

[Cite as *In re R.T.R.* , 2007-Ohio-6592.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

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IN THE MATTER OF THE	:	
ADOPTIONS OF:	:	C.A. CASE NO. 2007-CA-37
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	:	T.C. CASE NOS. 9364SP
R.T.R. AND C.K.R.	:	9365SP
	:	
	:	(Civil Appeal from
	:	Common Pleas Court)

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O P I N I O N

Rendered on the 7th day of December, 2007.

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GRADY, J.

{¶ 1} Respondent John P. Baker appeals from a judgment of the Greene County Court of Common Pleas, Probate Division, which granted a petition by David E. Rosengarten to adopt Baker's two biological children. Rosengarten is the husband of the children's mother.

{¶ 2} Rosengarten filed a petition to adopt his step-children, R.T.R. and C.K.R., on August 17, 2005. The children were eight and six years old at that time, and were living with Rosengarten. On April 10, 2006, the trial court conducted a hearing to determine whether Baker's consent to the adoption was in the children's best interest. On April 12, 2006, the trial court concluded that the adoption was in the children's best interest and that Baker's consent was unnecessary because he had failed to support the children without justifiable cause. Rosengarten's petition for adoption was granted. Baker filed a timely notice of appeal from the trial court's judgment.

{¶ 3} On January 19, 2007, we reversed the judgment of the trial court, because the trial court had improperly placed the burden of proof on Baker to show justification for non-support when the burden should have been on Rosengarten to demonstrate a lack of justification. We noted that Rosengarten did not present any evidence regarding Baker's ability to work and did not refute Baker's claims that his injuries had prevented him from working at his construction job. We remanded the cause for the trial court to determine whether Rosengarten proved by clear and convincing evidence that Baker's failure to provide maintenance and support was without justifiable cause.

{¶ 4} On remand, the trial court held a hearing and took additional evidence relating to whether Baker's failure to provide maintenance and support was without justifiable cause.

On March 26, 2007, the trial court found that Baker's failure to provide maintenance and support was without justifiable cause and granted Rosengarten's petition for adoption. Baker filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED IN FINDING THAT PETITIONER HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT'S FAILURE TO PROVIDE SUPPORT WAS UNJUSTIFIABLE."

{¶ 6} Under R.C. 3107.06, a probate court may grant a petition to adopt only if written consent has been executed by the mother and father of the child, unless consent is not required under R.C. 3107.07. Division (A) of that section provides that the consent of a natural parent is not required for adoption "when it is alleged in the adoption petition and the court finds . . . 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 either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

{¶ 7} The petitioner for adoption "has the burden of proving, by clear and convincing evidence, both (1) that the natural parent has failed to support the child for the requisite one-year period, and (2) that this failure was without justifiable cause." *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, at paragraph one of the syllabus. "Clear and convincing evidence" requires that the proof produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, 481 N.E.2d 613, citing *Cross v. Ledford* (1954), 161 Ohio St. 469.

{¶ 8} It is undisputed that Baker has not provided maintenance or support for R.T.R. and C.K.R. during the one-year period immediately preceding Rosengarten's petition for adoption. The sole issue on appeal is whether Rosengarten proved through clear and convincing evidence that Baker's failure to provide maintenance and support was without justifiable cause.

{¶ 9} Baker argues that the trial court's judgment is against the manifest weight of the evidence because injuries he suffered in an automobile accident in 2004 prevented him from continuing to work as a carpenter on construction jobs, as he had before. After that, when he did work, according to

Baker, he functioned as more of a supervisor, earning very little and paying others out of what he earned for work he could not perform.

{¶ 10} The trial court made the following findings of fact regarding whether Baker's failure to provide maintenance and support were justifiable:

{¶ 11} "John P. Baker did work, and was paid for same in the year preceding the filing of the adoption petitions. He had two knee operations in 1992-1993, and he has had much pain in his lower back for over 10 years, but he has continued to work a majority of the time. He is a contractor, specializing in exterior trim work. He has had to adjust the type of work he does due to his knee and back problems. He does more supervising of work crews and more cutting of boards for trim jobs, and he does less climbing. There were two specific jobs proven at this hearing where John Baker grossed \$4,500.00, and there was testimony that he worked several jobs for T&T construction. He also worked several odd jobs. All of these jobs were performed in the year preceding the filing of the adoption petitions, and he was paid for same.

{¶ 12} "John Baker was also in trouble with the law on three occasions in the year preceding the filing of the adoption petitions. In each case, he had been consuming

alcohol.

{¶ 13} "John Baker smokes cigarettes regularly.

{¶ 14} "John Baker worked out vigorously while in prison. He lifted weights and did stretching exercises daily. So he can tolerate some pain and continued to live a fairly normal life."

{¶ 15} Based on these findings, the trial court concluded that "[t]he petitioner offered clear and convincing proof that John P. Baker paid no child support. This evidence was provided at the first contested hearing and at this hearing. The petitioner at this hearing offered clear and convincing proof that the failure to provide support was without justifiable cause. John Baker did work during the year preceding the filing of the adoption petition. He was paid. He bought cigarettes and alcohol. He lifted weights and exercised. He paid no support."

{¶ 16} A probate court's determination regarding justifiable cause will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Adoption of Mesa* (1986), 23 Ohio St.3d 163, 166, 492 N.E.2d 140, citing *In re Adoption of McDermitt* (1980), 63 Ohio St.2d 301, 306. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be

reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

{¶ 17} At the March 2007 hearing, three individuals who worked with Baker on construction projects testified that Baker held several construction jobs during the year immediately preceding the date on which Rosengarten filed his petition for adoption. Although Baker could recall only \$4500 in income in 2005, the trial court clearly credited the testimony of his co-workers over that of Baker.

{¶ 18} Moreover, the trial court credited the testimony that Baker was physically able to perform a number of construction projects over Baker's testimony that he was physically unable to perform the construction work and pay any child support. "The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 19} Also, the trial court credited the testimony from the March 2007 hearing that Baker continued to purchase cigarettes and alcohol at the same time that he was not providing maintenance and support for his children, satisfying his own desires in that respect instead of supporting children he was obligated by law to support.

{¶ 20} The trial court's finding that Rosengarten proved by clear and convincing evidence that Baker's failure to provide support was without justifiable cause is supported by some competent, credible evidence. Therefore, the trial court's decision was not against the manifest weight of the evidence.

{¶ 21} The assignment of error is overruled. The judgment of the probate court will be affirmed.

WOLFF, P.J. and BROGAN, J., concur.

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Hon. Robert A. Hagler