

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

IN RE:

THE ADOPTION OF:

R.B.D.

OPINION AND JUDGMENT ENTRY
Case No. 17 BE 0049

Civil Appeal from the
Court of Common Pleas, Probate Division, of Belmont County, Ohio
Case No. 16 AD 28

BEFORE:

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Affirmed.

Atty. Albert E. Davies

Myser & Davies, 320 Howard Street, Bridgeport, Ohio 43912, for Appellant

Atty. Eric Costine

The Costine Law Firm, 136 West Main Street, St. Clairsville, Ohio 43950, for Appellees.

Dated: June 25, 2018

WAITE, J.

{¶1} Appellant-father challenges the judgment of the Belmont County Court of Common Pleas, Probate Division, granting the adoption of minor child R.B.D. to

Appellee-stepfather. Appellant argues that the trial court erred and abused its discretion in failing to grant a continuance of the “best interest” hearing to allow Appellant to participate. Throughout the proceedings below, Appellant repeatedly failed to appear or appeared late. The trial court acted within its sound discretion in proceeding with the hearing on best interest of the child with Appellant’s counsel present when Appellant not only failed to appear but did not provide any explanation. For the reasons expressed below, Appellant’s argument lacks merit. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant is the biological father of R.B.D. Appellee, R.B.D.’s stepfather, filed a petition to adopt the child on November 23, 2016, contending that Appellant’s consent to the adoption was not required because Appellant failed to have more than de minimis contact with the child for a period of at least one year immediately preceding the filing of the adoption petition.

{¶3} R.B.D. (d.o.b. 10/13/2010) has been in the physical custody of Appellee mother since birth. Appellant and mother were never married and never resided together. Both lived in Gallia County, Ohio. The Gallia County Court of Common Pleas, Juvenile Division, had jurisdiction over parenting and had issued decisions concerning parental rights and responsibilities.

{¶4} Mother moved to Belmont County in 2011. On November 22, 2016, mother married Appellee-stepfather. On November 23, 2016, Appellees petitioned Belmont County Court of Common Pleas, Probate Division, seeking to allow stepfather to adopt the minor child without the consent of Appellant. On January 17, 2017, Appellant filed a motion for continuance and an objection to the adoption. An initial

hearing was scheduled for February 10, 2017. On February 3, 2017, Appellant filed a motion for recusal of the trial court judge due to a potential conflict. The matter was assigned to another judge and the matter was continued.

{¶15} On April 19, 2017, a pretrial conference was held. Appellant's counsel appeared but Appellant failed to appear. No explanation for his absence was provided. A consent hearing was scheduled for June 21, 2017, and all parties were duly notified. The trial court continued the hearing until August 16, 2017 on its own motion. On August 16, 2017, Appellant's counsel appeared but Appellant again failed to appear with no explanation. The matter was continued until September 11, 2017. Appellant arrived forty-five minutes late for that hearing but was permitted to participate. On September 25, 2017, the trial court issued a judgment entry finding that Appellant's consent to adopt was not necessary, as Appellant had not had contact with the child since October of 2015. Appellant also failed to comply with the Gallia County Juvenile Court order to subscribe to an online calendar service in order to coordinate visitation, failed to be screened for drugs before visitation could commence, failed to communicate by telephone or mail with the child, and had failed to provide any support for the child. (9/25/17 J.E.) The trial court concluded:

Therefore, the Court finds by clear and convincing evidence that [Appellant]'s consent to the adoption of [the child] is not required due to the lack of more than de minimis contact with the minor child for a period of at least one year immediately preceding the filing of the adoption petition. Further, the Court finds that said lack of contact is without justifiable cause.

(9/25/17 J.E., p. 3.)

{¶6} A second hearing to determine the best interest of the child was held on October 30, 2017. All parties were duly notified of the hearing. Appellees were present along with their counsel. Appellant's counsel was present but once again, Appellant was not. The court inquired of Appellant's counsel as to his client's whereabouts:

THE COURT: The Court will note for the record that [Appellant] is not present here today for this adoption hearing. [Appellant's Counsel] do you know the whereabouts of your client?

[APPELLANT'S COUNSEL]: I do not your Honor. I did submit to my client by mail utilizing the address I have utilized for him throughout the course of these proceedings, the Courts [sic] most recent decision on the issue of consent, advising him of the hearing date, advising him to contact me in anticipation of the hearing date so that we could prepare for the same. I've had no contact with my client since submitting the letter since the Courts [sic] last proceeding. Um, and efforts to contact him by telephone as most recently as this morning have proven unfruitful.

THE COURT: Any preliminary motions (inaudible)?

[APPELLEES' COUNSEL]: No.

THE COURT: [Appellant's Counsel]?

[APPELLANT'S COUNSEL]: No sir.

THE COURT: I would ask that you just attempt to protect your client's rights as best you can in this hearing understanding the nature of the circumstances. As I indicated previously in Chambers discussing this with

counsel, the court has already determined that consent of the father was not necessary in this adoption so this is merely a final adoption hearing for and best interest case at this point so we will proceed. [Appellee Counsel] do you wish to present testimony and evidence?

(10/30/17 Tr., pp. 3-4.)

{¶7} Testimony was provided by both Appellees on both direct and cross-examination regarding the minimal visitation between the child and Appellant since the child's birth and the lack of any support or communication. At the close of Appellees' testimony, the trial court asked Appellant's counsel whether he had anything to present. Appellant's counsel informed the court that he had received a message at 9:37 a.m. while the hearing was in progress. Counsel stated that Appellant was "in transit" "a couple of exits away" and would be arriving soon. (10/30/17 Tr., p. 33.) Counsel requested a continuance stating, "I would ask for a brief suspension of the proceedings to allow them to appear and move forward with further testimony from them on the issue of best interest." (10/30/17 Tr., p. 33.) Appellees' counsel, however, urged the court to proceed, as the hearing had been set for 9:30 and Appellant had a history of missing or being late for most hearings. The trial court, construing Appellant's counsel's statement as a motion to continue, stated:

I appreciate your circumstance here however I am going to deny your motion to continue. Your client has known he's been late to every hearing. Didn't show up for one hearing. I'm not going to continue this hearing. This has become all too typical at this point and time so I'm going to deny your motion.

(10/30/17 Tr., p. 34.)

{¶8} The court concluded that it was in the minor child’s best interest to be adopted by Appellee-stepfather. On October 30, 2017, the trial court issued a final decree of adoption and ordered the minor child’s surname be changed to that of Appellee-stepfather.

{¶9} Appellant filed this timely appeal presenting a single assignment of error.

ASSIGNMENT OF ERROR

THE DUE PROCESS RIGHTS OF THE NATURAL AND BIOLOGICAL FATHER OF THE MINOR CHILD WERE VIOLATED AT THE “BEST INTEREST” HEARING HELD IN THE ADOPTION PROCEEDINGS AS HE WAS PREVENTED FROM HAVING MEANINGFUL PARTICIPATION AT SAID HEARING.

{¶10} Appellant’s main argument on appeal is that the trial court should have granted him a continuance rather than conclude the best interest hearing in his absence. Appellant contends his right to raise his child “is an essential and basic civil right” and the trial court must afford a parent “every procedural and substantive protection that the law allows.” (Appellant’s Brf., p. 5.) Appellant argues the trial court violated his right to due process by not granting a continuance when the court was aware before the hearing that Appellant was not present.

{¶11} R.C. 3107.07 governs whether parental consent to adopt is required. In the instant case, the trial court concluded that parental consent of the natural father, Appellant, was not required based on R.C. 3107.07(A). Pursuant to that subsection, parental consent is not required where the parent failed without justifiable cause to

communicate with, or to support, the minor child for a minimum of one year preceding the filing of the adoption petition. R.C. 3107.07(A). Appellee has the burden of proving by clear and convincing evidence both that the natural parent has failed to support the child for the requisite one-year time period, and that the failure was without justifiable cause. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 17 quoting *In re Adoption of Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph one of the syllabus.

{¶12} In order to determine whether the adoption petitioner has met his or her burden, the trial court must undertake a two-step process. If the matter is based on failure to support, the court must determine whether the natural parent has made a “financial contribution that comports with the requirements of R.C. 3107.07(A) to contribute maintenance and support.” *In re Adoption of M.B.* at ¶ 23. If the trial court is asked to find there has been a failure to provide support, the court must then “determine whether justifiable cause for the failure has been proved by clear and convincing evidence.” *Id.*

{¶13} The Supreme Court of Ohio has held that, “it is a question of fact whether a parent of a minor has willfully failed to provide for the maintenance and support of a minor child.” *Id.* at ¶ 21. The trial court’s judgment will not be reversed absent an abuse of discretion. *Id.* Moreover, “[t]he question of whether justifiable cause for failure to pay child support has been proven by clear and convincing evidence in a particular case is a determination for the probate court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence.” *Id.* at ¶ 24, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, paragraph two of the syllabus. A reviewing

court will affirm the judgment of the trial court as long as the record contains some competent and credible evidence to support the trial court's findings. *In re Adoptions of Groh*, 153 Ohio App.3d 414, 2003-Ohio-3087, ¶ 31.

{¶14} At the hearing on consent in the instant matter, evidence was presented by both parties. Appellant was permitted to participate despite arriving 45 minutes after the hearing commenced. Following the hearing, the trial court concluded that Appellant's consent to the adoption was not required pursuant to R.C. 3107.07(A) as the evidence demonstrated that Appellant had failed to have more than de minimis contact with the child for a period of at least one year prior to the filing of the adoption petition and that the lack of contact was without justifiable cause. (9/25/17 J.E.)

{¶15} The first prong of the two-step analysis required by R.C. 3107.07, whether Appellant's consent was required, had already been determined by the trial court and is not raised as an issue on appeal by Appellant. Appellant does not dispute the trial court's judgment that his consent was not required. Appellant's sole basis for appeal is his contention that the trial court violated his right to due process when it did not permit Appellant to participate in the best interest hearing held October 30, 2017. Specifically, Appellant argues the trial court was obligated to delay or continue the best interest hearing in order to allow him to participate.

{¶16} Appellee-stepfather contends a continuance of the best interest hearing was not sought on the record nor did Appellant's counsel seek to adjourn the proceedings at any time on the record, precluding Appellant's argument on appeal. Appellee-stepfather further contends that even if comments made by counsel for Appellant can be construed as a request for a continuance, the trial court did not abuse

its discretion in denying any such request. Appellees had testified on both direct and cross-examination, and Appellant had a history of being absent or late for all of the hearings held in the matter. We must note here that although Appellees urge this record contains no request for a continuance of the hearing, it is clear from the transcript of proceedings that the trial court interpreted Appellant's counsel's tardy statement as a request for continuance, and the court expressly denied the request: "I appreciate your circumstance here however I am going to deny your motion to continue." (10/30/17 Tr., p. 34.)

{¶17} The determination of whether to grant or deny a party's request for a continuance "is a matter that is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. An appellate court will not reverse the denial of a continuance absent an abuse of discretion. *Id.* An abuse of discretion connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶18} In determining whether to grant a motion for a continuance, the trial court should consider a number of factors: (1) the length of the delay requested; (2) if any prior continuances were requested and received; (3) the inconvenience to the parties and the court; (4) if the continuance is for legitimate reasons; (5) if the party requesting the continuance contributed to the circumstances giving rise to the request; and (6) any other relevant factors. *Youngstown Metro. Hous. Auth. v. Barry*, 7th Dist. No. 94-CA-147, 1996 WL 734017, at *1.

{¶19} In the instant case, it was noted at the outset of the best interest hearing that Appellant was not present. The court inquired as to his whereabouts. Appellant's counsel replied that counsel did not know where Appellant was but admitted that Appellant had been notified of the hearing. As the determination had already been made that Appellant's consent to the adoption was not required, Appellant's counsel had appeared, and Appellees were present with counsel, the trial court elected to move forward with the hearing where Appellees directly testified and were subject to cross-examination. At the close of Appellees' testimony the trial court inquired as to whether Appellant's counsel wished to present anything to the court. Appellant's counsel then indicated that he received a message shortly after the hearing had begun, indicating that Appellant was "a few exits away" and that counsel had apparently just noticed the message. However, by this time the hearing had reached its conclusion and Appellant had still not arrived. Moreover, Appellant had an extensive history of either being late or not appearing in every hearing held in the matter. While he arrived 45 minutes late for the consent hearing, Appellant was still permitted to participate. At the very next hearing regarding the child's best interest, Appellant failed to arrive. Appellant was aware of the date and time of this hearing because Appellant's counsel advised the court that he had informed Appellant. Counsel had also informed the court that despite the fact that he was aware of the hearing, Appellant did not respond to his counsel's call that morning or contact counsel about his unavailability. Appellant's counsel stated that he did not know why Appellant was not present and had no reason at all for Appellant's absence.

{¶20} We cannot conclude the trial court abused its discretion in denying Appellant’s tardy motion for a continuance. Our sister districts have held that where a party is represented by counsel at a hearing, is aware of the hearing, and offers no explanation of their absence, denial of a motion to continue is not an abuse of discretion. *In re A.C.*, 8th Dist. No. 99057, 2013-Ohio-1802, ¶ 10; *In re Distefano*, 3d Dist. No. 13-06-14, 2006-Ohio-4430, ¶ 12. Appellant had a history of being late or absent for every hearing in the matter and continuances had been previously granted by the trial court as a result. No excuses for this behavior were offered. The trial court had even allowed Appellant to participate in the consent hearing although he arrived 45 minutes past the scheduled hearing time. At the best interest hearing, Appellant was represented by counsel. At the close of Appellee’s evidence, Appellant still provided no clear indication as to his reason for delay or when he would appear. It was at that point that counsel requested a continuance of this matter. The trial court did not abuse its discretion in denying counsel’s motion. Appellant’s assignment of error is overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Probate Division, of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.