IN THE SUPREME COURT OF OHIO

IN THE ADOPTION OF B.B.	:	Supreme Court Case No. 2023-1633
Willliam Momenee	:	On Appeal from the Lucas County
	:	Court of Appeals, Sixth Circuit
Petitioner/Appellant	:	
v.	:	Court of Appeals
	:	Case No. L-23-1078
Steven Michael Bonds	:	
Respondent/Appellee	:	

MERIT BRIEF OF APPELLANT

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I. Introduction

This case presents an opportunity for this honorable Court to correct the misguided application of the law set forth in *In re Adoption of B.B.* and set clear guidelines for all future courts to properly apply adoption law.

II. Statement of the Case

In this case, Steven Bonds brought a petition in Lucas County Probate Court to adopt B.B. without the birth father's consent by alleging that the birth father had failed to pay child support and had not maintained contact with the child for at least one year prior to the filing of the petition.

After hearing the facts and the testimony of witnesses at the adoption trial, the honorable Judge Jack Puffenburger, an experienced and respected Probate Judge since 1991, entered a decision on March 6, 2023 finding that this Court's precedent of *In Re Adoption of A.K.* governs. *See* Trial Court Decision, pgs 2-3 citing *In Re Adoption of A.K.*, (2022) 168 Ohio St.3d 225 (holding that following a court order barring contact does not preclude the requirement of birth father's consent to an adoption).

Because a Juvenile Court Order prevented contact, and Appellant Momenee complied with that Order, he could not contact his daughter, B.B. Thus, his consent, as birth father, was required for adoption. In addition, Judge Puffenburger found that "birth father provided support through his employment prior to the expiration of the one-year period." *Id.* at p.3

Petitioner Bonds then appealed to the Sixth District Court of Appeals alleging error by the trial court in its application of *In Re Adoption of A.K.* In Bond's appeal brief, he argued

that *In Re Adoption of A.K.* did not apply to cases where a court order barred a father from having contact with his child. Appellee Bond's actual assignments of error are as follows:

> The Probate Court erred, to the prejudice of Appellant/Stepfather Steven M. Bonds, when it ruled against the manifest weight of the evidence, finding that:
>
> 1. Father/Appellee's compliance with a No-Contact Order automatically constituted justifiable cause for his failure to have any contact with the minor child during the one year period before the filing of the Petition for Adoption; and
>
> 2. Father/Appellee provided for the maintenance and support of the minor child during the one year period before the filing of the Petition for Adoption, although mother had not actually received any child support payments for a period of sixteen (16) months prior to the filing.

The Sixth District Court of Appeals, however, disregarded Appellee Bond's challenge to *In Re Adoption of A.K* and, sua sponte found an entirely different theory to remand – a theory that had not been raised by either party during the trial or on appeal.

To wit, the Court of Appeals created new law that a private person, the petitioner himself, may determine the time of placement under ORC 3107.07(A) even if there is a prior juvenile court order declaring parental rights. In doing so, the Sixth District Court of Appeals rewrote adoption law which conflicts with Ohio Supreme Court precedent set forth in *In Re Adoption of Kreyche*, 15 Ohio St. 3d 159.

Finally, please note that Steven Bonds just dismissed his petition to adopt B.B. on April 3, 2024 and father has begun visitation with his daughter. *See* Appendix I. Ordinarily, this might end the controversy, except that Bonds could refile. Further, the flawed reasoning set forth by the Sixth District in this case would govern other adoptions in the Sixth District and cause conflict and confusion among other lower courts. As such, this matter is still worthy of this

honorable Court's consideration to correct this errors of the Sixth District and set forth proper guidelines for adoption law in Ohio for all Ohio parents and children.

III. Statement of the Facts

The minor child B.B. was born to mother Nicole Knaggs and father William Momenee on June 2, 2012. Young B.B. became deeply bonded with Father as a baby and toddler. The child lived with her Father for more than four years until September 28, 2016 when Father caught mother cheating upon him with petitioner Steven Bonds. (Trial Transcript., p81, lines 1-6).

It is undisputed that Appellee loves his daughter and refuses to permit her to be adopted out. He has fought as best he can, and as best as he knows how, to keep and maintain a relationship with his daughter. He even sold his house to finance the fight to keep his daughter in his life. (Trial Tr., p.80, lines 11-18) ("I just really wanted to keep my house but because this matter was filed I decided my house wasn't as meaningful as my daughter is.").

Mother, Knaggs, however, has denied Father visitation upon false premises of domestic violence and has even had him jailed for wanting to see his child. (Trial Tr. p.64, lines 17-19 and Tr.p.64-65, lines 25-1) ("Q. He wanted to see his child and said please let me see the child and you called the police? A. Yes.").

First and foremost, Father has been found innocent of domestic violence by a jury in Toledo Municipal Court. (Tr. p.10, lines 1-4; *see also* Toledo Municipal Court under Case No. CRB-19-11605-0102) Interestingly enough, the false allegation of domestic violence wasn't even against birth mother Knaggs, but against a third party.

Mother, however, cut off visitation based upon this false claim of domestic violence. (Trial Tr, p.81, lines 15-23). The Juvenile Court issued an Order prohibiting contact with his child upon the false claim of domestic violence because Appellee could not be present. *See* Lucas County Juvenile Court Case No. 14241439.

Appellee could not participate in the Juvenile Court hearing because he had been jailed by Mother for an alleged violation of a protection order. (Trial Tr. p.58, lines 10-25 and Tr.p.60, lines 5-6) ("Q. So you claimed he violated the CPO, therefore he couldn't be there, correct? A. Correct.").

The juvenile court order expressly prohibited Father from any contact with the child. (Trial Tr., p.62, lines 18-24) ("Q. Father's time is suspended and he shall have no contact with the child until further court order, correct? A. Yes. Q. What does no contact with the child mean? A. No contact. He can't see the child, he can't speak to the child. Q. Can't call, can't test, can't write? A. Nope.").

Further, Appellant knowingly attempted to present false claims of domestic violence at the adoption hearing. (Trial Tr. p.10, lines 1-4). This false claim was withdrawn by attorney Szuch at the adoption hearing. Id. In fact, the trial court granted a motion in limine precluding domestic violence from being referenced in the adoption proceeding. (Trial Tr. p.10, lines 9-11).

Despite being down on his luck and struggling to combat mother's legal machinations to keep him from his child, Appellee regularly paid child support for his first child (from another mother). (Trial Tr. p.37, lines 14-16).

Father intended to pay child support for both children and thought that he had been because support was deducted from his paycheck. However, Father, on his own initiative, found

out that Mother Knaggs had not been receiving child support for B.B. because Mother's attorney had submitted the child support request to the wrong union. Again, on his own, and prior to the adoption petition, Father corrected the error of Mother's attorney so that child support could commence. (Trial Tr. p.34, lines 20-23 and Tr. p.89, lines 5-11).

> So when I called down to child support, I found out they sent their paperwork to the wrong union. They sent the paperwork to Local 85. I'm local 55. *** I had to call and correct it from child support myself."

(Trial Tr. p.86, lines 22-25 and Tr.p.87, line 18).

Through no fault of his own, there had been a lapse in child support which Father took the initiative to correct. In fact, the record shows that child support was paid by Father for the minor child, B.B., and deducted from his paycheck, on September 26, 2022 before the filing of the adoption petition. (Trial Tr. p.31, lines 18-23). As such, the trial court correctly found that Appellee Father did pay child support within the year prior to filing of the petition for adoption.

Further, the trial court did not address "placement" of the child in the petitioner's home or the timing of the placement because neither party raised this issue. In fact, the trial transcript and record shows no testimony, exhibit, or any other introduction of evidence as to the "placement" of the child in petitioner Bond's home. The absence of evidence as to "placement" is a key fact for this honorable Court to consider because the Sixth District Court of Appeals focused upon "placement" of the child in their reversal of Judge Puffenburger's finding of fact.

As shown in the Propositions of Law below, the Sixth District Court of Appeals erred in its application of the term "placement" and the effect of its interpretation upon Ohio law. Father William Momenee, on behalf of children and parents across Ohio, respectfully prays this honorable Court to correctly state the law of adoption as set forth in the Propositions of Law below and reverse the Sixth District Court of Appeals' decision in *In Re Adoption of B.B.*

PROPOSITIONS OF LAW REQUIRING REVERSAL

PROPOSITION OF LAW I: *Kreyche* should not be corrupted.

Upon the wisdom of this honorable Court, *In re Adoption of Kreyche* provided factors to determine whether a "placement" had occurred by a third-party agency, the welfare department, or by court order. 15 Ohio St.3d at 162. However, the Sixth District Court of Appeals corrupted this *Kreyche* by inexplicably expanding the term "placement."

First, the Sixth District Court of Appeals notes that "the probate court's decision is silent on the question of fact of B.B.'s date of placement of the child in appellant-petitioner's home." *In re Adoption of B.B*., Sixth District Court of Appeals, L-23-10778, ¶24. The probate court, however, is silent upon the issue because neither party raised it at trial.

The Court of Appeals first recognizes that the Lucas County Juvenile Court granted Appellant Momenee's parental rights and provided him with parenting time with his child, B.B. as follows:

> Since June 18, 2018, the Lucas County Juvenile Court ordered appellee to pay child support for B.B and since May 24, 2019, the juvenile court designated appellant-mother the residential parent and legal custodian of B.B. and awarded appellee parenting time.

In re Adoption of B.B., Sixth District Court of Appeals, L-23-10778, ¶2 (kindly note the mother did not appeal and therefore "appellant-mother" is in itself an error).

The Appellate Court later concluded that the Probate Court erred because November 2016, just after the parties began dating, could have been a date of placement for

adoption. *Id.* at ¶20. Indeed, the Court of Appeals stated "there is unrefuted testimony in the record that B.B. was placed in appellant-petitioner's home as early as November 2016 or as late as November 2020." *Id*. at 20.

Curiously enough, there is no testimony in the record that B.B. was placed in appellant-petitioner's home nor that it occurred in 2016 or 2020. In fact, the trial transcript shows the term "placement" had not been used by any party, counsel, or the court at ay time during the probate hearing of February 7, 2023. It was never mentioned! Even the term "place", used only four times during the hearing, referred simply to visits taking "place" and never referred to "placement" of the child. Thus, there is NO testimony the child had been placed or that placement had occurred. There is no "unrefuted testimony."

Aside from grievously misconstruing the evidence, the Court of Appeals fails to recognize a Juvenile Court order granting parental rights to the Appellant Father, William Momenee. His rights were never terminated. Instead, only a no-contact order had issued prior to the filing of the adoption petition.

Upon this reasoning, the Court of Appeals corrupts *Kreyche* by permitting the petitioner to determine the date of the "placement" of the child. For example, the evidence shows that Petitioner Appellee *began* a relationship with B.B.'s mother in July, 2016. The Court of Appeals therefore believes that the beginning of the boyfriend/girlfriend relationship, or a few months thereof, is a viable "placement" date of the child for adoption. Such a date, selected at petitioner's whim, would permanently deprive Appellee of all parental rights. Indeed, since birth Father Momenee had no knowledge of petitioner's dating habits, he cannot challenge Petitioner's claim, thereby making it "unrefuted" and binding according to the Sixth District's flawed reasoning.

Thus, the Sixth District's erroneous interpretation of *Kreyche* undermines and corrupts this honorable Court's application of the law. The original holding of *Kreyche* should stand and this honorable Court should not permit a petitioner from determining the placement date.

Proposition of Law II: *In re Adoption of B.B.* improperly requires the trial judge to fix the Petitioner's insufficient presentation of evidence.

In re Adoption of B.B., Appellee Steven Bonds failed to introduce any evidence, or even argue, as to the placement of the child. He did not even raise the issue on appeal! This deficiency in Bond's presentation at trial and absence upon appeal is Bond's error and Bond's alone.

According to the Sixth District Court of Appeals, however, the trial court must hold a hearing to fix Bond's error of presentation and make a finding as to the date the child had been placed for adoption. *In re Adoption of B.B.*, ¶21 ("Again, the probate court failed to analyze the separate one-year periods under R.C. 3107.07(A)."

This is not the role of the trial court. If Petitioner fails to present his case properly, and fails to raise the issue of "placement" under the second prong of RC 3107.07, it is not the burden of the trial court to step in and assist the petitioner by sua sponte raising the issue and demanding presentation of evidence thereon.

Imagine, if, for example, a plaintiff in a medical malpractice case forgot to establish proximate cause and failed to present a medical expert. Since proximate cause was not raised at trial, the court enters judgment for the defendant doctor. Upon appeal, however, the Sixth District holds that the trial court erred in failing to consider proximate cause, because construing the facts most favorably to the Plaintiff, there is irrefutable facts (although not presented on the record) that

Defendant caused Plaintiff's injury and therefore the matter should be remanded for a jury's consideration of damages.

Although this is a laughable example, it is not far from what the Sixth District now requires of the trial court. Under the mandate of *In re Adoption of B.B.*, ¶21, the trial court must hold another hearing to determine the time of placement – an issue that the petitioner failed to present, failed to prove, failed to provide evidence upon, and omitted at trial. Such a hearing, and any evidence taken, is an improper judicial intervention to fix Petitoner's failure to present evidence.

Interestingly enough, the Sixth District Court forbade a Probate trial court in an adoption hearing from doing this very same thing in the case of *In the Matter of Adoption of Kraft*, 1984 WL 7868, *4-5 (6th Dist. 1984).

To wit, the Sixth District found that the petitioner in *Kraft* erred by failing to assert the second prong of ORC 3107.07(A) (i.e.,as to time commencing from the placement of the child). *Kraft* at *4 ("appellee petitioners alleged only that appellant-father had willfully failed to communicate … for a period of more than one year immediately preceding the filing of this petition" (underlining in original)). The trial court erred by sua sponte finding appellant-father did not support the child within one year of the *placement* of the child. *Id.*

Thus, the *Kraft* case held that the probate court erred by going outside the pleadings to determine a failure of support (an issue that had not been raised by the parties). 1984 WL 7868 (6th Dist. 1984). In the instant case, however, the Sixth District violates the central holding of its own decision in *Kraft* by sua sponte raising an issue nowhere addressed in the adoption trial before the probate court and then remanding for the petitioner for a Mulligan opportunity to cure his deficient trial court presentation.

Proposition of Law III: *In re Adoption of B.B.* unlawfully shifts the burden of proof.

As noted above, no witness, party, counselor or judge discussed or testified upon the placement of the child in the case of *In Re Adoption of B.B*. Even so, the Sixth District Court of Appeals somehow imputed "unrefuted testimony" as to the placement of the child. *In Re Adoption of B.B*. at ¶20.

Existing Ohio law requires Petitioner Steven Bonds to bear the burden to prove placement by clear and convincing evidence. *In re Adoption of Holcomb*, 18 Ohio St.3d 361 (1985). Neither side offered testimony or evidence either way as to placement. If there is no testimony, it does not mean it is "unrefuted." Indeed, upon an absence of evidence, clear and convincing evidence cannot be established. Yet, the Sixth District's decision overturns this concept by placing the burden upon Father William Momenee to show that placement had not occurred. This improperly shifts the burden of proof contrary to law.

Just as erroneous, the Sixth District's decision *In Adoption of B.B*. fails to follow the presumption of the trial court's findings of fact. *In re J.T.*, 10th Dist. No. 11AP-1056, 2012-Ohio-2818, 2012 WL 2367541, ¶ 8 ("In reviewing a judgment granting permanent custody to FCCS, an appellate court 'must make every reasonable presumption in favor of the judgment and the trial court's findings of facts.").

This honorable Supreme Court should therefore reverse *In Adoption of B.B*. to correct this improper shifting of the burden of proof and other errors made by the Sixth District Court of Appeals.

PROPOSITION OF LAW IV: Corruption of *Kreyche* causes future conflict among courts.

If the Sixth District's interpretation of *Kreyche* would be allowed to stand, future lower court cases could accept and apply the principle that the mere statement of the petitioner in his application, without supportive testimony, alone constitutes irrefutable evidence that the child had been placed for adoption whenever the petitioner said it occurred. See *In Re Adoption of B.B*.

For example, the Eighth District opinion in *In re Margaret Rose Schwartz* reviews the definition of placement under ORC 3107 and restricts it to placement by an agency. 1985 WL 7416, *3 (8th Dist 1985)("Margaret was not placed in appellant's home by an agency, but came to reside in the Pergler home by virtue of a change in residence by her mother. We do not equate this change with a "placement" as set forth in ORC 3107.06").

In re Adoption of B.B. further conflicts with *In re Adoption of Jones*, whereby the Appellate Court refused to accept the date of marriage as a date to calculate placement of the child 70 Ohio App.3d 576, 579 (9th Dist. 1990) ("the court refused to employ the date of the petition … and insisted instead upon calculating the year from the date of the marriage and Annie's placement in Richard's home … We are unable to find any authority for this approach.").

Similarly, the decision of *In re Adoption of B.B.* to allow petitioner to determine the placement date could bring confusion to matters settled by the Court in the case of *In Re Adoption of J.A.S.*, 126 Ohio St.3d 145 (2010). *J.A.S.* involved interpretation of placement pursuant to R.C RC 5103.16(D) but also holds that merely living with a family member does not provide alone suffice for placement. *In Re Adoption of B.B.* holds otherwise.

Another lower court conflicts with *In Re Adoption of B.B.* because it found placement by a government agency to determine lack of support or contact. *In re Crandall*, 2007

WL 625009 (First Dist., 2007). Similarly, "placement" of a child occurred upon governmental action of appointing a grandmother as guardian of a child. *In re Adoption of G.W.* (Ohio App. 9 Dist., Lorain, 03-23-2005) No. 04CA008609, 2005-Ohio-1274, 2005 WL 663002 (unreported).

As noted in this honorable Court's ruling in *In re Adoption of Kreyche*, R.C. "3107.07 does not define the term 'placement." 15 Ohio St.3d 159, 161. In fact, the trial court in *Kreyche* struggled with the concept of a petitioner determining the date of placement.

> Based upon the above factors, the trial court stated, "it is the opinion of the Court that the placement of the child in the home of the petitioner originally was not a placement for adoption. Even if the Court considered that the subsequent marriage made it such a placement, certainly the conduct of the parties in mutually working out an agreement as to support and visitation would seem to negate any such theory of placement."

15 Ohio St.3d at 160.

To prevent such conflict or future misinterpretation of "placement" under adoption law, this honorable Court may perhaps, in reversal of *In Re Adoption of B.B.*, expand upon the ruling of *Kreyche* with clearer instruction to lower courts or perhaps recognize that the term "placement" is limited to acts done by an adoption agency (public or private) or governmental act.

If this honorable Court does choose to limit the statutory language of "placement" to agency or governmental acts, it would would prevent the quagmire of permitting a petitioner to arbitrarily determine the date of placement at his or her whim (such as when, in the instant case, Bonds *began* dating Knaggs, which the Sixth District considered unrefuted evidence of placement). It would further follow the wisdom expressed by the Courts in *In re Margaret Rose Schwartz* 1985 WL 7416, *3 (8th Dist 1985) and *In re Adoption of Jones*, 70 Ohio App.3d 576, 579 (9th Dist. 1990) where both Courts rejected arbitrary dates set forth by the petitioner as "placement."

Limiting "placement" would also fix a fundamental problem. Under the application of *In re Adoption of B.B.*, the parent challenging the adoption has no notice of "placement" and its retroactive occurrence. For example, as in *Kreyche*, the mother marrying another does not automatically raise the red flag to the birth father that all parental rights may cease to exist. Even worse, the Sixth District's opinion in *In re Adoption of B.B.* provides that a single mother's commencement of a new dating relationship constitutes notice that a father could permanently lose his daughter.

Moreover, "placement" is a legal term almost exclusively used by adoption agencies or governmental agencies such as children services. When a child moves, the parents may discuss where the child might reside or with whom the child would live, but no parent utilizes language such as "now that we are no longer together, the placement of the child should be with me" or "we just moved into this new school district and the placement of the child is here."

Furthermore, by limiting "placement" to an adoption or governmental agencies, this honorable Court might further follow the long-held intent of the legislature and the Courts to protect the sacred rights of parenting by setting a clear, bright line test before permanently terminating parental rights.

Whether this honorable Court chooses to expand the guidance of Kreyche or limit the interpretation of "placement" to that of agency or governmental acts, adoption law in Ohio desperately needs this honorable Court's assistance to prevent conflict among lower courts and provide certainty to both parents looking to adopt or those fighting to maintain relationships with their children.

CONCLUSION

As shown above, the Sixth District Court of Appeals decision of *In Re Adoption of B.B* has caused confusion and conflict in adoption law. First, it corrupted this Ohio Supreme Court precedent set forth in *In Re Adoption of Kreyche*. More specifically, it corrupts the term of "placement" under ORC 3107.07(A) and the standards set forth by this honorable Supreme Court.

Furthermore, the flawed decision of *In Re Adoption of B.B*. requires the trial court to fix Petitioner's utter failure to present evidence at trial (or even appeal) upon the "placement" issue; unlawfully shifts the burden of proof to the birth father, creates future conflict with inferior courts; and creates constitutional conflict.

Whether this honorable Court chooses in its wisdom to clarify its holding in *Kreyche* to provide further guidance to lower courts or prevent conflict altogether with limiting the term "placement" to agency or governmental actions, the misguided reasoning set forth in *In re Adoption of B.B.* should be corrected and reversed for the benefit of the children and parents of Ohio.

Respectfully submitted,

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Certificate of Service

I certify that a true and accurate copy of the foregoing Notice of Appeal was served via ordinary US Mail and by email on this 10th day of April, 2024 upon:

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Appendix

Appellant Merit Brief

Supreme Court Case No. 2023-1633

A. Trial Court Decision

B. Sixth District Court of Appeals Decision

C. Notice of Dismissal of Appellee's Adoption Petition

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO
PROBATE DIVISION

IN THE MATTER OF:	*	**CASE NO. 2022 ADP 000126**
	*	
THE ADOPTION OF	*	
BREYLYNN MACKENZEE BONDS	*	**JUDGMENT ENTRY**

On September 27, 2022, a Petition for Adoption of Minor was filed by Attorney Stephen M. Szuch on behalf of petitioner Steven Michael Bonds. The petition relates to a child currently known as Breylynn Mackenzee Momenee, date of birth June 2, 2012. The petition states that the birth mother of this child is Nicole Marie Bonds and that she has consented to this adoption. Her written consent was also filed with the court on September 27, 2022.

The petition goes on to allege that the birth father of this child is William Robert Momenee and that his consent is not required in this adoption proceeding because he failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition. Additionally, the petition alleges that Mr. Momenee's consent is not required because he failed without justifiable cause 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 the filing of the adoption petition.

On October 11, 2022, William Momenee filed a Formal Objection to Adoption and Attorney Mark Davis entered an appearance on his behalf on November 3, 2022. The court conducted a Zoom pre-trial on December 1, 2022 at which time the court directed that the matter be set for hearing. The court further indicated that all discovery was to be completed fourteen days prior to the hearing.

Prior to the commencement of the evidentiary portion of the hearing, Attorney Davis filed a Motion for Rule 11 and a Motion to Bifurcate Adoption Hearing. Additionally, Attorney Davis filed a Motion in Limine to Exclude Exhibits, Witnesses; and any False Allegation of Domestic Violence.

While the court has the authority to join a consent hearing with a best interest hearing, the parties agreed that those issues should be bifurcated in this matter and therefore the Motion to Bifurcate the hearing was granted by consent. Accordingly, the court agreed to proceed on the consent issue only. The court further granted the

Motion in Limine regarding allegations of domestic violence since documentation shows that the defendant was found not guilty of this charge by a jury. Additionally, the court took the Rule 11 Motion under advisement.

Case called for hearing to determine the necessity of the birth father's consent. Attorney Szuch present with petitioner Steven Michael Bonds. Attorney Mark Davis present with birth father William Robert Momenee.

The court heard the testimony of three witnesses. The first witness, Dana Patchen, is the custodian of records at Mr. Momenee's place of employment. She testified as to Respondent's Composite Exhibit G, which included Mr. Momenee's pay records of September 26, 2022. She testified that support for the subject child was deducted from his September 26, 2022 paycheck. She further explained that the business then sent a check to the Child Support Enforcement Agency on September 27, 2022 which included the support money deducted from Mr. Momenee's pay on the previous day. A copy of the check is also included in Respondent's Composite Exhibit G.

The court also heard the testimony of birth mother Nicole Bonds, who testified that she and birth father have been to court regarding custody, visitation and support issues. She identified Petitioner's Exhibit 1 which is a Judgment Entry from the Court of Common Pleas of Lucas County, Ohio, Juvenile Division, and reviewed the content of that order. She testified that Mr. Momenee has had no contact with the child since March of 2020. Ms. Bonds further identified and explained Petitioner's Exhibits 2, 3, 4, 5 and 6, which are records from the Juvenile Court and the Child Support Enforcement Agency.

Petitioner Steven Bonds testified that he is not aware of any contact the birth father had with the child during the one-year prior to the filing of the adoption petition and that no support was received during that period.

The court also heard the testimony of birth father William Momenee. Mr. Momenee testified that he had no contact with the child during the period of time in question due to the September 29, 2020 court order (Petitioner's Exhibit 1). That order suspended his parenting time as of September 17, 2020 and directed that he shall have no contact with the child until further court order. He further testified that he did provide support for the child during the one-year period, since the September 26, 2022 payment was deducted from his pay prior to the filing of the adoption petition. Mr. Momenee further testified that he has successfully completed participation in an Anger Management Program (Exhibit B), and a Court Diagnostic & Treatment Center Program (Exhibit C).

Petitioner argues that the birth father could have removed the no contact order by following the directives of the September 29, 2020 court order. Petitioner further argues that the child support payment was not received until after the petition was filed, irregardless of when it was deducted from the birth father's paycheck. No argument

was made relative to the sufficiency of the payment. Respondent birth father argues that the court order prevented him from contact with the child and that he provided support during the one-year period prior to the filing of the petition.

Ohio Revised Code Section 3107.07(A) states that a parent's consent is not required in an adoption proceeding if a court finds, by clear and convincing evidence, that the parent failed, without justifiable cause, to provide more than de minimis contact with the child or failed 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 adoption petition.

Any 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 Sunderhaus, 63 Ohio St.3d 127,132, 585 N.E.2d 418 (1992).

The issue of failure of a birth parent to provide more than de minimis contact when a no-contact order is in effect has been recently and thoroughly reviewed by the Ohio Supreme Court. In re Adoption of A.K., 168 Ohio St.3d 225, 2022-Ohio-350. A divided Supreme Court found that a parent's right to consent to the adoption of his or her child is not extinguished under R.C. 3107.07(A) for lack of sufficient contact with the child when the parent has acted in compliance with a no-contact order prohibiting communication or contact with his or her minor child. In fact, at page nine of this opinion, the court stated that "a probate court should not dispense with the requirement of a parent's consent when the parent abided by a court order prohibiting the parent from doing the very act that the statute requires in order for the parent to maintain his or her right to consent to the adoption of his or her minor child."

The Lucas County Juvenile Court's no-contact order was clearly in effect during the entire one-year period. Petitioner's argument that the birth parent could have and should have taken certain actions to request a removal of the court order is not persuasive. The fact is that the order was in effect and the birth father complied with the order. Accordingly, the petitioner has failed to provide clear and convincing evidence that the birth father's consent is not required due to his lack of contact with the minor.

Regarding the support issue, the evidence shows that the birth father provided support through his employment prior to the expiration of the one-year period. The fact that this support did not reach its destination prior to the statutory time period was beyond his control. Although a technical argument can be made that compliance with the statute requires the support to arrive at its destination prior to the expiration of the statutory time limit, this argument is not sufficient for a probate court to order a total termination of parental rights. As noted above, exceptions to the requirement of parental consent must be strictly construed in favor of the non-consenting parent. On this issue also, petitioner has failed to provide clear and convincing evidence that the birth father failed to timely meet his duty of support.

Accordingly, the court finds that the allegations in the petition that the consent of the birth parent is not required have not been proven by clear and convincing evidence. Since the petition lacks the required consents of both birth parents, it is hereby dismissed. Additionally, after due consideration, the Rule 11 motion for sanctions is hereby denied.

IT IS SO ORDERED.

3/6/23
DATE

JUDGE JACK R. PUFFENBERGER

Copies mailed this date to:

Attorney Stephen Szuch
Attorney Mark Davis

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

IN RE ADOPTION OF B.B.

COURT OF APPEALS NO. {48}L-23-1078

TRIAL COURT NO. 2022 ADP 000126

DECISION AND JUDGMENT

* * * * *

Stephen M. Szuch, for appellants

Mark Davis, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an expedited appeal from a judgment by the Lucas County Court of Common Pleas, Probate Division, which determined appellee's written consent was required to appellant-stepfather's petition for adoption of the minor child, B.B., and dismissed the petition. For the reasons set forth below, this court reverses and remands the judgment of the probate court.

1.

I. Background

{¶ 2} The following facts and timeline are relevant to this appeal. Appellant-mother, N.B., and appellee-father, W.M., who never married each other, are the natural parents of B.B., a minor. Appellant-petitioner, S.B., is married to N.B. and is the stepfather of B.B.

{¶ 3} Since June 18, 2018, the Lucas County Juvenile Court ordered appellee to pay child support for B.B., and since May 24, 2019, the juvenile court designated appellant-mother the residential parent and legal custodian of B.B. and awarded appellee parenting time.

{¶ 4} On July 18, 2020, appellant-petitioner married appellant-mother.

{¶ 5} Effective on September 17, 2020, the Lucas County Juvenile Court issued a no-contact order against appellee and in favor of B.B. The juvenile court's journalized order states, "Once father has engaged in [substance use and/or mental health] counseling services and completed no less than 50% of the batterer's intervention program, he may petition the court to reinstate his parenting time to begin SUPERVISED at the CRC." (Emphasis sic.)

{¶ 6} On September 26, 2022, appellee's payroll deducted the first child support payment for B.B. since May 18, 2021. Other child support payroll deductions during this period were for another minor child with another mother, neither of whom are parties to this appeal.

{¶ 7} On September 27, 2022, appellant-petitioner filed a petition to adopt B.B. Appellant-mother filed her written consent to the adoption that day. Using the probate court's form for a petition for adoption of a minor pursuant to R.C. 3107.05, appellant-petitioner checked-off the boxes that appellee's consent was not required for two reasons: (1) "The parent has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner"; and (2) "The parent has failed without justifiable cause 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 the filing of the adoption petition or the placement of the minor in the home of the petitioner." The petition also states B.B. "is living in the home of the petitioner, and was placed therein for adoption on the 18th day of July, 2020, by [appellant-mother] (married 7/18/20; cohabitated since Nov. 2016)."

{¶ 8} Appellee, acting pro se,[1] opposed the adoption petition on October 11, 2022.

{¶ 9} On February 6, 2023, appellee filed a motion for Civ.R. 11 sanctions against appellant-petitioner for filing the adoption petition in bad faith for two reasons. Appellee argued appellee had justifiable cause for not contacting B.B. the year preceding the adoption petition due to the juvenile court's no-contact order against appellee. Appellee

[1] Appellee was subsequently represented by counsel for the remainder of the proceedings.

further argued he made a child support payment for B.B. the day prior to the adoption petition.

{¶ 10} On February 7, 2023, the probate court held a contested-consent hearing on the preliminary issue of the necessity for appellee's written consent to the adoption petition. The probate court heard testimony from four witnesses and admitted 11 exhibits into evidence.

{¶ 11} On March 6, 2023, the probate court dismissed appellant-petitioner's adoption petition because it found appellee's written consent to the adoption of B.B. was necessary pursuant to R.C. 3107.07(A). The probate court stated two reasons for its determination that appellant-petitioner failed to provide clear and convincing evidence that appellee's consent was not required. First, citing *In re Adoption of A.K.*, 168 Ohio St.3d 225, 2022-Ohio-350, 198 N.E.3d 47, the probate court determined that, "Lucas County Juvenile Court's no-contact order was clearly in effect during the entire one-year period. Petitioner's argument that the birth parent could have and should have taken certain actions to request a removal of the court order is not persuasive. The fact is that the order was in effect and the birth father complied with the order." Second, citing *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127, 132, 585 N.E.2d 418 (1992), the probate court determined that, "the evidence shows that the birth father provided support through his employment prior to the expiration of the one-year period. The fact that this support did not reach its destination prior to the statutory time period was beyond his control.

Although a technical argument can be made that compliance with the statute requires the support to arrive at its destination prior to the expiration of the statutory time limit, this argument is not sufficient for a probate court to order a total termination of parental rights." The probate court also denied appellee's motion for Civ.R. 11 sanctions.

{¶ 12} Appellant-petitioner and appellant-mother timely appealed with two assignments of error:

> 1. The lower court erred in finding Father had justifiable cause for failing to maintain more than de minimis contact with B.B.
>
> 2. The lower court erred in finding that Father provided for the maintenance and support of the minor child during the one year immediately preceding the filing of the adoption proceeding.

II. Whether R.C. 3107.07(A) Requires Appellee's Written Consent

{¶ 13} Both assignments of error challenge the trial court's decision that appellee's written consent was required pursuant to R.C. 3107.07(A). We will address the assignments of error together.

{¶ 14} R.C. 3107.06(B) requires appellee's written consent to the adoption of B.B. unless consent is not required under R.C. 3107.07. *In re Adoption of H.P.*, Slip Opinion No. 2022-Ohio-4369, ¶ 20. Where a party is invoking the parental-consent requirement exception, that party carries the burden of establishing the exception by clear and convincing evidence. *Id.* "The statute is not framed in terms of avoidance, but is drafted

to require petitioner to establish each of his allegations[.]" *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985). Clear and convincing evidence is proof that produces in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Id.* at 368, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 15} In turn, R.C. 3107.07(A) states,

> 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, 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.

{¶ 16} We find the language of R.C. 3107.07(A) is clear and unambiguous and must be applied as written to give effect to its plain meaning. *In re Crandall*, 1st Dist. Hamilton No. C-060770, 2007-Ohio-855, ¶ 10; *In re Adoption of A.C.B.*, 159 Ohio St.3d 256, 2020-Ohio-629, 150 N.E.3d 82, ¶ 7; *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 19-20.

{¶ 17} There are separate, relevant one-year periods invoked by R.C. 3107.07(A): (1) preceding the filing of the adoption petition or (2) preceding the placement of the minor in the home of the petitioner. "Thus, a parent's consent is not required when the parent has failed without justifiable cause to provide more than de minimis contact *or* maintenance and support during the relevant one-year period." (Emphasis sic.) *In re Petition for Adoption of Z.H.*, 2022-Ohio-3926, 199 N.E.3d 1092, ¶ 22 (6th Dist.), citing *In re Adoption of A.K.*, 168 Ohio St.3d 225, 2022-Ohio-350, 198 N.E.3d 47, at ¶ 17.

{¶ 18} The disjunctive relationship of the contact and support provisions, coupled with the additional disjunctive relationship of the preceding one-year statutory periods measured from the adoption petition or the child's placement with the petitioner, mean that a parent's failure to meet any one of the four provisions is sufficient to nullify the need to obtain that parent's consent. *Adoption of A.K.* at ¶ 17 ("the General Assembly intended to make the provisions of equal importance because each provision is subject to the same evidentiary standard").

> We recognize that this reading of the statute can lead to a harsh result. Once a parent has failed to provide communication or support during the first year-long period, no amount of support or communication during the year preceding the petition can ameliorate the effect of the statute. By statute, parental consent to adoption would not be required. But the harsh

result of the statute is for the legislature to address; we apply the law as it is written.

In re Crandall at ¶ 10 (construing former R.C. 3107.07(A)).

{¶ 19} The issues regarding failure of de minimis contact, failure of support and maintenance, the petition date, the year preceding the petition, the date the child was placed with the petitioner, the year preceding the child's placement with the petitioner, and the existence of justifiable cause are questions of fact for the probate court. *See In re Adoption of Holcomb*, 18 Ohio St.3d at 368, 481 N.E.2d 613. We review for an abuse of discretion the probate court's determinations of these facts and decision regarding whether a financial contribution from a parent constitutes maintenance and support for purposes of R.C. 3107.07(A). *In re Adoption of M.B.* at ¶ 25. Abuse of discretion "'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 20} In this matter, the probate court determined as facts that appellee's payroll deduction for B.B.'s support was processed on September 26, 2022, and appellant-petitioner filed the adoption petition on September 27, 2022. The probate court then decided, "the evidence shows that the birth father provided support through his employment prior to the expiration of the one-year period. The fact that this support did

not reach its destination prior to the statutory time period was beyond his control." However, the probate court failed to analyze the separate one-year periods under R.C. 3107.07(A), which are recited in the probate court's own petition form, with respect to that September 26, 2022 child support payment. For example, there is unrefuted testimony in the record that B.B. was placed in appellant-petitioner's home as early as November 2016, or as late as July 18, 2020. Given the foregoing, we find it unlikely the probate court could determine that the September 26, 2022 support payment satisfied the one-year period preceding the child's placement with the petitioner under R.C. 3107.07(A).

{¶ 21} The same abuse of discretion standard of review applies to a probate court decision regarding the factual question of whether de minimis contact by a parent has occurred for purposes of R.C. 3107.07(A). *In re Adoption of A.W.*, 6th Dist. Huron No. H-22-007, 2022-Ohio-3360, ¶ 13. The probate court determined as facts that the juvenile court's no-contact order against appellee in favor of B.B. was in effect since September 17, 2020, and was justifiable cause under R.C. 3107.07(A). Again, the probate court failed to analyze the separate one-year periods under R.C. 3107.07(A), which are recited in the probate court's own petition form, when it stated, "Lucas County Juvenile Court's no-contact order was clearly in effect during the entire one-year period." Given the evidence in the record of the possible dates B.B. was placed in appellant-petitioner's home, we find it unlikely the probate court could determine that the juvenile

court's September 17, 2020 no-contact order was in effect during the preceding one-year period of B.B.'s placement date.

{¶ 22} Despite the foregoing failures, the probate court decided that by clear and convincing evidence, appellee's written consent to B.B.'s adoption by appellant-petitioner was necessary pursuant to R.C. 3107.07(A). "Once the clear and convincing standard has been met to the satisfaction of the probate court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof. The determination of the probate court should not be overturned unless it is unsupported by clear and convincing evidence." (Citations omitted.) *In re Adoption of Holcomb*, 18 Ohio St.3d at 368, 481 N.E.2d 613.

{¶ 23} We cannot say the evidence in the record supports the probate court's decision by clear and convincing evidence. We find the probate court abused its discretion when it failed to address the contact and support factors under R.C. 3107.07(A) measured from the placement of B.B. in the home of appellant-petitioner. "Since the statute contemplates the calculation of the requisite year from either of two dates, the trial court erred in considering only one." *In re Adoption of Jones*, 70 Ohio App.3d 576, 579, 591 N.E.2d 823 (9th Dist.1990).

{¶ 24} The probate court's decision is silent on the question of fact of B.B.'s date of placement in appellant-petitioner's home. "It is conceded that determination of 'placement' is crucial to an adoption proceeding pursuant to R.C. 3107.07(A)." *In the*

Matter Adoption of Kraft, 6th Dist. Lucas No. L-84-442, 1985 WL 7138, *3 (May 31, 1985). "'In making a determination as to whether a placement occurred, a court should consider, among other factors, whether the child was placed in the home by a third-party agency, the welfare department, or by court order; whether the child was placed in the home by a private action; whether the marrying parent had legal custody of the child; and the intent of the parties.'" *Id.*, quoting *In re Adoption of Kreyche*, 15 Ohio St.3d 159, 162, 472 N.E.2d 1106 (1984).

{¶ 25} Upon review, we find that appellant-petitioner's and appellant-mother's first and second assignments of error are well-taken, and this matter is remanded to the probate court to make additional findings of fact regarding all of the contact and support factors under R.C. 3107.07(A), which are recited in the probate court's own petition form, prior to determining whether appellee's written consent to B.B.'s adoption by appellant-petitioner is necessary.

III. Cross-Motions for Sanctions

{¶ 26} Appellee filed with the probate court a motion for Civ.R. 11 sanctions against appellant-petitioner alleging the petitioner intentionally misled the court with the reasons for not requiring his written consent to B.B's adoption. Following the contested-consent hearing, the probate court denied appellee's motion. Appellee does not appeal the probate court's decision.

{¶ 27} Rather, on September 19, 2023, appellee filed in this court an original motion for sanctions against appellant-petitioner alleging attempts "to taint the adoption proceedings with allegations of domestic violence that he knew to be false." Appellee does not identify the legal basis for his motion. Nevertheless, where appellee's motion relies exclusively on appellant-petitioner's conduct through references to the transcript of proceedings in the probate court, we lack authority to address the motion for sanctions for conduct solely occurring during probate court proceedings, and appellee's motion is denied. *In re Guardianship of Wernick*, 10th Dist. Franklin No. 06AP-263, 2006-Ohio-5950, ¶ 8, citing *State ex rel. Denlinger v. Douthwaite*, 12th Dist. Warren No. CA2003-04-054, 2004-Ohio-2069, ¶ 31.

{¶ 28} Further, even if appellee's motion for sanctions was based upon this appeal by appellant-petitioner, appellant-petitioner's assignments of error on appeal presented reasonable questions for review, and the appeal is not frivolous for purposes of App.R. 23. *Kelley v. Kelley*, 6th Dist. Wood No. WD-20-010, 2020-Ohio-6778, ¶ 41. Appellee's motion for sanctions is denied. App.R. 23.

{¶ 29} Appellant-petitioner opposed appellee's motion and filed a cross-motion for sanctions, pursuant to R.C. 2323.51, for appellee's motion for sanctions. Although appellee's motion for sanctions was unsuccessful, we decline to find it was "frivolous" under R.C. 2323.51. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-

4915, 45 N.E.3d 987, ¶ 15 (frivolous conduct "must involve egregious conduct"). Appellant-petitioner's cross-motion for sanctions is hereby denied.

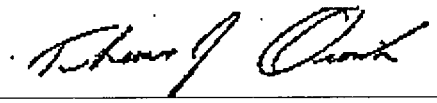
IV. Conclusion

{¶ 30} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Probate Division, is reversed and remanded for further proceedings consistent with this decision: to make additional findings of fact regarding all of the contact and support factors under R.C. 3107.07(A), which are recited in the probate court's own petition form, prior to determining whether appellee's written consent to B.B.'s adoption by appellant-petitioner is necessary. The cross-motions for sanctions by appellee and appellant-petition are denied. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed,
and remanded.

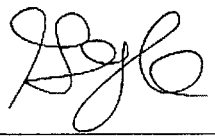
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J.



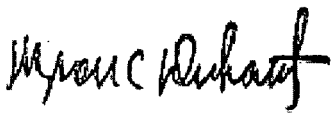
JUDGE

Gene A. Zmuda, J.



JUDGE

Myron C. Duhart, P.J.
CONCUR



JUDGE

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO
PROBATE DIVISION

IN MATTER OF THE ADOPTION OF BREYLYNN MACKENZEE BONDS	Case No.: 2022 ADP 000126
	Judge Puffenberger
	NOTICE OF DISMISSAL
	Stephen M. Szuch (0079923) Spengler Nathanson P.L.L. 900 Adams Street Toledo, OH 43604 Phone: (419) 241-2201 Fax: (419) 241-8599 Email: sszuch@snlaw.com
	Attorney for Petitioner Steven M. Bonds

Now comes Petitioner Steven M. Bonds, by and through counsel, and hereby gives notice of his intent to dismiss his Petition for Adoption in the above-captioned matter. Plaintiff requests the court dismiss the pending adoption.

WHEREFORE, Plaintiff respectfully request the Court dismiss his Petition for Adoption and for any other relief the Court deems just and equitable.

Respectfully submitted,

Stephen M. Szuch
Attorney for Petitioner Steven M. Bonds