

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

IN THE MATTER OF THE
ADOPTION OF K.L.K.-F. aka K.L.L.

Appellate Case No. 08-CA-46

Trial Court Case No. 82510

(Probate Appeal from
Common Pleas Court)

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OPINION

Rendered on the 29th day of May, 2009.

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BROGAN, J.

{¶ 1} K.L. appeals from the trial court's entry and order finding that he needed consent from his minor step-daughter's father, J.F., before he could proceed with an adoption petition.

{¶ 2} K.L. advances two assignments of error on appeal. First, he contends the trial court erred in finding that J.F. had communicated with the child in the one year immediately

preceding the filing of the adoption petition. Second, he claims the trial court erred in finding, alternatively, that J.F. had justifiable cause for any failure to communicate with the child during the one-year period.

{¶ 3} The record reflects that K.L. filed a petition to adopt his step-daughter, K.L.L., on May 23, 2008. The petition alleged that J.F.'s consent was not required because he had failed, without justifiable cause, to communicate with the child for at least the immediately preceding one year.

{¶ 4} The trial court held a November 24, 2008 hearing on the communication issue. After listening to testimony from four witnesses and speaking to the child in camera, the trial court resolved the issue in a December 16, 2008 entry and order. The trial court found that J.F. had engaged in a ten-minute telephone conversation with K.L.L. on March 28, 2008, approximately two months before K.L. petitioned to adopt her. Therefore, the trial court held that K.L. had failed to prove a complete absence of communication during the one-year period. The trial court then opined that even if the telephone conversation had not occurred, it would find justifiable cause for a lack of communication between J.F. and K.L.L. Specifically, the trial court found that J.F. had attempted to contact his daughter and that the child's mother, R.L., had rebuffed his efforts. As a result, the trial court held that J.F.'s consent was required before K.L. could adopt the child. K.L. then filed this timely appeal.¹

¹A trial court's ruling that a parent's consent to adoption *is not* required is a final, appealable order. *In re Adoption of Greer*, 70 Ohio St.3d 293, 1994-Ohio-69. We applied *Greer* and reached the same conclusion in *In re Adoption of W.K.M.*, 166 Ohio App.3d 684, 2006-Ohio-2326, which involved a petitioner's appeal from a trial court's ruling that a parent's consent was required. Therefore, based on *In re Adoption of W.K.M.*, the trial

{¶ 5} Under the version of R.C. 3107.07(A) in effect at the time of K.L.'s petition and the trial court's ruling, 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."² The party petitioning for adoption must prove, by clear and convincing evidence, that the parent failed to support or communicate with the child during the requisite 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 re Adoption of J.M.N.*, Clark App. No. 08-CA-23 and 08-CA-24, 2008-Ohio-4394, ¶11. Once the petitioner has made this showing, the burden of going forward with evidence 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. The burden of proof, however, remains with the petitioner, who must establish the lack of justifiable cause by clear and convincing evidence. *Id.* at 104. Whether justifiable cause has been proven by clear and convincing evidence is a determination for the probate court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 166, citing *In re*

court's order in the present case is immediately appealable.

²The General Assembly amended R.C. 3107.07(A) effective April 7, 2009. As amended, the statute now provides that a parent's consent to adoption is not required if the parent "has failed without justifiable cause to provide more than de minimus contact with the minor * * *." At the time of K.L.'s petition and the trial court's ruling, however, the statute eliminated the need for consent if there was an unjustifiable failure to "communicate."

Adoption of McDermitt (1980), 63 Ohio St.2d 301, 306.

{¶ 6} In his first assignment of error, K.L. contends the trial court erred in finding that J.F. had communicated with K.L.L. in the one year immediately preceding the filing of the adoption petition. Notably, K.L. does not dispute that J.F. and the child spoke on the telephone for approximately ten minutes in March 2008, well within the relevant one-year period. He essentially argues, however, that this conversation should not count. He characterizes it as coincidental, asserting that the purpose of J.F.'s call was to talk to his mother and that K.L.L. just happened to be present.

{¶ 7} Upon review, we find K.L.'s argument to be unpersuasive. We have defined "communicate" for purposes of R.C. 3107.07(A) as "'to make known,' 'to inform a person of, convey the knowledge or information of * * * to send information or messages * * *'" *In re Adoption of Peshek* (2001), 143 Ohio App.3d 839, 843, quoting Webster's Third New International Dictionary (1986), 460. A parent need not prove meaningful, substantial, significant, or regular communication. *Id.* at 844. To the contrary, the Ohio Supreme Court has held that R.C. 3107.07(A) must be strictly construed and that there must be "a complete absence of communication for the statutorily defined one-year period." *Holcomb*, 18 Ohio St.3d at 366-367. *Id.* We note too that the statute does not distinguish between whether the parent or child initiated the communication. It requires only that some communication occur.

{¶ 8} In the present case, the trial court found, as a factual matter, that J.F. had called his mother's house on March 28, 2008 and had spoken with someone else before talking to K.L.L. for approximately ten minutes. The trial court noted conflicting testimony about whether J.F. had asked to speak to K.L.L. or whether K.L.L. had asked to speak to

J.F. The trial court did not resolve this conflict, which it apparently found to be immaterial. Regardless of who initiated the conversation, the trial court held that it involved the passing of a message or thought from one person to another and, therefore, constituted “communication” within the meaning of R.C. 3107.07(A). We agree. Even if K.L.L. asked to speak to J.F., he acquiesced and talked to her for ten minutes. Therefore, K.L. failed to prove a complete absence of communication.

{¶ 9} In reaching the foregoing conclusion, we are unpersuaded by K.L.’s reliance on *In re Kr. E.*, Lorain App. No. 06CA008891, 2006-Ohio-4815. There the Ninth District noted the trial court’s disbelief of a mother’s claim to have seen her children and to have said hello to them at a funeral home. In any event, the Ninth District reasoned that “even if Mother saw the children at the funeral home, such a brief and unexpected occurrence does not constitute communication within the meaning of R.C. 3107.07.” *Id.* at ¶18. In support, the Ninth District relied on appellate decisions finding that a wave, smile, or nod did not constitute “communication.” *Id.* In the present case, however, J.F. did more than wave, smile, or nod at K.L.L. He spoke to her on the telephone for approximately ten minutes. This constituted “communication” under the statute. Accordingly, we overrule K.L.’s first assignment of error.

{¶ 10} In his second assignment of error, K.L. claims the trial court erred in finding, alternatively, that J.F. had justifiable cause for any failure to communicate with K.L.L. during the relevant one-year period. Given our agreement above with the trial court’s determination that J.F. *did* communicate with the child, we need not consider whether justifiable cause existed for a lack of communication. In the interest of completeness, however, we briefly will address the issue.

{¶ 11} We have recognized that “[s]ignificant interference by a custodial parent with communication between the non-custodial parent and the child, or significant discouragement of such communication, are relevant to whether there is justifiable cause for the non-custodial parent’s failure to communicate with the child.” *In re Adoption of H.M.F.*, Montgomery App. No. 22805, 2009-Ohio-1947, ¶19.

{¶ 12} In the present case, the trial court found that K.L.L.’s mother significantly discouraged communication between the child and J.F. The record contains ample evidence to support this conclusion. Most notably, J.F.’s mother testified that she provided daycare for K.L.L. and that the child’s mother had instructed her not to allow J.F. to speak to the child. J.F.’s mother abided by the wishes of K.L.L.’s mother and prevented J.F. from talking to his child. She did so because she “didn’t want to lose having [K.L.L.]” J.F. was able to speak to K.L.L. once for ten minutes only because another child gave K.L.L. the telephone without J.F.’s mother’s knowledge. J.F.’s mother further testified that, during the relevant one-year period, J.F. had attempted a number of times to speak to K.L.L. J.F.’s grandmother also testified about efforts by K.L.L.’s mother to prevent communication between J.F. and the child. In particular, J.F.’s grandmother stated that she had called K.L.L.’s mother to invite the child to a 2007 Christmas party. K.L.L.’s mother refused to let the child attend upon learning that J.F. would be present. She told J.F.’s grandmother that she did not want K.L.L. to see J.F. Although J.F. had been granted court-ordered visitation with K.L.L., he testified that he was unaware of the order and had been in jail when it was issued. He also testified that he lacked the finances to seek legal enforcement of the court order.

{¶ 13} As a reviewing court, we will defer to the trial court, which saw and heard the

witnesses, on the issue of substantial interference with communication between J.F. and K.L.L. and the existence of justifiable cause for any non-communication. Based on our review of the record, the trial court did not err in finding that K.L. had failed to establish a lack of justifiable cause by clear and convincing evidence. The trial court's ruling is not against the weight of the evidence. Accordingly, the second assignment of error is overruled.

{¶ 14} The judgment of the Miami County Common Pleas Court, Probate Division, is affirmed.

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FAIN and FROELICH, JJ., concur.

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