[Cite as *Askew v. Taylor*, 2004-Ohio-5504.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOSEPH ASKEW	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	John F. Boggins, J.
-vs-	:	
	:	Case No. 2004CA00184
WALTER D. TAYLOR	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court of Common Pleas, Probate Division, Case 190025
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 12, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BARBARA W. EISENBREI 4150 Belden Village St. N.W. Suite 108 Canton, OH 44718	WALTER D. TAYLOR, Pro se, #A387-535 Belmont Correctional Institution 68515 Bannock Road, S.R. 331 St. Clairsville, OH 43950

Edwards, J.

{¶1} Appellant Walter Taylor appeals from the May 10, 2004, Judgment Entry of the Stark County Court of Common Pleas, Probate Division, holding that appellant's consent to adoption was not necessary because appellant had failed, without justifiable cause, to provide maintenance and support and to communicate with his minor child 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 as required by R.C. 3107.07(A). Appellee is Joseph Askew.

STATEMENT OF THE FACTS AND CASE

{¶2} DeVaughnte Jimar Taylor (DOB 8/3/91) is the biological son of appellant Walter Taylor and DeAnn Askew. On March 23, 2004, appellee Joseph Askew, who is married to DeVaughnte's mother and thus is DeVaughnte's stepfather, filed a petition for adoption of DeVaughnte pursuant to R.C. 3107.05. The petition alleged that appellant's consent was not required since appellant had failed, without justifiable cause, to communicate with the minor and to provide for 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 petitioner's home. At the time the petition was filed, appellant was in prison. A hearing on the petition for adoption was scheduled for May 10, 2004.

{¶3} On April 20, 2004, appellant filed an objection to the adoption petition.[1] Appellant, in his objection, stated, in relevant part, as follows:

[1] Appellant also had filed an objection on October 20, 2003, before the petition for adoption was filed.

{¶4} "…In answer to the Petitioner's allegation, Respondent avers that on or about July 15, 2000, either from the Family Court or Probate Court of Stark County, he received notification of a NO-CONTACT ORDER ordering Respondent not to contact his son DeVaughnte unless Respondent first received permission from DeVaughtne's mother DeAnn Askew. Respondent's understanding of the No-Contact Order is that he is not to contact either his son DeVaughnte or DeAnn Askew, contact can only be initiated by DeAnn Askew. Respondent should not now be penalized and lose his son to adoption for obeying a valid court order."

{¶5} Appellant further denied that he failed to provide maintenance and support for DeVaughnte and alleged that, "on or about February 2004, pursuant to a court order issued either by the Family or Probate Court of Stark County, Respondent began paying child support payments." Appellant indicated that he was paying $5.25 per month, which is 25% of his $21.00 per month prison earnings, as child support.

{¶6} Pursuant to a Judgment Entry filed on May 10, 2004, the trial court found that appellant's consent to the adoption was not necessary pursuant to R.C. 3107.07 because appellant had failed, without justifiable cause, to provide maintenance and support and to communicate with his minor child for a period of a least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner. The same day, a Final Decree of Adoption was filed.

{¶7} Appellant now raises the following assignments of error on appeal:

{¶8} "I. THE PROBATE COURT ERRED AND ITS DECISION [IS] CONTRARY TO OHIO LAW WHEN IT RULED THE CONSENT OF APPELLANT WALTER DANIEL TAYLOR FOR THE ADOPTION OF HIS SON DEVAUGHNTE

JIMAR TAYLOR IS NOT REQUIRED BECAUSE APPELLANT IS A PARENT WHO HAS FAILED WITHOUT JUSTIFIABLE CAUSE TO COMMUNICATE WITH AND PROVIDE FOR THE MAINTENANCE AND SUPPORT OF HIS SON AS REQUIRED BY LAW OR JUDICIAL DECREE FOR A PERIOD OF AT LEAST ONE YEAR IMMEDIATLEY PRECEDING THE FILING OF THE ADOPTION PEITITON OR THE PLACEMENT OF HIS SON IN THE HOME OF THE PEITITONER THEREBY VIOLATING APPELLANT'S RIGHT OF DUE PROCESS OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶9} "II. THE PROBATE COURT ERRED IN FAILING TO SUMMARILY DISMISS APPELLEE JOSEPH ASKEW'S PEITTION FOR ADOPTION WHEN APPELLANT WALTER DANIEL TAYLOR WAS NEVER SERVED A COPY OF APPELLEE'S PETITON FOR ADOPTION PURSUANT TO THE PROVISIONS OF CIVIL RULES OF COURT WHICH FACT WAS BROUGHT TO THE PROBATE COURT'S ATTENTION AND DISMISSAL REQUESTED OF THE PROBATE COURT BY THE APPELLANT IN HIS REPLY BRIEF THEREBY DENYING APPELLANT DUE PROCESS AS PROVIDED BY OHIO CIVIL RULES OF COURT."

I

{¶10} Appellant, in his first assignment of error, argues that the trial court erred in holding that appellant's consent to the adoption of DeVaughnte was not required. We disagree.

{¶11} R.C. 3107.07 reads in pertinent part as follows: 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 finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner. * * *

{¶12} Pursuant to this statute, with respect to support, a 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* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, at syllabus 1. A probate court's finding on the issue of whether a natural parent's failure to provide support for his or her child has been proven by clear and convincing evidence will not be disturbed on appeal unless such finding is against the manifest weight of the evidence. Id. at syllabus 4. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr*. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶13} Since a court's finding that a parent failed to provide for the maintenance and support of his or her child during the one year period immediately preceding the filing of an adoption petition "is tantamount to a determination that the parent abandoned the child and thus forfeited parental rights," the inquiry for the trial court is whether the parent's failure to support is of such a degree as to constitute abandonment. *Celestino v. Schneider* (1992), 84 Ohio App.3d 192, 196, 616 N.E.2d 581. For such reason, Ohio courts have held that even minimal contributions toward the

support of a child meet the maintenance and support requirements of R.C. 3107.07(A) and preserve the natural parent's consent as a jurisdictional prerequisite to a child's adoption. Id. See also *In Re Adoption of McNutt* (1999), 134 Ohio App.3d 822, 732 N.E.2d 470.

{¶14} Since the petition for adoption was filed on March 23, 2004, the relevant period in this matter is from March 23, 2003, one year prior to the filing of the petition, to March 23, 2004, the date the petition was filed. From the limited record before this Court, it appears that appellant made only two $5.25 payments during such time as a result of State Wage Withholding of Prison Wages.[2] These two payments were made in or after February, 2004. Appellant made no payments voluntarily from March 23, 2003, to February, 2004. While appellant has been incarcerated since approximately 2000, "justice requires that we not ignore the reason appellant was put into his current position." *Frymier v. Crampton*, Licking App. No. 02 CA 8, 2002-Ohio-3591.[3] Appellant has been incarcerated since April of 2000 on two counts of felony child endangering as a result of injuring his children.

{¶15} As a result of appellant's criminal behavior, the Stark County Court of Common Pleas, Family Court Division, entered an order prohibiting appellant from

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[2] Pursuant to a Judgment Entry of Uncontested Divorce filed in the Stark County Court of Common Pleas, Domestic Relations Division, on June 8, 2001, appellant had been ordered to pay child support in the minimum amount of $50.00 per month for DeVaughnte.

[3] In *Frymier,* the trial court granted a stepfather's petition to adopt a child, finding that since the child's natural father had failed to provide support for his son without justifiable cause for one year prior to the stepfather's petition for adoption, the natural father's consent to adoption was not required. The natural father then appealed. In affirming the decision of the trial court, this Court noted that although the natural father was incarcerated and the divorce order effectively relieved him of child support payments until after he was released from prison, the natural father's own violent acts directed at his child's family "caused the subsequent lack of support for the child." This Court noted that the natural father was in prison after forcibly entering the house of the child's maternal grandfather, while the child was present, and striking the child's grandfather with two gunshots.

having contact with his children. As noted by appellee, appellant "created his own circumstances and should not be allowed to benefit from the consequences of this." Appellant's own violent acts caused both the subsequent lack of support for and contact with DeVaughnte. See *Frymier,* supra. Under the specific facts and circumstances of this case, we find that, the trial court's determination that appellant's consent to the adoption was not required was proper.

{¶16} Appellant's first assignment of error is, therefore, overruled.

II

{¶17} Appellant, in his second assignment of error, contends that the trial court erred in failing to serve appellant with a copy of the petition for adoption. Appellant specifically contends that he was never served a copy of the same with a summons as required by Civ. R. 4 and 4.1.

{¶18} Revised Code 3107.11 states, in relevant part, as follows: "(A) 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 hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court …." (Emphasis added). Revised Code 3107.11(B) states that notice of the filing of a petition for adoption and hearing on such petition "shall be given as specified in the Rules of Civil Procedure." In short, such section requires service of notice rather than issuance of summons. See *In re Burdette* (1948), 83 Ohio App. 368, 83 N.E.2d 813.[4]

[4] Such case concerns Gen. Code Section 10512-12 [now 3107.04]. Gen. Code Section 10512-12, on adoptions, provided that "the court shall fix a day for hearing…and shall cause notice to

{¶19} Civil Rule 73, which specifically addresses proceedings in a probate court, is the applicable Civil Rule. See *In The Matter of Adoption of Ashley and Amanda Lowery* (April 14, 1997), Licking App. No. 96-CA-00055, 1997 WL 219058. Such rule provides, in relevant part: "(E) Service of notice

{¶20} "In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods:…

{¶21} "(3) By certified or express mail, addressed to the person to be served at the person's usual place of residence with instructions to forward, return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered, provided that the certified or express mail envelope is not returned with an endorsement showing failure of delivery;"

{¶22} In the case sub judice, the Stark County Probate Court complied with Civ. R. 73. The record reveals that appellant was served with a notice of the filing of adoption petition and the hearing on the same by certified mail on March 25, 2004.

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be given to the guardian of the person of such child, if any, and to the parents or parent of the child…"

{¶23} Appellant's second assignment of error is, therefore, overruled.

{¶24} Accordingly, the judgment of the Stark County Court of Common Pleas, Probate Division, is affirmed.

By: Edwards, J.

Hoffman, P.J. concurs separately

Boggins, J. concurs

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JUDGES

JAE/0916

Hoffman, P.J., concurring

I concur in the majority's analysis and disposition of appellant's second assignment of error.

I further concur in the majority's disposition of appellant's first assignment of error. However, I would limit our reason for finding appellant's consent was unnecessary because of his failure to communicate without justifiable cause. I find appellant's minimal support payments within one year prior to the filing of the adoption petition sufficient to require consent.

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JUDGE WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JOSEPH ASKEW	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WALETER D. TAYLOR	:	
Defendant-Appellant	:	CASE NO. 2004CA00184

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Probate Division, is affirmed. Costs assessed to appellant.

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JUDGES