[Cite as *In re Petition for Adoption of C.E.B.*, 2022-Ohio-3286.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

IN THE MATTER OF

THE PETITION FOR ADOPTION OF: C.E.B.,

A MINOR.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0014

Civil Appeal from the
Court of Common Pleas, Probate Division, of Mahoning County, Ohio
Case No. 2021 AD 0017

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Frederick D. Nelson, Judge of the Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:
Affirmed.

Atty. Brian J. Macala, 117 South Lincoln Avenue, Salem, Ohio 44460, for Appellant

Atty. Rhys B. Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503-1130, for Appellees.

Dated: August 30, 2022

WAITE, J.

{¶1} Appellant-Father appeals a January 19, 2022 decision of the Mahoning County Court of Common Pleas, Probate Division, granting the adoption of minor child

C.E.B. to Appellees, the minor's maternal grandparents. Appellant argues that the trial court improperly denied his request for a continuance in order to allow newly appointed counsel an opportunity to investigate. Appellant also argues that the court erroneously determined that he did not have contact with or provide support to the minor child for more than one year. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} There is some dispute regarding the facts in this matter. Among the undisputed facts are that C.E.B. was born on August 12, 2015 and the now deceased natural mother and Appellant are the child's biological parents. However, Appellee-grandmother testified that Appellant was not present the day C.E.B. was born, while Appellant contested this assertion with an apparent screenshot of a Facebook post depicting a photograph of him holding a child at a hospital. There were questions as to the authenticity and date of the photo. The court questioned whether Appellant could demonstrate that the child depicted in the photograph was, in fact, C.E.B. He could not. Even so, there was no evidence to contradict the grandmother's assertion that Appellant was not present the day of the birth, as he ultimately conceded that the photograph was taken on August 13, 2015, the day after C.E.B.'s birth.

{¶3} Appellant also contests grandparents' testimony that he never saw the child from the time of birth until the time the instant matter was commenced. Appellant contends that he lived in an apartment with C.E.B. and the natural mother from the child's birth until she was nine months old. Appellant's story is somewhat unclear, however, as he later testified that he lived with the natural mother and child from the time of the birth until October or November of 2015, a period of two or three months, not nine. Appellant

claimed that Appellees had visited the apartment multiple times while he lived there. Appellees maintained that they first met Appellant during this proceeding, and never at any prior time. They believed that Appellant never saw or communicated with C.E.B. until the incident leading up to the instant case.

{¶4} According to Appellant, after his relationship with the natural mother ended, he moved in with another woman. She is currently his fiancée. He testified that after the end of his relationship with mother, C.E.B. lived in Columbus with him and this woman, insinuating that he had sole custody. He then testified that he and natural mother had agreed to some sort of joint custody of C.E.B.

{¶5} The record is unclear as to the exact date, but Appellant was arrested after he and several other unnamed persons assaulted an elderly man, causing his death. Appellant pleaded guilty and was sentenced to five years of incarceration.

{¶6} During Appellant's incarceration, C.E.B.'s natural mother died of complications while giving birth to another child. She died on June 11, 2017 and Appellant learned of her death several days later. Apparently, he was incarcerated in the same prison as the father of the natural mother's older children, who informed Appellant that natural mother had died. Appellant testified that he immediately called his mother and inquired as to the whereabouts of C.E.B. His mother stated that she believed the child was living with Appellees.

{¶7} On September 25, 2018, a hearing was held where Appellees were granted physical custody of C.E.B. Appellees had been caring for C.E.B. from the time of her mother's death. Although Appellant's mother attended the hearing and documents were introduced to show that Appellant was served with notice of the hearing, he claims he never received notice.

{¶8} Thereafter, Appellant became involved in a prison fight and was sent to solitary confinement for thirty days. After he was released from this confinement, he called his mother. While he claimed that his mother said she did not know the whereabouts of Appellees or C.E.B., he later conceded that his mother had visited C.E.B. and had sent him photographs of her visit. Appellant disputed Appellees' assertion that they had never met, claiming that they ceased contact with him after he requested that they bring C.E.B. to the prison to visit him.

{¶9} Appellant admits that he never sent C.E.B. cards or letters, never called, and did not send money. Appellant claims that he did not know where C.E.B. lived and did not believe it was his burden to send assistance absent Appellees' request.

{¶10} Appellant was released from prison on December 19, 2020. Appellant testified that he went back to Columbus after his release but did not attempt to contact C.E.B. Appellant claimed that his mother did not know Appellees' contact information even though he admitted she visited with C.E.B. several times while he was incarcerated and sent him photographs. He also claimed that he had asked the father of natural mother's older children for Appellees' contact information but he "couldn't give [Appellant] too much information." (Hrg., p. 74.) According to Appellant, this man did not have their address. However, he later testified that more than two months after his release he asked this man for Appellees' contact information and he did provide Appellant with Appellees' address.

{¶11} On February 26, 2021, Appellant drove to Appellees' house with his mother and the father of the older children. According to Appellees, Appellant stated that he was taking C.E.B. According to Appellant, he merely asked to see the child. Appellees called the police, who arrived and ordered Appellant to leave. Appellant took no further action

regarding C.E.B. until the current legal proceedings began, approximately four months after his attempted visit.

{¶12} On July 1, 2021, Appellees filed a petition for adoption. Appellant received notice and a hearing on the matter was scheduled for October 12, 2021. Appellant failed to file any written objections as required by rule but appeared to announce his intent to contest the adoption. The hearing was rescheduled for December 7, 2021. Appellant was appointed counsel. While his first counsel withdrew on October 20, 2021, replacement counsel was appointed the next day. Importantly, in the entry appointing new counsel the court ordered Appellant "to immediately contact" this counsel, and provided Appellant with counsel's contact information. Appellant did not comply with the court's order and did not contact counsel.

{¶13} According to counsel, he made an attempt to contact Appellant but to no avail. Appellant did not contact counsel until two hours before the hearing. They met in person for the first time minutes before the hearing began. Counsel orally requested a continuance to investigate this case based on information provided by Appellant at this last minute meeting. Apparently, Appellant claimed "potential" witnesses might be helpful, although he provided no information who these witnesses might be and failed to provide even a general description of how they may be helpful. The court denied counsel's motion, finding that Appellant had ample time to bring his claims to his counsel's attention prior to the hearing. The court emphasized that counsel had been appointed approximately one and one-half months before the hearing.

{¶14} At hearing, Appellant, Appellees, and Jennifer Thompson of Northeast Ohio Adoption Services testified. The court bifurcated the proceeding, first addressing the issue of the need for Appellant's consent, and after finding consent was not required, then

addressed the best interests of C.E.B. The court determined that allowing Appellees to adopt C.E.B. was in her best interest and approved the adoption. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING THE APPELLANT'S MOTION FOR A CONTINUANCE.

{¶15} Appellant contends that the trial court's denial of his motion to continue infringed on his fundamental right to parent his child. He emphasizes that he did not speak to his counsel until the day of the hearing, which prohibited any real investigation into the facts.

{¶16} Again, Appellant's counsel was appointed on October 21, 2021. The hearing had been rescheduled to accommodate Appellant once, already. Counsel claims that he attempted contact with Appellant shortly after he was appointed but did not hear from Appellant until two hours before the hearing. They met in person for the first time minutes before the hearing.

{¶17} Counsel's motion was made at the beginning of the hearing. The court denied the motion, stating:

> **THE COURT**: We've had this matter set. I've given ample opportunity for that to be done previously, and I'm denying it. You had ample opportunity. If you chose today to inform your counsel of that, that's your problem, [Appellant], that's not this court's. So we will proceed as going forward today.

(Hrg., p. 4.)

{¶18} 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." *In re Adoption of R.B.D.*, 7th Dist. Belmont No. 17 BE 0049, 2018-Ohio-2770, ¶ 17, citing *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. *State v. Nuby*, 7th Dist. Mahoning No. 16 MA 0036, 2016-Ohio-8157, ¶ 10, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶19} Where a party has moved to continue, a court should consider "(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." *In re Adoption of R.B.D.* at ¶ 18, citing *Youngstown Metro. Hous. Auth. v. Barry*, 7th Dist. Mahoning No. 94-CA-147, 1996 WL 734017, at *1.

{¶20} Counsel did not specifically request a certain length of time in his request to continue. As noted by the court, the hearing had previously been rescheduled. It is unclear whether delay would cause any direct harm, however, the witness from the adoption agency was present and ready to testify. The record does not reflect whether a delay would affect her ability to testify in the future. It is abundantly clear from this record that Appellant caused the stated reason for delay.

{¶21} As noted by the trial court, it was Appellant's duty per court order to contact his counsel and inform him of any available information or evidence necessary for his representation in this matter and Appellant had no explanation why he chose not to contact his counsel. Further, while the stated purpose of the continuance was to allow counsel to locate certain witnesses, he did not inform the court who those witnesses were or what testimony they would be expected to give, other than it would address the issue of consent.

{¶22} Based on this record and the applicable factors, Appellant caused the need for delay without any explanation of his actions. For these reasons, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THE APPELLANT FAILED TO HAVE CONTACT WITH OR PROVIDE SUPPORT AND MAINTENANCE FOR HIS MINOR CHILD DURING THE ONE YEAR PRIOR TO THE FILING OF THE PETITION FOR ADOPTION.

{¶23} Appellant argues that the court's consideration of his credibility presumes that the court placed on him the burden of proof. Appellant also argues that the court incorrectly stated the relevant time period when considering whether he had de minimis contact was seven months, instead of the standard one year.

{¶24} An 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. Belmont 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). A judgment supported by some competent, credible

evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). Similarly, a reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 614 N.E.2d 742 (1993).

{¶25} When a petition of adoption is filed, generally the petitioner must obtain the written consent of the natural mother and father. R.C. 3107.06. Certain exceptions to this rule are described in R.C. 3107.07. R.C. 3107.07(A) is relevant to this matter and provides the following:

> (A) A parent of a minor, 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.

"*De minimis* contact is not defined only as physical visitation with a child. Other forms of contact and support including gifts, cards, letters, financial support and telephone calls are also considered." *In re Petition for Adoption of A.M.D*., 7th Dist. Mahoning No. 16 MA 0052, 2016-Ohio-6976, ¶ 17.

{¶26} Contrary to Appellant's argument, there is no evidence in this record that the court improperly reassigned the burden of proof. The court in this matter weighed Appellant's credibility as it must with any witness and found his testimony to be incredible.

{¶27} Further, Appellant misreads the court's entry. The court did not use a seven-month timeframe in lieu of the one-year standard. Instead, the court allowed that Appellant may have had some justification for his failure to contact based on his incarceration for the first five months of the relevant period, but then recognized that Appellant took no efforts to contact the child despite having apparent means through his mother, who visited the child herself. In looking at the relevant one-year period, the court's entry noted that Appellant had some justifiable cause as to five months of the one-year period due to his incarceration. The court then also recognized that Appellant made absolutely no effort to communicate with the child, nor did he attempt to provide any other assistance during this same five-month period.

{¶28} The court's reference to seven months refers to the period after Appellant was released from confinement until the adoption petition was filed. The court emphasized that Appellant went back to Columbus with his fiancée after his release from prison. Even though Appellant finally drove to see the child two months after his release (when the police had to be called), he did not attempt any further contact with her after that trip and did nothing to assert any legal rights to the child. The court emphasized that Appellant did nothing until he received notice of Appellees' petition for adoption, more than four months after he attempted to visit. Further, while Appellant initially testified that "I didn't know I had to put a motion in to see my own child or to visit my daughter", he later admitted "[y]ou know why I didn't file a motion, I know how to show up. That's what I do,

I show up when it's my time, and that's all I'm trying -- that's all I'm trying to do." (Hrg., pp. 80, 131.)

{¶29} The record is replete with evidence that Appellant knew who had custody of C.E.B. and how to find her, yet he chose not to contact his child. Appellant had a great deal of contact with not just one person, but two (his mother and the father of natural mother's older children) who knew where Appellees lived, yet he did not meaningfully attempt to communicate with or visit C.E.B. He also did nothing to assert any rights to the child even after Appellees denied his access to her. He took no action until Appellees filed the instant petition.

{¶30} Accordingly, Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶31} Appellant argues that the trial court improperly denied his request for a continuance in order to allow newly appointed counsel an opportunity to investigate. Appellant also argues that the court erroneously determined that he did not have contact with or provide support to the minor child for more than one year. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Nelson, J., dissents with dissenting opinion.

Nelson, J., dissenting.

{¶32} I think that whether the trial court abused its discretion in not permitting a continuance of the hearing on the consent issue is a close question. On balance, however, and recognizing that "the right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law," *In re Adoption of Masa*, 23 Ohio St.3d 163, 165 (1986) (citation omitted), I reluctantly conclude in light of the record here that the trial court did err in not permitting a brief delay to allow Father's lawyer to get up to speed on his case, or at least in not inquiring further into the requested continuance. *See, e.g., In re A.R.M.R.*, 8th Dist. Cuyahoga No. 106969, 2019-Ohio-253, ¶ 29 ("Given the magnitude of the rights involved and the potential to forever terminate Mother's parental rights, we believe due process required a continuance"). Therefore, I very respectfully dissent (even while underscoring that nothing in what follows should be understood in any way to suggest any conclusion about what the result of the adoption proceedings should be at the end of the day).

{¶33} I start from what I believe to be our shared premise that when the state seeks to end a mother's or father's parental rights, "parents 'must be afforded every procedural and substantive protection the law allows.' " *In re Hayes*, 79 Ohio St.3d 46, 48 (1997), *superseded by statute*, quoting *In re Smith*, 77 Ohio App.3d 1, 16 (6th Dist.1991). "In Ohio, these protections include the right to assistance of counsel and the right to appointed counsel if a parent is indigent. See R.C. 2151.352; Juv.R. 4(A)." *In re R.K.*, 152 Ohio St.3d 316, 2018-Ohio-23, ¶ 12 (French, J., and Kennedy, J., concurring); *see also id.* at ¶ 1 (O'Neill, J., and O'Connor, C.J., lead opinion) ("One of those protective measures is the right to be represented by an attorney 'at all stages of the proceedings.' R.C. 2151.352"). And the right of a parent to be represented by counsel in such matters

implies a right to the effective assistance of an appropriately informed and prepared counsel. *See, e.g., In re Sox*, 7th Dist. Mahoning No. 06 MA 35, 2006-Ohio-7116, ¶ 14 (lead opinion) ("right to counsel includes the right to effective assistance of counsel"); *In re D.H.*, 7th Dist. Columbiana No. 16 CO 10, 2016-Ohio-7933, ¶ 16 (same).

{¶34} In this case, Father came to court to contest the proposed adoption of his daughter. The trial court appropriately appointed him counsel and set the matter over for a hearing somewhat less than two months hence. Father's lawyer promptly asked to withdraw given "other conflicting matters," *see* October 20, 2021 Motion, and the trial court appointed Father new counsel on October 21, 2021, six weeks out from the hearing, *see* October 21, 2021 Judgment Entry (ordering Father to call the new lawyer and moving hearing date back one day to December 8, 2021). At the hearing, bifurcated to consider whether father's consent to the adoption was necessary and, if not, whether the proposed adoption was in the best interest of the child, Dec. 8, 2021 Tr. at 3, Father's new lawyer (who also serves here as his appellate counsel) requested a "brief" continuance:

> I was appointed to this case by order as substitute legal counsel back in November [sic: the order of appointment actually issued October 21]. [Father] contacted me today and we had a brief telephone conversation just before the noon hour, and then I had the opportunity to meet with my client for the first time here at 1 o'clock to go over the sum and substance of the proceedings. There was certain information that he has provided to me, including the need to potentially bring witnesses relative in particular to the issue of his consent. As a consequence of that, I'm going to ask the court for a brief continuance for the purpose of being able to follow up on those

> leads and to secure subpoena -- under subpoena, if necessary, the attendance of those witnesses.

Id. at 3-4. The lawyer advises us in his briefing (but does not appear to have told the trial court) that he had at some unspecified time, by some unspecified method, "attempted to contact [Father], but [Father] only first made contact with his Court-appointed counsel two hours before the hearing, and then only personally met minutes before the hearing commenced." Appellant's Brief at 10 (further stating that as counsel, he "effectively [sic] entered into Trial with scant information and little preparation").

{¶35} As the majority recites, the trial court's response to the continuance request was to note that the hearing had been set and to tell Father his continuance motion would be denied because: "I've given ample opportunity for that [investigation of the case by counsel] to be done previously * * * . You had ample opportunity. If you chose today to inform your counsel of that, that's your problem * * *, that's not this court's. So we will proceed as going forward today." Tr. at 4.

{¶36} The majority correctly lists the particular factors that "a trial court should consider" in assessing whether to grant a continuance motion. *In re Adoption of R.B.D.*, 7th Dist. Belmont No. 17 BE 0049, 2018-Ohio-2770, ¶ 18, citing *Youngstown Metro. Hous. Auth. v. Barry*, 7th Dist. Mahoning No. 94-CA-147, 1996 WL 734017; *see supra* at ¶ 19. Those are the familiar factors specified in *State v. Unger*, 67 Ohio St.2d 65, 67-68 (1981), which reminds us that there are no " 'mechanical tests' " for the assessment that is to be based on the specific facts of each case, *id.* at 67. Here, where Father sought only a "brief" continuance given what his lawyer says on appeal was the lawyer's "scant information and little preparation," where the trial court made no inquiry into how and

when (or even whether) the lawyer had tried to reach his new client (or vice versa), or into what degree a short continuance would inconvenience other parties, and where Father and lawyer both were available in court to communicate with each other and to take direction (and any warning) from the trial judge, I cannot conclude that the trial court acted within its sound discretion and weighed the factors appropriately.

{¶37} The "length of the delay requested," *see Unger*, 67 Ohio St.2d at 67, was not long: Father sought only what his lawyer termed a "brief" continuance to allow the lawyer to communicate with and perhaps subpoena potential witnesses that Father apparently had identified to him, Tr. at 4. As to the second factor, "whether other continuances [had] been requested," *Unger* at 67, only one major continuance had issued (to permit the trial court to appoint a lawyer for Father; the revised hearing date then was deferred for one day after that earlier lawyer declined to participate, when the trial court designated new counsel by order). The trial court did not inquire into "inconvenience to litigants, witnesses, [or] opposing counsel," *id.*, and none was expressed (although doubtless there is emotional toll for conscientious grandparents who get geared up for an adoption hearing only to be asked to return at a later date), nor did the trial court mention any problem with its own schedule in accommodating a short delay. Nothing in the record suggests that the request was made for other than "legitimate reasons," *see id.* at 67-68; the request seemingly was not sought simply for delay alone, but rather to allow counsel to "follow up on those leads" involving potential witnesses relating "in particular to the issue of [Father's] consent" and to obtain subpoenas, Tr. at 4, although counsel was not more specific and the trial court did not probe what more needed to be done.

{¶38} To be sure, Father did "contribute[] to the circumstance [that gave] rise to the request for a continuance," *Unger* at 68, by not having been in earlier communication

with his new lawyer. But Father showed up for both hearing dates, and apparently called his lawyer to confer a couple hours before the December hearing: This does not appear to be a case in which a parent " ' "fails to cooperate with counsel and the court" ' " so as to permit an inference that he is knowingly and intelligently waiving his right to informed counsel. *Compare In re R.K.*, 2018-Ohio-23 at ¶ 16 (French, J., and Kennedy, J., concurring in syllabus and judgment only, adding that a court evaluating such waiver questions should "take into account the totality of the circumstances, including the parent's background, experience, and conduct"). Indeed, had Father simply failed to appear, rather than showing up and communicating with his lawyer, guidance of the Supreme Court of Ohio would seem to have counseled the grant of a continuance. *See id.* at syllabus (standing alone, "[w]aiver of counsel cannot be inferred from the unexplained failure of the parent to appear at a hearing"); *compare In re O.M.S.-W.*, 10th Dist. Franklin No. 19AP-269, 2020-Ohio-201 (reversing grant of permanent custody where trial court did not make proper inquiry in finding waiver of right to counsel).

{¶39} Thus, this case seems to me not so much like *In re Adoption of R.B.D.*, where the continuance was denied to a parent who was on at least his third unexplained absence from court and had failed to comply with various court orders, *see* 2018-Ohio-2770 at ¶ 5, and where the consent issue already had been determined, but perhaps closer to *In re A.R.M.R.* That latter case, like this one, involved the denial of a continuance for a hearing on the consent issue. *See* 2019-Ohio-253 at ¶ 20 (noting that "the Ohio Supreme Court has held that '[a]ny exception to the requirement of parental consent [to adoption] must be strictly construed so as to protect the right of natural parents to raise and nurture their children' ") (citations omitted). That case may have involved more confusion on the part of counsel than does this one, but the lawyer there as here was

required to proceed "without a full grasp of the circumstances" surrounding the adoption petition. *See id.* at ¶ 24. The "magnitude of the rights involved" informed the decision by the court of appeals there, *id.*, and are no less substantial here. *See also, e.g., In re Dietrich*, 11th Dist. No. 96-G-2020, 1997 WL 799561 (December 12, 1997) ("Considering the gravity of the situation for appellant, i.e. the loss of custody of her own child, we believe the trial court had a responsibility * * * to view appellant's letter as a motion for a continuance. * * * * [With no lawyer-client communication, lawyer's withdrawal, and client's absence, and with "no evidence that the request for the postponement was dilatory or contrived[, * * * *] no pattern of hiring and firing counsel so as to delay matters[, and * * * *] nothing in the record to establish that a continuance would have inconvenienced or prejudiced [others,] * * * * [and because] appellant was not seeking an unusually long delay but only enough time to retain a new lawyer[," continuance of custody hearing should have been granted).

{¶40} Rather than dismissing Father's continuance request out of hand, the trial court could have considered granting a brief continuance to foster appropriate preparation by counsel. Such a continuance could have provided for further attorney-client communication on the spot, accompanied by the trial court's expression of intent to proceed in this important matter on a relatively quick date certain. I would sustain Father's first assignment of error, rendering his second assignment moot. Because that is not the majority's view, I very respectfully dissent.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Probate Division, of Mahoning County, Ohio, is affirmed. Costs waived.

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.