[Cite as *In re Adoption of M.E.*, 2009-Ohio-2604.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In the Matter of the Adoption of: M. E.

Court of Appeals No. E-08-081

Trial Court No. 2008 4 004

DECISION AND JUDGMENT

Decided: June 5, 2009

* * * * *

Michele A. Smith, for appellant.

Robert M. Reno, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the November 2, 2008 judgment of the Erie County Court of Common Pleas, Probate Division, which held that consent of the child's father, appellant, to the adoption was unnecessary pursuant to R.C. 3107.07(A). Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO SHOW JUSTIFIABLE CAUSE FOR NOT COMMUNICATING WITH HIS MINOR CHILD FOR A PERIOD OF AT

LEAST ONE YEAR IMMEDIATELY PRECEDING THE FILING OF THE PETITION FOR ADOPTION OF APPELLANT'S MINOR CHILD.

{¶ 3} "SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO SHOW JUSTIFIABLE CAUSE FOR FAILING TO PROVIDE FOR THE MAINTENANCE AND SUPPORT OF THE APPELLANT'S MINOR CHILD FOR A PERIOD OF AT LEAST ONE YEAR IMMEDIATELY PRECEDING THE FILING OF THE PETITION FOR ADOPTION OF APPELLANT'S MINOR CHILD."

{¶ 4} On March 3, 2008, appellee sought to adopt his wife's minor child who was approximately 7 years old. Appellee asserted that the consent of appellant, the child's father, was unnecessary because appellant had failed without justifiable cause to communicate with or provide for the maintenance and support of the child for a period of at least one year immediately preceding the filing of the petition for adoption. Following a hearing on the matter, the trial court found that the allegations of the petition had been proven by clear and convincing evidence. Appellant then sought an appeal to this court. On appeal, appellant argues that the trial court's findings are not supported by the manifest weight of the evidence. Both assignments of error will be considered simultaneously.

{¶ 5} The petitioner for adoption bears the burden of establishing that there has not been "* * * more than de minimis contact with the minor or * * * 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." R.C. 3107.07(A). After the petitioner presents clear and convincing evidence of non-communication and non-support, the natural parent has the burden of going forward with evidence of a justifiable reason why he has not communicated with or supported the child. *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, paragraph one and two of the syllabus. However, the burden of proving that the natural parent's consent to the adoption is not necessary remains with the petitioner. Id. at paragraph four of the syllabus, and *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, paragraph one of the syllabus. The statute must be strictly construed to protect the fundamental liberty interests of the natural parent. *Santosky v. Kramer* (1982), 455 U.S. 745, 753-754, and *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 366.

{¶ 6} Pursuant to R.C. 3107.07(A), the probate court must determine if justifiable cause was established by clear and convincing evidence. There is no rigid definition for "justifiable cause." Rather, the probate court, as the fact finder, must determine whether justifiable cause exists in a particular case. Id. at 366-367. On appeal, the appellate court determines whether the trial court's decision was supported by the manifest weight of the evidence. *In re Adoption of Masa,* supra at paragraph two of the syllabus, and *In re Adoption of Holcomb*, supra, paragraph three of the syllabus. A determination is not against the manifest weight of the evidence when it is supported by competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 7} The following evidence was submitted at the hearing. Appellant stipulated to the fact that he had neither communicated with nor supported his child for a period of at least one year immediately prior to the filing of the petition for adoption (March 3, 2007 through March 3, 2008). A child support investigator for the Erie County Department of Job and Family Services testified that appellant made only two child support payments since the initial order to do so in January 2006, both of which were made after the filing of the petition for adoption in March 2008. Appellant testified that he obtained employment in May 2008 and support was then being withheld.

{¶ 8} The executive director, since March 2008, of Kinship (an agency providing for supervised visitations) testified that the records of the organization indicate that appellant's supervised visitations with his child began on April 4, 2005 and continued until February 16, 2006. The records show that appellant consistently visited his child twice a week and that the visits were reflective of a nurturing relationship. The only issue the director could see was that the child was sometimes unresponsive to appellant but there was no explanation for that behavior.

{¶ 9} Appellant's visitations were terminated by the former executive director of the agency on February 16, 2006. The records indicated that at a visitation on February 14, 2006 appellant sought to converse with his child about who was her father. Appellant had indicated to the child that his son who was with him was the child's brother. The child indicated that she only had a sister. Appellant asked the monitor if he could inquire of the child who told her this fact. The monitor told him that he could not

because the child did not want to continue the conversation and the issue was an adult matter. Appellant then asked the child who was her father and she told him another man's name. The monitor again directed appellant to avoid the conversation. At the next visitation, appellant asked the child if she knew that appellant is her father and she indicated that he is not her father. He also told her that his son is her brother and she denied that fact as well. When he asked her again whether she knew that he is her father, she shrugged her shoulders. Appellant then stated that her mother had been telling her this information and the director stepped in and told him that it was against the agency's policy to engage in such conversations speaking badly of the other parent. The director called the sheriff to have appellant removed and terminated all future visitations.

{¶ 10} The current director testified that she would consider reinstating appellant's visitations because she was new to the agency, but could not promise that she would reinstate visitation. The agency records indicated that appellant sent an e-mail the week after his visitations had been terminated indicating that his son would be visiting the child. It appears that the former director did not respond to the e-mail and appellant's son did not visit the child. The director could not testify as to whether appellant made any additional phone calls to the agency.

{¶ 11} The civil protection order issued in January 2005, which was incorporated into the divorce decree, prevents appellant from having any contact with his child other than through supervised visitations. Appellant testified that since 2005, his supervised visitation rights had increased from one hour, once a week to 90 minutes, twice a week as

a result of pro se motions he filed with the court. Regarding the last incident at Kinship, appellant testified that his child had been making comments since January 2006 that her mother had told her that appellant was not her daddy anymore and the child did not know what to call him. At the beginning of his next visit on February 15, 2006, the director wanted to talk to him, but appellant did not want to miss any of the time he had with his child. The director then indicated that he could not talk to the child about her relationship to him. Appellant told her that was going to do so because he felt it was necessary to make it clear to the child that he was her father. The director then ended the visitation and took the child away. Appellant tried to contact the director the following week, but she would not speak to him. In June or July, 2006, he had his mental health therapist call and attempt to help him. He testified that his therapist spoke to the director but visitation was not reestablished.

{¶ 12} He asserted that he was unable to obtain legal representation or pay the filing fees to challenge the termination of his visitation rights. Appellant had made a list of every attorney he contacted and the reason why he was unable to obtain their services. However, because appellee was unable to cross-examine every attorney listed, the list was not admitted into evidence and the parties stipulated that appellant had contacted ten attorneys and could not get one to take his case. He testified that he even contacted personnel at the court in an attempt to have a conversation with someone about the matter because he was unable to pay the filing fees. In February 2008, he sent a letter to the court stating that he had been unable to obtain representation and feared that his ex-wife

would be filing a motion to take his parental rights away. In October 2008, he attempted to file a motion with the court seeking visitation. But, since he could not pay the $100 filing fee and the court would not find him indigent, he was unable to file the motion. He tried to contact his ex-wife's lawyer, but he would not speak to him.

{¶ 13} Appellant further testified that he was unable to work in 2005-2006 due to a mental health issue. He testified that he was diagnosed with severe chronic depression and post traumatic stress syndrome, which are controlled by medication and weekly therapy. Prior to that time, he was in the Army, worked as a paramedic and a firefighter, worked in security, store management, and other various jobs. The longest he ever held a job was a year and a half to two years.

{¶ 14} In July 2007, he worked for the Bureau of Rehabilitation Services and Goodwill to determine what jobs he could handle without becoming overstressed. He obtained his first job in September that year as a hotel desk clerk, which he held for approximately one month. He was fired because he missed his shift at work. He had been stopped for a traffic violation and had been arrested for not paying his court fines. He was hired for another job in November 2007, to begin in April 2008. In the interim, appellant did not seek other work. This job lasted for approximately a couple of weeks from April to May, 2008. He was discharged after a background check revealed that he had outstanding arrest warrants in Sandusky Municipal Court. He obtained another

temporary job in May 2008 and worked one weekend. He was replaced after he had a flat tire and missed two days of work. After he was hired for each job, he contacted CSEA and notified them of his employment; but, because he did not work very long, no payments were ever made for the child's support. As of the time of the hearing in November 2008, appellant testified that he was still looking for work.

{¶ 15} Appellant had been denied Social Security Disability benefits. However, he receives $38 a month from Job and Family Services for his utility allowance. His housing is provided by the government. He also receives food stamps. He was unable to obtain any assistance from the Veteran's Commission. He has a valid driver's license, but his car is inoperable and his license plates would expire in a few weeks after the hearing. He also has a cell phone, so that potential employers can find him, but a friend pays the $27 monthly fee. Appellant is unable to find a friend or family member to give him or loan him money to cover the filing fees.

{¶ 16} Appellant also testified as to the 23 criminal charges against him, of which seven or nine are still pending. He is represented by the public defender in these cases. He asserted that many of the early charges were based upon allegations by his ex-wife of violations of the civil protection order. Currently, the pending charges are traffic violations.

{¶ 17} Appellant's mother testified that she has contact with her son through e-mail. She also stated that appellant has constantly been talking to her about his child. His

mother paid for an attorney to attend a hearing during the divorce proceedings. After that, she has been unable to help her son more than just a small sum now and then.

{¶ 18} Appellant stipulated to the fact that he had neither supported nor communicated with his child for the year immediately prior to the filing of the petition for adoption. Therefore, the issue before the probate court was whether there was justifiable cause for appellant's failure to support or communicate with his child.

{¶ 19} The probate court determined that appellant was capable of either resolving the problem with the agency or seeking help from the court based upon his successful prior self-representation in this case. The evidence in this case clearly support the finding that appellant was capable of asserting his rights. The crux of this case is whether appellant's efforts were frustrated by his lack of income. The court found that appellant's testimony that he was unable to obtain employment was not credible because he had worked until the time of the divorce. The court also noted that when appellant did obtain some income, he did not use any for the support of his daughter. We find that the manifest weight of the evidence supports this finding as well.

{¶ 20} We find appellant's first and second assignments of error are not well-taken.

{¶ 21} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas, Probate Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE