[Cite as *In re Adoption of A.L.E.*, 2017-Ohio-256.]

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

IN THE MATTER OF THE	:	Case No. 16CA10
ADOPTION OF:	:	
A.L.E.	:	DECISION AND JUDGMENT ENTRY
	:	

APPEARANCES:

Steven L. Story, Pomeroy, Ohio, for appellant, David Dudding.

Trenton Cleland, Pomeroy, Ohio, for appellee, Sherry D. Eagle.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 1-6-17
ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court, Probate Division, judgment that granted a petition to adopt A.L.E. The child's biological father (D.D.), respondent below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE PROBATE COURT'S DECISION THAT APPELLANT'S CONSENT TO THE ADOPTION OF THE SUBJECT MINOR CHILD WAS NOT NECESSARY IS CONTRARY TO LAW AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE PROBATE COURT ERRED IN FAILING TO HOLD A HEARING ON WHETHER THE ADOPTION WAS IN THE BEST INTEREST OF THE MINOR CHILD."

{¶ 2} On February 12, 2016, S.E., the child's maternal grandmother and the petitioner below and appellee herein, filed a petition to adopt A.L.E. Appellee alleged that on July 24, 2012 the Meigs County Juvenile Court placed the child in her home for adoption and that the child remained in her home since that time. Appellee further asserted that the child's biological mother's consent to the adoption was required, but that appellant's consent was not required for the following reasons: (1) appellant "has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or placement of the minor in the home of the petitioner," and (2) appellant "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 the filing of the adoption petition or the placement of the minor in the home of the petitioner."

{¶ 3} On April 4, 2016, the biological mother filed a consent to the adoption. On April 15, 2016, appellant filed an "Answer, Objection to Adoption and Motion to Dismiss With Supporting Memorandum."[i] On June 22, 2016, the trial court held a hearing to consider appellee's adoption petition and to determine whether appellant's consent was required.

{¶ 4} At the hearing, appellee testified that she has lived in the same home for more than eight years and that the child has lived with her since the juvenile court's 2012 placement. Appellee stated that during the year preceding the adoption petition, appellant's only contact with the child consisted of a December 2015 birthday card.

{¶ 5} Appellant explained that he had been incarcerated three times for drug-related

offenses: (1) from January 2005 to February 2006, (2) from April 2007 to January 2008, and (3) from June 2010 to December 2015. Appellant stated that he did not attempt to contact A.L.E. while incarcerated because "it's always been a very uncomfortable place, and I have not been in the frame of mind to even attempt it and now I feel strong enough to." Appellant admitted that he last saw the child in September 2011 and that during the year before appellee filed the adoption petition, appellant made three child support payments. Documentation revealed that at least two of the three payments came from appellant, and the other payment came from an undisclosed source.

{¶ 6} Appellant related that he presently resides with his parents and that he is self-employed while he plans to start welding school in the fall of 2016. Appellant also explained that he takes Vivitrol for his opiate/heroin addiction and that he has "lost complete cravings for the substance and have had a positive * * * attitude, regular sleep, regular meals. * * * I feel the best I've ever felt in twenty (20) years."

{¶ 7} A.D., appellant's mother, testified that she supported appellant's drug-addiction recovery and that appellant had become a changed person on Vivitrol. A.D. further related that appellant worked as a contractor for her and his father so that he could afford to pay child support.

{¶ 8} On June 29, 2016, the trial court determined that appellant's consent to the adoption was not required because appellant failed, without justifiable cause, to provide more than de minimis contact with the child for a period of at least one year immediately preceding the filing of the adoption petition or the child's placement. On the same date, the trial court issued a final decree of adoption. This appeal followed.

I.

FIRST ASSIGNMENT OF ERROR

{¶ 9} In his first assignment of error, appellant argues that the probate court's decision that appellant's consent to the adoption was not necessary is contrary to law and is against the manifest weight of the evidence.

{¶ 10} Initially, we note that "'natural parents have a fundamental liberty interest in the care, custody, and management of their children.'" *In re Adoption of K.N.W.*, 4th Dist. Athens Nos. 15CA36 and 15CA37, 2016-Ohio-5863, ¶ 21, citing *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 16, quoting *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶16. This is a constitutionally protected interest. *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 11. Because an adoption permanently terminates the natural parent's parental rights, courts must afford the natural parent every procedural and substantive protection before it deprives the parent of the right to consent to the adoption. *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 11} R.C. 3107.06 generally requires the written consent of the natural parents of children who are the subject of petitions to adopt. R.C. 3107.07(A), however, specifies that a parent's consent to adoption is not required if clear and convincing evidence establishes the following:

> 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.

{¶ 12} Although this appeal only involves whether appellant, without justifiable cause, failed to provide more than de minimis contact with the child for at least the year preceding the filing of the adoption petition, we note that R.C. 3107.07(A) is written in the disjunctive. *In re Adoption of K.C.*, 3rd Dist. Logan No. 8-14-03, 2014-Ohio-3985, ¶ 21. "Therefore, a failure without

justifiable cause to provide *either* more than de minimis contact with the minor *or* maintenance and support for the one-year time period is sufficient to obviate the need for a parent's consent." (Emphasis sic.) *Id.*, citing *In re Adoption of A.H.*, 9th Dist. Lorain No. 12CA010312, 2013-Ohio-1600, ¶ 9; accord *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23 ("R.C. 3107.07(A) does not require parental consent to adoption if the parent either failed to communicate with or failed to support the child for a minimum of one year preceding the filing of the adoption petition and if there was no justifiable cause for the failure.")

{¶ 13} R.C. 3107.07(A) thus involves "a two-step analysis." *M.B.* at ¶ 23. First, a court must consider whether a parent failed to communicate with or failed to support the child for a minimum of one year preceding the filing of the adoption petition. *Id.* Second, if the parent failed in either of the foregoing respects, the court then "determine[s] whether justifiable cause for the failure has been proved by clear and convincing evidence." *Id.*

{¶ 14} A probate court possesses discretion when determining whether a parent failed to communicate with or support the child during the one-year period. *Id.* at ¶ 25. Thus, in the absence of an abuse of discretion, an appellate court will not disturb the probate court's finding concerning a parent's failure to communicate with or support the child. *Id.* Abuse of discretion means an " 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.' " *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. "An abuse of discretion includes a situation in which a trial court did not engage in a ' "sound reasoning process." ' " *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, quoting *State v. Morris*, 132 Ohio St.3d 337,

2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. *Darmond* at ¶ 34. Accordingly, the probate court's decision may be reversed only if appellant can demonstrate that the decision was unreasonable, arbitrary, or unconscionable.

{¶ 15} The question of justifiable cause, however, is a factual matter for the probate court that an appellate court will not disturb, unless the probate court's finding "'is against the manifest weight of the evidence.'" *Id.* at ¶ 24, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986), paragraph two of the syllabus. "When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed." See *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 68 (4th Dist.), citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25; *Pinkerton v. Salyers*, 4th Dist. Ross No. 13CA3388, 2015-Ohio-377, ¶ 18, citing *In re M.M.*, 4th Dist. Meigs No. 14CA6, 2014-Ohio-5111,¶ 22. Generally, an appellate court will presume that a trial court's findings are accurate and will reverse a judgment as being against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the judgment. *Martin* at ¶ 68. *In re Adoption of K.N.W.*, 4th Dist. Athens Nos. 15CA36, 15CA37, 2016-Ohio-5863, ¶ 27.

{¶ 16} We additionally observe that "'[t]he party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent failed to communicate with [or support]

the child during the requisite one-year period and that there was no justifiable cause for the failure * * *.'" *In re Adoption of B.B.S.*, 4th Dist. Washington No. 15CA35, 2016-Ohio-3515, ¶ 30, citing *In re Adoption of I.M.B.*, 5th Dist. Stark No. 2012CA00137, 2012-Ohio-6264, ¶ 21; quoting *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985). In other words, "'No burden is to be placed upon the non-consenting parent to prove that his failure * * * was justifiable.'" *Id.*, quoting *Holcomb* at 368.

{¶ 17} After our review of the evidence in the case at bar, we do not believe that the trial court's determination that appellant failed to provide more than de minimis contact with the child for a period of at least one year immediately preceding the filing of the adoption petition constitutes an abuse of discretion. "The term 'contact' is not defined in the statute; however, the dictionary defines it as, inter alia, 'an establishing of communication with someone or an observing or receiving of a significant signal from a person or object.' *Merriam-Webster's Collegiate Dictionary* 268 (11th Ed.2005)." *In re N.L.T.*, 9th Dist. Lorain No. 14CA010567, 2015-Ohio-433, ¶ 27. In 2008, R.C. 3107.07(A) was amended and has been in effect since April 7, 2009. Prior to the amendment, R.C. 3107.07(A) stated that consent to adoption would not be required of a parent of a minor when "the parent has failed without justifiable cause to communicate with the minor * * * 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." Am.Sub.H.B. No. 7, 2008 Ohio Laws 172 (effective April 7, 2009). "By changing the standard from 'communicate,' which could imply a single contact, to 'more than de minimis contact,' which seems to imply more than a single contact, the Legislature indicated its intent to require more effort from the parent to have contact and communication with the child." *In re R.L.H.*, 2d Dist. Montgomery No. 25734, 2013-Ohio-3462, ¶

7.

{¶ 18} In the case sub judice, the evidence adduced at the hearing reveals that over the course of the year preceding the filing of the adoption petition, appellant's only contact with his son was one birthday card. In *In re Adoption of M.B.*, the Supreme Court of Ohio considered the question of "whether a parent's making a single payment or sending a Christmas card is sufficient support to frustrate R.C. 3107.07(A)." The court held that a "trial court has discretion to make these determinations, and in connection with the first step of the analysis, an appellate court applies an abuse-of-discretion standard when reviewing a probate court decision * * *." Although *In re Adoption of M.B.* focused on the support prong of R.C. 3107.07(A) rather than the contact prong as in the case at bar, the court held that a $125 Christmas gift card and a $60 cash birthday gift were de minimis.

{¶ 19} Moreover, when a father argued that his sole Skype visit precluded the trial court from ruling that his consent was not required for lack of contact, our colleagues in the Seventh Appellate District concluded that the father fell short, citing the change in R.C. 3107.07(A) from "communicate" to "more than de minimis contact" signaling the legislature's intent "to require more effort from the parent to have contact and communication with the child." *In re Adoption of F.A.*, 9th Dist. Summit, No. 27275, 2015-Ohio-2249, ¶ 13, citing *In re J.D.T.*, 7th Dist. Harrison No. 11 HA 10, 2012-Ohio-4537, ¶ 9.

{¶ 20} "Comparing examples of when other courts have found that no more than de minimis contact existed, we see that the standard has not been raised higher by Ohio courts: *In re Adoption of A.L.C.*, 7th Dist. No. 14 BE 4, 2014-Ohio-4045 (father did not contact the child for over one year but argued he had justifiable cause); *In re Adoption of R.L.H.*, 2d Dist. No. 25734,

2013-Ohio-3462 (mother voluntarily suspended her agreed upon court-ordered parenting time, and mother did not see, speak, or correspond with the child); *In re Adoption of K.D.*, 6th Dist. No. L-09-1302, 2010-Ohio-1592 (father's only effort to contact the child was through an internet site and a visit to a clerk's office, and the father's limited cognition and bi-polar disorder did not provide justifiable cause); *In re M.F.*, 9th Dist. No. 27166, 2014-Ohio-3801 (father failed to contact the child, but was prevented by court order and later by the mother ignoring his email requests); *In re Adoption of J.A.C.*, 4th Dist. No. 14CA3654, 2015-Ohio-1662 (father only performed a single two-hour visitation during the year)." *In re Adoption of K.A.H.*, 10th Dist. Franklin No. 14AP-831, 2015-Ohio-1971, ¶ 11.

{¶ 21} Consequently, we agree with the trial court's conclusion that sending one birthday card during the year preceding the filing of the adoption petition constitutes de minimis contact, and the trial court's determination that this constituted a failure to provide more than de minimis contact is not an abuse of the court's discretion.

{¶ 22} Appellant next argues that the trial court's finding that he lacked justifiable cause for his failure to provide more than de minimis contact during the time period in question is against the manifest weight of the evidence. In particular, appellant asserts that his incarceration for more than nine months during the one year period preceding the adoption petition hampered his ability to have personal contact with the child. Appellant contends that his incarceration prevented him from being more involved in his child's life and that he was "uncomfortable" contacting his child while he was in prison. Appellant further argues that even though his contact with the child was limited to sending one birthday card, he took other substantial actions to get his life in order so that he could establish a quality relationship with the child.

{¶ 23} The term "justifiable cause" has eluded definition, but we have noted in previous decisions that "the word 'justifiable' means '[c]apable of being legally or morally justified; excusable; defensible.' " *In re Adoption of* K.N.W., 4th Dist. Athens Nos. 15CA36, 15CA37, 2016-Ohio-5863, ¶ 32, citing *In re Adoption of B.B.S.*, 4th Dist. Washington No. 15CA35, 2016-Ohio-3515, ¶ 16, quoting *Black's Law Dictionary* 882 (8th Ed.2004). In addition, we look to *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 367-368, 481 N.E.2d 613 (1985) for guidance: "We believe the better-reasoned approach would be to leave to the probate court as finder of fact the question of whether or not justifiable cause exists. *In re Adoption of McDermitt* (1980), 63 Ohio St.2d 301, 408 N.E.2d 680 [17 O.O.3d 195]. The probate court is in the best position to observe the demeanor of the parties, to assess their credibility, and to determine the accuracy of their testimony. As guidance to the probate courts, we state additionally that significant 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} In the case sub judice, no evidence was adduced to establish that the petitioner interfered with or discouraged contact. Moreover, " '[a] trial court is not obligated to find justifiable cause exists solely on the basis that a parent is incarcerated. * * * Instead, when a parent is in prison, reviewing courts have determined that imprisonment is one of several factors the court should consider.' " *In re J.A.B.*, 11th Dist. Trumbull No. 2013-T-0114, 2014-Ohio-1375, ¶ 37, quoting *In re Adoption of C.M.F.*, 12th Dist. Butler Nos. CA2013-06-090 and CA2013-06-091, 2013-Ohio-4719, ¶ 17.

{¶ 25} "Ohio courts have maintained that incarceration alone does not constitute a 'willful

failure to properly support and maintain a child' rendering void the consent requirement. * * * That same rationale can be applied in regard to communication. However, a natural parent's term of incarceration does not prevent that parent from communicating with the child or otherwise toll the one-year statutory time period." *In re Adoptions of Doyle*, 11th Dist. Ashtabula Nos. 2003–A–0071, 2003–A–0072, 2004-Ohio-4197, ¶ 14. The *Doyle* court also found that although the mother had been incarcerated, she was not prohibited from communicating with her children. Further, the court noted that visitation does not equate with communication because a parent can communicate with a child "notwithstanding the inability to physically visit with the child." *Id.* at ¶ 17. For example, the court noted that the mother was not foreclosed from sending cards or letters to the children or otherwise attempting to communicate outside the realm of physical communication. *Id.*

{¶ 26} Similarly, in the case sub judice, although appellant's incarceration prevented him from physically visiting his child during nine of the twelve months in question, appellant was not precluded from otherwise keeping in contact with his child. Appellant knew his child's location, but chose, other than the single card, not to communicate. When asked during the hearing if he could have contacted A.L.E. if he had so chosen, appellant replied, "I, I could have tried." See *In re N.L.T.*, 9th Dist. Lorain No. 14 CA010567, 2015-Ohio-433 (mother who had phone number and address during periods of incarceration, but chose not to contact child, was not justifiable.), and *In re Adoption of C.A.L.*, 12th Dist. Clermont No. CA2015-01-010, 2015-Ohio-2014 (father's incarceration did not provide justified cause for his failure to contact his child as there was no indication that father lacked access to paper and postage.)

{¶ 27} Although we recognize that appellant's actions to improve his life and to address his

long-term drug addiction are admirable, they do not establish justifiable cause for his failure to provide more than de minimis contact with his child during the during the one year period preceding the filing of the adoption petition. Consequently, we do not believe that the trial court's determination that appellant lacked justifiable cause is against the manifest weight of the evidence. Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 28} In his second assignment of error, appellant argues that the probate court erred by failing to hold a hearing on whether the adoption was in the child's best interest. Appellant asserts that even though the court found that his consent to the adoption is not required, the court still was required to ascertain whether the adoption will serve the child's best interest. In addition, appellant contends that some courts have taken the approach that two separate hearings should be held to make the two different determinations.

{¶ 29} R.C. 3107.11 governs the requirements for the final adoption hearing. R.C. 3107.11(A) states: "After the filing of a petition to adopt an adult or a minor, the court shall fix a time and place for hearing the petition. The hearing may take place at any time more than thirty days after the date on which the minor is placed in the home of the petitioner. At least twenty days before the date of the hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following:

"* * *

"(2) A person whose consent is not required as provided by division (A),(G), (H), or (I) of section 3107.07 of the Revised Code and has not consented[.]"

{¶ 30} According to R.C. 3107.14, the purpose of the final adoption hearing is to determine

whether all consents have been obtained or excused, and to determine whether the adoption is in the child's best interests: "(C) If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted as supported by the evidence, it may issue * * * a final decree of adoption or an interlocutory order of adoption * * *."

{¶ 31} The Supreme Court of Ohio has considered the issue of whether a court must hold separate hearings for the consent and best-interests portions of the adoption petition. "After considering the plain language of the statutes, we can find nothing to suggest that the legislature intended to require two hearings on each adoption petition. In fact, R.C. 3107.11(A) discusses notification requirements for 'the hearing' on the adoption petition, and R.C. 3107.14(C) discusses factual findings a court must make at 'the hearing,' implying that only one hearing is necessary. Again, in interpreting the intent of the legislature as to statutory language, we must accord that language its 'usual, normal, or customary meaning,' without adding any addition language. * * * There is nothing in the statute that either requires or prevents a separate hearing for the consent and best-interests portions of an adoption proceeding. Accordingly, although a court may choose to hold separate hearings on consent and the best interests of the child, there is no requirement to do so. One hearing to address both requirements is sufficient, provided notice of the adoption hearing pursuant to R.C. 3107.11(A) is afforded the biological parent." *In re Adoption of Walters*, 112 Ohio St.3d 315, 859 N.E.2d 545, 2007-Ohio-7, ¶ 21.

{¶ 32} Accordingly, in the case sub judice the probate court was not required to hold separate hearings. The court did, however, reference the best interest of A.L.E. during the final adoption hearing. Moreover, appellant concedes that the court's "Final Decree of Adoption" states

that the court found "that the adoption is in the best interest of the minor child adopted."

{¶ 33} After our review, we conclude that the probate court properly applied the clear and convincing evidence standard in finding that the adoption is in the child's best interest, and the court's decision is also supported by the manifest weight of the evidence.

{¶ 34} Accordingly, based on the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., dissenting:

{¶ 35} At the risk of being criticized (and possibly somewhat justifiably so) as substituting my judgment for that of the trial court, I respectfully dissent.

{¶ 36} Although being imprisoned results from poor but voluntary exercise of free will, it seems under these facts, appellant's efforts to restructure his life warrants the chance to reestablish his role as a parent. Thus, I conclude the record contains no evidence it is in the child's best interest to terminate appellant's rights by approving the adoption.

JUDGMENT ENTRY

It is ordered that the appeal be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Hoover, J.: Concurs in Judgment & Opinion
Harsha, J.: Dissents with Dissenting Opinion

For the Court

BY: _____
Peter B. Abele, 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.

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i. It appears from the record that the trial court did not rule on this objection and motion, but in light of the trial court's issuance of the final decree of adoption, we conclude that the trial court implicitly denied the objection and motion. See *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198(1998), holding that an appellate court ordinarily presumes that a trial court overruled a motion when the trial court fails to explicitly rule on the motion.