**[Cite as *In re Adoption of M.B.* , 2011-Ohio-1215.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

IN THE MATTER OF:
THE ADOPTION OF M.B.

C.A. No. 25304

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2008 AD 193

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

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CARR, Presiding Judge.

**{¶1}** Appellant, S.B. ("Father"), appeals the judgment of the Summit County Court of Common Pleas, Probate Division, which determined that his consent to the adoption of his child, M.B., by appellee, T.R. ("Stepfather"), was not necessary. This Court reverses.

I.

**{¶2}** M.B. was born on April 27, 1996. Her mother, A.R. ("Mother"), and Father divorced in 2000. Mother married Stepfather on April 28, 2001, at which time M.B. began living in Stepfather's home. On September 12, 2008, Stepfather filed a petition for adoption of M.B. He alleged that Father's consent to the adoption was not necessary pursuant to R.C. 3107.07 because Father had failed without justifiable cause to provide for the maintenance and support of M.B. for one year immediately preceding the filing of the petition. Throughout the case below, the parties referred to the relevant time period from September 12, 2007, to September 12, 2008, as the "adoption period" and we will do the same.

**{¶3}** On October 10, 2008, Father filed an objection to the adoption petition, disputing that his consent was not required. The parties engaged in discovery. On April 17, 2009, the matter proceeded to hearing before the magistrate. On July 20, 2009, the magistrate issued a decision in which she found that the $125 gift card and $60 cash that Father sent to the child, respectively for Christmas and her birthday during the adoption period, did not constitute support. Moreover, the magistrate found that Father did not have justifiable cause for failing to pay support. The magistrate ordered, therefore, that Father's consent to the adoption was not necessary. Father filed timely objections to the magistrate's decision.

**{¶4}** In his objections, Father argued that the two "financial items," i.e., the gift card and cash, he sent to M.B. at Christmas and her birthday constituted support for purposes of negating the applicability of R.C. 3107.07. In addition, he argued that, should the trial court determine that he failed to provide any support to M.B., then his failure was justified by his circumstances. Stepfather filed a response in opposition to Father's objections. On February 19, 2010, the probate court found that Father had communicated with M.B. during the adoption period and that he had paid child support until seven months prior to the commencement of the adoption period, although he failed to make any child support payments to either Mother or the relevant child support agency during the adoption period. In addition, the probate court found that the Christmas gift card and birthday cash which Father sent directly to the child were "not for necessities" and, therefore, did not constitute support. The probate court then found that Father's failure to pay support for the child during the adoption period was without justifiable cause. Consequently, the probate court overruled Father's objections, adopted the Magistrate's decision, and ordered that Father's consent to the adoption was not necessary pursuant to R.C. 3107.07.

**{¶5}** Father filed a timely appeal, raising one assignment of error for review.

**ASSIGNMENT OF ERROR**

"PAYMENTS OF CASH AND GIFT CARD TOTALING $185.00 ARE SUPPORT UNDER [R.C.] 3107.07 AND THE COURT ERRED IN FINDING FATHER'S CONSENT UNNECESSARY."

**{¶6}** Father argues that the probate court erred in concluding that his consent to the adoption of M.B. was not required pursuant to R.C. 3107.07 because he had failed to pay support for the child during the one year period immediately preceding the filing of the adoption petition. This Court agrees.

**{¶7}** The issues of Father's communication with the child and any justifiable cause for failure to provide support and maintenance are not at issue in this appeal. Rather, Father merely challenges the probate court's finding that his gifts to the child in the amount of $185.00 did not constitute support.

**{¶8}** Stepfather urges this Court to review the matter to determine whether the probate court's finding that parental consent is unnecessary was against the manifest weight of the evidence. The case he cites in support, however, holds merely that the probate court's determination regarding justifiable cause will not be disturbed unless it was against the manifest weight of the evidence. See *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 106. Whether Father had justifiable cause for any failure to pay support, however, is not before this Court on appeal. Rather, Father challenges the probate court's determination that the money he provided to the child was not in the nature of support. Our review of that issue necessarily requires us to determine the meaning of "maintenance and support" as contemplated by the statute. "An appellate court's review of the interpretation and application of a statute is de novo [and we may]

not give deference to a trial court's determination [in that regard.]" *In re Barberton-Norton Mosquito Abatement Dist.*, 9th Dist. No. 25126, 2010-Ohio-6494, at ¶11.

**{¶9}** R.C. 3107.06 enunciates the general requirement that a father must execute a written consent before another person may adopt his child. R.C. 3107.07 sets forth exceptions to the consent requirement.

**{¶10}** The version of R.C. 3107.07 in effect at the time relevant to this matter states, in pertinent part:

> "Consent to adoption is not required of any of the following:
>
> > "(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."

The petitioner has the burden of proving, by clear and convincing evidence, that the natural parent failed to provide for the maintenance and support of the child. *Gorski v. Myer*, 5th Dist. No. 2005CA00033, 2005-Ohio-2604, at ¶13.

**{¶11}** This Court has adopted the well established view that "the consent provisions of R.C. 3107.07(A) are to be strictly construed to protect the interests of the nonconsenting parent." *In the Matter of the Adoption of Jarvis* (Dec. 11, 1996), 9th Dist. No. 17761, citing *In re Adoption of Sunderhaus* (1992), 63 Ohio St.3d 127; *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361. Moreover, we recognized the termination of a parent's rights by way of adoption as "an extreme measure," requiring that the parent's failure to provide maintenance and support must rise to the level of abandonment and loss of interest in the child. Id., citing *In re Adoption of Mackall* (Apr. 24, 1985), 9th Dist. No. 1365.

**{¶12}** The applicable version of the statute does not define the terms "maintenance and support." Moreover, although Sub. S.B. 189 out of the 128th General Assembly proposes amendments to the current version of the statute which would clarify the meaning of "maintenance and support," those amendments have not yet been adopted and, in any event, would not apply retroactively to this case. See, e.g., *In re Adoption of W.C.*, 189 Ohio App.3d 386, 2010-Ohio-3688, at ¶33-42 (recognizing a parent's constitutional fundamental liberty interest in raising his child; the unconstitutional retroactive application of laws to protected, vested rights; the legislature's lack of an express intent that R.C. 3107.07 be applied retroactively; and the burdensome, rather than merely remedial, nature of the amendment); see, also, *VanBremen v. Geer*, 187 Ohio App.3d 221, 2010-Ohio-1641.

**{¶13}** Where the legislature has failed to define terms, this Court recognizes the basic rule of construction by which we accord words their ordinary meaning. *Absolute Machine Tools, Inc. v. Liberty Precision Industries, Ltd.*, 9th Dist. No. 08CA009503, 2009-Ohio-4612, at ¶15, citing *In re Adoption of Huitzil* (1985), 29 Ohio App.3d 222, 223. Other districts have done the same when considering the meaning of the "maintenance and support" discussed in R.C. 3107.07. See, e.g., *Garner v. Greenwalt*, 5th Dist. No. 2007 CA 00296, 2008-Ohio-5963, at ¶26. Black's Law Dictionary (8 Ed.2004) 973 defines "maintenance" as "[f]inancial support given by one person to another[.]" "Support" is defined as "[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree and comfort to which one is accustomed." Id. at 1480. In addition,

> "As long as the parent makes some provision for the support of the child during the one year preceding the adoption petition, the statutory condition for dispensing with the parent's consent to an adoption is not satisfied even if the amounts are relatively small compared to the support obligation. A court should consider a parent's nonmonetary contributions of clothing, shoes, and diapers to a child. 'Maintenance and support,' within the meaning of the statute providing

> that a natural parent's consent to adoption is not required if the natural parent failed without justifiable cause to provide maintenance and support for the child for one year, does not simply refer to child-support payments or other monetary contributions; it may mean any type of aid to feed, clothe, shelter, or educate the child, to provide for health, recreation, or travel expenses, or to provide for any other need of the child. When a natural parent is accused of not having provided support and maintenance for one year without justifiable cause, 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." 47 Ohio Jur.3d Family Law, Section 895.

**{¶14}** In this case, the parties do not dispute that there was a child support order in effect and that Father had not made any child support payments through the applicable child support enforcement agency. Moreover, the parties agree that Father did not send any money for the benefit of the child directly to Mother during the adoption period. This Court has recognized that "when a husband and wife are divorced, their obligation to support a minor child is governed by the domestic relations child support statute, R.C. 3109.05." *Jarvis,* supra, citing *Meyer v. Meyer* (1985), 17 Ohio St.3d 222, 224. However, we also recognized in *Jarvis* that there are procedural mechanisms by which a parent may compel the payment of child support by the other. In *Jarvis,* the divorce decree noted that the issue of child support was being "held in abeyance." Accordingly, the father was not under court order to support the child, so we recognized the parent's common law duty to support his child. We noted that the mother could have moved the domestic relations court for an order of support. In the instant case, where a support order existed, Mother could have filed a contempt motion based on Father's failure to pay child support. A finding of contempt and any concomitant orders designed to compel compliance with the support order are the consequences Father might have reasonably expected in this case. Under the circumstances of this case, however, Father should not have reasonably expected an involuntary termination of his parental rights.

**{¶15}** The parties agree that Father sent a $125 Aeropostale gift card at Christmas and $60 in cash in April 2008 directly to M.B. Father conceded that he sent both to the child as gifts.

**{¶16}** There is a split of authority on whether certain gifts or other monetary contributions may constitute support. For example, the Tenth District Court of Appeals affirmed the trial court's finding that the putative father had failed to provide support to his child when he merely purchased $133 worth of toys and clothing for the child as gifts at Christmas because the child already possessed a sufficient amount of toys and clothing. *In re Adoption of Strawser* (1987), 36 Ohio App.3d 232, 234-5. The *Strawser* court further concluded that the father's provision of medical insurance for the child, purchased for $6.00 per month and of which the mother knew nothing, did not constitute support because it had no real value to the child. Id. The Sixth District Court of Appeals has strictly construed the meaning of the word "support" to mean only those monies paid directly to the child's parent or the appropriate child support bureau and not money given directly to the child. *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-91-199. The *McCarthy* court construed a $10 bill and four $1 bills sent directly to the child in two letters from the father as gifts which would not constitute support for purposes of R.C. 3107.07. Id. In addition, the Eleventh District Court of Appeals concluded that a father who paid child support in the amount of $329.40, an amount less than three percent of his income, had failed to provide maintenance and support for his child so that his consent to adoption was not required. *In re Adoption of Wagner* (1997), 117 Ohio App.3d 448, 454. The *Wagner* court also discounted the father's payments for medical insurance for the child because the mother was unaware that the benefit existed. Id. On the other hand, some courts have recognized the provision of maintenance and support where a parent has made only meager child support payments to the appropriate support bureau. See, e.g., *Celestino v.*

*Schneider* (1992), 84 Ohio App.3d 192, 197 (father's payment of $36 to support bureau constituted support for purposes of R.C. 3107.07); *Vecchi v. Thomas* (1990), 67 Ohio App.3d 688, 691 (father's payment of $130 to support bureau constituted support for purposes of R.C. 3107.07). Moreover, the Third District Court of Appeals has recognized a father's care for the child's physical needs during visitation as support for purposes of R.C. 3107.07, even in the absence of any payments to the child support enforcement agency. *In the Matter of the Adoption of Huffman* (Aug. 29, 1986), 3d Dist. No. 10-85-4. Neither the Ohio Supreme Court nor this Court, however, has addressed this particular issue.

**{¶17}** In this case, we conclude that the two monetary gifts to the child constituted maintenance and support. Despite the lack of child support payments, Father's monetary gifts to M.B. evidenced his intent not to abandon his child. The gift card was from a clothing store, which enabled the child to purchase clothing, an undeniable necessary. In addition, it is difficult to see how the $60 in cash for the child's birthday did not provide the means by which the child might attain additional comforts. Although not child support pursuant to a judicial decree, those monies served to provide additional financial support for the benefit of the child. Accordingly, there was clear and convincing evidence that Father provided for the maintenance and support of M.B. during the adoption period by virtue of his two monetary gifts to the child. Although Father's total financial contribution to the child's welfare was small, the timing of the contributions was thoughtful and clearly evidenced his intent not to abandon the child. Accordingly, the trial court erred in construing Father's contributions as a failure to provide maintenance and support for the child. Therefore, the probate court erred by concluding that Father's consent to the adoption of M.B. was not required. Father's assignment of error is sustained.

III.

**{¶18}** Father's sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas, Probate Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

**{¶19}** The majority concludes that a $125 gift certificate at Christmastime and a $60 cash gift at M.B.'s birthday are sufficient to establish maintenance and support by Father when he made no support payments for one year. I must respectfully dissent. The majority correctly points out that the terms "maintenance and support" are not defined in this section of the Revised Code. As a result, we give those terms their ordinary meanings. The American Heritage Dictionary defines "maintenance" as "[t]he action of maintaining[;] * * * [t]he state of being maintained[;] * * * a means of maintaining or supporting." The American Heritage Dictionary (Second College Ed. 1995) 757. "Maintain" is defined as "[t]o provide for;" to "sustain." Id. "Support" is defined as "[t]o provide for or maintain, by supplying with money or necessities." Id. at 1222. These are common, ordinary meanings of the terms. A gift certificate at Christmas and a small cash gift at a child's birthday do not, in my mind, constitute support. Those are tokens of affection that are expected from friends or relatives who have no obligation for maintenance. Even Father recognized that they were just gifts. He was not "maintaining" or "supporting" M.B. in any real sense of those words.

**{¶20}** Father did not send any money for M.B. to Mother for the child's support. However, the majority notes that Mother did not seek a motion for contempt with the trial court or in any other way attempt to compel Father to meet his obligation. It argues that Father might have reasonably expected contempt orders as a result of his recalcitrance, but he could not expect an involuntary termination of his parental rights. Contempt proceedings were certainly available to Mother; however, the majority misses the point. Father was aware during the entire year that he had not made a single support payment. We recognize the legal maxim that each person is presumed to know the law. *State v. Pinkney* (1988), 36 Ohio St.3d 190, 198. R.C. 3107.07(A)

provides that consent for adoption is not required where a parent of a minor child has failed to provide for the maintenance and support of that child as required by legal decree for a period of at least one year. Because of Father's failure to meet his obligation, the responsibility for taking care of M.B. fell on Mother as custodial parent. I would be hesitant to place any further responsibility upon her (such as putting him on notice) than that which she already bears.

**{¶21}** Parenting involves sacrifice and responsibility. While one parent meets the day-to-day expenses of providing for food, clothing and shelter, I don't think it wise to allow the other to show up with gifts on holidays and consider that as the type of support and maintenance that triggers a notice of the intent to adopt. If the statutory provision of whether Father had justifiable cause for failure to pay support were an issue, the result might be different. However, on the legal issue of whether his two holiday gifts constitute maintenance and support, I agree with the trial court that they do not. Accordingly, I would affirm.

APPEARANCES:

SCOT A. STEVENSON, Attorney at Law, for Appellant.

DIANA COLAVECCHIO, Attorney at Law, for Appellee.