

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

In the Matter of:	:	Case No. 14CA3654
	:	
The Adoption of J.A.C.	:	
	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
	:	<b>RELEASED: 04/27/2015</b>

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APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio for Appellant.

George L. Davis, IV, George L. Davis, III Co., L.L.C., Portsmouth, Ohio for Appellee.

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Harsha, J.

{¶1} David D., the biological father of J.A.C., appeals the probate court's judgment finding that his consent is not required for the adoption of J.A.C. by Kevin C., the step-father, and the finding that granting the adoption is in the child's best interest.

{¶2} David contends that the probate court erred when it found that his consent to the adoption was unnecessary because Kevin failed to prove by clear and convincing evidence that David's lack of monetary support or contact was unjustified. The probate court did not err in finding Kevin satisfied his burden of proof. After Kevin proved failure of payment, David failed to go forward with evidence to establish a justifiable cause. His unemployment was voluntary and did not excuse his obligations to pay child support. And there was no evidence of any impediments or interference with David's supervised weekly visitation schedule that would excuse him from exercising his visitation rights. Thus Kevin satisfied his burden of proof. We overrule David's first assignment of error.

{¶3} Next David argues that the probate court abused its discretion when it determined that the adoption was in the best interest of the child. David argues that the statutory factors enumerated in R.C. 3107.161(B) clearly demonstrate that Kevin's petition to adopt J.A.C. should be denied. The probate court did not abuse its discretion; rather the probate court gave due consideration to David's argument that he has overcome his drug use and had begun actively paying child support through the domestic court. David's contentions that Deborah, the biological mother, rebuffed his attempts to make contact with J.A.C. and that she attempted to poison their son's attitude toward him are not supported by the record. Finally, his argument that there is significant doubt about whether the marriage between Kevin and Deborah will succeed given that this is Deborah's third marriage is tenuous speculation. We overrule David's second assignment of error and affirm the probate court's judgment.

### I. FACTS

{¶4} David D. and Deborah C., who are J.A.C.'s biological parents, divorced in 2008. David was entitled to supervised visitation with J.A.C. for two hours, one day a week and was required to make monthly child support payments of \$397.71. Later Deborah married Appellee Kevin C. and in October 2013, Kevin and Deborah petitioned the probate court for a step-parent adoption of J.A.C. They alleged that David's consent to the adoption was not required because he had failed to provide more than de minimis contact with the child or provide maintenance and support for at least one year prior to the filing of the adoption petition. David objected to the adoption, denied that he had not had more than de minimis contact with the child in the previous year, and argued that his failure to provide support was justified by his loss of employment.

{¶15} The probate court held a hearing on whether David's consent to the adoption was needed. On the question of whether David had more than de minimis contact with J.A.C., the court found that David was under a court order that all of his parenting time was to be supervised. David had one visit, which lasted less than two hours, with the child in the one year prior to the filing of the adoption petition. David had made no other attempts to exercise parenting time by phone, email, letter, personal contact or otherwise and Deborah had done nothing to conceal the child or deny parenting time from David. As a result the court found that Kevin had established by clear and convincing evidence that David had failed to provide more than de minimis contact with the child during the one year period, without justifiable cause, and that the burden shifted to David to show by clear and convincing evidence some facially justifiable cause. Because the only reason David provided for not contacting the child more was that the supervised visits made him feel as though he were "under a microscope", the probate court found that David failed to show some justifiable cause for his lack of contact.

{¶16} On the question of whether David had provided maintenance and support to the child during the one-year period, the court found that it was undisputed that David had made no court ordered support payments during the one-year term. Thus, the court looked to see whether David had a justifiable cause for failing to pay support. The court found that, while David's failure to provide support was due to his unemployment, his unemployment was caused by his failure to pass a drug test and therefore was voluntary. The court noted that Ohio courts do not modify or terminate child support when the unemployment is voluntary. Additionally, the court found that David had made

no effort to obtain employment. Therefore, the court found that Kevin established by clear and convincing evidence that David failed to support the child for the one-year period and that this failure was without justifiable cause. David had failed to provide evidence of some facially justifiable cause for his failure to make child support payments. Because David had nothing more than de minimis contact and had failed to provide support, both without justification, the court held that David's consent to the adoption was unnecessary.

{¶7} The probate court held a separate hearing on Kevin's adoption petition and determined that the adoption would be in the child's best interest. The court noted that under R.C. 3107.161(C) David had the burden of showing that Kevin's adoption of J.A.C. was not in the child's best interest and that it was not the least detrimental available alternative. After it applied the factors set forth in R.C. 3107.161(B) to the evidence presented at the hearing, the probate court determined that virtually every factor was neutral to or favored the petitioner and that David had failed to meet his burden to show that the adoption was not in the child's best interest. The court granted Kevin's adoption petition and David appealed.

## II. ASSIGNMENTS OF ERROR

{¶8} David raises two assignments of error for our review:

1. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT DAVID [D.'S] CONSENT TO THE ADOPTION WAS NOT REQUIRED BECAUSE APPELLEE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HIS LACK OF MONETARY SUPPORT AND LACK OF CONTACT WAS UNJUSTIFIED.

2. TRIAL COURT ABUSED ITS DISCRETION BY DETERMINING THAT THE FINALIZATION OF THE ADOPTION WAS IN THE BEST INTEREST OF THE CHILD.

### III. LAW AND ANALYSIS

#### A. Timeliness of the Notice of Appeal

{¶9} Although the probate court entered its order on the issue of consent on May 9, 2014, and David did not file his appeal until September 11, 2014, the notice of appeal is timely. In *In re Adoption of Greer*, 70 Ohio St.3d 293, 638 N.E.2d 999 (1994), the Supreme Court of Ohio held that, “[a] trial court's finding pursuant to R.C. 3107.07 that the consent to an adoption of a party described in R.C. 3107.06 is not required is a final appealable order.” *Id.* at paragraph one of the syllabus. See also *In re Adoption of Johnson*, 72 Ohio St.3d 1217, 651 N.E.2d 429 (1995). Accordingly, the probate court's May 9, 2014 entry on the issue of consent is a final appealable order. Although David failed to file a notice of appeal from the May 9, 2014 judgment entry within thirty days from that date, that failure is not fatal.

{¶10} App. R. 4(B)(5) provides:

Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ.R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ.R. 54(B).

{¶11} Thus, even though the probate court's finding that David's consent is not required was a final appealable order, it is considered a “partial final judgment” that is also appealable under App.R. 4(B)(5) thirty days after the court renders a final order on all issues in the case. See *In re Adoption of S.L.N.*, 4<sup>th</sup> Dist. Scioto App. No. 07CA3189, 2008-Ohio-2996; *In re Adoption of Eblin*, 126 Ohio App.3d 774, 776, 711 N.E.2d 319 (3<sup>rd</sup> Dist. 1998). See also the dissenting opinions in: *In re Adoption of Knauff*, 4<sup>th</sup> Dist.

Highland App. No. 01CA7, 2001-Ohio-2577 and *In re Adoption of Carter*, 4<sup>th</sup> Dist. Gallia App. No. 95CA11, 1995 WL756569 (Dec. 15, 1995). Because David filed his notice of appeal within 30 days of the probate court's issuance of the final order that disposed of the remaining claim in the adoption petition, his appeal is timely and we have jurisdiction over his appeal.

#### B. Was Consent Necessary?

{¶12} The relationship between a parent and child is a constitutionally protected liberty interest. See *In re Adoption of Zschach*, 75 Ohio St.3d 648, 653, 665 N.E.2d 1070 (1996). Therefore, a parent's consent to an adoption is required and any exception to this requirement “must be strictly construed so as to protect the right of natural parents to raise and nurture their children.” *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976).

{¶13} R.C. 3107.07(A) provides for exceptions to requiring the natural parent's consent for adoptions:

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, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact 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.

{¶14} “[T]he 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*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987) paragraph one of the syllabus.

“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.) *Id.* at 167, 23 OBR at 333, 492 N.E.2d at 143.

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.

*Id.* at 104, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986).

{¶15} “The question of whether a natural parent's failure to support his or her child has been proven by the petitioner by clear and convincing evidence to have been without justifiable cause 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.” *Id.* at paragraph four of the syllabus. A judgment is not against the manifest weight of the evidence if some competent, credible evidence in the record supports it. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978) syllabus.

{¶16} As we have noted in previous decisions, the word “justifiable” means “[c]apable of being legally or morally justified; excusable; defensible.” Black's Law Dictionary (8th Ed.2004) 882. Some facially justifiable reasons for failure to support one's child are: (1) unemployment and a lack of income, and (2) the custodian, 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. *In re Adoption of Hughes*, Ross App. No. 07CA2947, 2007-Ohio-3710, ¶¶ 20-21.

### 1. Failure to Provide Support

{¶17} It is undisputed that David failed to provide any support to the child during the year prior to the date Kevin's adoption petition was filed. The only issue was whether his failure was justified.

{¶18} Here Kevin presented evidence that David was under a court order to provide monthly support payments and that Deborah did not refuse or waive support. Kevin also presented evidence that David was employed, but his employer fired him because of his illegal drug use. The probate court noted that David's termination as a result of his decision to use illegal drugs was a voluntary act that did not justify modification of David's child support obligations and thus, did not provide a justifiable excuse for his failure to pay them. *See Fuller v. Fuller*, 4<sup>th</sup> Dist. Lawrence App. No. 99CA04, 2000WL807224 (June 14, 2000) citing and discussing *Cole v. Cole*, 70 Ohio App.3d 188, 590 N.E.2d 862 (6<sup>th</sup> Dist. 1990).

{¶19} Kevin also presented evidence that David was not under any disability, but he nevertheless failed to take any steps to secure employment after he was fired. After David was fired, he submitted no resumes or job applications. The probate court noted that there was a small town within several miles of David's home, but that David did nothing to seek employment.

{¶20} Kevin submitted evidence that: 1) David's failure to provide support was caused by unemployment due to illegal drug abuse; 2) David had no physical disabilities



preventing him from seeking employment; 3) David's lack of a driver's license was due to his failure to provide child support payments; and 4) David made no attempts to find new employment. Thus, the burden of presenting evidence of some facially justifiable cause for his failure to provide support shifted to David. However, in his own direct testimony, David conceded that he had a drug problem that started several years before he was fired and continued for a year after he was fired. He testified that he was fired, not because of his ongoing drug abuse problems, but because of a "misunderstanding." However, David offered no further testimony or other evidence concerning the purported misunderstanding and conceded on cross examination that had it not been for his drug problem he would probably still be employed there. David's excuse for failing to look for employment was his failure to have a driver's license. However, David lost his license as a result his failure to make his child support payments.

{¶21} David argues that the facts of his case are like the father's in *In re Adoption of B.I.P.*, 4<sup>th</sup> Dist. Jackson App. No. 07CA9, 2007-Ohio-6846. However, as the probate court correctly explained, the only similarities are that both fathers had a drug problem, minimal income, and lived with their parents. In *B.I.P.* there was no court ordered child support obligation, the mother refused the father's offers of monetary support, and father consistently sought employment and counseling through drug treatment programs. Here, David has not made any offers of monetary support, has not made any efforts to gain employment, and has not sought help from drug rehabilitation programs since being fired from his employment for drug abuse.

{¶22} The probate court's determination under R.C. 3107.07(A) that David's consent was not needed was supported by the manifest weight of the evidence. Kevin

presented clear and convincing evidence that David's failure to support his child was unjustified. When the burden to present evidence shifted to David, he failed to rebut the evidence presented by Kevin or provide evidence of some facially justifiable cause for his failure to provide support to J.A.C. Therefore, Kevin satisfied his burden of proof to establish David's failure was not justified. The court's finding that David's lack of support was unjustified is not against the manifest weight of the evidence.

## 2. Failure to Provide more than De Minimis Contact

{¶23} David had one contact with his child during the year prior to Kevin's petition. The contact consisted of one supervised visit lasting less than two hours. David argues that he was repeatedly frustrated in his attempts to exercise visitation by his lack of income and lack of ability to drive. He claims this, coupled with his "feeling as though he was under a microscope", constituted significant discouragement under *In re Adoption of Ramos*, 5<sup>th</sup> Dist. App. No. CT2001-0058, 2002-Ohio-1128, \*3:

"[E]ven if a parent has completely failed to communicate with his children during the prescribed period, his or her consent to adoption nevertheless may be required if there exists justifiable cause for the failure of communication." "Typically, a parent has justifiable cause for non-communication if the adopting spouse has created substantial impediments to that communication." "[S]ignificant interference by a custodial parent with communication between the non-custodial parent and the child, or significant discouragement of such communication is required to establish justifiable cause for the non-custodial parent's failure to communicate with the child."

{¶24} First, David's lack of income and ability to drive were caused by his own voluntary actions, not Deborah's conduct. Therefore, as the probate court correctly determined, they cannot constitute "substantial impediments" or "significant interference" by Deborah. That leaves only David's claim that he felt scrutinized during his supervised visitation. David's evidence consists of his testimony and the cross

examination testimony of Deborah. On cross examination Deborah testified that her mother supervised the one visitation David had during the year prior to the filing of the adoption petition and that her mother did not have hostility towards David. Deborah testified that she looked in on the visit, but did not interfere with or closely scrutinize David:

Q. Were you able to witness any of the interaction in, uh, the spring of two thousand thirteen, the last visit that you testified about? Did you witness any of Jesse's and David's interaction?

A. I would look out the window every now and then. . .

Q. OK.

\* \* \*

Q . . . Uh, I'm just trying to get to did they appear to have, you know, a loving, bonding time or could you even tell?

A. It looked like two kids playing together.

Q. OK.

A. That's all I can tell you.

Q. OK.

A. I don't try to spy too much. It's not my time with him.

**{¶25}** David did not directly contradict Deborah's testimony. Instead, to provide evidence that Deborah significantly interfered or substantially impeded his visits, he testified that he felt like he was under a magnifying glass:

Q. Ok. Have you made any attempts at other visitation with Jesse since that time [April, 2013]?

A. No

Q. Why have you not Mr. Davis?

A. It's very complicated.

Q. Ok. Well, please do your best to explain for myself and for the Court.

THE COURT: That's what we're here for.

A. To go visit my son at his mother's house with, uh, you know, it's difficult sir with she's remarried and it's like I have no freedom to play in the yard. It's like I'm under a magnifying glass. Um, just trying to dig and find everything in the world possibly wrong.

**{¶26}** We find nothing in the testimony concerning visitation that would justify David's lack of contact with his child. David did not testify about any actions or

statements made by Deborah that would constitute any interference – significant or insignificant – on her part. His own subjective feeling of self-consciousness is his only impediment. The probate court's determination under R.C. 3107.07(A) that David's consent was not needed is supported by the manifest weight of the evidence. David failed to provide evidence of some facially justifiable cause for his failure to have more than de minimis contact with J.A.C.

{¶27} Because the probate court correctly determined that David's consent to adoption was not needed under R.C. 3107.07(A), we overrule David's first assignment of error.

#### C. Was Adoption in the Best Interest of the Child?

{¶28} David argues that the trial court abused its discretion by determining that Kevin's adoption of J.A.C. was in the child's best interest.

{¶29} R.C. 3107.161(B) provides that when a court makes a determination in a contested adoption concerning the best interest of a child, the court must consider all relevant factors, which include, but are not limited to, all of the following:

- (1) The least detrimental available alternative for safeguarding the child's growth and development;
- (2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;
- (3) The wishes of the child in any case in which the child's age and maturity makes this feasible;
- (4) The duration of the separation of the child from a parent;
- (5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements;

(6) The likelihood of safe reunification with a parent within a reasonable period of time;

(7) The importance of providing permanency, stability, and continuity of relationships for the child;

(8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(9) The child's adjustment to the child's current home, school, and community;

(10) The mental and physical health of all persons involved in the situation;

(11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any criminal offense involving any act that resulted in a child being abused or neglected [or other specific crimes].

**{¶30}** A person who contests an adoption petition has the burden of providing to the court “material evidence needed to determine what is in the best interest of the child” and the burden of establishing “that the child's current placement is not the least detrimental available alternative.” R.C. 3107.161(C). For these purposes, “least detrimental available alternative” means “the alternative that would have the least long-term negative impact on the child.” R.C. 3107.161(A).

**{¶31}** We reverse a probate court's best-interest determination only if we find an abuse of the court's discretion. To find an abuse of discretion, we consider whether the court's decision is unreasonable, arbitrary, or unconscionable. *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 320, 574 N.E.2d 1055 (1991).

**{¶32}** David argues that the testimony provided at the best interest hearing shows that he has overcome his drug use and had begun actively paying child support through the domestic court. David argues that the testimony shows that Deborah rebuffed his attempts to make contact with J.A.C. and that she attempted to poison their

son's attitude toward him. Finally, he argues that there is significant doubt about whether the marriage between Kevin and Deborah will succeed given that this is Deborah's third marriage. He argues that this lack of stability goes directly to the factors enumerated in R.C. 3107.161(B)(7), "The importance of providing permanency, stability, and continuity of relationships for the child."

{¶33} David contends that the least detrimental alternative would be to deny Kevin's adoption petition. An adoption would sever his relationship with J.A.C, but denying the adoption will allow Deborah to continue to have all parenting decision-making rights and will allow Kevin to serve as "father figure" as long as his marriage to Deborah lasts.

#### 1. Drug and Alcohol Abuse

{¶34} David's argument that he has overcome his substance abuse problems is not supported by the evidence as he continues to struggle with alcohol abuse. Deborah L., J.A.C.'s maternal grandmother, supervised many of David's visitations and testified that on several occasions David appeared for his visitation under the influence of alcohol, slurring his words and stumbling about on occasion. David admitted to having a history of DUIs and that he was drunk in September 2013, the night his father called law enforcement officials to come out to the house. David was charged with having a firearm while intoxicated and convicted of persistent disorderly conduct. Deborah C. testified that she witnessed David under the influence of drugs and alcohol a number of times throughout the relevant time period. Although David denied excessive use of alcohol immediately prior to and during his visitations with J.A.C., he testified that he

had continued to consume alcohol up until about a month before the best interest hearing in July 2014.

{¶35} Even though the evidence shows that David's alcohol abuse problems have resulted in several DUIs, a disorderly conduct conviction, marital difficulties and divorce, David has not sought treatment for his substance abuse problems, other than that which was mandated by his former employer. And his failure to successfully complete that treatment resulted in his job loss. Additionally, David's supervised visitation with J.A.C. was subject to modification if he completed a drug and alcohol assessment. However, during the six years since the issuance of the visitation order, David never completed a drug and alcohol assessment so that he could request unsupervised visitation or other modifications to his visitation.

{¶36} David supports his argument that he has overcome his previous drug use by referencing his testimony at the best interest hearing. The relevant portion of the transcript he cites to in support of his claim that he has overcome his substance abuse problems provides:

Q. . . . did you eventually sit down and look at the situation and say hey I need help and I need to get myself better?

A. Yes.

Q. OK. What steps did you take to do that?

A. I started looking at my father, which is ninety years old. And, realized I'm not getting nowhere, you know. I'm sinking, you know. I'm, I'm not getting nowhere. I said this is not the answer. I started staying away from those types of people. I haven't had a drink, Mr. Loesch, I have not had a drink in a month. I have not even had a drink of beer in a month.

David's claim that he has overcome his problems with alcohol as evidenced by four weeks of sobriety is only one factor the probate court considered. The court specifically considered David's claim when it analyzed the mental and physical health of all persons

and found, “respondent is at best a recovering alcoholic and recovering drug addict.”

The probate court expressly considered David’s claim of sobriety, but rejected the idea that four weeks of sobriety sufficiently established that the adoption was not in the best interest of the child or that the child’s current placement was not the least detrimental available option. The court did not abuse its discretion in coming to that conclusion.

## 2. Child Support Payments

{¶37} David contends that he has been actively paying his child support and that this factor, along with his recent sobriety claim, clearly demonstrates that adoption was not in the child’s best interest. However, the probate court correctly found that David had failed to make any child support payments in the year prior to the filing of the adoption petition and that David only began making payments in response to a contempt finding, to purge the contempt. At the time of the best interest hearing, David’s child support arrearage was over \$14,000 and he had only recently made payments totaling \$1,000 to purge his contempt.

{¶38} The factors set forth in R.C. 3107.161(B) do not specifically list failure to pay child support as a factor for the court to consider and the probate court’s decision does not expressly address this in its decision other than to make a finding of fact that “In order to purge his contempt, respondent paid \$1,000.00 toward his arrearage.” It is evidence that would go to the importance of stable family relationships in R.C. 3107.161(B)(5) and (7) and David’s lack of support and sporadic payments does not support a finding in his favor. The probate court did not abuse its discretion when it implicitly found that David’s efforts to purge his contempt for nonpayment failed to



sufficiently establish that the adoption was not in the best interest of the child or that the child's current placement was not the least detrimental available option.

### 3. Contact with J.A.C.

**{¶39}** David contends that his efforts to visit J.A.C. were rebuffed by Deborah. However, we find no evidence of this anywhere in the record. There was only one instance in which Deborah asked David not to come for the visitation because of a conflict with J.A.C.'s baseball practice schedule. However, she testified that she contacted David to request a change in visitation to a different day that same week. David's argument that he was wrongfully prevented from seeing J.A.C during a Christmas Day visit David's parents had with J.A.C. is also unsupported. The testimony was that Deborah agreed to have David's parents over to see J.A.C. on Christmas Day. This was not David's scheduled supervised visitation day and there was no evidence that David was entitled to any Christmas Day visitation per the domestic court order. The overwhelming evidence in the record shows that David was welcome to exercise his visitation rights as long as he was not under the influence of drugs or alcohol. J.A.C.'s maternal grandparents, David's former in-laws, routinely supervised David's visitation and had a positive, caring long-term relationship with David.

**{¶40}** David also claims that Deborah attempted to poison J.A.C.'s attitude toward him by not taking affirmative steps to inform David of the events in J.A.C.'s life. To the extent this could be considered "poisoning," David contributed equally to the poisoning, acknowledging that he did not take any affirmative steps of his own to be involved with the events in J.A.C.'s life. We cannot find any evidence to support David's

claim that he was denied contact with J.A.C. Therefore we find that the probate court did not abuse its discretion in any manner concerning this argument.

#### 4. Instability in the Marriage

{¶41} David's last argument is that there is significant doubt about whether Kevin and Deborah's marriage will succeed and that this question of stability goes to the "importance of providing permanency, stability, and continuity of relationship for the child." R.C. 3107.161(B)(7). However, there is no evidence in the record that Kevin and Deborah's marriage is unstable or will not succeed. David testified that he did not know anything about Kevin personally, had never seen him interact with J.A.C, did not know the type of relationship Kevin had with J.A.C., could not describe the condition of Kevin and Deborah's home, and was entirely unaware of how J.A.C. was doing in school or in his social life. David's only foundation for his doubts about Kevin and Deborah's stability is his knowledge of her two prior divorces and the couple's relatively short engagement. We find this too tenuous a connection to make where the evidence in the record shows that Kevin and Deborah have had a loving, supportive and stable marriage for two and one-half years as of the time of the best interest hearing. The probate court did not abuse its discretion in finding that the importance of providing a permanent, stable and continuous relationship for J.A.C. was a factor in favor of Kevin's adoption. We overrule David's second assignment of error.

#### IV. CONCLUSION

{¶42} The probate court did not abuse its discretion when it determined that David's failure to provide maintenance and support was unjustified and therefore his consent to J.A.C.'s adoption was not required. Kevin presented clear and convincing

evidence that the failure to provide support was unjustified and David failed to provide evidence of a facially justifiable cause. Similarly, the probate court did not abuse its discretion when it determined that David failed without justifiable cause to provide more than de minimis contact with J.A.C. during the period of at least one year immediately preceding the filing of the adoption petition and therefore his consent to J.A.C.'s adoption was not required. There was no evidence that Deborah substantially interfered with or significantly impeded David's efforts to visit J.A.C. Lastly, the probate court did not abuse its discretion when it determined that Kevin's adoption of J.A.C. was in the child's best interest and was the least detrimental available alternative. Accordingly, we overrule David's assignments of error and affirm the probate court's judgment.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas, Probate Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**