[Cite as *In re R.M.*, 2009-Ohio-3252.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF THE ADOPTION OF:	)	CASE NO. 07 MA 232
R.M., A Minor	)	OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Probate Division, of Mahoning County, Ohio
Case No. 2007 AD 0008

JUDGMENT: Reversed. Adoption Petition Dismissed.

APPEARANCES:

For Appellant, Angela Lynn Feola:

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For Appellee, Tracy Markulin:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 24, 2009

[Cite as *In re R.M.*, 2009-Ohio-3252.]
WAITE, J.

{¶1} Appellant Angela Lynn Feola ("Angela") appeals the judgment of the Mahoning County Court of Common Pleas, Probate Division, granting a petition of adoption of her daughter, R.M., to Appellee Tracy Diane Markulin ("Tracy"). Appellee is R.M.'s step-mother and is married to Appellant's ex-husband, Louis Markulin ("Louis"), who is the biological father of R.M. The child is now ten years old. The parents have been in a custody dispute over R.M. since 2001, which began during their legal separation proceedings. Appellant argues that Ohio's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") applies in this case and should have prevented the probate court from taking jurisdiction. By its own terms, though, the UCCJEA does not apply to adoptions, and the probate court had jurisdiction to proceed with the adoption. Appellant also contends that the court improperly found that she had failed to make sufficient support payments and due to that failure, her consent was not required for the adoption to be granted. The record reflects that Appellant provided sufficient support to satisfy the "maintenance and support" standard found in R.C. 3107.07(A), and therefore, the adoption petition could not be granted without her consent. The judgment of the probate court is reversed and the adoption petition dismissed.

History of the Case

{¶2} Angela and Louis are the biological parents of R.M., who was born on May 4, 1999. Angela and Louis began proceedings to end their marriage in 2001 in Lawrence County, Pennsylvania. The parties entered into a shared parenting agreement at that time.

{¶3} Louis began a relationship with Tracy at about this same time in 2001. Angela moved to Florida in 2002. In May 2002, Louis took sole custody of R.M. On March 6, 2003, the court granted Angela visitation rights at her residence in Florida. Angela exercised three visitation periods of 14 days each, until Louis filed a motion on August 12, 2003, to terminate the custody arrangement. Visitation was subsequently modified so that Angela would have supervised custody.

{¶4} The most recent visitation between Appellant and R.M. occurred in August 2003, when the child participated in a two-week visitation period in Florida.

{¶5} The divorce between Angela and Louis became final on February 26, 2004. Louis and Tracy were married on March 21, 2004, in Boardman, Ohio.

{¶6} Louis obtained a protection from abuse order against Angela on April 30, 2004. The order was based on allegations that someone living with Angela was sexually abusing the child, although there were no allegations that it was Angela. Louis refused to cooperate with further visitation between Appellant and R.M. after these allegations surfaced.

{¶7} On May 13, 2004, a final order was issued by the common pleas court in Lawrence County, Pennsylvania, designating R.M. as a protected person under Pennsylvania law and prohibiting Appellant from having any contact with R.M. except as specified in a prior order allowing supervised partial custody.

{¶8} On March 30, 2005, Louis filed, in Pennsylvania, a petition to terminate Angela's parental rights. The petition was denied on August 2, 2006.

{¶9} In June 2006, Tracy and Louis moved to Canfield, Ohio, and established residence there.

{¶10} On August 15, 2006, the Lawrence County court ordered Louis to take the necessary steps to reintroduce the child to Angela. Weekly supervised visits were to begin on August 20, 2006. Angela returned from Florida to participate in visitation.

{¶11} Louis filed for a continuance of the visitation order on August 22, 2006, and visitation was rescheduled to September 1, 2006. The parties agreed, without court order, to continue visitation to September 26, 2006. Angela appeared at the visitation site, but the visit did not occur.

{¶12} On September 26, 2006, Louis filed a motion for extension of time and/or cancellation of visitation. The court denied the motion and rescheduled visitation to September 29, 2006, at the office of Dr. Lynn DiMarzio. Angela appeared for visitation, but no visitation occurred.

{¶13} On October 20, 2006, Angela filed a petition for review of the custody order and a petition for contempt. Louis filed a motion to dismiss.

{¶14} On January 17, 2007, the Lawrence County court referred the parties to Kids in Common for implementation of supervised visitation. The court noted that Louis' failure to cooperate in visitation would result in sanctions, including the possible loss of custody privileges.

{¶15} On January 23, 2007, the Lawrence County court allowed Louis to withdraw his second petition for termination of parental rights, and it was so ordered.

{¶16} On February 26, 2007, Tracy filed a Petition for Adoption of Minor in the Mahoning County Court of Common Pleas, Probate Division. Included in the petition was a consent to adoption form signed by Louis.

{¶17} On April 12, 2007, Angela filed an objection to the petition for adoption. Angela denied that she had failed to communicate with or support the child during the preceding one year period. Angela requested that the petition be dismissed.

{¶18} On April 24, 2007, Tracy filed a supplemental adoption form, indicating that Pennsylvania had issued recent rulings regarding custody of R.M.

{¶19} The case was assigned to a magistrate, and a magistrate's hearing was held on April 24-25, 2007.

{¶20} On May 8, 2007, the magistrate issued his decision. The magistrate held that Ohio's version of the UCCJEA, found in R.C. Chapter 3127, does not apply to adoption proceedings. The magistrate found that Angela had justifiable cause for failing to communicate with the child due to interference from Louis. The magistrate found that Angela contributed $185.00 out of a total child support order of $11,426.13 in the year preceding the filing of the adoption petition. The magistrate noted Appellant's testimony that her minimal support payments were all she could afford. The magistrate found that Appellant paid between $7,000 and $10,000 in attorney's fees over the past few years. The magistrate noted Appellant's testimony that her attorney recommended that she make minimum support payments of $25.00 to $30.00 per month.

{¶21} The magistrate found that Appellant had been residing in West Long Beach, Florida since 2002, and that she also spent a considerable amount of time in Orlando, Florida. He found that Appellant was employed as a secretary/receptionist at $9.00 per hour at a carpet cleaning company based in Orlando. The magistrate found that Appellant had a flexible work schedule and could perform her job without being physically present at company headquarters, and that she earned slightly less than $7,000 in 2006. The magistrate noted that as of November of 2005, Appellant's monthly income was $3,408 per month, based on a support order issued in Pennsylvania.

{¶22} The magistrate further found that Appellant had a suspended Pennsylvania license to work as a cosmetologist. She also possessed a valid West Virginia massage therapy license. The magistrate noted Appellant's testimony that she had been involved in an automobile accident in Florida in 2005 and suffered injuries that prevented her from becoming fully employed as a massage therapist. The magistrate recognized that Appellant filed for Chapter 7 bankruptcy in October of 2005, and that the bankruptcy petition was approved in March, 2006.

{¶23} The magistrate found that Appellant has no mortgage or rent expense, and that most of her food expense was paid by her employer, family, and friends. The magistrate found that Appellant's mother gave her money on several occasions for transportation between Florida and Pennsylvania.

{¶24} The magistrate determined that Appellant had the ability to make payments for child support, but decided to use her income for other purposes. The

magistrate determined that Appellant failed to provide maintenance and support for the child for the one year period prior to the filing of the adoption petition, and recommended that the petition be approved.

{¶25} Appellant filed objections to the magistrate's decision on May 17, 2007.

{¶26} On November 27, 2007, the trial court adopted and approved the magistrate's decision and issued its judgment.

{¶27} This appeal was filed on December 21, 2007. On January 17, 2008, we issued a judgment entry holding that the November 27, 2007, trial court judgment was not a final appealable order because it merely adopted the magistrate's decision without clearly defining the rights and obligations of the parties. We held the appeal in abeyance for 30 days so that the parties could obtain a final appealable order.

{¶28} On February 13, 2008, the trial court issued a new judgment entry overruling Appellant's objections, adopting the magistrate's decision, and granting Appellee's adoption petition.

{¶29} Appellant presents four assignments of error on appeal, which shall be reviewed out of order for purposes of our analysis.

ASSIGNMENT OF ERROR NO. 1

{¶30} "The Probate Court committed reversible error by failing to apply the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA) and thereby improperly assuming subject matter jurisdiction."

{¶31} It is undisputed that original and exclusive jurisdiction over adoption proceedings is vested in the probate court. *In re Adoption of Biddle* (1958), 168 Ohio St.2d 209, 152 N.E.2d. Appellant contends, though, that the probate court should not have accepted jurisdiction over the adoption case filed by Appellee because a prior court already had jurisdiction over the custody of R.M. Appellant argues that she has been involved in litigation over custody and visitation regarding R.M. since 2001, when she and Louis began divorce proceedings in Pennsylvania. Appellant claims that the UCCJEA, if followed, would have given priority to Pennsylvania's jurisdiction in matters relating to custody of R.M. She argues that the trial court should have followed the UCCJEA, and in doing so, should have declined to take jurisdiction of the adoption case until the common pleas court in Lawrence County, Pennsylvania relinquished its jurisdiction. Appellant's argument is not persuasive.

{¶32} The UCCJEA, codified in Ohio in R.C. 3127.01 through 3127.53, was drafted so that jurisdictional conflicts and competition could be avoided between different states with regard to child custody litigation. The intent of the UCCJEA was to ensure that a state court would not exercise jurisdiction over a child custody proceeding if it was commenced while a court in another state was already exercising its jurisdiction over the child in a pending custody proceeding. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶20-21. Over 40 states, including Ohio and Pennsylvania, have adopted the UCCJEA.

{¶33} A trial court's decision as to whether to exercise jurisdiction pursuant to the UCCJEA should only be reversed upon a showing of an abuse of discretion.

Beck v. Sprik, 9th Dist. No. 07CA0105-M, 2008-Ohio-3197; *In re Collins*, 5th Dist. No. 06CA000028, 2007-Ohio-4582. The phrase "abuse of discretion" connotes more than an error of judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶34} However, Appellee argues that the UCCJEA does not apply to adoptions and Appellee is correct. R.C. 3127.02 states:

{¶35} "Sections 3127.01 to 3127.53 of the Revised Code do not govern adoption proceedings or proceedings pertaining to the authorization of emergency medical care for a child."

{¶36} Pennsylvania's version of UCCJEA contains a similar provision: "This chapter does not govern an adoption proceeding * * *." 23 Pa.Cons.Stat. §5403.

{¶37} Since the UCCJEA, by its own terms, does not apply to adoptions, Appellant's argument must fail.

{¶38} Appellant, though, cites *In re Adoption of Asente* (2000), 90 Ohio St.3d 91, 734 N.E.2d 1224, to establish that the UCCJEA does apply to adoption cases. *Asente* was an adoption case in which custody issues were in dispute between Ohio and Kentucky. In *Asente*, the Ohio Supreme Court applied the former version of the UCCJEA, known as the Uniform Child Custody Jurisdiction Act ("UCCJA"), and determined that Ohio did not have jurisdiction to proceed with an adoption petition filed in Trumbull County. It must immediately be pointed out, though, that the former UCCJA did not contain any provision excluding adoption proceedings from its

authority. R.C. 3127.02, as part of the new UCCJEA, now excludes adoption proceedings. R.C. 3127.02 did not exist during the litigation of the *Asente* case, and thus could not have been a factor in the court's decision. R.C. 3127.02 became effective on April 11, 2005, and *Asente* was decided August 23, 2000. The UCCJEA, pursuant to R.C. 3127.02, now excludes adoptions. Thus, the instant appeal is distinguishable from the situation presented to the Ohio Supreme Court in *Asente*.

{¶39} Appellee further points out that the mere existence of prior custody orders and decrees from a divorce action in Pennsylvania does not divest Ohio courts from proceeding with an adoption petition. Numerous courts have concluded that, "probate courts have jurisdiction to proceed with adoptions even where the involved child is subject to custody orders within the continuing jurisdiction of domestic relations or juvenile courts." *In re Adoption of Joshua Tai T.*, 6th Dist. No. OT-07-555, 2008-Ohio-2733, ¶37, citing *In re Adoption of Biddle*, supra, 168 Ohio St. 209, 6 O.O.2d 4, 152 N.E.2d 105, paragraph two of syllabus; *In re Hitchcock* (1996), 120 Ohio App.3d 88, 103-104, 696 N.E.2d 1090; see also *In re T.N.W.*, 8th Dist. No. 89815, 2008-Ohio-1088.

{¶40} There are occasions, though, when a prior custody proceeding in one court could prevent another court from exercising jurisdiction to hear an adoption petition. In *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, the Ohio Supreme Court was asked to resolve a jurisdictional conflict between two Ohio courts:

{¶41} "* * * The issue presented for our review is whether a probate court must refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is pending in the juvenile court. We hold that, in such circumstances, the probate court must defer to the juvenile court and refrain from addressing the matter until adjudication in the juvenile court.

{¶42} "It is well established that the original and exclusive jurisdiction over adoption proceedings is vested in the probate court. *State ex rel. Portage Cty. Welfare Dept. v. Summers* (1974), 38 Ohio St.2d 144, 67 O.O.2d 151, 311 N.E.2d 6, paragraph two of the syllabus. We have therefore held, 'A Probate Court has jurisdiction to hear and determine an adoption proceeding relating to a minor child notwithstanding the fact that the custody of such child is at the time within the continuing jurisdiction of a divorce court.' *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 6 O.O.2d 4, 152 N.E.2d 105, paragraph two of the syllabus.

{¶43} "However, we have also recognized 'the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter.' *In re Adoption of Asente* (2000), 90 Ohio St.3d 91, 92, 734 N.E.2d 1224. Therefore, we hold that when an issue concerning the parenting of a minor child is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child.

{¶44} "Moreover, this case requires us to again acknowledge that natural parents have a fundamental right to the care and custody of their children. *In re*

Adoption of Masa (1986), 23 Ohio St.3d 163, 165, 23 OBR 330, 492 N.E.2d 140, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. Because adoption terminates those fundamental rights, any exception to the requirement of parental consent to adoption must be strictly construed. Id." *In re Adoption of Pushcar*, supra, ¶8-11.

{¶45} The crux of the matter in *Pushcar* was a dispute over the actual parentage of the child. The matter was in the early stages of resolution in juvenile court through genetic testing when the adoption petition was filed in probate court. There are no parentage issues in dispute in the instant appeal. There are pending custody and visitation orders that have emanated from Lawrence County, Pennsylvania, but there are no proceedings attempting to litigate the long-term custody of R.M. Although Louis had previously filed two separate petitions for involuntary termination of parental rights in Lawrence County, the first petition was overruled and the second petition was dismissed prior to the adoption petition being filed in Ohio. Appellant argues that there are two matters still pending in Pennsylvania: an emergency petition for expedited review of the custody order, filed October 20, 2006, and a contempt motion. According to the record, the emergency petition was resolved on January 17, 2007, when the Lawrence County court issued an order referring supervised visitation to Kids in Common in New Castle, Pennsylvania. (1/17/07 Order.) The record does not indicate when the contempt motion was filed or if it has been resolved. Even if the contempt motion is still pending, a contempt motion prompts the court to enforce a past order and is not a

proceeding that attempts to resolve the long-term fate of the child. Thus, Appellant has not pointed to any ongoing litigation in Lawrence County, Pennsylvania that would prevent the probate court of Mahoning County from proceeding with an adoption petition. Appellant has mentioned that there is some type of motion for grandparent's visitation action pending in Pennsylvania, but no grandparents have made an appearance in this case to argue the significance of the alleged motion.

{¶46} Appellant also argues in passing that the federal Parental Kidnapping Prevention Act ("PKPA"), Section 1738A et seq., Title 28, U.S.Code, should also have prevented the probate court from taking jurisdiction of the adoption case. The PKPA addresses questions of jurisdiction in cases involving interstate custody and visitation disputes. The PKPA was created to bolster the effectiveness of the former UCCJA, now known as the UCCJEA. *State ex rel. Morenz v. Kerr*, 104 Ohio St.3d 148, 2004-Ohio-6208, 818 N.E.2d 1162, ¶16. The PKPA mandates that states give full faith and credit to valid child custody orders of another state (Section 1738A(a)).

{¶47} The PKPA only applies if all of its conditions are met, and one of those conditions is a residency requirement. According to Section 1738A(d), Title 28, U.S.Code:

{¶48} "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

{¶49} The PKPA might have applied to the instant case if R.M. or one of the parties resided in Pennsylvania. Section 1738A does not define the phrase, "residence of the child or of any contestant". Courts have determined that the phrase refers to a person's legal residence or domicile. *McDougald v. Jenson* (C.A.11, 1986), 786 Fed.2d 1465. There is no dispute in this case that Appellant is a resident of Florida and has been for a number of years, and that Appellee and Louis are residents of Ohio. R.M. resides with her father and Appellee, and there is nothing in the record indicating that R.M. has any significant contact with Pennsylvania. Since no party has any continuing contact with Pennsylvania, it does not appear that the PKPA would have any impact on the jurisdiction of the probate court over this adoption case.

{¶50} Because neither the UCCJEA, the PKPA, or the *Asente* case are dispositive to the issues in this appeal, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 4

{¶51} "The Probate Court erred in failing to make a specific finding that the adoption was in the best interest of the minor child and further in failing to schedule a hearing to determine the best interest of the minor child."

{¶52} There are two issues within this assignment of error. The first is whether the court was required to hold a second hearing to determine the best interests of the child. As we will explain below, Appellant is correct that she was entitled to 20 days notice and to a hearing regarding the best interests of the child.

The second issue is whether the court failed to determine whether the adoption was in the best interests of the child. Appellant is again correct that the court failed to make a ruling as to whether the adoption was in the best interests of the child.

{¶53} This Court, in *In re Adoptions of Groh*, 153 Ohio App.3d 414, 2003-Ohio-3087, 794 N.E.2d 695, set forth the procedural requirements in adoption cases in which the court finds that the consent of one or more parties is not required for the adoption. Clearly, Appellant did not consent to the adoption in the instant case. Therefore, Appellee was required to establish that Appellant's consent was not required pursuant to R.C. 3107.07. This matter was resolved in the magistrate's hearing held on April 25, 2007, and in the objections to the magistrate's hearing. The trial court concluded that Appellant's consent was not required under R.C. 3107.07(A), and then proceeded to grant the adoption petition. However, this was not the correct procedure.

{¶54} R.C. 3107.11 governs the requirements for the final adoption hearing. R.C. 3107.11(A) states:

{¶55} "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 to all of the following*:

{¶56} "* * *

{¶57} "(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[.]" (Emphasis added.)

{¶58} 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 best interests of the child:

{¶59} "(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 * * *."

{¶60} It is well-established that, "[a]ny exception to the requirement of parental consent must be strictly construed so as to protect the right of natural parents to raise and nurture their children." *In re Adoption of Schoeppner* (1976), 46 Ohio St.2d 21, 24, 75 O.O.2d 12, 345 N.E.2d 608; accord *Holcomb*, supra, 18 Ohio St.3d at 366, 18 OBR 419, 481 N.E.2d 613.

{¶61} The trial court held an extensive hearing on the consent issue and determined that Appellant's consent was not required because she failed to provide sufficient maintenance and support for the child in the 12 months preceding the filing of the petition for adoption. This Court, in *Groh*, reasoned that: "The fact that appellant's consent was not required for the adoptions did not automatically mean that [the mother] approved of the adoption or that her input did not matter. Even though the court determined that her consent was not required, she continued to be

the natural mother of the children and was entitled to an opportunity to show that the adoptions were not in the best interests of the children." Id. at ¶71.

{¶62} We agree with the other courts that have specifically held that the probate court must conduct another evidentiary hearing and give 20 days notice of the hearing to decide the best interests of the child after it decides that a parent's consent is not necessary for the adoption to take place. *In re Adoption of S.L.C.*, 5th Dist. No. 05-CA-32, 2005-Ohio-7067; *In re Adoption of Chapman*, 4th Dist. No. 03CA2722, 2004-Ohio-254; *In re Adoption of Kuhlmann* (1994), 99 Ohio App.3d 44, 51, 649 N.E.2d 1279 (First District); *In re Adoption of Jordan* (1991), 72 Ohio App.3d 638, 645-646, 595 N.E.2d 963 (Twelfth District); *In re Adoption of Jorgensen* (1986), 33 Ohio App.3d 207, 515 N.E.2d 622 (Third District).

{¶63} Under the facts of this case it is clear that the trial court was required to schedule an additional hearing to determine the best interests of the child. Appellant did not, at any time, consent to the adoption. The issue of consent to adoption was heard on April 24-25, 2007. Objections were filed, and the court issued its judgment on November 27, 2007. The judgment was appealed, and we determined that the judgment was not a final appealable order because it merely adopted the magistrate's decision but did not specifically grant the petition for adoption. The trial court filed a further judgment entry on February 13, 2008, once again adopting the magistrate's decision and granting the adoption. There is no indication in the record that there was ever a hearing after the initial magistrate's hearing on April 25, 2007,

to resolve the question of the best interests of the child. Therefore, the probate court is required to hold an additional hearing to determine the best interests of the child.

{¶64} Appellant also argues that the trial court failed to determine the best interests of the child before granting the adoption. This best interests determination is required by R.C. 3107.14(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 * * *." Although there was some mention of the best interests of the child at the April 25, 2007, magistrate's hearing and in the trial court's judgment entry of November 27, 2007, there is no discussion of best interests in the magistrate's decision or the revised judgment entry of February 13, 2008. It is this latest judgment entry that provides the final appealable order in this case. It is evident that the probate court has not yet made its best interest determination and that Appellant is entitled to a hearing, with notice, on this matter. Therefore, we sustain Appellant's fourth assignment of error.

{¶65} Although not raised by the parties, we sua sponte address a jurisdictional matter that has arisen in our analysis on this assignment of error. As an appellate court, we are limited to reviewing final appealable orders, pursuant to R.C. 2505.02. Section 3(B)(2), Article IV, Ohio Constitution; *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 2007-Ohio-2205, 113 Ohio St.3d 410, 865 N.E.2d 1289, ¶44. Interlocutory orders, as a general rule, are not entitled to review on appeal. In the instant case, the final adoption decree is yet to be issued,

and we have determined that the probate court has not yet conducted a mandatory best interests hearing nor issued a ruling as to the best interests of the child. The ruling under appeal is only a partial resolution of the adoption petition. Hence, we must decide whether this partial decision constitutes a final appealable order. The Tenth District Court of Appeals dealt with the same question: "In the present case, appellant has appealed the probate court's decision in the 'consent' phase. Such determinations are final appealable orders, despite the fact that the probate court has not yet proceeded to the 'best interest' phase. *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999, paragraph one of the syllabus." *Greer* held that: "A trial court's finding pursuant to R.C. 3107.07 that the consent to an adoption of a party described in R.C. 3107.06 is not required is a final appealable order." Id. at paragraph one of the syllabus. We agree with the Tenth District, and with every other court that has raised this matter, and hold that the probate court's consent determination in an adoption case is a final appealable order.

ASSIGNMENTS OF ERROR NO. 2 & 3

{¶66} "The Probate Court committed reversible error in its subjective finding that the amount of Appellant's child support payments during the last year was insufficient to constitute support and maintenance pursuant to O.R.C. 3107.07(A)."

{¶67} "The Probate Court erred in finding that Appellee had met her burden of proof to show that Appellant had failed to provide support and maintenance for the minor child without justifiable cause within the preceding one year period."

{¶68} These two assignments of error are related and will be treated together. Both issues relate to whether Appellant provided sufficient maintenance and support of her child. R.C. 3107.07(A) provides that a natural parent's consent to the adoption of his child is not required if the court finds that said parent has failed without justifiable cause either to communicate with the child or to provide for the maintenance and support of the child as required by law or judicial decree for a period of at least one year prior to the filing of the petition for adoption. Pursuant to R.C. 3107.07(A), the petitioner for adoption has the burden of proving, by clear and convincing evidence, both that the natural parent has failed to support the child for the requisite one-year period and that this failure was without justifiable cause. *In Re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, paragraph one of the syllabus. A probate court's determination under R.C. 3107.07(A) will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. *In Re Adoption of Masa* (1986), 23 Ohio St.3d 163, 492 N.E.2d 140, paragraph two of the syllabus; *Bovett* at paragraph four of the syllabus. The language of R.C. 3107.07(A) must be strictly construed to protect the interest of the non-consenting parent who is subject to forfeiture of his or her parental rights. *In Re Adoption of Sunderhaus* (1992) 63 Ohio St.3d 127, 132, 585 N.E.2d 418.

{¶69} "The rights to conceive and to raise one's children have been deemed 'essential, * * * basic civil rights of man,' * * * and '[r]ights far more precious * * * than property rights.' " (Citations omitted.) *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551. The permanent termination of parental rights

has been described as, “the family law equivalent of the death penalty in a criminal case.” *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45. Based upon these principles, the Ohio Supreme Court has determined that a parent who is at risk of losing all parental rights over his or her child, “must be afforded every procedural and substantive protection the law allows.” (Citation omitted.) *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶14, quoting *In re Hayes* (1997), 79 Ohio St.3d 46, 49, 679 N.E.2d 680.

{¶70} The first question Appellant presents is whether the trial court incorrectly concluded that the adoption could proceed without her consent because she failed to provide sufficient maintenance and support for R.M. In Ohio, a child cannot be adopted without the consent of the biological parents unless some specific statutory exemption applies to remove the consent requirement. *McGinty v. Jewish Children's Bur.* (1989), 49 Ohio St.3d 159, 161, 545 N.E.2d 1272. One such statutory exemption is found in R.C. 3107.07(A), which allows an adoption to proceed without the consent of a parent who has been found to have provided insufficient maintenance and support of the child. R.C. 3107.07(A) states:

{¶71} “Consent to adoption is not required of any of the following:

{¶72} “(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."

{¶73} R.C. 3107.07(A) does not define "maintenance" or "support." Similarly, the statute does not define "communicate." The Ohio Supreme Court, in reviewing what it means to fail to communicate with a child under R.C. 3107.07(A), determined that, "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." (Emphasis omitted.) *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 366, 481 N.E.2d 613.

{¶74} The Ohio Supreme Court has not attempted to judicially define "maintenance and support" as it has defined "communicate" in R.C. 3107.07(A). Ohio has long recognized that a biological parent's duty to support his or her children is a "principle of natural law" that is "fundamental in our society". *Pretzinger v. Pretzinger* (1887), 45 Ohio St. 452, 15 N.E. 471. This duty of support is independent of the presence or absence of court orders for support. *Nokes v. Nokes* (1976), 47

Ohio St.2d 1, 351 N.E.2d 174. The common law duty to support one's child has been codified in R.C. 3103.03.

{¶75} Some appellate districts have held that the maintenance and support requirement of R.C. 3107.07(A) is determined through an objective test similar to the object test defined in *Holcomb*, and that even a meager contribution to the child's support could satisfy the maintenance and support requirement of R.C. 3107.07(A). *In re Adoption of McNutt* (1999), 134 Ohio App.3d 822, 732 N.E.2d 470 (non-monetary contributions should be considered in determining whether a parent provided sufficient maintenance and support); *Celestino v. Schneider* (1992), 84 Ohio App.3d 192, 616 N.E.2d 581 (a single payment of $36 satisfies the maintenance and support requirement); *Vecchi v. Thomas* (1990), 67 Ohio App.3d 688, 588 N.E.2d 186 (father's payment of $130 in child support precluded a finding of failure to provide maintenance and support.)

{¶76} Other districts have found that occasional gifts or cash payments that would be of no use to the child would not satisfy the "maintenance and support" requirement of R.C. 3107.07(A). In *In re Adoption of Knight* (1994), 97 Ohio App.3d 670, 647 N.E.2d 251, the Tenth District Court of Appeals held that a single, partial payment of $20 within the one-year period prior to the filing of the adoption petition was de minimis and did not make the natural parent's consent necessary for the adoption. In *In re Adoption of Carletti* (1992), 78 Ohio App.3d 244, 604 N.E.2d 243, the Fifth District held that a single payment of $15 did not constitute maintenance and support. The Eleventh District held that payment of "some" support is insufficient if

the parent has discretionary income that could have been used to pay additional support. *In re Adoption of Wagner* (1997), 117 Ohio App.3d 448, 690 N.E.2d 969. In *Wagner*, the appellate court determined that a payment of $329.40 was insufficient to satisfy the "maintenance and support" requirement when the parent was required to pay $7,800 per year in support and earned $13,443 in the year prior to the adoption.

{¶77} Appellant cites the aforementioned *Groh* case in support of applying an objective test to determine whether she satisfied the "maintenance and support" requirement. The trial court in *Groh* held that the mother did not satisfy the maintenance and support requirement, but on appeal we held that, "[w]hen a parent is accused of not having provided support and maintenance for one year, the relevant inquiry is not whether the parent provided support 'but whether the parent's failure to support * * * is of such magnitude as to be the equivalent of abandonment.' " Id. at ¶39, quoting *Celestino*, supra, 84 Ohio App.3d at 196, 616 N.E.2d 581.

{¶78} In *Groh*, the mother admitted that she failed to make support payments, but she also attempted to prove that she made or attempted to make other types of contributions to the child to provide maintenance and support. *Groh* held that some types of support, other than monetary support, may satisfy the maintenance and support requirement, such as providing food, clothing, shelter, or education for the child; providing for health, recreation, travel expenses; or providing for any other need of the child. Id. at ¶48.

{¶79} In the instant case, the trial court found that Appellant made $185.00 in support payments in the one year period immediately preceding the filing of the

adoption petition. Appellant made these payments in $25 and $30 increments in seven of the twelve months prior to the filing of the adoption petition. The probate court found that Appellant was in arrears in child support in the amount of $11,426.13. The court found that Appellant earned $9.00 per hour in her job and earned slightly less than $7,000 in 2006. Partially based on these facts, the probate court concluded that Appellant had not met the "support and maintenance" requirement and that her consent was not necessary for the adoption to proceed.

{¶80} In light of *Holcomb, Groh, McNutt, Celestino*, and *Vecchi*, we must disagree with the conclusion reached by the probate court. Appellant, on the recommendation of her attorney, made payments totaling $185 in the 12 month period preceding the filing of the adoption petition. She made these payments for the express purpose of satisfying the maintenance and support requirement of the adoption statutes in order to preserve her parental rights in the adoption process. There is nothing in the record indicating that she had abandoned her child or that her support payments were the equivalent of abandoning her child. In fact, most of her disposable income was spent paying the attorneys who were helping her preserve, rather than abandon, her parental rights and restore visitation with the child. We are also aware that Appellant had a limited ability to earn income due to an automobile accident, had declared bankruptcy, had only a high school education, and was actually borrowing money and relying on the generosity of friends to provide the basic necessities of life. Because we have consistently attempted to apply as much of an objective standard as possible in interpreting the "maintenance and support"

requirement of R.C. 3107.07(A), we hold that, under the specific facts of this case, Appellant's contribution of $185 in support satisfies the "maintenance and support" test.

{¶81} The trial court abused its discretion in determining that Appellant failed to provide, "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". R.C. 3107.07(A). By providing sufficient maintenance and support to satisfy the requirements of R.C. 3107.07(A), Appellant did not forfeit her right to withhold consent to the adoption. Appellant's second assignment of error is hereby sustained. We do not reach the issue raised in Appellant's third assignment of error, dealing with justifiable cause for failing to provide support, because we have concluded that she provided sufficient support to satisfy the statutory requirements.

Conclusions

{¶82} Based on the record here, Appellant's first argument that UCCJEA and the PKPA apply to void the probate court's jurisdiction is without merit. The UCCJEA does not apply to adoption cases, and the PKPA contains a residency requirement that is not met in this case and we hereby overrule Appellant's first assignment of error. Appellant's fourth assignment of error has merit in that the probate court was required to hold a separate hearing, with notice, on whether the adoption would be in the best interests of the child. Appellant's second assignment of error is also persuasive. Appellant's contribution of $185 to the child in the 12 months prior to the filing of adoption petition qualify as "maintenance and support," and the payments

preserved her right to withhold consent to the adoption. Appellant's third assignment of error is moot. The judgment of the Mahoning County Court of Common Pleas, Probate Division, is reversed and the adoption petition dismissed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.