

further order of the court, we agree with Henderson that she could not be said to have “failed without justifiable cause to [have provided] 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 the filing of the adoption petition,” as required by R.C. 3107.07(A) for dispensing with the requirement of parental consent to the adoption. Accordingly, the order of the trial court that Henderson’s consent is not required for the adoption is **Reversed** and **Vacated**.

I

In 1995, due to personal and financial difficulties, Henderson entered into an agreement giving legal custody of her minor child to the child’s paternal grandparents, Gail and Crawford Pope. The case was assigned to the Montgomery County Common Pleas Court, Juvenile Division. The parties entered into the agreement with the understanding that Henderson would regain custody when she was capable of caring for the child. In 1995, the juvenile court entered an order granting legal custody to the Popes. The order also granted visitation to Henderson. Finally, the order stated that, “there shall be no child support order at this time.”

In 1997, the child was returned to Henderson. However, within several days, the child was returned to the Popes. In February, 2000, Henderson filed a motion to regain custody, but the motion was denied by the juvenile court.

In June, 2000, the Popes brought an action seeking to adopt the child, by filing an application for placement for adoption with the Montgomery County Common Pleas Court, Probate Division. The application was based upon the Popes’ claim that Henderson had failed to communicate with, or support, the child for a period of one year preceding the filing of the application. Henderson filed an objection thereto. Following a hearing, the probate court found that Henderson had

communicated with the child, but that she had failed, without justifiable cause, to provide support for the child. Therefore, the court denied Henderson's objection and granted the Popes' application. From this order Henderson appeals.

II

Although Henderson sets forth five assignments of error, she only advances argument with regard to two. Since we find one of these issues dispositive, rendering the remaining issues moot, we limit our discussion to the First Assignment of Error, which is as follows:

THE TRIAL COURT ERRED IN FINDING CLEAR AND CONVINCING EVIDENCE THAT SUPPORTS "WITHOUT JUSTIFIABLE CAUSE" IN GRANTING AN ADOPTION.

We construe Henderson's Assignment of Error as stating that the trial court erred in finding that she had failed to support her child for a period of one year immediately preceding the filing of the Pope's petition for adoption, within the meaning of R.C. 3107.07(A), which provides that a failure to support dispenses with the requirement of parental consent to the child's adoption.

The right of a natural parent to the care and custody of her children is one of the most fundamental in law. This fundamental liberty interest of natural parents in the care, custody and management of their children is not easily extinguished. ***Santosky v. Kramer*** (1982), 455 U.S. 745, 753-754. Adoption terminates those fundamental rights. R.C. 3107.15(A)(1). Accordingly, adoptions are generally not permissible absent the written consent of both parents. R.C. 3107.06.

The exception to this rule applicable to the case at bar is set forth in R.C. 3107.07, which states:

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 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.

Ohio courts have held that " * * * [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." *In re Schoeppner* (1976), 46 Ohio St.2d 21, 24.

Henderson contends that she was not required to support the child, and thus, the failure to do so cannot be used against her. She cites an order issued by the juvenile court specifically directing that "there shall be no child support order at this time." This order is in the record of this appeal. There is no indication in the record before us that the order was ever rescinded or amended. Therefore, Henderson is correct in her assertion that she was not required to pay support to the Popes pursuant to an order of the juvenile court.

The Popes, however, contend that Henderson was required to support her child pursuant to the general support statute found in R.C. 3103.03, which states that a biological parent of a minor child must support that child. They further contend that even though Henderson had given them legal custody of the child, she still had the residual parental duty to support the child pursuant to R.C. 2151.011(B). In support, they cite *In re Adoption of Kuhlmann* (1994), 99 Ohio App.3d 44.

The facts in *Kuhlmann* are similar. There, the natural mother of a minor child entered into an agreement giving a friend temporary custody of the child while she "got her life together." *Id.*, at 46. Based upon the agreement, the juvenile court entered an order granting temporary custody to the friend, but the order did not make reference to child support. *Id.* at 47. Subsequently, the friend filed a petition

in probate court seeking to adopt the child, based upon the mother's failure to support the child. The mother objected. *Id.* The probate court dismissed the petition finding that the mother's failure to support the child was justified, and that the mother's consent was thus required for the adoption. *Id.*, at 46. On appeal, the First District Court of Appeals reversed, holding that in the absence of a court order regarding support, the mother still had the residual duty to support the child pursuant to R.C. 3103.03 and 2151.011(B).

We find *Kuhlmann* distinguishable. In that case, the juvenile court order did not adjudicate the issue of child support. It neither ordered the payment of child support, nor relieved the mother of that obligation. In the case before us, the juvenile court entered an order specifically relieving Henderson of her duty to support the child. Thus, unlike the order in *Kuhlmann*, the order of the juvenile court in this case addressed the issue of child support, and determined that Henderson had no obligation to pay child support, at least until further order of the court. This superseded Henderson's statutory duty of support. If, as the Popes argued at the oral argument of this appeal, it was error for the juvenile court to have relieved Henderson, pending further order of that court, of her child support obligation, there was no appeal from that order.

Under a strict construction of the statute, Henderson was not required by law or judicial decree to provide support for the child. Accord, *In re Adoption of Thiel* (Feb. 23, 1999), Hardin App. No. 6-98-12, unreported; *In the Matter of Adoption of Jarvis* (Dec. 11, 1996), Summit App. No. 17761, unreported. Any reasonable person construing the effect of the order of the juvenile court would conclude that it absolved Henderson of both her general statutory duty of support as well as any judicially-decreed duty. Therefore, the probate court also erred in finding that Henderson's failure to pay was not justified.

If the Popes are concerned with the issue of support, the proper procedure

would be an application for an order of support in the juvenile court. If a support order is entered, and Henderson fails to comply, then a subsequent application for placement for adoption might be appropriate.

Henderson’s First Assignment of Error is sustained. Her remaining assignments of error are overruled as moot.

III

Henderson’s First Assignment of Error having been sustained, the order of the probate court determining that Henderson’s consent to the adoption is not required is **Reversed** and **Vacated**.

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YOUNG, J., concurs.

GRADY, J., concurring and dissenting:

I agree that the probate court abused its discretion when it held that consent of the child’s mother, Salesha Henderson, was not required to permit the child’s adoption, per R.C. 3107.07(A). However, I would not go as far as my colleagues have gone in holding that the prior decree of the juvenile court relieved Ms. Henderson of her duty to support her child.

R.C. 3107.07(A) speaks of two duties of support. One is a particular duty imposed by judicial decree. The other is the broad, general duty imposed by statute. R.C. 3103.03. A judicial decree operates to enforce the statutory duty, reducing it to specific terms for performance. However, a judicial decree cannot relieve an obligor of the statutory duty of support. At most, a judicial decree can only relieve the obligor of any liability or loss resulting from a failure to perform the duty.

The “justifiable cause” exception in R.C. 3107.07(A) operates to relieve a

parent from the exemptions for which that section provides to the parental consent requirement for adoptions in R.C. 3107.06, which is otherwise absolute. I agree that the trial court abused its discretion when it found that Ms. Henderson's failure to provide for her child's support was without justifiable cause, in view of the juvenile court's order as well as evidence that the paternal grandparents to whom custody had been granted spurned Ms. Henderson's offers of support. I would reverse and remand on that basis.

The source of this particular dispute is the juvenile court's order concerning child support. The parties no doubt agreed to it, each for their particular purposes. However, the order amounts to an abuse of discretion. R.C. 2151.23(F)(1); R.C. 3109.04. Further, Ms. Henderson should realize that the order, to the extent that it has caused her to avoid her support obligation, undermines her position in an adoption proceeding brought by the grandparents.

Regardless of the friction in her relationship with the grandparents, Ms. Henderson should seek a modification of the juvenile court order to provide a support requirement consistent with the income she now enjoys. Her support payments would be made to the Montgomery County Child Support Enforcement Agency, not to the grandparents directly. Absent some modification of the order and support payments, which can probably be arranged through the Agency, Ms. Henderson may find herself defending against another adoption petition in the future.

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