

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In the Matter of the Adoption of: B.G., C.G. Court of Appeals Nos. E-10-024
E-10-025

Trial Court Nos. 2009 4 008
2009 4 009

DECISION AND JUDGMENT

Decided: October 12, 2010

* * * * *

William H. Smith, Jr., for appellant.

Linda Fritz-Gasteier, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, father, appeals from judgments entered by the Erie County Court of Common Pleas, Probate Division, finding that father's consent to the adoption of his two minor children ("B.G." and "C.G.") by appellee, maternal great grandmother, was not necessary. For the reasons that follow, the judgments of the trial court are reversed.

{¶ 2} The minor children in this case were born in 2007 to mother and father, who were never married. Within a week of the children's birth, mother left them with maternal great grandmother and maternal great grandmother's husband, in whose care the children have continuously remained.

{¶ 3} Maternal great grandmother and her husband were awarded legal custody of the children on April 15, 2008. They filed petitions to adopt the children on June 4, 2009. Mother consented to the adoption. Father did not.

{¶ 4} On May 12, 2010, an evidentiary hearing was held on the issue of whether father's consent to the adoptions was required under R.C. 3107.07.

{¶ 5} At the hearing, Erie County Child Support Investigator Cindy Hahn testified that father was ordered to pay \$30.60 per month in child support for each child. According to Hahn, CSEA records showed that father had made no payments on either of the child support orders between April 15, 2008 and the date of the hearing.

{¶ 6} Maternal great grandmother likewise testified that she received no child support from father, either in the form of cash or in-kind gifts since the children's births. She further testified that father had only visited with the children twice prior to the filing of the petition for adoption, and that these visits took place in late 2007 and early 2008, in maternal great grandmother's home. The visits coincided with the dates on which father was in town for court hearings in the custody matter, and undisputedly took place more than one year before the filing of the petitions for adoption.

{¶ 7} Father testified that he was struck by an automobile at five years of age, which resulted in brain damage that continues to affect him and, "to some degree," his ability to work. He further testified that although he was not currently employed, he was receiving Supplemental Security Income ("SSI"), and that it was from this income that he was making child support payments.

{¶ 8} Father stated that he had failed to pay child support when it was first ordered because he had "always" been told that anyone drawing SSI did not have to pay. When questioned by his own attorney about the attempts he had made over the years to contact his children and bond with them, father stated, "Well, I've talked to the mother * * * a whole lot about my children, and asked her questions, even though she is told not to give me any answers." Father stated that it was primarily maternal great grandmother who instructed mother not to answer any questions.

{¶ 9} After the hearing, the trial court determined that father's consent to the adoption was not required, pursuant to R.C. 3107.07, because: (1) father failed without justifiable cause to communicate with his children for a period of at least one year immediately preceding the filing of the adoption petitions or the placement of the minors in the home of the petitioner; and (2) father failed without justifiable cause to provide for the maintenance and support of the children as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petitions or the placement of the minors in the home of the petitioner.

{¶ 10} Father timely filed a notice of appeal, raising the following assignments of error:

{¶ 11} I. "THE TRIAL COURT UTILIZED AN INCORRECT BURDEN OF PROOF IN REACHING ITS DECISION."

{¶ 12} II. "THE TRIAL COURT'S JUDGMENT THAT APPELLANT FAILED WITHOUT JUSTIFIABLE CAUSE TO COMMUNICATE WITH BG AND CG FOR A PERIOD OF ONE YEAR IMMEDIATELY PRECEDING THE FILING OF THE ADOPTION PETITIONS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 13} III. "THE TRIAL COURT'S JUDGMENT THAT APPELLANT FAILED WITHOUT JUSTIFIABLE CAUSE TO PROVIDE FOR THE MAINTENANCE AND SUPPORT OF BG AND CG FOR A PERIOD OF ONE YEAR IMMEDIATELY PRECEDING THE FILING OF THE ADOPTION PETITIONS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 14} We begin with father's first assignment of error, challenging the burden of proof that was used by the trial court. R.C. 3107.07(A) relevantly provides that a parent's consent to adoption is not required when that 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."

{¶ 15} The party who is petitioning for adoption must prove, by clear and convincing evidence, that the parent failed to support or communicate with the child during the applicable one-year period and that there was no justifiable cause for the failure. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus; *In the Matter of the Adoption of K.L.K.-F, aka K.L.L.*, 2d Dist No. 08-CA-46, 2009-Ohio-2543, ¶ 5. After the petitioner has made this showing, the burden shifts to the parent to show a facially justifiable cause for the failure. *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, paragraph two of the syllabus; *In the Matter of the Adoption of K.L.K.-F, aka K.L.L.*, supra. "The burden of proof, however, remains with the petitioner," who must establish the lack of justifiable cause by clear and convincing evidence. *Bovett*, supra, at paragraph two of the syllabus.

{¶ 16} Whether justifiable cause has been proven by clear and convincing evidence is for the probate court's determination and will not be disturbed on appeal unless that determination is against the manifest weight of the evidence. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 166, citing *In re Adoption of McDermitt* (1980), 63 Ohio St.2d 301, 306; *K.L.K.-F*, supra.

{¶ 17} Applying the foregoing law to the facts of the instant case, we find that the petitioners, maternal great grandmother and her husband, were obligated to prove, by clear and convincing evidence: (1) that father failed to support or communicate with the children during the applicable one-year period; and (2) that such failure was without justifiable cause. *Holcomb*, supra, at paragraph four of the syllabus. Once petitioners

established that father had failed to support or communicate with the children for one year, the burden of going forward with the evidence shifted to father to show some "facially justifiable" cause. *Bovett*, supra, paragraph two of the syllabus. The burden of demonstrating that the failure to support or communicate was without justifiable cause remained, however, with petitioners. *Id.* Any alteration in this allocation of the burden of proof may offend due process. *Masa*, supra, at fn. 2.

{¶ 18} In the current case, the trial judge indicated that the burden of proof he used in reaching his decision was as follows:

{¶ 19} "And just so we're clear on the method of proceeding, the Petitioners will bear the burden of proof showing that clear and convincing evidence and then once, if cause has been demonstrated * * * if the Petitioners can demonstrate the failure to communicate and the failure to maintain and support, or either one, one ground alone is sufficient. If the Petitioners meet that burden by clear and convincing evidence, then the burden shifts to show justifiable cause to the natural father."

{¶ 20} It is thus apparent from the record that the trial judge applied the incorrect burden of proof in this case. That is, the trial court erroneously required father to prove that his failure to support and communicate with the children was justified, when the burden of proving that the failure to support and communicate was without justifiable cause properly belonged to the petitioners.

{¶ 21} Because the trial court used an incorrect burden of proof in reaching its decision, its conclusion is erroneous as a matter of law, and the judgment may not stand.

In re A.M.W., 170 Ohio App.3d 389, 2007-Ohio-682, ¶ 13. Consideration of the evidence under the proper burden of proof must be undertaken in the first instance by the trial court. *Id.* Accordingly, we remand this matter to the trial court for consideration under the proper burden of proof.

{¶ 22} For the foregoing reasons, appellant's first assignment of error is found well-taken. As a result of our determination of the first assignment of error, the remaining two assignments of error are rendered moot.

{¶ 23} The judgment from which this appeal is taken is reversed, and the cause is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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