

ORIGINAL

IN THE SUPREME COURT OF OHIO

**In the Matter of
The Adoption of M.B.**

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Case No. 11-0831

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

MERIT BRIEF OF APPELLANT T.R.

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STATEMENT OF FACTS

This case arises as a result of T.R.'s filing of an Adoption Petition seeking to adopt his step-daughter, M.B., a minor child, in the Summit County Court of Common Pleas, Probate Division. S.B., the biological father of M.B. opposed the adoption, claiming he had made gifts of a \$125.00 Aeropostale clothing store gift card and sent a birthday card which included \$60.00 in cash claiming in the Trial Court such constituted maintenance and support and that thereby his consent was required for the adoption (Supp. 13, 22, 23, 83; Tr. 13, 22, 23, 83).

The Summit County Probate Court, Judge Spicer, after hearing held, a review of the case file, a review of the transcript of proceedings before his Magistrate, a review of the applicable law, and a review of the arguments of counsel, upheld the Magistrate's Decision and ruled that the consent of S.B. to the adoption was not required for the Court to proceed with the adoption in an eight page Order (App. 52-59) on March 12, 2010.

On March 16, 2011, the Ninth Judicial District Appellate Court issued a Decision and Journal Entry reversing the ruling of the lower court (App. 37-47), determining that the consent of S.B. (father) to the adoption of M.B. was necessary, further holding their review regarding the interpretation and application of R.C. 3107.07 is *de novo* (App. 39, 40).

S.B. (Appellee below) timely filed on March 24, 2011, a Motion pursuant to App. R. 25 to certify a conflict between the decision of the Ninth Judicial District Court of Appeals and the Tenth Judicial District Court of Appeals Decision in *In re Adoption of Strawser* (1987) 36 Ohio App.3d 232, the Sixth Judicial District Court of Appeals decision in *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992) 6th Dist. No. L-91-199, and the Eleventh Judicial Court of Appeals in *In re Adoption of Wagner* (1997), 117 Ohio App. 3d 448 regarding the support and maintenance ruling and secondly sought a ruling that a conflict be certified between the Ninth

Judicial District Court of Appeals and the Fifth Judicial District Court of Appeals decision in *In the matter of the Adoption of Kat P.*, 5th Dist. Nos. 09 CA 10, 09 CA 11, 2009-Ohio-3852 regarding whether the review standard should be *de novo* or whether the decision was contrary to the manifest weight of the evidence (App. 68-74). In a Journal Entry dated April 18, 2011, the Ninth Judicial District ruled a conflict of law exists (App. 48-51) and certified a conflict on both issues as follows:

When a biological parent fails to provide any court ordered child support for one year, do small monetary gifts, paid directly to the child constitute the provision of “maintenance and support of the minor as required by law or judicial decree” for purposes of R.C. 3107.07(A)?

and on the following issue:

When reviewing a probate court’s decision regarding whether or not a biological parent’s financial contribution constitutes “maintenance and support of the minor as required by law or judicial decree” for purposes of R.C. 3107.07(A), is the standard of review *de novo* or whether the decision is against the manifest weight of the evidence?

On May 16, 2011, T.R. filed Notice of Certified Conflict with the Ohio Supreme Court pursuant to S.Ct. Prac. R. 41 (App. 1-36). On June 22, 2011, the Supreme Court of Ohio, per Chief Justice O’Connor, determined that a conflict exists and ordered the transmittal of the record and briefs on the two certified issues indicated above by the Appellate Court. (App. 75).

ARGUMENT

Proposition of Law No. 1

When a biological parent fails to provide any court ordered child support for one year, small monetary gifts paid directly to the child do not constitute the provision of

maintenance and support of the minor as required by law or judicial decree for purposes of R.C. 3107.07(A).

The starting point for our analysis is Ohio Revised Code Section 3107.07(A) which reads as follows:

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 minimus 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.

Of some importance, we believe, is that once this threshold has been met, the Probate Court must next determine what is in the best interest of the child before granting the adoption. R.C. 3107.161. (App. 80). This is so because in the final analysis, such is the goal of adoptions – to serve a child’s best interest, providing a permanent, stable home. *In re Adoption of Ridenour* (1991), 61 Ohio St. 3d 319. Thus, in Ohio, there is a two step process which the child’s natural parents are free to participate in (one or both hearings) should they so choose. More on the importance of the process later.

Ohio’s statutory scheme is set against the background of the constitutionally protected interest of the natural parents which flows through the Fifth and the Fourteenth Amendments to the United States Constitution (App. 76, 77).

A brief look at the constitutional backdrop is also necessary to properly analyze this matter. Appellant would invite the Court’s attention to *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648 which contains a succinct discussion of the various constitutional interests involved in adoptions, discussing both the parental rights and the state’s legitimate interest in

protecting the welfare of children. The case cites *Lehr v. Robertson* (1983), 463 U.S. 248 as support for the “state’s interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously.” *Lehr, supra*, at 265. After giving due deference to the parental rights, *Lehr* hones in to the heart of the matter – due process. The state’s ability to end parental rights by adoption must be “accomplished by procedures meeting the requisites of the Due Process Clause.” *Lehr, supra*, at 261. This boils down to fundamental fairness, the right to be heard.

The frequently cited case of *Santosky v. Kramer* (1981), 102 S. Ct. 1388, is oft referred to as standing for the proposition that natural parental rights are of a constitutional magnitude (which they are). A careful reading of the case, however, reveals it stands for the proposition that before parental rights may be permanently severed by the state, clear and convincing evidence is required, overruling a New York law requiring only a preponderance of the evidence standard. *Santosky, supra*, is frequently cited in the case law as though it has elevated parental rights to some sacrosanct height when the opposite is the case – it calls for procedural due process in those instances when parents who have become such by reason of natural births intervene in proceedings to terminate their rights as a result of behavior contrary to their responsibilities and duties as parents and contrary to the best interest of their children. *Santosky, Id.* at 766, notes the valid interest of the state in adoption proceedings – (1) a *parens patriae* interest in promoting and preserving the child’s welfare, and (2) the fiscal and administrative goals of lessening the cost and burden of adoptions. The Court goes on to state that finding an alternate home is in the state’s interest when parents are unfit and either cannot or will not provide a normal family home. Of note, vociferous dissents were filed by four Justices who strongly opined that a preponderance of the evidence standard should suffice, seeing the

majority's ruling as an infringement on the rights of the states. Justice Rehnquist in dissent, *Id.* at 1405, opines his thoughts that the majority "... abandoned evaluation of the overall effect..." of New York's entire adoption scheme.

We invite this review to the Court's attention so that O.R.C. 3107.07(A) is not seen in a vacuum and is analyzed in the proper constitutional framework regarding parental rights and the true meaning of the *Santosky, supra*, decision. Justice Rehnquist goes on to point out that in New York, there was a separate dispositional hearing to determine the best interest of the child. He then points out the appellate rights which existed in New York at the time, so a parent might further contest the adoption. So it is in Ohio presently – a logical scheme allowing intervention at several points. One must also be cognizant that meeting one's legal obligations to pay child support and staying in contact with one's child or children precludes operation of the statute.

The above is not to say a natural parent's rights are unprotected constitutionally. They are protected and have been for quite some time, almost 100 years, by the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Meyer v. Nebraska* (1923), 262 U.S. 390 and *Pierce v. Society of Sisters* (1925), 268 U.S. 510. It is to point out that such rights are not absolute and that valid state interests can outweigh such.

Let us turn to the analysis of the Ninth District Court of Appeals decision, below, (App. 37-47) and the decision of the Sixth District Court of Appeals case *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-99-199 (App. 21-24).

The Ninth District ruling was a 2-1 decision (Judge Moore dissenting). The Court centered its decision on a determination that the word "maintenance" as embodied in O.R.C. 3107.07 must be construed as "[f]inancial support given by one person to another," *citing* Black's Law Dictionary (8 Ed. 2004, 1973) and the word "support" as "[s]ustenance or

maintenance, esp., articles such as food and clothing that allow one to live in the degree and comfort to which one is accustomed,” *also citing* Black’s Law Dictionary (8 Ed. 2004, 1480). (App. 41, Decision and Journal Entry of the Ninth District Court of Appeals).

The Court cites 47 O. Jur. 3d Family Law, Section 895, which refers to relatively small support provisions as being sufficient to override the no consent required statute. The cited section indicates a court should consider contributions of clothes, shoes, and diapers. The article then says O.R.C. 3107.07 *may* (emphasis added) mean any aid to a child providing for a recreational need or other need. The section cited is concluded with the following quote:

... [t]he relevant inquiry is not whether the parent provided support, but whether the parent’s failure to support is of such magnitude as to be the equivalent of abandonment.

47 O. Jur. 3d Family Law, Section 895. No Ohio cases are cited by Ohio Jurisprudence in support of its proposition. After the Appellate Court then cites several appellate decisions from various districts which held small monetary gifts are not support, the court points to districts holding that efforts greater in magnitude to support one’s child than herein were sufficient to void the statute and require parental consent.

The Appellate Court below then claimed the Aeropostale card constituted maintenance and support because it “enabled the child to purchase clothing, an undeniable necessary” (App. 44) and that “it is difficult to see how the \$60.00 in cash for the child’s birthday did not provide the means by which the child might attain additional comforts.” (App. 44). The Court saw the above as clear and convincing evidence of maintenance and support. The Court also saw the timing of the contributions to be thoughtful and evidence of intent not to abandon the child. The foregoing, sadly, is virtually the entire analysis on that key issue by the Court.

There is no analysis regarding the degree and/or comfort M.B. is accustomed to. Indeed, a review of the transcript of proceedings before the Probate Magistrate is somewhat barren in this regard, making such an analysis based upon assumptions that must have resulted from the financial data presented (Supp. 1-131), all of which are contra the Court's ruling.

Judge Moore, in her dissent, visited the American Heritage Dictionary to find the meaning of maintenance and support and found the ordinary meaning to be "the action of maintaining, the state of being maintained, a means of maintaining or supporting." (American Heritage Dictionary, Second College Ed. 1995, 757). Judge Moore then simply and logically concludes a Christmas gift certificate and a small birthday gift of cash are not support, but tokens of affection – something one expects from even friends or relatives who have no legal duty of support.

The Sixth District's decision involved two separate gifts of \$10.00 and \$4.00. *In the Matter of the Adoption of McCarthy, supra*. That Court portrayed such gestures as gifts, not child support payments. This, we suggest, assists in our hypothecation of the legislative intent. The Court cites *In re Adoption of Bovett* (1987), 33 Ohio St. 3d 102 and found the common usage of the word "support" indicates payments are to be made to the custodial parent or the Bureau of Support. The Court stated "payments made directly to the child constitute a gift as there is no indication that the payments will ever reach the custodian of the child to be used for the child's needs." *Id.*, at 4. With all due respect to Black's Law Dictionary, we believe these definitions more germane to the issues herein.

It strikes counsel that should this Court conclude that small monetary gifts paid directly to a child are not maintenance and support as envisioned by R.C. 3107.07(A), that the provision of such gifts by a parent can be argued as a basis to allow a natural parent to challenge the

adoption in the best interest phase of the proceeding. That parent is further allowed to argue his failure was justifiable given his circumstances at the preceding consent stage that they did the best they could by providing the gifts. Below, the Appellate Court wondered why that issue was not raised on appeal.

The record before the Magistrate in the Summit County Probate Court would support that Court's finding even using what we see as the Ninth Judicial District's faulty analysis. While clothing is necessary, it is clear that M.A.B., the minor herein, suffered no want in that regard. Her standard of living included participating in several sports and traveling for same. (Supp. 10; Tr. 10). S.B.'s child support was to be \$1,000.00 per month (Supp. 20; Tr. 20), and he was \$18,000.00 behind on same. (Supp. 21; Tr. 21). S.B.'s tax return showed adjusted gross income of \$165,631.00 in 2006, and \$108,196.00 in 2005. (Supp. 32; Tr. 32). S.B. characterized the items paid as gifts, not support, (Supp. 89; Tr. 89) indicating his ordinary definition of the term "support" excluded these gifts. It is clear from the financial exhibits filed in the Probate Court that the home of the child to be adopted provided her with a wonderful lifestyle in a nice suburb of Akron. The annual income of her mother and stepfather exceeding \$200,000. (Supp. 135, 136).

Back in 1987, in the case of *In re Adoption of Bovett* (1987), 33 Ohio St. 3d 102, Justice Douglas, in a concurring opinion, sets out a reasonable answer to this Court's certified first question which we would urge the Court to adopt in its determination of whether the two small gifts herein constitute maintenance and support. He states that the making of one payment of support or the sending of a Christmas card should not frustrate the adoption statute. He opined that the legislature could not have meant that result and points to the phrase "as required by law or judicial decree," O.R.C. 3107.07(A), as defining the terms "maintenance" and "support."

While a cursory glance at the case law proves, as we all know, that one person's guess as to legislative intent is oftentimes as good as another's (i.e., perhaps only fortune tellers can read peoples' minds), we would argue Justice Douglas' analysis is sensible and reasonable. He, in our opinion, rightfully wishes to leave matters of adoption in the hands of the Probate Judge, the trier of fact. He ends by stating:

In short, I think we need to set forth that the Probate Court is not bound to negate the effect of the statute simply because a natural parent has made a payment or two during the year. *Id.*, at 107.

He then accurately predicts that until the Ohio Supreme Court rules, inconsistent judgments will continue to occur.

Judge Spicer, the Probate Judge herein, issued a detailed opinion, carefully analyzing the evidence and applicable law. (App. 52-59). His careful reasoning was ignored below.

In a long line of cases, the Tenth Judicial District Court of Appeals has consistently interpreted the statute in question consistent with Judge Spicer's holding.

In the case of *In re Adoption of Knight* (1994), 97 Ohio App. 3d 670, the Tenth Judicial District Court of Appeals held that a single \$20 child support payment, the payment of \$300 for a child psychologist, and the purchase of health insurance for the child did not constitute maintenance and support.

Purchasing \$133 worth of toys and clothing at Christmas was not considered support because the child had sufficient amounts of same already. *In re Adoption of Strawser* (1987), 36 Ohio App. 3d 232. The facts in *Strawser, supra*, are, in actuality, very similar to the instant case, and we invite the Court's attention thereto.

An interesting analysis is made in *In the Matter of the Adoption of B.M.S.* (2007), 2007 Ohio 5966, Tenth Dt., Franklin Cty. The Court ruled that the father's consent to adoption was unnecessary as he failed to provide maintenance and support for one year preceding the filing of the petition for adoption, despite furnishing food, entertainment, and gifts to the children. Pointing to *In re Adoption of Jorgensen* (1986), 33 Ohio App. 3d 207, the Court points to the father's ability to raise arguments at the best interest phase of the adoption. The Court also notes the absence of definitions for the terms "maintenance" and "support," citing Black's Law Dictionary as did the Ninth Judicial District in its opinion below and also adding it has been defined in *Kimble v. Kimble* (2002), 97 Ohio St. 3d 424 as a duty to provide to the economic maintenance and education of a child until it reaches the age of majority. Citing *Kimble, supra*, the Court notes the terms refer to conveniences, shelter, medical care, and reasonable personal care. In other words, all of a child's economic necessities.

A glance at R.C. 1.49 is necessary, particularly subsections (A) and (E) when undergoing statutory meaning exercises. The consequences of a particular construction and the object sought to be attained we suggest support the Probate Court's Order in this case and those subsections were not clearly addressed by the appellate majority.

We would, therefore, suggest that a few small monetary gifts are not sufficient to give a right to object to an adoption. They are a pittance in the overall needs of a child. While not a total abandonment, they are within a hair's breath of such. They are the equivalent of throwing an oar to a drowning person and leaving the life preserver attached to a rope hanging on the wall of the boat. A prior court having already deemed that neither custody nor shared parenting should be enjoyed by the parent seeking to prevent the adoption, could the legislature have intended that small token gifts can thwart the adoption statute? There is a valid public policy

purpose supporting this interpretation of the statute. It would promote adherence to the responsibilities of parents to pay child support. To do otherwise allows the sending of a card or two with a buck or two and the thumbing of one's nose at the support laws to proceed apace. We urge the Court to not read this statute in a vacuum, but in conjunction with the entire adoption and child support schemes established by the legislature and the case law, giving the words "maintenance" and "support" their ordinary meaning in conjunction therewith.

Proposition of Law No. 2

When reviewing a Probate Court's decision regarding whether or not a biological parent's financial contribution constitutes maintenance and support of the minor as required by law or judicial decree for purposes of R.C. 3107.07(A), the standard of review is whether the decision is contrary to the manifest weight of the evidence.

The Ninth Judicial District Court of Appeals certified a second conflict with its decision on the issue of the proper standard of review of a probate court's ruling on whether financial contributions are maintenance and support with the decision *In the Matter of the Adoption of Kat P.*, 5th Dist. Nos. 09 CA 10, 09 CA 11, 2009-Ohio-3852.

The Ninth Appellate District, below, applied a *de novo* standard of review because they had to determine the meaning of "maintenance" and "support" (App. 39, 40), terms not defined in O.R.C. 3107.07. The Court goes through a tortuous journey in its attempts to define the terms, but, in reality, they never actually do. Rather, the Court speaks of the gifts provided herein as constituting maintenance and support, as evidencing "his intent not to abandon his child," as a "means by which the child might attain additional comforts." (App 44). These assertions, we respectfully point out, fly directly in the face of the record before the Trial Court attached in its entirety (Supp. 1-131), and the Hearing conducted before its Magistrate. The

rambling testimony of S.B. as seen therein is directly contra a desire on his part to provide undeniable necessities. He believed the child well off, financially; the \$60 gift provided no "additional comforts" - it would be but a tank or two of gas to motor M.B. to one of her many sporting events; Aeropostale sells more than clothing, and the record is silent as to what the card was actually used for, perhaps not for the "undeniable necessary" of clothing the Appellate Court surmised was bought with the card. (App. 44). Without drawing too tight a rope to walk regarding the definitions of "abandonment" and "total abandonment," one is left scratching an itch upon one's pate when considering that despite paying no child support (or perhaps using this \$185.00 to do such which S.B. chose not to) that these two measly tokens can be seen as intent not to abandon M.B. - a matter not in issue before the Appellate Court but which point goes rather to the failure to communicate aspects of the statute as opposed to the issue of maintenance and support.

After, engaging, again, respectfully, in this legal form of ring-around-the-rosy, the Court then proceeds to determine these gifts are clear and convincing evidence of maintenance and support thereby supplanting (or more accurately standing it upon its fragile skull) the Probate Court's decision juxtaposed thereto - that there was clear and convincing evidence before it these gifts were not maintenance and support. A manifest weight of the evidence review supports the Probate decision, which the Appellate Court needed to avoid in order to reach its conclusion.

The lower Court underwent an analysis of the case law on both sides of the issue of the meaning of the words, but danced around giving them precise meanings fitting easily into every day usage by lawyers and Judges. Whether these gifts are considered support do not, in sooth, turn on the definition of those magical words underlying this case because as has been said, this

minefield is not easy to navigate, and is best left to the Trial Judge to tread. S.B. had a \$12,000 per year obligation and an almost \$18,000 arrearage - \$185 is slightly over one percent of same. (Supp. 20, 21; Tr. 20, 21).

Let's look at the Fifth Appellate District's case for a moment. *In the Matter of the Adoption of Kat P., supra*, involved a detailed analysis of the proceedings before the Fairfield County Probate Court. Pointing to the maxims regarding who decides witness credibility, the Court upheld the Probate Court's view of same. Interestingly enough, the Christmas gifts given by the father were used by him in that case not to argue that they were support, but as being in contact with the children during the year immediately preceding the adoption. The court found clear and convincing evidence to support the trial court's ruling and found it not against the manifest weight of the evidence.

Appellant must confess to some befuddlement – it is not clear after several readings of that case why it alone as opposed to the two other cases pointed to below is in conflict with the Ninth Appellate Court's decision. *In re Adoption of Bonett, supra*, which was distinguished below, seems to Appellant to be substantially similar on the review issue herein presented. We would suggest its logic is surely applicable to the instant matter and ought to be followed herein. They are fine lines of distinction, assuredly; but despite same, the similarities are striking. The very first words of Justice Brown's decision are, "This case calls upon us again to interpret and refine the application of R.C. 3107.07(A)." *Bonett, Id.*, at 103. The Court goes on to state, at 106, "Although we are properly obliged to strictly construe the language of R.C. 3107.07(A) in order to protect the interests of a natural parent ... we are not persuaded to adopt a construction so strict as to turn the statute into a sham." Admittedly, the statute was different in 1987, but this logic, we suggest, is persuasive.

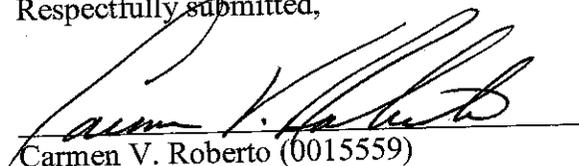
If the Ninth Appellate District should not have preceded *de novo*, this case conceivably could end with that determination – without reaching the definitions concerns. This case could be sent back to the Appellate Court to review the Probate Court ruling in light of that standing. It seems, however, that regardless of which standard of review is utilized that confusion will continue until the terms are defined.

While one must admit that either a *de novo* review or a manifest weight of the evidence review could be seen to be in order, the more logical approach would be to proceed on the weight of the evidence theory.

CONCLUSION

Appellant urges the Court to adopt the two propositions of law stated in his argument, reverse the holding of the Appellate Court, and reinstate the ruling of the Summit County Probate Court.

Respectfully submitted,

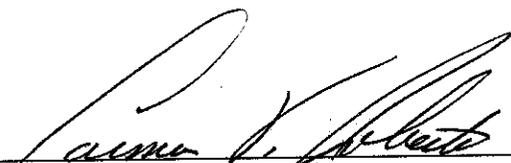


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PROOF OF SERVICE

I hereby certify that a true and accurate copy of this *Merit Brief of Appellant T.R.* was served via electronic mail and via ordinary U.S. mail this 21st day of July, 2011, upon the following:

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Notice of Certified Conflict

Now comes Appellant, T.R., the Stepfather of M.B., and gives notice pursuant to S.Ct. Prac. R. 4.1 that, on April 18, 2011, the Ninth District Court of Appeals certified a conflict on the following two issues:

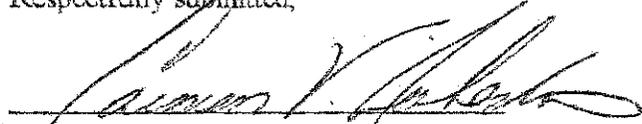
1. When a biological parent fails to provide any court ordered child support for one year, do small monetary gifts paid directly to the child constitute the provision of "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A)?
2. When reviewing a probate court's decision regarding whether or not a biological parent's financial contribution constitutes "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is contrary to the manifest weight of the evidence?

On March 16, 2011, the Ninth District Court of Appeals issued a decision that held that small monetary gifts in themselves constitute "maintenance and support as required by law or judicial decree" without the payment of any court-ordered child support. It has now found that its decision is in conflict with *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-91-199, in which the Sixth District Court of Appeals held that gifts do not constitute "maintenance and support" in the absence of the payment of child support.

The March 16, 2011, judgment reversed a prior holding by the Summit County Probate Court that held that the gifts given in this case did not constitute "maintenance and support." In reviewing the lower court's decision, the Ninth District utilized a de novo standard of review. It has now found that its use of this standard of review is in conflict with the case of *In the Matter of the Adoption of Kat P.*, (5th Dist.), Fairfield App. Nos. 09CA10, 09CA11, 2009-Ohio-3852, which

held that the proper standard of review is whether the probate court's decision is against the manifest weight of the evidence.

Respectfully submitted,

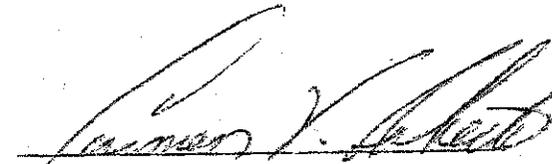


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Proof of Service

The undersigned certifies that a true and accurate copy of the foregoing was sent by regular U.S. Mail this 16th day of May, 2011 to:

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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HERRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

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

7:11 APR 18 PM 2: 23

C.A. No. 25304

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

Appellee has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on March 16, 2011, and the judgments of several other district courts of appeal. Appellant has responded to the motion. Appellee proposes two issues for certification.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

Appellee has proposed that a conflict exists between this Court and the Tenth District Court of Appeals in *In re Adoption of Strawser* (1987), 36 Ohio App.3d 232; the Sixth District Court of Appeals in *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-91-199; and the Eleventh District Court of Appeals in *In re Adoption of Wagner* (1997), 117 Ohio App.3d 448 on the following narrowly crafted issue:

First issue: "When a biological parent fails to provide any court ordered child support for one year, but gives the child two small gifts in the form of cash and a gift card, do such gifts constitute the provision of 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A)?"

Were we to construe appellee's issue as narrowly as presented, we would conclude that no conflict exists between our opinion and any of the three cited opinions. Even construing the issue more broadly, however, we conclude that no conflict exists between the instant opinion and the opinions of the Tenth and Eleventh districts. The *Strawser* court addressed the issue of whether non-monetary gifts (toys and clothing) and the payment for a benefit about which neither the child nor residential parent knew constituted "maintenance and support" for purposes of R.C. 3107.07(A). The *Wagner* court addressed the issue of whether the payment of a meager portion of court-ordered child support constituted "maintenance and support" for purposes of R.C. 3107.07(A).

Construing the issue more broadly, we reasonably conclude that a conflict exists between the instant opinion and the opinion of the Sixth District Court of Appeals. The *McCarthy* court addressed the issue of whether, in the absence of the payment of any court-ordered child support, two small monetary gifts paid directly to the child constituted "maintenance and support" for purposes of R.C. 3107.07(A). The Sixth District concluded that such payments do not constitute maintenance or support because they will not reach the custodian to be used for the child's needs. In the instant case, this Court concluded that the payment of two small monetary gifts paid directly to the child, in the absence of the payment of any court-ordered child support, constituted "maintenance and support" because they might reasonably be used for the child's needs and demonstrated the intent not to abandon the child. Accordingly, we conclude that a conflict of law exists, and we certify a conflict on the following question:

"When a biological parent fails to provide any court-ordered child support for one year, do small monetary gifts paid directly to the child constitute the provision of 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A)?"

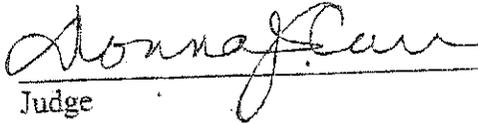
Appellee has proposed that a conflict exists between this Court and the Fifth District Court of Appeals in *In the matter of the Adoption of Kat. P.*, 5th Dist. Nos. 09CA10, 09CA11, 2009-Ohio-3852, on the following issue:

Second issue: "When reviewing a probate court's decision that a given level of material contribution does not constitute 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is contrary to the manifest weight of the evidence?"

Citing *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, the Fifth District broadly stated that "[a]n appellate court will not disturb a trial court's decision on adoption unless it is against the manifest weight of the evidence." *In re Kat P.*, at ¶12. The *Masa* court, however, enunciated the manifest weight of the evidence standard of review within a much narrower context, specifically, on the "question of whether justifiable cause [for the failure to support] has been proven by clear and convincing evidence[.]" *Id.* at 165. In the instant case, this Court declined to expand the application of the standard of review relevant to the issue of "justifiable cause" enunciated by the Ohio Supreme Court in *Masa* and *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 106, to the issue of whether the parent failed to provide "maintenance and support" of the child. Because R.C. 3107.07(A), as in effect at the time relevant to this matter, did not define the terms "maintenance and support," necessarily requiring our interpretation of those terms, we applied a de novo standard of review. Accordingly, we conclude that a conflict of law exists, and we certify a conflict on the following question:

"When reviewing a probate court's decision regarding whether or not a biological parent's financial contribution constitutes "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is against the manifest weight of the evidence?"

Upon consideration, appellee's motion to certify a conflict is granted.



Judge

Concur:
WHITMORE, J.
MOORE, J.

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
DANIEL M. HOFFIGAN IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
ss:
2011 MAR 16 AM 8:02

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

SUMMIT COUNTY
CLERK OF COURTS C.A. No. 25304

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

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

CARR, Presiding Judge.

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

I.

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

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

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

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

ASSIGNMENT OF ERROR

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

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

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

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

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

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

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

“Consent to adoption is not required of any of the following:

“(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.”

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

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

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

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

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

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

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

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

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

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

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

III.

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

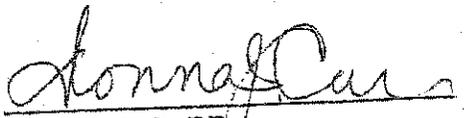
Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellee.


DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

{¶19} The majority concludes that a \$125 gift certificate at Christmastime and a \$50 cash gift at M.B.'s birthday are sufficient to establish maintenance and support by Father when he made no support payments for one year. I must respectfully dissent. The majority correctly points out that the terms "maintenance and support" are not defined in this section of the Revised Code. As a result, we give those terms their ordinary meanings. The American Heritage Dictionary defines "maintenance" as "[t]he action of maintaining[;] * * * [t]he state of being maintained[;] * * * a means of maintaining or supporting." The American Heritage Dictionary (Second College Ed. 1995) 757. "Maintain" is defined as "[t]o provide for;" to "sustain." Id. "Support" is defined as "[t]o provide for or maintain, by supplying with money or necessities." Id. at 1222. These are common, ordinary meanings of the terms. A gift certificate at Christmas and a small cash gift at a child's birthday do not, in my mind, constitute support. Those are tokens of affection that are expected from friends or relatives who have no obligation for maintenance. Even Father recognized that they were just gifts. He was not "maintaining" or "supporting" M.B. in any real sense of those words.

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

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

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

APPEARANCES:

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

DIANA COLAVECCHIO, Attorney at Law, for Appellee.

148G5K

Time of Request: Wednesday, March 23, 2011 09:40:20 EST
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Research Information

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CUYAHOGA FALLS, OH 44221-2530



8 of 8 DOCUMENTS



Caution
As of: Mar 23, 2011

In the matter of the adoption of: Ryan Michael McCarthy; Brian John McCarthy
Denise Lorraine McCarthy Appellants v. Gary Groszewski Appellee

Court of Appeals No. L-91-199

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS
COUNTY

1992 Ohio App. LEXIS 103

January 17, 1992, Decided

PRIOR HISTORY: [*1] Trial Court No. AD 90-0109

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants mother and stepfather sought review of a judgment of the Probate Division of the Court of Common Pleas of Lucas County (Ohio), which had denied their petition for the stepfather's adoption of the mother's child. They contended that the probate court erred in finding that appellee father's consent was required to the adoption.

OVERVIEW: The mother and stepfather alleged in their petition that the father's consent to the adoption was not required. *Ohio Rev. Code Ann. § 3107.07(A)* provided that consent was not required if the father had failed without justifiable cause to provide support for the child during the year prior to the filing of the petition. The father had been incarcerated for much of the year and had made no payments through the child support enforcement agency. He had, however, made two payments totaling \$ 14 directly to the child during the year. The probate court found that because of these payments the father's consent was required. The court held that under *Ohio Rev. Code Ann. § 2301.36(A)* the father's payments were considered gifts and not support for the child. The

probate court erred in finding that the father had provided any support for the child during the year.

OUTCOME: The court reversed and remanded the judgment of the probate court to determine whether there was a justifiable cause for the father's failure to support the child.

LexisNexis(R) Headnotes

Family Law > Adoption > Consent > Biological Parents
Family Law > Adoption > Consent > Exceptions

[HN1] The Ohio statute which governs when the consent of a natural parent is required for the adoption of the parent's child is *Ohio Rev. Code Ann. § 3107.07*. Section 3107.07(A) provides that consent to adoption is not required when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Adoption > Procedures > General Overview

Family Law > Child Support > General Overview

[HN2] The party seeking permission to adopt has the burden to establish by clear and convincing evidence that: (1) the natural parent has not supported the child for one year before the petition for adoption was filed; and (2) the failure to provide support was without justifiable cause. Once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one year period, the burden of going forward with the evidence shifts to the natural parent to show some facially justifiable cause for such failure. The burden of proof, however, remains with the petitioner.

Civil Procedure > Appeals > Standards of Review > General Overview

Family Law > Adoption > Consent > General Overview

[HN3] A trial court's ruling on the issue of whether the natural parent failed to provide support with justifiable cause should not be reversed on appeal unless the ruling is against the manifest weight of the evidence.

Family Law > Child Support > Obligations > General Overview

[HN4] *Ohio Rev. Code Ann. § 2301.36(A)* provides that upon issuing or modifying a support order or issuing or modifying any order described in *Ohio Rev. Code Ann. § 3113.21(D)*, the court shall require that support payments be made to the child support enforcement agency of the county as trustee for remittance to the person entitled to receive payments. Any payment of money by the person responsible for the support payments under a support order to the person entitled to receive the support payments that is not made to the child support enforcement agency in accordance with the applicable support order shall not be considered as a payment of support and, unless the payment is made to discharge an obligation other than support, shall be deemed to be a gift.

Governments > Legislation > Interpretation

[HN5] *Ohio Rev. Code Ann. § 1.42* provides that words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or a particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Family Law > Child Custody > General Overview
Family Law > Child Support > Obligations > General Overview

Family Law > Guardians > General Overview

[HN6] Ohio courts construe the term "support" used in *Ohio Rev. Code Ann. § 3107.07(A)* to encompass situations where natural parents are subject to court imposed support orders. The common usage of the word support carries with it the connotation that payments will be made to the child's custodian or to a bureau which will forward the payments to a child's custodian for direct use for items such as food, clothing, and shelter for the child. Payments made directly to the child constitute a gift as there is no indication that the payments will ever reach the custodian of the child to be used for the child's needs.

COUNSEL: John F. McCarthy and Warren D. Wolfe, for appellants. Gregg D. Hickman, for appellee.

JUDGES: Peter M. Handwork, P.J., James R. Sherck, J., CONCUR. George M. Glasser, J., concurs in judgment only.

OPINION

DECISION AND JOURNAL ENTRY

This is an appeal from a judgment entry of the Lucas County Court of Common Pleas, Probate Division, in which the court dismissed a petition for adoption filed by appellants. The court ruled that the petition seeking permission for a husband to adopt the son of his wife could not be granted as the child's natural father did not give consent to the adoption. Appellants, the husband and wife, have presented one assignment of error for this court's consideration which states:

"A. The Probate Court Erred in Finding that Without Appellee's Consent, Appellants' Petition for Adoption Must Be Denied Because as a Matter of Law Appellee failed to Support His Son for at Least One Year Preceding the Filing of the Petition for Adoption and His Failure To Pay Support Was Without Justifiable Cause."

After carefully reviewing the record, we conclude that the ruling of the Lucas County Court of Common Pleas, Probate Division, requiring [*2] the consent of the child's natural father for an adoption was against the manifest weight of the evidence.

[HN1] The Ohio statute which governs when the consent of a natural parent is required for the adoption of the parent's child is *R.C. 3107.07* which reads in pertinent part:

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

"(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner." R.C. 3107.07(A).

When appellants filed the petition for the adoption of the minor child in this case on July 9, 1990, appellants indicated that appellee's consent for the adoption was not required even though he was the child's natural father as he had failed without justifiable cause to provide support for the child for at least one year immediately preceding the filing [*3] of the petition for an adoption. A hearing was conducted on November 21, 1990, to determine whether the consent of appellee could be waived. The Supreme Court of Ohio has indicated that [HN2] the party seeking permission to adopt has the burden to establish by clear and convincing evidence that: (1) the natural parent has not supported the child for one year before the petition for adoption was filed; and (2) the failure to provide support was without justifiable cause. *In re Adoption of Bovett (1987)*, 33 Ohio St. 3d 102, paragraphs two and three of the syllabus. The court has stated:

"Once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one year period, the burden of going forward with the evidence shifts to the natural parent to show some facially justifiable cause for such failure. The burden of proof, however, remains with the petitioner." *Id.* at paragraph two of the syllabus.

At the same time, the Supreme Court of Ohio indicated that [HN3] a trial court's ruling on the issue of whether the natural parent failed to provide support with justifiable cause should not be reversed [*4] on appeal unless the ruling is against the manifest weight of the evidence. *Id.* at paragraph four of the syllabus.

At the hearing conducted by the lower court, evidence was introduced showing that when appellee was divorced from the child's mother, the Lucas County Court of Common Pleas imposed an obligation for support of the child on appellee. Further evidence was introduced to show that appellee had failed to make any payments on the child support through the Lucas County Child Support Enforcement Agency for at least one year preceding the filing of the petition for adoption. Appellee then assumed the burden of going forward with the evidence. Appellee agreed that he had not made any child support payments through the Lucas County Child Sup-

port Enforcement Agency. However, appellee testified that during much of the year preceding the filing of the petition for adoption he was incarcerated for various violations of the law stemming from his problems with alcohol abuse. He acknowledged that there were short periods of time during the year preceding the filing of the petition when he was not incarcerated. He also acknowledged that during those periods of time he failed to seek [*5] employment. He testified that in the year preceding the filing of the petition for adoption, he earned \$ 200. He testified that he earned the money cleaning buildings for an acquaintance. He then testified that during the year immediately preceding the filing of the petition for adoption, he sent his son a total of \$ 14. He stated that he included a \$ 10 bill in one letter which he sent his son and four \$ 1 bills in a second letter which he sent directly to his son. After making that disclosure, appellee was questioned by appellants' attorney and responded as follows:

"Q. But you didn't give any money to your former wife?

"A. Well, I figure that I've given her enough in my lifetime, I would give some to Ryan.

"Q. You say you figure you have no obligation to support your child?

"A. Those were your words, sir. No, I don't figure--

"Q. You said to me that you had given her enough in your lifetime, right?

"A. Yes, sir.

"* * *

"Q. Just to establish that was not directed to your former wife in the terms of child support?

"A. Excuse me?

"Q. That money was not sent to your former wife to meet your child support obligations, was it?

"A. [*6] Well, it was sent to Ryan, and I'm assuming that they don't let him handle that kind of money, and Denise would take the money and spend it in whatever fashion would be reasonable.

"Q. You don't know that then?

"A. No. I don't know that."

The trial court, considering this testimony, ruled that appellee had provided support in the amount of \$ 14 to his child during the year immediately preceding the filing of the petition for adoption. Accordingly, the court ruled that the petition for adoption could not be granted absent approval from appellee. Since appellee refused to consent to the adoption, the petition for adoption was dismissed.

Appellants urged the trial court to construe the \$ 14 given to the minor child as a gift. In support of their argument, appellants pointed to the provisions of R.C. 2301.36(A) which state in pertinent part:

[HN4] "Upon issuing or modifying a support order or issuing or modifying any order described in division (D) of section 3113.21 of the Revised Code, the court shall require that support payments be made to the child support enforcement agency of the county as trustee for remittance to the person entitled to receive payments * * *. Any [*7] payment of money by the person responsible for the support payments under a support order to the person entitled to receive the support payments that is not made to the child support enforcement agency in accordance with the applicable support order shall not be considered as a payment of support and, unless the payment is made to discharge an obligation other than support, shall be deemed to be a gift." R.C. 2301.36.

The trial court rejected the argument of appellants stating:

"Under R.C. 2301.34(B), which defines the phrase 'support order,' no section under Chapter 3107 of the Revised Code, which deals with adoptions, is referred to. The word 'support' and the phrase 'support order' have two different meanings, hence the support order mentioned under R.C. 2301.34(A) has no application to the support called for under R.C. 3107.07(A)."

No citations were given by the trial court to support its conclusion. R.C. 1.42 states:

[HN5] "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or a particular meaning, whether by legislative definition or otherwise, shall be construed [*8] accordingly." R.C. 1.42.

Our review of existing case law in Ohio demonstrates that [HN6] Ohio courts have construed the term "support" used in R.C. 3107.07(A) to encompass situations where natural parents were subject to court imposed sup-

port orders. See *In re Adoption of Bovett, supra* (natural father's failure to pay court imposed child support order constituted failure to provide support without justifiable cause). In addition, we find that the common usage of the word support carries with it the connotation that payments will be made to the child's custodian or to a bureau which will forward the payments to a child's custodian for direct use for items such as food, clothing, and shelter for the child. Payments made directly to the child constitute a gift as there is no indication that the payments will ever reach the custodian of the child to be used for the child's needs. Accordingly, we find that the trial court's ruling that the payment of \$ 14 to the child constituted support was against the manifest weight of the evidence in this case. To the extent that appellants' sole assignment of error challenges the trial court's ruling that appellee did provide some support to his [*9] son in the year immediately preceding the filing of the adoption petition, the assignment of error is well-taken. However, this court declines to make any ruling as to whether the failure to provide support was without justifiable cause. Rather, we remand this case to the Lucas County Court of Common Pleas, Probate Division, for the court to conduct further proceedings to determine whether the failure to pay support was without justifiable cause. Appellant's sole assignment of error is well-taken in part and not well-taken in part.

The judgment of the Lucas County Court of Common Pleas, Probate Division, is reversed. This case is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.,

James R. Sherck, J.,

CONCUR.

George M. Glasser, J., concurs in judgment only.

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[Cite as *in re Kat P.*, 2009-Ohio-3852.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

THE ADOPTION OF:

KAT.P. AND KAS.P.

JUDGES:

Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case Nos. 09CA10
09CA11

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Probate Division, Case Nos. 085036 and
085037.

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 29, 2009

APPEARANCES:

For Appellant

JAMES L. DYE
P.O. Box 161
Pickerington, OH 43147

For Appellee

CHAD FOISSET
555 City Park Avenue
Columbus, OH 43215

Farmer, P.J.

{¶1} On May 29, 2008, appellee, Jimmi Popcevski, filed a petition to adopt his two minor stepchildren without consent of their biological father, appellant, Sasho Dukovski. A hearing was held on October 6, 2008. By entry filed January 27, 2009, the trial court found appellant's consent was not needed because appellant failed without justifiable cause to provide for the maintenance and support of his minor children for at least one year prior to the filing of the petition, and failed without justifiable cause to communicate with his children for at least one year prior to the filing of the petition.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE BIOLOGICAL FATHER IN DETERMINING THAT HIS CONSENT TO THE ADOPTION OF HIS MINOR CHILDREN WAS NOT NECESSARY PURSUANT TO R.C. 3107.07(A) AS SASHO DUKOVSKI HAD COMMUNICATED WITH HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION."

II

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE BIOLOGICAL FATHER IN DETERMINING THAT HIS CONSENT TO THE ADOPTION OF HIS MINOR CHILDREN WAS NOT NECESSARY PURSUANT TO R.C. 3107.07(A) AS SASHO DUKOVSKI HAD PROVIDED MAINTENANCE AND/OR SUPPORT FOR HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION."

III

{¶5} "ANY FAILURE BY SASHO DUKOVSKI TO COMMUNICATE WITH HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION WAS JUSTIFIED PURSUANT TO R.C. 3107.07(A)."

IV

{¶6} "ANY FAILURE BY SASHO DUKOVSKI TO PROVIDE MAINTENANCE AND/OR SUPPORT FOR HIS CHILDREN WITHIN THE YEAR IMMEDIATELY PROCEEDING FILING THE PETITION FOR ADOPTION WAS JUSTIFIED PURSUANT TO R.C. 3107.07(A)."

I, II, III, IV

{¶7} We will address these assignments collectively as they relate to the same facts and the same determinations by the trial court.

{¶8} Appellant claims the trial court erred in finding that he provided no support for his children and had no contact with his children for at least one year prior to the filing of the adoption petition.

{¶9} The applicable standard for an adoption without consent is controlled by R.C. 3107.07 which states the following:

{¶10} "(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."

{¶11} "The party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent failed to communicate with the child during the requisite one-year period and that there was no justifiable cause for the failure of communication." *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, paragraph four of the syllabus. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶12} An appellate court will not disturb a trial court's decision on adoption unless it is against the manifest weight of the evidence. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶13} In its entry filed January 27, 2009 at Findings of Fact Nos. 6 and 11, the trial court found that appellant provided no support and appellant had no contact with the children during the one year period preceding the filing:

{¶14} "As of October 1, 2008, the total balance due and owing by Mr. Dukovski for children support was \$38,299.09 for these children. Mr. Dukovski paid no child support during the one year prior to the Adoption Petitions being filed, May 20, 2007 through May 20, 2008, through the Child Support Enforcement Agency (CSEA) or otherwise. Further, Mr. Dukovski paid nothing in child support for these children through CSEA or otherwise for the five year period prior to the filing of these Petitions for Adoption. Additionally, the children and Mrs. Popcevski received no other form of support from Mr. Dukovski, or from anyone on his behalf, during the five year period preceding the filing of the Adoption Petitions.

{¶15} "The children have not seen or spoken with Mr. Dukovski or received any mail or the other communication since late 2003."

{¶16} Basically, there are few contested facts on the issue of providing support. The child support records substantiate that appellant paid no support from May 30, 2007 to May 29, 2008. T. at 11. This occurred despite the fact that appellant sought and received a reduced child support order on February 26, 2007 because of his limited income (\$115.00 per month from the county for disability). T. at 10, 57, 78. Appellant admitted to paying no child support in the one year proceeding the filing of the petition because he did not have an income except for his disability which was delayed because of a lack of documentation. T. at 56-57, 72-74. Appellant had been denied social security disability and the matter was currently in the appeals process. T. at 68-69.

{¶17} Appellant claimed he had a justifiable cause for not supporting the children i.e., an automobile accident in 1997. He testified he suffered neck, head, and back injuries which prevented him from working or being a reliable worker. T. at 59-60, 63,

66-67, 70-71. He also suffered from anxiety attacks and depression and an inability to drive. T. at 61, 66-68, 70-71, 216-217.

{¶18} This testimony is in stark contrast to the testimony of several witnesses who stated appellant performs in a band and the performances are very physical. T. at 116-118, 132, 145, 149, 160-161. In addition, after the accident, appellant completed his music degree at The Ohio State University. T. at 61.

{¶19} Appellant's living expenses were small and he relied on his parents' support. T. at 72, 91. Basically the \$115.00 per month was his to freely spend. T. at 22, 79. However, appellant did not even attempt to pay a partial amount of the reduced child support order until after the adoption petition had been filed. T. at 11. There was no evidence that any other support was given outside the realm of the child support order.

{¶20} Appellant refuted the testimony that he performs in bands and denied that he was a regular band member, despite the fact that band advertising showed him as a member and the band was paid for performing. T. at 118, 120-125, 150-151, 234-236.

{¶21} The trial court was presented with two opposite views of appellant. One side presented him as a malingerer and appellant presented himself as a victim. It was within the province of the trial court to determine from the unrefuted lack of child support for the children whether appellant had a justifiable cause. The determination of the credibility of witnesses lies within the discretion of the trial court, and we may not substitute our judgment on appeal. *Seasons Coal Company v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶22} On the issue of lack of support, we cannot find that the trial court's conclusion was against the manifest weight of the evidence.

{¶23} On the issue of contact, appellant argues he contacted the children via Christmas presents he mailed to them on December 21, 2007 to the home of the maternal grandmother, Nada Purdef. T. at 87-90. Appellant also argues he called Ms. Purdef's home in an attempt to contact the children. T. at 92-94. Ms. Purdef denied these claims. T. 169-170. She testified she never received a voicemail or a message from appellant. T. at 185.

{¶24} Appellant relies on the 2007 Christmas gifts to support his argument of a legitimate attempt to contact the children. Appellant argues the gifts were never returned, and he relies on Ohio's postmark rule. T. at 89.

{¶25} Neither of the children lived with Ms. Purdef, nor was she the day care provider as they were both in school. T. at 265-266. The gifts were sent to a stale address because Ms. Purdef had moved in late October, 2007. T. at 171. Ms. Purdef's new phone number was listed in the telephone book. T. at 171-172. Appellant's own mother, Lancha Dukovski, had contact with Ms. Purdef at church. T. at 179, 211.

{¶26} Ms. Dukovski and Sonya Canterbury, appellant's sister, testified as to the 2007 Christmas presents. They both stated "we sent" the Christmas gifts. T. at 214, 225-227. Ms. Canterbury acknowledged that the telephone call she witnessed being made to Ms. Purdef was actually initiated by Ms. Dukovski, not appellant. T. at 229. Appellant acknowledged the 2007 Christmas gifts were a joint effort by his family, not his alone. T. at 245. He admitted that he did not purchase them. Id.

{¶27} Appellant also argues the children's mother, Lola Popcevski, thwarted his attempts at visitation. Appellant argues Ms. Popcevski refused weekly supervised visitation at the Fairfield County Visitation Center from the beginning of a revised visitation order in 2004-2005. T. at 251-255. Appellant also argues Ms. Popcevski had an unlisted phone number, but he was aware of her address. T. at 247-248.

{¶28} Appellant cannot rely on old visitation issues to exonerate himself from his failure to contact the children. In examining the "contact" rule, this court has been faithful to the proposition that any contact, no matter how slight, is sufficient. As this court stated in *In re Adoption of Campbell*, Guemsey App. No. 07CA43, 2008-Ohio-1916, ¶¶22, 28-30, respectively:

{¶29} "The right of a natural parent to the care and custody of her children is one of the most fundamental in law. This fundamental liberty interest of natural parents in the care, custody and management of their children is not easily extinguished. *Santosky v. Kramer* (1982), 455 U.S. 745, 753-754. Adoption terminates those fundamental rights. R.C. 3107.15(A)(1). Accordingly, adoptions are generally not permissible absent the written consent of both parents. R.C. 3107.06.' *In re Adoption of Stephens*, Montgomery App. No. 18956, 2001-Ohio-7027.

{¶30} "Although the term 'communicate' is not defined in R.C. Chapter 3107, it has been defined as 'to make known,' 'to inform a person of, convey the knowledge or information of * * * to send information or messages[.]' " *In re Adoption of Jordan* (1991), 72 Ohio App.3d 638, 644.

{¶31} "Asked to determine the legislature's intended meaning of the term 'communicate' as used in R.C. § 3107.07(A), the Supreme Court in *Holcomb* held that:

{¶32} "Our reading of the statute indicates that the legislature intended to adopt an objective test for analyzing failure of communication * * *. The legislature purposely avoided the confusion which would necessarily arise from the subjective analysis and application of terms such as failure to communicate *meaningfully, substantially, significantly, or regularly*. Instead, the legislature opted for certainty. It is not our function to add to this clear legislative language. Rather, we are properly obliged to 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.' *Holcomb*, 18 Ohio St.3d at 366."

{¶33} In the case sub judice, there is no evidence that the children ever received any gifts or had the benefit of any contact with appellant. Appellant cannot receive the benefit of his dilatory conduct to excuse the lack of affirmative action on his part.

{¶34} Upon review, we find there was clear and convincing evidence to support the trial court's findings, and the trial court's decision was not against the manifest weight of the evidence.

{¶35} Assignments of Error I, II, III, and IV are denied.

{¶36} The judgment of the Court of Common Pleas of Fairfield County, Ohio, Probate Division is affirmed.

By Farmer, P.J.

Hoffman, J. and

Wise, J. concur.

JUDGES

SGF/jpb 0713

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

THE ADOPTION OF:

KAT.P. AND KAS.P.

JUDGEMENT ENTRY

CASE NOS. 09CA10
09CA11

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, Probate Division is affirmed. Costs to appellant.

JUDGES

STATE OF OHIO
COUNTY OF SUMMIT

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

COURT OF APPEALS
DANIEL M. HERRIGAN, IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
MAR 16 AM 8:02

SUMMIT COUNTY
CLERK OF COURTS C.A. No. 25304

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

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

CARR, Presiding Judge.

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

I.

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

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

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

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

ASSIGNMENT OF ERROR

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

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

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

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

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

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

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

“Consent to adoption is not required of any of the following:

“(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.”

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

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

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

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

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

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

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

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

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

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

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

III.

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

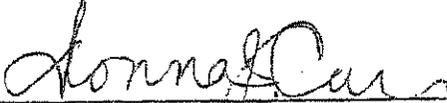
Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellee.


DONNA J. CARE
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

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

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

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

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

APPEARANCES:

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

DIANA COLAVECCHIO, Attorney at Law, for Appellee.

STATE OF OHIO)

COUNTY OF SUMMIT)

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

)ss: COURT OF APPEALS
DANIEL M. HORRIGAN

7:01 APR 18 PM 2: 23

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C.A. No. 25304

JOURNAL ENTRY

Appellee has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on March 16, 2011, and the judgments of several other district courts of appeal. Appellant has responded to the motion. Appellee proposes two issues for certification.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

Appellee has proposed that a conflict exists between this Court and the Tenth District Court of Appeals in *In re Adoption of Strawser* (1987), 36 Ohio App.3d 232; the Sixth District Court of Appeals in *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-91-199; and the Eleventh District Court of Appeals in *In re Adoption of Wagner* (1997), 117 Ohio App.3d 448 on the following narrowly crafted issue:

First issue: "When a biological parent fails to provide any court ordered child support for one year, but gives the child two small gifts in the form of cash and a gift card, do such gifts constitute the provision of 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A)?"

Were we to construe appellee's issue as narrowly as presented, we would conclude that no conflict exists between our opinion and any of the three cited opinions. Even construing the issue more broadly, however, we conclude that no conflict exists between the instant opinion and the opinions of the Tenth and Eleventh districts. The *Strawser* court addressed the issue of whether non-monetary gifts (toys and clothing) and the payment for a benefit about which neither the child nor residential parent knew constituted "maintenance and support" for purposes of R.C. 3107.07(A). The *Wagner* court addressed the issue of whether the payment of a meager portion of court-ordered child support constituted "maintenance and support" for purposes of R.C. 3107.07(A).

Construing the issue more broadly, we reasonably conclude that a conflict exists between the instant opinion and the opinion of the Sixth District Court of Appeals. The *McCarthy* court addressed the issue of whether, in the absence of the payment of any court-ordered child support, two small monetary gifts paid directly to the child constituted "maintenance and support" for purposes of R.C. 3107.07(A). The Sixth District concluded that such payments do not constitute maintenance or support because they will not reach the custodian to be used for the child's needs. In the instant case, this Court concluded that the payment of two small monetary gifts paid directly to the child, in the absence of the payment of any court-ordered child support, constituted "maintenance and support" because they might reasonably be used for the child's needs and demonstrated the intent not to abandon the child. Accordingly, we conclude that a conflict of law exists, and we certify a conflict on the following question:

"When a biological parent fails to provide any court-ordered child support for one year, do small monetary gifts paid directly to the child constitute the provision of 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A)?"

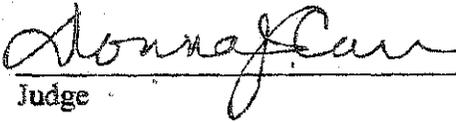
Appellee has proposed that a conflict exists between this Court and the Fifth District Court of Appeals in *In the matter of the Adoption of Kat. P.*, 5th Dist. Nos. 09CA10, 09CA11, 2009-Ohio-3852, on the following issue:

Second issue: "When reviewing a probate court's decision that a given level of material contribution does not constitute 'maintenance and support of the minor as required by law or judicial decree' for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is contrary to the manifest weight of the evidence?"

Citing *In re Adoption of Masa* (1986), 23 Ohio St.3d 163, the Fifth District broadly stated that "[a]n appellate court will not disturb a trial court's decision on adoption unless it is against the manifest weight of the evidence." *In re Kat P.*, at ¶12. The *Masa* court, however, enunciated the manifest weight of the evidence standard of review within a much narrower context, specifically, on the "question of whether justifiable cause [for the failure to support] has been proven by clear and convincing evidence[.]" *Id.* at 165. In the instant case, this Court declined to expand the application of the standard of review relevant to the issue of "justifiable cause" enunciated by the Ohio Supreme Court in *Masa* and *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 106, to the issue of whether the parent failed to provide "maintenance and support" of the child. Because R.C. 3107.07(A), as in effect at the time relevant to this matter, did not define the terms "maintenance and support," necessarily requiring our interpretation of those terms, we applied a de novo standard of review. Accordingly, we conclude that a conflict of law exists, and we certify a conflict on the following question:

"When reviewing a probate court's decision regarding whether or not a biological parent's financial contribution constitutes "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is against the manifest weight of the evidence?"

Upon consideration, appellee's motion to certify a conflict is granted.



Judge

Concur:
WHITMORE, J.
MOORE, J.

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

IN THE MATTER OF
THE ADOPTION OF:

MADALYN ANN BEBAN

)
)
)
)

CASE NO. 2008 AD 193

ORDER

This matter comes before the Court following Hearing held on November 10, 2009, on the Objection to Magistrate's Decision, filed July 30, 2009, by Scot A. Stevenson, Attorney on behalf of Stephen Beban; the Objection Brief, filed September 30, 2009, by Scot Stevenson, Attorney on behalf of Stephen Beban; the Petitioner's Response to Objection Brief, filed October 13, 2009, by Diana Colavecchio, Attorney on behalf of Thomas Ratcliff; and for the Court's independent review and analysis of the issues, appropriate rules of law applicable to the issues in this case, and the Court's review and analysis of the Magistrate's Decision filed in this matter pursuant to Civ. R. 53(D) on July 20, 2009, which found that the consent of Stephen Beban to the adoption of Madalyn Ann Beban is not required. Present before the Court at the hearing on the objections were Attorneys Diana Colavecchio on behalf of the Petitioner, Thomas Ratcliff, and Scot Stevenson on behalf of the Respondent, Stephen Beban.

The Court finds, after hearing held, due consideration thereof, and review of the case file, the transcript, and the applicable law, the Objection to the Magistrate's Decision of July 20, 2009, is hereby overruled. The Court has considered the arguments presented upon appeal and finds the same are not well-taken, and determines that there is no error of law or defect in the Magistrate's Decision. The Court further finds that the Magistrate's Decision of July 20, 2009, contains sufficient findings of fact and conclusions

PROBATE COURT COUNTY OF SUMMIT, O.
FILED

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BILL SPICER, Judge

of law to allow the Court to make its own independent analysis of the issues, and to apply the appropriate rules of law in making its final judgment entry and order in this matter.

STATEMENT OF FACTS

Madalyn Ann Beban was born on April 27, 1996, in San Francisco, California. Her parents Ann and Stephen Beban were thereafter married to one another on October 15, 1997. Ann and Stephen Beban were subsequently divorced from one another in 2000 in the State of Florida. At that time, Ann was named as the custodial parent and Stephen Beban was ordered to pay child support in the amount of \$1,000.00 per month. Ann married Thomas Ratcliff on April 28, 2001. Thomas Ratcliff filed the Petition to adopt his step-daughter on September 12, 2008.

It is agreed that while Stephen Beban did not have any personal visitation with Madalyn during the year prior to the filing of the adoption petition they did exchange telephone calls from four to six times during that time period, satisfying that communication took place between parent and child. It is also agreed that Stephen Beban did pay child support regularly for a number of years, however, his last child support payment was made on February 12, 2007. During the one year prior to the filing of the adoption petition, from September 12, 2007, to September 12, 2008, it is also agreed that Stephen Beban sent Madalyn a Christmas card with a \$125.00 gift card in December, 2007, and a birthday card with \$60.00 cash in April, 2008. The gifts were enclosed in cards signed by Beban, his fiancée, LaVerne, and her children.

CONCLUSIONS OF LAW

At issue in this matter is whether the consent of Stephen Beban is required for the adoption to go forward. Ohio Revised Code Section 3107.07(A) provides that a parent's consent to the adoption of his minor child is not required when:

*** the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

In discussing R.C. 3107.07(A), the Ninth District Court of Appeals has stated that "[t]he statute is to be read in the disjunctive. Therefore, a petitioner must only establish that a parent has failed either to communicate or to support the child, not both, before excusing the necessity of consent to the adoption by the natural parent." *In re Adoption of C.P. and J.P.*, 2003-Ohio-4905.

The relationship between a parent and a child is a constitutionally protected liberty interest. See *In re Adoption of Zschach* (1996), 75 Ohio St.3d 648, 653; *Santosky v. Kramer* (1982), 455 U.S. 745, 753. The termination of a natural parent's right to object to the adoption of his or her child is a very serious matter which requires strict adherence to the statutes. *In re Adoption of Jarvis*, 1996 WL 724748 (Ohio App. 9th Dist.). In an adoption case, the petitioner has the burden of proving by clear and convincing evidence the natural parent's noncompliance with the requirement of support or communication. *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, paragraph one of the syllabus. Once a petitioner has established the failure to provide support or to communicate within the required one-year period, the natural parent has the burden of going forward with some evidence to show that

the failure was justified, but the burden of proof remains with the petitioner. *Id.* at paragraph two of the syllabus.

The Court must first address whether a gift card for \$125.00 to a clothing store and \$60.00 cash in a birthday card constitute support? Although the terms "maintenance and support" are not defined in R.C. 3107.07(A), it has been determined that they are to be given their plain and ordinary meaning. See *Garner v. Greenwalt*, 2008-Ohio-5963, citing *In Re: Adoption of B.M.S.*, 2007-Ohio-5966. "Maintenance" has been defined as "financial support given by one person to another." *Black's Law Dictionary* (8 Ed. 2004) 973; *Garner* at 9. "Support" has been defined as "sustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed." *Garner* at 9.

Several Courts of Appeals have discussed the issue. In *In re Strawser* (1987), 36 Ohio App.3d 232, the Court ruled that \$133.00 in clothing and toys would not be considered support when those gifts were not requested and provided no real value of support because the minor already had sufficient clothes and toys. *Strawser*, paragraph one of the syllabus. The Court concluded that gifts provided to the minor child during the Christmas holiday did not provide for the care and support of the child. This reasoning was subsequently followed in the cases of *In re Adoption of McNutt* (1999), 134 Ohio App.3d 822; *In re Adoption of James* (2003), 126 Ohio Misc.2d 7; *In re Adoption of Breckenridge*, 2004 WL 894604 (Ohio App. 10th Dist.); and *Garner v. Greenwalt*, 2008-Ohio-5963. In *Garner*, the biological mother paid for occasional McDonalds meals and gave the minor child some small toys. The *Garner* Court ultimately followed the above reasoning in holding that the purchases made were in the nature of gifts, rather than maintenance and support.

The gifts offered by Beban were not for necessities. It is therefore decided that the gifts made by Beban at Christmas in 2007, and on Madalyn's birthday in 2008, do not constitute support. Madalyn has had the benefit of support and maintenance from her step-father, Thomas Ratcliff, since his marriage to her mother in 2001. As these gifts do not qualify as support, does Beban's assertion that he was unemployed and without means to pay support provide justifiable cause for his failure to do so?

As stated above, the petitioning party has the burden of proving by clear and convincing evidence that the natural parent has failed to support the child for the requisite one-year period and that the failure was without justifiable cause. *In re Masa* (1986), 23 Ohio St.3d 163. Once evidence of justifiable cause is demonstrated by the non-consenting parent the burden shifts back to the petitioner to show a lack of justifiable cause by clear and convincing evidence. As stated by the Court in *In re Bovett* (1987), 33 Ohio St.3d 102, 104, "a natural parent may not simply remain mute while the petitioner is forced to demonstrate why the parent's failure to provide support is unjustifiable. Rather, once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one-year period, the *burden of going forward with the evidence* is on the natural parent to show some facially justifiable cause for such failure. The *burden of proof*, however, remains with the petitioner." (Emphasis in original.)

Stephen Beban has apparently been unemployed since February, 2007. The last child support payment paid through CSEA was on February 12, 2007. There is currently an arrearage in excess of \$18,000.00.

Despite Stephen Beban's unemployment, the petitioner produced records

indicating that he had monies available to him during the pertinent time period, as follows:

Ex. C: 10-15-07	Sale of Marriott time-share	\$3,677.79
Ex. E: 9-30-07	Charles Schwab-Account # 3089	\$364.22
Ex. F: 9-30-07	Charles Schwab Account # 3087	\$20.34
Ex. G: 9-30-07	Charles Schwab Account # 3096	\$1,000.15
Ex. H: 8-22-07	Bank Account #6667, between	\$3.36 & \$4,624.36

During the year from August of 2007 to August of 2008, Stephen Beban paid on a \$35,000.00 lease for an Infinity G35 (described by the manufacturer as an "entry-level luxury sedan") for transportation to find work.

Stephan Beban asserts that he was unemployed or underemployed, and finally, that a 36 hour hospitalization followed by 60 days of intensive out-patient treatment rendered him unable to pay support. However, *Bovett, supra*, also requires the Court to consider the respondent's circumstances during the entire year in which he failed to make support payments. *Bovett*, at Paragraph three of the syllabus, states:

Under R.C. 3107.07(A), the probate court shall determine the issue of justifiable cause by weighing the evidence of the natural parent's circumstances for the statutory period for which he or she failed to provide support. The court shall determine whether the parent's failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause.

Stephen Beban described his job loss in February, 2007, and his efforts to work as a free-lance contractor in various sales positions. Mr. Beban also acknowledged that he had expenses during this period of charge cards (\$300-\$500 per month), loans (\$220 per month for time-share) automobile lease, fuel and maintenance, and contributions to the household he shared with LaVerne (\$250-\$900 per month). During the pertinent time period, Mr. Beban attempted various sales positions from which he was terminated for failure to meet expected sales quotas.

Stephen Beban's job search activities consisted of online applications for sales jobs, followed by "waiting and seeing" if offers materialized. Mr. Beban did not describe taking any temporary positions just to meet his expenses and support obligation. Mr. Beban abandoned his search when a job was promised, although the company decided later not to fill the position. Mr. Beban's sole means of search appeared to be on the internet. Despite having an expensive car lease, it is unclear how many face to face interviews actually took place.

Stephen Beban's lifestyle did not adjust during periods of unemployment. Despite using funds for other commitments, Mr. Beban failed to pay any child support whatsoever from February, 2007, until after he received notice of the adoption petition being filed in September, 2008. The petitioner has proven, by clear and convincing evidence, that Mr. Beban's employment status was not justifiable cause for his failure to pay support.

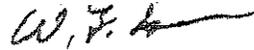
Finally, Stephen Beban asserts that his thirty-six hour hospitalization and sixty day outpatient program from July 14, 2008, to September 10, 2008, for depression provide justifiable cause for his failure to pay support. Again, *Bovett*, supra, directs the Court to determine whether the parent's failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause. Mr. Beban did not offer any other physical evidence to prove his mental health condition beyond his Psychiatric Discharge Note entered as Exhibit #3. The Court finds that although Mr. Beban's illness temporarily rendered him unable to work, it does not excuse his non-payment of support for the other ten months of the pertinent year.

Upon due consideration and review, it is hereby decided that the consent of

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Stephen Beban to the adoption of Madalyn Ann Beban is not required. Therefore, pursuant to Civ. R. 53(D), the Court hereby overrules the Objection to the Magistrate's Decision of July 20, 2009, and adopts the Magistrate's Decision, its conclusions, findings and recommendations as the Court's own, and as the Court's Judgment Entry and Order of the Court in this matter.

IT IS SO ORDERED.



BILL SPICER, JUDGE

PROBATE COURT COUNTY OF SUMMIT, O.
FILED

FEB 19 2010

BILL SPICER, Judge

C: Diana Colavecchio, Esq.
Scot Stevenson, Esq.
Leslie Graske, Esq.
Magistrate Tracy Stoner

IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

SUMMIT COUNTY, OHIO

IN THE MATTER OF
THE ADOPTION OF:
MADALYN ANN BEBAN

CASE NO: 2008 AD 193
JUDGE BILL SPICER
MAGISTRATE'S DECISION

This matter came on for hearing on the 17th day of April, 2009, before Magistrate Ann L. Snyder, on a hearing to determine whether the consent of the father of Madalyn Ann Beban is necessary for an adoption to go forward. Present at the hearing was the Petitioner, Thomas H. Ratcliff, and his wife and Madalyn's mother, Ann E. Ratcliff, represented by Attorney Diana Colavecchio. The father, Respondent Stephen L. Beban, was present and represented by Attorney Scot Stevenson.

The following exhibits were admitted:

Petitioner's Exhibits:

- A. Decree of Dissolution, Ann Elizabeth Caster and Stephen Beban
- B. CSEA Arrearage Affidavit
- C. Escrow Instructions; Beban, Seller
- D. Visa Bill, Airline Tickets
- E. Charles Schwab statement, Acct. #3089, 9-30-2007 to 9-30-2008
- F. Charles Schwab statement, Acct. # 3087, 9-30-2007 to 9-30-2008
- G. Charles Schwab statement, Acct. # 3096, 9-30-2007 to 9-30-2008
- H. Bank acct. #6667, 8-22-07 to 9-18-08
- I. Asset spreadsheet
- J. IRS 1040 for Stephan Beban, 2005
- K. IRS 1040 for Stephan Beban, 2006
- L. IRS 1040 for Stephan Beban, 2007
- M. Park Avenue Group, employment statement
- N. Cedant, employment statement

PROBATE COURT COUNTY OF SUMMIT, O.

FILED

JUL 20 2009

BILL SPICER, Judge

Respondent's Exhibits:

1. Monster.com, apply history
2. Email correspondence
3. Psychiatric Discharge Note
4. Transitions Memo

Madalyn was born April 27, 1996 in San Francisco, California. Ann and Stephen Beban were married October 15, 1997, and divorced in 2000. Ann was named the custodial parent. Ann married Thomas Ratcliff on April 28, 2001. The adoption petition was filed on September 12, 2008.

At issue in this matter is whether the consent of Stephen Beban is required for the adoption to go forward. Ohio Revised Code §3107.07(A) provides that a parent's consent to the adoption of his minor child is not required . . . "where 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 at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of petitioner". In the case of In Re Adoption of C.P. and I.P., 2003-Ohio-4905, the Ninth District Court of Appeals discussed R.C. 3107.07(A) and stated the following: "The statute is to be read in the disjunctive. Therefore, a petitioner must only establish that a parent has failed *either* to communicate *or* to support the child, not both, before excusing the necessity of consent to the adoption by the natural parent."

It is agreed that Madalyn and Stephen exchanged telephone calls from four to six times during the year preceding the filing of the adoption petition, satisfying that communication took

place between parent and child. It is also agreed that Stephen Beban did pay child support regularly for some time; however, his last child support payment was made February 12, 2007. During the relevant one year period, from September 12, 2007 to September 12, 2008, it is also agreed that Stephen sent Madalyn a Christmas card with a \$125.00 gift card in 2007, and a birthday card in April of 2008 with \$60.00 cash. The gifts were enclosed in cards signed by Beban, his fiancée, LaVerne, and her children. Does a gift card for \$125.00 and \$60.00 cash in a birthday card constitute support?

Several Courts of Appeals have discussed the issue. *In re Strawser* (1987), 36 Ohio App3d 232, ruled that \$133 in clothing and toys would not be considered support when those gifts were not requested and provide her no real value of support because she already has sufficient clothes and toys. (*Strawser syllabus*, paragraph one.) That court concluded that gifts provided to the child during the Christmas holiday would not provide for the care and support of the child. This argument was followed in *In re Adoption of McNutt* (1999), 134 Ohio App.3d 822; *In re Adoption of James* (2003), 126 Ohio Misc.2d 7; *In re Adoption of Breckenridge* (2004), 2004 WL 894604 (Ohio App. 10 Dist.). The gifts offered by Beban were not for necessities. It is therefore decided that the gifts made by Beban at Christmas in 2007, and on her birthday in 2008 do not constitute support. Madalyn has had the benefit of support and maintenance from her

step-father, Thomas Ratcliff, since his marriage to her mother in 2001. If these gifts do not qualify as support, does Beban's assertion that he was unemployed and without means to pay support provide justifiable cause for his failure?

In re Masa (1986), 23 Ohio St.3d

163, provides the Court with guidance in deciding the matter of support. "[T]he party petitioning for adoption has the burden of proving, by clear and convincing evidence that the natural parent has failed to support the child for the requisite one-year periods and also that the failure was without justifiable cause." Once evidence of justification is demonstrated by the non-consenting parent, the burden shifts back to the petitioner to show a lack of justification by clear and convincing evidence. See also, *in re Bovett* (1987), 33 Ohio St.3d 102, at 104: "Therefore, a natural parent may not simply remain mute while the petitioner is forced to demonstrate by the parent's failure to provide support is unjustifiable. Rather, once the petitioner has established, by clear and convincing evidence, that the natural parent has failed to support the child for at least the requisite one-year period, the *burden of going forward with the evidence* is on the natural parent to show some facially justifiable cause for such failure. The *burden of proof*, however, remains with the petitioner." (Emphasis in original.)

Stephen Beban has apparently been unemployed since February, 2007. The last child support paid through CSEA was February 12, 2007. There is currently an arrearage in excess of \$18,000.00.

Despite Beban's unemployment, the petitioner produced records indicating that he had monies available to him during the pertinent period, as follows:

Ex. C: 10-15-07	Sale of Marriott time-share	\$3,677.79
Ex. E: 9-30-07	Charles Schwab account #3089	364.22
Ex. F: 9-30-07	Charles Schwab account #3087	20.34
Ex. G: 9-30-07	Charles Schwab account #3096	1,000.15
Ex. H: 8-22-07	Bank account #6667, between	\$3.36 & 4,624.36

During the year from August of 2007 to August of 2008, Beban paid on a \$35,000.00 lease for an Infinity G35 (described by the manufacturer as an "entry-level luxury sedan") for transportation to find work.

Beban argues that he was unemployed or underemployed, and finally, that a 36 hour hospitalization followed by 60 days of intensive out-patient treatment rendered him unable to pay support. But *Bovett, supra*, also requires the Court to consider the respondent's circumstances during the entire year during which he failed to make support payments. The *Bovett* syllabus, paragraph three, states:

3. Under R.C. 3107.07(A), the probate court shall determine the issue of justifiable cause by weighing the evidence of the natural parent's circumstances for the statutory period for which he or she failed to provide support. The court shall determine whether the parent's failure to support the child *for that period as a whole* (and not just a portion thereof) was without justifiable cause.

Beban described his job loss in February, 2007, and his efforts to work as a free-lance contractor in various sales positions. He also acknowledged he had expenses during this period of charge cards (\$300-500 per month), loans (\$220 per month for timeshare), automobile lease, fuel and maintenance, and contributions to the household he shared with LaVerne (\$250-900 per month). During the pertinent period, he attempted various sales positions from which he was terminated for failure to meet expected sales quotas.

Beban's job search activities consisted of online application for sales jobs, followed by "waiting and seeing" if offers materialized. Beban did not describe taking any temporary positions just to meet his expenses and support obligation. He abandoned his search when a job was promised, although the company decided later not to fill the position. His sole means of search appeared to be the internet; despite having an expensive car lease, it is unclear how many face to face interviews actually took place.

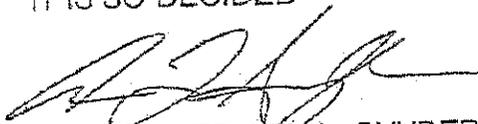
Beban's lifestyle did not adjust during periods of unemployment. Despite using funds for other commitments, he failed to pay any child support whatsoever from February 2007 until after he received notice of the adoption petition being filed in September, 2008. The petitioner has proven, by clear and convincing evidence, that Beban's employment status was not justifiable cause for his failure to pay support.

Finally, Beban asserts that his thirty-six hour hospitalization and sixty day outpatient program from July 14 to September 10, 2008 provide justifiable cause for his failure to pay support. *Bovett, supra*, directs the court to determine whether the parent's failure to support the child for that period as a whole (and not just a portion thereof) was without justifiable cause. Beban's illness temporarily rendered him unable to work; it does not excuse his non-payment of support for the other ten months of the pertinent year.

Upon due consideration, it is hereby decided that the consent of Stephen Beban to the adoption of Madalyn Ann Beban is not required. Attorney Colavecchio shall prepare a journal entry consistent with this decision. Parties shall have 14 days from the date of this decision to file an objection. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law

unless the party timely and specifically objects to that finding or conclusion as requested by Civ. R. 53(E)(3). This matter shall then proceed to hearing on the issue of whether it is in the child's best interest to be adopted.

IT IS SO DECIDED



MAGISTRATE ANN L. SNYDER

PROBATE COURT COUNTY OF SUMMIT, O.

FILED

JUL 20 2009

BILL SPICER, Judge

c: Attorney Diana Colavecchio
Attorney Scot Stevenson
Attorney Leslie Graske
Magistrate Tracy Stoner

A copy of this decision was mailed to counsel on July 20, 2009.

Motion to Certify a Conflict to the Ohio Supreme Court

Now comes appellee, Stepfather, pursuant to App.R. 25, and moves this Court for an order certifying this case to the Ohio Supreme Court as being in conflict with the decisions of other Ohio appellate courts. Specifically, the questions in conflict among the appellate districts are:

1. When a biological parent fails to provide any court ordered child support for one year, but gives the child two small gifts in the form of cash and a gift card, do such gifts constitute the provision of "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A)?
2. When reviewing a probate court's decision that a given level of material contribution does not constitute "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is contrary to the manifest weight of the evidence?

On each of the above two questions, the holding of this Court in the instant case is in conflict with decisions of other courts of appeals.

Memorandum in Support of Motion

Both the appellant and this Court have agreed that there is a split of authority concerning the nature and level of material contributions necessary to satisfy the support requirements of R.C. 3107.07(A). At page 8 of his brief on the merits, appellant stated, "Ohio courts have split in determining what constitutes support under R.C. 3107.07." Likewise at ¶16 of its judgment en-

try, this Court held, "There is a split of authority on whether certain gifts or other monetary contributions may constitute support." Specifically, this Court cited the following cases as holding that gifts of the nature of those provided in the instant case do *not* constitute sufficient support under R.C. 3107.07 as to preserve the necessity of the biological parent's consent to an adoption.

1. *In Re Adoption of Strawser* (10th Dist., 1987), 36 Ohio App.3d 232 (Christmas gifts of toys and clothes valued at \$133.00 coupled with medical insurance did not constitute "support.")

2. *In the Matter of the Adoption of McCarthy* (Jan. 17, 1992), 6th Dist. No. L-91-199 ("Support" only consists of those moneys paid directly to the custodial parent or child support agency).

3. *In re Adoption of Wagner* (11th Dist., 1997), 117 Ohio App.3d 448 (The payment of child support of \$329.40, along with the provision of health insurance did not constitute "support").

After citing these cases, this Court further stated at ¶16, "Neither the Ohio Supreme Court nor this Court, however, has addressed this particular issue." This lack of Supreme Court direction was lamented by Supreme

Court Justice Douglas in his concurring opinion in *In re Adoption of Bovett*

(1987), 33 Ohio St.3d 102, 107:

This case presents us with an opportunity to decide what the language of the statute means concerning support and/or communication during the critical one-year period. I agree that this initial determination should be made by the probate judge and his or her judgment should not be tampered with absent an abuse of discretion. What specific guidance needs to be given, however, is whether the making of one payment of support during the year or the sending of a Christmas card is enough to frustrate the operation of the statute. Certainly the legislature could not have meant such a result.***

In short, I think we need to set forth that the probate court is not bound to negate the effect of the statute simply because a natural parent has made a payment or two during the year or has communicated once or twice during the year. Until this court meets and decides that issue, inconsistent judgments of trial courts and courts of appeals on the question will continue to prevail.

Appellee respectfully suggests that it is now time for the Ohio Supreme Court to address the issue and resolve the conflict among the districts.

In addition to the foregoing, there is also a conflict between this Court and others as to the proper standard of review to be used by an appellate court when reviewing a lower court's decision as to the necessity for a parental consent.

Appellant argued that the proper standard of review was de novo whereas appellee asserted that the proper standard was whether the lower court's decision was against the manifest weight of the evidence. See, *Bovett*,

supra. This Court agreed with appellant, holding that the manifest weight standard set forth in *Bovett* was limited to the question of whether a parent's lack of support was justifiable.¹ That decision is in conflict with *In re Kat P.*, 2009-Ohio-3852, which applied the same manifest weight standard to review all aspects of the lower court's decision on the question of parental consent, stating broadly at ¶12 of its decision.

An appellate court will not disturb a trial court's decision on adoption unless it is against the manifest weight of the evidence. *In re Adoption of Masa* (1986), 23 Ohio St.3d 163. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

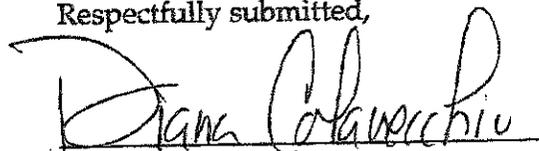
The court in *In re. Kat. P.* made no distinction between the standard of review on the question of the appropriate level of support and that applicable on the question of whether the failure to support was justifiable. See also *Garner v. Greenwalt*, Stark App. No. 2007 CA 00296, 2008-Ohio-5963, and *In re Adoption of B.M.S.*, Franklin App. No. 07AP-236, 2007-Ohio-5966, both of which

¹ While the precise issue in *Bovett* concerned justifiable cause for the lack of support, Justice Douglas' concurrence suggests that a reviewing court should also defer to the probate court on the initial question of whether a given level of support is sufficient.

applied a manifest weight standard of review to determine if a given amount of financial contribution constituted support.

Accordingly, pursuant to App.R. 25, and the Ohio Supreme Court's jurisdiction to resolve conflicts as provided in Article IV, Section 3(B)(4) of the Ohio Constitution, the appellee respectfully requests that this Court issue an order certifying the conflicts created by this case to the Ohio Supreme Court for resolution.

Respectfully submitted,



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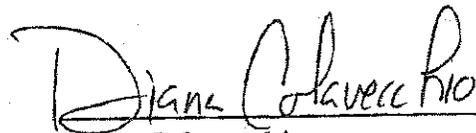


Virgil Arrington Jr. 0018647
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Cuyahoga Falls, Ohio 44223
330-923-9097
Counsel for Appellee

Proof of Service

The undersigned certifies that a true and accurate copy of the foregoing
was sent by regular U.S. Mail this 24 day of
MARCH, 2011 to:

Scot Stevenson
441 Wolf Ledges Parkway #400
Akron, Ohio 44311



Diana Colavecchio

FILED

JUN 22 2011

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

In the Matter of the Adoption of M.B.

Case No. 2011-0831

ENTRY

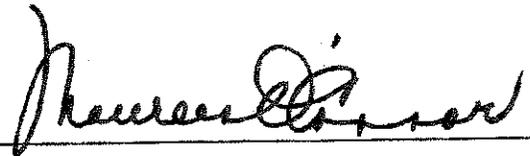
This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Summit County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issues stated in the court of appeals' Journal Entry filed April 18, 2011, as follows:

"1. When a biological parent fails to provide any court ordered child support for one year, do small monetary gifts paid directly to the child constitute the provision of "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A)?"

"2. When reviewing a probate court's decision regarding whether or not a biological parent's financial contribution constitutes "maintenance and support of the minor as required by law or judicial decree" for purposes of R.C. 3107.07(A), is the standard of review de novo or whether the decision is contrary to the manifest weight of the evidence?"

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Summit County.

(Summit County Court of Appeals; No. 25304)



Maureen O'Connor
Chief Justice

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment V. Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment XIV. Rights Guaranteed: Priveleges and Immunities of Citizenship, Due Process, and Equal Protection

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Archive

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS: RULES OF CONSTRUCTION

Effective through 6/10/2011

§ 1.49. Determining legislative intent

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

History. Effective Date: 01-03-1972

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Ohio Statutes

Title 31. DOMESTIC RELATIONS - CHILDREN

Chapter 3107. ADOPTION

Effective through 6/10/2011

§ 3107.07. Consent unnecessary

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.

(B) The putative father of a minor if either of the following applies:

(1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

(C) Except as provided in section 3107.071 of the Revised Code, a parent who has entered into a voluntary permanent custody surrender agreement under division (B) of section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A parent who is married to the petitioner and supports the adoption;

(F) The father, or putative father, of a minor if the minor is conceived as the result of the commission of rape by the father or putative father and the father or putative father is convicted of or pleads guilty to the commission of that offense. As used in this division, "rape" means a violation of section 2907.02 of the Revised Code or a similar law of another state.

(G) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably;

(H) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably;

(I) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(J) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101(b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101(b)(1)(F), as amended or reenacted.

(K) Except as provided in divisions (G) and (H) of this section, a juvenile court, agency, or person given notice of the petition pursuant to division (A)(1) of section 3107.11 of the Revised Code that fails to file an objection to the petition within fourteen days after proof is filed pursuant to division (B) of that section that the notice was given;

(L) Any guardian, custodian, or other party who has temporary custody of the child.

Effective Date: 10-29-1999; 2008 HB7 04-07-2009

Archive

Ohio Statutes

Title 31. DOMESTIC RELATIONS - CHILDREN

Chapter 3107. ADOPTION

Effective through 6/10/2011

§ 3107.161. Determining best interest of child in contested adoption – burden of proof

(A) As used in this section, "the least detrimental available alternative" means the alternative that would have the least long-term negative impact on the child.

(B) When a court makes a determination in a contested adoption concerning the best interest of a child, the court shall consider all relevant factors including, but not limited to, all of the following:

- (1) The least detrimental available alternative for safeguarding the child's growth and development;
- (2) The age and health of the child at the time the best interest determination is made and, if applicable, at the time the child was removed from the home;
- (3) The wishes of the child in any case in which the child's age and maturity makes this feasible;
- (4) The duration of the separation of the child from a parent;
- (5) Whether the child will be able to enter into a more stable and permanent family relationship, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements;
- (6) The likelihood of safe reunification with a parent within a reasonable period of time;
- (7) The importance of providing permanency, stability, and continuity of relationships for the child;
- (8) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
- (9) The child's adjustment to the child's current home, school, and community;
- (10) The mental and physical health of all persons involved in the situation;

(11) Whether any person involved in the situation has been convicted of, pleaded guilty to, or accused of any criminal offense involving any act that resulted in a child being abused or neglected; whether the person, in a case in which a child has been adjudicated to be an abused or neglected child, has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether the person has been convicted of, pleaded guilty to, or accused of a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the person's family or household; and whether the person has been convicted of, pleaded guilty to, or accused of any offense involving a victim who at the time of the commission of the offense was a member of the person's family or household and caused physical harm to the victim in the commission of the offense.

(C) A person who contests an adoption has the burden of providing the court material evidence needed to determine what is in the best interest of the child and must establish that the child's current placement is not the least detrimental available alternative.

Effective Date: 11-06-1996