

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE ADOPTION OF S.L.P.	:	
	:	No. 108602
	:	
	:	
[Appeal by R.G. and N.G.]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 13, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2018ADP09171

Appearances:

John J. Schneider, *for appellants.*

Thompson Hine, L.L.P., Frank R. DeSantis, and Laura L.
Watson Schultz, *for appellee.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Petitioners-appellants R.G. and N.G. appeal the decision of the Cuyahoga County Court of Common Pleas, Probate Division, that dismissed their petition for adoption of the minor child S.L.P. for lack of consent of the biological mother. Upon review, we affirm the decision of the probate court.

Background

{¶ 2} S.L.P. (d.o.b. 10/22/2007) is the biological child of mother J.K. (“mother”). The child’s biological father C.P. (“father”) is deceased. The petitioners are father’s aunt, N.G., and uncle, R.G. N.G. was appointed guardian of the minor child on September 27, 2013, with the consent of the child’s biological parents, who were stated to be “undergoing financial difficulties” and “wish[ed] to designate a stable custodian” for their minor child. The record reflects that following the appointment of the guardian for the minor child, the biological parents continued to have contact and visitation with the child, who lived nearby.

{¶ 3} The biological parents ended their relationship in June 2016, and father died in July 2017. Mother made attempts to continue her relationship with the child; however, she believed her efforts were being hindered by the guardian. After inquiring about her visitation rights with the probate court, mother filed a motion to terminate the guardianship on March 1, 2018. One month later, on April 2, 2018, R.G. and N.G. filed their petition for adoption.

{¶ 4} Mother, while acting pro se, filed an objection to the petition for adoption on May 16, 2018, and moved for the appointment of counsel. The probate court denied mother’s request for appointed counsel, and mother appealed that decision. The appeal was later dismissed after mother obtained counsel. Mother renewed her objection to the petition for adoption after obtaining counsel.¹

¹ The motion to terminate the guardianship was filed in *In the Matter of the Guardianship of S.L.P.*, Cuyahoga P.C. No. 2013GRD191899 (Aug. 28, 2013). Mother

{¶ 5} On February 19, 2019, the petitioners moved to strike or dismiss mother's objection. The probate court denied the motion upon finding that the method of service did not make clear the exact day by which objections should have been filed, the objections had been filed "well in advance" of the adoption hearing, it was within the court's discretion to deem the objections to be timely, and that the motion to strike or dismiss the objection had not been timely made.

{¶ 6} The matter proceeded to a hearing on April 11, 2019, and the court issued a detailed decision on April 22, 2019. Upon a thorough review of the testimony and evidence submitted, the court determined that the petitioners "failed to establish by clear and convincing evidence that [mother] failed, without justifiable cause, to have more than de minimis contact with [the child]." The court found in part as follows:

The evidence establishes that [mother] attempted to maintain contact with her [child] through numerous phone calls, gifts and cards. The evidence further shows that when [mother] was unable to have contact with her child[,] she contacted the Court to see if she had legal recourse and then immediately followed through on the information given to her by the Court.

{¶ 7} The probate court also determined that "Petitioner[s] [have] not established by clear and convincing evidence that [mother] failed without justifiable cause to provide maintenance and support for [the child]." The court found that mother, whose 2017 tax return reflected her low income, "was not under a court order to pay support" for the child and that the petitioners had failed to show that

represents that the motion to terminate guardianship was withdrawn on November 15, 2018, but she has continued to seek visitation with the child.

mother “could have, or should have, provided more support than the items of clothing and small gifts given to the child.” The court further stated the following:

The Court finds that at the time the guardianship was established the stated reason supporting the appointment of [N.G.] was that she could provide the financial stability that the biological parents could not. The Court further finds that [mother] continued to have minimal income during the relevant time period and finds that she was not under any order to pay support nor was she requested to pay support by [N.G.]. The court finds that [mother] did provide some necessities for the child in the form of gifts including clothing, hats, scarves, umbrella and fast food gift certificates. The Court finds that [mother] was consistent in her gift giving during the relevant time period and further finds that the gifts at least in part satisfy her common law duty of support.

{¶ 8} Upon concluding that the consent of mother to the adoption is required pursuant to R.C. 3107.06(A) and 3107.07(A), the probate court dismissed the petition for adoption. This appeal followed.

Law and Analysis

{¶ 9} The petitioners raise 14 assignments of error for review. We shall address several assignments of error together.

{¶ 10} Under the first five assignments of error, the petitioners claim the probate court erred by proceeding with a hearing to determine whether the adoption required mother’s consent. They challenge the court’s allowance of mother’s objection to the petition and the court’s failure to strike or dismiss mother’s objection, and they maintain that mother waived her right to consent under R.C. 3107.07(K). They further claim the probate court lacked statutory jurisdiction to hold the hearing.

{¶ 11} Probate courts possess original, exclusive jurisdiction over adoption proceedings relating to a minor child. *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, 110 N.E.3d 1236, ¶ 27, citing *In re Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, ¶ 9. Because of the serious import of adoption, which terminates all parental rights of a natural parent, the law accords a natural parent certain protections including the right to adequate notice and an opportunity to be heard before any parental rights may be terminated. *In re Greer*, 70 Ohio St.3d 293, 298, 1994-Ohio-69, 638 N.E.2d 999.

{¶ 12} R.C. 3107.06 provides a parent with a statutory right to bar the adoption of his or her minor child by withholding consent to that adoption. *Id.* Pursuant to R.C. 3107.06, “[u]nless consent is not required under [R.C. 3107.07], a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all” who are identified in the statute, including “[t]he mother of the minor[.]” The requirement of obtaining parental consent may be excused pursuant to R.C. 3107.07, which provides in relevant part as follows:

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, 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.

* * *

(K) Except as provided in divisions (G) and (H) of this section, a juvenile court, agency, or person given notice of the petition pursuant to division (A)(1) of section 3107.11 of the Revised Code that fails to file an objection to the petition within fourteen days after proof is filed pursuant to division (B) of that section that the notice was given; * *

{¶ 13} “R.C. 3107.07 * * * does not exist in a vacuum” and is “part of a complex statutory scheme” involving laws that regulate family relationships. *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28, ¶ 18. The statute must be strictly construed in favor of the retention of parental rights. *Id.* at ¶ 12. Moreover, “[a]ny exception to the requirement of parental consent must be strictly construed so as to protect the right of natural parents to raise and nurture their children.” *In re Greer* at 298, citing *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976); *see also In re Pushcar* at ¶ 11, 13.

{¶ 14} R.C. 3107.06 and 3107.07 do not create a jurisdictional limitation on the probate court’s authority; rather, the statutes set forth substantive criteria for the probate court to apply in adoption proceedings. *State ex rel. Roush v. Montgomery*, 156 Ohio St.3d 351, 2019-Ohio-932, 126 N.E.3d 1118, ¶ 7, 9. Before the probate court may grant a petition for adoption, the court must find that “the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted as support by the evidence[.]” R.C. 3107.14(C). If the requirements for a decree of adoption have not been satisfied, then the court must dismiss the petition. R.C. 3107.14(E).

{¶ 15} In this case, the petition for adoption was filed on April 2, 2018, a month after mother had moved to terminate the guardianship and expressed her interest in retaining her parental rights. The petition for adoption claimed that consent of the biological mother was not necessary because of her alleged failure to provide any support for the minor child during the relevant time period and her alleged failure to have more than de minimis contact with the minor child during the relevant time period.

{¶ 16} Pursuant to R.C. 3107.11, the clerk of courts was to provide all required notices to mother, and R.C. 3107.11(C) instructs that “[a]ll notices required under this section shall be given as specified in the Rules of Civil Procedure.” Pursuant to Civ.R. 73(E)(5), service may be made by regular mail after a certified mailing is returned unclaimed. The record demonstrates that notice of the petition was sent to mother on April 10, 2018, by certified and regular mail contemporaneously. The certified mail was returned to the court on May 10, 2018, and marked as “vacant, unable to forward.” Although the regular mail was sent to the same address and not returned, and mother acknowledged receipt of the notice, technically service could not be completed by regular mail until after the certified mail service was returned. Thus, the trial court determined that the method of service did not make clear the exact day by which objections should have been filed and acted within its discretion in deeming the objection that was filed on May 16, 2018, timely.

{¶ 17} Also, the petitioners did not move to strike or dismiss mother's objection when it was first filed, or when it was renewed, and the parties proceeded through discovery. It was not until two days before the hearing scheduled for February 18, 2019, that the petitioners moved to strike or dismiss mother's objection. Arguably, the petitioners forfeited their claim that mother's consent was excused under R.C. 3107.07(K).

{¶ 18} The petitioners' reliance upon the decision in *In re Adoption of L.C.F.*, 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545, is misplaced. In that case, during the trial court proceedings, the petitioners never moved to strike the biological parents' objection to the adoption, which the record demonstrated was untimely filed. *Id.* at ¶ 27-28. The court noted the basic principle that "the failure to object at the time of trial waives all but plain error." *Id.* at ¶ 28, citing *Sheflyand v. Schepis*, 8th Dist. Cuyahoga Nos. 95665 and 95667, 2011-Ohio-2040, ¶ 17. Because the trial court's decision that consent for the adoption was required was reversed on other grounds, the court found any error in allowing the biological parents to testify was harmless. *Id.* at ¶ 29. *In re Adoption of L.C.F.* did not consider the timeliness of a motion to strike filed during the trial court proceedings, and nothing in that decision may be read to suggest that the petitioners' motion herein was timely.

{¶ 19} Under the circumstances in this case, we do not find the trial court abused its discretion in deeming the motion to strike untimely. Furthermore, any error in this regard would be harmless. As we have already determined, it was within

the trial court's discretion to consider mother's objection timely filed. Also, her nonconsent was documented throughout the proceedings, and we find nothing that would preclude the probate court from exercising its discretion to sua sponte grant leave to file an objection by permitting mother's filing. *See In re A.R.M.R.*, 8th Dist. Cuyahoga No. 106969, 2019-Ohio-253, ¶ 4-5 (a mother, who appeared pro se, was granted leave to file written objections to a petition for adoption, and the trial court proceeded with a consent hearing).

{¶ 20} Upon our review, we cannot conclude that the probate court abused its discretion by denying the petitioners' motion to strike or dismiss mother's objection. Considering that R.C. 3107.07 must be strictly construed in favor of the retention of parental rights, we find that the court acted within its discretion in denying the petitioners' motion and by considering mother's objection.

{¶ 21} Finally, there is nothing in the statutory framework that would preclude the probate court from proceeding with the consent hearing. Contrary to the petitioners' argument, the probate court had jurisdiction to proceed with the consent hearing to determine whether mother's consent was excused. Accordingly, we overrule assignments of error one through five.

{¶ 22} The petitioners raise a number of assignments of error that challenge the probate court's factual findings, weighing of the evidence, and determinations relative to R.C. 3107.07(A). R.C. 3107.07(A) abrogates the requirement that a parent consent when 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.” The petitioners had the burden of proving the applicability of R.C. 3107.07(A) by clear and convincing evidence. *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, 110 N.E.3d 1236, at ¶ 38, citing *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985), paragraph four of the syllabus.

{¶ 23} First, we consider the petitioners’ arguments relating to the probate court’s determination that they “failed to establish by clear and convincing evidence that [mother] failed, without justifiable cause, to have more than de minimis contact with [the child].” The probate court recognized mother’s efforts to maintain contact through phone calls, gifts, and cards. The probate court also considered that mother sought legal recourse in her efforts to maintain contact with the child.

{¶ 24} The petitioners make lengthy challenges to the evidence presented and dispute individual factual findings that were made by the probate court. Although the petitioners may disagree with the probate court’s findings, it was the petitioners’ burden to establish the exception to parental consent applied by clear and convincing evidence.

{¶ 25} Our review of the record reflects that there is testimony and evidence of phone calls, cards, and gifts from mother to the child during the relevant time period. In addition to other evidence presented, the daily logs submitted by the petitioners indicate that mother visited the child on two occasions, called five times, and sent cards and small gifts six times. Nonetheless, the petitioners contend that the contact mother made with the child was “very limited contact,” that mother

failed to maintain regular visitation despite living “down the block,” and that there is no credence to the claim that N.G. was interfering with mother’s ability to maintain contact. The probate court had discretion over the factual determinations involved, and we find no abuse of its discretion. The probate court considered mother’s multiple efforts of maintaining contact, which included her efforts in seeking legal recourse. The probate court was required to consider that mother had filed a motion to terminate the guardianship as part of its consideration. *See In re Adoption of M.G.B.-E.* at ¶ 47. Insofar as the petitioners challenge the introduction of phone records, we find any error in this regard was harmless.

{¶ 26} With regard to justifiable cause, the Supreme Court of Ohio has stated that “[e]ven if a parent has completely failed to communicate with his children during the statutory period, his consent to adoption will still be required if there exists justifiable cause for the failure[.]” “[t]he burden of proving a lack of justifiable cause remains on the petitioner[.]” and “[t]ypically, 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, 110 N.E.3d 1236, at ¶ 39, citing *In re Adoption of Holcomb*, 18 Ohio St.3d at 367-368, 481 N.E.2d 613. Justifiable cause may exist under other circumstances as well.

{¶ 27} Although the petitioners maintain the evidence does not demonstrate that they interfered with mother’s communication, they failed to prove a lack of justifiable cause under the facts and circumstances in this case. Mother testified that

many of her attempts to get in touch with the child were unanswered and that she did not receive calls back. Mother also testified that she was very uncomfortable with the petitioners and their family, and she did not visit with the child as much as she would have liked as a result. She eventually sought legal recourse. We do not find the probate court's determination that the petitioners failed to establish by clear and convincing evidence that mother failed, without justifiable cause, to have more than de minimis contact with the child to be against the weight of the evidence.

{¶ 28} Next, we consider the petitioners' arguments relating to the probate court's determination that "Petitioner[s] [have] not established by clear and convincing evidence that [mother] failed without justifiable cause to provide maintenance and support for [the child]." Here, the probate court considered that mother had minimal income and that she had provided some necessities for the child. The court further found that mother was not under any order to pay support, nor was she requested to pay support.

{¶ 29} Petitioners again challenge the individual factual findings of the probate court at length. The petitioners claim that mother was employed full time for three months during the relevant time period and that she could have paid something while she was employed. The probate court recognized that mother had been employed, that her employment was terminated, that she was unemployed and receiving unemployment compensation while seeking work, and that her 2017 tax return reflected her low income. The petitioners also argue that the child's father had provided support until his death, and that they had asked him to request she

pay for support. However, mother testified that she was never asked to pay support and the probate court found this testimony to be credible. The petitioners also claim that mother was providing support for her “future stepson.” The trial court recognized that mother resided with that child’s father, who was her fiancé.

{¶ 30} A probate court has broad discretion in making factual determinations concerning the failure of support. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 25. Upon our review, we do not find the probate court abused its discretion.

{¶ 31} The petitioners also argue that the record demonstrates mother’s failure to provide support was without justifiable cause. In support of their argument, the petitioners cite *In re Adoption of L.C.F.*, 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545. In that case, the court found no competent, credible evidence to support a finding of justifiable cause for the biological parents’ failure to support their minor children when despite their low income, the record was clear that the biological parents had money to support their minor children, but deliberately chose not to do so. *Id.* at ¶ 19-20. However, the record demonstrated that the biological parents had been asked to support the children and the petitioners had filed motions for support in the probate and juvenile courts. *Id.* at ¶ 17. Also, there was testimony reflecting that the biological parents had the means to support their children, but they were unwilling to do so. *Id.* at ¶ 15-16. The court recognized that there is “a distinction between a parent who is unwilling but able to support, and a parent who is willing to support but unable to do so[,]” and that the

latter can constitute justification. *Id.* at ¶ 14, quoting *In re Adoption of Kuhlmann*, 99 Ohio App.3d 44, 51, 649 N.E.2d 1279 (1st Dist.1994), citing *In re Adoption of Masa*, 23 Ohio St.3d 163, 166, 492 N.E.2d 140 (1986).

{¶ 32} Unlike *In re Adoption of L.C.F.*, the record in this case does not establish a deliberate failure to provide support without justifiable course for doing so. In this case, the petitioners were aware of mother's financial difficulties, there is evidence of mother's low income and unemployment, the petitioners did not seek any court order for payment of support, and mother testified she was never requested to pay support. It has been held that "a natural parent is not obligated to provide support where the person [with] custody of the child is advised of the parent's financial condition and expresses no interest in receiving financial assistance." *In re Adoption of J.A.B.*, 11th Dist. Trumbull No. 2013-T-0114, 2014-Ohio-1375, ¶ 44, citing *In re Adoption of Hadley*, 2d Dist. Greene No. 90 CA 117, 1991 Ohio App. LEXIS 3783, 7-8 (Aug. 1, 1991). Upon the record in this case, the probate court could have reasonably concluded that mother had a reasonable belief that her financial support was unnecessary.

{¶ 33} The probate court's decision reflects that it thoroughly considered the testimony and evidence presented in this matter, weighed the evidence, and determined witness credibility. The probate court found that "although the [petitioners] showed evidence of [mother's] income in 2017, [they] did not prove by clear and convincing evidence that [mother] could have, or should have, provided more support than the items of clothing and small gifts given to the child."

{¶ 34} “[A]n appellate court should not substitute its judgment for that of the trial court when competent, credible evidence supports the trial court’s decision.” *Kasunic v. Koenig (In re K.L.)*, 8th Dist. Cuyahoga No. 80762, 2002-Ohio-4281, ¶ 15, citing *In re Adoption of Deems*, 91 Ohio App.3d 552, 558, 632 N.E.2d 1347 (3d Dist.1993). Upon our review, we find that the probate court’s determination that the petitioners “[have] not established by clear and convincing evidence that [mother] failed without justifiable cause to provide maintenance and support for [the child]” is supported by competent, credible evidence in the record and is not against the manifest weight of the evidence.

{¶ 35} Finally, we are not persuaded by any additional arguments presented by the petitioners that have not been specifically addressed herein. We have reviewed the entire record and do not find any reversible error occurred.

{¶ 36} Petitioners’ remaining assignments of error are overruled.

Conclusion

{¶ 37} The probate court concluded that mother’s consent to the adoption is required and dismissed the petition for adoption. Our review reflects that the probate court’s determination is supported by competent, credible evidence in the record and is not against the manifest weight of the evidence. We recognize that the petitioners have been caring for the child for some time and have a well-established relationship with the child. However, natural parents have a fundamental liberty interest in the care, custody, and management of their child that is not easily

extinguished. *Santosky v. Kramer*, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

{¶ 38} Judgment affirmed.

It is ordered that appellee recover from 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 common pleas court, probate division, to carry this judgment into execution.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
MICHELLE J. SHEEHAN, J., CONCUR