[Cite as *In re Ewart*, 2005-Ohio-116.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

IN THE MATTER OF	:	Case No. 04CA2796
THE ADOPTION OF	:	DECISION AND JUDGMENT ENTRY
SUMMER DAWN EWART	:	**Released 1/10/05**

APPEARANCE:[1]

Michele R. Rout, Chillicothe, Ohio, for Appellants Charles A. and Patricia A. Ewart.

Harsha, J.

{¶1} Charles and Patricia Ewart appeal the trial court's finding that Ralph Ludemann, who is Summer Dawn Ewart's biological father, must consent to this step-parent adoption proceeding, even though he failed to support Summer during the relevant one-year period. The Ewarts contend the court's finding that the lack of support was justified is against the manifest weight of the evidence. Because the record contains some evidence that Mr. Ludemann had no means of supporting Summer and made reasonable efforts to obtain employment, we hold that the trial court's determination is not against the manifest weight of the evidence. Accordingly, we must affirm the judgment.

[1] Although Ralph L. Ludemann was represented by counsel in the trial court, Mr. Ludemann did not retain counsel on appeal or file a brief on his own behalf.

{¶2} In April 2004, Mr. and Mrs. Ewart filed an adoption petition for Summer in the Ross County Probate Court. Mr. Ewart is Summer's step-father and Mrs. Ewart is her biological mother. The petition alleged that the consent of Mr. Ludemann, Summer's biological father, to the adoption was not required because Mr. Ludemann had failed without justifiable cause to communicate with and to provide for the maintenance and support of Summer for at least one year preceding the filing of the petition.

{¶3} Mr. Ludemann objected to Summer's adoption and argued that his consent was necessary. At the hearing, the Ewarts dismissed their claim that Mr. Ludemann had unjustifiably failed to communicate with Summer, but still asserted that he had failed without justifiable cause to provide for Summer's maintenance and support. Mr. Ludemann conceded that he had not provided maintenance or support for Summer between April 2003 and April 2004, the relevant period, but argued that his actions were justified because he was unemployed during that period. The trial court accepted Mr. Ludemann's evidence and concluded that his failure to support Summer was justifiable; therefore, it concluded that Mr. Ludemann's consent to the adoption was necessary.

{¶4} The Ewarts appealed the trial court's decision, assigning the following error: "I. The trial court erred

when it found that the consent of the biological father was necessary as such was against the manifest weight of the evidence."

{¶5} We cannot reject a finding that parental consent is necessary for an adoption unless it is against the manifest weight of the evidence. See In re Adoption of Bovett (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, at paragraph four of the syllabus; In re Adoption of Masa (1986), 23 Ohio St.3d 163, 492 N.E.2d 140, at paragraph two of the syllabus. In other words, if the trial court's finding is supported by some competent, credible evidence, we cannot reverse that decision on appeal. See Shemo v. Mayfield Hts., 88 Ohio St.3d 7, 10, 2000-Ohio-258, 722 N.E.2d 1018, 1022; Vogel v. Wells (1991), 57 Ohio St.3d 91, 96, 566 N.E.2d 154, 159; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 37 N.E.2d 578, syllabus.

{¶6} This standard is highly deferential to the trial court because as the trier of fact, it is in a better position than the appellate court to view the witnesses and to observe their demeanor, gestures and voice inflections, and to use those observations in weighing the credibility of the proffered testimony. See Myers v. Garson, 66 Ohio St.3d 610, 615, 1993-Ohio-9, 614 N.E.2d 742, 745; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273,

1276. Accordingly, we must defer to the trial court on issues of weight and credibility. Moreover, a trial court is free to believe all, part, or none of the testimony of each witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438, 439; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591, 596.

{¶7} Parents have a fundamental liberty interest in the care, custody and management of their children. Troxel v. Granville (2000), 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 56,; Santosky v. Kramer (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-1395, 71 L.Ed.2d 599, 606. The right to raise one's child is an essential and basic civil right. In re Hayes (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, 682-683; In re Murray (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169, 1171. Obviously, an adoption terminates that right. In re Adoption of Greer, 70 Ohio St.3d 293, 298, 1994-Ohio-69, 638 N.E.2d 999, 1003; also see, R.C. 3107.15(A)(1). Therefore, unless a specific statutory exemption applies, children cannot be adopted without the consent of their natural parents. See R.C. 3107.06(A); also see, McGinty v. Jewish Children's Bur. (1989), 46 Ohio St.3d 159, 161, 545 N.E.2d 1272, 1274.

{¶8} R.C. 3107.07(A) provides such an exemption: "A parent of a minor, when it is alleged in the adoption

petition and the court finds after proper service of notice and 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 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." The party that seeks to adopt a child without parental consent must prove, by clear and convincing evidence, both (1) that the natural parent failed to support or to communicate with the child for the requisite one-year time period, and (2) that the failure was without justifiable cause. Bovett, 33 Ohio St.3d 102, at paragraph one of the syllabus; Masa, 23 Ohio St.3d 163, at paragraph one of the syllabus.

{¶9} The parties agree that Mr. Ludemann failed to support Summer during the relevant period, between April 2003 and April 2004. Once it is apparent that a natural parent has failed to support his child, the burden of going forward with the evidence shifts to that parent to show some facially justifiable reason for the failure. Bovett, supra, at 104, 515 N.E.2d at 922. A parent can meet that burden by showing that he is unemployed and has no income. See In the Matter of the Adoption of Caitlin M. Way, Washington App. No. 01CA23, 2002-Ohio-117, citing In re Adoption of Kessler

(1993), 87 Ohio App.3d 317, 323, 622 N.E.2d 354, 358, and In re Adoption of Howell (1991), 77 Ohio App.3d 80, 97, 601 N.E.2d 92, 103.

{¶10} Mr. Ludemann testified that he was employed by Showa Aluminum ("Showa") for approximately eighteen (18) months as a temporary employee. During this period, Mr. Ludemann substantially complied with the court-ordered support payments for Summer. However, in March 2003, Showa decided to convert Mr. Ludemann from a temporary to a full-time employee. Showa required that all full-time employees possess a GED and terminated Mr. Ludemann's employment because he did not have one. Mr. Ludemann testified that he was attending GED classes at the time he was terminated, but had not earned a GED. Following his termination, Mr. Ludemann moved in with his brother and began seeking other employment. Mr. Ludemann testified that he applied for numerous jobs but his efforts were hampered by his lack of education and transportation. Finally, in the summer of 2004, Mr. Ludemann obtained employment at Burger King.

{¶11} The trial court credited Mr. Ludemann's testimony that he diligently sought employment between April 2003 and April 2004. Therefore, we must conclude that Mr. Ludemann met his burden of going forward with the evidence by showing some facially justifiable cause for his failure to support Summer. Once Mr. Ludemann met his burden of going forward,

the Ewarts had to show by clear and convincing evidence that Mr. Ludemann's justification was illusory. Kessler, supra, at 324. The trial court concluded that the Ewarts failed to overcome Mr. Ludemann's evidence of justification.

{¶12} However, the Ewarts contend that the trial court erroneously failed to consider the evidence they presented. In support of their argument, the Ewarts cite the court's finding that "[o]ther than cross-examination of the father and his witness, Petitioners offered no evidence relative to the issue of justification." The Ewarts contend that the court ignored the testimony of the Child Support Enforcement Agency ("CSEA") representative who stated that Mr. Ludemann failed to advise CSEA of his current address and failed to inform CSEA when he obtained new employment in July 2004.

{¶13} Mr. Ludemann denied both of these contentions. He testified that CSEA had his correct address and he does not know why mail sent to him was returned to CSEA. Mr. Ludemann also testified that he informed CSEA of his employment at Burger King. CSEA began deducting child support for another child in July 2004 but failed to deduct the court-ordered support for Summer. Mr. Ludemann contacted CSEA to inform them of this error and, in August 2004, CSEA began deducting the support payments for both children. Mr. Ludemann introduced two recent pay stubs supporting this contention.

{¶14} The trial court apparently placed little weight on the testimony of the CSEA representative. Given its limited relevance to the issue of whether Mr. Ludemann failed without justification to support Summer during the pertinent time period, we find no error in the court's decision. It is apparent from the record that Mr. Ludemann resumed his support payments for Summer shortly after obtaining employment at Burger King. Moreover, there is no evidence that Mr. Ludemann attempted to hide his employment from CSEA to avoid making child support payments.

{¶15} The Ewarts also assert that the trial court erred in finding that Mr. Ludemann made reasonable efforts to obtain employment. Admittedly, Mr. Ludemann's testimony varied concerning the exact number of job applications he submitted. However, the trial court apparently credited Mr. Ludemann's testimony that he made substantial efforts to obtain employment. Mr. Ludemann testified that he submitted job applications to nearly every restaurant, gas station, store, and employment agency in Chillicothe. Mr. Ludemann also named several of the employers he contacted. Although the Ewarts fault Mr. Ludemann for not making further efforts, as the trier of fact, the trial court was free to believe Mr. Ludemann's testimony. The trial court's findings are supported by competent, credible evidence and

we cannot substitute our judgment for that of the trial court.

{¶16} The Ewarts also argue that Mr. Ludemann admitted that he borrowed money from his friend, Carrie McGovern, and others and that he should have used this money to support Summer since he did not pay rent or purchase food or clothing for himself. However, there was no testimony about how much money Mr. Ludemann borrowed and it appears from the record that Mr. Ludemann only borrowed money on rare occasions. Therefore, we cannot conclude that the trial court should have found that Mr. Ludemann had sufficient means to support Summer merely because he borrowed an unknown amount of money at some point during the relevant period.

{¶17} Based on our review of the record, we conclude that the trial court's finding that Mr. Ludemann was justified in failing to support Summer is not against the manifest weight of the evidence. Because the court's decision is supported by competent, credible evidence, we must overrule the appellants' sole assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellee recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court, Probate Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.