[Cite as *In re M.E.M.* , 2010-Ohio-4430.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ADOPTION OF M.E.M.	:	**O P I N I O N**
	:	**CASE NO. 2010-L-020**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 08 AD 0027.

Judgment: Reversed and remanded.

Marc L. Stolarsky, Marc L. Stolarsky Law, L.L.C., P.O. Box 24221, Cleveland, OH 44124 (For Appellant Christian D. Hullett).

John W. Shryock, John Shryock Co., L.P.A., 30601 Euclid Avenue, Wickliffe, OH 44092 (For Appellee Earnest Bernard McLeod).

MARY JANE TRAPP, P.J.

{¶1} Mr. Christian Hullett appeals from the judgment of the Lake County Court of Common Pleas, Probate Division, which found his consent to the adoption of his daughter, "M," was not necessary pursuant to R.C. 3107.07(A). Despite the magistrate's decision to the contrary, the trial court found that Mr. Hullett's failure to communicate with M during the one-year period at issue was not justifiable.

{¶2} We disagree. Our review of the record reveals there was competent and credible evidence to justify Mr. Hullett's failure to communicate with his daughter as M's mother, Erin McLeod, continually thwarted his attempts to visit the child and provide

support. In fact, M is not even aware, despite Mr. Hullett's efforts, that Mr. Hullett is her natural father.

{¶3} **Substantive and Procedural Facts**

{¶4} The magistrate found the following facts after holding a hearing on August 24, 2009. Ernest McLeod, Mrs. McLeod's husband and M's step-father, filed a petition for adoption of a minor, M, on July 31, 2008. Mr. Hullett, M's natural father, did not consent to the adoption, and had already filed a petition for visitation in the Lake County Court of Common Pleas, Juvenile Division. The court stayed the adoption proceeding pending the outcome of the visitation complaint.

{¶5} Mr. Hullett failed to change his address with the juvenile court and was therefore not served with Mrs. McLeod's motion to dismiss the visitation complaint. Accordingly, the motion was granted and the complaint was dismissed.

{¶6} Mr. McLeod alleged in his petition of adoption that Mr. Hullett's consent was not required because Mr. Hullett had failed to communicate with M for a period of at least one year prior to the filing of the adoption petition, July 31, 2007 – July 31, 2008. Mr. McLeod then filed a motion to amend the petition to include the additional ground that the consent of the putative father was not required because Mr. Hullett had failed to register with the Putative Father Registry within 30 days of M's birth on October 23, 2003.

{¶7} The motion to amend the adoption petition and the consent issue was referred to the magistrate for hearing, and the magistrate issued her decision on October 19, 2009, finding that Mr. Hullett no longer met the definition of a putative father as evidenced by the CSEA Administrative Order Establishment of Paternity pursuant to

R.C. 3111.46, filed July 7, 2004, well before Mr. McLeod filed his adoption petition in 2008. Mr. Hullett testified that he did not register because he was unaware of the registry and the requirement to register.

{¶8} The evidence also showed that during the one-year period at issue Mr. Hullett was at a half-way house from July 31, 2007 until October 18, 2007, and incarcerated from October 18, 2007 until February 7, 2008. Although he did not attempt to contact M after his release from jail, Mr. Hullett did seek the assistance of Legal Aid in order to prepare and file a petition for visitation, and acted pro se in the juvenile court. Mr. Hullett testified that he did not attempt to visit M after his release in February 2008 because he was concerned his presence would cause the police to be called and he would end up in jail, as had occurred in the past. When he attempted to contact Mrs. McLeod in 2003, the police escorted him from the property.

{¶9} Since learning of his child's birth, he has had two visits with M, both when she was five months old. Despite Mr. Hullett's efforts, Mrs. McLeod has refused any additional visitations, as well as support and maintenance for M. CSEA issued a support order, but Mrs. McLeod asked that the order be terminated as she did not want support from M's father.

{¶10} M is unaware of her father's existence.

{¶11} The magistrate found that it was undisputed that Mr. Hullett did not communicate with M during the one-year period immediately preceding Mr. McLeod's filing of the adoption petition; that he did not attempt to visit, send gifts, or cards; and further, that Mrs. McLeod did not interfere with Mr. Hullett's visitation.

{¶12} The magistrate also found, however, that Mr. Hullett's failure to communicate was justifiable as he took the proper legal steps to obtain visitation with his daughter, doing so within the one-year period prior to the filing of the adoption petition. The magistrate found Mr. Hullett's testimony, that he did not want to call Mrs. McLeod or stop at her home to request visitation, to be credible, especially given the couple's tumultuous history, as well as his personal history with the police, time in prison, and supervised parole.

{¶13} The magistrate concluded that Mr. Hullett's failure to communicate was justifiable, and that Mr. McLeod did not meet his burden by clear and convincing evidence. The magistrate recommended that the consent of Mr. Hullett be required for Mr. McLeod's petition for adoption.

{¶14} The trial court, however, upon review of Mr. McLeod's objections, found the magistrate's decision not well-taken in part. The court found that Mr. Hullett's failure to communicate with M during the one-year period was not justifiable because despite his incarceration, he sent no gifts or cards. Thus, the trial court concluded Mr. Hullett's consent to the adoption was not necessary.

{¶15} Mr. Hullett now appeals, raising two assignments of error:

{¶16} "[1.] The trial court erred in finding that petitioner-appellee met in [sic] his burden to prove by clear and convincing evidence that the failure of respondent-appellant to communicate with the child during that portion of the requisite one year period after July 31, 2007, was without justifiable cause.

{¶17} "[2.] The trial court erred in finding petitioner-appellee succeeded in his burden to prove by clear and convincing evidence that respondent-appellant did not

provide for the support and maintenance of the child as required by law or judicial decree during that portion of the requisite one year period, was without justifiable cause [sic].”

{¶18} **Justifiable Cause – Visitation**

{¶19} In his first assignment of error, Mr. Hullett contends the trial court erred in finding his failure to communicate with M was without justifiable cause. Specifically, he argues he was pursuing visitation through the juvenile court and had a justifiable reason for not trying to communicate directly with the M. We agree. Mr. Hullett has been attempting to establish visitation and support for his child since he learned of her birth when she was five months of age. The child is not even aware that Mr. Hullett is her natural parent as Mrs. McLeod has prevented him from forming a relationship with his daughter when he has clearly demonstrated his willingness to do so.

{¶20} “The right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law.” *In re Adoption of Lasky,* 11th Dist. Nos. 2004-P-0087, 2004-P-0088, and 2004-P-0089, 2005-Ohio-1565, ¶17, quoting *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 165. “Since adoption terminates these fundamental rights, any exception to the requirement of parental consent to adoption must be strictly construed so as to protect the rights of natural parents to raise and nurture their children.” Id.

{¶21} R.C. 3107.07(A) provides that the consent of a natural parent is not required for adoption if the court finds, after proper service of notice and a hearing, that “the parent has failed without justifiable cause to communicate with the minor or to

provide for the maintenance and support of the minor as required by law *** for a period of at least one year immediately preceding *** the filing of the adoption petition ***."[1]

{¶22} "The petitioner for adoption has the burden of proving, by clear and convincing evidence, both (1) that the natural parent has failed to support the children for the requisite one-year period, and (2) that his failure was without justifiable cause." *Lasky* at ¶19, quoting *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, paragraph one of the syllabus, following *Masa* at paragraph one of the syllabus; *In re Adoption of Geisman* (Sept. 29, 2000), 11th Dist. No. 99-A-0071, 2000 Ohio App. LEXIS 4572, 5. "The same test and standards of proof also apply to the issue of the natural parent's communications with the children." Id., citing *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus. "Clear and convincing evidence is that measure of proof 'which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" Id., quoting *Cross v. Ledford* (1954), 161 Ohio St.3d 469, paragraph three of the syllabus. "It is more than a preponderance of the evidence, but does not rise to the level of beyond a reasonable doubt." Id.

{¶23} "A petitioner bears the burden of proving, by clear and convincing evidence, that consent is not necessary." *In re Adoption of Sartain* (March 22, 2002), 11th Dist. No. 2001-L-197, 2002 Ohio App. LEXIS 1328, 10, citing *Bovett* at paragraph

---

1. We note that the standard set forth in R.C. 3107.07(A) has changed, effective April 7, 2009. Rather than requiring a showing that "the parent has failed without justifiable cause to communicate with the minor," the new standard now provides that consent is unnecessary if "the parent has failed without justifiable cause to provide more than the de minimis contact with the minor" for at least one year. Since the legislature did not expressly provide for the retroactive application of the new version of R.C. 3107.07(A), we will apply the former "failure to communicate" standard rather than the new "de minimis contact" standard, as the trial court did below. See *In re Adoption of A.J.B.*, 12th Dist. No. CA2008-12-306, 2009-Ohio-2200, fn. 1, citing *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, ¶69, citing *State v. Cook* (1998), 83 Ohio St.3d 404, 410.

one of the syllabus; *Masa* at paragraph one of the syllabus; *In re Wagner* (1997), 117 Ohio App.3d 448, 452. "Once a petitioner establishes by clear and convincing evidence, that the natural parent failed to communicate or failed to provide maintenance and support for a minor child in the year immediately preceding the filing of an adoption petition, the burden shifts to the natural parent to show some justifiable reason for the failure." Id. at 10-11, citing *Bovett* at paragraph two the syllabus; *Wagner* at 452. The burden of proof, however, remains on the petitioner. Id., citing *In re Tucker* (Dec. 21, 2001), 11th Dist. No. 2000-T-0144, 2001 Ohio App. LEXIS 5839, 6; *In re Wagner* (Jan. 30, 1998), 11th Dist. No. 97-A-0010, 1998 Ohio App. LEXIS 293.

{¶24} "A trial court's determination as to whether the consent of a natural parent is required will not be disturbed on appeal absent a showing that the determination was against the manifest weight of the evidence." Id. at 11, citing *Bovett* at paragraph four of the syllabus; *Masa* at paragraph two the syllabus. "As such, as long as the record contains some competent and credible evidence to support the trial court's findings, a reviewing court would affirm the judgment of the trial court." Id. quoting *In re McNutt* (1999), 134 Ohio App. 3d 822, 829. "A trial court is best able to observe the witnesses' demeanor, gestures, voice inflections and use these observations to weigh the credibility of their testimony." Id. at 11-12, citing *State ex rel. Pizza v. Strope* (1990), 54 Ohio St.3d 41, 45-46.

{¶25} Further, upon review of a magistrate's decision, Civ.R. 53(E) requires the trial court to conduct an independent analysis of the issues considered by the magistrate. *Arnold v. Arnold*, 4th Dist. No. 04CA36, 2005-Ohio-5272, ¶31, citing *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835. "Therefore, the trial

court must conduct a de novo review of the decisions considered in the magistrate's report." Id., citing *Inman v. Inman* (1995), 101 Ohio App.3d 115, 118. "Ordinarily, it is presumed that the trial court performed an independent analysis in reviewing the magistrate's decision." Id., citing *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7. "Accordingly, the party asserting error bears the burden of affirmatively demonstrating the trial court's failure to perform its Civ.R. 53(E) duty of independent analysis." Id., citing *Inman* at 119; *Hartt* at 7. As a matter of law, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶26} Both the trial court and Mr. McLeod cite to our decision in *In re Adoption of Doyle*, 11th Dist. Nos. 2003-A-0071 and 2003-A-0072, 2004-Ohio-4197, in support of the proposition that Mr. Hullett's acknowledged failure to communicate was without justifiable cause. The facts there, however, are distinguishable from the present case. As Mr. Hullett correctly copied verbatim, but yet failed to cite, the case of *In re A.J.B.* succinctly distinguishes *Doyle* under similar circumstances.

{¶27} In *Doyle*, two children were taken from their parents at one-year of age and four-days old, respectively. The father regained custody of the children, but the mother was denied visitation because she failed to follow the case plan, which included staying sober and finding long-term employment. She was then incarcerated during the relevant one-year period at issue. The mother in *Doyle* never attempted any communication with the children while she was incarcerated, although she was not prevented from doing so. The children were aware of her existence, and she knew

where they were residing. Thus, we held that "a parent can communicate with a child notwithstanding the inability to physically visit with the child. *** Appellant was not precluded from sending cards or letters to the children or otherwise attempting to communicate outside the realm of physical visitation." Id. at ¶17.

{¶28} The fact that Mr. Hullett has never sent cards or gifts in this instance is not sufficient grounds upon which to rest a conclusion that his failure to communicate was without justifiable cause. M is unaware that Mr. Hullett is his father. Her mother, Mrs. McLeod, continues to refuse to allow Mr. Hullett to support and maintain the child, or to allow visitation. Further, and most importantly, their tumultuous relationship has resulted in the police being called to the scene. Thus, with good cause Mr. Hullett chose instead to use the legal process as a way to gain access to his daughter, and we cannot fault him for that attempt given the circumstances.

{¶29} "Ohio courts have held that justification of a parent's failure to communicate with his or her child is shown when there has been 'significant interference' with a parent's communication with a child or 'significant discouragement' of such communication." *In re KR. E., K.E., & A.E.*, 9th Dist. No. 06CA008891, 2006-Ohio-4815, ¶21, citing *Holcomb* at paragraph three of the syllabus.

{¶30} We agree with the magistrate, who, in concluding Mr. Hullett had justifiable cause for not communicating with M, stated that "Mr. Hullett should not be penalized for taking the proper legal steps to obtain visitation with his daughter. To find otherwise would permit a stepparent to sever a natural parent's rights by filing an adoption petition once a natural parent who has not communicated files a complaint for

visitation. Adoption results in the permanent severance of the parent-child relationship and must be strictly construed in favor of the rights of the natural parent."

{¶31} Thus, we find the trial court erred in finding that Mr. Hullett's failure to communicate was not justifiable as Mr. McLeod failed to carry his burden of proof by clear and convincing evidence that Mr. Hullett was not prevented from visiting or supporting his daughter.

{¶32} As Mr. Hullett's first assignment of error is with merit, we reverse and remand.

{¶33} **Support and Maintenance**

{¶34} In his second assignment of error, Mr. Hullett contends the trial court erred in determining he failed to provide for M's support and maintenance for the relevant one-year period at issue. Mr. McLeod correctly notes that the issue of support and maintenance was not the basis for the trial court's determination. As the trial court's judgment is silent on the issue of support and maintenance because neither party raised it below, we find this error to be without merit.

{¶35} We reverse on Mr. Hullett's first assignment of error. While we agree with the trial court's finding that there was no evidence of contact, we also find, as did the magistrate, that the lack of contact was justifiable in light of the circumstances. The evidence supports the finding that Mr. Hullett had justifiable cause for his failure to communicate and, accordingly, his consent is necessary for Mr. McLeod's petition for

adoption to proceed.

{¶36} The judgment of the Lake County Court of Common Pleas, Probate Division, is reversed and remanded.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

TIMOTHY P. CANNON, J., concurs.