[Cite as *In re A.K.*, 2017-Ohio-9165.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105426

IN RE: A.K., ET AL.
Minor Children

[Appeal by Father]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case Nos. 2015 ADP 08542 and 2015 ADP 08543

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 21, 2017

ATTORNEY FOR APPELLANT

Mary Catherine Barrett
700 West St. Clair Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

Michelle McGuire
P.O. Box 81804
Cleveland, Ohio 44181

Rebecca A. Clark
Law Offices of James B. Palmquist, III
6 Public Square
Medina, Ohio 44256

ANITA LASTER MAYS, J.:

{¶1} Respondent-appellant, the natural father ("respondent") of A.K. and C.K. ("children"), appeals the decision of the Cuyahoga County Probate Court that the petitioners-appellees, the maternal grandparents of the children ("petitioners") may adopt the children without respondent's consent. We affirm.

I. Background and Facts

{¶2} The respondent was convicted of murdering the children's natural mother and sentenced to serve a term of 23 years to life. The Juvenile Division of the Summit County Common Pleas Court issued a "no-contact" order against respondent on October 26, 2006, barring any contact whatsoever with the children. On February 28, 2007, the juvenile court granted permanent custody to the petitioners. The children have special needs and behavioral issues, require a high level of care and need full-time supervision. Schooling alone is at a cost of $70,000 per year.

{¶3} On June 8, 2015, petitioners filed for adoption to allow them to secure increased benefits to meet the children's needs, as well as prepare for the children's future care. On June 22, 2015, respondent objected to the petition. The proceedings were bifurcated to address whether respondent's consent was required for adoption, involving an inquiry into whether respondent had been in contact with, and provided support for, the children within the year prior to the suit (R.C. 3107.07(A)). Upon reaching a

determination that consent was not required, the trial court would then consider whether the adoption was in the best interests of the children.

{¶4} Hearings were held before the magistrate on February 9, 2016, and February 10, 2016 on the question of consent. Witnesses included respondent, his mother and brother, and petitioners. The magistrate granted respondent's motion to limit references to his conviction to the name of the crime and place and date of conviction.

{¶5} Respondent argued that the only reason that he has not been in contact with the children is due to the no-contact order. Respondent encourages his family to visit the children as often as possible and is always eager to hear how they are doing. The relationship between petitioners and respondent's family members has been strained, but the paternal grandmother, mother of respondent, visits the children approximately four times per year. The paternal grandmother usually brings small gifts for the children and leaves a check with petitioners for $400.

{¶6} Respondent has numerous letters and cards that he has written to the children that he gives to the paternal grandmother for safekeeping. The paternal grandmother provides respondent with pictures of the children and keeps him apprised of their activities. Respondent participates in a program that allows him to have Christmas gifts anonymously sent to the children, has learned sign language because the children were learning it, and also learned to knit items for the children.

{¶7} Respondent admits he was unable to provide support for the year prior to the petition in this case in light of the $1,330 received from his family and $240 prison

income for the year, but points to the guardianship estate that he created for the children's support. On November 10, 2006, petitioners filed a wrongful death suit against respondent. Allegedly without knowledge of the suit, through power of attorney issued to respondent's brother, a guardianship estate was created and assets included mother's life insurance, investments accounts, and proceeds from the sale of the house. The value of the estate in July 2007 was approximately $600,000.[1] Petitioners allege respondent lacked authority to transfer the assets due to the Slayer Statute and that the estate should not be considered as support provided within the past year.

{¶8} There has been no order of child support in effect and petitioners did not request support. During the pending action, petitioners stipulated they were able to sufficiently care for the children and did not require assistance. Respondent and paternal grandmother were already aware that petitioners had substantial financial resources.

{¶9} On February 23, 2016, the trial court granted petitioners' application for the hearing transcript. Written closing arguments were submitted by the parties on February 24, 2016 and February 26, 2016.

{¶10} On March 24, 2016, the magistrate determined that respondent's failure to communicate and to provide support were justified. As a result, respondent was required to consent to the adoption. After receiving two extensions, petitioners filed objections to the magistrate's decision on April 7, 2016, and May 27, 2016.

---

[1] The magistrate determined that respondent's direct contribution amount was $90,000, though the trial court disagreed and ultimately determined that respondent failed to contribute.

{¶11} Since adoption cases are not electronically accessible at the court, respondent filed a motion to determine whether the transcript had been filed and whether an extension to file the transcript had been requested. The court confirmed that the transcript had not been filed as of June 8, 2016, and no extension had been requested. Respondent filed his opposition to petitioners' objections, citing their failure to timely file the transcript. Petitioners filed the transcript on June 16, 2016.

{¶12} On July 11, 2016, respondent filed a motion to strike the transcript pursuant to Civ.R. 53(D)(3)(b)(iii) because the transcript was filed after the 30-day deadline.

{¶13} The trial court did not explicitly rule on the motion to strike. On December 8, 2016, the trial court sustained the objections to the magistrate's decision and ordered that the adoption proceedings may continue without the consent of respondent.

II. Legal Argument

{¶14} The sole assigned error presented for review is whether the Probate Court erred in holding that petitioners could adopt the children without respondent's consent. We affirm the trial court's findings.

{¶15} We begin our analysis by acknowledging the foundational tenet that "one of the most precious and fundamental" rights of a "natural parent" is "to the care and custody of his children." *In re Adoption of P.L.H.*, Slip Opinion No. 2017-Ohio-5824, ¶ 23, citing *In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986), citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Termination of such a fundamental right requires that we strictly construe "any exception

to the requirement of parental consent to adoption in order to protect the right of natural parents to raise and nurture their children." *Id.*, citing *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976).

A. Objections to Magistrate's Decision and Transcript

{¶16} Civ.R. 53(D)(3)(b)(iii) requires in pertinent part:

> Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶17} Respondent argues that petitioner's objections to the magistrate's decision should have been stricken because they were filed after the 30-day limit without extension or explanation. Generally, the failure to file a transcript by an objecting party limits the trial court's review of objections to the conclusions of law by the magistrate. *Vannucci v. Schneider*, 8th Dist. Cuyahoga No. 104598, 2017-Ohio-192, ¶ 17, citing *In re C.L.*, 8th Dist. Cuyahoga No. 93720, 2010-Ohio-682, ¶ 8; *Allread v. Allread*, 2d Dist. Darke No. 2010 CA 6, 2011-Ohio-1271, ¶ 18. If the transcript is later submitted with the record on appeal, it may not be considered because the appellate court's review is limited to the evidence before the trial court. *State ex rel. Pallone v. Ohio Court of Claims*, 143 Ohio St.3d 493, 2015-Ohio-2003, 39 N.E.3d 1220, ¶ 11.

{¶18} The trial court observed as to the noncompliance,

> [T]his Court recognizes that the Objections were not strictly compliant with the Ohio Rules of Civil Procedure in that there were timeliness issues as to their complete filing. This Court notes, however, that Petitioners requested extensions for leave to file Supplemental Objections as well as the transcript of the relevant hearing, and now determines that this case should be decided on the merits rather than procedural technicalities.

See Journal Entry No. 1382500 (Dec. 4, 2016).

{¶19} Civ.R. 53(D)(4)(b) vests a trial court with broad discretion in entertaining objections to the decision of a magistrate.

> "Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate." Clearly, the rule allows the court to choose from among a range of options in response to a magistrate's decision. The rule does not require the court to state why it would adopt or reject a magistrate's decision.

Feldman v. Feldman, 8th Dist. Cuyahoga No. 92015, 2009-Ohio-4202, ¶ 22, quoting Civ.R. 53(D)(4)(b).

{¶20} Further,

> [W]hether a transcript has been filed or not, the trial judge always has the authority to determine if the magistrate's findings of fact are sufficient to support it's conclusions of law, and come to a different legal conclusion.

Id. at ¶ 23, citing *Kozlevchar v. Kozlevchar*, 8th Dist. Cuyahoga No. 76065, 2000 Ohio App. LEXIS 2094 (May 18, 2000).

{¶21} The trial court's decision was within its broad discretion, as provided by rule and law.

B. Consent to Adopt

{¶22} As the right of the natural parent is fundamental, we consider whether petitioners have demonstrated by clear and convincing evidence, after notice and hearing to the natural parent, that circumstances exist supporting extinguishment of those rights. The consent of the natural parent to adoption is not required where the natural parent has

> [F]ailed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

R.C. 3107.07(A).

{¶23} Once the communication or support element has been established, the probate court must then "proceed to determine whether justifiable cause for the failure has been proved." *In re Adoption of L.C.F.* 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545, ¶ 10, citing *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23.

1. Contact

{¶24} It is undisputed that Respondent has failed to maintain contact with the children since the issuance of the no-contact order on October 26, 2006. Therefore, we move directly to the question of justification.

{¶25} The no-contact order provides that the "Father shall have no contact with the minor children absent an Order from this Court." Respondent testified that he had never seen the order but understood that it was permanent and that it could not be lifted. He also expressed concern that petitioners would terminate contact between the children

and the paternal grandmother if an attempt was made to have the order lifted or modified. The magistrate determined that respondent's concerns were valid and constituted justification.

{¶26} Petitioners' objections cited case law supporting the premise that the juvenile court order could have been modified and respondent's failure to attempt to repeal or modify the order rebuts the assertion of justification.[2] The trial court agreed with petitioners, but also held that "more significant factors" exist to disprove justification. *See* Journal Entry No. 1382500 (Dec. 4, 2016), at p. 6. "Justice requires that this Court should not ignore the reason [Respondent] was put into his current position." Journal Entry No. 1382500 (Dec. 4, 2016), at p. 6. citing *Frymier v. Crampton*, 5th Dist. Licking No. O2 CA 8, 2002-Ohio-3591 (incarcerated parent's violent acts against family caused the failure to provide support.)

{¶27} "But for [Respondent's] heinous actions, the children's mother would still be alive," the Respondent " would not be in prison, and the children would not now be subject to these Adoption proceedings. He should not now be allowed to reap any legal benefit from the consequences of his crime." Journal Entry No. 1382500 (Dec. 4, 2016), at p. 7.

---

[2] *In re Adoption of M.S.*, 7th Dist. Belmont Nos. 11 BE 14 and 11 BE 15, 2011-Ohio-6403 and *In re Adoption of K.C.*, 3d Dist. Logan No. 8-14-03, 2014-Ohio-3985.

{¶28} The trial court found the rationale of *In re Adoption of Tucker*, 11th Dist. Trumbull No. 2000-T-0144, 2001-Ohio-8774, to be persuasive in this case. The father in *Tucker* sexually abused his child and consented to no-contact during probation or for five years as part of a plea agreement. Upon the filing of an adoption action, the father argued that the no-contact order constituted justifiable cause. The *Tucker* court concluded that "'a defendant cannot invoke the alleged involuntariness of a judicial no-contact order because the defendant's own willful misconduct involving that child created the need for that court order." Journal Entry No. 1382500 (Dec. 4, 2016), at p. 7, fn.1, quoting *Tucker* at *3.

{¶29} Respondent is serving a sentence of 23 years to life for murdering the children's mother. The children have special needs that require ongoing specialized care. Petitioners have supported and nurtured the children over the years. We wholly agree with the trial court's conclusion that "public policy dictates that the very unique circumstances of this case not be disregarded." Journal Entry No. 1382500 (Dec. 4, 2016), at p. 13. "[U]nlike individuals who are in prison for crimes unrelated to their children," "it would be entirely unjust to allow [Respondent] to use his imprisonment" to justify the failure to contact and support where Respondent's "own actions" "necessitated his prison sentence in the first place." Journal Entry No. 1382500 (Dec. 4, 2016), at p. 13.

{¶30} We affirm the trial court's determination that respondent has failed to demonstrate justifiable cause for his failure to contact the children.

2. Support

{¶31} Due to our disposition on the issue of contact, we need not address the trial court's discerning analysis on the issue of support. The failure to establish "either the communication or the support prong" "is sufficient to obviate the need for parental consent" since the statute "is written in the disjunctive." *In re Adoption of L.C.F.*, 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545, ¶ 23, citing *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). *See also In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23 (parental consent is not required if the parent unjustifiably "either failed to communicate with or failed to support the child for a minimum of one year").

{¶32} Respondent's sole assignment of error is overruled.

{¶33} The probate court's judgment is affirmed.

It is ordered that appellees recover from appellant 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 Court of Common Pleas, 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.

_____

ANITA LASTER MAYS, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
EILEEN A. GALLAGHER, P.J., DISSENTS WITH SEPARATE OPINION

EILEEN A. GALLAGHER, P.J., DISSENTING

{¶34} For the following reasons, I respectfully dissent from the majority opinion. Because I find that the petitioners failed to prove, by clear and convincing evidence, that respondent has failed without justifiable cause to provide more than de minimis contact with the minors in this case or to provide for the maintenance and support of the minors for the relevant one-year period I would reverse the trial court's finding that the adoption can proceed without the consent of respondent.

{¶35} I find scant support in the record for the trial court's decision to sustain the petitioners' objections to the magistrate's decision. On appellate review, a trial court's ruling on objections to a magistrate's decision will not be reversed absent an abuse of discretion. *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 99498 and 100229, 2014-Ohio-1508, ¶ 17. An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶36} As noted by the majority, there is no dispute that petitioner did not contact or provide support for his children during the relevant one-year period preceding the petition to adopt. The sole question before this court is whether respondent had justifiable cause for his failure to contact and support his children.

{¶37} "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." *In re Adoption of Kuhlmann*, 99 Ohio App.3d 44, 51, 649 N.E.2d 1279 (1st Dist.1994), citing *In re Adoption of Masa*, 23 Ohio St.3d 163, 166, 492 N.E.2d 140 (1986); *In re Adoption of L.C.F.*, 8th Dist. Cuyahoga Nos. 101798 and 101799, 2015-Ohio-1545, ¶ 14. "The latter could constitute justification." *Id*.

I. Contact

{¶38} In my view, the record supports the magistrate's conclusion that petitioner was willing but unable to contact the children due to the mandates of the no-contact order. No-contact orders have previously been held to constitute justifiable cause for a parent's failure to communicate with his children. *In re M.F.*, 9th Dist. Summit No. 27166, 2014-Ohio-3801, ¶ 25; *In the Matter of the Adoption of Bryan W.*, 6th Dist. Huron No. H-96-039, 1997 Ohio App. LEXIS 1771 (May 2, 1997). I find the trial court's reliance on *In re Adoption of Tucker*, 11th Dist. Trumbull No. 2000-T-0144, 2001-Ohio-8774, to be misplaced because that decision explained in detail the unique reasoning behind its rejection of a no-contact order as a justifiable cause for a lack of contact:

> This decision is limited to the specific fact situation presented in this case -- where the parent prohibited by a court order from contacting his or her child has been found guilty of sexually abusing that child, which criminal conduct forms the basis for the court order. In such a situation, a defendant cannot invoke the alleged involuntariness of a judicial no-contact order because the defendant's own willful misconduct involving that child created the need for that court order. Application of or reliance on this ruling beyond the specific facts presented would be inappropriate.

Id.

{¶39} In this instance the magistrate's finding that respondent was willing but unable to contact his children was supported by the evidence in the record. Extensive testimony was admitted to establish respondent's inability to contact the children due to the court order, the near certainty that any effort to lift the order would be intensely contested by the petitioners and the likelihood that any effort to pursue legal relief from the order would invite retaliation against the paternal family members' ability to visit the children. Conversely, the record is replete with letters respondent has written to his children and delivered to his mother for safekeeping in the event that one day his children are permitted to read them.

{¶40} I further find error in the trial court's overriding rationale that petitioner's own actions, which resulted in his incarceration and the issuance of the no-contact order, disqualified him from establishing justifiable cause. This narrow interpretation of R.C. 3107.07 was rejected by the Ohio Supreme Court in *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 345 N.E.2d 608 (1976):

> [A]lthough the fact of imprisonment might, when combined with other factors, lend support to a finding of a willful failure to support * * * it will not constitute such failure as a matter of law.

Id. at 24 (Citations omitted.)

{¶41} In the *Schoeppner,* the Supreme Court found that incarceration did not constitute a willful failure to support and maintain a child. *Id.* at syllabus. "The statute does not specify imprisonment as an exception to the requirement of consent, nor does it

equate imprisonment with the willful failure to properly support and maintain a child." *Id*. at 24. Nonetheless, the Court did not hold that the fact of incarceration automatically justified nonsupport. Rather, the Court found that the fact of imprisonment was one of several factors that the court should consider. *Id*.

{¶42} In my view the record reflects that the petitioners failed to demonstrate by clear and convincing evidence that respondent has failed, without justifiable cause, to provide more than de minimis contact with his children.

II. Support

{¶43} I further disagree with the trial court's decision to overturn the magistrate's factual determinations pertaining to whether justifiable cause had been established for respondent's failure to support the children. I find little relevancy in the parties' dispute regarding the manner in which the family's assets were liquidated following the death of the mother. There appears to be no dispute that all assets were transferred to estates in favor of the children for which maternal grandfather is the fiduciary. The sole pertinent fact from this tangent is that respondent had no assets during the relevant one-year period.

{¶44} Petitioners stipulated prior to trial that they were financially able to independently provide for the children during this time period and they did not request any financial support from respondent.

{¶45} In overturning the magistrate's decision the trial court found the magistrate erred in concluding that respondent's expenses exceeded his income during the relevant year. The trial court reasoned that because it found that respondent's prison expenses

were covered by monies deposited in his commissary account by family members he could have forwarded to his daughters the $240 he earned from his prison employment that year.

{¶46} I find the trial court's calculations to be in error because the court's conclusion is based on a superficial examination of the record. The various witnesses offered estimates regarding money given to respondent and his prison income that the trial court relied upon in reaching its conclusion. However, reliance on these estimates was unnecessary because the record contains an exhibit from the custodian of records for Grafton Correctional Institution that details all deposits and expenditures from respondent's prison account. The records reflect that respondent earned $238.25 and was provided $1330.00 from family members during the relevant one-year period. The record further reflects that respondent began the year with a balance of $206.47 in his commissary account and, after accounting for all his prison expenses, concluded the year with $145.56. The record and the testimony do not reflect that respondent used the funds to purchase items that could fairly be termed as "luxury" purchases. The trial court's finding that respondent received funds in excess of his prison costs that he could have transferred to his daughters is contradicted by the record.

{¶47} Finally, the trial court reiterated its prior finding — that respondent cannot demonstrate justifiable cause for a lack of support because his own actions placed him in prison. For the reasons previously addressed I find this reasoning to be contrary to established Ohio law.

{¶48} I would find that the trial court abused its discretion in sustaining the objections to the magistrate's opinion and reverse.