

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

In The Matter Of The Adoption Of: T.M.

Court of Appeals No. S-09-010

Trial Court No. 064012

DECISION AND JUDGMENT

Decided: September 30, 2009

* * * * *

K. Ronald Bailey, for appellant.

Roger W. Hafford, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas, Probate Division, that granted appellee's petition to adopt minor child T.M. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant I.M., biological father of T.M., sets forth two assignments of error:

{¶ 3} "I. The trial court erred by failing to recognize the lack of due process as justifiable cause for appellant not communicating with his daughter for a period of at least one (1) year.

{¶ 4} "II. The trial court erred by failing to recognize incarceration as justifiable cause for appellant not communicating with his daughter for a period of at least one (1) year, or in the alternative to toll time."

{¶ 5} On May 26, 2006, appellee J.W. filed a petition to adopt T.M. Appellee is married to T.M.'s biological mother ("Mother"), who filed her consent to the adoption. In the petition, appellee alleged that appellant's consent was not required because appellant had failed without justifiable cause to communicate with T.M. or provide maintenance and support for a period of at least one year immediately preceding the filing of the adoption petition.

{¶ 6} On July 17, 2006, appellant filed objections to the petition for adoption. Appellant asserted that because he had been incarcerated since October 28, 2005, he had justifiable cause for not communicating with T.M.

{¶ 7} By judgment entry filed on October 20, 2006, the trial court found that "[i]mprisonment of a parent does not per se provide legal justification for failing to communicate with a child." The matter was scheduled for an evidentiary hearing on the petition.

{¶ 8} The hearing was held on May 1, 2007. Mother testified that from May 2005 until May 2006 appellant had no contact with the child and did not provide any child support. She further testified that she has lived with appellee and T.M. at her current address in Vicary, Ohio, since July 2004, and that she did not inform appellant of the change when she moved to that address. She stated that appellant has family members who know where she lives.

{¶ 9} Appellant testified that he was incarcerated for a felony conviction from October 2005 until June 2006. He further testified that when he was sentenced, the trial court did not advise him that, as a result of his incarceration, he might lose his right to withhold consent to his child's adoption if he failed to communicate with or support her in any one-year period immediately preceding the filing of an adoption petition. Appellant testified that in November 2003, two months after his child was born, Mother told him that a restraining order had been issued prohibiting him from having any contact with the child. He stated that he was never served with a copy of a restraining order and did not attempt to verify its existence or seek legal advice regarding the matter. Appellant also stated that he did not attempt to contact Mother or the child because he believed he could not do so due to the restraining order. He denied ever attempting to contact the child through her maternal grandmother, although he knew the grandmother's phone number. Appellant stated under direct examination that he wrote two letters to Mother in December 2005 and January 2006. In contrast, however, when asked under

cross-examination whether he took any steps whatsoever to try to contact his daughter, appellant admitted, "From December of '05, not really."

{¶ 10} In the final decree of adoption filed February 6, 2009, the trial court found appellant's "excuses" for failing to communicate with his daughter to be "irrational and unjustifiable" and not credible. The trial court found that appellant failed without justifiable cause to communicate with his daughter within one year immediately preceding the filing of the adoption petition and that all consents were either filed or not required by law. Accordingly, the trial court found that the adoption of T.M. by her stepfather appellee was in the child's best interest and granted the adoption. It is from that judgment that appellant appeals.

{¶ 11} Appellant's two assignments of error will be addressed together. In support of his first assignment of error, appellant asserts that his right to due process was denied when he was not informed, at his sentencing for an unrelated criminal proceeding in 2006, that his incarceration could result in the loss of his right to parent his child. Appellant argues that R.C. 3107.07(A) is constitutionally flawed because it does not give a parent notice of conduct that could lead to the termination of parental rights.

{¶ 12} The finding of the probate court in adoption proceedings "will not be disturbed on appeal unless such determination is against the manifest weight of the evidence." *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 104, paragraph four 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.

{¶ 13} R.C. 3107.07(A) provides that a birth parent's consent to the adoption of a minor child is not necessary where the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the petition for adoption or placement of the minor in the home of the petitioner.

{¶ 14} Ohio law requires that a parent receive notice of a pending adoption, that the parent have an opportunity to object, and that a proper hearing take place to determine whether the parent's consent is necessary. *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648. Appellant does not dispute that he was served with notice of the pending adoption. The record reflects that he submitted objections to the adoption. Further, appellant attended the hearing on May 1, 2007 regarding his objections and testified at that hearing. Despite having been afforded those rights and having availed himself of the procedures set forth in the law, appellant complains that the law as it exists in Ohio allowed him to unknowingly waive his parental rights "by conduct that he had no reason to suspect would lead to such result."

{¶ 15} The record reflects that at the time of appellant's sentencing, approximately five months of the relevant 12-month period prior to the filing of the adoption petition had passed without appellant having contacted his child. The trial court found, and we

agree, that appellant provided no justifiable reason for failing to contact his child during that time. Further, we find that appellant has not provided this court with any rational argument to support his claim that the sentencing court should have delved into appellant's personal life and advised him of the law as set forth in R.C. 3107.07 as it relates to parental consent to the adoption of his child -- an issue without a shred of legal relevance to appellant's criminal case.

{¶ 16} In support of his second assignment of error, appellant asserts that incarceration is a form of disability which makes it very difficult for a parent to communicate with his child. Appellant argues that his incarceration therefore constituted justifiable cause for failing to communicate with his daughter.

{¶ 17} Ohio courts have consistently held that incarceration alone is not a justifiable reason for failing to communicate with one's child. *In the Matter of: The adoption of Peyton Ashley F.* (Oct. 13, 2000), 6th Dist. No. L-00-1146; *In the Matter of the Adoptions of Doyle*, 11th Dist. Nos. 2003-A-0071, 2003-0072, 2004-Ohio-4197. Again, we note that appellant was not incarcerated until October 2005, which was five months after the start of the relevant 12-month period immediately preceding the filing of the petition. But during those five months when he was free to do so, appellant did not contact his child. Even after his period of incarceration began, appellant was not prevented from contacting his child, despite his actions being restricted in some obvious respects. Although appellant testified that he sent two letters to his child's mother during his incarceration, the trial court found that appellant's testimony in that regard was not

credible. Appellant's testimony that he sent the letters, however, indicates that he knew it was possible to communicate with others while he was in prison if he so desired.

{¶ 18} Based on the foregoing, we find that the trial court did not err by finding that appellant's failure to communicate with his child for one year prior to the date the petition to adopt was filed was without justifiable cause, and by finding that appellant's consent to the adoption was not required. Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 19} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellant.

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, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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