IN THE SUPREME COURT OF OHIO

IN RE ADOPTION OF A.C.B.	*	Supreme Court Case No. 2018-1300
	*	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
	*	Court of Appeals Case No. L- 18-1043
	*	Trial Court Case No. 2017 ADP 000098

REPLY BRIEF OF APPELLANT B.D.

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Proposition of Law: Pursuant to the explicit language of Ohio Revised Code 3107.07(A), provision of any maintenance and support during the statutory one-year period is sufficient to preserve a natural parent's right to object to the adoption of his or her child.

I. APPELLANT'S INTERPRETATION OF R.C. 3107.07(A) IS CORRECT.

The main issue in dispute is the proper interpretation of the "maintenance and support" provision in R.C. 3107.07(A). Appellant correctly asserts that the express language of the statute supports a finding that any amount of maintenance and support during the relevant one-year period preceding an adoption petition is sufficient to preserve a natural parent's right to object to the adoption of his or her child. Ohio Revised Code 3107.07(A) provides:

> A parent of a minor, 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 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.

Because R.C. 3107.07(A) authorizes adoption without parental consent, and involves a permanent termination of parental rights, the statute must be "strictly construed so as to protect the rights of natural parents to raise and nurture their children." *In re Adoption of Masa*, 23 Ohio St.3d 163, 166, 23 Ohio B. 330, 492 N.E.2d 140 (1986); *see also In re Adoption of Holcomb*, 18 Ohio St. 3d 361, 366, 481 N.E.2d 613, 619 (1985) (courts must "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.") For interpretation purposes—and to respect the interest of the nonconsenting parent—the "express language of the statute should be the *paramount*

consideration." *In re Adoption of A.C.B.*, 2018-Ohio-3081, ¶ 31, 106 N.E.3d 1277, 1285 (Ct. App.) (Mayle, J., dissenting) (emphasis added).

Noticeably, "the plain language of R.C. 3107.07(A) does not designate any qualifying amount of "maintenance and support" that a non-consenting parent must pay to avoid complete forfeiture of their parental rights." *Id.* at 1285-86. This indicates that any amount of maintenance and support—no matter how meager, insubstantial, or trivial—during the relevant one-year period is sufficient to preserve a nonconsenting parent's right to object to the adoption of his or her child. *Id.* Indeed, the absence of qualifying language as to the amount of "maintenance and support" within the express language of the statute supports this interpretation.

When interpreting a statute, courts cannot substitute their own judgement for that of the Legislatures. Moreover, courts "are not justified in adding words to such statutes, neither may the courts delete words from a statute, but must construe intent of the lawmakers as expressed in the law itself." *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948). Accordingly, because R.C. 3107.07(A) does not include language such as *de minimis*, meager, or insubstantial as a qualifier to the amount of "maintenance and support," it is improper for Ohio courts to add such language in the determination of whether a parent has provided "maintenance and support" as required by law or judicial decree.

Moreover, this view is supported by the history of the statute. The prior version of R.C. 3107.07(A) provided:

> 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.

In re Adoption of Hupp, 9 Ohio App. 3d 128, 129, 458 N.E.2d 878, 881 (1982). Thereafter, the Legislature amended R.C. 3107.07(A) "by changing the standard from 'communicate,' which could imply a single contact, to 'more than de minimis contact,' which seems to imply more than a single contact." *In re Adoption of J.D.T.*, 2012-Ohio-4537, ¶ 9, 978 N.E.2d 602, 604 (Ct. App.). This indicates that the Legislature intended "to require more effort from the parent to have contact and communication with the child." *Id.* At that time, however, the Legislature specifically chose not to change the standard to require more than *de minimis* "maintenance and support." Notably—and logically—this indicates that the Legislature did not intend to require more than *de minimis*, meager, or insubstantial "maintenance and support" to preserve a parent's right to object to the adoption of his or her child.

Accordingly, Appellant respectfully urges the court to find that any amount of maintenance and support during the the relevant one-year period is sufficient to preserve a parent's right to object to the adoption of his or her child.

II. THE "WITHOUT JUSTIFIABLE CAUSE" ELEMENT IS NOT RELEVANT TO THE COURT'S ANALYSIS.

The "without justifiable cause" element is not relevant to the issue that Appellant has asked this Court to resolve. Applying R.C. 3107.07(A) requires a two-step analysis—which involves two distinct and separate factual determinations. *In re Adoption of M.B.*, 131 Ohio St. 3d 186, 2012-Ohio-236, 963 N.E.2d 142, at ¶ 23. First, probate courts must "determine if a parent made a financial contribution that comports with the requirements of R.C. 3107.07(A) to constitute maintenance and support." *Id.* Second, if the probate court finds a failure of support, it must "determine whether justifiable cause for the failure has been proved by clear and convincing evidence." *Id.* As articulated above, this means that in analyzing the first step, Ohio courts must

merely determine whether or not the nonconsenting parent as provided *any* maintenance and support for the child during the relevant one-year period preceding the adoption petition. If the court finds that *no* maintenance and support has been provided as required by law or judicial decree, then the court must determine whether justifiable cause for the failure exists.

Contrary to Appellee's assertion, a finding that any maintenance and support is sufficient to preserve the natural parent's rights does not leave courts without the "discretion or need to consider whether without justifiable cause exists." Appellee's Brief, p. 9. Rather, when and if the court determines that the nonconsenting parent has not provided any maintenance or support, the court must thereafter determine whether justifiable cause for the failure exists. Furthermore, where there is no provision of maintenance and support during the relevant one-year period accompanied by a lack of justifiable cause, parents risk losing their parental rights under R.C. 3107.07(A).

Moreover, contrary to Appellee's assertion, Appellant's interpretation of R.C. 3107.07(A) neither ignores the history of the statute nor the without justifiable cause element. Appellee's Brief, p. 7. Appellee appears to base its argument on the probate court's determination that Appellant had no justifiable cause for failing to provide maintenance and support. *See generally* Appellee Brief, p. 3-4, 8, 12. In support of this position, Appellee impermissibly focuses its analysis on the dated predecessor of R.C. 3107.07(A), R.C. 3107.06(B)(4), which has not been in effect in Ohio law since 1977. *In re Adoption of Hupp*, 9 Ohio App. 3d 128, 130, 458 N.E.2d 878, 882 (1982). The predecessor, R.C. 3107.06(B)(4), allowed an adoption to take place without the consent of a parent where the parent "willfully failed to properly support and maintain the child for a period of more than two years immediately preceding the filing of the petition." *Id.* To be clear, R.C. 3107.07(B)(4) was replaced by R.C. 3107.07(A) more than forty years ago. Moreover, because the Legislature thought it necessary to remove the "willful" nonpayment element from the statute,

Appellant will not waste the Court's time by centering its argument on an element that no longer applies. Such a focus is not relevant to the decision that Appellant has asked this Court make, as Appellant is not appealing, and does not seek this Court's review, of the Probate's Court's finding that there was no justifiable cause for the failure to provide maintenance and support.

Furthermore, to the extent that Appellee seeks to direct this Court's attention to "justifiable cause" element or the dated and repealed "willful nonpayment" element with its conclusory statement that Appellant has "for all practical purposes, financially abandoned A.C.B.," Appellant respectfully implores the Court to disregard such considerations. *See generally* Appellee Brief, p.4.

III. THE COURTS ANALYSIS FROM IN RE ADOPTION OF M.B. SHOULD NOT BE APPLIED TO THIS CASE.

In the case *In re Adoption of M.B.*, this Court was asked to determine whether a small monetary gift by a biological parent to a minor child on Christmas and the child's birthday constitute maintenance and support as required by R.C. 3107.07(A). *In re Adoption of M.B.*, 131 Ohio St. 3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 20. The Court held *de minimis* monetary gifts from a biological parent to a minor child do not constitute maintenance and support, because they are not payments as required by law or judicial decree under R.C. 3107.07(A). *In re Adoption of M.B.*, 131 Ohio St. 3d 186, 2012-Ohio-236, 963 N.E.2d 142. In making this decision, the Court was persuaded by the fact that "in giving effect to every word in the statute ... the maintenance and support required by R.C. 3107.07(A) is that which is specifically 'required by law or judicial decree.'" *Id.* Notably, a monetary Christmas or birthday gift to a minor child by a parent is not required by law or judicial decree.

Appellee interprets *In re Adoption of M.B.* as giving trial courts the discretion to make the determination as to whether a financial contribution constitutes maintenance and support, in all termination of parental rights cases. Appellee Brief, p. 6. While such discretion should be given to trial courts in cases where the facts are similar to those at issue in *In re Adoption of M.B.*—a financial contribution is rendered that is not required by law or judicial decree—this standard, as outlined above, disregards the Legislatures intent with respect to maintenance and support as required by law or judicial decree—in this case, child support payments provided through a state's child services payment system. Because child support payments are precisely the type of maintenance and support as contemplated by the statute, it is not necessary for trial courts to use their discretion to determine the sufficiency of the amount of the maintenance and support provided. Indeed, strictly construing the express language of the statute, illustrates that the Legislature did not intend that trial courts exercise discretion in this matter.

Accordingly, Appellant respectfully urges the Court the find that the holding of *In re Adoption of M.B.* does not apply to this case.

IV. APPELLANT PROVIDED MAINTENANCE AND SUPPORT AS REQUIRED BY LAW OR JUDICIAL DECREE.

Although "maintenance and support" is not defined by the Legislature in R.C. 3107.07(A), this Court has held that maintenance and support "is that which is specifically "required by law or judicial decree."" *In re Adoption of M.B.*, 963 N.E.2d at 146. Certainly a $200.00 support payment from a parent to a minor child that is tendered through a states own Child Services payment system, constitutes "maintenance and support" as required by judicial decree. Even Appellee acknowledges that Appellant sent a $200.00 child support payment during the relevant one-year period. Appellee Brief, p. 2. While it is true that Appellant did not pay all of the annual child support obligations, surely R.C. 3107.07(A) does not require that parents pay the full sum of the

annual support obligation or face a permanent termination of parental rights. Such an interpretation would be unreasonable.

Accordingly, because Appellant made a $200.00 support payment through the Indiana Child Services payment system, Appellant provided maintenance and support as required by law or judicial decree.

CONCLUSION

For the reasons set forth herein, Appellant respectfully urges this Court to reverse the judgment of the Sixth District Court of Appeals for Lucas County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was served upon counsel of record for the Plaintiff-Appellee, James L. Rogers, by ordinary mail, at the below address as of the 29 day of January 2019.

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