[Cite as *In re K.D.*, 2010-Ohio-1592.]

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

In the Matter of:
The Adoption of K.D.

Court of Appeals No. L-09-1302

Trial Court No. 2009 ADP 000059

DECISION AND JUDGMENT

Decided: April 9, 2010

* * * * *

Robert S. Salem, for appellant.

David C. Bruhl, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the judgment of the Lucas County Court of Common Pleas, Probate Division, finding that he failed without justification to have more than de minimis contact with his daughter for more than a year preceding an adoption petition. For the reasons that follow, we affirm.

{¶ 2} When K.D. was prematurely born in 2006, both she and her mother tested positive for cocaine. The Lucas County Children's Services Board was engaged almost immediately and provided substance abuse screening and treatment for K.D.'s mother.

{¶ 3} K.D. remained hospitalized for approximately two months. By the time she was released from the hospital, children's services had arranged for appellees, K.D.'s maternal uncle and aunt, to provide for her temporary care. On July 6, 2006, the Lucas County Court of Common Pleas, Juvenile Division, adjudicated K.D. neglected and awarded appellees temporary custody. At the outset, children's services put in place a case plan to reunify K.D. with her parents. Her mother was to participate in substance abuse treatment, her father, appellant, J.W., was to take anger management and parenting classes.

{¶ 4} On March 2, 2007, following a hearing that appellant did not attend, the juvenile court granted children's services' motion to grant legal custody of K.D. to appellees. In April 2007, however, appellant contacted the court, asserting that he had not received notice of the legal custody hearing.

{¶ 5} The court held a second hearing, following which the parties were referred to mediation. The mediation resulted in a consent agreement wherein appellant was afforded supervised weekly visitation with K.D. under the auspices of the Children's Rights Council. The mediation agreement was reduced to judgment in the juvenile court.

{¶ 6} Appellant failed to appear or was late beyond the agreed limits for three of seven visitations between October 26, 2007, and January 25, 2008. This prompted the

Children's Rights Council to discontinue its supervision of these visits on December 11, 2007. At the request of both parties, however, the council agreed to host additional visitations at a different location.

{¶ 7} At the final visitation, on January 25, 2008, the visitation supervisor reported that things did not go well. K.D. was very anxious when left alone with appellant, crying and screaming when not distracted. As a result of this observed behavior, appellees contacted their attorney.

{¶ 8} Appellees' attorney sent appellant a letter, advising him that because he had been habitually absent/tardy from visitations, failed to complete the anger management or parenting classes as ordered and was suspected to be off his medications for bi-polar disorder, that appellees intended to seek a court order barring further visitation or, alternatively, visitation preceded by drug testing. Appellees' counsel sent a second letter to the Children's Rights Council, advising the organization that K.D. would not be returning for further visitation with appellant.

{¶ 9} Appellees never filed for an order barring further visitation. Nevertheless, it is undisputed that, from the time of the attorney's letter forward, appellant had no visitation, communication or contact with K.D. On April 14, 2009, appellees petitioned the trial court to adopt K.D. In their application, appellees asserted that the consent of neither parent was necessary because K.D.'s parents had failed without justification to have more than de minimis contact with the child for the previous year.[1]

[1]The whereabouts of K.D.'s mother are unknown.

{¶ 10} The trial court set a date for a hearing on the petition and ordered notice to be provided to all parties. Appellant responded to the notice with a letter to the court, complaining that appellees were responsible for denying him visitation and objecting to the adoption. The court appointed counsel for appellant and the matter moved forward for an October 27, 2009 hearing, solely on the issue of whether appellant's lack of contact with his child was justifiable so as to maintain for him the right to object to the adoption.

{¶ 11} At the conclusion of the hearing, the trial court found that appellant had failed to provide more than de minimis contact with the child without justifiable cause for a period in excess of one year prior to the adoption petition and, therefore, his consent to adoption was unnecessary. Appellant appeals this judgment, setting forth the following two assignments of error:

{¶ 12} "I. The trial court erred as a matter of law in holding that appellees' unilateral termination of court-ordered visitations did not constitute significant interference with appellant's efforts to contact his daughter, and therefore did not establish justifiable cause for appellant's lack of contact with his daughter[.]

{¶ 13} "II. The trial court erred as a matter of law in holding that appellant's limited cognitive abilities and psychological condition did not establish justifiable cause for appellant's lack of contact with his daughter."

{¶ 14} Ordinarily, a minor child may be adopted only with the natural parent's consent. R.C. 3107.06. Parental consent for adoption is not required, however, "* * * 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 * * * 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). The burden of proof rests with the petitioner for adoption to prove both the lack of contact and the absence of justifiable cause on the part of the natural parent. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus; *In Re A. M. W.*, 170 Ohio App.3d 389, 2007-Ohio-682, ¶ 8.

{¶ 15} "* * * The question of whether justifiable cause exists in a particular case is a factual determination for the probate court and will not be disturbed upon appeal unless such determination is unsupported by clear and convincing evidence." *Holcomb*, at paragraph three of the syllabus. Clear and convincing evidence is that measure "* * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. "*[S]ignificant* interference by a custodial parent with communication between the non-custodial parent and the child, or *significant* discouragement of such communication, is required to establish justifiable cause for the non-custodial parent's failure to communicate with the child." *Holcomb* at 367-368 (Emphasis in original.)

{¶ 16} There is no dispute in this matter that appellant had no contact with K.D. for a period in excess of one year prior to the application for adoption. The only issue

before the trial court was whether justifiable cause existed for this lack of contact. The only issue before this court is whether the trial court's finding that justifiable cause did not exist was against the manifest weight of the evidence.

{¶ 17} Judgments supported by some competent credible evidence will not be disturbed on appeal as against the manifest weight. *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, syllabus. Thus, if there is any evidence of record by which the trial court could have reached a firm conviction that appellant's failure to contact his daughter for a year was not justified, the trial court's judgment must be affirmed. *Holcomb* at 368.

{¶ 18} At trial, appellant testified that his last contact with K.D. was on January 25, 2008. A few days later, appellant received the letter from appellees' attorney, advising him that they intended to cease visitation through the Children's Rights Council and to seek an order barring further visitation. Appellant testified that in February 2008, he attempted to contact appellee's attorney, but was advised he was unavailable. In October 2008, according to appellant, he asked his wife to contact appellees through Myspace.com, a social networking website. Appellant and his wife testified that there was no response to the message.

{¶ 19} Appellant continued, testifying that between March and May 2009, he visited the juvenile court, attempting to obtain appellees' contact information. According to appellant, he was advised that this information was confidential. In May 2009, after appellant received service of the adoption petition, he sought legal representation, but

was told, according to his testimony, that he did not qualify for a legal aid attorney or did not have enough money to retain counsel. The trial court appointed counsel for appellant on August 26, 2009.

{¶ 20} Appellant argues that the January 30, 2008 letter from appellees' attorney and their cancellation of visitation at the Children's Rights Council was a significant interference with his non-custodial rights and a significant discouragement of communication with the child, by itself sufficient justifiable cause for non-contact. Alternatively, appellant suggests, given his mental condition of bi-polar disorder, "exacerbated after he stopped taking his medication in December 2008," and his limited education, he had difficulty understanding the proceedings. Such diminished cognition forms an alternate reason to find justifiable cause for his lack of contact, appellant insists.

{¶ 21} The trial court refused to find the letter from appellees' attorney sufficient interference with appellant's rights to constitute justifiable cause for his failure to contact his daughter for the next year. We note that neither the attorney's letter to appellant, nor his letter to Children's Rights Council, deny visitation. The letter to Children's Rights Council advises that appellees will not be bringing K.D. back to that location. The letter to appellant indicates that appellees will seek an order denying visitation or, alternatively, drug testing 24 hours prior to supervised visitation.

{¶ 22} It may be that appellant misunderstood the letter or ascribed to it more authority than was due, but we cannot see how this letter by itself justifies essentially no attempt to make contact with this child for the next year. The one year period prior to the

adoption petition in this matter is from April 14, 2008, until April 14, 2009. By his own testimony, the only effort that appellant made to contact his child during this period was a Myspace message and an unsuccessful visit to the clerk's office at juvenile court. This is sufficient evidence by which the trial court could have found clearly and convincingly that appellant's lack of contact with K.D. was without justifiable cause. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 23} With respect to whether appellant's limited cognition and bi-polar disorder should operate to provide justifiable cause for appellant's lack of contact, we fail to find evidence that this should be the case. Appellant, by his own admission, was on his medications for eight months during this period, so assuming any kind of efficacy for this medication, he should have been functional during some of this time. Appellant also testified that he had completed the tenth grade and introduced no evidence of illiteracy or other cognitive impairment. Accordingly, the trial court's rejection of this proposition is not against the weight of the evidence. Appellant's remaining assignment of error is not well-taken.

{¶ 24} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. It is ordered that appellant pay court 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.

Arlene Singer, J. _____

_____
JUDGE

Thomas J. Osowik, P.J. _____

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Keila D. Cosme, J. _____ JUDGE
CONCUR.

_____
JUDGE