[Cite as *In re Kat P.*, 2009-Ohio-3852.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
THE ADOPTION OF:	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
KAT.P. AND KAS.P.	:	
	:	Case Nos. 09CA10
	:	09CA11
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Probate Division, Case Nos. 085036 and 085037

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 29, 2009

APPEARANCES:

For Appellant

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For Appellee

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Farmer, P.J.

{¶1} On May 29, 2008, appellee, Jimmi Popcevski, filed a petition to adopt his two minor stepchildren without consent of their biological father, appellant, Sasho Dukovski. A hearing was held on October 6, 2008. By entry filed January 27, 2009, the trial court found appellant's consent was not needed because appellant failed without justifiable cause to provide for the maintenance and support of his minor children for at least one year prior to the filing of the petition, and failed without justifiable cause to communicate with his children for at least one year prior to the filing of the petition.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE BIOLOGICAL FATHER IN DETERMINING THAT HIS CONSENT TO THE ADOPTION OF HIS MINOR CHILDREN WAS NOT NECESSARY PURSUANT TO R.C. 3107.07(A) AS SASHO DUKOVSKI HAD COMMUNICATED WITH HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION."

II

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE BIOLOGICAL FATHER IN DETERMINING THAT HIS CONSENT TO THE ADOPTION OF HIS MINOR CHILDREN WAS NOT NECESSARY PURSUANT TO R.C. 3107.07(A) AS SASHO DUKOVSKI HAD PROVIDED MAINTENANCE AND/OR SUPPORT FOR HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION."

III

{¶5} "ANY FAILURE BY SASHO DUKOVSKI TO COMMUNICATE WITH HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION WAS JUSTIFIED PURSUANT TO R.C. 3107.07(A)."

IV

{¶6} "ANY FAILURE BY SASHO DUKOVSKI TO PROVIDE MAINTENANCE AND/OR SUPPORT FOR HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION WAS JUSTIFIED PURSUANT TO R.C. 3107.07(A)."

I, II, III, IV

{¶7} We will address these assignments collectively as they relate to the same facts and the same determinations by the trial court.

{¶8} Appellant claims the trial court erred in finding that he provided no support for his children and had no contact with his children for at least one year prior to the filing of the adoption petition.

{¶9} The applicable standard for an adoption without consent is controlled by R.C. 3107.07 which states the following:

{¶10} "(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."

{¶11} "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 Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶12} An appellate court will not disturb a trial court's decision on adoption unless it is against the manifest weight of the evidence. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9.

{¶13} In its entry filed January 27, 2009 at Findings of Fact Nos. 6 and 11, the trial court found that appellant provided no support and appellant had no contact with the children during the one year period proceeding the filing:

{¶14} "As of October 1, 2008, the total balance due and owing by Mr. Dukovski for children support was $38,299.09 for these children. Mr. Dukovski paid no child support during the one year prior to the Adoption Petitions being filed, May 20, 2007 through May 20, 2008, through the Child Support Enforcement Agency (CSEA) or otherwise. Further, Mr. Dukovski paid nothing in child support for these children through CSEA or otherwise for the five year period prior to the filing of these Petitions for Adoption. Additionally, the children and Mrs. Popcevski received no other form of support from Mr. Dukovski, or from anyone on his behalf, during the five year period preceding the filing of the Adoption Petitions.

{¶15} "The children have not seen or spoken with Mr. Dukovski or received any mail or the other communication since late 2003."

{¶16} Basically, there are few contested facts on the issue of providing support. The child support records substantiate that appellant paid no support from May 30, 2007 to May 29, 2008. T. at 11. This occurred despite the fact that appellant sought and received a reduced child support order on February 26, 2007 because of his limited income ($115.00 per month from the county for disability). T. at 10, 57, 78. Appellant admitted to paying no child support in the one year proceeding the filing of the petition because he did not have an income except for his disability which was delayed because of a lack of documentation. T. at 56-57, 72-74. Appellant had been denied social security disability and the matter was currently in the appeals process. T. at 68-69.

{¶17} Appellant claimed he had a justifiable cause for not supporting the children i.e., an automobile accident in 1997. He testified he suffered neck, head, and back injuries which prevented him from working or being a reliable worker. T. at 59-60, 63,

66-67, 70-71. He also suffered from anxiety attacks and depression and an inability to drive. T. at 61, 66-68, 70-71, 216-217.

{¶18} This testimony is in stark contrast to the testimony of several witnesses who stated appellant performs in a band and the performances are very physical. T. at 116-118, 132, 145, 149, 160-161. In addition, after the accident, appellant completed his music degree at The Ohio State University. T. at 61.

{¶19} Appellant's living expenses were small and he relied on his parents' support. T. at 72, 91. Basically the $115.00 per month was his to freely spend. T. at 22, 79. However, appellant did not even attempt to pay a partial amount of the reduced child support order until after the adoption petition had been filed. T. at 11. There was no evidence that any other support was given outside the realm of the child support order.

{¶20} Appellant refuted the testimony that he performs in bands and denied that he was a regular band member, despite the fact that band advertising showed him as a member and the band was paid for performing. T. at 118, 120-125, 150-151, 234-236.

{¶21} The trial court was presented with two opposite views of appellant. One side presented him as a malingerer and appellant presented himself as a victim. It was within the province of the trial court to determine from the unrefuted lack of child support for the children whether appellant had a justifiable cause. The determination of the credibility of witnesses lies within the discretion of the trial court, and we may not substitute our judgment on appeal. *Seasons Coal Company v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶22} On the issue of lack of support, we cannot find that the trial court's conclusion was against the manifest weight of the evidence.

{¶23} On the issue of contact, appellant argues he contacted the children via Christmas presents he mailed to them on December 21, 2007 to the home of the maternal grandmother, Nada Purdef. T. at 87-90. Appellant also argues he called Ms. Purdef's home in an attempt to contact the children. T. at 92-94. Ms. Purdef denied these claims. T. 169-170. She testified she never received a voicemail or a message from appellant. T. at 185.

{¶24} Appellant relies on the 2007 Christmas gifts to support his argument of a legitimate attempt to contact the children. Appellant argues the gifts were never returned, and he relies on Ohio's postmark rule. T. at 89.

{¶25} Neither of the children lived with Ms. Purdef, nor was she the day care provider as they were both in school. T. at 265-266. The gifts were sent to a stale address because Ms. Purdef had moved in late October, 2007. T. at 171. Ms. Purdef's new phone number was listed in the telephone book. T. at 171-172. Appellant's own mother, Lancha Dukovski, had contact with Ms. Purdef at church. T. at 179, 211.

{¶26} Ms. Dukovski and Sonya Canterbury, appellant's sister, testified as to the 2007 Christmas presents. They both stated "we sent" the Christmas gifts. T. at 214, 225-227. Ms. Canterbury acknowledged that the telephone call she witnessed being made to Ms. Purdef was actually initiated by Ms. Dukovski, not appellant. T. at 229. Appellant acknowledged the 2007 Christmas gifts were a joint effort by his family, not his alone. T. at 245. He admitted that he did not purchase them. Id.

{¶27} Appellant also argues the children's mother, Lola Popcevski, thwarted his attempts at visitation. Appellant argues Ms. Popcevski refused weekly supervised visitation at the Fairfield County Visitation Center from the beginning of a revised visitation order in 2004-2005. T. at 251-255. Appellant also argues Ms. Popcevski had an unlisted phone number, but he was aware of her address. T. at 247-248.

{¶28} Appellant cannot rely on old visitation issues to exonerate himself from his failure to contact the children. In examining the "contact" rule, this court has been faithful to the proposition that any contact, no matter how slight, is sufficient. As this court stated in *In re Adoption of Campbell,* Guernsey App. No. 07CA43, 2008-Ohio-1916, ¶22, 28-30, respectively:

{¶29} " 'The right of a natural parent to the care and custody of her children is one of the most fundamental in law. This fundamental liberty interest of natural parents in the care, custody and management of their children is not easily extinguished. *Santosky v. Kramer* (1982), 455 U.S. 745, 753-754. Adoption terminates those fundamental rights. R.C. 3107.15(A)(1). Accordingly, adoptions are generally not permissible absent the written consent of both parents. R.C. 3107.06.' *In re Adoption of Stephens,* Montgomery App. No. 18956, 2001-Ohio-7027.

{¶30} "Although the term 'communicate' is not defined in R.C. Chapter 3107, it has been defined as ' "to make known," "to inform a person of, convey the knowledge or information of * * * to send information or messages[.]" ' *In re Adoption of Jordan* (1991), 72 Ohio App.3d 638, 644.

{¶31} "Asked to determine the legislature's intended meaning of the term 'communicate' as used in R.C. § 3107.07(A), the Supreme Court in *Holcomb* held that:

{¶32} " 'Our reading of the statute indicates that the legislature intended to adopt an objective test for analyzing failure of communication * * *. The legislature purposely avoided the confusion which would necessarily arise from the subjective analysis and application of terms such as failure to communicate *meaningfully, substantially, significantly,* or *regularly.* Instead, the legislature opted for certainty. It is not our function to add to this clear legislative language. Rather, we are properly obliged to strictly construe this language to protect the interests of the non-consenting parent who may be subjected to the forfeiture or abandonment of his or her parental rights.' *Holcomb,* 18 Ohio St.3d at 366."

{¶33} In the case sub judice, there is no evidence that the children ever received any gifts or had the benefit of any contact with appellant. Appellant cannot receive the benefit of his dilatory conduct to excuse the lack of affirmative action on his part.

{¶34} Upon review, we find there was clear and convincing evidence to support the trial court's findings, and the trial court's decision was not against the manifest weight of the evidence.

{¶35} Assignments of Error I, II, III, and IV are denied.

{¶36} The judgment of the Court of Common Pleas of Fairfield County, Ohio, Probate Division is affirmed.

By Farmer, P.J.

Hoffman, J. and

Wise, J. concur.

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JUDGES

SGF/jpb 0713

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	
THE ADOPTION OF:	:	JUDGEMENT ENTRY
	:	
KAT.P. AND KAS.P.	:	
	:	CASE NOS. 09CA10
	:	09CA11

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

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JUDGES