[Cite as *In re Adoption of L.R.K.*, 2015-Ohio-747.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

ADOPTION OF

L. R. K.

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. CT2014-0040

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 20144004

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 27, 2015

APPEARANCES:

For Appellant Father

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Wise, J.

{¶1} Appellant-Father Valentine Yoder appeals the decision of the Muskingum County Court of Common Pleas, Probate Division, which granted Appellee Michael Patrick Kelley's petition for adoption of L.R.K.

{¶2} This appeal is expedited and is being considered pursuant to App.R.11.2(C). The relevant facts leading to this appeal are as follows:

STATEMENT OF THE FACTS AND CASE

{¶3} On May 26, 2012, Viola Yoder nka Viola Kelley married Petitioner, Appellee Michael Patrick Kelley.

{¶4} On March 11, 2014, Appellee Michael Patrick Kelley filed a petition for adoption of his stepdaughters in Muskingum County Probate Court.

{¶5} On April 28, 2014, Appellant Valentine U. Yoder, father of the children, filed objections to the adoption.

{¶6} The cases were bifurcated with the first hearing held August 26, 2014, to determine if the consent of Valentine Yoder was necessary.

{¶7} At this hearing, the trial court heard testimony from the Petitioner, Michael Patrick Kelley, from the children's mother, Viola Kelley, and from the children's natural father, Valentine U. Yoder.

{¶8} The trial court found the following:

{¶9} Appellant Valentine Yoder and Viola Yoder nka Viola Kelley were married November 1, 1990, in Pennsylvania. Two children were born during their marriage: L.R.K., d.o.b. May 15, 2000, and G.A.K., d.o.b. July 4, 2003. The couple divorced on June 20, 2008.

{¶10} In the divorce proceeding, Viola was granted full custody of L.R.K. and G.A.K.; Valentine was granted visitation with L.R.K. and G.A.K. every two weeks on Saturday afternoons, for a period of 4-5 hours each visit. Viola Kelley testified that the visitation the Court ordered for Valentine was more than what Valentine requested.

{¶11} At the time that Viola and Valentine divorced in June 2008, Viola resided with L.R.K. and G.A.K. at Rinehart Road in Salesville, Ohio, in a mobile home that fronted the road on land owned by Viola's father. Viola, L.R.K. and G.A.K. had moved into the residence at Rinehart Road in November 2007.

{¶12} Viola, L.R.K. and G.A.K. continued to reside at the mobile home on Rinehart Road in Salesville, Ohio, until they moved to their current home at 187 Friendship Drive, New Concord in Spring, 2012. Between November 2007 and May 2012, they lived at no residence other than that on Rinehart Road in Salesville.

{¶13} Viola kept a log of visitation. The log was admitted into evidence as Petitioner's Exhibit A. The first entry in the log was made May 13, 2008. Valentine exercised visitation with L.R.K. and G.A.K. approximately 3-4 times in 2008. Valentine last saw L.R.K. and G.A.K. on July 12, 2008. The last entry in the log was made in March 21, 2009. Valentine had missed 18 visits with L.R.K. and G.A.K. at the time of the last log entry in March 2009. Valentine thereafter never again saw L.R.K. and G.A.K. and never again asked for or exercised any visitation with L.R.K. and G.A.K..

{¶14} L.R.K. and G.A.K. were 7 years old and 4 years old, respectively, at the time that Valentine and Viola divorced. L.R.K. and G.A.K. are now 14 years old and 11 years old, respectively.

{¶15} During the time that Viola resided with L.R.K. and G.A.K. at Rinehart Road in Salesville, Ohio, Viola had a land line telephone. Viola did not provide the telephone number to Valentine. However, the number was listed in the telephone book under the name of Viola Yoder. Valentine Yoder admitted that he never attempted to look Viola's number up in the phone book.

{¶16} Valentine Yoder admitted that he did not make any calls to L.R.K. or G.A.K. from or after his last visit with them in 2008.

{¶17} Valentine Yoder admitted that he did not send any letters, cards, gifts or other written communication to L.R.K. or G.A.K. from or after his last visit with them in 2008,

{¶18} At the time of Viola's divorce from Valentine in 2008, L.R.K. attended Buckeye Trails Schools. L.R.K. and G.A.K. both attended Buckeye Trails Schools until they moved to 187 Friendship Drive, in the John Glenn School District, in May 2012.

{¶19} Valentine Yoder admitted that from the time of his divorce from Viola in 2008, he did not make any contact with L.R.K. or G.A.K. at Buckeye Trails Schools, did not attend any of their school activities, and did not request any information about them from the school or any other local schools. Valentine Yoder never attempted to find out where his kids were in school.

{¶20} Viola Kelley testified that she has done nothing to discourage or interfere with any contact between L.R.K. and G.A.K. and their natural father, Valentine Yoder. Viola Kelley had no phone number or address at which to contact Valentine Yoder. She attempted without success to find him on the internet. She could not make contact with him through his relatives, as his relatives are Amish. Viola was unaware of Valentine

trying to make contact with her family to find her. For purposes of a letter from her attorney early in 2014, and for this hearing, Viola was able to make contact with Valentine only by way of mail to Guernsey County Job and Family Services, for forwarding by the Department to Valentine.

{¶21} Valentine Yoder resides at 155 Meadowpark Drive, Cambridge, Guernsey County, Ohio. He has resided there since July 2010. Prior to that and from the time of his divorce from Viola, Valentine Yoder has resided at Kimbolton, Ohio, Strasburg, Ohio, Salesville, Ohio, N. 5th Street in Cambridge, Ohio, and then his current address in Cambridge, Ohio.

{¶22} Viola has moved only one time since she divorced Valentine. Valentine has moved approximately five times since he and Viola divorced. Neither party filed notice with the court in Guernsey County of their respective moves. Neither party informed the other of their respective moves. Valentine Yoder asserted that he tried showing up at Viola's place in 2008, before the divorce, but that he was thrown off the property twice by Viola's dad. Valentine asserted that there was a confrontation with Viola's dad and that Valentine was told not to come back.

{¶23} Viola's mobile home on her father's property fronted on Rinehart Road, and her dad's home was beyond hers down the lane.

{¶24} Valentine Yoder was aware that Viola had remarried because of his child support papers.

{¶25} Valentine Yoder testified that he contacted Viola's brother last year, but that Viola's brother would not give him Viola's address.

{¶26} Valentine Yoder testified that he called Ida, Viola's mother, a year ago in the Spring and that she hung up on him.

{¶27} In July 2011, Valentine Yoder took Viola back to Court in Guernsey County, Ohio, to lower his spousal and child support. Valentine was represented by an attorney in that action. A copy of Valentine's Motion, by his attorney, was admitted into evidence as Petitioner's Exhibit B. Both Valentine and Viola appeared at the hearing on Valentine's Motion to lower support. Despite having not seen his daughters since July, 2008, Valentine made no request to see or have parenting time or visitation with L.R.K. or G.A.K. when he instituted court proceedings three years later in July, 2011.

{¶28} At the conclusion of the hearing, the trial court found that consent was not necessary and a subsequent best interest hearing was scheduled for October 8, 2014.

{¶29} Following the hearing on October 8, 2014, the trial court held that it was in the best interest of the children for the adoption to be granted, and a final decree of adoption was entered that same day.

{¶30} Appellant timely filed a notice of appeal and herein raises the following Assignments of Error:

ASSIGNMENTS OF ERROR

{¶31} "I. THE TRIAL COURT ERRED IN FINDING PURSUANT TO OHIO REVISED CODE 3107.07(A) THAT APPELLANT FAILED WITHOUT JUSTIFIABLE CAUSE TO PROVIDE MORE THAN DE MINIMUS [SIC] CONTACT WITH THE CHILDREN FOR A PERIOD OF ONE YEAR IMMEDIATELY PRECEDING THE FILING OF THE ADOPTION PETITION AND SUCH FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶32} "II. THE COURT ERRED IN FAILING TO RECOGNIZE THE OHIO REVISED CODE 3109.051(G)(1) DUTY OF A RESIDENTIAL PARENT TO INFORM A NONRESIDENTIAL PARENT OF RELOCATION THEREBY DENYING THE APPELLANT NOTICE OF WHERE THE CHILDREN WERE LIVING DURING THE NECESSARY ONE YEAR LOOK BACK PERIOD"

I., II.

{¶33} We shall address Appellant's assignments of error together as he did in his brief.

{¶34} In his two assignments of error, Appellant argues that the trial court erred in determining that he failed without justifiable cause to provide more than de minimis contact with the child for one year prior to the filing of the step-parent adoption petition based on a violation of R.C. 3109.051(G)(1). We disagree.

{¶35} R.C. §3107.07 governs when consent to adoption is not required. Subsection (A) states consent is not required when:

{¶36} "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."

{¶37} The right of a natural parent to the care and custody of his or 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). Any exception to the requirement of parental consent must be strictly construed so as to protect the right of the natural parents to raise and nurture their children. *In Re: Adoption of Schoeppner* (1976), 46 Ohio St.2d. 21, 345 N.E.2d 608.

{¶38} The petitioner for adoption has the burden of proving by clear and convincing evidence that the natural parent has failed to provide support or maintain more than de minimis contact with the child for at least a one-year period prior to the filing of the petition, and also must prove the failure was without justifiable cause. *In Re: Adoption of Bovett* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919. If the petitioner meets his burden of proof, then the natural parent has the burden of going forward with evidence to show some justifiable cause for his or her failure to support or contact the child. However, the burden of proof never shifts from the petitioner. *Id.*

{¶39} In *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, the Ohio Supreme Court explained that clear and convincing evidence is more than a preponderance of the evidence but does not rise to the level of beyond a reasonable doubt as required in criminal cases. It must produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. *Cross,* syllabus by the court, paragraph three.

{¶40} 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.

{¶41} Justifiable cause has been found to exist if the custodial parent significantly interferes with or discourages communication between the natural parent and the child. *In Re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613. A probate court may examine any preceding events that may have a bearing on the parent's failure to communicate with the child, and the court is not restricted to focusing solely on events occurring during the statutory one-year period. *In re: Adoption of Lauck* (1992), 82 Ohio App.3d 348, 612 N.E.2d 459.

{¶42} The trial court, as the trier of fact here, determines the weight and credibility of the evidence. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. We may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St.3d 619, 614 N.E.2d 748.

{¶43} In the case *sub judice*, Appellant maintains that his consent to the adoption was required because his inability to have more than de minimis contact with the child was justified because of mother's failure to provide him with her new address and/or telephone number when she moved from Guernsey County to Muskingum County.

{¶44} Here, the trial court believed the testimony of mother and Appellee that Appellant did not have any contact whatsoever with L.R.K. during the one-year period prior to the filing of the adoption petition, that being March 11, 2013, through March 11,

2014, or for the one-year period prior to L.R.K. being "placed" or moving into the home of Appellee, June, 2011 through June, 2012. In fact, at the Consent Hearing, the trial court found that it had been more than six (6) years since Appellant had had any contact with L.R.K. The trial court further found that L.R.K. had only lived in a new residence for the last two of those six years. For the first four years, L.R.K. lived at the Rinehart Road address in Salesville, the same place they had lived at all times since the divorce. (T. at 28-32). The trial court also found that Appellant only ever availed himself of visitation with L.R.K. four times, the last being July 12, 2008. (T. at 29-32, 43-44, 62-63). During this time period, Appellant never sent cards, letters or gifts to L.R.K. (T. at 61). Also, during the entire time L.R.K. lived at the Salesville address, her mother had a listed telephone number, but Appellant never placed any calls to L.R.K. or called to inquire about her. (T. at 39, 58, 61). Further, L.R.K. continued to attend Buckeye Trails School after the divorce, but Appellant never attended any of her school activities or contacted the school concerning the child's progress. (T. at 62, 66).

{¶45} In addition to arguing that his failure to have contact with LR.K. was justified due to the mother's failure to notify him about the family's move to Muskingum County, Appellant also asserts that he attempted communication on two occasions with other family members: one phone call to a maternal uncle and one to the maternal grandmother, both in the Spring of 2013, and both of which he claims that he was not rebuffed. (T. at 48-51). Appellant also offered, as one reason for his failure to continue contact, that he had an altercation with his ex-wife's father in 2008, prior to the divorce being finalized. Appellant admitted that he made few attempts at contact and offered as excuses his lack of access to a telephone or a reliable vehicle.

{¶46} Upon review, we do not find that Appellant has demonstrated significant interference or discouragement by Appellee or the mother, such that would justify Appellant's failure in this case. The instances cited by Appellant as alleged attempts at contact were with other family members, not Appellee, mother or L.R.K.

{¶47} The trial court, after hearing testimony from all of the witnesses, found that Appellee and the mother had "done nothing to discourage or interfere with any contact between [L.R.K. and G.A.K.] and their natural father, Valentine Yoder." (J/E Sept. 22, 2014, ¶21 and 36). Upon review, we find that the trial court was in the best position to determine the credibility of the witnesses.

{¶48} Finally, Appellant argues that the fact that he made regular support payments should be considered as communication with the children.

{¶49} We note that R.C. §3107.07(A) is written in the disjunctive. 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. *See In re Adoption of A.H.,* 9th Dist. No. 12CA010312, 2013–Ohio–1600, ¶ 9, citing *In re Adoption of McDermitt,* 63 Ohio St.2d 301, 304 (1980). Here, Appellee's petition for adoption of L.R.K. specifically alleged that Appellant's consent was not required because Appellant had failed without justifiable cause to provide more than de minimis contact with L.R.K. for a period of at least one year immediately preceding the filing of the adoption petition. Accordingly, any argument Appellant advances on appeal regarding his payment of child support is not relevant to the issue of whether he failed to provide more than de minimis contact with L.R.K..

{¶50} We further find, based on Appellant's failure to have any contact with his children for the four years prior to their move to Muskingum County, that the trial court did not put much weight in Appellant's argument that the mother's failure to file a relocation notice pursuant to R.C. §3109.051(G)(1) was not the cause of Appellant's failure to have contact with his children.

{¶51} We find, based on the foregoing, the trial court could conclude Appellant had failed to maintain more than de minimis contact with L.R.K. for a period of at least one year immediately preceding the filing of the petition, and such failure was unjustified. We therefore do not find that the trial court erred in determining that Appellant's consent to L.R.K.'s adoption was not required.

{¶52} Appellant's assignments of error are overruled.

{¶53} For the foregoing reasons, the judgment of the Court of Common Pleas, Probate Division, Muskingum County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JWW/d 0203