[Cite as *In re Adoption of L.C.F.*, 2015-Ohio-1545.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101798 and 101799

IN RE: ADOPTION OF L.C.F. AND C.P.F.
Minor Children

[Appeal by Guardians, C.F. and P.F.]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case Nos. 2011 ADP 7644 and 2011 ADP 7645

BEFORE: Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 23, 2015

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MARY EILEEN KILBANE, P.J.:

{¶1} This consolidated appeal arises from the probate court's judgment dismissing the petitions for adoption of the minor children, C.P.F. and L.C.F., filed by guardians-appellants C.F. and P.F. (collectively, the "Fs"). Finding merit to the appeal, we reverse and remand.

{¶2} The facts giving rise to this consolidated appeal were set forth by this court in the Fs' previous appeal, *In re: Adoption of C.P.F. & L.C.F.*, 8th Dist. Cuyahoga Nos. 101147 and 101148, 2014-Ohio-4479.

> In December 2009, the biological parents of C.P.F. and L.C.F. were living in a hotel, jobless, using drugs, and unable to support their three small children. They signed a handwritten agreement with T.C. and D.C. (collectively, the "Cs"), a maternal aunt and uncle of the children's biological mother, in which they acknowledged that they were unemployed and drug addicted, and gave the Cs "temporary emergency guardianship" of C.P.F. and L.C.F. [[1]Their other child went with another family member.] The agreement provided that it would remain in effect until the four signatories agreed that it was no longer necessary.
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> In early April 2010, after the biological father had completed 90 days of drug rehabilitation, the Cs returned the children to the biological parents. However, after learning that the parents were again using drugs, the Cs recovered the children in July 2010 through a court order. They told the parents that they would not be permitted to see the children unless they met certain conditions: they were drug free for six months, had gainful employment, and the biological father completed anger management classes. The Cs were overwhelmed by caring full-time for C.P.F. and L.C.F., who have special needs, however, and the Fs offered to care for the children. The children began spending time with the Fs and by October 2010, were living primarily with the Fs.
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> On April 15, 2011, the Cs resigned as guardians of C.P.F. and L.C.F., and the court appointed the Fs as successor guardians. In early May, the biological parents learned for the first time that C.P.F. and L.C.F. were living with the Fs and that a successor guardianship had been granted. In

June 2011, the biological parents filed a motion to vacate the guardianship and for visitation; they withdrew the motion in August 2011, however, after the biological father relapsed. On October 13, 2011, the biological parents refiled their motion to terminate the guardianship and for visitation. Later that day, the Fs filed petitions for adoption of C.P.F. and L.C.F.

The adoption proceedings were stayed pending resolution of the biological parents' motion to terminate guardianship and for visitation, and the parties subsequently entered an agreed judgment entry regarding the motions. The stay of proceeding regarding the adoption petitions was then dissolved [on August 23, 2012, and the biological parents then filed objections to the Fs' petitions on October 26, 2012].

Under R.C. 3107.06, a petition to adopt a minor may only be granted if the biological parents consent to the adoption in writing. Under R.C 3107.07(A), however, the consent of the biological parent is not required if, after notice and hearing, a court finds by clear and convincing evidence that the parent has failed without justifiable cause to communicate with the child or provide maintenance and support as required by law or judicial decree for at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the petitioner's home.

In January 2013, the magistrate held a hearing on the issue of whether the biological parents' consent to the adoptions was required. Considering the period of October 13, 2010, through October 13, 2011 (the one-year period prior to the filing of the adoption petitions), [[2]The children were placed with the Fs on April 15, 2011. The magistrate found that they lived with their biological parents from early April 2010 until July 12, 2010, so it was apparent that the biological parents provided contact and support for their children during the one-year period prior to their placement with the Fs] the magistrate found that the Fs had failed to establish by clear and convincing evidence that the biological parents failed without justifiable cause to provide more than de minimis contact with their children. Specifically, he found that the evidence showed that from December 2010 through February 2011, the biological mother made repeated telephone calls to the Cs, who admitted in their testimony that they hung up on her and did not make return calls when she left messages. D.C. admitted that the biological mother asked to see the children but he refused to allow it. The Cs admitted that they intentionally did not tell the biological mother that the children were living with the Fs. In light of this evidence, the magistrate concluded that there was justifiable cause for the biological parents' failure to maintain contact with their children.

With respect to maintenance and support, the magistrate found there was no legal or judicial obligation for the biological parents to pay support and, even if there were, there was justifiable cause for their failure to do so based upon the conduct of the Cs and the Fs. [The magistrate's decision was partly based on the disparity of income between the biological parents and the Fs. The magistrate noted that the Fs undertook the care and support of the children voluntarily and were quite capable of supporting the children without the minimal (less than $100 per month) contribution by the biological parents.] The magistrate found that the biological parents were "affirmatively misled" by the Cs regarding the whereabouts of their children from October 2010 through April 2011, and that the Fs voluntarily undertook the care and support of the children and did not disclose this to the biological parents.

Accordingly, although the magistrate acknowledged that the biological parents are not good parents, he recommended that the trial court issue a judgment indicating that their consent to the adoptions was required and dismissing the Fs' petition for adoption pursuant to R.C. 3107.06 based upon the biological parents' non-consent. On June 7, 2013, the Fs filed objections to the magistrate's decision. On the same day and before the trial court had ruled on their objections, they also filed second petitions for adoption of C.P.F. and L.C.F. The probate clerk assigned the second petitions the same lower court case numbers as the first petitions for adoption.

In October 2013, the trial court entered a judgment adopting the magistrate's decision; the Fs timely appealed the trial court's judgment. *In re: Adoption of L.C.F.*, 8th Dist. Cuyahoga No. 100633, and *In re: Adoption of C.P.F.*, 8th Dist. Cuyahoga No. 100634. [[3]This court dismissed the appeals on May 19, 2014, for lack of a final, appealable order because although the trial court adopted the magistrate's decision, it failed to enter a separate judgment stating the relief to be granted. * * *]

In December 2013, the biological parents filed a motion to dismiss the Fs' second petitions for adoption. The trial court subsequently granted the motion to dismiss. The court ruled that

[u]ntil the Eighth District Court of Appeals renders its decision on this trial court's decision of October 16, 2013, any other proceedings in the adoption issue are stayed as to the first petition for adoption. It is not possible for this court to hear any further evidence in the adoption of [L.C.F. and C.P.F.]

> during the pendency of the appeal, and in the event this court's decision is reversed and remanded, any subsequent hearings will be on the petition for adoption filed on October 3, 2011.

Id. at ¶ 2-11.

{¶3} On appeal, the Fs challenged the trial court's dismissal of their second petitions for adoption. We found the trial court erred in dismissing the second petitions rather than staying their consideration until the appeal proceedings were completed. *Id.* at ¶ 21. We stated that

> [t]he Fs filed the second petitions for adoption in June 2013; they filed their appeal of the trial court's judgment regarding the first petitions on November 15, 2013. Thus, the second petitions were pending when the appeal was filed. Accordingly, although the trial court had no jurisdiction to proceed with the second petitions while the Fs' appeal regarding the first petitions was pending, the trial court's jurisdiction to consider the second petitions would resume after the appeal was completed. Accordingly, the trial court should have stayed any consideration of the second petitions pending the appeal, rather than dismissing the petitions.

Id. We remanded the matter for the trial court to issue a modified entry staying the second petitions pending appeal. *Id.* at ¶ 24.

{¶4} In the interim, and following our dismissals of *In re: Adoption of L.C.F.*, 8th Dist. Cuyahoga No. 100633 and *In re: Adoption of C.P.F.*, 8th Dist. Cuyahoga No. 100634, the trial court entered a new judgment entry adopting the magistrate's decision on July 11, 2014.[1] In this entry, the court dismissed the Fs' October 2011 petition for adoption, finding that consent of the biological parents is "necessary to the adoption

[1]The Fs also filed a third petition for adoption on April 2, 2014, to which the biological parents objected.

because they have with justifiable cause failed to provide for the maintenance and support of the minor [children] for a period of at least one (1) year immediately preceding either the filing of the adoption petition (October 13, 2011) or the placement of the minor [children] in the home of the petitioners (April 15, 2011)." The court further found that "there was justifiable cause for the failure of the parents to provide more than *de minimis* contact with the minor."

{¶5} It is from this order that the Fs now appeal, raising the following four assignments of error for review, which shall be discussed together where appropriate.

Assignment of Error One

> The trial court erred in failing to make a finding that the magistrate's decision stated a sufficient factual basis in determining the factual issues and inappropriately applying the law as required by Civil Rule 53 and where the decision is against the manifest weight of the evidence in determining there was justifiable cause for nonsupport.

Assignment of Error Two

> The trial court erred in allowing the [biological parents] to object to the adoption when they failed to object to the filing of the adoption within 14 days of proof of service of notice of the adoption hearing as required by O.R.C. 3107.11.

Assignment of Error Three

> The trial court erred when it failed to address the issue of whether the [biological parents] relinquished their natural parental rights when they consented to the guardianship and abandoned their children according to the Ohio Revised Code.

Assignment of Error Four

> The trial court erred when it ruled against the manifest weight of evidence that the [biological parents] had justifiable cause for their failure to contact the children from October 14, 2010 to October 13, 2011 and the minimal telephonic attempts were nothing more than de-minimis contact.

Support and De Minimis Contact

{¶6} In the first and fourth assignments of error, the Fs challenge the trial court's judgment finding that consent to the adoption was necessary because the biological parents have, with justifiable cause, failed to provide for the maintenance and support of the children and failed to provide more than de minimis contact for the year preceding the filing of their petition.

{¶7} The adoption proceedings in this case are governed by R.C. Chapter 3107. These proceedings involve a two-step process, which first includes a "consent" phase and then includes a "best interest" phase. *In re Adoption of Jordan*, 72 Ohio App.3d 638, 645, 595 N.E.2d 963 (10th Dist.1991), citing R.C. 3107.14(C); *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7, 859 N.E.2d 545, ¶ 5. Thus, if the probate court makes a determination that a parent's consent is not required, it must still determine that adoption is in the best interest of the child. *In re Adoption of Kuhlman*, 99 Ohio App.3d 44, 649 N.E.2d 1279 (1st Dist.1994), citing R.C. 3107.11 and 3107.14; *Jordan*. Here, the Fs filed their adoption petitions under the "consent" phase, which allows for the adoption of the minor child if the natural parents consent to the adoption or if certain circumstances exist where a natural parents' consent to the adoption is not required. R.C. 3107.06 and 3107.07.

{¶8} Relevant to the instant case, R.C. 3107.07(A) provides parental consent to adoption is not required 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 child 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.

{¶9} Thus, the petitioner "has the burden of proving by clear and convincing evidence, both (1) that the natural parent has failed to provide more than de minimis contact with the minor or has failed to support the child for the requisite one-year period, and (2) that this failure was without justifiable cause."[2] *In re Adoption of Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph one of the syllabus, following *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986). If the probate court finds either the communication or the support prong has been met, then it must proceed to determine whether justifiable cause for the failure has been proved. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23.

{¶10} The Ohio Supreme Court has clarified the standard of review under R.C. 3107.07(A) in *In re Adoption of M.B.* In *M.B.*, the court considered the portion of R.C.

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[2]In *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus, 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. *Id.*

3107.07(A) that pertains to financial support. *Id.* at ¶ 14.[3] The court noted that probate courts undertake a two-step analysis when applying R.C. 3107.07(A). *Id.* at ¶23. The first step involves deciding a factual question — in that case, whether the parent had willfully failed to provide for the support and maintenance of a minor child. *Id.* Probate courts have discretion over the factual decision of "whether the biological parent provided support as contemplated by R.C. 3107.07(A) 'and his or her judgment should not be tampered with absent an abuse of discretion.'" *Id.* at ¶ 21, quoting *Bovett* at 107.

In the second step, if the probate court finds a failure of support, the court then determines "whether justifiable cause for the failure has been proved by clear and convincing evidence." *M.B.* at ¶ 23.

> "[T]he question of whether justifiable cause for failure to pay child support has been proven by clear and convincing evidence in a particular case is a determination for the probate court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence."

Id. at ¶ 24, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986), paragraph two of the syllabus.

{¶11} In applying the above to the instant case, we find no abuse of discretion by the trial court with respect to its finding that the biological parents failed to have more

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[3]"However, due to the similar nature of the findings that are required for both prongs of R.C. 3107.07(A), the court's discussion [in *In M.B.*] appears to apply to the review of both requirements under R.C. 3107.07(A), i.e., a parent's consent to adoption is not required if the parent either fails to provide financial support, or fails, without justifiable cause, to provide more than de minimis contact with the child." *In re Adoption of J.R.H.*, 2d Dist. Clark No. 2013-CA-29, 2013-Ohio-3385, ¶ 25.

than de minimis contact with C.P.F. and L.C.F. We further find no abuse of discretion with the trial court's conclusion that the biological parents failed to provide for the maintenance and support of the children. Especially in light of the stipulation by the biological parents that they made no support payments from October 2010 through October 2011. Therefore, the issue before us is whether the trial court's decision that justifiable cause exists for the biological parents' failure to provide support and maintain more than de minimis contact is against the manifest weight of the evidence.

{¶12} Under the civil manifest weight standard, an appellate court should not substitute its judgment for that of the trial court when competent and credible evidence exists to support all the essential elements of the case. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶13} With respect to maintenance and support, the trial court found there was justifiable cause for the biological parents' failure to provide for the maintenance and support of the minor children. In the magistrate's decision, the magistrate found that there was no legal or judicial obligation for the biological parents to pay support and, even if there were, there was justifiable cause for their failure to do so based upon written agreement executed between the biological parents and the Cs and the conduct of the Cs and the Fs. The written agreement provides:

> I, we, [the biological parents,] consent to give emergency temporary guardianship of [L.C.F. and C.P.F.] to [the Cs]. This consent is given due to our financial situation resulting from lack of employment and drug * * *

> addictions. This agreement will remain in place until all four parties mentioned above are in agreement that it is no longer necessary.

The magistrate found that this agreement suggests that the Cs would be financially responsible for the children. The magistrate further found that the biological parents were affirmatively misled by the Cs as to their children's whereabouts from October 2010 through April 2011. The magistrate's decision was also based on the disparity of income between the biological parents and the Fs. The magistrate noted that the Fs voluntarily undertook the care and support of the children and were quite capable of supporting the children without the less than $100 per month contribution by the biological parents.

{¶14} "In determining whether the failure to support a child is justified, the Supreme Court has made a distinction between a parent who is unwilling but able to support, and a parent who is willing to support but unable to do so." *Kuhlman*, 99 Ohio App.3d at 51, 649 N.E.2d 1279, citing *Masa*, 23 Ohio St.3d at 166. "The latter could constitute justification." *Id.* We do not find this circumstance here.

{¶15} Rather, the record demonstrates that the biological parents had money to support L.C.F. and C.P.F. but were unwilling to do so. They stipulated to the fact that no payments were made to either the Cs or the Fs from October 2010 through October 2011. At the consent hearing, the biological father testified that he had the means to pay some support to his children, but chose not to because he did not care for the Fs to have possession of his children. The biological father stated that he would have supported his children if they lived with him. He also testified that he had the financial means to pay the Cs for the support of his children but opted not to. When Fs' counsel asked the

biological father "is it your testimony that your reason for not paying support is because you didn't think you had to[,]" the biological father replied, "[t]hat, and I didn't believe they deserved it. * * * I thought somebody had my kids that didn't deserve to have my kids, and I wasn't obligated by the Court to pay child support." The biological father testified that he would not permit his wife (the biological mother) to financially support the children either. The biological father testified that he made $13,851 in 2010 with a $7,000 tax refund and $10,744 in 2011 with a $2,774 tax refund.

{¶16} The biological mother's testimony echoed the same reasoning as her husband's. She testified that the minor children should not have been with the Cs or the Fs, and therefore, they were not deserving of any child support. She further testified that from late 2010 through 2011 she was able to work, but chose not to because her husband made sufficient money. The Cs returned L.C.F. and C.P.F. to them in April 2010 under the premise that she and her husband were no longer addicted to drugs. The biological mother admitted that she was still on drugs at that time and abused crack while the kids were with them. The biological parents had to return the kids back to the Cs in July 2010. She also testified that their eldest son was returned to them in August 2011. She testified they bought their eldest son whatever he wanted. Although not in the record, at oral argument appellants' counsel noted that the eldest son was removed from the biological parents' home and back into the custody of Lake County, only after being reunified with them for a few months.

{¶17} The record further demonstrates that D.C. testified that he and his wife asked the biological parents to support the children, but they never received any financial support from them. The Fs also asked for support by filing a motion for support in August 2011. This motion was first filed in probate court and was dismissed for lack of jurisdiction. The motion subsequently was filed in juvenile court. The Fs also testified that they did not receive any money from the biological parents.

{¶18} We note that

> 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*, 45 Ohio St. 452, 15 N.E. 471 [(1887)]; *Aharoni v. Michael*, 74 Ohio App.3d 260, 598 N.E.2d 1215 [10th Dist.1991]. Such a duty of support is not dependent upon the presence or absence of court orders for support. *Nokes v. Nokes*, 47 Ohio St.2d 1, 351 N.E.2d 174 [(1976)]. The common law duty to support one's child has been codified in R.C. 3103.03. *Id.*

Garner v. Greenwalt, 5th Dist. Stark No. 2007 CA 00926, 2008-Ohio-5963, ¶ 25, *discretionary appeal not allowed*, 120 Ohio St.3d 1528, 2009-Ohio-614, 901 N.E.2d 246. "[A] parent of a minor, has the common-law duty of support as well as a duty of support decreed by court. The judicial decree of support simply incorporates the common-law duty of support." *In re Adoption of McDermitt*, 63 Ohio St.2d 301, 305, 408 N.E.2d 680 (1980).

{¶19} The testimony was clear that the biological parents had money to financially support their minor children, but chose not to do so. The agreement between the biological parents and the Cs did not negate their obligation to support their children. The biological parents' deliberate failure to do so weighs against a finding of "justifiable

cause." While the biological parents yearly income may be low, their complete failure to apply any part of their income weighs against a finding of justification.

{¶20} Thus, finding no competent, credible evidence to support the decision of the court that the biological parents had justifiable cause for failing to support L.C.F. and C.P.F. for a period of at least one year immediately preceding the filing of the adoption petition, we find that its judgment was against the manifest weight of the evidence. Under R.C. 3107.07(A), the Fs may proceed with the adoption of L.C.F. and C.P.F. without the consent of either parent. *See In re Adoption of Kuhlmann*, 99 Ohio App.3d 44, 49, 649 N.E.2d 1279 (1st Dist.1994) (where the First District Court of Appeals found that the biological mother did not have justifiable cause for failing to support her son when the record demonstrated the mother had income to provide support and chose not to do so).

{¶21} We recognize that 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*, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Nonetheless, the circumstances of the instant case warrant a reversal of the trial court's decision.

{¶22} Accordingly, the first assignment of error is sustained.

{¶23} In the fourth assignment of error, the Fs challenge the trial court's decision that there was justifiable cause for the failure of the biological parents to provide more

than de minimis contact with the minor children. R.C. 3107.07(A), however, 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 the parent's consent. *In re Adoption of A.H. & M.H.*, 9th Dist. Lorain No. 12CA010312, 2013-Ohio-1600, ¶ 9, citing *In re Adoption of McDermitt*, 63 Ohio St.2d 301, 304, 408 N.E.2d 680 (1980). Therefore, because of our disposition of the first assignment of error, we need not address whether the evidence supported the trial court's alternate finding that the biological parents' lack of contact with the children also had been without justification.

{¶24} Accordingly, the fourth assignment of error is moot. App.R. 12(A)(1)(c).

Petition Objection

{¶25} In the second assignment of error, the Fs argue the trial court erred in allowing the biological parents to object to the adoption when they failed to object to the filing of the adoption petition within 14 days as required by R.C. 3107.11.

{¶26} R.C. 3107.11 states in relevant part:

> (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 * * *:
>
> * * *
>
> (B) Upon the filing of a petition for adoption that alleges that a 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,

> the clerk of courts shall send a notice to that parent with the following language in boldface type and in all capital letters:
>
> A FINAL DECREE OF ADOPTION, IF GRANTED, WILL RELIEVE YOU OF ALL PARENTAL RIGHTS AND RESPONSIBILITIES, INCLUDING THE RIGHT TO CONTACT THE MINOR, AND * * * TERMINATE ALL LEGAL RELATIONSHIPS BETWEEN THE MINOR AND YOU AND THE MINOR'S OTHER RELATIVES, SO THAT THE MINOR THEREAFTER IS A STRANGER TO YOU AND THE MINOR'S FORMER RELATIVES FOR ALL PURPOSES. IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST FILE AN OBJECTION TO THE PETITION WITHIN FOURTEEN DAYS AFTER PROOF OF SERVICE OF NOTICE OF THE FILING OF THE PETITION AND OF THE TIME AND PLACE OF HEARING IS GIVEN TO YOU. IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST ALSO APPEAR AT THE HEARING. A FINAL DECREE OF ADOPTION MAY BE ENTERED IF YOU FAIL TO FILE AN OBJECTION TO THE ADOPTION PETITION OR APPEAR AT THE HEARING.

{¶27} In the instant case, the petition was filed on October 13, 2011. The clerk of courts issued notice to the biological parents on September 11, 2012. The docket indicates that the biological parents were served with the notice on September 18, 2012. They did not file their objection to the adoption until more than a month later, on October 26, 2012. The hearing was initially scheduled for December 4, 2012, but did not take place until January 28, 2013. The Fs argue that by untimely filing their objections, the biological parents relinquished their right to contest the adoption.

{¶28} However, the Fs never filed a motion to strike the biological parents' motion as untimely. The matter proceeded with the Fs taking the biological parents' depositions and a hearing before the magistrate. The Fs did not raise an objection at the hearing to the biological parents' testimony, nor did they raise this in their objections to the magistrate's decision. We note that the failure to object at the time of trial waives all but

plain error. *Sheflyand v. Schepis*, 8th Dist. Cuyahoga Nos. 95665 and 95667, 2011-Ohio-2040, ¶ 17, citing *State v. Sutton*, 8th Dist. Cuyahoga No. 90172, 2008-Ohio-3677, citing *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968). "[P]lain error does not exist unless, but for the error, the outcome of the trial would have been different." *State v. Joseph*, 73 Ohio St.3d 450, 455, 1995-Ohio-288, 653 N.E.2d 285. Under Crim.R. 52(B), notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶29} Here, the court conducted an evidentiary hearing concerning whether the biological parents' consent for the adoption was required. The trial court concluded that consent was required. Any error in allowing the biological parents to testify at the hearing is harmless because the trial court's decision is now reversed on appeal.

{¶30} Thus, the second assignment of error is overruled.

Abandonment

{¶31} In the third assignment of error, the Fs argue that the trial court erred in failing to address the issue of whether the biological parents abandoned their minor children. However, in light of our decision that the trial court erred when it concluded that the biological parents' consent to the adoption was required, we find this assignment of error is moot, and we decline to address it. App.R. 12(A)(1)(c).

{¶32} Accordingly, judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellants recover of appellees 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 common pleas court, probate division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA A. BLACKMON, J., CONCUR