[Cite as *In re Adoption of A.L.C.*, 2014-Ohio-4045.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	CASE NO. 14 BE 4
THE ADOPTION OF A.L.C.	)	
	)	
	)	OPINION
	)	
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Probate Division, Case No. 13 AD 16.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Francesca Carinci Suite 904-911 Sinclair Building Steubenville, OH 43952
For Defendant-Appellee:	Attorney Joseph Vavra 132 West Main Street St. Clairsville, OH 4395

JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 9, 2014

[Cite as *In re Adoption of A.L.C.*, 2014-Ohio-4045.]
DeGenaro, J.

{¶1} Scott Kunik, Appellant and biological father of A.L.C, appeals from a judgment of the Belmont County Court of Common Pleas, Probate Division, which held that his consent to A.L.C.'s adoption by Boyd Carpino, Jr. was not required. The probate court found that Scott Kunik failed to have contact with the child, without justifiable cause, for more than one year immediately preceding the filing of the adoption petition. Based on the analysis below, the judgment of the probate court is affirmed.

{¶2} Appellant Scott Kunik is the biological father of A.L.C., born, September 26, 2006. A.L.C.'s mother, Michelle Carpino, has been married to Appellee Boyd Carpino, Jr. since October 3, 2008, and together they have two sons.

{¶3} Boyd filed a petition to adopt A.L.C. on October 25, 2013. The petition alleged that Scott's consent was not required for the adoption because Scott failed without justifiable cause to maintain more than de minimis contact with A.L.C. for at least one year immediately preceding the filing of the petition. On October 28, 2013, a 'Notice of Hearing on Petition for Adoption' was filed with the Probate Court, with a certified mail receipt signed by Scott on October 26, 2013 attached to the notice. Scott filed his objection to the adoption on November 8, 2013.

{¶4} On December 20, 2013, the probate court held a hearing on the petition, and a step-parent adoption home study was filed, recommending that the adoption be granted. The probate court bifurcated the hearing to the extent that the only information to be provided at this hearing was whether Scott's consent was necessary.

{¶5} The probate court's January 9, 2014 judgment entry found by clear and convincing evidence that there had been no contact by Scott with A.L.C. for a period of one year immediately preceding the filing of the adoption petition; that there were no personal contacts during that period of time: no telephone calls, no electronic messages, no cards and no gifts. The probate court noted that Scott did not deny this at the hearing and Scott does not challenge this determination on appeal. The probate court further found by clear and convincing evidence that Scott had no justifiable cause for his failure to contact A.L.C. during that period of time and that his consent for her adoption was not needed.

{¶6} In his sole assignment of error, Scott asserts:

{¶7} "The court erred in finding that the Appellee had met his burden of proof to show that the Appellant failed to contact the minor child for a period in excess of one year without justifiable cause."

{¶8} Regarding our standard of review, "[a]n appellate court will not disturb a trial court's decision on an adoption petition unless it is against the manifest weight of the evidence." *In re D.R.*, 7th Dist. No. 11-BE-11, 2011-Ohio-4755, ¶9 citing *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986). "In determining whether a judgment is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact 'clearly lost its way and created such a manifest miscarriage of justice' that there must be a reversal of the judgment and an order for a new trial." *In re Adoption of E.E.R.K.*, 2d Dist. No. 2013 CA 35, 2014-Ohio-1276, ¶18 citing *Stegall v. Crossman*, 2d Dist. Montgomery No. 20306, 2004-Ohio-4691, ¶29. And where, as here, witnesses give conflicting testimony, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact." *In re B.A.H.,* 2d Dist. No. 2012-CA-44, 2012-Ohio-4441, at ¶21."

{¶9} Typically the written consent of a minor child's natural parents is required prior to adoption, however, R.C. 3107.07 provides exceptions to this requirement. *In re D.N.O.*, 5th Dist. No. 2012-CA-00239, 2013-Ohio-601, ¶20-21. Pursuant to R.C. 3107.07(A), a parent's consent to adoption is not required:

> "when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

{¶10} "[T]he party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent failed to communicate with the child during the requisite one-year period and that there was no justifiable cause for the failure of communication." *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985). "Once the petitioner has presented clear and convincing evidence that the parent has failed to support or communicate with his child for the statutory period, the parent then has the 'burden of going forward with the evidence * * * to show some facially justifiable cause for such failure.'" *In re Adoption of Lauck*, 82 Ohio App.3d 348, 351, 612 N.E.2d 459 citing *In re Adoption of Bovett*, 33 Ohio St.3d 102, 104, 515 N.E.2d 919 (1987). Clear and convincing evidence is that proof which establishes in the minds of the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶11} Scott does not deny his lack of contact with A.L.C. for over a year, however, he argues that there was justifiable cause. He cites Michelle's desire for him to not "play any type of role in the child's life" and her intention "to do everything possible to terminate" the relationship between him and his daughter. Scott cites two examples, telephone calls of October 3, 2012 and October 19, 2012, in which he attempted to get visitation and Michelle denied him. Scott also contends that his grandmother's attempts to contact the child, some successful and some of which failed, should be imputed to him.

{¶12} Michelle counters by admitting that she denied Scott visitation on October 3 and October 19, 2012. As grounds, she stated that the last contact between Scott and A.L.C. was on September 29, 2012, and an accident on outdoor play equipment happened at Scott's residence resulting in A.L.C. being admitted to the hospital for surgery for a broken arm. When Scott called to arrange visits on the aforementioned dates she denied him time indicating that A.L.C. was still in a cast and was seeing a doctor. She acknowledged in her testimony that once A.L.C.'s cast was removed that her attorney advised her that she had to let the child visit with Scott should he call again. However, Scott did not call again.

{¶13} Scott asserts that the two denials of visitation constitute justifiable cause. "Ohio courts have held that justification of a parent's failure to communicate with his or her child is shown when there has been 'significant interference' with a parent's communication with a child or 'significant discouragement' of such communication." *In re KR. E., K.E., & A.E*., 9th Dist. No. 06CA008891, 2006-Ohio-4815, ¶21, citing *Holcomb*, *supra*, at paragraph three of the syllabus. These two denials do not rise to the level of significant interference. The Second District discussed factors to consider in determining whether a parent's ability to communicate with a child has been impeded:

> [T]he record indicates that E.H. changed the family's home telephone number at some point after J.H.'s last visit in May 2011. This could be perceived as an attempt to discourage communication. However, E.H. and K.H. continued to reside at the same address where they had lived for many years, and J.H. made no attempt to speak with them directly about visitation. J.H. also failed to call E.H. via cell phone for several months after her last visitation, nor did she text E.H., even though they had previously communicated in that fashion. J.H. also never filed a motion to enforce her visitation rights, even though she knew she could do so. A failure to enforce visitation could be justifiable if the person did not have the financial means to enforce the order. However, the trial court would be in the best position to determine the difficult credibility assessments surrounding this issue. (citations omitted)

In re Adoption of J.R.H., 2d Dist. No. 2013-CA-29, 2013–Ohio–3385, ¶38.

{¶14} This court has held that minimal contact was justified when the residential parent significantly thwarts a non-residential parent's ability to communicate with their child, and therefore parental consent was required. *In re Adoption of J.D.T*., 7th Dist. No. 11 HA 10, 2012-Ohio-4537, ¶17-24. This conclusion was based upon factors such as: numerous phone calls made to the child without the child being permitted to speak; a

letter sent to the child on a holiday; and an arranged secret meeting to see the child by the non-residential parent.

{¶15} In contrast, here the parties lived about five minutes away from each other, Michelle has resided at her address for five years prior to the hearing, has not changed her phone numbers and did not attempt to conceal A.L.C. from Scott. Michelle testified that "quite a few times a week" she went to the drive-thru at Wendy's, Scott's workplace, with A.L.C. in the van, but Scott didn't say anything. Additionally, Boyd testified that they have never discouraged visits and actually encouraged visits years ago. Boyd's cellular phone number has been the same for the past seven years. Finally, the circumstances in *J.D.T., supra*, are not present; Scott did not make phone calls, send gifts or letters, or attempt to arrange a meeting with the child.

{¶16} Scott's contention that his grandmother's attempts at contact should be imputed to him was contradicted by her testimony that she made attempts without him present and signed cards solely in her name; moreover, she saw A.L.C. at a dance recital and was permitted to visit with her in the Carpino home.

{¶17} The record supports the trial court's judgment that Scott failed without justifiable cause to have more than de minimis contact with A.L.C. for one year preceding the adoption petition; thus, the probate court's judgment is not against the weight of the evidence. Accordingly, Scott's sole assignment of error is meritless and the judgment of the probate court is affirmed.

Vukovich, J., concurs.

Waite, J., concurs.