

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ROSS COUNTY

In the Matter of the Adoption of                                 :       Case No. 22CA25  
A.R.Z.   :  
  :       DECISION AND  
  :       JUDGMENT ENTRY  
  :  
  :       **RELEASED 12/28/2022**

---

APPEARANCES:

Michele R. Rout, Chillicothe, Ohio, for appellant.<sup>1</sup>

---

Hess, J.

{¶1} Stepfather appeals the trial court’s decision denying his adoption petition. He contends that the trial court erred when it found that the consent of the father was necessary. Stepfather argues that he established by clear and convincing evidence that the father had no contact with the child for one year prior to the adoption petition and the failure was without justifiable cause. Stepfather also argues that the trial court erred in admitting a timeline exhibit into evidence, and in pursuing a line of irrelevant questioning with one of the witnesses.

{¶2} We find that the court’s finding that the stepfather failed to prove by clear and convincing evidence that the father failed without justifiable cause to provide more than de minimus contact with the child is not against the manifest weight of the evidence. Here, the father’s lack of contact had justifiable cause. We also reject stepfather’s contention that the trial court erred in admitting a timeline exhibit because stepfather

---

<sup>1</sup> Father did not file a brief.

invited any purported error by using the exhibit to cross examine and impeach witnesses. We further find that stepfather failed to object to the trial court's questions thereby waiving this issue on appeal.

{¶3} We reject stepfather's assignment of error and affirm the trial court's judgment.

#### I. FACTS AND PROCEDURAL HISTORY

{¶4} A.R.Z. was born on May 5, 2012. The biological parents never married each other, but at the time of the petition both had married other persons. Mother married stepfather in August 2021. Father married stepmother in May 2019. Stepfather filed an adoption petition on April 6, 2022 in which he alleged father's consent to the adoption was not required because: (1) father failed without justifiable cause to provide more than de minimis contact with the child for a period of at least one year prior to the petition and (2) father failed without justifiable cause to provide for the maintenance and support of the child for a period of one year prior to the filing of the petition.<sup>2</sup> The trial court held a hearing on the petition in June 2022 and rendered a decision denying the petition on July 11, 2022.

{¶5} The trial court found that the father did not consent to the adoption and that the stepfather failed to establish that the father's consent was not needed. The trial court found that the mother had custody of the child, the father did not have a parenting time order, the father was subject to a child support order, and the father had substantially complied with his child support order. Even though father did not have a parenting time order, between November 2019 and August 2020 the father had parenting time rights by

---

<sup>2</sup> At the hearing, stepfather voluntarily withdrew his allegation that father had failed to provide maintenance and support for the child because child support payment records presented at the hearing showed that the father had substantially complied with his monthly child support payments throughout the child's lifetime.

agreement with the mother and had some overnight and weekend parenting time. However, the mother unilaterally terminated that informal parenting time agreement in August 2020 and refused to allow any further visitation. The trial court found that the father did not have direct contact with the child between April 6, 2021 and April 6, 2022, the relevant one-year look back period. However, during that time the father had attempted to communicate with the child and schedule parenting time by contacting the mother twice through a social media account and once by text. Unknown to the father, the mother had terminated her social media account. Mother did not respond to any of father's communications.

{¶6} The trial court acknowledged that the stepfather had developed a close, loving relationship with the child. However, it found that the father's lack of contact with the child had a justifiable cause because the mother had refused to allow the child to visit with the father and she did not respond to or acknowledge any of father's communications with her.

## II. ASSIGNMENT OF ERROR

{¶7} Stepfather assigns the following error:

The trial court erred when it found that the consent of the father was necessary and its finding that the petitioner had failed by clear and convincing evidence to establish [sic] that the father's lack of communication was not justified.

## III. LEGAL ANALYSIS

### A. Consent for Adoption

{¶8} Adoption is governed by R.C. Chapter 3107. R.C. 3107.07(A) provides that consent to adoption is not required where:

(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.

R.C. 3107.07(A) involves “a two-step analysis.” *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23. First, a court must consider whether a parent failed to have more than de minimis contact with the child or failed to support the child for a minimum of one year preceding the filing of the adoption petition. *Id.* Second, if the parent failed in either respect, the court determines whether justifiable cause exists. *Id.* A parent ordinarily “has justifiable cause for failing to communicate when the custodial parent significantly interferes with or significantly discourages communication.” *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787, 110 N.E.3d 1236, ¶ 39.

{¶9} The party petitioning for adoption has the burden of proving by clear and convincing evidence that the parent failed without justifiable cause to have more than de minimis contact with the child. *In re Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985). “No burden is to be placed upon the non-consenting parent to prove that his failure \* \* \* was justifiable.” *Id.*

{¶10} The probate court possesses discretion in determining whether a parent failed to have contact with the child during the one-year period. *In re Adoption of M.B.* at ¶ 25; accord *In the Matter of K.M.F. and K.A.F.*, 4th Dist. Highland Nos. 19CA1, 19CA2, 2019-Ohio-2451, ¶ 13 (“Generally, a probate court possesses discretion to determine whether a parent failed to have contact with or support the child during the one-year period.” citing *In re Adoption of M.B.* at ¶ 25). Therefore, an appellate court will not disturb

the probate court's finding concerning a parent's failure to have contact with the child in the absence of an abuse of discretion. *Id.* Abuse of discretion means an “ ‘unreasonable, arbitrary, or unconscionable use of discretion, or \* \* \* a view or action that no conscientious judge could honestly have taken.’ ” *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. “Abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. Accordingly, the probate court's decision may be reversed only if an appellant can demonstrate that the decision was unreasonable, arbitrary, or unconscionable.

{¶11} However, the question of justifiable cause is a factual matter for the probate court that an appellate court will not disturb unless the probate court's finding “ ‘is against the manifest weight of the evidence.’ ” *M.B.* at ¶ 24, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986), paragraph two of the syllabus. “When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.” *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 68 (4th Dist.), citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25. Generally, an appellate court will presume that a trial court's findings are accurate and will reverse a judgment as being against the manifest weight of the evidence only in the

exceptional case in which the evidence weighs heavily against the judgment. *In re K.N.W.*, 4th Dist. Athens Nos. 15CA36, 15CA37, 2016-Ohio-5863, ¶ 27.

{¶12} When reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the factfinder's credibility determinations. *Eastley* at ¶ 21. Thus, “ ‘ “every reasonable intendment must be made in favor of the judgment and the finding of facts.” ’ ” *Id.*, quoting *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, 1276, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191-192 (1978). Furthermore, “ ‘ “[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.” ’ ” *Id.*, quoting *Seasons Coal Co.*, 10 Ohio St.3d at 80, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191-192 (1978); *Matter of Adoption of T.C.W.*, 4th Dist. Meigs No. 19CA6, 2020-Ohio-1484, ¶ 40-44.

{¶13} Here the trial court determined that the father's consent was necessary because he had justifiable cause for his failure to provide more than de minimis contact with the child for a period of at least one year immediately preceding the filing of the adoption petition. The adoption petition was filed on April 6, 2022, therefore the relevant one-year look back period began April 6, 2021. The trial court found that the father made three attempts to contact his child and his failure to reach the child was justified because the mother unilaterally terminated father's parenting time, closed her social media account without informing the father, and did not respond to his text message.

### 1. Evidence Presented at the Hearing

**{¶14}** At the hearing, mother testified that she does not talk to father and instead communicates with father through father's wife, stepmother. Stepmother likewise testified that father and mother agreed to have stepmother serve as the "mediator" for communications between them. Father testified that he had filed a pro se complaint and motion for visitation in 2018, but did not follow through with it because after he filed it mother agreed to voluntarily provide visitation. Mother, father, and stepmother all testified that mother began providing voluntary visitation to father from November 2019 through August 2020, which included overnight and weekend visitation. However, mother testified that in August 2020, she unilaterally terminated visitation and refused to reinstate it even though father and stepmother had been insistent upon it. Mother testified that she stopped the visitation due to conflict with another child in the home, but stepmother testified that mother never gave them a reason for her decision.

**{¶15}** Father testified that during the relevant lookback period between April 6, 2021 and April 6, 2022, father attempted to communicate with his child a number of times but each time mother refused to acknowledge or respond to his communications. On May 5, 2021, father sent Happy Birthday wishes to the child on mother's Facebook account. Mother did not acknowledge or respond. On July 14, 2021, father again sent a message to mother's Facebook account telling the child he and stepmother loved and missed him and expressed a desire to see the child. Mother did not respond to the Facebook messages father sent in May and July 2021 even though she testified that she did not close her Facebook account until September 2021, "In September of 2021, I cancelled my Facebook account." That same day in July 2021, father also sent mother a message, "Hey

how is [child] doing? Why won't you answer either of us?" and a third message that he was saving money to retain a lawyer, was going in for a consultation soon, and asked her to please tell the child hello and that he loved him. However, the third text message about his plans to retain a lawyer included a notation at the bottom of it that said, "Couldn't send." Mother did not acknowledge or respond to any of these messages. Father and stepmother testified that on September 21, 2021, they texted mother the following message:

[Mother], this is [stepmother]. I'm sure you know your husband gave me your number yesterday when he delivered a package to my work. My old phone with your number in it stopped working awhile ago so we didn't have your number. We tried reaching out to you through Facebook several times but [stepfather] explained that it was hacked and you no longer use the account.

Anyway, we miss [child] like crazy. He was here frequently and we never wanted to stop seeing him. We would like to see him again soon. The baby has hand foot and mouth disease so we would need to wait a few days because it's highly contagious but we really want to see him soon.

Mother did not acknowledge or respond to this message. On November 18, 2021, father again texted, "Hey this is [father]. Just checking on [child]. Tell him what we love him and miss him. Thanks." This message has an indication that it was "Read 11/18/21" but again, mother failed to respond or acknowledge it. On February 11, 2021, father texted and asked about how the child was doing, but mother did not respond or acknowledge it. Mother testified that she did not receive the February 11, 2021 message, but she does not know why it did not come through to her. Mother responded to only one of the father's text messages, which he sent after the adoption petition was filed in which he texted, "We love u and miss u [child]." Mother did not acknowledge the message, nor did she indicate she would pass it along to the child. Instead, mother responded, "Don't forget deposition is tomorrow 1pm 52 east Main Street. [sic]"



**{¶16}** Mother also testified that in July 2021, she and stepfather moved residences with the child and did not tell the father that she had moved, nor did she give father her new address. Mother also testified that she would not have voluntarily allowed the child and father to visit during the one-year period before the adoption petition without a court order, “I would rather him take me to court at that point.”

**{¶17}** We find that the court’s finding that the stepfather failed to prove by clear and convincing evidence that the father failed without justifiable cause to provide more than de minimus contact with the child is not against the manifest weight of the evidence. Here, the father’s lack of contact had justifiable cause. The record demonstrates mother’s pattern of impeding the father’s attempts to develop and maintain a relationship with the child. Mother unilaterally cut off visitation between child and father and refused to resume it, despite father and stepmother’s insistence. The mother also failed to respond to any of father’s attempts to communicate with the child or to reestablish visitation, she shutdown her Facebook communication without informing the father, and she moved residences with the child without informing the father of the move or of her new address.<sup>3</sup> We defer to the trial court in making credibility determinations and in evaluating how much weight to give each witness’s testimony. We believe that the foregoing evidence constitutes some competent and credible evidence to support the court’s finding that father’s failure to contact the child was justifiable. Consequently we will not disturb the trial court’s finding.

## 2. Admissibility of Timeline of Visitations Exhibit

**{¶18}** Stepfather also argues that in reaching its decision, the trial court relied upon an inadmissible timeline of visitation dates marked as Exhibit D and prepared by the

---

<sup>3</sup> Mother suggested father was not impeded by her failure to provide him with her and the child’s new address because father could review records at the county courthouse to locate her new address.

father reflecting the number and types of visitation (day, weekend, or overnight) father had with child during the time period when mother had allowed visitation. Stepfather objected to its admissibility on the grounds that, in his discovery request to father, he had asked for a copy of calendars showing visitation records. Instead in his discovery response, the father had provided a timeline of the visits, not a copy of a calendar. As a result, counsel challenged the accuracy of Exhibit D and argued it was inadmissible because it lacked accuracy.

{¶19} “ ‘Decisions involving the admissibility of evidence are reviewed under an abuse-of-discretion standard of review.’ ” *DeepRock Disposal Sols., LLC v. Forte Productions, LLC*, 4th Dist. Washington No. 20CA15, 2021-Ohio-1436, ¶ 40, quoting *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 22.

{¶20} For the first time on appeal, stepfather contends that the timeline is inadmissible under Evid.R. 805 (hearsay within hearsay) and Evid.R. 901 (requirement of authentication or identification). Because these arguments were not raised at the trial court level, they cannot be raised for the first time on appeal. *Simon v. Aulino*, 2020-Ohio-6962, 165 N.E.3d 706, ¶ 72 (4th Dist.)

{¶21} Moreover, stepfather presented the timeline exhibit to the father during the stepfather’s case-in-chief, confirmed that the timeline had been prepared by father in response to discovery, and proceeded to question the father about the dates and details of the timeline. Then, stepfather relied heavily on the timeline in his attempts to impeach the father’s credibility. Stepfather prepared his own exhibit, marked as Exhibit I, which was a compilation of 14 photographs of the child. When the mother testified, she was asked to

compare certain dates on the timeline with the photographs to prove that the child was with her on some of the dates. Later during cross examination, mother conceded that it was possible that in each of the photographs the child could have been with the mother and then, later that same day, with the father.

**{¶22}** The compilation of photographs marked as Exhibit I, which was admitted into evidence, has no relevance without reference to Exhibit D. Stepfather invited any purported error by using Exhibit D during his examination of the father and the mother for impeachment purposes. And, stepfather failed to make any argument that he was prejudiced by the admission of Exhibit D. We find no prejudice where both the mother and stepmother testified that the child had extensive visitation with the father during the periods reflected on the timeline.

**{¶23}** We reject stepfather's contention that the trial court erred by admitting the timeline marked as Exhibit D.

### 3. Questions by Trial Court

**{¶24}** Stepfather contends that the trial judge asked the mother questions about how many marriages she had and how many different fathers existed for her children. Stepfather argues that this line of questioning "holds no relevance and obviously played a role [sic] in the decision of the Court." Though he argues that the questions "obviously" played a role in the court's decision, he fails to explain or connect the questions with any aspect of the court's decision.<sup>4</sup>

**{¶25}** Evid.R. 614(B) permits the court to "interrogate witnesses, in an impartial manner, whether called by itself or by a party."

---

<sup>4</sup> It would appear from the context that the trial court asked these questions to give it a general background understanding of the composition and makeup of the families involved in the child's life.

Evid.R. 614(A) and (B) provide that the court may call witnesses or interrogate witnesses, in an impartial manner, whether called by itself or by a party. During a trial, the judge may, in the interest of justice, act impartially in developing facts germane to an issue of fact to be determined by the jury. The court, in questioning a witness pursuant to Evid.R. 614(B), may not indicate by its intensity, tenor, range and persistence the court's opinion of a witness's credibility or the sufficiency of the testimony.

Since a trial court's powers pursuant to Evid.R. 611 and 614 are within its discretion, a court reviewing a trial court's interrogation of witnesses and comments must determine whether the trial court abused that discretion. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.

\* \* \*

Evid.R. 614(C) provides as follows:

"Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present."

The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time, assuring that objections are made in ample time to afford the opportunity to take possible corrective measures. The failure of a party to object in accordance with Evid.R. 614(C) waives consideration of the claimed error on appeal because the failure to object deprives the trial court of any opportunity to correct the alleged error. (Citations omitted.)

*State v. Davis*, 79 Ohio App.3d 450, 454-455, 607 N.E.2d 543, 546-547 (4th Dist.1992)

**{¶26}** Trial courts routinely exercise their right to ask questions as provided in Evid.R. 614, particularly when the court sits as the trier of fact. Stepfather failed to object to the questions of the trial court and has waived this issue on appeal. *Id.*

**{¶27}** We find that the court's finding that the father had justifiable cause for failing to have contact with the child is not against the manifest weight of the evidence and was not based on inadmissible evidence or improper questioning of the witnesses. We overrule

the stepfather's assignment of error and affirm the trial court's finding that the father's consent to the adoption was necessary.

#### IV. CONCLUSION

{¶28} We overrule appellant's assignment of error and affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**

#### **JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas, Probate Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
Michael D. Hess, Judge

#### **NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**