[Cite as *In re Adoption of K.A.H.*, 2015-Ohio-1971.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of the Adoption of K.A.H et al.,	:	
	:	No. 14AP-831
(W.J.H.,		(Prob. No. 559762)
	:	
Appellant).		(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on May 21, 2015

Nina P. Scopetti, for appellee.

J. Douglas Stewart, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Probate Division

TYACK, J.

{¶ 1} Appellant, W.J.H., is appealing the decision of the Franklin County Probate Court which required that P.C.'s consent be obtained before his children can be adopted by their step-father. For the following reasons, we affirm the probate court's decision.

{¶ 2} W.J.H. presents three assignments of error for our consideration:

> [I.] THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BECAUSE IT MISAPPLIED THE "MORE THAN DE MINIMIS CONTACT WITH THE MINOR CHILD" STANDARD SET FORTH UNDER §3107.07 OHIO REVISED CODE.
>
> [II.] THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DETERMINING THAT THE EXISTENCE OF A ZERO SUPPORT ORDER NEGATES THE FATHER'S COMMON LAW DUTY OF SUPPORT.
>
> [III.] THE TRIAL COURT COMMITTED ERROR TO THE PREJUDICE OF THE APPELLANT BY FAILING TO APPLY

> §3107.07 (K) THEREBY PROMOTING SURPRISES AT TRIAL AND FRUSTRATING THE ORDERS OF THE COURT.

{¶ 3} W.J.H. petitioned to adopt two minor children, K.A.C. and P.C.C. Both children were born to S.H., formerly known as S.C., while she was married to P.C. The couple divorced in 2009. The divorce decree incorporated a shared parenting plan and ordered that P.C. pay no child support. S.H. was employed as a physician during all material times and appeared to be drawing an income many times greater than P.C. Shortly after the divorce, P.C. moved to England.

{¶ 4} In 2011, S.H. and the petitioner W.J.H. were married. In April 2013, W.J.H. petitioned to adopt the children. P.C. received notice of the adoption petition on or about June 13, 2013 and filed a written objection on July 26, 2013. The petition for adoption alleged that P.C.'s consent to the adoption was not necessary due to the provisions of R.C. 3107.07, which reads:

> Consent to adoption is not required of any of 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.

{¶ 5} After a hearing, the probate court's magistrate found that the consent of P.C. was required. This finding was based upon a factual finding that between July 1, 2012 and March 24, 2013, P.C. placed calls to his children totaling 91 minutes at a cost of 112 British Pounds Sterling, the equivalent of roughly $174 U.S.D. Because of the phone calls and because of an undetermined number of cards and gifts which were provided during the relevant time frame, the magistrate found W.J.H. failed to demonstrate by clear and convincing evidence that P.C. did not have more than de minimis contact with his children.

{¶ 6} W.J.H. filed objections to the magistrate's decision and P.C. filed a reply. The probate court overruled the objections and approved and adopted the magistrate's decision. W.J.H. has, in turn, properly appealed the probate court's decision.

{¶ 7} The Supreme Court of Ohio has articulated a two-step analysis for probate courts to employ when applying R.C. 3107.07(A). *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, ¶ 23. The first step involves the factual question of whether the petitioner has proved by clear and convincing evidence that the parent willfully failed to have more than de minimis contact with the minor child and failed to provide maintenance and support. *Id.* at ¶ 21; R.C. 3107.07(A). "A trial court has discretion to make these determinations, and in connection with the first step of the analysis, an appellate court applies an abuse-of-discretion standard when reviewing a probate court decision." *Id.* at ¶ 25. The second step occurs if a probate court finds a failure to have more than de minimis contact and provide the required maintenance and support, the court then determines the issue of whether there is justifiable cause for the failure. *Id.* at ¶ 23. A probate court's decision on whether justifiable cause exists will not be disturbed on appeal unless the determination is against the manifest weight of the evidence. *Id.* at ¶ 24; *In re Adoption of Masa*, 23 Ohio St.3d 163 (1986), paragraph two of the syllabus. The consent provisions of R.C. 3107.07(A) are to be strictly construed to protect the interests of the non-consenting parent. *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127 (1992).

{¶ 8} W.J.H.'s first assignment of error argues that P.C.'s 91 minutes of phone calls and a few cards do not amount to more than de minimis contact with the children. There is evidence that many of these minutes were spent waiting for the maternal grandparents, who P.C. would call to put the children on the phone. There is also evidence that, on some phone calls, P.C. was unable to speak to the children.

{¶ 9} We review the probate determination of the significance of these facts under an abuse of discretion standard. *M.B.* at ¶ 25. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} W.J.H. makes the argument that since the legislature recently changed the language of R.C. 3107.07(A) on April 7, 2009 from "communicate" to "provide more than

de minimis contact" that the contact requires more quality and quantity. We agree that more is required. Changing the standard from what could be a single contact to "more than de minimis contact" implies the legislature indicated its intent to require more effort from the parent to have contact and communication with the child. *In re Adoption of K.C.*, 3d Dist. No. 8-14-03, 2014-Ohio-3985, ¶ 22. However, the requisite amount of contact is a legal question. Whether W.J.H. has met that standard is a factual question.

{¶ 11} Comparing examples of when other courts have found that no more than de minimis contact existed, we see that the standard has not been raised higher by Ohio courts: *In re Adoption of A.L.C.*, 7th Dist. No. 14 BE 4, 2014-Ohio-4045 (father did not contact the child for over one year but argued he had a justifiable cause); *In re Adoption of R.L.H.*, 2d Dist. No. 25734, 2013-Ohio-3462 (mother voluntarily suspended her agreed upon court-ordered parenting time, and mother did not see, speak, or correspond with the child); *In re Adoption of K.D.*, 6th Dist. No. L-09-1302, 2010-Ohio-1592 (father's only effort to contact the child was through an internet site and a visit to a clerk's office, and the father's limited cognition and bi-polar disorder did not provide justifiable cause); *In re M.F.*, 9th Dist. No. 27166, 2014-Ohio-3801 (father failed to contact the child, but was prevented by court order and later by the mother ignoring his email requests); *In re Adoption of J.A.C.*, 4th Dist. No. 14CA3654, 2015-Ohio-1662 (father only performed a single two-hour visitation during the year). Contrasting these examples where courts found that there was no more than de minimis contact with the children with P.C.'s short but regular phone calls, we cannot find that the probate court's decision is unreasonable, arbitrary or unconscionable.

{¶ 12} We note the well-established law that the right to parent one's children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28. Parents have a "fundamental liberty interest" in the care, custody, and management of the child. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In recognition of the significance of that fundamental interest, the Supreme Court of Ohio has described the permanent termination of parental rights as "the family law equivalent of the death penalty in a criminal case." *In re Hayes*, 79 Ohio St.3d 46, 48 (1997). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id*. In regard to the permanent termination of parental rights specific to the

context of adoptions, as a general rule, the biological parent must consent and may withhold consent to adoption. R.C. 3107.06; *see also In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, ¶ 6 (stating "[b]ecause adoption terminates fundamental rights of the natural parents, * * * [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").

{¶ 13} We find that the probate court did not abuse its discretion in determining that W.J.H. failed to prove by clear and convincing evidence that P.C. did not provide more than de minimis contact with his children.

{¶ 14} The first assignment of error is overruled.

{¶ 15} W.J.H.'s second assignment of error argues that the existence of a zero support order does not negate P.C.'s common law duty of support. P.C. argues that the existence of a zero support order is justifiable cause to not have provided financial support for his children. A probate court's decision on whether justifiable cause exists will not be disturbed on appeal unless the determination is against the manifest weight of the evidence. *M.B.* at ¶ 24; *Masa* at paragraph two of the syllabus. Decisions supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *Melvin v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-975, 2011-Ohio-3317, ¶ 34; *see C. E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279 (1978).

{¶ 16} Examining the nature of the duty of support and maintenance to which R.C. 3107.07 refers, Ohio has long recognized that a biological parent's duty to support his or her children is a "principle of natural law" that is "fundamental in our society." *In re B.M.S.*, 10th Dist. No. 07AP-236, 2007-Ohio-5966; *Aharoni v. Michael*, 74 Ohio App.3d 260, 263 (10th Dist.1991). Moreover, this duty is not impaired by the termination of the marriage. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 458 (1887), paragraph one of the syllabus.

{¶ 17} "The biological or adoptive parent of a minor child must support the parent's minor children out of the parent's property or by the parent's labor." R.C. 3103.03(A). "Such duty of support is not dependent upon the presence or absence of court orders for support." *B.M.S.* at ¶ 23; *Nokes v. Nokes*, 47 Ohio St.2d 1 (1976). "[A]

parent of a minor, has the common-law duty of support as well as a duty of support decreed by court. The judicial decree of support simply incorporates the common-law duty of support." *In re Adoption of McDermitt*, 63 Ohio St.2d 301, 305 (1980). Such duty of support is not dependent upon the presence or absence of court orders for support. *Nokes* at 5; *B.M.S.* at ¶ 23 (Consent was not found to be necessary after the biological father was found to not have paid court ordered child support despite showing no financial reason for failing to). "This common law duty of support is owed to a person who has the physical custody of the child." *Burrowbridge v. Burrowbridge*, 5th Dist. No. 2005CA00049, 2005-Ohio-6303, ¶ 39, concurring opinion. Parents of a minor child may not unilaterally or bilaterally decide to ignore the obligation of support. *In re England*, 10th Dist. No. 92AP-1749 (May 18, 1993). "[A] written agreement between the parents cannot abrogate a parent's independent statutory duty to provide support for the child." *Hoelscher v. Hoelscher*, 91 Ohio St.3d 500, 502 (2001), citing *In re Dissolution of Marriage of Lazor*, 59 Ohio St.3d 201 (1991).

{¶ 18} However, when a husband and wife are divorced, their obligation to support a minor child is governed by the domestic relations child support statute, R.C. 3109.05. *See Lazor* at 203; *see Meyer v. Meyer*, 17 Ohio St.3d 222, 224 (1985). "The duty of divorced parents to support the minor children of their marriage is governed by * * * R.C. 3109.05. There is no basis for the argument that R.C. 3103.031 governs." *Id.* at 224.

{¶ 19} The probate court, in the case at bar, determined that the shared parenting plan which set P.C.'s child support payments as $0 was incorporated into the divorce decree. The probate court reasoned that, when no support order is issued at the time of the custody award, the custodial parent is not entitled to support payment. *See Id.* The trial court then found that when no support was due from one of the parents, said determination is an applicable judicial order for purposes of consent under R.C. 3107.07, thus giving P.C. justifiable cause for failure to provide maintenance and support. The trial court relied on *In re Way*, 4th Dist. No. 01CA23 (Jan. 9, 2002).

{¶ 20} In *In re Way*, the mother's consent was found not be required by the probate court under R.C. 3107.07(A). *Id.* The mother was on disability and a juvenile court relieved her of support obligations due to lack of income years earlier. *Id.* The probate court as trial court concluded that although the mother was under no court order

to pay child support, she had a common-law duty to support her daughter, and could have provided some nonmonetary assistance. *Id.* The Fourth Appellate District disagreed. It relied on two reasons as to why the mother's failure to support was justifiable. First, the mother had no income. Second, the mother was relieved of child support payments by court order:

> We believe that appellant could have reasonably assumed that this order relieved her of any obligation to provide support of any kind. If this was not the case, and if appellant did risk the loss of her parental rights by complying with that order, we believe that notions of fundamental fairness require that appellant be provided notice to that effect.

Id. at 10. The fourth district, in its analysis, continually relies on the fact that a juvenile court relieved the mother of child support.

{¶ 21} Other appellate courts have found that a zero support order is a justifiable excuse to not provide support. *In re Adoption of Stephens*, 2d Dist. No. 18956 (Dec. 21, 2001). "Where a domestic relations court has reviewed the facts and determined that no support is due from one of the parents, that is an applicable judicial order for the purposes of R.C. 3107.07 until it is modified." *In re Adoption of Thiel*, 3d Dist. No. 6-98-12 (Feb. 23, 1999).

> To additionally compel the application of R.C. 3103.03 when there is already a valid judicial order in existence would be to incorrectly interpret R.C. 3107.07 to mean: "as required by law *in addition to* a judicial decree where a domestic relations court has determined that child support should be not set." We decline to apply this expansive interpretation of the statutes to the detriment of the natural parent.

(*Emphasis sic.*) *In re Adoption of Jarvis*, 9th Dist. No. 17761 (Dec. 11, 1996).

{¶ 22} The record indicates that P.C. did provide some gifts and birthday cards. This court has held that supplying gifts and other nonessential items is not considered support or maintenance for purposes of R.C. 3107.07(A). *B.M.S.* at ¶ 30. We held that, "[i]n an action for adoption where it is alleged that the natural father willfully abandoned or failed to care for and support his daughter, his purchase of toys and clothes for her in the value of about $133 is insufficient to fulfill his duty of support where the gifts to the child are not requested and they provide her no real value of support because she already

has sufficient clothes and toys." *In re Adoption of Strawer*, 36 Ohio App.3d 232 (10th Dist.1987), paragraph one of the syllabus.

{¶ 23} However, we find that the child support order of zero dollars that was incorporated into the divorce decree governs in this case. P.C.'s common-law duty to support, which is reduced to statute R.C. 3103.03(A), is now governed by the domestic relation's child support statute, R.C. 3109.05. We agree with the court's reasoning in *Jarvis*, "[t]o additionally compel the application of R.C. 3103.03 when there is already a valid judicial order in existence would be to incorrectly interpret R.C. 3107.07." *Id*. The zero support order is a justifiable excuse for P.C. failing to pay support for his children. The probate court's determination that a child support order of zero existed is supported by competent and credible evidence. We do not find that the probate court's determination is against the manifest weight of the evidence.

{¶ 24} The second assignment of error is overruled.

{¶ 25} The third assignment of error argues that the trial court committed error to the prejudice of appellant by failing to apply R.C. 3107.07(K) in which P.C. was required to file a written objection within 14 days after notice was received of the petition of adoption else his consent to adoption would not be required.

{¶ 26} R.C. 3107.07(K) states:

> Except as provided in divisions (G) and (H) of this section, a juvenile court, agency, or person given notice of the petition pursuant to division (A)(1) of section 3107.11 of the Revised Code that fails to file an objection to the petition within fourteen days * * *.

{¶ 27} It is clear that P.C. failed to file an objection to the petition within the requisite 14 days, but he did file on July 26, 2013. However, the hearing on the matter did not occur for several more months in October 2013. W.J.H. did not raise this matter until after the magistrate had already issued a decision on his objections to the magistrate's decision.

{¶ 28} A party who fails to raise an argument in the court below waives his or her right to raise it on appeal. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). It is well-settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. Ordinarily, errors which arise

during the course of a trial which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43 (1975). Thus, a party cannot raise new issues or legal theories for the first time on appeal. *Hudson v. P.I.E. Mut. Ins. Co.*, 10th Dist. No. 10AP-480, 2011-Ohio-908, ¶ 12. It is clear that W.J.H did not raise this issue before the magistrate and only did so after the magistrate had issued its decision. W.J.H. has waived his right to raise this issue.

{¶ 29} The third assignment of error is overruled.

{¶ 30} Having overruled the assignments of error, the decision of the Franklin County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

SADLER and LUPER SCHUSTER, JJ., concur.