[Cite as *In re adoption of A.M.H.*, 2009-Ohio-4576.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN THE MATTER OF:	:	
THE ADOPTION OF A.M.H.		C.A. CASE NO. 23413
	:	T.C. NO. 2008 ADP 0164
	:	(Civil appeal from Common Pleas Court, Probate Division)
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O P I N I O N

Rendered on the 4th day of September, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of R.N., filed May 6, 2009. R.N. appeals from the April 8, 2009, decision of the Probate Court of Montgomery County determining that R.N.'s consent for the adoption of his minor child, A.M.H., was not required. The November 17, 2008, petition for the adoption of A.M.H. asserted, and the probate court determined, after a hearing, that R.N. failed, without justifiable cause, to provide for the maintenance and support of

A.M.H. during the year preceding the petition, pursuant to R.C. 3107.07(A). R.N. argues that he did in fact provide maintenance and support for A.M.H., and that any failure was justifiable due to his "medical condition." The petitioner herein is M.H., who married the minor child's mother, A.H., in July, 2008.

{¶ 2} A.H. and R.N. were previously married, in May, 2001, and they divorced in June, 2002. After their divorce, A.H. and R.N. resumed their relationship, and A.M.H. was born on April 28, 2007. A.H. and R.N. have two other children, and R.N. is subject to a child support order for those children, but a support order was never issued for A.M.H. A.H. and R.N. resided together until November, 2007, when M.H. moved in with A.H., and R.N. moved into a residence down the street from them.

{¶ 3} R.N. asserts two assignments of error. His first assignment of error is as follows:

{¶ 4} "THE TRIAL COURT'S FINDING THAT APPELLEE HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT [R..N.'s] CONSENT WAS NOT REQUIRED DESPITE IN-KIND SUPPORT TO THE INFANT CHILD AND CASH SUPPORT PAID FOR OLDER SIBLINGS LIVING IN THE SAME HOUSEHOLD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 5} "A. [R.N.'S] PAYMENT OF CHILD SUPPORT FOR THE BENEFIT OF THE INFANT CHILD'S HOUSEHOLD CONSTITUTES SUPPORT AND MAINTENANCE.

{¶ 6} "B. [R.N.'S] PROVISION OF BABY FOOD, DIAPERS, FORMULA AND CLOTHING CONSTITUTE MAINTENANCE AND SUPPORT.

{¶ 7} "C. [R.N.'S] PROVISION OF IN-KIND SUPPORT FOR HIS INFANT CHILD DURING HIS VISITS CONSTITUTES MAINTENANCE AND SUPPORT."

{¶ 8} "The right of a parent to the care and custody of his or her children is one of the most fundamental in law. *Santosky v. Kramer* (1982), 455 U.S. 745, 753, * * *; *In re Adoption of A.M.B.,* Montgomery App. No. 21973, 2007-Ohio-2584, at ¶ 12. This fundamental liberty interest of parents in the care, custody, and management of their children is not easily extinguished. *Santosky*, 455 U.S. 753-754. Adoption terminates those fundamental rights. * * * Accordingly, adoptions are generally not permissible absent written consent of both parents. (Citations omitted)." *In re Adoption of H.M.F.,* Montgomery App. No. 22805, 2009-Ohio-1947, ¶ 13.

{¶ 9} The version of R.C. 3107.07 in effect at the time of M.H.'s petition provides, "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 finds after proper service of notice and hearing, 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." In other words, a breach of the parental duty to maintain and support one's minor child can result in the judicial termination of the parent-child relationship. "For this reason, we have held that '* * * [a]ny exception to this requirement of parental consent [to adoption] must be strictly construed so as to protect the right of the natural parent to raise and nurture their children. *In re*

Schoeppner (1976), 46 Ohio St.2d 21, 24, * * * ." *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 164.

{¶ 10} "R.C. 3107.07 does not modify or define the terms 'maintenance' or support.' The General Assembly chose not to modify the terms with words such as [']substantially['] or 'regularly,' indicating an intention by the General Assembly to adopt an objective test for analyzing a parent's failure to support. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 366 * * * ." *Gorski v. Myer*, Stark App. No. 2005CA00033, 2005-Ohio-2604, ¶ 17.

{¶ 11} Black's Law Dictionary defines "maintenance" in part as "[s]ustenance; support; assistance; aid. The furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child * * * ." Sixth Ed., 953. Similarly, "support" means, "[f]urnishing funds or means for maintenance; to maintain; to provide for, to enable to continue; to carry on." Id., 1439.

{¶ 12} "The party petitioning for adoption must prove, by clear and convincing evidence, that the parent failed to support * * * the child during the requisite one-year period and that there was no justifiable cause for the failure. *In re Adoption Holcomb*, * * * 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." *In re K.L.K-F.,* Miami App. No. 08-CA-46, 2009-Ohio-2543, ¶ 5. "It is a heavy burden, but it does not require the trier of fact to construe the evidence most strongly in favor of the parent or to resolve evidentiary conflicts or disputes in the parent's favor." *In re Adoption of*

Alexander (Sept. 29, 1995), Darke App. No. 1366, Grady, J. Dissenting.

{¶ 13} "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 this failure. *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, paragraph two of the syllabus." *In re K.L.K-F.,* id. "Justifiable cause for failure to support may be shown by impossibility or extreme difficulty, or significant interference and discouragement by the natural parent to prevent the payment of support." (citation omitted). The burden imposed on the non-consenting parent is only to show facially justifiable cause for the failure." *Matter of Adoption of Dues* (Aug. 29, 1991), Montgomery App. No. 12112.

{¶ 14} "The burden of proof, however, remains with the petitioner, who must establish the lack of justifiable cause by clear and convincing evidence. (Citation omitted.) 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,* [at 166], citing *In re Adoption of McDermott* (1980), 63 Ohio St.2d 301, 306." *In re K.L.K.-F.*, Id. "In determining whether the petitioner has met that burden, the probate court must focus on the year as a whole, and not on whether the parent's failure was justified during any part of the year. *In re Adoption of Bovett*, * * * (affirming the trial court's decision that the failure to pay was unjustified, despite three months of unemployment, upon focusing on the year as whole.)" *In re Adoption of A.C.S.*, Montgomery App. Nos. 20557, 20558, 20559, 2004-Ohio-5933, ¶ 22.

{¶ 15} " 'In determining whether a judgment is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice" that there must be a reversal of the judgment and an order for a new trial.' *Stegall v. Crossman*, Montgomery App. No. 20306, 2004-Ohio-4691, ¶ 29, citing *Prior v. Tooson*, Clark App. No. 2002-CA-91, 2003-Ohio-2402, ¶ 29. * * * Because the trier of fact sees and hears the witnesses and is particulary competent to decide 'whether, and to what extent, to credit the testimony of particular witnesses,' we must afford substantial deference to its determinations of credibility. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288." *In re Adoption of C.S.,* Montgomery App, Nos. 20557, 20558, 20559, 2004-Ohio-5933, ¶ 23.

A. Child Support Paid on Behalf of A.M.H.'s Siblings

{¶ 16} R.N. did not argue below that his court-ordered child support payments for the benefit of his older children satisfied R.C. 3107.07 as to A.M.H. In the interest of thoroughness, however, we will briefly address this argument.

{¶ 17} We note that by its express language, R.C. 3107.07(A) provides that parental consent to adoption is not required when the parent fails to provide for the maintenance and support of the minor child that is subject to the petition of adoption.

{¶ 18} Further, R.N.'s reliance upon *In the Matter of the Adoption of Alexander*, for the proposition that the child support he pays pursuant to court order

for his older children somehow inures to the benefit of A.M.H., for R.C. 3107.07(A) purposes, is misplaced. In *Alexander*, we reversed the trial court's decision that the natural father's consent to adoption was not necessary, because the father's mother had delivered money to the Bureau of Support as gifts to her son for his support obligation, and the funds were deposited to the father's credit with the Bureau of Support. In other words, in *Alexander*, support was received, specifically for the child at issue, and it was attributed to the child's father, belying petitioner's claims therein of a failure to support.

{¶ 19} Any support R.N. may have paid for his older children has no bearing on the issue of his maintenance and support of A.M.H., and he has provided no authority to the contrary. We further note that, when asked at the hearing about his obligation to his other children, R.N. responded, "* * * I just talked to child support recently and they said I was roughly around $12,000.00 in arrearges [sic]." When asked if he had specifically provided financial support for A.M.H. during the relevant period, R.N. answered, "None whatsoever."

{¶ 20} Although not raised below, we conclude that clear and convincing evidence shows that R.N. failed to provide maintenance and support to A.M.H. by means of child support payments to his older children.

B. In-kind Maintenance and Support

{¶ 21} According to the probate court, "[t]estimony from the parties revealed that Robert's entire contributions for the relevant period were a package of diapers, a single can of formula, and some baby food."

{¶ 22} The parties stipulated that R.N. purchased one package of diapers

which he gave to a neighbor of A.H.'s to give to A.H., "because there was a restraining order on me. I couldn't go over there." According to A.H., the package of diapers was "in return for the money that I had paid for him, for his rent the month before. Which didn't even equal what the rent was. I paid over $400.00 for his rent." R.N. conceded that A.H. paid one month's rent for him. According to A.H., R.N. "promised to pay me back for the money that I had a month prior provided to him." While R.N. provided the package of diapers, his doing so was merely in gratitude for the rent payment A.H. had made, and not in the nature of A.M.H.'s maintenance and support.

{¶ 23} Regarding R.N.'s provision of formula and baby food, the evidence was in dispute. The record reveals that R.N. received Veterans Administration ("V.A.") assistance during the months of December, 2007, January and February, 2008, and R.N. testified that he purchased two large cans of formula for A.M.H. with his V.A. vouchers. Regarding the formula, R.N. stated that he gave one can to A.H., and as to the other can, he "requested that she could give me * * * finance back * * * for that because I had no money." R.N. testified that A.H. gave him $10.00 for the can, while A.H. testified that she gave him $15.00 in exchange for the second can of formula. According to A.H., "he traded me cash for formula."

{¶ 24} R.N. also testified that he "purchased approximately $35.00 worth of baby food" for A.M.H., with V.A. food vouchers. According to R.N., he kept some of the baby food at his home for visitation purposes, giving the rest of it to A.H. A.H.'s testimony was clear that she did not receive any baby food from R.N.

{¶ 25} R.N. also testified that he purchased clothing and toys for A.M.H. for

Christmas in 2007 and also in 2008, but that the 2008 gifts remain in R.N.'s possession. A.H. testified that R.N. only provided gifts for the older children, but not for A.M.H., and the probate court clearly believed A.H.'s testimony, crediting him only with one package of diapers, formula and baby food.

{¶ 26} In determining that R.N.'s in-kind contributions did not constitute support or maintenance, the probate court in part analogized the facts herein with the facts found in the case of *In re Adoption of Campbell* (April 14, 2000), Montgomery App. Nos. 18042, 180043. In *Campbell,* the biological mother of two minors subject to a petition for adoption admitted that she never paid support pursuant to a juvenile court order. Although she did not have many visits with the children, she testified that she brought gifts for the children each time she visited. Finally, she bought Christmas gifts and bought one meal at Burger King during one visit.

{¶ 27} After reviewing numerous cases addressing the issue of what constitutes sufficient support to maintain the right to withhold consent to adoption, we determined in *Campbell*, "[o]ne consistent theme exists throughout * * * : meager contributions to a child's support and maintenance have been held to require a parent's consent, but mere gifts and other incidentals have not." We concluded that the mother unjustifiably failed to support her daughters for the relevant period. See also, *In re Adoption of Dues* (Aug. 29, 1991), Montgomery App. No. 12112 ("We are not prepared to hold that an isolated purchase of clothes and a Christmas gift fulfills parent's obligation of support for their child"). But see, *Matter of Adoption of Mills* (October 25, 1993), Warren App. No. CA93-04-036, (finding support and

maintenance established where mother visited son in Michigan every other weekend, gave the custodial parents money and "provided enough diapers to last for a two week period as well as clothing, food, and toys," and also medical insurance at an additional cost to her of $40 per month.)

{¶ 28} Having reviewed the record, we find the matter herein somewhat distinct from *Campbell*, since the items R.N. provided were not in the nature of gifts, but we conclude, as did the probate court, that one package of diapers, formula, and an unsubstantiated amount of baby food, do not constitute maintenance and support pursuant to R.C. 3107.07(A). Regarding the diapers and one can of formula, the items were not freely given, and the circumstances under which they were provided appear to be more to the benefit of R.N. than A.M.H. A.H.'s testimony, which is corroborated by R.N.'s, indicates that A.H. provided cash to R.N. at his request in exchange for one can of formula. In other words, he cashed out his V.A. vouchers. The record further suggests that R.N. provided diapers in exchange for having had his rent paid by A.H. Finally, A.H. denied receiving any baby food and Christmas gifts for A.M.H. from R.N. It is significant that the probate court credited A.H.'s testimony as to credibility over R.N.'s. Accordingly, we conclude that M.H. met his burden by clear and convincing evidence that R.N. failed to provide maintenance and support for A.M.H. by means of in-kind support during the relevant period.

C. Maintenance and Support During Visitation

{¶ 29} We note that R.N. did not argue before the probate court that he provided support and maintenance to A.M.H. during visitation, although R.N.

asserts in his brief that he "provided support and maintenance for the infant child during his visits." The record, however, contradicts his assertion. R.N. testified that after he moved down the street from his children, he would "sometimes" see A.M.H. everyday or every couple of days. According to R.N., "I would get off work * * * [and] I would call [A.H. and] ask her if I could come down she would tell me to come down to the house. I would go down and spend a half an hour, a hour and half down at her house with her and [A.M.H.]" R.N. also stated that he would have A.M.H. in his home "for an hour to two hours at a time," and that he would then call A.H. to pick up the baby. R.N. stated that these visitations occurred over a two month period before he moved to New Paris, Ohio, for six months to live with his sister, during which time he did not see A.M.H.

{¶ 30} When asked if R.N. saw A.M.H. frequently when he lived down the street from him, A.H. testified, "Not regularly, no. It was just when he wanted to see him, you know, the kids would walk down the street * * * * and then he would ask randomly I think it was just a few times that he had seen him. And it would be no more than an hour or hour and a half at a time. He would cry or something he would call and say could you come and get him or the kids would wheel him back down in the * * * stroller." A.H. testified that R.N. did not provide food during his infrequent visits with A.M.H., and that "[o]ne or two times he * * * saw them, [A.H.] provided food to him in case he needed to eat and he couldn't handle the baby long enough to have to feed him." A.H. testified that the last time R.N. saw A.M.H. "was when I attempted to let him see him for [A.M.H.'s] birthday and that was about for ten minutes and that is the last time he saw him."

{¶ 31} There is nothing in the record to suggest that R.N. provided support and maintenance for A.M.H. during his visitations, over a two month period, that often occurred at A.H.'s residence, and which R.N. and A.H. agreed lasted at most an hour and a half to two hours. While R.N. testified that he retained a portion of the baby food to feed A.M.H. during visitation, R.N. did not specifically describe feeding the baby. R.N. and A.H.'s testimony was consistent that after the brief visitations at his residence, R.N. would call A.H. to retrieve A.M.H., suggesting that R.N. was unable meet the baby's needs with food, diapers, clothing, a place to sleep, etc.

{¶ 32} We also note that R.N.'s reliance upon *In re Adoption of Huffman* (Aug. 29, 1986), Mercer App. No. 10-85-4, and *In re Adoption of Pinkava* (Jan.13, 1989), Lucas App. No. L-88-034 is misplaced. In those cases the non-consenting parents had exercised regular, weekly or bi-weekly visitation in the parent's home throughout the relevant period. See also *In re Adoption of McNutt* (1999), 134 Ohio App.3d 822, 831 ("Thus, Burgess presented undisputed evidence that, during the one-year period in question, he provided Justine with necessities in the course of exercising his visitation privileges with her."); *Gorski,* ¶ 17 ("Father sees the child every other weekend, providing him with food, clothing, and toys. Although father concedes he did not pay any support through the Child Support Enforcement Agency during the [relevant period], we find that fact alone is not of such magnitude as to be the equivalent of abandonment.")

{¶ 33} Having reviewed the record, we conclude that clear and convincing evidence exists that R.N. did not provide maintenance and support for purposes of

R.C. 3107.07(A) during his brief visitations with A.M.H.

{¶ 34} R.N.'s first assignment of error is overruled; A.H. provided clear and convincing evidence that R.N. failed to provide maintenance and support for A.M.H. during the relevant period.

{¶ 35} R.N.'s second assignment of error is as follows:

{¶ 36} "THE TRIAL COURT'S FINDING THAT APPELLEE HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT [R.N.'S] JOB LOSS AND MENTAL ILLNESS DID NOT CONSTITUTE A FACIALLY JUSTIFIABLE CAUSE FOR FAILURE TO PROVIDE MAINTENANCE AND SUPPORT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 37} "A. [R.N.'S] MENTAL HEALTH DISABILITY PROVIDED JUSTIFIABLE CAUSE AS TO HIS FAILURE TO PROVIDE MAINTENANCE AND SUPPORT.

{¶ 38} "B. THE NATURAL PARENT'S FAILURE TO REQUEST FINANCIAL ASSISTANCE FROM [R.N.] PROVIDES JUSTIFIABLE CAUSE.

{¶ 39} "C. [R.N.'S] LACK OF RESOURCES PROVIDED JUSTIFIABLE CAUSE AS TO HIS FAILURE TO PROVIDE MAINTENANCE AND SUPPORT."

{¶ 40} We will consider subparts A. and C. together as they are interrelated.

A. Mental Health Disability and C. Lack of Resources

{¶ 41} When asked if he had justifiable cause for failing to provide maintenance and support for A.M.H., R.N. responded, "My medical condition. If I had a job, I would do more." The probate court determined that R.N.'s employment "has only been limited by his own actions," and we agree.

{¶ 42} R.N. testified that he was employed at Architectural Maintenance from April, 2007 until November 14, 2007, when he lost his job "due to the circumstances," during the month that he moved out of the home he shared with A.M.H. and M.H. moved in. R.N. testified that he was making $12.00 an hour at Architectural Services, working 40 hours a week "some weeks." R.N.'s first job in 2008 was at Del Monde, where he worked 33 to 35 hours a week for $10.00 an hour, from March to April, but he "was arrested and they let me go." R.N. testified that he then umpired for the Greater Dayton Umpire Association and the Miami Blue Umpires Association, in the summer of 2008. R.N. testified that in 2008, he made $900.00 for the season umpiring for the Greater Dayton Umpire's Association, and he made $562.00 in 2008 working for the Miami Valley Umpire's Association. R.N. also worked at the Christmas Tree shop from November, 2008 until January 2, 2009. R.N.'s W-2 from the Christmas Tree shop indicated that he made $898.23 in 2008.

{¶ 43} According to R.N., he worked only "briefly" at each job because he suffers from Anti-Social Personality Disorder and Bi-Polar Disorder. R.N. testified, "if I wasn't taking my medication my job would be gone within a month, a month and a half. During Architectural Maintenance I was taking my medication, everything was fine." R.N. testified that he is no longer capable of working except for umpiring, which "is deemed recreational therapy for me. That's the only reason why I'm able to contain that position."

{¶ 44} R.N. testified that he has unsuccessfully sought a disability determination from the Veterans Administration for many years, from the Social

Security Administration, and from the military, but that he has never been determined to be disabled. R.N. testified that he now receives State Disability Assistance, but there was no evidence presented to verify this statement, and there is no evidence of the exact nature of the assistance he receives. R.N. also testified that he receives food stamps.

{¶ 45} A.H. was asked if, during the time between A.M.H.'s birth and the time when R.N. moved out, if R.N. was working and providing support and maintenance for her and A.M.H., and she responded, "Mostly, yes." According to A.H., R.N. "[i]s fully capable of holding down a job. He umpires every year and he manages not to mess that up. Every season he goes from spring until the middle of fall. So, almost three seasons he's able to keep that up. * * * he goes to jail sporadically for different things. So, that's been the only thing that has kept him from being able to do that. He can hold down a job. Mainly it's his temper." A.H. further testified that R.N. told her, "now that [M.H.] is in the picture, F the kids and let him take care of all of them. And for a very long time he * * * didn't provide any support. June of '07 until December I think it was he didn't provide any support for the older two." A.H. further testified that R.N. "[d]oesn't behave properly around his children. I wasn't ordered to make him see them. And he didn't feel the need to pay support. So, my son got to know a different father and I wasn't going to confuse him and put him in a harmful, emotionally, mentally and harmful situation * * * [R.N.] can't control himself."

{¶ 46} We agree with the trial court's determination that R.N.'s argument that he cannot work due to his "medical condition" is refuted by his own, as well as

A.H.'s testimony. R.N. testified that his "condition" responds to treatment; he testified that he is able to work when on medication. A.H. testified that R.N. "mostly" worked and supported his family until the petitioner moved into her home. R.N.'s testimony about being in arrears regarding his other children is consistent with A.H.'s testimony that he withheld support because of M.H.'s purported ability to support the family. R.N.'s statement, "F the kids and let [M.H.] take care of all of them," suggests that R.N.'s failure to support his family is deliberate and not the result of a "medical condition" or lack of resources. In other words, R.N. has not shown that his failure to provide is due to impossibility, extreme difficulty, or significant interference and discouragement by the natural parent to prevent the payment of support. As the probate court noted, R.N. was able to provide gifts for his other children, and, as a smoker, buy cigarettes for himself.

{¶ 47} Finally, we note that R.N.'s reliance upon *In re: Adoption of Richison* (June 11, 1999), Montgomery App. No.17488, and *In the Matter of the Adoption of Way*, Washington App. No. 01CA23, is misplaced. In *Richison,* the natural father had justifiable cause for his failure to provide maintenance and support where he had spinal cord damage through his neck, at 3-C and 4 of his vertebrae, he had tried to work full time, and was unable to work eight hours a day. Unlike the matter herein, we concluded in *Richison* that the natural father "made reasonable efforts to earn income, but that his injury severely limits his earning ability."

{¶ 48} Also, R.N. cites *Way* for the proposition that he had "no reason to know or believe that he had a duty to make cash support payments for the infant child when [M.H.] did not request it from [R.N.] and no order existed requiring him to

pay any amounts beyond the amounts he already was paying for the older two children." *Way* is distinguishable from the matter herein because the natural mother in *Way,* a "slow learner" living on Social Security disability benefits, had *specifically* been relieved of any financial obligation by the juvenile court, and she "could have reasonably assumed that this order relieved her of any obligation to provide support of any kind." The Fourth District found "sufficient evidence to establish" that she justifiably failed to support her daughter.

B. Lack of a Child Support Order for A.M.H.

{¶ 49} R.N. did not argue below that the absence of a child support order provides justifiable cause for R.N.'s failure to support A.M.H. R.N. relies upon *In re: LaValley,* (July 9, 1999), Montgomery App. No. 17710, in which we determined, quoting *In re Adoption of Hadley* (May 6, 1991), Greene App. No. 90 CA 117, "'Where a child's needs are being adequately provided for by [custodial parents], who are in a better financial position than the natural parent, and the [custodial parents], being aware of the natural parent's financial circumstances, express no interest in receiving financial assistance from the natural parent, we conclude that the natural parent's failure to contribute towards the support of the child is not 'without justifiable cause,' for purposes of R.C. 3107.07(A)." The custodians of the child in *LaValley,* who had been married for over 25 years, had a combined income of nearly $100,000, and it was undisputed that they did not seek child support from the child's mother, who opposed the adoption.

{¶ 50} While there is no child support order in place for A.M.H., R.C. 3103.03 provides, "(A) The biological * * * parent of a minor child must support the parent's

minor children out of the parent's property or by the parent's labor." Further, the record reveals that R.N. executed a paternity affidavit on April 29, 2007, which provides in part, "I am the natural father of the child named on this form and I assume the paternal duty of support of the child."

{¶ 51} There is no evidence in the record to suggest that R.N. failed to support A.M.H. based upon a reasonable belief that, in the absence of a child support order, he was not obligated to support his minor child. R.N. has not been relieved of his common law duty of support of A.M.H., as in *Way;* See also *In re Adoption of W.K.M.*, Montgomery App. No. 21373, 2006-Ohio-2326. A.H. testified that R.N. did not inquire, during the relevant period, about A.M.H.'s need for maintenance and support. R.N.'s contact with A.H. was irregular, and during six months of the relevant period, R.N. was absent. While R.N. testified that A.H. did not ask him for financial support, given his behavior, discussed above, it is reasonable to conclude that A.H. recognized the futile nature of such a request. Finally, A.H. testified that she had been trying to get a child support order in place at the time of the hearing, and that a court date had been set on the issue of A.M.H.'s support.

{¶ 52} Having reviewed the entire record, weighed the evidence and all reasonable inferences, and having considered witness credibility, we cannot determine that the probate court lost its way such that a manifest miscarriage of justice occurred. Substantially deferring to the probate court's credibility determinations, we agree that M.H. has established, by clear and convincing evidence, that R.N. failed to provide support and maintenance for A.M.H. during the

relevant period, and that his failure was without justifiable cause. Since the judgment of the probate court is not against the manifest weight of the evidence, the judgment of the probate court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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