

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE ADOPTION OF J.J.P.	:	
	:	No. 108679
A Minor Child	:	
	:	
[Appeal by T.W., Mother]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Probate Division
Case No. 18-ADP-09281

Appearances:

John H. Lawson, *for appellees.*

J. Michael Drain, *for appellant.*

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Appellant-mother T.W. (“Mother”) appeals the determination by the Cuyahoga County Court of Common Pleas, Probate Division (the “probate court”) that Mother’s consent to the adoption of J.J.P. by his paternal grandparents is not required due to Mother’s failure to support the child without justifiable cause. For the reasons that follow, we affirm.

Factual Background and Procedural History

{¶ 2} J.J.P. is the biological son of Mother and J.P. (“Father”). Father died of a drug overdose on October 4, 2017. Petitioners-appellees M.P. (“Grandfather”) and D.P. (“Grandmother”) are J.J.P.’s paternal grandparents (collectively, “petitioners”). On October 5, 2018, petitioners filed a petition for the adoption of J.J.P. At that time, J.J.P. was three years old. The petition alleged that Mother’s consent to the adoption was not required because Mother had failed, without justifiable cause (1) to provide more than de minimis contact with J.J.P. for at least one year prior to the filing of the adoption petition and (2) to provide for the support and maintenance of J.J.P. for at least one year prior to the filing of the adoption petition. On October 25, 2018, Mother filed an objection to the adoption petition.

{¶ 3} On December 17, 2018, the magistrate held an evidentiary hearing to determine whether Mother’s consent to the adoption of J.J.P. was necessary under R.C. 3107.06 and 3107.07. Grandfather, K.M. (one of J.J.P.’s paternal aunts) and Mother testified at the hearing.

{¶ 4} Mother and Father moved in with petitioners in July 2014; J.J.P. has been living with petitioners since his birth in January 2015. On May 20, 2015, Father suffered a drug overdose, but survived. Neither Father nor Mother lived with petitioners after that incident. Grandfather testified that after Father’s May 2015 drug overdose, petitioners immediately initiated proceedings in the juvenile court to obtain legal custody of J.J.P. Petitioners were granted legal custody of J.J.P. in June 2016.

{¶ 5} Grandfather testified that Mother had had no face-to-face visitation, telephone calls or other communications with J.J.P. since October 5, 2017 and that the last time Mother had visited J.J.P. was on his first birthday in January 2016. Grandfather further testified that Mother had not provided any monetary support or clothing for J.J.P. nor had she given J.J.P. any gifts since October 5, 2017.

{¶ 6} K.M., one of Father's sisters, testified that she helped arrange approximately 7-8 visits for Mother and Father with J.J.P. from May 2015 through January 2016. She stated that she "took on" coordinating visitation because "it was difficult getting everybody together," it was "stressful" for Grandfather and she wanted "to try and make it easier for everyone." K.M. testified that although she had previously received texts from Mother regarding scheduling visitation, after J.J.P.'s first birthday in January 2016, she did not receive any communications from Mother requesting visitation with J.J.P.

{¶ 7} Mother disputed that she had not had contact with J.J.P. since January 2016 and stated that she had seen the child "numerous times" before Father died in October 2017, including at Father's rehab facility. Mother acknowledged, however, that there were "lots of periods of time" when she was "not available" for visitation, including when she was in rehab programs and more than six months in late 2016 and 2017 when she was hospitalized, had open-heart surgery and was in recovery at a nursing home facility.

{¶ 8} Mother claimed that, after Father died, she "got [her] life straight," had "changed completely" and wanted "to be part of [her] son's life" but that

Grandfather prevented her from having contact with J.J.P. Mother testified that she called petitioners “at least twice a week” and left “numerous messages” on Grandfather’s phone in an effort to “reach out and reunite us,” but that petitioners “completely cut [her] off.” Mother claimed that she also spoke with K.M. about J.J.P. Mother stated that she told petitioners and K.M. that she “wanted [J.J.P.]” and “wanted to see [J.J.P.]” but her calls were not returned. Mother stated that she believed that petitioners blamed her for their son’s death and refused to let her see J.J.P. in “retaliation.” Mother testified that in January 2018, she texted Grandfather regarding a potential birthday gift for J.J.P. but that, once again, he did not respond.

{¶ 9} Unable to reestablish contact with J.J.P. by other means, in March 2018, Mother filed a motion for shared parenting in the juvenile court. In November 2018, the juvenile court granted petitioners’ motion to dismiss Mother’s motion without prejudice on the grounds that Mother had not perfected service of the motion on petitioners, had made no effort to perfect service and did not file a brief in opposition to petitioners’ motion to dismiss her motion.

{¶ 10} With respect to her financial support of J.J.P., Mother admitted that she did not provide any financial support for J.J.P. from October 5, 2017 to October 5, 2018. Mother testified that she did not provide support for J.J.P. because “[n]othing was ever even set for support.” Mother stated that she had been receiving Social Security benefits since January or February 2018 and was “willing to support” J.J.P. In response to her counsel’s question as to whether, “by virtue of [her] receiving Social Security [benefits],” J.J.P. “would be covered under some

government program,” Mother responded, “Yes,” and further stated that J.J.P. could be covered under her husband’s health insurance.

{¶ 11} On January 8, 2019, the magistrate issued her decision. The magistrate determined that Mother’s consent to the adoption of J.J.P. should not be required under R.C. 3107.07(A) based on Mother’s failure to support J.J.P. Although the magistrate found that petitioners were “unsuccessful” in proving by clear and convincing evidence that Mother had failed without justifiable cause to have more than de minimis contact with J.J.P. for at least one year immediately preceding the filing of the adoption petition, she found that petitioners had proven by clear and convincing evidence that Mother had failed without justifiable cause to provide for the maintenance and support of J.J.P. as required by law or judicial decree for at least one year immediately preceding the filing of the adoption petition. As the magistrate explained:

It is Petitioner’s contention that [Mother] failed to support the minor child during the period beginning October 5, 2017 through October 5, 2018. [Mother] does not contradict this assertion, but argues that there was no support order in place.

[Mother] confirmed that she began receiving Social Security income in January or February 2018, within the relevant statutory period. While no evidence was provided to show the extent of income received, [Mother] affirmatively testified that she has not sent any money to Petitioners since becoming a recipient of Social Security, nor did she provide support prior to that date. Additionally, no evidence was presented to show that [Mother] provided any other form of support, such as health insurance or clothing, during the relevant time period.

The testimony presented demonstrates that [Mother] had at least some money to financially support her minor child but chose not to do so. The lack of a support order does not negate her obligation to

support her child, and her deliberate failure to do so weighs against a finding of “justifiable cause.”

{¶ 12} Mother filed objections to the magistrate’s decision, arguing that the magistrate had erred in determining that Mother’s consent to the adoption was not required due to her failure to support her son. Mother claimed that the magistrate had improperly shifted the burden of proving a lack of justifiable cause for Mother’s nonsupport from petitioners to Mother and that the magistrate’s decision was not supported by the record because (1) the testimony at the hearing “made it obvious that the grandparents had created a firewall between them and the mother for the applicable period” such that “no amount of support would have been accepted” and (2) Mother’s testimony that she received Social Security disability payments meant that J.J.P. “would likewise have received support during the twelve-month period in the form of Social Security payments” and, “[h]ence, * * * would have been supported as of January 2018.”

{¶ 13} On May 13, 2019, the probate court issued a judgment entry overruling Mother’s objections, adopting the magistrate’s decision and ordering that the adoption petition proceed without Mother’s consent. The probate court agreed that petitioners had met their burden of proving by clear and convincing evidence that Mother had failed to provide for the maintenance and support of J.J.P. as required by law or judicial decree from October 5, 2017 through October 5, 2018 and that there was no justifiable cause for her failure to support J.J.P.

{¶ 14} Mother appealed, raising the following two assignments of error for review:

Assignment of Error No. 1: The trial court committed prejudicial error by shifting the burden to prove non-support for a twelve-month period to Appellant/Mother instead of on Petitioners/Appellees.

Assignment of Error No. 2: The trial court committed prejudicial error by failing to strictly construe R.C. 3107.07([A]) in favor of Appellant/Mother.

Law and Analysis

{¶ 15} In her first assignment of error, Mother contends that (1) the probate court improperly applied the burden of proof under R.C. 3107.07(A) as it relates to a biological parent's failure to support his or her child and (2) the record does not support the probate court's finding that Mother's consent to the adoption was not required because Mother failed without justifiable cause to provide for the maintenance and support of J.J.P. as required by law or judicial decree from October 5, 2017 through October 5, 2018. We disagree.

{¶ 16} Pursuant to R.C. 3107.06(A), a petition to adopt a minor may be granted only if the child's mother consents in writing to the adoption unless an exception applies under R.C. 3107.07. R.C. 3107.07(A) provides, in relevant part:

Consent to adoption is not required of * * * [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 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 * * *.

{¶ 17} A probate court must engage in a “three-step analysis” when determining whether a parent has failed to provide for the maintenance and support of a child under R.C. 3107.07(A). As the Ohio Supreme Court explained in *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28:

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.

Id. at ¶ 15.

{¶ 18} The petitioner in the adoption proceeding bears the burden to prove by clear and convincing evidence both that the parent failed to provide maintenance and support for the child for the one-year period preceding the filing of the adoption petition and that this failure was without justifiable cause. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 3, 22; *In re Adoption of Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph one of the syllabus; *In re Adoption of L.C.F.*, 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545, ¶ 9. However, as the Ohio Supreme Court explained in *Bovett*:

“Lest one may think we are placing an unfair burden on the adopting parent, *it should be pointed out that the adopting parent has no legal duty to prove a negative. If the natural parent does not appear to go forward with any evidence of justification, obviously the adopting parent has only the obligation of proving failure of support by the requisite standard.*” (Emphasis added.) [*In re Adoption of Masa*, 23 Ohio St.3d 163, 167, 492 N.E.2d 140 (1986).]

Therefore, a natural parent may not simply remain mute while the petitioner is forced to demonstrate why the parent's failure to provide support is unjustifiable. Rather, once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one-year period, the *burden of going forward with the evidence* is on the natural parent to show some facially justifiable cause for such failure. The *burden of proof*, however, remains with the petitioner.

(Emphasis sic.) *Bovett* at 104.

{¶ 19} In other words, once a petitioner meets his or her initial burden of proving a failure of support, the burden of production shifts to the biological parent to present evidence of a facially justifiable cause for the failure of support. If the biological parent shows a facially justifiable reason for his or her failure to support the child, then the burden shifts back to the petitioner (who retains the burden of proof) to prove by clear and convincing evidence that the failure was not justified, i.e., that the parent's justification is illusory. *See, e.g., In re Adoption of B.I.*, 2017-Ohio-9116, 101 N.E.3d 1171, ¶ 9 (1st Dist.), *aff'd*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28; *In re Adoption of Ewart*, 4th Dist. Ross No. 04CA2796, 2005-Ohio-116, ¶ 11, citing *In re Adoption of Kessler*, 87 Ohio App.3d 317, 324, 622 N.E.2d 354 (6th Dist.1993).

{¶ 20} "Clear and convincing evidence" is that measure or degree of proof that "produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954), paragraph three of the syllabus; *L.C.F.* at ¶ 9, fn. 2. Examples of facially justifiable reasons for failure to support a child may include: (1) unemployment and

a lack of income or (2) the custodian of the child, who is in a better financial position than the natural parent, adequately provides for a child's needs and expresses no interest in receiving any financial assistance.¹ *See, e.g., In re Adoption of S.A.H.*, 4th Dist. Ross No. 07CA2947, 2007-Ohio-3710, ¶ 20-21. A probate court's determination of whether justifiable cause exists for a parent's failure to pay child support will not be reversed unless it is against the manifest weight of the evidence. *M.B.* at ¶ 24; *L.C.F.* at ¶ 10.

{¶ 21} A parent has a fundamental duty to support his or her child. That duty is not dependent upon the presence of a court order for support. *See* R.C. 3103.03(A) ("The biological or adoptive parent of a minor child must support the parent's minor children out of the parent's property or by the parent's labor."). "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." *B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28 at ¶ 17, 21, 27.

{¶ 22} To preserve the right to consent to adoption, a failure to support must be justified "for substantially the entire one-year period" preceding the filing of the

¹ Mother has not claimed that she lacked the ability or resources to support J.J.P. or that petitioners did not need, and had expressed no interest in receiving, any financial assistance from Mother for the support of J.J.P. As such, this case is distinguishable from *In re Adoption of S.L.P.*, 8th Dist. Cuyahoga No. 108602, 2020-Ohio-495, and we do not further address those issues here.

adoption petition. *In re Adoption of Tyler K. Kilbane & Ashley Kilbane*, 130 Ohio App.3d 203, 207, 719 N.E.2d 1012 (8th Dist.1998), quoting *Kessler*, 87 Ohio App.3d at 321-322, 622 N.E.2d 354. “It is not enough to show that sometime during the year a failure to support was justified. It must be demonstrated that no modicum of support reasonably could have been provided at any time during the year.” *Kilbane* at 207, quoting *Kessler* at 321-322; *see also Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919, at paragraph three of the syllabus (“Under R.C. 3107.07(A), the probate court shall determine * * * whether the parent’s failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause.”) (Emphasis deleted.).

{¶ 23} In this case, there was no child support order. Accordingly, Mother had a general obligation to support J.J.P. under R.C. 3103.03(A). *B.I.* at ¶ 17, 21, 27. Grandfather testified that Mother had not provided any monetary support or clothing for J.J.P. or given J.J.P. any gifts since October 5, 2017. At the hearing, Mother admitted that she did not provide any support for J.J.P. during the relevant time period. As such, petitioners met their initial burden, presenting clear and convincing evidence that Mother had failed to make any financial contribution toward the maintenance or support of J.J.P. during the year preceding the filing of the adoption petition.

{¶ 24} Once petitioners met their initial burden of proving Mother’s failure to support, the burden of production shifted to Mother to present evidence of “some facially justifiable cause” for the failure to support. *Bovett* at paragraph two of the

syllabus. Although Mother asserts that the probate court “shifted the burden of proof to prove justifiable cause upon Appellant/Mother,” the record does not support this. The record reflects that the only burden the probate court placed on Mother was “to show facially justifiable cause” for her failure to support J.J.P. *In re J.J.P.*, Cuyahoga P.C. No. 18-ADP-09281 (May 13, 2019), quoting *In re Adoption of Dues*, 2d Dist. Montgomery No. 12112, 1991 Ohio App. LEXIS 4110 (Aug. 29, 1991). The probate court was clear that the burden of proof remained with petitioners. *Id.*

{¶ 25} At the hearing, Mother testified that she had been receiving Social Security benefits since January or February 2018 and had the means to support J.J.P. but did not provide any financial support for J.J.P. because there was no child support order. On appeal, Mother asserts that petitioners’ “interference with her ability to interact with her son” was her “justifiable cause” for her failure to support J.J.P. Mother argues that petitioners’ unwillingness to communicate with her “foreclosed the possibility of [Mother] contributing to her son’s support” and that “[t]he testimony at the December 17, 2018 hearing demonstrated that no amount of support would have been accepted by [petitioners]” and that any attempts by Mother to offer child support to petitioners would have, therefore, been “fruitless.” As such, Mother contends, petitioners failed to meet their burden of proving that Mother lacked justifiable cause in failing to support J.J.P.

{¶ 26} In this case, the probate court found that petitioners met their burden of proving by clear and convincing evidence that Mother lacked justifiable cause for her failure to support J.J.P. The probate court explained its decision as follows:

[Mother] argues that because Petitioners interfered with her ability to contact the minor child, it thereby interfered with her ability to provide for the maintenance and support of the minor child during the relevant one-year period. This Court, however, does not find this argument persuasive. Upon review of the transcript, the testimony elicited established that [Mother] attempted to have contact with the minor child to which Petitioners did not respond, thereby forcing [Mother] to file with a Motion to Modify Parenting Time with Juvenile Court. The Magistrate found, and this Court agrees, there is merit to [Mother's] assertion that Petitioners interfered with her ability to communicate with the child from October 5, 2017 through October 5, 2018. This same reasoning, however, cannot be applied to [Mother's] failure to provide for the maintenance and support of the child, when [Mother's] testimony was clear that she had never actually made a meaningful attempt to provide for the maintenance and support of the child during the relevant time period.

This Court further finds that while there was no child support order between [Mother] and Petitioners, it is recognized that [Mother] has a common law duty to provide support for her child, and "such a duty of support is not dependent upon the presence or absence of court orders for support." *Nokes v. Nokes*, 47 Ohio St.2d 1, 351 N.E.2d 174 (1976). No testimony was presented that [Mother] failed to establish a child support order to assist in supporting her child; that she sent any monetary assistance to the Petitioners' address where [Mother] had previously resided; that she offered health insurance for the minor child; or, that she sent clothing or shoes for the child. Further, there was no testimony that there was any agreement between [Mother] and Petitioners that [Mother] did not have to assist in supporting the child while the child was in Petitioners' custody. The testimony of [Mother] was not that she had attempted or offered to provide for the maintenance and support of the child and was denied; the testimony of [Mother] was that she had simply never attempted to provide for the maintenance and support of her child. Therefore, without any attempt by [Mother] this Court cannot speculate as to whether Petitioners would have accepted or interfered with the maintenance and support offered by [Mother]. * * *

[Mother] argues that because she was receiving Social Security, her minor child would have likewise been eligible to receive support in the form of Social Security payments. She argues that because the minor child would have been entitled to these payments, the child would have been supported during the statutory time period. This Court first notes that [Mother] provided no evidence, except her mere confirmation through testimony, that the child would have been eligible for Social Security payments. Further, this Court must consider what maintenance and support the minor child has actually received from [Mother], as “contributions which are of no value to the child generally do not qualify as maintenance and support.” *In re Adoption of McNutt*, 134 Ohio App.3d 822, 830, 732 N.E.2d 470, 475 (4th Dist. 1999). As such, this Court cannot qualify unpaid Social Security benefits as maintenance and support during the relevant time period since no value was actually provided to the minor child therefrom.

The Magistrate found, and this Court agrees, that the Petitioners met their burden of establishing by clear and convincing evidence that [Mother] failed without justifiable cause to provide for the maintenance and support of the minor child as required by law or judicial decree from October 5, 2017 through October 5, 2018.

{¶ 27} A parent’s lack of contact with his or her biological child and failure to provide support for his or her child are two separate inquiries under R.C. 3107.07(A). Here, although there was evidence that petitioners impeded Mother’s attempts to visit or otherwise have contact with J.J.P., there is no evidence that Mother was prevented from providing financial support for J.J.P. or that she had ever made an attempt² to provide support for J.J.P. during the period in question. *See, e.g., In re Adoption of J.M.N.*, 2d Dist. Clark Nos. 08-CA-23 and 08-CA-24, 2008-Ohio-4394, ¶ 25-26 (where there was “no hint that [mother] ever so much as

² Although Mother testified that she had texted Grandfather about giving J.J.P. a birthday gift in January 2018 — to which Grandfather never responded — a de minimis gift given to a minor child for the child’s birthday does not constitute maintenance and support for the purposes of R.C. 3107.07(A). *M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142 at ¶ 2.

considered giving * * * financial assistance to care for her children,” trial court’s determination that mother lacked justifiable cause for failing to support her children was not against the manifest weight of the evidence). This is not a case in which, due to the interference of others, the parent did not know where her child lived and, therefore, did not know where to send support. *Compare In re Adoption of K.O.D.K.*, 5th Dist. Ashland No. 15-COA-039, 2016-Ohio-1003, ¶ 28-29, 32. Mother knew exactly where J.J.P. was living; i.e., he had been living with petitioners since he was born.

{¶ 28} The probate court’s decision in this case is well-reasoned, is supported by competent, credible evidence and is not against the manifest weight of the evidence. Accordingly, Mother’s first assignment of error is overruled.

{¶ 29} In her second assignment of error, Mother contends that probate court erred in failing to strictly construe R.C. 3107.07(A) in her favor. Citing *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, 110 N.E.3d 1236, Mother argues that by “filing for her parental rights in the juvenile court,” she “engaged in the proper procedure to secure her parental rights” and that the probate court “should have strictly construed R.C. 3107.07(a) [sic] to recognize those efforts.”

{¶ 30} In *M.G.B.-E.*, the Ohio Supreme Court addressed a probate court’s authority to determine whether parental consent is required for an adoption when preexisting matters concerning the parenting of the child are pending in another court. *M.G.B.-E.* at ¶ 1. The court held that “[w]hen a parent has filed a parenting motion in a juvenile or domestic-relations court having continuing jurisdiction over

a child prior to the filing of a petition to adopt that child, the probate court must consider the parent's legal action as part of its consideration whether the parent failed without justifiable cause to have more than de minimis contact with the child during the year immediately preceding the filing of the adoption petition, under R.C. 3107.07(A)." *Id.* at ¶ 47.

{¶ 31} At issue in this appeal, however, is whether Mother failed to support J.J.P. without justifiable cause during the year preceding the filing of the adoption petition, not whether she failed to have more than de minimis contact with J.J.P. without justifiable cause during the year immediately preceding the filing of the adoption petition. The motion to modify parenting time Mother filed in the juvenile court in March 2018 involved a request for visitation. There is no evidence in the record that Mother, through her motion for shared parenting or any other filing in the juvenile court, ever sought to provide financial support for J.J.P. Accordingly, Mother's second assignment of error is meritless and overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellees recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the Cuyahoga County 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
MARY EILEEN KILBANE, J., CONCUR