[Cite as *In Re Adoption of B.B.S.*, 2016-Ohio-3515.]

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

IN THE MATTER OF THE ADOPTION OF: B.B.S.	:	Case No. 15CA35
	:	
	:	DECISION AND JUDGMENT ENTRY
	:	
	:	**Released: 06/15/16**

APPEARANCES:

William B. Summers, Parkersburg, West Virginia, for Appellant, S.C.[1]

Michael D. Buell, Buell & Sipe Co., L.P.A., Marietta, Ohio, for Appellees.

McFarland, J.

{¶1} This is an appeal from a Washington County Common Pleas Court, Probate Division, decision and entry on consent to adoption, which determined that the consent of the biological parents of B.B.S. was not required for the adoption of B.B.S. On appeal, S.C., Appellant herein and biological mother of B.B.S., contends that the trial court erred by concluding that her consent to adoption was not required because Appellant demonstrated justifiable cause for both failing to provide maintenance and support and for failing to provide more than de minimus contact with B.B.S. in the one year immediately preceding the filing of the petition for adoption.

[1] S.C. is the biological mother of B.B.S. B.B.S.'s father, A.C., has not filed a brief and is not participating on appeal.

{¶2} Because we conclude the trial court's determination that there was no justifiable cause for Appellant's failure to provide maintenance and support and more than de minimus contact with B.B.S. was not supported by clear and convincing evidence and was against the manifest weight of the evidence, Appellant's sole assignment of error is sustained. Accordingly, we reverse the trial court's judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

FACTS

{¶3} The minor child that is the subject of these proceedings, B.B.S., was born on October 12, 2010 to her mother, S.C., Appellant herein, and her father, A.C.[2] The child was voluntarily placed by her mother with Appellees, B.S. and M.S., in August of 2011. According to the record before us, S.C. was having issues at the time that included unemployment, as well as abuse that was being inflicted by B.B.S.'s father, A.C. The child remained in the care of Appellees, who were granted legal custody of B.B.S. on January 17, 2012.[3]

{¶4} The decision and entry on custody that was filed by the Washington County Juvenile Court on January 17, 2012 made several

[2] S.C. and A.C. have never been married and have different last names.
[3] At the same time, S.C.'s other child, who is approximately one year older than B.B.S., was voluntarily placed by S.C. in the care and custody of S.C.'s parents, Y.C. and T.C.

findings that are pertinent to the issues in the current appeal. First, the juvenile court found that S.C. was "totally incapable of providing care or support for the child." Second, the court further ordered as follows, in pertinent part:

> "2. The parents, [A.C. and S.C.] are granted visitation with the minor child at the discretion of [B.S. and M.S.].
>
> 3. [B.S. and M.S.] are referred to the Washington County Child Support Enforcement Agency should they desire to pursue support."

Thus, Appellant was determined to be totally incapable of providing support to B.B.S. and as such was not automatically ordered to pay child support, but rather the decision to pursue support was left up to Appellees. Further, Appellant was granted visitation, but only at the discretion of Appellees. The record reflects that Appellees never pursued child support from either parent.

{¶5} Appellees filed a petition for adoption of B.B.S. on February 6, 2015. Their petition alleged that the consent of the parents was not required and claimed that both parents had failed without justifiable cause to provide more than de minimus contact with the child, and had failed without justifiable cause to provide for the maintenance and support of the child as

required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition. The affidavit filed in support of the petition stated that there had been no contact from Appellant since October 31, 2011 to present, and that there had been no contact from the child's father, A.C., from January 17, 2012 to present. Appellees also attached a copy of the January 17, 2012 decision and entry on custody filed by the juvenile court in support of their petition.

{¶6} Both Appellant and A.C. filed objections to the petition for adoption. Appellant filed her objection through counsel and A.C. filed a pro se objection. A hearing on the issue of whether the parents' consent was required was held on May 18, 2015. Appellant and Appellees were present at the hearing, with counsel. A.C., though he had filed a pro se objection to the adoption petition, did not appear at the hearing nor was counsel present on his behalf. Appellees both testified in support of their petition. Appellant testified in support of her objection to the petition and also presented her mother, Y.C., as a witness.

{¶7} During the hearing, Appellant testified that she attempted contact with the child on October 10, 2014, just two days before the child's fourth birthday. She testified that her mother, Y.C., placed a call to B.S. and that Y.C. informed B.S. that Appellant wanted to see the child. Appellant then

got on the telephone and had a conversation with B.S., which involved B.S. telling her that she wanted Appellant to be a part of the child's life but not right away, because it would confuse the child. B.S. verified during the hearing that she told Appellant she needed to show them [Appellees] that she was serious and gain their trust "if she wanted back in [the child's] life at all." Y.C. and M.S. testified that a telephone conversation did take place on October 10, 2014. It was also undisputed at the hearing that the call lasted approximately fifty-two minutes.

{¶8} Appellant testified that she then began sending text messages to B.S. to inquire about the child and asking B.S. to tell the child that her mother loved her. Appellant introduced printed copies of the text messages which were admitted as an exhibit. The exhibit clearly shows the text messages back and forth between Appellant and B.S., and indicates that Appellant sent B.S. fifteen text messages between October 12, 2014 and November 27, 2014. The text messages inquire how the child is doing, convey Happy Birthday and Happy Thanksgiving wishes, and request that B.S. tell the child that Appellant loves her. The exhibit also contains a text message sent from B.S. to Appellant on December 17, 2014, informing Appellant that she would not "be accepting any texts or phone calls from you from this day forward. * * *." Appellant responded via text that she had

not been able to use her phone because she had not had wifi.[4] B.S. testified that she told Appellant during their initial telephone conversation on October 10th that she needed to call her, not text her. B.S. further testified that she did not convey any of the messages to the child because the child did not know Appellant.

{¶9} Appellees testified that they never sought support from Appellant or A.C. They testified that they did not seek support from A.C. because he was in jail. They testified that they did not seek support from Appellant because she was unemployed at the time of the original order. They also testified, however, that they became aware Appellant was working at Kmart in May of 2013 because they saw her at work. The record indicates they still did not seek support from Appellant. Appellant testified that she became employed at Kmart in August of 2012. There is no evidence in the record regarding the details of Appellant's employment, her hourly rate, number of hours worked, annual income or other benefits received.

{¶10} Appellant's counsel argued during closing that Appellant's failure to support the child was justifiable because she had not been ordered

[4] Appellant testified during the hearing that although she had a phone she could not use her phone to place calls. She testified that she had an app on her phone that allowed her to text when she had wifi service available.

to pay support in the custody order. Appellant's counsel further argued her failure to contact the child was justifiable because Appellees interfered and prevented contact from occurring. The trial court took the matter under advisement and issued a decision and entry finding that Appellees had proven their case by clear and convincing evidence that both parents failed to provide more than de minimus contact with the minor child, and had failed to contact the child, during the one-year period prior to the filing of the adoption petition, and that there was no justifiable cause for their failure. It is from the decision and entry that Appellant brings her timely appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED BY CONCLUDING THAT THE CONSENT OF THE MOTHER WAS NOT REQUIRED BECAUSE THE MOTHER DEMONSTRATED JUSTIFIABLE CAUSE."

{¶11} In her sole assignment of error, Appellant contends that the trial court erred by concluding that her consent was not required for the adoption of B.B.S. In support of her argument, she contends that she demonstrated justifiable cause for both failing to provide maintenance and support, and failing to provide more than de minimus contact with B.B.S. in the one-year time period immediately preceding the filing of B.S. and M.S.'s petition for

adoption. Based upon the following statutory and case law, as well as the facts presently before this Court, we agree.

{¶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). *In re Adoption of Masa*, 23 Ohio St.3d 163, 167, 492 N.E.2d 140 (1986).

Thus, 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. Instead, 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. *Bovett* at 104; quoting *In re Adoption of Masa*.

{¶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, syllabus (1978).

{¶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 essentially undisputed that Appellant failed to provide any support to the child during the year prior to the date the adoption petition was filed. Although Appellant did submit a receipt identifying a pair of pants she purchased for the child for her birthday in 2014, Appellant does not dispute the trial court's finding that she failed to provide maintenance and support for the child. Instead she relies on the fact that there was a zero support order issued by the juvenile court when Appellees were granted custody of the child, as well as the fact that Appellees never sought support. Thus, the only issue is whether her failure to provide maintenance and support was justified.

{¶18} Appellees contend that Appellant had a duty to support the child regardless of whether she was ordered to pay child support by the juvenile court. They also contend that Appellant's failure to provide maintenance and support was not justified by their failure to seek support for the child. Appellees contend that Appellant did not meet her burden of demonstrating her failure to support was justifiable, because she did not testify as to her reason why she had not supported her child.

{¶19} The trial court found as follows with respect to the issue of support and maintenance:

> "11. Neither parent is under a child support order. Notwithstanding that the parents are not subject to a support order, they have a legal duty to support their child. During the one year prior to the filing, the father failed to provide any type of support including money, clothing or food.
>
> 12. The mother testified that the only money she spent on the child during the one year period in question was $13.77 for a pair of pants on her birthday in October 2014. However, she did not give the pants to the Swains. She instead kept them at her parent's house. Said purchase does not satisfy the duty of support requirement."

We agree with the trial court's determination that the purchase of a singular birthday gift does not satisfy the duty of support requirement. The provision of de minimus gifts does not constitute adequate support for purposes of R.C. 3107.07. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, paragraph two of the syllabus. Thus, and in light of the fact that it is undisputed that Appellant paid no direct financial support to Appellees, we limit our discussion to whether there was justifiable cause for this failure.

{¶20} We have previously considered the lack of a child support order as one of several factors justifying the failure to support a minor child. See *In re Adoption of B.I.P*., Jackson No. 07CA9, 2007-Ohio-6846, ¶ 20-23; see, also, *In re Adoption of Hughes*, Ross No. 07CA2947, 2007-Ohio-3710, ¶ 19. And, "when a child's needs are adequately provided for by a custodian who is in a better financial position than the natural parent, and the custodian expresses no interest in receiving any financial assistance from the natural parent, the natural parent's failure to support the child may be deemed justifiable." *In re Adoption of Hughes, supra,* at ¶ 21; citing *In the Matter of the Adoption of Caitlyn M. Way*, 4th Dist. Washington No. 01CA23, 2002 WL 59629, fn. 3; citing *In re Adoption of LaValley,* 2nd Dist. Montgomery No. 17710, 1999 WL 961785 (July 9, 1999) .

{¶21} Here, a review of the record indicates that the child was placed in the custody of Appellees in 2012. At that time, the juvenile court found that Appellant was "totally incapable of providing care or support for the child." Thus, the juvenile court did not establish a support order, but instead ordered that "[Appellees] are referred to the Washington County Child Support Enforcement Agency should they desire to pursue support." Further, at the hearing on consent, Appellee, B.S., conceded that she never sought support from either parent, in part because she knew that Appellant

was unemployed and that A.C. was in jail. She later testified that she became aware Appellant was employed at Kmart in May of 2013, however, she still did not seek support. Likewise, Appellee M.S. testified that they had received no financial or other support from the parents, and also that he did not see a need for support. We are also mindful that the "Prefinalization Adoption Assessment Report", which was before the trial court and is part of our record on appeal, indicates that when asked, B.S. reported "that they did not request child support for [B.B.S.] and are able to meet her needs without assistance." Further, in light of the way in which the custody order was worded, we believe it was reasonable for Appellant to infer that if Appellees desired or needed support for the child, they would have sought it. We believe that this evidence establishes a facially justifiable cause for Appellant's failure to support the child.

{¶22} Once Appellant met her burden of going forward, Appellees had to show by clear and convincing evidence that Appellant's justification was illusory. See *In re Adoption of Ewart*, Ross No. 04CA2796, 2005-Ohio-116, ¶ 11; citing *In re Adoption of Kessler*, 87 Ohio App.3d. 317, 324, 622 N.E.2d 354, 358 (1993). The trial court apparently believed Appellees met this burden and ultimately found that, despite the fact Appellant was under no support order, she still had a legal duty to support her child. We disagree.

{¶23} Although we agree that Appellant had a common law duty to support her child, we believe that based upon these particular facts, Appellant "could have reasonably assumed that this order relieved her of any obligation to provide support of any kind." *In the Matter of the Way, supra,* at *3.

{¶24} In *Way,* this Court reasoned as follows:

> "There is no question that parents have a duty to support their children. See generally *Haskins v. Bronzetti* (1992), 64 Ohio St.3d 202, 203, 594 N.E.2d 582, 584; *State ex rel. Wright v. Industrial Commission* (1943), 141 Ohio St. 187, 47 N.E.2d 209, at paragraph one of the syllabus. In divorce cases, however, the Ohio Supreme Court has held that this duty is superseded by the statutory child support provisions. See *Meyer v. Meyer* (1985), 17 Ohio St.3d 222, 224, 478 N.E.2d 806, 808. Thus, custodial parents are not entitled to receive support payments from non-custodial parents on the basis of a general duty of support when no support order was issued at the time of the custody award. *Id.* at the syllabus. The *Thiel* and *Jarvis* courts essentially carried this rule into adoption cases and held that when a domestic relations court ordered no support be paid

> by the non-custodial parent, that order superseded the common law duty of support. Thus, a petitioner seeking to adopt a minor child could not exploit the non-custodial parent's compliance with that order in order to establish an unjustifiable failure of support under R.C. 3107.07."

As we found in *Way*, we find that in this case, based upon the facts presently before us, the juvenile court's order relieving Appellant of her support obligation superseded Appellant's general duty to support her child. *Way* at *5. Further, as we noted in *Way*, "fundamental fairness requires that appellant be informed that she had some duty to [the child], above and beyond the Juvenile Court order, and that her failure to provide support could result in the loss of her parental rights." We believe the same notion of fairness espoused in *Way* is still applicable today.

{¶25} We readily acknowledge that it may appear we have somewhat departed from the reasoning in *Way* in some of our more recent decisions. However, we noted in these cases that our holdings were based upon the facts before us, which made the cases factually distinguishable from *Way*. For instance, in *In re Adoption of L.C.H. and K.S.C.*, 4th Dist. Scioto No. 09CA3318, 09CA3319 and 09CA3324, ¶ 50, faced with evidence in the record that the parent had experienced "an appreciable and near immediate

change in her income," we held that "we do not believe that a parent should be able to rely on an outdated support order to avoid the duty to one's children." In that case, in reaching our decision, we had before us fairly detailed income information of the parent at issue and based upon that information, we found the situation to be distinguishable from *Way*. *Id.* at ¶ 51. See also, *In the Matter of the Adoption of S.L.N.*, 4th Dist. Scioto No. 07CA3189, 2008-Ohio-2996, ¶¶ 32-33 (finding that evidence indicating the mother had received two settlement checks exceeding more than $10,000 during the pertinent one-year period and also received monthly SSI benefits rendered the matter distinguishable from *Way*.)

{¶26} Here, however, once Appellant presented facially justifiable reasons for her failure to provide support, mainly that there was no support order and that Appellees had failed to request support, the burden ultimately shifted back to Appellees to show that Appellant's facial justification was illusory. *S.L.N.* at ¶ 30. Unfortunately, other than testimony that Appellant was employed at Kmart, where she became employed in August of 2012, we have no other information. Appellees did not introduce any evidence regarding the number of hours usually worked by Appellant, her hourly rate or her annual income. Likewise, there is no evidence in the record of Appellant's living expenses or other benefits possibly received.

{¶27} Thus, in other cases which we have found factually distinguishable from *Way*, there was detailed income and expense information which demonstrated such a change in circumstances that the parent's duty of support essentially trumped the zero support order. We do not have such evidence here. As such, we cannot conclude that Appellees carried their burden of demonstrating that Appellant's reliance on the fact that there was no support ordered was unreasonable in light of the circumstances of this particular case. Likewise, we find the trial court's determination that Appellant's failure to provide support was unjustified, not to be supported by competent, credible evidence, and thus, against the manifest weight of the evidence.

2. Failure to Provide more than De Minimus Contact

{¶28} It is undisputed that Appellant failed to provide more than de minimus contact with the child during the year prior to the date the adoption petition was filed. Thus, the only issue is whether her failure to provide more than de minimus contact was justified. Appellant concedes that from the time Appellees were granted custody of the child in 2012 to the present, Appellant had no contact with the child. Appellant contends that she requested to see the child on October 10, 2014 but was denied by B.S., and that her subsequent attempts to communicate with the child via text message

were interfered with as well. We note that the January 2012 custody order granted Appellant visitation with the child, but "at the discretion of [Appellees]." Appellees deny that they prevented Appellant from seeing the child, and instead contend that they desired Appellant gradually develop a relationship with the child to avoid confusion on the part of the child. They also contend that although Appellant sent several text messages, she never actually requested to speak with or visit the child.

{¶29} The trial court rejected Appellant's argument that her failure to provide more than de minimus contact was justifiable, finding as follows:

> "6. The mother's last physical contact was on October 31, 2011. After that date there was no type of contact for three years until a few days before the child's birthday in October 2014, when the maternal grandmother called the petitioners to say her daughter (mother) wanted to see her child. The mother got on the telephone and talked to [B.S.], the petitioner. They talked about the fact that the mother needed to gain the [Appellees'] trust and show continued interest in the child and take it slow since the child did not know the mother. The mother agreed to take it slow and build up trust before visiting. *The mother was not denied contact with child.*

7. After that there were no more telephone calls from the mother. However the mother sent eleven (11) texts over a 47 day period to the [Appellees] between October 12th (the child's birthday) and November 27th. The text messages from the mother did not ask for visits or contact with her daughter. Rather, the mother merely said she wanted to check on how her daughter was doing *and for the [Appellees] to tell the child her mother loved her*. None of the text messages sent by the mother requested visitation nor asked for telephone calls with the child.

8. *The mother testified that she never requested in her text messages to see or talk to her daughter because her daughter did not know her*.

9. The maternal grandparents who have custody of the mother's other child, exercised visitation over the years with [the child] at their home. *The mother never visited the child during those visits*.

10. After receiving no texts or calls for three weeks, *[B.S.] informed the mother on December 17, 2014, by text that she was not going to accept any further texts or calls* since the

mother failed to show she was serious about reestablishing contact with the child. After that date, no further communication of any form was received from the mother." (Emphasis added).

{¶30} " 'The party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent failed to communicate with the child during the requisite one-year period and that there was no justifiable cause for the failure of communication.' " *In re Adoption of IMB*, 5th Dist. Stark No. 2012CA00137, 2012-Ohio-6264, ¶ 21; quoting *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, 481 N.E.2d 613. See also, *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 104, 515 N.E.2d 919. " 'No burden is to be placed upon the non-consenting parent to prove that his failure to communicate was justifiable.' " *Id.*; quoting *Holcomb* at 368. Further, as noted in *Holcomb* at paragraph three of the syllabus, "[t]he 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."

{¶31} Here, the trial court made several findings which, at first glance, would seem to support its decision that Appellant's failure to provide more than de minimus contact was unjustified. However, we find that upon

further review of the record, there is substantial evidence which indicates that Appellees significantly interfered with Appellant's attempts to have contact with the child. First, we must point out that based upon our review of the hearing transcript, we disagree with the trial court's determination above that Appellees' response to Appellant's October 10, 2014 telephone call did not result in Appellant being denied contact with the child.

{¶32} Appellee, B.S., conceded that Appellant, via a telephone call made on October 10, 2014, requested to see her child. B.S. testified that when Appellant's mother initially stated on the telephone call that Appellant wanted to see the child, she responded "no, that's not a good idea." B.S. testified that she was concerned the child would be "devastated" as she had not seen Appellant for three years. She further testified that she informed Appellant during that telephone call that Appellant would have to gain their trust "if she wanted back in [the child's] life in any way at all." The record indicates that this telephone conversation lasted fifty-two minutes. Further, B.S. conceded on cross examination that during the call she knew that Appellant wanted to see the child. Thus, we find the trial court's conclusion that "[t]*he mother was not denied contact with child[]"* to be unfounded, against the manifest weight of the evidence, and not supported by clear and convincing evidence.

{¶33} Second, it is undisputed that Appellant followed up after the telephone call with a series of text messages over the next six to seven weeks, repeatedly asking about the child and asking B.S. to relay information to the child, including Happy Birthday wishes, Happy Thanksgiving wishes and to tell the child that her mother loved her. These messages were printed out and entered as evidence at the hearing. B.S. conceded during the hearing that she did not give those messages to the child, stating that "it would be kind of hard to do that" because the child did not know Appellant. We believe such conduct constitutes significant interference with communication between Appellant and the child. B.S. seemed to justify this behavior in her testimony, stating that she expected Appellant to call her to check on the child rather than text her. She claimed that she would have set up visitation with Appellant if Appellant had called rather than texted, yet she testified that Appellant's texts asking about the child accomplished essentially the same purpose that a call would.

{¶34} Further, despite B.S.'s claim that none of Appellant's text messages actually requested to speak to or visit with the child, B.S. agreed on cross examination that Appellant was attempting contact with the child in her November 4th, 7th, 10th, 12th, 19th and 27th text messages. Appellant, on the other hand, testified that she could not call B.S. because she did not

have a telephone, but rather only had a text messaging app that she could use when she had wifi available. She also testified that she texted rather than called B.S. (which she would have had to do from her mother's landline) so that she could prove attempted contact and B.S. could not claim that she did not contact her. Further, Appellant testified that she did not ask to speak to or visit the child during these text messages because B.S. told her during the October 10, 2014 telephone conversation that she could not see the child. Thus, the trial court's finding that Appellant "*testified that she never requested in her text messages to see or talk to her daughter because her daughter did not know her"* is not supported by the record.

{¶35} Third, in reaching its decision, the trial court relied on and seemed to fault Appellant for not having contact with the child during the times that Appellant's parents had visitation with the child. However, there is testimony in the record by both Appellant and her mother, Y.C., that B.S. had specified that Appellant was not to be present during their visits with the child. Further, although B.S. was not specifically asked to confirm this fact during the hearing, there has been no attempt by her to deny it. Thus, Appellant's failure to attempt contact with the child during these visits would be justified.

{¶36} Finally, we address the trial court's finding regarding B.S.'s December 17, 2014 text message to Appellant stating that she would not accept any further texts or calls from Appellant. The trial court set forth this finding, seemingly in support of its decision that Appellant's failure to provide more than de minimus contact with her child was unjustified. However, we believe such conduct by B.S. instead constitutes significant discouragement of communication between Appellant and the child and further leads to the conclusion that Appellant's failure to have contact was justified, rather than unjustified.

{¶37} Based upon the foregoing, we conclude that the trial court's finding that Appellant was not denied contact with her child during the October 10, 2014 telephone call is against the manifest weight of the evidence. Further, we conclude that the trial court's finding that Appellant's failure to provide more than de minimus contact with her child was unjustified is not supported by clear and convincing evidence in the record. Instead, we find that Appellant attempted contact with the child several times but was denied during the one-year period immediately preceding the filing of the adoption petition.

{¶38} This Court has noted that:

> " '[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.' " *In the Matter of the Adoption of J.A.C., supra,* at ¶ 23; quoting *In re Adoption of Ramos*, 5th Dist. No. CT2001-0058, 2002-Ohio-1128, *3.

{¶39} Based upon these facts, we conclude that Appellant's failure to have more than de minimus contact with the child for the one year preceding the filing of the adoption petition was justifiable. We specifically find that Appellant's failure to provide more than de minimus contact with the child was justified based upon the record before us, which demonstrates significant interference and discouragement of contact between Appellant and the child by Appellee, B.S. We also conclude that the trial court's

determination that Appellant lacked justification is not supported by clear and convincing evidence and thus is against the manifest weight of the evidence. We further note that although the trial court noted in its entry that Appellant had no contact with the child for three years until a few days before the child's birthday in October of 2014, it is also apparent from the record that Appellees took no action during those three years to initiate adoption proceedings, but rather waited until Appellant tried to reestablish contact with the child do so.

{¶40} As such, we conclude that Appellees have failed to prove by clear and convincing evidence that Appellant unjustifiably failed to support or provide more than de minimus contact with the child during the specified time period. Thus, Appellant's sole assignment of error is sustained. Accordingly, the trial court's decision and entry determining Appellant's consent for adoption was not necessary is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION and that Appellant recover of Appellees any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, 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.

Harsha, J.: Concurs in Judgment and Opinion.
Hoover, J.: Dissents.

For the Court,

BY: _____
Matthew W. McFarland, 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.