

given notice of the petition and hearing date. She filed an objection to the petition, followed by a brief contesting the adoption. Appellant, who is also remarried, filed a request to have her husband appointed as a stand-in for her at the hearing and/or for a phone appearance, both of which were denied by the trial court.

{¶ 3} Appellant's husband appeared at the hearing, and the court explained on the record that appellant's husband did not have standing to appear on appellant's behalf. The court explained that the law does not provide for appellant to contest the adoption except through providing the court with information through counsel. The court also answered questions asked by appellant's husband.

{¶ 4} The court subsequently issued entries finding appellant's consent to the adoption was not necessary and granting the adoption. Appellant now appeals the trial court's decision that her consent to the adoption was not necessary. In her *pro se* brief, appellant raises various arguments regarding the adoption procedure and the court's decision, but does not allege a specific assignment of error.¹ We construe appellant's brief as a single assignment of error arguing that the court erred in finding her consent to the adoption was not necessary.

{¶ 5} The right of natural parents to the care and custody of their child is one of the most precious and fundamental in law. *In re A.N.L.*, 12th Dist. Nos. CA2004-11-131, CA2005-04-046, 2005-Ohio-4239. *See also Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394 (1982). Because adoption terminates these rights, Ohio law requires parental consent to an adoption unless a specific statutory exemption exists. *In re Caudill*, 4th Dist. No. 05CA4, 2005-Ohio-3927; R.C. 3107.06.

1. Appellant makes various arguments regarding the adoption assessor's investigation and failure to contact her and investigate the failure to communicate and failure to support. However, the duty of an adoption assessor is to ascertain whether the person seeking to adopt a child is suitable, not whether the consent of the natural parent is required. *See* R.C. 3107.031. Instead, it is the duty of the court to determine whether consent of a natural parent is required based on the evidence presented at the hearing. *See* R.C. 3107.07.

{¶ 6} An exemption to parental consent exists if a court finds, after notice and a hearing, that in the year preceding the adoption petition, the parent failed without justifiable cause to have more than de minimus contact with the child or failed to provide support and maintenance for the child. R.C. 3107.07(A).

{¶ 7} In this case, the petition for adoption alleged that appellant failed to communicate with the children and also failed to support the children for the requisite one-year time period. Appellant responded by filing an objection to the petition and also a brief alleging that she was prevented from communicating with the children by their father.

{¶ 8} When a petitioner for adoption alleges that a parent's consent is not required based on a failure to communicate, the burden is on the petitioner to establish by clear and convincing evidence both that the parent failed to communicate and that the failure was without justifiable cause. *In re Adoption of Holcomb*, 18 Ohio St.3d 361 (1985), paragraph four of the syllabus. Justifiable cause can be established with evidence that there was significant interference or significant discouragement of communication by the custodial parent. *Id.* at paragraph three of the syllabus.

{¶ 9} Likewise, when the petitioner alleges that a parent's consent is not required due to a failure to provide support for the child, the burden is on the petitioner to establish both that the parent has failed to support the child for the requisite one-year period and that this failure was without justifiable cause. *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, ¶ 22. The Ohio Supreme Court recently held that a determination that a parent failed to provide "support and maintenance" must be based on a failure to make payments as required by law or judicial decree. *Id.* at ¶ 20; R.C. 3107.07(A). Whether a parent has failed to provide support and whether justifiable cause exists for the failure to support when a parent is incarcerated are factually specific determinations based on the circumstances and evidence presented at the hearing. See *In re D.R.*, 7th Dist. No. 11BE11, 2011-Ohio-4755.

{¶ 10} In order for a court to find a natural parent's consent to an adoption is not required, the petitioner must establish by clear and convincing evidence that in the year preceding the petition, the parent either failed to support the child or failed to communicate with the child. *In re M.B.* at ¶ 22. Once the petitioner has established this failure, the burden of going forward shifts to the parent to show some facially justifiable cause for the failure. *In re Adoption of Bovett*, 33 Ohio St.3d 102, 104 (1987). The burden of proof, however, remains with the petitioner. *Id.* If the natural parent does not appear at the hearing, or does not go forward with evidence of justification, the petitioner has only the obligation of establishing the failure of support or communication. *Id.*

{¶ 11} In this case, the transcript of the hearing evidences only a discussion with appellant's husband regarding his inability to legally represent her interests at the hearing. No further testimony or evidence was presented at the hearing to satisfy the petitioner's initial burden to establish a failure to support or a failure to communicate. Because appellant was not present at the hearing, and was without counsel, she was legally unable to present evidence of justification. However, appellant's burden of producing some evidence of justification did not arise until the petitioner established the failure to communicate or support.

{¶ 12} Because no evidence was presented on the record at the hearing, this court must find, based on the record before us, the petitioner did not meet her burden to establish appellant failed to communicate or to support the children for the year preceding the petition. Accordingly, we must reverse the trial court's determination that appellant's consent to the adoption is not required and reverse the entry granting the adoption. We hereby remand the case to the probate court to hold a hearing on the record in which both the petitioner and appellant are given the opportunity to present evidence and testimony.

{¶ 13} Judgment reversed and remanded.

RINGLAND and PIPER, JJ., concur.