[Cite as *In re K.M.F.*, 2019-Ohio-2451.]

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

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	:	
IN THE MATTER OF:		Case No. 19CA1
	:	19CA2
K.M.F. AND K.A.F.	:	DECISION AND JUDGMENT ENTRY
	:	

APPEARANCES:

Justin Chase Taylor, London, Ohio, pro se Appellant.

J. Allyce Horne, Hillsboro, Ohio, for Appellees.[1]

CIVIL CASE FROM COMMON PLEAS COURT, PROBATE DIVISION
DATE JOURNALIZED: 6-12-19
ABELE, J.

{¶ 1} This is a consolidated appeal from Highland County Common Pleas Court, Probate Division, judgments that granted the petitions to adopt K.M.F. and K.A.F. K.M.F.'s biological father (J.T.),[2] respondent below and appellant herein, assigns the following errors for our review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE PROBATE COURT ERRED WHEN IT FOUND THAT MY CONSENT TO ADOPTION WAS NOT REQUIRED BASED UPON INCOMPLETE AND/OR ERRONEOUS INFORMATION REGARDING ALLEGED DE MINIMIS CONTACT WITH MY

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[1] Appellees did not file an appellate brief or otherwise appear in this appeal.

[2] During the trial court proceedings, the petitioners appeared to agree that J.T. is K.M.F.'s biological father. There is, however, apparently some dispute whether he is K.A.F.'s biological father. For purposes of our decision, we nevertheless will consider appellant's assignments of error as if he is the children's biological father.

> CHILDREN WHEN, IN FACT, THE ADOPTING COUPLE, WHO HAVE CUSTODY OF MY CHILDREN, DENIED ME ANY CONTACT WITH [THE CHILDREN]."
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> SECOND ASSIGNMENT OF ERROR:
>
> "THE PROBATE COURT ERRED WHEN IT ERRONEOUSLY FOUND THAT MY CONSENT TO ADOPTION WAS NOT REQUIRED DUE TO AN ALLEGED FAILURE TO REGISTER AS A PUTATIVE FATHER WHEN THE STATE OF OHIO HAD ALREADY DETERMINED I AM THE BIOLOGICAL FATHER."

{¶ 2} In February 2018, the children were placed in the legal custody of P.F. and L.F., petitioners below. Seven months later, petitioners filed petitions to adopt the minor children and alleged that the biological mother's consent is required and that she consented to the adoption. The petitions further asserted that appellant's consent is not required because he failed, without justifiable cause, to provide (1) more than de minimis contact with the children for at least one year immediately preceding the filing of the adoption petition, and (2) for the maintenance and support of the children, as required by law or judicial decree, for a period of at least one year immediately preceding the filing of the adoption petition.

{¶ 3} Appellant objected and asserted that petitioners did not permit him to have contact with the children and that petitioners' "egregious, selfish, and unwarranted actions" is the reason he has not had contact with the children.

{¶ 4} On December 19, 2018, the trial court held a hearing. At the hearing, the court noted that the biological mother and appellant are currently incarcerated on involuntary

manslaughter charges that arose out of a drug overdose. Additionally, L.F. testified that the father has not seen K.M.F. since March 2017. L.F. indicated that, after she and her husband filed the petitions to adopt, appellant sent two letters and later a Christmas card.

{¶ 5} At the conclusion of the hearing, the trial court determined that appellant's consent to the adoption is not required. The court found that appellant failed, without justifiable cause, to provide more than de minimis contact with the children for at least one year immediately preceding the filing of the adoption petition. The court noted that appellant recently sent letters and a Christmas card, but observed that appellant did so only after petitioners filed the petitions to adopt. The court concluded that although appellant had the means to send letters to the children before the petitions were filed, he apparently chose not to do so. The court additionally found that appellant did not register as a putative father.[3] The trial court also concluded that granting the adoption petitions is in the children's best interest. Thus, the court granted the petitions to adopt. This appeal followed.

I

{¶ 6} In his first assignment of error, appellant asserts that the trial court erroneously concluded that his consent to the adoption is not required. In particular, appellant contends that the court incorrectly found that he lacked justifiable cause for failing to have more than de minimis contact with the children. Appellant asserts that he was not responsible for the lack of contact with the children because appellees did not allow him to do so.

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[3] The trial court also pointed out that appellant was not present at the hearing and indicated that appellant did not request that he be conveyed to the court for the hearing. Appellant did not argued on appeal that the trial court erred by holding the final hearing in his absence. We also observe that the trial court served notice of the hearing on appellant and notified him that, if he wished to contest the adoption, he must file a written objection and appear at the hearing.

{¶ 7} Initially, we point out and emphasize 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 a natural parent's parental rights, courts must afford the natural parent every procedural and substantive protection before it deprives a parent of the right to consent to the adoption. *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 8} Because parents have a constitutionally protected fundamental liberty interest in the care, custody, and management of their children, parental consent to an adoption ordinarily is required. *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976); *accord In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, 110 N.E.3d 1236, ¶ 40; R.C. 3107.06. Any exception to the consent-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); *accord M.G.B.-E.* at ¶ 40.

{¶ 9} R.C. 3107.07 defines the circumstances under which a parent's consent to adoption is not required. Under R.C. 3107.07(A), a parent's consent is not required if the trial court "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."

{¶ 10} We also note that R.C. 3107.07(A) is written in the disjunctive. *In re X.A.F.*, 4th Dist. Athens No. 17CA18, 2018-Ohio-215, ¶ 13; *In re 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." *K.C.* at ¶ 21, citing *In re A.H.*, 9th Dist. Lorain No. 12CA010312, 2013–Ohio–1600, ¶ 9; *accord In re 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.")

{¶ 11} 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 have more than de minimis contact with the child 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 determines whether justifiable cause exists. *Id.* A parent ordinarily "has justifiable cause for failing to communicate when the custodial parent significantly interferes with or significantly discourages communication" *M.G.B.-E.* at ¶ 39.

{¶ 12} The party petitioning for adoption has the burden to prove, by clear and convincing evidence, that the parent failed, without justifiable cause, to have more than de minimis contact with the child, or failed to support the child for a minimum of one year preceding the filing of the adoption petition. *In re Holcomb*, 18 Ohio St.3d 361, 368, 481

N.E.2d 613 (1985); *accord In re B.B.S.*, 4th Dist. Washington No. 15CA35, 2016–Ohio–3515, ¶ 30. In other words, "'[n]o burden is to be placed upon the non-consenting parent to prove that his failure * * * was justifiable.'" *Holcomb* at 368.

{¶ 13} Generally, a probate court possesses discretion to determine whether a parent failed to have contact with or support the child during the one-year period. *M.B.* 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 have contact 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.

{¶ 14} 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.'" *M.B.* 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." *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. 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. *In re K.N.W.*, 4th Dist. Athens Nos. 15CA36, 15CA37, 2016–Ohio–5863, ¶ 27.

{¶ 15} Moreover, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the factfinder's credibility determinations. *Eastley* at ¶ 21. Thus, """every reasonable intendment must be made in favor of the judgment and the finding of facts.""" *Id.*, quoting *Seasons Coal Co.*, 10 Ohio St.3d at 80, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Furthermore, """[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.""" *Id.*, quoting Seasons Coal Co., 10 Ohio St.3d at 80, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶ 16} Consequently, "we should not reverse a judgment merely because the record contains evidence that could reasonably support a different conclusion." *Bugg v. Fancher*, 4th Dist. Highland No. 06CA12, 2007-Ohio-2019, 2007 WL 1225734, ¶ 9. Instead, as we explained

in *Bugg*:

> "It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently. Rather, we must defer to the trier of fact in that situation."

Id. at ¶ 9.

{¶ 17} After our review of the evidence in the case at bar, we do not believe that the trial court's finding, that appellant lacked justifiable cause for failing to have more than de minimis contact with the children, is against the manifest weight of the evidence. The court observed that appellant sent the children letters and a Christmas card only after the petitioners filed the petitions to adopt. The court thus believed that appellant had the means to communicate with the children during the one year period preceding the filing of the adoption petitions, but did not do so. Moreover, appellant did not appear at the hearing or present any evidence to support his claim that the petitioners frustrated his attempts to have contact with the children. Under these circumstances, we cannot conclude that the trial court's finding that appellant lacked justifiable cause is against the manifest weight of the evidence.

{¶ 18} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 19} In his second assignment of error, appellant asserts that the trial court incorrectly determined that his consent was not required due to his failure to register as a putative father. Appellant asserts that the state had previously determined that he is the biological father, that his

name appears on the children's birth certificates and that a DNA test was conducted.

{¶ 20} However, even if the trial court arguably erred by concluding that appellant's consent is not required due to his failure to register as a putative father, the trial court's alternate finding that appellant failed without justifiable cause to have more than de minimis contact with the children for one year immediately preceding the filing of the adoption petition nevertheless supports its conclusion that appellant's consent is not required. Thus, any possible error with the court's alternate finding would constitute harmless error that we must disregard. Civ.R. 61 (stating that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); *see In re A.A.*, 4th Dist. Athens No. 14CA38, 2015-Ohio-1962, 2015 WL 2452413, ¶ 48 (explaining that when trial court finds one of statutory conditions exists, any error associated with findings regarding alternate statutory conditions constitutes harmless error); *In re S.M.*, 4th Dist. Highland No. 14CA4, 2014-Ohio-2961, 2014 WL 3014037, ¶ 29 (observing that when trial court makes surplus finding in permanent custody context, any error with surplus finding constitutes harmless error). We therefore need not consider appellant's challenge to the court's finding that he failed to register as a putative father.

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

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the appeal be affirmed and that appellees recover of appellant the 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 Highland 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.

Smith, P.J. & McFarland, J.: Concur in Judgment & 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.