

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

In the Matter of:
The Adoption of G.V.

Court of Appeals No. L-09-1160

Trial Court No. 2008 ADP 000010

DECISION AND JUDGMENT

Decided: November 30, 2009

* * * * *

Michael R. Voorhees, for appellants.

Alan J. Lehenbauer, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Probate Division, that dismissed appellants' petition to adopt minor child G.V. as having been filed prematurely. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. Minor child G.V. was born in October 2007. On November 1, 2007, the child's birth mother executed a permanent surrender in accordance with R.C. 5103.15 and asked a private adoption agency to take permanent custody of the infant. On November 4, 2007, J.B., the child's legal father, executed a permanent surrender in which he indicated that he was not the child's biological father. At the time the permanent surrenders were executed, the child's mother and J.B. were recently divorced. J.B. was presumed to be the legal father pursuant to R.C. 3111.03(A)(1) because he was married to the child's mother at the time the child was conceived. On November 8, 2007, G.V. was placed with appellants for the purpose of adoption.

{¶ 3} On November 15, 2007, appellee B.W. timely registered with the Ohio Putative Father Registry, seeking to initiate parental rights relative to G.V. On December 28, 2007, appellee filed a "Parentage Complaint: Petition to Establish Parental Rights and for Other Relief" in the Fulton County Court of Common Pleas, Juvenile Division. In response, appellants filed a motion requesting dismissal of the parentage complaint.

{¶ 4} On January 16, 2008, appellants filed a petition for adoption in the Lucas County Court of Common Pleas, Probate Division. On February 21, 2008, the Fulton County Juvenile Court transferred the parentage proceedings initiated by appellee to the Lucas County Court of Common Pleas, Juvenile Division, pursuant to Juv.R. 11.

{¶ 5} On April 23, 2008, appellee filed objections to the adoption. On May 19, 2008, the Lucas County Probate Court stayed the adoption proceedings pending determination of paternity by the Lucas County Juvenile Court. Thereafter, the juvenile court directed appellants, appellee, the child's birth mother and the individuals or agency with possession of G.V. to present themselves and the child for genetic testing as directed by the court. On March 17, 2009, the juvenile court issued a judgment entry declaring appellee to be the father of G.V. The juvenile court then dismissed the proceedings in that court due to the pending adoption.

{¶ 6} On June 2, 2009, a hearing was held in the probate court to address appellee's objections to the adoption. On June 4, 2009, the probate court issued the judgment entry which is the subject of this appeal dismissing the petition for adoption. In its decision, the trial court noted that the parties disagreed as to which adoption statute should be applied relative to the issue of whether or not appellee's consent to the adoption was necessary. Appellants asserted that R.C. 3107.07(B)(2), which addresses the circumstances under which the consent of a putative father is not required, should apply because appellee was a putative father when the petition to adopt was filed. Appellants asserted that appellee could not be elevated to the position of legal father once the adoption case had commenced. In response, appellee argued that, in light of the juvenile court's finding of parentage, the probate court should apply the provisions of R.C. 3107.07(A), which sets forth the circumstances under which the consent of a legal parent is not required.

{¶ 7} In response to these claims, the probate court found, pursuant to *In re Adoption of Pushcar* (2006), 110 Ohio St.3d 332, that while an issue concerning parenting of a minor child is pending in juvenile court – as was the case herein – a probate court must defer to the juvenile court and refrain from proceeding with the adoption of that child. The trial court reasoned, based on *Pushcar*, that the Supreme Court of Ohio intended the probate court to consider the findings of a juvenile court that are made while an adoption proceeding is being held in abeyance. In the case before us, appellee was found to be G.V.'s legal father while the probate case was stayed. Therefore the probate court ruled for purposes of determining the necessity of appellee's consent to the adoption that appellee is to be deemed a legal father and that the case falls under the provisions of R.C. 3107.07(A). Pursuant to R.C. 3107.07(A), a parent's consent to the adoption of a minor child is not necessary if 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.

{¶ 8} The trial court concluded, based on the holding in *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127, paragraph two of the syllabus, that the one-year statutory period of nonsupport which obviates the requirement to obtain parental consent to an adoption began to run on March 17, 2009, the date that appellee's parentage was judicially established. The court further reasoned that since the one-year period did not

begin to run until judicial ascertainment of paternity, appellants could not prove, pursuant to R.C. 3107.07(A), that appellee had failed to communicate with the child for one year prior to the filing of the petition because the petition was filed prior to the date paternity was established. The trial court therefore found that the petition for adoption was filed prematurely. It is from that judgment that appellants filed a timely appeal.

{¶ 9} Appellants set forth the following assignments of error:

{¶ 10} "Appellants' First Assignment of Error

{¶ 11} "The Probate Court erred by finding that Appellee was no longer a putative father in the adoption proceeding.

{¶ 12} "Appellants' Second Assignment of Error

{¶ 13} "The Probate Court erred in finding that it did not have exclusive jurisdiction over the adoption proceeding.

{¶ 14} "Appellants' Third Assignment of Error

{¶ 15} "The Probate Court erred by allowing Appellee to be a party to the adoption proceeding.

{¶ 16} "Appellants' Fourth Assignment of Error

{¶ 17} "The Probate Court erred by refusing to consider all allegations set forth in the Petition that were stated as separate grounds for finding the consent of the putative father is not required."

{¶ 18} Because adoption terminates a natural parent's fundamental right to the care and custody of his children, "any 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." *In re Schoeppner's Adoption* (1976), 46 Ohio St.2d 21, 24. Further, 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, 204. 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.

{¶ 19} In support of their first assignment of error, appellants assert that the trial court erred by finding that it was required by *Pushcar* to consider the juvenile court's determination of parentage made while the probate case was stayed. As explained above, *Pushcar* held that the probate court must defer to the juvenile court and refrain from addressing the matter until after adjudication in the juvenile court. Appellants cite the holding of the First District in *In the Matter of the Adoption of P.A.C.* In *P.A.C.*, the court held that where a biological father did not timely register with the putative father registry before the adoption petition was filed or otherwise safeguard his right to object to the adoption of his child, his consent to the adoption was not required even though a parentage action was pending at the time the petition was filed. In the case before us, however, appellee registered on the putative father registry 17 days after the child was born, well within the 30-day time limit allowed by law. Within two months after the child's birth, appellee filed a parentage action; appellants filed their petition to adopt 18 days later.

{¶ 20} After appellee's paternity was established, the probate court in this case correctly acknowledged the juvenile court's finding and proceeded with the adoption case and consideration of whether appellee's consent was required for the adoption.

{¶ 21} Based on the foregoing, we find that the trial court did not err by finding that appellee was no longer a putative father in the adoption proceeding. Accordingly, appellants' first assignment of error is not well-taken.

{¶ 22} In their second assignment of error, appellants assert that the probate court erred by finding that paternity was relevant to the adoption proceeding and staying the adoption until the juvenile court determined the paternity issue. Appellants assert that since they withdrew from their petition the allegation that appellee was not the child's biological father, the issue of paternity was irrelevant to the adoption proceeding. Pursuant to *Pushcar*, however, the probate court in this case correctly determined that it could not proceed with the adoption until paternity was established by the juvenile court. Appellee's status as either a putative father or biological father would control which statutory provision would be applied to determine under what circumstances his consent would be required. In this case, if appellee were found merely to be a putative father, pursuant to R.C. 3107.07(B)(2), appellants would only have to show that he willfully abandoned or failed to support the minor child, or that he willfully abandoned the mother during her pregnancy and until the time of the surrender or placement of the child in appellants' home. Because the issue of paternity clearly was relevant in this case, the

probate court properly stayed the case pending the juvenile court's determination.

Accordingly, appellants' second assignment of error is not well-taken.

{¶ 23} In their third assignment of error, appellants assert that the probate court erred by allowing appellee to be a party to the adoption proceeding. Appellants base their argument on the undisputed fact that J.B. was the child's legal father at the time that the adoption petition was filed, as he was married to mother at the time that G.V. was conceived. Appellants state correctly that since both legal parents executed permanent surrenders, their consent is not necessary for an adoption. Appellants then claim that since J.B. was the child's legal father, appellee had no legal authority either to register with the putative father registry or to file objections in the adoption case. Referring to J.B. and appellee, appellants further claim that it is a due process violation to require adoptive parents to seek the consent of "multiple classifications of fathers," at different points in time.

{¶ 24} Appellants' arguments have no merit. At no time during the pendency of this case was it asserted that appellants had to obtain the consent of the legal father. J.B. executed a permanent surrender of his parental rights when the child was six days old. In the permanent surrender, J.B. stated, "I am not the biological father." Appellants' argument as to the unfairness of adoptive parents being burdened with having to seek the consent of "multiple classifications of fathers" simply cannot be applied to the facts of this case. Should the petition to adopt G.V. be refiled, based on the probate court's ruling, the only individual whose consent appellants would potentially need would be

appellee. Appellants also incorrectly claim that appellee was not entitled to receive notice of the adoption proceeding, stating that in Ohio the only means for a putative father to be entitled to receive notice of an adoption proceeding is to timely register with the putative father registry. Since that is exactly what appellee did, this argument simply has no merit. Further, pursuant to R.C. 3107.11, appellee had a right to receive notice of the adoption petition and of the time and place of the hearing. Appellants did not give him such notice. On March 14, 2008, the probate court ordered appellants to serve appellee, as putative father, with notice of the petition. As appellants' arguments have no merit, their third assignment of error is not well-taken.

{¶ 25} In support of their fourth assignment of error, appellants assert that the probate court erred by refusing to consider all of their arguments as to why appellee's consent was not required. Ultimately, the probate court did not reach a decision as to whether appellee's consent was or was not required. This is because the court dismissed the petition to adopt as prematurely filed, for the reasons set forth above. Accordingly, this argument has no merit and appellants' fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.