[Cite as *In re Adoption of R.M.Z.*, 2009-Ohio-5627.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF R.M.Z.	:	C.A. CASE NO. 23511
	:	T.C. NO. 2008 ADP 00031
	:	(Civil appeal from Common Pleas Court, Probate Division)

. . . . . .

O P I N I O N

Rendered on the 23rd day of October, 2009.

. . . . . .

DAVID M. McNAMEE, Atty. Reg. No. 0068582, 42 Woodcroft Trail, Suite D, Beavercreek, Ohio 45430
Attorney for Plaintiff-Appellant, S.L.

RICHARD HEMPFLING, Atty. Reg. No. 0029986, 15 W. Fourth Street, Suite 100, Dayton, Ohio 45402
Attorney for Defendant-Appellee, M.Z.

. . . . . .

FROELICH, J.

{¶ 1} S.L. appeals from a judgment of the Montgomery County Court of Common Pleas, Probate Division, which denied his petition for adoption of R.M.Z. after concluding that the consent of the biological father, M.Z., was required.

I

{¶ 2} R.M.Z. was born in June 2004. His mother, M.L., and his father,

M.Z., were never married. In December 2004, M.Z.'s paternity was established, and he was ordered to pay child support in the amount of $54 per week. He made payments from December 2005 through July 2006, totaling $2,550. M.Z. was incarcerated in December 2006.

{¶ 3} In September 2007, M.L. married S.L. On March 14, 2008, S.L. filed a petition for adoption of R.M.Z. M.L. consented to the adoption, and S.L. alleged that M.Z.'s consent was not required because M.Z. had failed, without justifiable cause, to support or to communicate with R.M.Z. for the year preceding the filing of the petition. M.Z. objected to the petition. The trial court held a hearing on April 6, 2009, which consisted primarily of the admission of stipulations and joint exhibits. Following the hearing, the trial court found that M.Z.'s consent to the adoption was required. The court held that he had not failed to communicate with or to support R.M.Z. without justifiable cause in the year preceding the filing of the petition for adoption.

{¶ 4} S.L. appeals, raising one assignment of error.

II

{¶ 5} S.L.'s assignment of error states:

{¶ 6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING APPELLEE'S CONSENT FOR ADOPTION WAS REQUIRED, AS THE APPELLANT DID DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THERE WAS NO CONTACT AND NO SUPPORT FOR OVER ONE (1) YEAR PRIOR TO THE TIME OF FILING THE PETITION FOR ADOPTION, AND NO JUSTIFIABLE REASON FOR LACK OF THE SAME."

{¶ 7} S.L. claims that the trial court abused its discretion in concluding that M.Z.'s consent to R.M.Z.'s adoption was required. He asserts that M.Z.'s failure to pay any child support in 2007 and 2008 was not justifiable because he was receiving $25 per month while in prison. He also contends that M.Z.'s contact with M.L. did not constitute contact with the child in the year prior to the filing of the petition for adoption.

{¶ 8} "The right of a natural parent to the care and custody of [his or] her children is one of the most fundamental in law. This fundamental liberty interest of natural parents in the care, custody and management of their children is not easily extinguished. *Santosky v. Kramer* (1982), 455 U.S. 745, 753-754. Adoption terminates those fundamental rights. R.C. 3107.15(A)(1). Accordingly, adoptions are generally not permissible absent the written consent of both parents. R.C. 3107.06." *In re Adoption of Stephens,* Montgomery App. No. 18956, 2001-Ohio-7027.

{¶ 9} Pursuant to R.C. 3107.07(A), 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." Because R.C. 3107.07(A) is written in the disjunctive, *either* failure to communicate *or* failure to support during the one-year time period is sufficient to obviate the need for a parent's consent. *In re Adoption of Ford*, 166 Ohio App.3d 161, 2006-Ohio-1889, at ¶4, citing *In re Adoption of McDermitt* (1980), 63 Ohio

St.2d 301, 304.

{¶ 10} The party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the biological parent failed to support or to communicate with the child during the requisite one-year period and that there was no justifiable cause for the failure of support or communication. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus; *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, 166. To prove facts by clear and convincing evidence requires that the proof "'*** produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Holcomb*, supra, at 368, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 11} Once the petitioner has established, by clear and convincing evidence, that the biological parent has failed to communicate with or to support the child for the one-year period, the burden of going forward with evidence shifts to the biological parent to show some 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 at all times with the petitioner, who must establish the lack of justifiable cause by clear and convincing evidence. Id.

{¶ 12} The question of whether justifiable cause exists in a particular case is a factual determination for the probate court and will not be disturbed upon appeal unless such determination is unsupported by clear and convincing evidence. *Holcomb,* supra, at paragraph three of the syllabus.

{¶ 13} S.L.'s petition for adoption was filed on March 14, 2008. Thus, the

court had to determine whether M.Z. had failed to support or communicate with R.M.Z. in the year preceding the filing date.

A. Failure to Support

{¶ 14} The parties do not dispute that M.Z. failed to support R.M.Z. in the year preceding the filing of the petition for adoption. M.Z. was incarcerated during this time. M.Z. claimed that, due to his incarceration, his failure to support R.M.Z. had been justified. S.L. disagreed, pointing out that M.Z. had had some income while in prison but had not used any of this money for R.M.Z.'s support.

{¶ 15} The trial court found that M.Z.'s paternity had been established in December 2004, and he had been ordered by an Indiana court to pay $54 per week in child support. M.Z. paid a total of $2,550 in child support payments between December 2005 and July 2006, when the payments stopped. M.Z. was incarcerated from December 2006 through March 2009. The trial court found that he received "a mere $25 per month for state institutional pay" during this period, and from July 2007 through January 2008, M.Z.'s account balance at the prison was only a couple of cents. The court also found that, in January 2008, M.Z. had sought a modification of his child support obligation because of his situation and inability to pay, but that M.Z. had subsequently withdrawn his request for a modification because he believed that he would be able "to take care of his obligation once he was released and began working."

{¶ 16} S.L. argues that, because of the life that M.Z. decided to lead (which resulted in prison), M.Z. can hardly justify not being able to make his payments. S.L. cites *In re Adoption of A.M.W.* (March 31, 2008), Medina App. Nos.

07CA0062-M and 07CA0063-M, for the proposition that the incarcerated father's consent was not required since he failed to pay support while receiving pay for work while in prison. However, in *A.M.W*., there was evidence in the record that the father received between $57 and $72 monthly in prison, including $17 in prison "pay" and the rest from his sister. Further, there was evidence that he spent some of his money for legal expenses and a writing course and that he did not send even small checks to the mother for fear of insulting her, which he feared would negatively affect his criminal appeal. The trial court specifically found that the father "repeatedly placed his own needs before those of the children." Id. at ¶15.

{¶ 17} There was no such evidence in R.M.Z.'s case. If *A.M.W.* holds that a father's proven income and the choices he makes about how to expend it are relevant to a court's decision as to whether a failure to support is justified, we agree. To the extent the holding suggests that failure to support during a period of imprisonment, even with minimal state compensation, does away with the need for an incarcerated parent's consent, we respectfully disagree.[1]

{¶ 18} The trial court concluded that, under the circumstances presented, M.Z.'s failure to provide support for R.M.Z. was justifiable. The trial court relied on our decision in *In re Adoption of McMillion* (Dec. 31, 1991), Miami App. No. 91-CA-14, which also involved an incarcerated father's failure to pay support from his institutional pay. In *McMillion*, we found that the trial court had not abused its

[1]An argument can be made that termination of parental rights due solely to incarceration results in damage to the parent, the child, and the community. Clarke, Maternal Justice Restored (2006), 50 How. L. J. 263, 271.

discretion in finding justifiable cause for the father's failure to support the child, observing:

{¶ 19} "It was undisputed that the appellee failed to provide any support for his son during the one year preceding the petition. The trial court found that the only income earned by the appellee from his prison labor was 'as little as a few dollars a month to as much as $50.00 a month.['] The court found that the appellee was required by the federal institution to provide for his own toiletries and food snacks and all his income went for that purpose. The trial court found that appellee's failure to provide support for his son was with justifiable cause."

{¶ 20} In this case, the trial court found that the facts were very similar to *McMillion.* Although the trial court did not make any specific findings regarding M.Z.'s expenditure of his minimal prison income, it did conclude that, considering his "meager income of $25 a month," he had had justifiable cause for his failure to pay support. The trial court did not abuse its discretion in reaching this conclusion.

B. Failure to Communicate

{¶ 21} Incarceration of a parent, absent additional circumstances, does not justify failure to communicate with a child, because it does not preclude letter-writing and phone calls. *In re Adoptions of Doyle*, Ashtabula App. Nos. 2003-A-0071 and 2003-A-0072, 2004-Ohio-4197, at ¶14; *In re Adoption of Black* (Nov. 29, 1985), Sandusky App. No. S-85-21. The trial court found that M.Z. had regularly sent letters to M.L. so he could keep in contact with R.M.Z. while he was in prison. M.L. admitted that she had received the letters and, for the most part,

had not responded to them. Prior to the filing of the petition for adoption, M.Z. had petitioned the Indiana court to require M.L. to bring R.M.Z. to the prison for monthly visits and to require her to keep her current address on file so he could stay in contact with R.M.Z. He also asked M.L. in his letters to bring R.M.Z. for visitation, but she refused.

{¶ 22} The trial court concluded that M.Z. had "diligently sought to develop a bond with his young son, despite being incarcerated. He did not allow his incarceration to hinder his attempts to remain in contact with his son. However, he received no cooperation from the child's mother." We also note that R.M.Z. was only three years old when S.L. filed his petition, so he would have been unable to access or read letters written directly to him without help. It was undisputed that M.Z. had sent numerous letters to M.L. Based on all of these considerations, the court concluded that M.Z. had done "all that he could" to maintain contact with R.M.Z. in the year preceding the filing of the petition for adoption, and that he had not failed to communicate with the child without justifiable cause. The trial court did not abuse its discretion in concluding that M.Z. had made his best efforts to maintain contact with his son, even if those efforts proved unsuccessful.

{¶ 23} In sum, the trial court did not abuse its discretion in concluding that, in the year preceding the filing of S.L.'s petition for adoption, M.Z. had had justifiable cause for his failure to support R.M.Z. and for his lack of direct communication with R.M.Z. Thus, the trial court did not abuse its discretion in concluding that M.Z.'s consent to the adoption was required.

{¶ 24} The assignment of error is overruled.

III

{¶ 25} The judgment of the trial court will be affirmed.

. . . . . .

DONOVAN, P.J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

David M. McNamee
Richard Hempfling
Hon. Alice O. McCollum