

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

In The Matter Of:  
The Adoption of  
E.A.K.

Case No. 20205\*\*\*

**E N T R Y**

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This matter came on for hearing this 1<sup>st</sup> day of December, 2020 to consider the Petition of J.W.K., filed herein May 22, 2020, to adopt his stepdaughter, E.A.K. At issue is the question of whether or not the consent of the biological father, Austin, is a necessary prerequisite to the Court's consideration of said adoption petition. The Petitioner has suggested, per R.C. 3107.07, that the consent of Austin is not a necessary prerequisite to the Court's consideration as a result of his failure, without justifiable cause, to either provide more than de minimus contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition herein, or provide for the maintenance and support of the child as required by law or judicial decree for the same period of time.

J.W.K. did appear with counsel, Attorney Matthew Barbato. Austin appeared with counsel, Attorney Robert D. Goelz. The Court received several exhibits and the testimony of Austin and the child's biological mother, Lacy. The Court then afforded legal counsel the opportunity to brief the matter. Both counsel availed themselves of that opportunity and each filed a brief herein on January 4, 2021.

After consideration of the testimony and the exhibits presented to the Court, as well as the Briefs filed with this Court, the Court renders the following decision.

Some background. E.A.K. is an eight year old child born of the marriage between Austin and Lacy. This marital relationship soured and the biological mother, Lacy, filed an action in divorce which led to a final decree of divorce filed in Preble County on April 8, 2015. That court named Lacy as the residential and custodial parent of the child but granted “parenting time” to Austin. Despite awarding custody to Lacy, the court, at the request of the parties, directed Austin to pay “zero dollars” for child support for said child. The Court wrote that “this is a deviation of statutory child support due to the agreement between the parties and because the non-residential parent spends time with the child every week.” This notwithstanding, Austin paid \$1,590 in 2018 and \$3, 612 in 2019 towards the child’s support.

In May of 2018, Austin was arrested while visiting with the child and charged with operating a motor vehicle while under the influence of alcohol. He concedes that he has not had any contact with the child since that time.

The Court directs its attention to the time period of May 22, 2019 through May 22, 2020 --- the date that the instant Petition for Adoption was filed in this Court. The Court first considers the allegation that Austin failed to support the child during that period of time. The common law duty of support by a parent of that parent’s child was codified in R.C. 3103.031 wherein it is written: “A biological parent of a child ... assumes the parental duty of support for that child...” In this case, however, the Preble County court specifically addressed Austin’s duty to support the child and accepted an agreement between the parents that directed that this statutory duty of support be waived.

The Court also considers here a text exchange between the parties wherein Austin tells Lacy “I have to be in Eaton tomorrow. I know E.A.K. probably needs a springish clothes/shoes

so I'm going to send you money". Lacy replied "No thanks". Austin then writes, "I send it please pick it up," to which Lacy replies "I don't want it."

Finally, and as noted above, Austin tendered the sum of \$3,612 in 2019 towards the child's support. As there was no specific testimony as to the timing of this payment(s), the Court assumes it was spread out over the twelve month period of 2019. Austin paid this despite his agreement with Lacy --- which was memorialized by court order --- that he be excused from making any support payments for the child. While there is no evidence that Austin tendered any payments for the support of the child during the first four and one-half months of 2020, the Court finds that the payments made in 2019 were significant. As such, the Court finds that Austin did provide for the maintenance and support of his child during the applicable one year period of time.

Even, however, should this Court have found that these payments were insignificant, the Court would necessarily find that Austin's lack of support for the child was justifiable. It was, after all, reasonable for him to rely upon and act pursuant to the Preble County Court order which essentially advised him that he need not pay any support for the child. See *In Re Adoption of B.I.* 157 Ohio St. 3d 29, 2019 – 2450. Moreover, Lacy impeded his efforts to support the child when she refused to accept at least one of Austin's offers of financial assistance. This Court finds no equity in now punishing Austin for relying on the integrity of that original court order as well as the wishes of Lacy.

Therefore, with respect to the issue of support and maintenance of the child, the Court finds that Austin made significant support payments for the benefit of the child and that any deficiency therein is justifiably excused.

The Court now considers the second prong of the Petition: Whether Austin failed to provide more than de minimus contact with regard to the minor child for said applicable one year period of time during this time. Austin concedes that he failed to have any contact with the child during this time. In light of this concession, the sole question becomes whether this failure was justifiable. Moreover, the burden of going forward on this issue shifts to Austin to show some facially justifiable cause for this failure. *In Re Adoption of Bobett (1987), 33 Ohio St. 3rd 102.* Toward this end Austin did testify and presented copies of the applicable court order regarding his parenting time as well as a chain of text messages between he and Lacy. In short, he blames Lacy for this failure.

The evidence shows that Lacy did secure the assistance of an attorney to write Austin a letter on January 21, 2019 advising him of her desire that all subsequent visitation between Austin and the child be supervised; and further advising him that if he was unwilling to agree to the same, that she would present the matter to the court. Apparently no such agreement was reached and in 2019, Lacy brought the matter back before the Preble County court on a motion to modify parenting time. The magistrate rendered a decision on September 27, 2019. Noting that Austin did not appear before the Court to defend the motion to modify parenting time, the magistrate concluded that Austin “should not have parenting time with the parties’ child until he submits to a hair follicle test and petitions the court for parenting time.” The magistrate’s decision was approved by the Court on December 3, 2019.

Austin acknowledges that he never submitted a hair follicle test. Nor did he file a motion to reinstate his right to parenting time with the child, despite consulting with legal counsel. Rather, Austin opted to informally attempt to persuade Lacy to permit him to speak with the

child by telephone or by way of Facetime technology. The parties presented the Court with several text messages wherein Austin made such a request. Lacy denied these requests citing the wishes of the child and the length of time which had passed since the last visitation between Austin and the child. She explained to this Court that she “understood” the magistrate’s decision to bar any and all contact between Austin and the child, including telephone or Facetime contact; and this is what she did.

The Court initially notes that the vast majority of the text messages between Austin and Lacy are outside the one year applicable period of time. With respect to Austin’s Exhibit A, the last text message in which he requested an opportunity to visit with the child was on May 13, 2019 --- again, outside the applicable time period. While Austin otherwise inquires about the activities of the child during the applicable period of time, he never requests the opportunity to visit with her.

Both Austin and Lacy, however, testified that the 2019 court order modifying parenting time governed their respective approaches to Austin’s contact with the child. The Court here first notes that this decision was not filed by the Court until December 3, 2019 --- in the seventh month of the 12 month applicable period of time. From May 22, 2019 through December 3, 2019, Austin was in no way being prevented from visiting with the child pursuant to any court order.

Moreover, from December 3, 2019 through May 22, 2020 --- the final five months of the applicable twelve month period of time --- said order merely suspended “parenting time” between Austin and the child “until he submitted to a hair follicle test and petitioned the court for parenting time.” That order did not deny Austin the right to *all contact* with his child. Had there

been a full “no-contact” order in effect during the twelve month applicable period of time, the court could have found justifiable cause for Austin’s failure to have contact with his child.

However, that was not the case here.

When, as in this case, there is a court order restricting visitation, but not imposing a full no-contact order, such an order does not afford a natural parent justifiable cause to fail to have contact with the child. *In Re Adoption of Mineer*, 4<sup>th</sup> Dist. 2004-Ohio-656; *In Re Adoption of K. K.*, 9<sup>th</sup> Dist. 2006-Ohio-1488.

The Court thinks it noteworthy that Austin took no steps to defend the request for the modification, to challenge the court order in question, or to comply with the court order’s stated conditions for visitation --- that is, to submit a hair follicle test and petition the court for parenting time. Even in the face of Lacy’s less than hospitable rebuffs to Austin’s attempt to talk with his child, Austin failed to avail himself of the straightforward legal avenues to see his child. Moreover, the Court finds this failure lasted beyond the one year applicable time period --- extending instead a full two years back to the date of the arrest in question in May of 2018. More is expected from a parent seeking to visit their child.

Accordingly, the Court finds that Austin’s failed to provide more than de minimus contact with his child during the applicable one year period of time; and further finds that this failure was not justifiable under the circumstances in this case. As a result of this failure, and pursuant to R.C. 3107.07, the consent of Austin is not a necessary prerequisite to the Court’s consideration of the Petition for the adoption of his child filed May 22, 2020.

IT IS SO ORDERED.

**THIS IS A FINAL APPEALABLE ORDER.**

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RICHARD P. CAREY, JUDGE

cc: Matthew J. Barbato, Esq.  
Robert D. Goelz, Esq.