

[Cite as *In re A.L.H.*, 2020-Ohio-3527.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: A.L.H.  
      C.L.H.

C.A. Nos.     18CA0084-M  
                  18CA0085-M

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE Nos.    2018 06 AD0034  
                  2018 06 AD0035

DECISION AND JOURNAL ENTRY

Dated: June 30, 2020

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SCHAFFER, Judge.

{¶1} Appellant C.H. (“Stepmother”) appeals the judgment of the Medina County Court of Common Pleas, Probate Division, that dismissed Stepmother’s petition for adoption of the children A.L.H. and C.L.H. after finding that appellee Mother’s consent was required for adoption and Mother did not consent. This Court affirms.

I.

{¶2} Mother and Father are the biological parents of A.L.H. (d.o.b. 5/27/04) and C.L.H. (d.o.b. 11/19/08). Pursuant to the parents’ 2012 divorce decree, Father was designated as the children’s residential parent and legal custodian. Mother was granted supervised visitation during two full weekends each month and was ordered to pay “\$00.00 per month” for child support. Father was designated the health insurance obligor for the children, while Mother had no obligation

to pay cash medical support. Mother was required, however, to pay 50% of deductible and copayment costs for the children's healthcare.

{¶3} Father and Stepmother were married in August 2014, after having their own child the year before. On June 21, 2018, Stepmother filed a petition to adopt A.L.H. and C.L.H., alleging that Mother's consent to adoption was not required pursuant to R.C. 3107.07(A). Specifically, Stepmother alleged that Mother had failed for a period of at least one year immediately prior to the filing of the petition, without justifiable cause, both to provide more than de minimis contact with the children and to provide for the maintenance and support of the children as required by law or judicial decree. Mother filed a brief in opposition to the petition for adoption.

{¶4} After multiple continuances, the probate court held an evidentiary hearing at which Father, Stepmother, and Mother testified. The trial court issued a judgment finding a lack of clear and convincing evidence to support either of Stepmother's statutory allegations that Mother's consent to adoption was not required. Although Stepmother appealed from that judgment, this Court issued a journal entry dismissing her appeal for lack of a final, appealable order because the adoption petition remained pending and Stepmother would not be precluded the opportunity for effective relief after the disposal of the petition. *In re A.L.H.*, 9th Dist. Medina Nos. 19CA0056-M and 19CA0057-M (Sept. 9, 2019).

{¶5} Mother then filed a motion to dismiss Stepmother's petition, which the probate court granted. Stepmother timely appealed and raises two assignments of error for consideration. As both assignments of error challenge the probate court's application of R.C. 3107.07(A), we first set out certain general principles of law which are relevant to both arguments.

{¶6} A natural parent of a child who is the subject of an adoption petition must generally consent in writing to the adoption. R.C. 3107.06. R.C. 3107.07(A), however, provides two exceptions to the consent requirement as follows:

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.

{¶7} As the exceptions are disjunctive, clear and convincing evidence of either will suffice to remove the requirement for the natural parent's consent. Clear and convincing evidence is evidence that will "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368 (1985).

{¶8} Because adoption terminates a parent's fundamental rights to further custody and care of a child, the Ohio Supreme Court has held that "\* \* \* 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 Adoption of Masa*, 23 Ohio St.3d 163, 164 (1986). *See also In re Adoption of P.L.H.*, 151 Ohio St.3d 554, 2017-Ohio-5824, ¶ 23. The burden of proof remains at all times with the petitioner to show by clear and convincing evidence the lack of either the requisite contact or support, as well as the lack of justifiable cause. *In re Adoption of L.R.B.*, 9th Dist. Summit No. 28678, 2018-Ohio-1489, ¶ 35. Even so, in the face of evidence of a lack of the requisite contact or support, the respondent-parent may not simply remain mute, but must rather demonstrate some facially justifiable cause for the parent's failure. *Id.* at ¶ 35-36. Nevertheless, while the respondent-parent may acquire a burden of going forward, the ultimate

burden of proof remains with the petitioner. *Id.* at ¶ 36. *See also In re Adoption of Bovett*, 33 Ohio St.3d 102, 104 (1987).

{¶9} The probate court’s inquiry in these cases is two-fold. First, the trial court must determine whether the petitioner has shown by clear and convincing evidence that the respondent-parent has failed to provide contact with or support for the child pursuant to the requirements of R.C. 3107.07(A). *In re Adoption of A.V.H.*, 9th Dist. Summit No. 29103, 2019-Ohio-369, ¶ 13, quoting *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, ¶ 23. If so, the probate court must proceed to the second step “to determine whether the parent had justifiable cause for his failure” to provide contact or support. *Id.*

{¶10} R.C. Chapter 3107 does not define the term “justifiable cause.” Courts must construe the term “to involve the parent’s ability to financially support or have contact with the child.” *In re Adoption of B.A.A.*, 9th Dist. Wayne No. 16AP0073, 2017-Ohio-8137, ¶ 15. In addition, “the term ‘justifiable cause’ must encompass a parent’s ability to fulfill parental obligations to [her] child and we ‘ought not ask the impossible as a condition of preserving fundamental parental rights[.]’” *Id.* at ¶ 17, quoting *In re Adoption of Masa* at 167.

#### ASSIGNMENT OF ERROR I

The Trial Court erred in determining that the consent of the Mother was required as it was established that the Mother has failed without justifiable cause to provide more than de minimis contact with the minor [children] in the year prior to the filing of the Petition because the evidence when viewed in the context of all relevant factors met the burden of establishing said standard by clear and convincing evidence.

{¶11} Stepmother argues that Mother’s consent to the adoption of A.L.H. and C.L.H. was not required because Mother failed without justifiable cause within the relevant time period to provide more than de minimis contact with the children. This Court disagrees.

{¶12} “[A] noncustodial parent has justifiable cause for failing to communicate when the custodial parent significantly interferes with or significantly discourages communication.” *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, ¶ 39, citing *In re Adoption of Holcomb*, 18 Ohio St.3d at 367-368. *See also In re Adoption of F.A.*, 9th Dist. Summit No. 27275, 2015-Ohio-2249, ¶ 15. Moreover, the strict construction of R.C. 3107.07(A) requires consideration of both the noncustodial parent’s “efforts to reestablish parental rights[,]” including legal efforts, as well as the custodial parent’s “efforts to impede [the noncustodial parent’s] contact with the children.” *In re Adoption of M.G.B.-E.* at ¶ 40.

{¶13} Pursuant to Mother’s and Father’s divorce decree, Mother was entitled to supervised weekend visitation twice a month, as well as split holiday visits. In the alternative, visitation was to occur as Mother and Father agreed. Because Mother moved, first to Michigan, and then to Kentucky, visits were flexible and less frequent than twice a month. There is no dispute that the last in-person visit between Mother and the children took place during the week of Thanksgiving 2015. The last time Mother had telephone contact with either child was in May 2016, when A.L.H. called Mother. Neither Father nor Stepmother remembered any birthday or Christmas cards or gifts sent by Mother to the children in 2017 or 2018, although both admitted that they did not retrieve the family’s mail from the mailbox. Rather, the children brought in the mail. Based on this evidence, Stepmother met her initial burden of demonstrating that Mother had failed to have more than de minimis contact with the children during the one-year look back period immediately preceding the filing of Stepmother’s petition for adoption.

{¶14} The burden of going forward then shifted to Mother to demonstrate some facially justifiable cause for her failure to have contact with the children. Based on a review of the evidence, Mother demonstrated justifiable cause based on the significant interference and

discouragement by both Father and Stepmother of Mother's communication and contact with the children.

{¶15} After A.L.H. called Mother in May 2016, Father told Mother that all further communication between Mother and the children must be through him. Father testified that he and Mother communicated almost exclusively through text messages and the Facebook Messenger application ("Messenger"). At the end of 2013, Father got a new phone with a new number from his employer. He admitted that he did not tell Mother that he was using a new number. Moreover, while Father gave his old phone with the old number to A.L.H., he never told Mother that either.

{¶16} Mother testified regarding her multiple attempts to contact Father about visitation and communications with the children during the one-year look back period relevant to this case, i.e., June 21, 2017 to June 21, 2018. For example, Mother reached out to Father (1) in August 2017, to see what school supplies she could provide, (2) in November 2017, for C.L.H.'s birthday and to request visitation during Thanksgiving, (3) in December 2017, to inquire about the children's interests for Christmas gifts, as well as to schedule a holiday visit, and (4) in February 2018, to wish Father a happy birthday and ask if she could call the children. Father did not respond to any of those attempts by Mother to seek information and contact with the children.

{¶17} In addition, in March 2018, Mother tried to send Father a message via Messenger, but she received a notification that she was blocked and "cannot reply to this conversation." Father admitted that he blocked Mother from his Messenger account at "sometime." Immediately thereafter, Mother texted Father at two phone numbers she believed were his. Mother's cell phone records admitted into evidence indicate that Mother texted both numbers. Father admitted that both numbers were linked to phones he owned. Nevertheless, Mother received no response from

one number and a response from the other which read, “This isn’t [Father].” Father claims not to have written that text, but thought it was possible that A.L.H. sent it.

{¶18} Furthermore, earlier in March 2018, Mother sent a message and ultrasound picture to Father to share the news of her recent pregnancy with the children. Father did not respond to that message either. Stepmother admitted that Father and she did not immediately show the ultrasound image to the children and only did so later because they planned to call the children as witnesses during the adoption proceedings.

{¶19} Significantly, Father admitted that he remembered that Mother contacted him on June 18, 2018, to request visitation with the children. The text of the message was as follows:

I would like to arrange a visit with the girls. I will come up there and stay during the visit. I know for some reason you think it’s not normal for kids to see me and I have waited 2 years and have believed everything you told me, but I believe I am still a good mother and even though there were a few minor hiccups that happened there was nothing wrong that was major that happened during any of the visits. I am sure that they have had little things go wrong in their everyday lives even with you. It is a normal part of life that everyone has to deal with. You act like a visit with me is so dramatic and it’s just not the case. I don’t do drugs and try to always do the best I can. I even quit smoking for the girls when they asked me to stop and it’s been 2 years. I am their mother and I think I should be able to communicate with both of the girls. I am begging you to let me see my children. If after three visit[s] they say they don’t want anything to do with me then I will back off. I don’t want to disrupt their lives. I just want to be a part of it. Me and you have our differences but believe it or not, I hold no grudges towards you. I believe your [sic.] a good father and provider. I miss my girls. I believe I did the right thing at the time of the divorce because of the bad situation I put myself in but I have tried for 6 years to move past that mistake in my life...and even though I’m not a perfect person I believe I try to do good in life and that makes me vulnerable to the real meanies of the world. I just want to see my girls and move past this whole no communication thing. Please consider this as I am their mother just as you are their father. Thank you.

{¶20} Father further admitted that he ignored this message because he erroneously believed that Stepmother had already filed her petition for adoption. Father ignored three more messages from Mother, including a second ultrasound picture, sent between June 28, 2018 and

July 3, 2018. Although Mother sent those messages after Stepmother had filed her petition, Mother was not served and did not receive notice of the petition until July 20, 2018.

{¶21} On July 12, 2018, also before Mother had received notice of Stepmother's petition, Mother filed a motion in the domestic relations court to enforce her parenting time and require Father to comply with the visitation provisions in the parents' divorce decree. Mother attached her affidavit, executed on July 5, 2018, to the motion, averring that Father would not allow her to visit with or have telephone contact with the children, based on one excuse or another. In *In re M.G.B.-E.* at ¶ 43, the Ohio Supreme Court found the noncustodial parent's efforts to enforce his parental rights to be relevant. Although the efforts of the parent in that case occurred before the filing of the adoption petition, this Court accords relevance to Mother's efforts in this case, given that she had not yet received notice of the adoption petition when she executed her affidavit and filed her motion to enforce her parental rights.

{¶22} Father admitted that he initiated contact with Mother in January 2018, but only to confront her for claiming one of the children as a tax exemption. He contacted her again in April 2018, to confront her about securing a payday loan in his name. In Stepmother's brief to this Court, she admitted that Father and she decided to petition for adoption and terminate Mother's parental rights based on Mother's actions that impacted Father's financial status. After noting the tax exemption and loan, Stepmother wrote: "These events led [Father] and [Stepmother] toward filing a step parent adoption." Later in her brief, Stepmother again indicated that Father and she sought to cut Mother out of the children's lives in retaliation for perceived wrongs against them, not for anything Mother had done or failed to do in regard to the children. Specifically, Stepmother wrote, "It was not until Mother's erratic behavior and criminal activity now against [Father] that caused him to support the Petition of his wife [Stepmother]. Enough was enough."

{¶23} Based on a review of the record, the clear and convincing evidence establishes that Mother had made multiple attempts during the year preceding the filing of Stepmother's petition to have contact with the children. Her messages were met with silence by Father, as he systematically deprived Mother of any ability to see or talk with the children. After unilaterally deciding that any contact Mother had with the children must go through him, Father ignored Mother's attempts to set up any opportunities for contact with the girls. It was only when Mother's actions negatively impacted Father that he contacted her. Then, in retaliation, Father sought to permanently thwart Mother's ability to have any relationship with the children by supporting Stepmother's petition to adopt A.L.H. and C.L.H. Under these circumstances, Father significantly interfered with and discouraged all communication and contact between Mother and the children. Accordingly, Mother had justifiable cause for failing to maintain more than de minimis contact with the children during the year preceding the filing of Stepmother's petition. Stepmother's first assignment of error is overruled.

#### ASSIGNMENT OF ERROR II

The Trial Court erred in determining that the consent of the Mother was required as it was established that the Mother has failed without justifiable cause to provide for the maintenance and support of the minor [children] as required by law or judicial decree in the year prior to the filing of the Petition because the evidence when viewed in the context of all relevant factors met the burden of establishing said standard by clear and convincing evidence.

{¶24} Stepmother argues that Mother's consent to adoption of A.L.H. and C.L.H. was not required because Mother failed without justifiable cause within the relevant time period to provide for the maintenance and support of the children as required by law or judicial decree. This Court disagrees.

{¶25} The Ohio Supreme set out the following test relevant to this issue:

To determine whether a parent has failed to provide child support as required by law or judicial decree involves a three-step analysis. The court must first determine what the law or judicial decree required of the parent during the year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner. Second, the court determines whether during that year the parent complied with his or her obligation under the law or judicial decree. Third, if during that year the parent did not comply with his or her obligation under the law or judicial decree, the court determines whether there was justifiable cause for that failure.

*In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, ¶ 15. “If [a parent] had no obligation to provide child support, the analysis ends there.” *Id.* at ¶ 16. In other words, the matter is resolved by the first step of the test, and there is no need to consider justifiable cause. *Id.*

{¶26} The Ohio Supreme Court expressly determined that a parent who is relieved of paying child support pursuant to a decree has no separate obligation under law to provide for the maintenance and support of a child. *Id.* at ¶ 17 (“The General Assembly created a binary system in which a parent has a general obligation of support toward a child when the parent’s responsibilities are not the subject of a court order and a specific obligation of support when a court has determined the parent’s obligation by decree.”). A parent will be subject to a child support obligation imposed either by decree or by law, never both at the same time. *Id.* at ¶ 27. Moreover, where a decree imposes a zero-dollar (\$0) child support order, a parent has no other duty under law to provide for the maintenance and support of a child. *Id.* at ¶ 29.

{¶27} In this case, the parents’ divorce decree established Mother’s child support obligation, ordering that Mother “shall pay child support for the minor children in the sum of \$00.00 per month \* \* \*.” Accordingly, Mother did not fail to meet her obligation to provide for the maintenance and support of the children as that obligation was imposed by decree. The inquiry ends here as Stepmother failed to prove by clear and convincing evidence that Mother’s consent to adoption was not required for failing to pay support.

{¶28} Stepmother, however, argues that Mother somehow had an obligation to pay child support because Mother was required to notify Father when she obtained employment. While the decree contained a provision requiring Mother to so notify Father, that provision was included in regard to claiming the children for purposes of federal income tax exemptions. Child support was addressed two pages later in the decree and contained no requirement for Mother to notify Father regarding her employment status. Moreover, had Father believed that Mother was employed and able to pay child support, he could have filed a motion in the domestic relations court to modify the terms of child support. He did not. Accordingly, at all times during the year preceding the filing of Stepmother's petition, Mother maintained an obligation pursuant to decree to pay \$00.00 for the maintenance and support of the children. In addition, despite Mother's obligation to pay half of the medical deductibles and copayments for the children's care, Stepmother and Father failed to present any evidence that they ever notified Mother regarding any of those costs. Under these circumstances, Stepmother's second assignment of error is overruled.

### III.

{¶29} Stepmother's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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JULIE A. SCHAFER  
FOR THE COURT

CALLAHAN, P. J.  
CARR, J.  
CONCUR.

APPEARANCES:

RICHARD MARCO, Attorney at Law, for Appellant.

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