To Do or Not to Do: Bypassing Parental Consent for Adoption

Adoption Consent Statute R.C. 3107.07

Consent to an adoption (by a biological parent) is not required if:

1. They have failed without justifiable cause to provide more than de minimis contact with the child for the one-year period of time immediately prior to when the petition for adoption was filed; OR

2. They have failed to provide for the maintenance and support of the minor as required by law or judicial decree for the one-year period of time immediately prior to the petition for adoption was filed.

** Applies to both step-parent adoptions and to third-parties with legal custody.

** One year period of time runs from the date the petition for adoption is filed (strictly construed).

** If an absent parent files a motion to establish/re-establish contact with a child in domestic relations/juvenile court BEFORE an adoption is filed, that will be considered by the probate court to be "contact" with the child. *In re P.A.C., 126 Ohio St.3d 236, 2010-Ohio-3351.*

Recent Case Law Relative to Consent of a Biological Parent

- *In re Adoption of B.I., 157 Ohio St.3d 29, 2019-Ohio-2450*

  Holding: When a judicial decree indicates that a biological parent has a $0.00 child support obligation, an adoption petitioner cannot succeed in bypassing parental consent for the adoption based on that parent's nonsupport of the child

  Take Away: Do NOT set a parent's child support obligation at zero if your client may want an adoption option in the future

- *In re Adoption of A.C.B., 159 Ohio St.3d 256, 2020-Ohio-629*

  Holding: Whether a parent has provided the financial support necessary to preserve their right to withhold consent to adoption is measured by the terms of the judicial decree. When a parent was ordered to pay $85/week but paid only one single payment of $200 in a year (and was in arrears $17,000), it did not amount to sufficient support to prevent the adoption; a complete absence of financial support is not required.

  Take Away: Sporadic or infrequent support payments, and significant support arrears, may very well bypass parental consent for adoption.

Other Applicable Adoption Case Law Developments

- *In the matter of the Adoption of M.M.F., 163 Ohio St.3d 521, 2020-Ohio-6785*

  Holding: Indigent parents in adoption proceedings are afforded the right to court-appointed counsel

  Take Away: Adoption matters (even simple ones) are now hotly litigation, longer and more expensive for the petitioners.

- *State ex rel. Allen City Children Servs. Bd. v. Mercer Cty. Common Pleas Court, Probate Div., 150 Ohio St.3d 230, 2016-Ohio-7382*

  Holding: Probate court's authority to order preadoption placement of a child is within its exclusive original jurisdiction even when the child is subject to continuing jurisdiction in juvenile court.

  Take Away: Even when a juvenile/domestic relations court case is ongoing (ie: CSB involved in abuse/neglect/dependency case OR private custody matter), parties can circumvent that proceeding by filing an adoption matter alleging the parent(s) consent is not necessary. Biological parent(s) can also circumvent proceedings by consenting to an adoption of the child by another.

- *In re B.N.S., 2020-Ohio-4413 (12 Dist. Court Appeals)*

  Holding: When proceedings in regards to a child are pending in both domestic relations/juvenile court (visitation matters) and probate court (adoption matter alleging parents' consent to an adoption can be bypassed), the DR/JV court may within its discretion stay their proceedings pending the outcome of the adoption but is not required to do so.

  Take Away: If you're the petitioner in an adoption, request stays in the other courts so that children are not court-ordered to visit with a biological parent who then becomes extinguished quickly thereafter.

Ohio Revised Code

Section 3107.07 Consent unnecessary.

Effective: March 23, 2015
Legislation: Senate Bill 250, Senate Bill 207 - 130th General Assembly

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 fifteen 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, putative father, or mother, of a minor if the minor is conceived as the result of the commission of rape or sexual battery by the father, putative father, or mother and the father, putative father, or mother 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 and "sexual battery" means a violation of section 2907.03 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.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in R.C. 1.52(B) that amendments are to be harmonized if reasonably capable of simultaneous operation.

IN RE ADOPTION OF B.I.

[Cite as *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450.]

*Adoption—R.C. 3107.07(A)—A parent's nonsupport of his minor child pursuant to a judicial decree ordering zero support does not extinguish the requirement of that parent's consent to the adoption of the child—Appellee-father did not "fail[] without justifiable cause * * * to provide for the maintenance and support of the minor as required by law or judicial decree" under R.C. 3107.07(A)—Court of appeals' judgment affirming probate court's judgment affirmed.*

(Nos. 2018-0181, 2018-0182, 2018-0350, and 2018-0351—Submitted January 8, 2019—Decided June 25, 2019.)

APPEAL from and CERTIFIED by the Court of Appeals for Hamilton County, Nos. C-170064 and C-170080, 2017-Ohio-9116.

KENNEDY, J.

{¶ 1} This is a discretionary appeal and certified-conflict case from the First District Court of Appeals involving R.C. 3107.07(A), the statute that sets forth when the adoption of a minor may proceed without a parent's consent. Pursuant to that statute, a parent's consent is not required when the court "finds by clear and convincing evidence that the parent has failed without justifiable cause to provide * * * for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding * * * the filing of the adoption petition." In this case, we consider the effect on the operation of that statute of a judicial decree relieving a parent of an obligation to provide child support—is a parent susceptible to the severance of his or her parental rights for failing to provide maintenance and support for at least one year when a court has

issued a decree relieving the parent of any obligation to pay child support? We hold that pursuant to the plain and unambiguous language of R.C. 3107.07(A), when read in conjunction with the statutory scheme instructing how a court of competent jurisdiction calculates a child-support obligation, a parent's nonsupport of his or her minor child pursuant to a judicial decree does not extinguish the requirement of that parent's consent to the adoption of the child.

FACTS AND PROCEDURAL HISTORY

{¶ 2} K.I. ("the mother") and appellee, G.B. ("the father"), are the natural parents of B.I., who was born in 2007. The mother and father were never married. In 2016, the mother's husband, appellant, G.I. ("the stepfather"), filed in the Hamilton County Probate Court a petition seeking to adopt B.I. and arguing that under R.C. 3107.07(A), the father's consent was not required. That statute provides that a natural parent's consent to adoption is not necessary if the probate court determines

> 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 * * * the filing of the adoption petition.

R.C. 3107.07(A).

{¶ 3} The stepfather argues that the father had failed to provide support for B.I. during the year preceding the filing of the petition; he abandoned his claim that the father had failed to provide more than de minimis contact in that period (failure to maintain contact had been the basis for a failed attempt by the stepfather to adopt B.I. in the Clermont County Probate Court in 2014).

{¶ 4} The father entered prison in 2009 and remained there for the relevant time period. In 2010, the mother requested the Clermont County Juvenile Court to terminate the father's child-support obligation and to reduce his arrearages to zero. The court issued an order stating as follows: "It is hereby ordered * * * that the Defendant's current support obligation is terminated at the request of Plaintiff. At Plaintiff's request, the outstanding support arrearage is reduced to $0.00. CSEA [Child Support Enforcement Agency] is hereby directed to adjust its records accordingly."

{¶ 5} During the one-year period prior to the filing of the petition for adoption, the father had received $18 a month as prison income and his parents and a friend had deposited $5,152 into his prison account; that year, the father spent $4,681.62 in the prison commissary. There is no dispute that the father provided no financial support to B.I. during that period.

{¶ 6} The probate-court magistrate determined that even though the father was not subject to a child-support order under a judicial decree, he still had money available and an obligation as a parent to provide child support within his means. Finding that the father had provided no child support during the applicable year, the magistrate concluded that the father's consent to the adoption was not required. The probate court overruled the magistrate, finding that a valid, zero-support order provides justifiable cause for a failure to provide maintenance and support under R.C. 3107.07(A).

{¶ 7} The stepfather filed two appeals in the First District Court of Appeals, one upon the probate court's filing of its opinion granting the father's objections and overruling the magistrate's decision and the second upon the probate court's dismissal of the adoption petition. The appellate court consolidated the cases and affirmed the probate court's judgment, holding that "under R.C. 3107.07(A), where a court has ordered a parent to pay no child support or zero child support, that court order of support supersedes any other duty of support 'required by law,' and

therefore the parent cannot fail without justifiable cause to provide maintenance and support of a minor child." 2017-Ohio-9116, 101 N.E.3d 1171, ¶ 19.

{¶ 8} The First District certified a conflict between its judgments and the judgments of the Fifth District Court of Appeals in *In re Adoption of A.S.*, 5th Dist. Licking No. 10-CA-140, 2011-Ohio-1505, and *In re Adoption of Z.A.*, 5th Dist. Licking No. 16-CA-05, 2016-Ohio-3159. This court determined that a conflict exists between the judgments below and the Fifth District's judgment in *A.S.* and ordered the parties to brief the following question:

> "In an adoption-consent case under R.C. 3107.07(A) in which a court has previously relieved a parent of any child-support obligation, does that previous order supersede any other duty of maintenance and support so as to provide 'justifiable cause' for the parent's failure to provide maintenance and support, therefore requiring the petitioner to obtain the consent of that parent?"

152 Ohio St.3d 1441, 2018-Ohio-1600, 96 N.E.3d 297, quoting the court of appeals' February 27, 2018 entry.

{¶ 9} Additionally, the stepfather filed jurisdictional appeals that we accepted. The stepfather asserted the following two propositions of law in those cases:

> Proposition of Law No. I: An adoption consent case under R.C. 3107.07(A) must be decided on a case-by-case basis through the able exercise of the trial court's discretion. The trial court must give due consideration to all known factors in deciding whether a natural parent's consent is required under the statute.

> Proposition of Law No. II: In an adoption consent case under R.C. 3107.07(A), a court order setting the natural parent's child support obligation at zero does not justify the parent's failure to provide maintenance and support to his or her child as a matter of law. Instead, a trial court must exercise its discretion and weigh all of the circumstances around which a parent has failed to provide maintenance and support; and a so-called zero support order is just one factor (among many) that the court must consider.

See 152 Ohio St.3d 1441, 2018-Ohio-1600, 96 N.E.3d 297.

{¶ 10} We sua sponte consolidated the certified-conflict cases and the jurisdictional appeals. *Id.*

LAW AND ANALYSIS

{¶ 11} This case—and the statute at the center of this case—is not about child-support enforcement; it is about the severance of parental rights. At its core, this case raises a critical question: Can child-support obligors rely on the authority of court orders that affect the most important aspects of their lives? Can a parent who relies on a valid order of a court of competent jurisdiction suffer—because he or she relied on that order—the " 'family law equivalent of the death penalty,' " *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991), the severing of parental rights through the adoption of the parent's child by another person without the parent's consent?

The application of R.C. 3107.07(A)

{¶ 12} This case turns on a phrase in R.C. 3107.07, and we must strictly construe the statute in favor of the retention of parental rights. "Because adoption terminates fundamental rights of the natural parents, 'we have held that "* * * [a]ny exception to the requirement of parental consent [to adoption] must be strictly

construed so as to protect the right of natural parents to raise and nurture their children." ' " (Ellipsis and brackets sic.) *In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E.2d 245, ¶ 6, quoting *In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986), quoting *In re Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976). "[I]n construing R.C. 3107.07(A), this court is 'properly obliged to strictly construe * * * [its] 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.' " (Ellipsis and brackets sic.) *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127, 132, 585 N.E.2d 418 (1992), quoting *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 366, 481 N.E.2d 613 (1985).

{¶ 13} R.C. 3107.07 provides:

> 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.

{¶ 14} In this case, we do not face the question whether the father had de minimis contact with his child, B.I.; the stepfather's 2014 attempt to adopt on that basis in Clermont County failed, and the stepfather has abandoned that claim in this case. Here, we consider only whether the father "has failed without justifiable cause * * * to provide for the maintenance and support of the minor as required by law or judicial decree," R.C. 3107.07(A).

{¶ 15} To determine whether a parent has failed to provide child support as required by law or judicial decree involves a three-step analysis. The court must first determine what the law or judicial decree required of the parent during the year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner. Second, the court determines whether during that year the parent complied with his or her obligation under the law or judicial decree. Third, if during that year the parent did not comply with his or her obligation under the law or judicial decree, the court determines whether there was justifiable cause for that failure.

{¶ 16} We stand in this case at the first step—determining what the law or judicial decree required of the parent for the year prior to the filing of the petition. If the father had no obligation to provide child support, the analysis ends there. But appellate courts, as did the probate court in this case, have tended to consider the existence of a court order establishing no obligation of support as part of the justifiable-cause determination, *e.g.*, *In re Adoption of A.N.W.*, 7th Dist. Belmont No. 15 BE 0071, 2016-Ohio-463, ¶ 31 ("a zero support order or a no support order constitutes justifiable cause for failing to provide support and maintenance"); *In re Adoption of K.A.H.*, 10th Dist. Franklin No. 14AP-831, 2015-Ohio-1971, ¶ 23 ("The zero support order is a justifiable excuse for [the father's] failing to pay support for his children"). Indeed, this court, in determining that a conflict exists among appellate districts, ordered briefing in this case on the issue whether a court order relieving a parent of a child-support obligation provides justifiable cause for the parent's failure to provide maintenance and support. But the issue is not whether a decree ordering zero support—or one that terminates a previously ordered support obligation or modifies a previously ordered support amount to zero—justifies a failure to provide maintenance and support; instead, the issue is

whether the existence of a no-support order[1] means that the parent subject to it was under no obligation to provide maintenance and support. Determining the parent's obligation—that which was required by law or judicial decree for the year prior to the filing of the petition—is the threshold issue.

{¶ 17} Therefore, the crux of the issue before us is this: if a court has issued a decree relieving a parent of any child-support obligation, is there a separate obligation that arises by law under which that parent still is required to provide maintenance and support to the child? The answer to that question is no. The General Assembly created a binary system in which a parent has a general obligation of support toward a child when the parent's responsibilities are not the subject of a court order and a specific obligation of support when a court has determined the parent's obligation by decree.

R.C. 3107.07 is connected to Ohio's statutory child-support scheme

{¶ 18} R.C. 3107.07, the statute declaring when the consent of a parent is not required for a minor's adoption, does not exist in a vacuum. It is part of a complex statutory scheme involving laws that regulate and control the most intimate aspect of our personal lives—our family relationships.

{¶ 19} R.C. 3103.03(A) contains the statutory declaration that all spouses and parents have an obligation to support themselves, each other, and their minor children from their own property and labor:

> Each married person must support the person's self and spouse out of the person's property or by the person's labor. If a married person is unable to do so, the spouse of the married person must assist in the support so far as the spouse is able. The biological

1. The term "no-support order" encompasses, for purposes of this opinion, orders terminating previously ordered support, zero-support orders, and orders modifying a previously ordered support amount to zero.

> or adoptive parent of a minor child must support the parent's minor children out of the parent's property or by the parent's labor.

{¶ 20} The statute subsumes the common-law obligation: "The common-law duty to support one's minor children has been replaced by R.C. 3103.03." *Nokes v. Nokes*, 47 Ohio St.2d 1, 5, 351 N.E.2d 174 (1976); *see also Haskins v. Bronzetti*, 64 Ohio St.3d 202, 204, 594 N.E.2d 582 (1992) (lead opinion) ("The General Assembly has, in various instances, codified the common-law duty imposed on parents to support their minor children. For example, former R.C. 3103.03 placed a statutory burden on the mother and father, regardless of their marital status, to support their minor children" [footnote omitted]).

{¶ 21} R.C. 3103.03 sets forth a parent's obligation to support his or her children in the absence of a child-support order. "Under R.C. 3103.03, all parents, whether married or not, have a duty to support their minor children; it follows logically from this that all children have a right to be supported by their parents, regardless of the parents' marital status." *In re Dissolution of Marriage of Lazor*, 59 Ohio St.3d 201, 202, 572 N.E.2d 66 (1991). But this general statutory declaration does not end our inquiry; it is merely the beginning.

{¶ 22} Another statute comes to the forefront when marriages end. "R.C. 3109.05 sets forth the power of the trial court to make child support orders when a marriage terminates." *Meyer v. Meyer*, 17 Ohio St.3d 222, 223, 478 N.E.2d 806 (1985). The domestic-relations court "may order either or both parents to support or help support their children" pursuant to R.C. 3109.05; parental obligations are determined by a support order issued in compliance with the process set forth in R.C. Chapter 3119.

{¶ 23} Child support is established in a similar manner in cases in which the parents of the child were never married and paternity has been established in a paternity action or by an acknowledgment of paternity in the juvenile court. *See*

R.C. 3111.13(C) and 3111.29. The juvenile court may issue a child-support order; "[t]he juvenile court shall exercise its jurisdiction in child support matters in accordance with section 3109.05 of the Revised Code." R.C. 2151.23(F)(2). Therefore, like the domestic-relations court, the juvenile court determines a parent's support obligation pursuant to R.C. 3109.05 in accord with R.C. Chapter 3119.

{¶ 24} The trial court also has the ability to modify the child-support order:

> It has long been recognized in Ohio that a court retains continuing jurisdiction over its orders concerning the custody, care, and support of children * * *. A child affected by such an order is considered a ward of the court, which may always reconsider and modify its rulings when changed circumstances require it during the child's minority.

Singer v. Dickinson, 63 Ohio St.3d 408, 413-414, 588 N.E.2d 806 (1992). In the event of a substantial change of circumstances, the court may modify the child-support amount. R.C. 3119.79. When the court issues or modifies a child-support order, it does so by applying statutory guidelines; it "calculate[s] the amount of the obligor's child support obligation in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to 3119.24 of the Revised Code." R.C. 3109.02.

{¶ 25} When modifying a child-support order, the trial court has the authority to reduce a child-support order to zero in two ways. Pursuant to its authority under R.C. 3119.22 and 3119.23, the court may deviate from the child-support guidelines and modify a parent's obligation of support to zero. And pursuant to R.C. 3119.06, the court has the discretion to reduce a minimum order

of support to zero. But the court maintains jurisdiction to make future modifications to the order.

The child-support order establishes the parent's obligation

{¶ 26} Once issued, the child-support order determines what the parent's obligation is. As noted above, R.C. 3103.03 replaced the common-law obligation to support one's minor children. And this court has stated that "[t]he judicial decree of support simply incorporates the common-law duty of support." *In re Adoption of McDermitt*, 63 Ohio St.2d 301, 305, 408 N.E.2d 680 (1980). That incorporation of the common-law obligation of support—itself subsumed into R.C. 3103.03—into the judicial decree means that there are not side-by-side obligations to provide support, one under R.C. 3103.03 and one under a child-support order issued pursuant to R.C. 3109.05. Instead, the child-support order, when it exists, establishes the obligation.

{¶ 27} Ohio's statutory scheme regarding families and children makes clear that there are two statuses of parental obligation: first, a general obligation of parents to support their children imposed by law in R.C. 3103.03, and second, a specific child-support obligation imposed by judicial decree pursuant to R.C. 3109.05 and Chapter 3119 that supersedes the general obligation once the court issues its decree. When R.C. 3107.07(A) uses "or" in the phrase "by law or judicial decree," it recognizes that a parent's obligation of support can have one of two possible statuses—general or specific. But a parent can have only one obligation status at a time. "To additionally compel the application of R.C. 3103.03 when there is already a valid judicial order in existence would be to incorrectly interpret R.C. 3107.07 to mean: 'as required by law *in addition to a* judicial decree where a * * * court has determined that child support should be not set.' " (Emphasis sic.) *In re Adoption of Jarvis*, 9th Dist. Summit No. 17761, 1996 WL 724748, *5 (Dec. 11, 1996). A parent is subject either to the general obligation or to a specific obligation and is evaluated accordingly.

The father's obligation under R.C. 3107.07(A) is defined by the Clermont County support order

{¶ 28} Here, the father's child-support obligation was determined by the Clermont County Juvenile Court. A juvenile court has continuing jurisdiction to modify a child-support obligation. In this case, the mother requested that the father's existing obligation of child support be terminated and that any child-support arrearages he owed be vacated. It is undisputed that the trial court had the authority to reduce the existing child-support obligation to zero. The trial court could have used one of two vehicles: its authority under R.C. 3119.22 and 3119.23 to deviate from the child-support guidelines or its authority under R.C. 3119.06 to reduce the minimum order of support to zero. The court granted the mother's request, ordering as follows: "[T]he Defendant's current support obligation is terminated at the request of Plaintiff. At Plaintiff's request, the outstanding support arrearage is reduced to $0.00. CSEA is hereby directed to adjust its records accordingly."

{¶ 29} The court's order means that for the time period at issue in this case, the father's duty "to provide for the maintenance and support of the minor as required by * * * judicial decree," R.C. 3107.07(A), was reduced to zero. The only question remaining is whether after the trial court reduced the child-support obligation to zero, the father had some other obligation under the statutory scheme to continue to provide maintenance and support to B.I. He did not.

{¶ 30} As set forth above, R.C. 3103.03(A) imposed a general obligation on the father to support B.I. from his own property and labor. However, once the parties invoked the jurisdiction of the juvenile court to establish parentage, calculate child support pursuant to the guidelines, and issue an order of child support pursuant to the guidelines, the court's decree thereafter superseded the general obligation of support set forth in R.C. 3103.03(A). If the support order did not, in fact, supersede the father's general obligation of support under R.C.

3103.03(A), then the mother's attempt to modify the existing child-support order would have been a vain act—it would have been of no benefit to the father if after the termination of his current obligation under the support order, he remained obligated under R.C. 3103.03(A) to provide maintenance and support.

{¶ 31} The juvenile court had jurisdiction to relieve the father of his prior child-support obligation at the mother's request and has continuing jurisdiction to modify the father's current support obligation from zero to an amount calculated by the court. This is not an instance of there being no support order in place; it is an instance of a no-support order that is subject to modification.

{¶ 32} The General Assembly has enacted a specific statutory scheme instructing courts how to calculate child-support amounts and has given those courts discretion to deviate from the child-support guidelines, including the authority to modify a parent's child-support obligation to zero. This policy decision to allow a court with jurisdiction to deviate from the child-support guidelines and relieve a parent of an obligation of support is not for us to question. As members of the judiciary, ours is not the realm of creating policy; the General Assembly is "the arbiter of public policy in Ohio." *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 31.

The Fifth District erred in In re Adoption of A.S. *in creating a support obligation for purposes of R.C. 3107.07(A) based on a criminal statute*

{¶ 33} In the conflict case *In re Adoption of A.S.*, 2011-Ohio-1505, the father had been ordered to pay $0.00 in child support pursuant to a paternity action in Franklin County. But the Fifth District incorporated a criminal statute, R.C. 2919.21(A)(2), to determine whether a parent has "failed * * * to provide for the maintenance and support of the minor *as required by law* or judicial decree" (emphasis added), R.C. 3107.07(A). *Id.* at ¶ 20-22, 29. In *A.S.*, the Fifth District determined that the criminal statute provides the applicable "law" in "as required by law."

{¶ 34} R.C. 2919.21(A)(2) reads, "No person shall abandon, or fail to provide adequate support to * * * [t]he person's child who is under age eighteen * * *." This is essentially the same obligation imposed under R.C. 3103.03(A), which reads, "The biological or adoptive parent of a minor child must support the parent's minor children out of the parent's property or by the parent's labor." The obligation to provide for the child is the same under both statutes; the difference is that R.C. 2919.21(A)(2) imposes a criminal penalty. Perhaps because a parent's child-support obligation under R.C. 3103.03(A) is so clearly superseded by the obligations imposed by a child-support order pursuant to R.C. 3109.05, the Fifth District attempted in *A.S.* to bring in through the back door that same obligation for purposes of R.C. 3107.07(A) under a different statute. That does not work.

{¶ 35} If we concluded that R.C. 2919.21(A)(2) creates a separate support obligation, the probate court would have to determine as part of the R.C. 3107.07(A) analysis whether the parent objecting to an adoption has failed to comply with that obligation; that is, to find that the parent failed to support the child as required by law, the court would be required to conclude that the parent violated R.C. 2919.21(A)(2). But can there be a violation of R.C. 2919.21(A)(2) if a court has modified the parent's child-support obligation to zero? Ohio courts say no.

{¶ 36} In *Rowland v. State*, 14 Ohio App. 238, 239 (3d Dist.1921), the defendant had been convicted of a criminal offense under G.C. 1655 for failing to contribute to the support of his minor child. The statute provided that "[w]hoever is charged by law with the care, support, maintenance or education of a minor * * * and is able to support or contribute toward the support or education of such minor, fails, neglects, or refuses so to do" is guilty of a criminal offense. But the child's parents' divorce decree had stated that "the custody, care, education, control, support and maintenance of the child are awarded to the wife" and that the defendant was "released from any further responsibility regarding the child." *Id.* at

238. The court reversed the conviction, holding that the defendant was no longer obligated to support the child and that as long as the order remained in force, it was a defense against a prosecution for a failure to support the child. *Id*. at 239-240.

{¶ 37} In *State v. Holl*, 25 Ohio App.2d 75, 266 N.E.2d 587 (3d Dist.1971), the Auglaize County Juvenile Court had found the defendant guilty of nonsupport of his daughter, fining him and ordering him imprisoned for 30 days. The imprisonment was suspended on the condition that he pay $10 a week to the child's mother until the child reached the age of 18. However, the defendant had been paying $10 a month for support of the child pursuant to a decree issued by the Auglaize County Court of Common Pleas when it awarded custody of the child to her mother. On appeal, the Third District reversed the conviction, holding, "It is anomalous that, while complying with one court order for support, a person could be found guilty of nonsupport in another court. Compliance with the Common Pleas Court order is a bar to prosecution for nonsupport in the Juvenile Court." *Id.* at 77.

{¶ 38} Because compliance with a juvenile court's no-support order would likewise be a bar to a parent's prosecution for a failure to support a child, a probate court could not find that the parent violated R.C. 2919.21(A)(2) by relying on the no-support order and therefore could not find that the parent failed to provide the support "required by law" for purposes of R.C. 3107.07(A).

The effects of a contrary holding are unacceptable

{¶ 39} The most important consequence of the contrary holding advocated by the stepfather is that a parent—even one that has continuous and meaningful contact with his or her child—could forever lose all contact with that child by relying on a court's no-support order. The stepfather argues that even when there is an order canceling child support, a probate court still must separately assess a parent's independent statutory *and* common-law duties to support his or her child. If we concluded that another source imposes on that parent a separate obligation to

provide child support, then the parent would not be able to rely on a valid court order setting forth child-support responsibilities. To conclude that a zero-support order is not determinative of the necessary level of maintenance and support "required by law or judicial decree" would essentially mean that the court order specifically addressing the obligor's financial responsibility to the child is invalid; instead, some other amorphous obligation would set the level of child support that the parent must provide in order to maintain the parent-child relationship.

{¶ 40} And this would be the case for any child-support order, not just a no-support order. A parent could no longer simply comply with a judicial decree setting a low, moderate, or even high level of support—whether the parent's consent is necessary for the adoption of his or her child would depend on what constitutes "adequate support" under R.C. 2919.21(A)(2) or some other measure as determined by the probate court.

{¶ 41} Further, adoption of the stepfather's reading of R.C. 3107.07(A) would undermine the integrity of child-support orders. In the absence of fraud or lack of jurisdiction, "a judgment is considered 'valid' (even if it might perhaps have been flawed in its resolution of the merits of the case) and is generally not subject to collateral attack." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 25. "The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

{¶ 42} Every day, families rely on court orders to define parents' lawful obligations. They structure their lives around what the court has ordered. Our decision today ensures that the judgment of the court with the jurisdiction to set child-support levels can be relied upon.

CONCLUSION

{¶ 43} The General Assembly did not create a child-support system in which a domestic-relations or juvenile court determines by court order an adequate level of child support, only to have a probate court sever the parental rights of a parent because the parent abided by that support order. Therefore, pursuant to R.C. 3107.07(A), a parent's nonsupport of his or her minor child pursuant to a zero-support order of a court of competent jurisdiction does not extinguish the requirement of that parent's consent to the adoption of the child.

{¶ 44} Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

FRENCH, DEWINE, and DONNELLY, JJ., concur.

O'CONNOR, C.J., dissents, with an opinion.

FISCHER, J., dissents, with an opinion.

STEWART, J., dissents, with an opinion.

O'CONNOR, C.J., dissenting.

{¶ 45} With one limitation, I join Justice Stewart's dissenting opinion in concluding that this is not a case in which there is a judicial order establishing child support. The majority creates a legal fiction with the term "no-support order" and incorrectly uses that term to describe three factually distinct scenarios: "orders terminating previously ordered support, zero-support orders, and orders modifying a previously ordered support amount to zero." Majority opinion at ¶ 16, fn. 1. Thus, I would also conclude that the proper course is to reverse the court of appeals' judgment and remand the case to the probate court to determine whether the father had justifiable cause for failing to provide maintenance and support for his child. I do not, however, join Justice Stewart's dissenting opinion to the extent that it discusses the burden of proof and the clear-and-convincing-evidence standard or

suggests a need to overrule case law that is not at issue in this case. *See* dissenting opinion, Stewart, J., at ¶ 66-68.

FISCHER, J., dissenting.

{¶ 46} I respectfully dissent because the majority sets forth an interpretation of R.C. 3107.07(A) that I believe ignores the plain language of the statute.

I. Plain Language of R.C. 3107.07(A)

{¶ 47} In answering the certified question, we must determine the meaning of the language used by the legislature in R.C. 3107.07(A). When considering the meaning of a statute, our "primary goal * * * is to ascertain and give effect to the legislature's intent in enacting the statute." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. We first consider the "plain meaning of the statutory language." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52. If that language is "unambiguous and definite," we apply it "in a manner consistent with the plain meaning of the statutory language." *Lowe* at ¶ 9. We do not look to the canons of statutory construction when the plain language of a statute provides the meaning. *See Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, 768 N.E.2d 1170, ¶ 8, citing *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E.2d 611 (1994).

{¶ 48} R.C. 3107.07(A) provides that a parent's consent to an adoption is not required if "without justifiable cause" the parent has failed to provide for the "maintenance and support of the minor as required by law *or* judicial decree" during the relevant time period. (Emphasis added.) "The legislature's use of the word 'or,' a disjunctive term, signifies the presence of alternatives." *In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, 950 N.E.2d 505, ¶ 18, citing *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 51-52, and *Pizza v. Sunset Fireworks Co., Inc.*, 25 Ohio St.3d 1, 4-5, 494 N.E.2d 1115 (1986).

{¶ 49} Thus, under the plain language of R.C. 3107.07(A), a parent's consent to an adoption is not required if the parent *either* has failed to provide support for the minor as required by law *or* has failed to provide support for the minor as required by judicial decree. The parent's failure to fulfill *either* of the two obligations identified in R.C. 3107.07(A) is sufficient for the court to move on to the next step of the analysis and examine whether the parent had "justifiable cause" for the failure.

{¶ 50} To conclude, as the majority does, that the existence of a judicial decree that relieves a parent of an obligation to pay child support is dispositive of all maintenance-and-support obligations relevant to R.C. 3107.07(A), we would need to rewrite the statute to provide that a parent's consent to an adoption is not required if, without justifiable cause, the parent has failed to provide support for the minor "as required by judicial decree or, if there is no judicial decree, as required by law." The majority's rewritten version of the statute may or may not be wise; indeed, the legislature may do well to enact the majority's rewritten version. Nonetheless, when a statute's meaning is clear and unambiguous, no construction is necessary and courts will not add or delete words from that statute to change its effect so that it provides increased protections of parental rights. *See Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, ¶ 12.

II. How R.C. 3107.07(A) Should be Applied

{¶ 51} R.C. 3107.07(A) provides that when determining whether a parent's consent is required for an adoption to proceed based on an alleged unjustifiable failure to provide maintenance and support for the child, a court must (step one) examine any relevant judicial decree. Regardless of whether there is a judicial decree ordering the parent to provide some level of support, a judicial decree ordering zero support, or no relevant judicial decree, the court also must (step two) determine the level of support required by "law" other than by judicial decree. The

court then must (step three) determine whether the nonconsenting parent has failed to meet either or both of the legally required levels of support during the relevant one-year period. Finally, if the court determines that the parent has failed to meet either or both of the legally required levels of support during the relevant one-year period, the court then must (step four) weigh several factors, including but not limited to the level of support ordered in any judicial decree as well as the facts found by the court that issued that order, and determine whether there was justifiable cause for that parent's failure. After this simple, multistep process is complete, the court will be able to determine whether the parent has forfeited the right to object to the adoption pursuant to R.C. 3107.07(A).

III. A Judicial Decree Impacts Multiple Steps in the R.C. 3107.07(A) Analysis

{¶ 52} It is important to explain that a judicial decree ordering zero child support plays an important role in the various steps in the analysis required under R.C. 3107.07(A).

{¶ 53} First, in many cases, the facts found by the court that issued a decree relieving a parent of a child-support obligation may support a court's conclusion, after weighing all the relevant factors, that the parent has no other legal obligation to provide for the maintenance and support of the child. For example, it is reasonable to assume that a substantial percentage of judicial decrees relieving a parent of a child-support obligation are issued because the parent lacks the ability and resources to provide support. Thus, while a judicial decree relieving a nonconsenting parent of a child-support obligation is not dispositive in adoption-consent cases, the facts found by the court that issued that decree may often result in dismissal of the adoption petition.

{¶ 54} Second, even when a judicial decree does not require the noncustodial parent to provide support but that parent has the resources to do so, there will be situations in which the parent will have "justifiable cause" for failing

to provide maintenance and support as required by law. For example, the court should include in its weighing process whether offers of assistance from the noncustodial parent were rebuffed by the custodial parent and whether the custodial parent agreed to the no-support decree rather than contesting it. Indeed, in the context of an alleged failure to provide maintenance and support, barring facts that were unknown to the court or a change in circumstances for the noncustodial parent, it may be a rare case in which a valid judicial decree ordering zero support is in place but the parent's consent is not needed for the adoption to proceed.

IV. Conclusion

{¶ 55} I would answer the certified-conflict question in the negative and hold that a judicial decree that relieves a parent of a child-support obligation is not dispositive of all maintenance-and-support obligations relevant to R.C. 3107.07(A). I would accordingly remand this case to the probate court for that court to determine whether any "law" required appellee, G.B., to provide maintenance and support for B.I. for the relevant one-year period.

{¶ 56} For these reasons, I respectfully dissent.

STEWART, J., dissenting.

{¶ 57} A judicial order that relieves a parent of a child-support obligation previously imposed by a court does not, and should not, function as a matter of law the same way as a judicial order establishing a child-support obligation. The majority opinion goes to great lengths to lay out the statutory scheme of court-ordered child support, but this is not a case in which there is a judicial order establishing support. In this case, the juvenile-court order at issue terminated the father's child-support obligation that had been previously ordered by the court and there is no dispute that the father had failed to support his child during the year prior to the filing of the adoption petition. Under these circumstances, R.C. 3107.07(A) requires the probate court to determine, by clear and convincing

evidence, whether the father's failure to provide support is without justifiable cause. I would answer the conflict question in the affirmative, adopt both propositions of law asserted by the petitioner-stepfather, reverse the court of appeals' judgment, and remand this case to the probate court to determine whether there is clear and convincing evidence that the father's failure to provide maintenance and support was without justifiable cause.

{¶ 58} When the Revised Code speaks of child support "required by law or judicial decree," *id.*, it refers to what this court has long acknowledged: there are separate common-law and statutory duties to support a child. *See, e.g., Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, ¶ 11 (stating that a parent's "duty to support his child is manifest at common law and in statutory law"); *Haskins v. Bronzetti*, 64 Ohio St.3d 202, 205, 594 N.E.2d 582 (1992) (plurality opinion) ("Both common and statutory law in Ohio mandate that a parent provide sufficient support for his or her child").

{¶ 59} The duty of support imposed by the common law was "to provide reasonably" for the maintenance of a parent's minor children. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 458, 15 N.E. 471 (1887), *overruled on other grounds*, *Meyer v. Meyer*, 17 Ohio St.3d 222, 478 N.E.2d 806 (1985), syllabus. This obligation has been construed as one to provide for the child's "necessaries," which we have defined in a related context as "food, shelter, clothing, and medical services." *Embassy Healthcare v. Bell*, 155 Ohio St.3d 430, 2018-Ohio-4912, 122 N.E.3d 117, ¶ 4 (construing doctrine according to which a husband was liable to third parties for necessaries they had provided to his wife).

{¶ 60} The statutory duty of child support requires a "biological or adoptive parent of a minor child" to "support the parent's minor children out of the parent's property or by the parent's labor." R.C. 3103.03(A). A parent's duty under R.C. 3103.03(A) is separate and apart from any child-support obligation that a court has

imposed on that parent. *Hoelscher v. Hoelscher*, 91 Ohio St.3d 500, 501, 747 N.E.2d 227 (2001).

{¶ 61} When a court enters a child-support order, that order supersedes any duty of support under R.C. 3103.03(A) or the common law. *See Meyer* at 224. But when a judicial decree subsequently relieves a parent of the court-ordered obligation, the duty of support still exists. To hold otherwise would effectively eliminate any duty that a parent has to support his or her child.

{¶ 62} To illustrate why this is the case, suppose that an obligor parent had a court-ordered child-support obligation terminated on the grounds that the parent, perhaps being incarcerated or disabled, no longer had either the financial means to provide support or any reasonable prospect of being able to provide support. Now suppose that this obligor parent later obtained a financial windfall. The obligor parent would once again have the means to provide child support. The support duty would apply even if the custodial parent had not yet obtained a new child-support order. *Hoelscher* at 501-502.

{¶ 63} When the juvenile court terminated the father's court-ordered child-support obligation and arrears in this case, it did not order "zero" support or order the father not to support his child. It would defy logic to think that any court order or statute would mandate that a parent not support his child. The juvenile court's August 19, 2010 order states that "Defendant's current support obligation is terminated at the request of Plaintiff. At Plaintiff's request, the outstanding support arrearage is reduced to $0.00. CSEA is hereby directed to adjust its records accordingly." Nothing in the juvenile court's order could possibly be construed as ordering the father to not support his child. By terminating the existing child-support obligation, the court did nothing more than relieve the father of his judicially ordered obligation to pay child support such that neither the mother nor the child-support enforcement agency could hold him accountable for not complying with that support order.

{¶ 64} Additionally, the fact that the order terminating the father's child-support obligation is subject to modification is irrelevant in this case. Any notion that it would be incumbent on the custodial parent (the mother in this case) to institute subsequent proceedings against the father to reimpose a duty to support his child is equally troubling. The father's common-law duty to provide for the child's necessaries—food, shelter, clothing, and medical services—remained. *See State ex rel. Wright v. Indus. Comm.*, 141 Ohio St. 187, 189-190, 47 N.E.2d 209 (1943) (dependency is based on the child's right to support, and parents are charged by statutory and common law with the duty of supporting their child; the obligation of a parent to support his minor children is not excused when no order was made for support of the children).

{¶ 65} The father had a duty of support notwithstanding the termination of his existing court-ordered support obligation. There is no dispute that the father had failed to pay child support for the year prior to the adoption petition's filing, so the only remaining question for purposes of the R.C. 3107.07(A) analysis is whether his failure to provide child support was justifiable. R.C. 3107.07(A) requires the probate court to answer that question by considering all relevant evidence before it. Thus, I would hold that the probate court erred by accepting as conclusive evidence of justifiable cause the juvenile court's order terminating the father's existing court-ordered support obligation.

{¶ 66} I would also overrule previous decisions of this court that place the burden on the adoption petitioner to prove by clear and convincing evidence that a parent has failed, without justifiable cause, to support his child. *See In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986), paragraph one of the syllabus; *In re Adoption of Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph one of the syllabus; *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 22. The statute places no such burden on the petitioner.

{¶ 67} R.C. 3107.07(A) states that consent to an adoption is not required of a parent of a minor when it is alleged in the adoption petition and the court finds by clear and convincing evidence that the parent has failed without justifiable cause to support the minor as required by law or judicial decree. By the plain wording of the statute, the petitioner need only allege that a parent has failed, without justifiable cause, to support his child. The statute also makes clear that it is incumbent on the trial court to find (not for the petitioner to prove) by clear and convincing evidence that the parent has failed without justifiable cause to support the child.

{¶ 68} To be sure, any claimant or petitioner who moves a court for any kind of judicial action risks the probability that he will not be granted the relief he seeks absent evidence in support of what he claims or alleges. But this statute places no burden of proof on the petitioner, and the General Assembly clearly knows how to do so. *See, e.g.*, R.C. 2953.23(A)(1)(b) (requiring that a postconvicton "petitioner *show[]*" by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the petitioner guilty [emphasis added]). To illustrate the point, if an adoption petitioner alleges that a parent's consent is not required because the parent has failed without justifiable cause to support his child within the year prior to the petition's filing and that parent concedes that he has not supported his child but presents evidence in support of justifiable cause that he is addicted to drugs or alcohol and uses his money to support his habit, that information would be sufficient in and of itself for the probate court to make findings and determine whether the parent's consent is required for the adoption. And yet, the petitioner would have done nothing more than make the allegation. It makes no sense to require the petitioner to prove a negative. *Masa* at 169 (Douglas, J., dissenting). Furthermore, any due-process rights of the parent are protected by the fact that the trial court's findings must be based on evidence that is clear and convincing.

{¶ 69} In this case, the probate court had before it evidence that the father had failed to support his child for the relevant one-year period, that he had been relieved of his court-ordered child-support obligation, that he was incarcerated, and that he had had access to nominal funds in his prison commissary account. The probate court understands its obligation to strictly construe any exception to the requirement of parental consent to adoption in favor of protecting the parental rights of natural parents. *See In re Adoption of G.V.*, 126 Ohio St.3d 249, 2010-Ohio-3349, 933 N.E.2d 245, ¶ 6. But it is the probate court that is tasked with weighing all relevant evidence and making a determination based on evidence that is clear and convincing.

{¶ 70} The majority opinion reaches beyond the question presented in this case to make a decision that should be made by the probate court. A juvenile court's order terminating a parent's judicially ordered child-support obligation does not, as a matter of law, relieve that parent of his duty to provide maintenance and support for his child under R.C. 3103.03(A) and the common law. The majority opinion in this case incorrectly equates an order terminating a child-support obligation with an order establishing such an obligation. I would simply hold that in an adoption-consent case under R.C. 3107.07(A), when a court has terminated a parent's court-ordered child-support obligation and the parent has not provided maintenance and support for the applicable one-year period, the probate court must determine whether that parent's failure to support was without justifiable cause.

{¶ 71} I therefore would reverse the court of appeals' judgment and remand this case for the probate court to consider all relevant evidence presented to determine whether the father had justifiable cause for failing to provide maintenance and support for his child.

Lindhorst & Dreidame Co., L.P.A., and Bradley D. McPeek, for appellant.

Susan Mineer, for appellee.

Mary Catherine Barrett, urging affirmance for amicus curiae, A.G.

_____

IN RE ADOPTION OF A.C.B.

[Cite as *In re Adoption of A.C.B.*, 159 Ohio St.3d 256, 2020-Ohio-629.]

Adoption—R.C. 3107.07(A)—Whether a noncustodial parent has provided the financial support necessary to preserve his or her right to withhold consent to the adoption of his or her child is measured by the terms of the judicial decree—Appellant-father failed without justifiable cause to comply with the child-support obligations of the judicial decree for the one-year period preceding the filing of appellee-stepfather's adoption petition—Court of appeals' judgment affirming probate court's judgment affirmed.

(No. 2018-1300—Submitted May 7, 2019—Decided February 26, 2020.)

APPEAL from the Court of Appeals for Lucas County,
No. L-18-1043, 2018-Ohio-3081.

DEWINE, J.

{¶ 1} A statute, R.C. 3107.07(A), provides that a parent's consent to the adoption of his child is not required when the parent has failed, without justifiable cause, to provide for the maintenance and support of the child as required by law or judicial decree for a period of one year prior to the filing of the adoption petition. The question before us concerns the import of the phrase "as required by law or judicial decree." The appellant is a biological parent who had been ordered by a court to pay child support of $85 per week for a total of $4,420 a year. He did not comply with the court order; rather, the only payment he made in the year before the filing of the adoption petition was a single payment of $200. Both the probate court and the court of appeals found that this single payment—constituting less than 5 percent of his annual obligation—did not amount to the provision of support as required by law or judicial decree. We agree, and thus affirm the decision below.

Adoption of A.C.B.

{¶ 2} This case involves the adoption of a child. For ease of reference, and in keeping with this court's practice of protecting the identity of juveniles, we will refer to the child by his initials, A.C.B.; we will refer to the party seeking to adopt the child as stepfather; and we will refer to A.C.B.'s birth parents as mother and father.

{¶ 3} A.C.B.'s parents dissolved their marriage in Indiana in 2013. The decree of dissolution, which incorporated a settlement agreement between the parents, awarded sole custody of A.C.B. to mother and ordered father to pay $85 per week in child support. Soon thereafter, father returned to Kosovo. After leaving the United States, he made only sporadic child-support payments, which diminished over time.

{¶ 4} Mother later moved to Ohio and married stepfather. In 2015, she asked father if he would consent to stepfather adopting A.C.B. Father refused. In 2017, stepfather petitioned the probate court to adopt A.C.B. He alleged that under R.C. 3107.07(A), father's consent was not required because father had, without justifiable cause, failed to provide maintenance and support as required by law or judicial decree for the year preceding the filing of the adoption petition.

{¶ 5} The probate court held a hearing on whether father's consent to the adoption was required. The parties stipulated that in the year preceding the adoption petition, father had made a single child-support payment of $200—a payment that was made two days before the filing of the petition. At the time of the hearing, father owed over $17,000 in child support. Father testified that his income had increased substantially since the child-support order had been entered, and that in the year prior to the filing of the adoption petition, he made close to $58,000. He admitted that he could "have afforded without any problem" to pay more in support than he did, but he chose not to make the payments. He told the court that he "may have been worried [about] where the money [from his child-

support payments] was going." Father apologized and described his payment record as "inexcusable" for the year in question and said that he might have let his emotions get the better of him.

{¶ 6} The probate court found that during the year preceding stepfather's adoption petition, father had failed to provide for the maintenance and support of A.C.B. as required by the judicial decree and that his failure to do so was not justifiable. The Sixth District Court of Appeals affirmed the probate court's judgment. 2018-Ohio-3081, 106 N.E.3d 1277. We accepted father's discretionary appeal. 154 Ohio St.3d 1422, 2018-Ohio-4496, 111 N.E.3d 20. In his lone proposition of law, he asserts that under R.C. 3107.07(A), "provision of *any* maintenance and support during the statutory one-year period is sufficient to preserve a natural parent's right to object to the adoption of their child." (Emphasis added.)

The plain language of R.C. 3107.07(A)

{¶ 7} R.C. 3107.07(A) provides that a natural parent's consent to the adoption of a minor child is not required when the court

> 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.

(Emphasis added.) In construing the support clause of this provision, we have held that the party seeking to adopt the child must prove by clear and convincing evidence both (1) that the natural parent has failed to support the child for the requisite one-year period and (2) that this failure was without justifiable cause. *In*

re Adoption of Bovett, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph one of the syllabus (following *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140 (1986), paragraph one of the syllabus). Father does not challenge the probate court's finding that he lacked justifiable cause for failing to make the required payments. And he did not assign an error concerning justifiable cause below. 2018-Ohio-3081, 106 N.E.3d 1277, at ¶ 21, fn. 1. Thus, the only issue before us is whether his lone $200 payment over the relevant one-year period constitutes maintenance and support "as required by law or judicial decree."

{¶ 8} The starting point—and because the language is clear, the ending point—for our analysis is the text of the statute. The plain text of R.C. 3107.07(A) instructs a trial court to determine whether a natural parent provided maintenance and support "as required by law or judicial decree" for a period of at least one year immediately preceding the filing of the adoption petition. Here, the judicial decree sets forth precisely what father was required to pay: $85 per week, for a total of $4,420 over the course of a year. Father did not pay what the judicial decree required. He paid only $200 for the entire year before stepfather filed the adoption petition. Thus, under the plain language of the statute, father did not "provide for the maintenance and support" of A.C.B. "as required by law or judicial decree" for the requisite one-year period.

{¶ 9} Despite the unambiguous terms of the statute, father asks us to hold that the payment of *any* support at all when a child-support order is in place constitutes the payment of support as required by law or judicial decree. Under this view (shared by the second dissent), a parent's consent is required unless there is a complete absence of support in the year prior to the filing of the adoption petition. Thus, a single $5 payment over the course of the year would suffice to protect the parent's right to consent. To reach this result, father looks to another portion of the statute—the clause that provides that a parent's consent is not required when the court finds that the parent, without justifiable cause, has failed to have more than

de minimis contact with the child. R.C. 3107.07(A). He argues that because the legislature inserted a "more than de minimis" qualifier in the contact clause, and did not insert any qualifying language such as "de minimis, meager, or substantial" in the support clause, the legislature intended for any payment of support, no matter how meager, to suffice in preserving a parent's right to withhold consent to the adoption of a child.

{¶ 10} The problem with this argument is that it ignores the plain language of the statute. Father is correct that the legislature did not choose to qualify the amount of maintenance and support to be provided with any of his suggested terms, but the legislature did include qualifying language: "as required by law or judicial decree." R.C. 3107.07(A). Whether father has provided the necessary support under the statute is measured by the terms of the judicial decree.

{¶ 11} The first dissent presents a slightly different argument than father. Though purporting to apply the plain language of the statute, it would essentially read the phrase "as required by law or judicial decree" out of the statute. This dissent zeroes in on the phrase "for a period of at least one year immediately preceding * * * the filing of an adoption petition" and concludes that if there has been one child-support payment made during the year, then parental consent is required. In other words, if someone is ordered to pay child support weekly, that person need only make 1 of the 52 required payments for the year. But, of course, that's not what the statute says. It says consent is not required if the parent has failed "to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding * * * the filing of the adoption petition." R.C. 3107.07(A). Certainly, a parent who makes only one payment during the year—and thus is substantially in arrears on that year's child support—has failed to provide support as required by law or judicial decree for a period of at least one year preceding the filing of the adoption petition.

{¶ 12} To prop up its reading, the first dissent plucks a few phrases from prior opinions and asserts that we have already decided the issue in front of us; indeed, that stare decisis compels its preferred reading of the statute. Dissenting opinion of Kennedy, J., at ¶ 34. That's simply not true. In none of the cases cited did we address the issue presented here. In *In re Adoption of M.B.* and *In re Adoption of Sunderhaus,* we referenced the one-year period as the applicable period for determining whether the father had failed to support the child. 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23; 63 Ohio St.3d 127, 585 N.E.2d 418 (1992), paragraph two of the syllabus. But in neither case did we spell out what it meant to fail to provide support "as required by law or judicial decree." The other case cited by the first dissent actually undercuts its argument. In *In re Adoption of Bovett*, a father had failed to pay support for a one-year period, during three months of which he was unemployed. 33 Ohio St.3d at 103, 515 N.E.2d 919. The court of appeals had held that it was necessary to consider only the period of time in which the father was unemployed in making the justifiable-cause determination. *Id.* In the court of appeals' view, "[i]f, during *any part* of the year prior to the filing of the adoption petition, the nonsupporting parent had justifiable cause for not paying support, he is not barred from objecting to the adoption." (Emphasis added.) *In re Adoption of Bovett*, 10th Dist. Franklin No. 86AP-429, 1986 WL 11771, *3 (Oct. 14, 1986). We rejected this construction and held that the entire one-year period must be considered. *In re Adoption of Bovett* at paragraph three of the syllabus. In other words, it wasn't enough that the father had justifiable cause for failing to pay support during the period that he was unemployed. He also had to have justifiable cause for not paying during the rest of the year. Such a result would make no sense under the first dissent's reading of the statute. If a parent only needed to make a single payment during the year to preserve his right to object, then logically, a showing that there was justifiable cause for *any* missed payment during the year would have been sufficient for the *Bovett* parent to preserve his right to object. (It's

also worth noting that a concurring justice in *Bovett* explicitly criticized the majority for failing to take advantage of the "opportunity" to provide guidance on the proposition asserted by the first dissent here—"whether the making of one payment of support during the year" would preserve the natural parent's right to consent.) *Id*. at 107 (Douglas, J., concurring).

{¶ 13} Father, like both dissents, seeks to justify his strained construction of the statutory language by resorting to policy arguments and through the invocation of the rights of natural parents. But of course, it is not only the interests of the biological parent that are at stake but also the interests of the child—interests that we have deemed "paramount." *See State ex rel. Booth v. Robinson*, 120 Ohio St. 91, 95, 165 N.E. 574 (1929). No question those charged with drafting of legislation of this sort must undertake a difficult balancing involving the rights of the child, the biological parents, and the potential adoptive parent. That policy judgment, though, is one entrusted to the legislature to make—and where, as here, its statutory command is clear, our role is to defer to the legislative judgment and apply the language of the statute.

{¶ 14} Our decision today that the plain language of the statute controls is consistent with this court's precedent applying R.C. 3107.07(A). In *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985), this court examined the contact component of an earlier version of R.C. 3107.07(A). The statute referred to parents who had "failed without justifiable cause to communicate with the minor." *Id*. at 366, quoting former R.C. 3107.07(A), Am.S.B. No. 205, Section 1, 138 Ohio Laws, Part I, 700. The court found that the "explicit language" of the statute controlled. *Id*. at paragraph two of the syllabus. Because the legislature had not qualified the term "communicate" with words like "*meaningfully*, *substantially*, *significantly*, or *regularly*," the court refused to add such terms to the statute. (Italics sic.) *Id*. at 366-367. Similarly, here, the explicit language controls—support is measured by what is required by law or judicial decree.

{¶ 15} Indeed, R.C. 3107.07(A)'s predecessor provided that parental consent was not required if a parent failed to "properly" support the child. *See* former R.C. 3107.06(B)(4), Am.S.B. No. 49, Section 1, 133 Ohio Laws, Part I, 72, 89. The legislature later removed the adjective "properly" and replaced it with the phrase "as required by law or judicial decree." *See* former R.C. 3107.07(A), Am.Sub.H.B. No. 156, Sections 1 and 2, 136 Ohio Laws, Part I, 1839, 1845, 1859. With this change, the legislature opted for an objective standard for determining what amount of maintenance and support was required—the amount set forth by law or judicial decree. *See* Charles R. Pinzone Jr., *Ohio's Exception to Consent in Adoption Proceedings: A Need for Legislative Action*, 36 Case W.Res.L.Rev. 348, 355 (1985).

A two-step analysis

{¶ 16} Of course, not every failure to provide maintenance and support as required by law or judicial decree will mean that a parent's consent to an adoption is not required. Assessing whether a parent has failed to provide support as required by law or judicial decree is just one step in the analysis. In this step, the statute instructs a probate court to review a biological parent's child-support payments for *a period of at least one year* preceding the filing of the adoption petition.

{¶ 17} The next step requires that the adoptive parent prove by clear and convincing evidence that the parent's failure to provide maintenance and support as required by law or judicial decree was without justifiable cause. R.C. 3107.07(A); *In re Adoption of Bovett*, 33 Ohio St.3d at 104, 515 N.E.2d 919. This ordinarily will not be an easy showing to make. The clear-and-convincing standard is the highest degree of proof available in civil cases. *Stark Cty. Milk Producers' Assn. v. Tabeling*, 129 Ohio St. 159, 171, 194 N.E. 16 (1934). It requires evidence that is sufficient to "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*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. If the adoptive parent

cannot show by clear and convincing evidence that the biological parent's failure to provide support as required by law or judicial decree was without justifiable cause, the parent's consent to the adoption is still required.

{¶ 18} Not satisfied that the framework created by the legislature adequately protects the biological parent, the dissenting justices propose that we tweak the statutory language. They worry that in a hypothetical case, different from the one in front of us, application of the statute as written might work too harsh a result. Though they do not come right out and say so, the dissents seem to think that the statutory modifications they propose are preferable to allowing the probate court to make the justifiable-cause determination entrusted to it by the legislature. But that's a policy judgment—one that our Constitution leaves to the legislature to make, not the judiciary. For our part, we ought not to adopt a construction that "turn[s] the statute into a sham." *In re Adoption of Bovett* at 106, 515 N.E.2d 919.

Father failed to provide support as required by the judicial decree

{¶ 19} Here, application of the statute is straightforward. The Indiana court order required father to pay support of $85 per week, for a total of $4,420 over the course of a year. Father did not even come close to doing what was required by the judicial decree. He paid only $200 in the relevant one-year period (less than 5 percent of his annual obligation) and had an arrearage of over $17,000. Thus, he did not provide maintenance and support as required by law or judicial decree. Further, the probate court found that he lacked justifiable cause for not complying with the decree, and he did not challenge that finding below. Therefore, father's consent is not required for the adoption of A.C.B.

Conclusion

{¶ 20} In making a single $200 payment toward a $4,420 annual child-support obligation, father failed to provide maintenance and support as required by law or judicial decree. We affirm the judgment of the court of appeals.

Judgment affirmed.

O'CONNOR, C.J., and FRENCH, J., concur.

FISCHER, J., concurs in part and concurs in the judgment, with an opinion.

KENNEDY, J., dissents, with an opinion joined by DONNELLY, J.

STEWART, J., dissents, with an opinion.

FISCHER, J., concurring in part and concurring in judgment.

{¶ 21} I join in the majority's decision to affirm the judgment of the Sixth District Court of Appeals and its holding that appellant, A.C.B.'s father, failed to provide maintenance and support as required by law or judicial decree. I respectfully disagree, however, with the portion of the majority opinion's analysis concluding that R.C. 3107.07(A) is unambiguous. I accordingly concur in the court's judgment and in its holding that "whether [a parent] has provided the necessary support under the statute is measured by the terms of the judicial decree." Majority opinion at ¶ 10.

{¶ 22} "A statute is ambiguous 'if a reasonable person can find different meanings in the [statute] and if good arguments can be made for either of two contrary positions.' " (Brackets sic and emphasis deleted.) *Turner v. Hooks*, 152 Ohio St.3d 559, 2018-Ohio-556, 99 N.E.3d 354, ¶ 12, quoting *4522 Kenny Rd., L.L.C. v. Columbus Bd. of Zoning Adjustment*, 152 Ohio App.3d 526, 2003-Ohio-1891, 789 N.E.2d 246, ¶ 13 (10th Dist.). In this case, the parties have presented different interpretations of R.C. 3107.07(A), and the viability of those interpretations is illustrated by the contrary positions taken in the majority and dissenting opinions. Notably, the justices of this court are not alone in their differing interpretations of R.C. 3107.07(A). Ohio's courts of appeals are similarly divided on what the statute means. *See, e.g.*, *In re R.M.*, 7th Dist. Mahoning No. 07 MA 232, 2009-Ohio-3252, ¶ 75-76 (noting that some appellate districts have determined that even a meager contribution to the child's support could satisfy the maintenance-and-support requirement of R.C. 3107.07(A), while other districts

have found that more than a meager contribution is required). I would accordingly find R.C. 3107.07(A) ambiguous.

{¶ 23} "[W]here a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991). "To discern legislative intent, we read words and phrases in context and construe them in accordance with rules of grammar and common usage." *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013-Ohio-4654, 998 N.E.2d 1124, ¶ 15. When interpreting a statute, " 'significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.' " *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus. Furthermore, "we determine the intent of the legislature by considering the object sought to be attained." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 554, 721 N.E.2d 1057 (2000).

{¶ 24} Pursuant to R.C. 3107.07(A), a parent's consent to adoption is not required if the parent fails "without justifiable cause * * * to provide for the maintenance and support of the minor as required by * * * judicial decree for a period of at least one year" prior to the filing of the adoption petition. In order to give effect to the whole of R.C. 3107.07(A), we interpret the statute to provide that a parent must comply with the terms of the judicial decree for at least the entire year immediately preceding the filing of the adoption petition.

{¶ 25} Thus, the ambiguity inherent in the statute can be resolved by referring to the specific terms of the judicial decree involved in each case. Here, the judicial decree in this case required a payment of $85 per week, and therefore, A.C.B.'s father was required to pay that amount each week in order to "provide for the maintenance and support of the minor as required by * * * [the] judicial decree."

Yet, on numerous occasions in the year prior to the filing of the adoption petition, he failed to pay the weekly $85 amount. Thus, the terms of the judicial decree were not met.

{¶ 26} This interpretation of R.C. 3107.07(A) is not unreasonable. I acknowledge that we must strictly construe exceptions to the requirement of parental consent to adoption in order to protect the rights of natural parents. *In re Adoption of P.L.H.*, 151 Ohio St.3d 554, 2017-Ohio-5824, 91 N.E.3d 698, ¶ 23. In doing so in this case, however, we should not countenance the clear failure to abide by the terms of the judicial decree as required by R.C. 3107.07(A). Because a single payment of child support over the course of the applicable one-year period does not constitute a full year's compliance with a judicial decree that requires the parent to make weekly payments, I agree with the conclusion reached in the majority opinion.

{¶ 27} This interpretation squares with the requirements of R.C. 3107.07(A) as a whole. The statute provides that parents who fail without justifiable cause to provide more than de minimis contact with a child for the year preceding the adoption petition will lose the right to withhold consent to the adoption of that child. It is more specific when addressing the provision of maintenance and support. Instead of requiring the parent to have provided "more than de minimis" maintenance and support, R.C. 3107.07(A) requires the parent to have "provide[d] for the maintenance and support of the minor as required by law or judicial decree." These requirements are logical, as contact with a child is inherently difficult to measure objectively, while compliance with a judicial decree can easily be measured. Moreover, while one might argue that the provisions of R.C. 3107.07(A) are incongruous with criminal statutory provisions addressing the failure to provide child support, our task is to interpret the Revised Code, not to question the policy choices of the General Assembly. Finally, this interpretation of R.C. 3107.07(A) is not unconstitutionally vague, as R.C. 3107.07(A) puts parents

on sufficient notice that if they fail without justifiable cause to comply with the terms of a judicial decree, they risk losing the right to withhold consent to an adoption.

{¶ 28} For these reasons, I respectfully concur in the court's judgment and in its holding that "whether [a parent] has provided the necessary support under the statute is measured by the terms of the judicial decree." Majority opinion at ¶ 10.

KENNEDY, J., dissenting.

{¶ 29} The statutory trigger to strip parents of their right to withhold consent to their child's adoption is based on time, not the amount of support paid or unpaid. R.C. 3107.07(A) protects a parent's right to withhold consent to the adoption of his or her child unless the parent has failed without justifiable cause to provide the maintenance and support required by a child-support order *over a period of at least one year prior to the filing of an adoption petition*. Therefore, the statute contains an express duration requirement—a period of one year—that must be satisfied before the parent will be presumed to have abandoned his or her parental rights and responsibilities and before the probate court may find an absence of justifiable cause for the failure to provide support, thereby destroying the parent's relationship with the child through adoption. Because the majority reads the duration condition out of the statute, I dissent.

{¶ 30} In this case, looking back for a period of a year from the filing of the adoption petition, A.C.B.'s father did not fail to make every child-support payment for one full year. Rather, in the year preceding the filing of the adoption petition, he paid some child support, a $200 payment shortly before the petition was filed, in accordance with the parents' Indiana decree of dissolution. Therefore, the court of appeals erred in holding that A.C.B.'s father's consent was not required before the adoption could proceed. Accordingly, I would reverse the judgment of the court of appeals.

{¶ 31} This case places us in familiar territory: statutory construction. Our duty in construing a statute is to determine and give effect to the intent of the General Assembly as expressed in the language it enacted. *Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, 54 N.E.3d 1196, ¶ 18; *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 20. R.C. 1.42 guides our analysis, providing that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Further, as we explained in *Symmes Twp. Bd. of Trustees v. Smyth*, "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). Rather, "[a]n unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

{¶ 32} R.C. 3107.07(A) provides that a parent retains his or her right to withhold consent to the adoption of his or her minor child unless the court

> 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.

(Emphasis added.)

{¶ 33} R.C. 3107.07(A) is unambiguous. Before a parent loses the right to withhold consent to the adoption of his or her child, he or she must (1) without justifiable cause (2) for a period of at least one year immediately preceding the filing of the adoption petition either (3) fail to provide more than de minimis contact

with the child or (4) fail to provide for the maintenance and support of the child as required by law or judicial decree.

{¶ 34} We have previously held that a parent does not lose the right to withhold consent to an adoption unless he or she has "failed to support the child for a minimum of one year preceding the filing of the adoption petition," *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23, and we have described R.C. 3107.07(A) as requiring a "one-year period of nonsupport," *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127, 585 N.E.2d 418 (1992), paragraph two of the syllabus. That is, "[t]he statute and the cases make clear that a failure either to communicate with the child or to provide for the maintenance and support of the child *must be shown to have continued for an entire year* before the issue of justifiable cause is reached." (Emphasis added.) *In re Adoption of Bovett*, 33 Ohio St.3d 102, 105, 515 N.E.2d 919 (1987). The statute, we have stated, requires a "*complete failure* to make any child support payments" during the one-year period. (Emphasis added.) *In re Adoption of Masa*, 23 Ohio St.3d 163, 166, 492 N.E.2d 140 (1986). Stare decisis is most compelling when precedent involves statutory construction, *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 6, 539 N.E.2d 103 (1989), and the majority fails to justify departing from stare decisis today.

{¶ 35} In *In re Adoption of Bovett,* we rejected the invitation to overrule our prior holding in *In re Adoption of Masa* that the petitioner for adoption had the burden to prove, by clear and convincing evidence, that the natural parent of the child had lost the right to withhold consent to the adoption. Rather, we held that "[p]ursuant to R.C. 3107.07(A), the petitioner for adoption has the burden of proving, by clear and convincing evidence, *both* (1) that the natural parent *has failed to support the child for the requisite one-year period*, and (2) that this failure was without justifiable cause." (Emphasis added.) *In re Adoption of Bovett* at paragraph one of the syllabus. The court recognized that only after the natural

parent has failed to provide any support for the child for the whole one-year period does the probate court address the second step of the analysis regarding whether that failure to provide support was justified. *Id.* at 105 ("The statute and the cases make clear that a failure * * * to provide for the maintenance and support of the child must be shown to have *continued for an entire year* before the issue of justifiable cause is reached. Once such a failure has been proven, the probate court must then decide whether that failure was without justifiable cause" [emphasis added and citations omitted]). Put another way, the parent's right to withhold consent is in jeopardy only when the failure to provide support has *continued* for the entire one-year period.

{¶ 36} At that point, the separate justifiable-cause analysis is triggered, which, according to *Bovett*, permits the right to withhold consent to be terminated if the petitioner proves that "the parent's failure to support the child *for that period as a whole* (and not just a portion thereof) was without justifiable cause." (Emphasis sic.) *Id*. at paragraph three of the syllabus. Because the focus is on the one-year period as a whole, i.e., the entire duration—just as it is with the payment of support—the existence of justifiable cause for a single missed payment during the year is not by itself sufficient to preserve the right to withhold consent. *Bovett* instructs the probate court to look at *the year as a whole* and decide whether the petitioner proved that the complete failure to provide support was unjustified. In *Bovett*, the father had failed to pay child support for one year, triggering the justifiable-cause analysis. And looking at the whole year (not just a portion of it), his unemployment for three months did not, standing alone, justify the failure to provide any support for the entire year when he was gainfully employed for the other nine months. As with the failure to provide support, the justifiable-cause analysis looks at *the totality* of the one-year period, not the number of missed payments, to decide whether the complete lack of support was without justifiable

cause. That focus is the same whether there appears to be justification for only 1 missed weekly payment or for 51 missed payments.

{¶ 37} But in any case, we have no occasion to consider the application of a justifiable-cause analysis in this case. According to our precedent in *Bovett*, the probate court never reaches the justifiable-cause analysis because the one-year period of non-support did not occur. Because A.C.B.'s father did not completely fail to provide child support for the full year preceding the adoption petition, *Bovett* is distinguishable on that ground and the justifiable-cause analysis is not at issue.

{¶ 38} The General Assembly established this duration requirement for a reason: the failure to contact or support the child for a period of one year raises a presumption that the parent has abandoned his or her parental rights and responsibilities. It has long been recognized that although parents have a paramount right to the care and custody of their children, that right can be voluntarily relinquished, or it can be lost by abandonment of the child or by becoming totally unable to provide for the child's support or care. *See Reynolds v. Goll*, 75 Ohio St.3d 121, 123-124, 661 N.E.2d 1008 (1996); *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977); *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877). In codifying these bases for the loss of parental rights, the statute made them more objective. Before the presumption arises, there must be a lack of contact or support for the full one-year period. *See In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, at ¶ 23; *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127, 585 N.E.2d 418, at paragraph two of the syllabus; *In re Adoption of Bovett*, 33 Ohio St.3d at 105, 515 N.E.2d 919. If so, that presumption may be rebutted by a showing of justifiable cause. R.C. 3107.07(A).

{¶ 39} The General Assembly, as the sole arbiter of public policy, did not use a payment threshold as the trigger to remove the right to withhold consent; it used a temporal threshold: one year. The majority, however, reads that one-year duration requirement out of the statute when it holds that a parent does not preserve

the right to withhold consent to an adoption unless he or she strictly complies with the child-support obligation and makes each and every child-support payment throughout the year. As Justice Stewart's dissenting opinion points out, the majority's reasoning permits the filing of an adoption petition seeking to terminate a noncustodial parent's parental rights immediately upon a missed or partial child-support payment. Dissenting opinion of Stewart, J., at ¶ 54. It is therefore unnecessary under the majority's interpretation of the statute for a probate court to review the full one-year period, because it does not need to look any further back than the last missed payment—and tellingly, the majority here looks no farther back than two weeks.

{¶ 40} But if the General Assembly had intended to deprive a parent of his or her right to withhold consent to an adoption when there was *any* failure to provide maintenance and support *within the preceding year*, it could have easily done so using that language. But it did not and instead required a failure to provide maintenance and support *for a period of at least one year*. By separating the duration requirement out from the rest of the statute, the majority takes a provision protecting the right to withhold consent unless there is an ongoing, continuous failure to provide support for a period of at least a year and replaces it with one that makes any failure to comply with the child-support order within the year preceding the petition a basis for eliminating the right to withhold consent. "[A] court may not rewrite the plain and unambiguous language of a statute under the guise of statutory interpretation," *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 20, and we should not do so today.

{¶ 41} Moreover, when considered with other provisions in Ohio's statutory scheme, the majority's analysis, taken to its logical conclusion, would suggest that the General Assembly has provided more protections to a putative father than to an established parent subject to a child-support order. Among other grounds, a putative father's consent is not required for adoption if he "has willfully

abandoned or failed to care for and support the minor." R.C. 3107.07(B)(2)(b). But under the majority's holding today, a natural parent's consent is not necessary when he or she, without justifiable cause, has failed to make one child-support payment. However, we have held that a putative father's interest in a potential relationship with a child is afforded "far less constitutional protection" than that given to an established parent-child relationship. *In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 26. Nothing in the plain language of R.C. 3107.07 indicates that the General Assembly intended to upend that order.

{¶ 42} The majority also appears blind to the practical realities of domestic-relations law. Although many people use a stepparent adoption to bring a blended family together, it may also be misused as a tool for removing a natural parent from a remarried parent's life. "When families break apart, it is not uncommon for parents to harbor feelings of pain, bitterness, and anger toward their former partners. * * * For some parents, the opportunity to terminate the parental rights of their ex-spouse provides the ultimate weapon in the arsenal of matrimonial warfare." Blair, *Parent-Initiated Termination of Parental Rights: The Ultimate Weapon in Matrimonial Warfare*, 24 Tulsa L.J. 299, 300-301 (1989). Adoption not only eliminates the noncustodial parent's parental rights and responsibilities—including the right to visitation and to have a say in the child's education and religious affiliation—but also severs the child's legal relationships with the parent, grandparents, and other blood relatives. *See generally* R.C. 3107.15; *State ex rel. Allen Cty. Children Servs. Bd. v. Mercer Cty. Court of Common Pleas, Probate Div.*, 150 Ohio St.3d 230, 2016-Ohio-7382, 81 N.E.3d 380, ¶ 31. Stepparent adoption destroys those family ties by creating new ones. And because withholding consent may be a noncustodial parent's only defense in a stepparent-adoption proceeding, loss of that right should not be premised on something so relatively minor as a missed or untimely child-support payment. *See* 2 Haralambie, *Handling*

Child Custody, Abuse and Adoption Cases, Section 14:8, at 799 (3d Ed.2009) (a stepparent adoption "is not easy, especially if the other birth parent is still living").

{¶ 43} Yet today's holding makes terminating a parent's right to withhold consent to adoption much easier, potentially allowing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), to be severed based only on a single, unjustified failure to make a court-ordered child-support payment on time and in full. The majority's holding is untenable in light of the plain language of R.C. 3107.07(A), our case precedent construing it, and the constitutional protections in favor of parental rights.

{¶ 44} The analysis of the concurring opinion fares no better. It concludes that R.C. 3107.07(A) is ambiguous, and purporting to apply principles of statutory construction, it states that "we interpret the statute to provide that a parent must comply with the terms of the judicial decree for at least the entire year immediately preceding the filing of the adoption petition." Concurring opinion of Fischer, J., at ¶ 24. However, construing the statute to permit the termination of parental rights upon a single, unjustified failure to make a court-ordered child-support payment over a year-long period is manifestly unreasonable.

{¶ 45} Even if the concurring opinion were correct that the statute is ambiguous, the interpretation it selects is fundamentally wrong for three reasons.

{¶ 46} First, deciding that R.C. 3107.07(A) is susceptible to multiple reasonable constructions means that this court "must construe strictly [this] exception to the requirement of parental consent to adoption in order to protect the right of natural parents to raise and nurture their children." *In re Adoption of P.L.H.*, 151 Ohio St.3d 554, 2017-Ohio-5824, 91 N.E.3d 698, ¶ 23. And between a construction that protects the right to withhold consent unless the parent unjustifiably fails to make all court-ordered child-support payments throughout the year and one that revokes that right when the parent unjustifiably fails to make only

one of those payments, the strictest construction is the one prescribing that a single payment of child support required by a judicial decree is sufficient to preserve the right to withhold consent. The interpretation of the concurring opinion therefore fails to acknowledge, much less safeguard, the fundamental right of a natural parent to the care and custody of his or her child.

{¶ 47} Second, the view of the concurring opinion fails to read R.C. 3107.07(A) as a whole and to construe its provisions together with other related statutes. *See Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 22 (the in pari materia canon of construction may be used to interpret ambiguous statutes). R.C. 3107.07(A) provides a second ground for denying a parent the right to withhold consent to adoption: when the parent "fail[s] without justifiable cause to provide more than de minimis contact with the minor * * * for a period of at least one year." This statute protects the right to withhold consent if the parent has *more than* de minimis contact while *not* requiring more than a de minimis payment of child support to preserve that right. But more importantly, R.C. 3107.07(A) was not enacted to enforce child-support obligations. As Justice Stewart's dissenting opinion points out, R.C. 2919.21(B) makes the failure to pay court-ordered child support a crime, and R.C. 2705.031 subjects that failure to a court's power of contempt. Dissenting opinion of Stewart, J., at ¶ 53. The court's decision to permit the termination of parental rights for unjustifiably missing a single child-support payment is plainly incongruous with the penalties imposed by these other statutes—the maximum criminal penalty for missing a single child-support payment is a 180-day jail term and fine of $1,000, R.C. 2919.21(G)(1); R.C. 2929.24(A)(1); R.C. 2929.28(A)(2)(a)(i), and the contempt statute permits a maximum penalty of $250 and 30 days in jail for the first offense, R.C. 2705.05(A)(1).

{¶ 48} Third, holding that R.C. 3107.07(A) is ambiguous means that this statute, which affects the fundamental rights of parents, is unconstitutionally vague

and does not put a parent on fair notice that a single, unjustified failure to make a court-ordered child-support payment could result in the termination of parental rights. Although the vagueness doctrine is more commonly applied in reviewing criminal laws and First Amendment claims, we have recognized that the prohibition against vague laws also applies "in any case in which the statute challenged substantially affects other fundamental constitutional rights." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 87; *see also United States v. Davis*, __ U.S. __, 139 S.Ct. 2319, 2323, 204 L.Ed.2d 757 (2019) ("In our constitutional order, a vague law is no law at all"); *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966) ("Vague laws in any area suffer a constitutional infirmity").

{¶ 49} "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). It not only protects the public's right to "fair notice of what the law demands of them," but also it maintains the separation of powers by ensuring that it is the legislative branch of government itself that writes the law. *Davis*, ___ U.S. at ___, 139 S.Ct. at 2325. When the legislature passes a vague law, it is not the role of this court "to fashion a new, clearer law to take its place." *Id.* at 2323.

{¶ 50} Therefore, if the concurring opinion were correct that R.C. 3107.07(A) is ambiguous, such that reasonable people could differ as to its meaning and application, then this statute has not given A.C.B.'s father fair notice that missing even a single child-support payment without justifiable cause would result in the termination of his parental rights. And it is not the role of this court to rewrite the statute to make it clear.

{¶ 51} In any case, the General Assembly unambiguously required a one-year period of nonpayment of child support in order to avoid the result reached by the court today. Here, A.C.B.'s father stayed in contact with the child but missed most, though not all, child-support payments required under the Indiana decree of dissolution during the one-year period preceding the filing of the adoption petition. But those facts alone do not trigger the presumption that he has abandoned his parental rights and responsibilities. It is only if he failed to make any child-support payments throughout that entire one-year period that the presumption would arise and authorize the probate judge to determine whether there was "justifiable cause" for the total nonpayment of child support. Therefore, A.C.B.'s father has retained his right to withhold consent to A.C.B.'s adoption. For these reasons, I dissent and would reverse the judgment of the court of appeals.

DONNELLY, J., concurs in the foregoing opinion.

STEWART, J., dissenting.

{¶ 52} "[T]he right of a natural parent to the care and custody of his children is one of the most precious and fundamental in law." *In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986), citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). It is a constitutionally protected right. *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 11. Because adoption terminates this fundamental right, any exception to the requirement of a parent's consent to the adoption of his or her child must be "strictly construe[d]" to protect that right. *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 366, 481 N.E.2d 613 (1985); *see also In re Adoption of Masa* at 165; *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976) (holding that incarceration does not, as a matter of law, constitute a "willful failure" to support a child for purposes of the statutory-consent requirement).

{¶ 53} R.C. 3107.07(A) sets forth Ohio's statutory exceptions to a parent's right to withhold consent to the adoption of his or her child. It is a remedy for children abandoned by a parent. R.C. 3107.07(A) was not enacted as a means to enforce child-support obligations. *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, 131 N.E.3d 28, ¶ 11. Nor was it enacted to punish a parent for not fully complying with court-ordered child-support obligations. There are other statutes that do this. R.C. 2919.21(B) criminalizes a parent's failure to provide child support as established by a court order. *See State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531, ¶ 18. And R.C. 2705.031 authorizes contempt actions for failure to pay child support. *See Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 16.

{¶ 54} Against this backdrop, we are asked to determine—in the context of a situation involving court-ordered child-support payments—what R.C. 3107.07(A) means in setting forth that a parent's consent to the adoption of a minor child is not required when the court "finds by clear and convincing evidence that the parent has failed without justifiable cause to * * * provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding * * * the filing of the adoption petition." In other words, what constitutes *failure* and thereby necessitates the justifiable-cause analysis? Although the majority makes a point of noting that A.C.B.'s father, B.D., did not "come close" to paying the full amount of child support he owed, majority opinion at ¶ 19, while also calling attention to the fact that B.D's lone payment was made only two days before the adoption petition was filed, the majority ultimately holds that anything short of making *all* child-support payments is a failure to provide support, necessitating a justifiable-cause analysis. I disagree.

{¶ 55} In *In re Adoption of Holcomb,* we held that the applicable version of R.C. 3107.07(A) authorized adoption without a natural parent's consent only in cases in which there was a "complete absence of communication." 18 Ohio St.3d

at 366-367, 481 N.E.2d 613. The version of R.C. 3107.07(A) in effect at the time provided that a parent's consent to the adoption of his or her child was not required " 'when it is alleged in the adoption petition and the court finds * * * 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 * * * the filing of the adoption petition.' " *Id.* at 366, quoting former R.C. 3107.07, Am.S.B. No. 205, Section 1, 138 Ohio Laws, Part I, 700.

{¶ 56} We found that the General Assembly adopted an objective standard for probate courts to use when analyzing a nonconsenting parent's communication with a child. *Id.* By not including qualifying language before "communicate," the legislature "opted for certainty" and "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*." (Emphasis sic.) *Id.* We observed that it is not the role of the courts to add language to the statute, *id.*, and for this reason, we held that pursuant to the explicit language of that version of R.C. 3107.07(A), only a "complete absence of communication for the statutorily defined one-year period" was sufficient to allow for an adoption without a parent's consent, *id.* at 366-367.

{¶ 57} The same analysis is relevant to a parent's provision of maintenance and support. By not including terms such as "completely," "significantly," "meaningfully," or "more than de minimis," the legislature adopted an objective standard for courts to use when determining whether a parent has failed to provide maintenance and support as required by law or judicial decree under R.C. 3107.07(A). It is also worth noting that since our decision in *In re Adoption of Holcomb*, the General Assembly has amended R.C. 3107.07(A) on multiple occasions, and while the current version now requires a parent to have "more than de minimis contact" with his or her child, the legislature has not made a

corresponding change to the "maintenance and support" requirement.[1] The majority opinion concludes that qualifying language such as meaningfully, substantially, significantly, or regularly is unnecessary because support "is measured by what is required by law or judicial decree." Majority opinion at ¶ 14. I do not agree that this phrase constitutes a measurement. "As required by law or judicial decree" denotes the mechanisms by which support is required and rendered. To construe the phrase as *the* measure of support required necessarily elevates one form, "judicial decree," over the other, "as required by law." Nothing in the statute indicates that this is what the legislature intended.

{¶ 58} Under the majority's view, failure to support as required by judicial decree is a simple and fixed measure: pay anything less than 100 percent of your court-ordered child support and you have failed to provide support as required by judicial decree. But how would a failure to support "as required by law" be measured by anything other than a complete absence of support? Did the General Assembly intend to impose a more exacting standard on parents who support their children pursuant to a judicial decree than on parents who support their children based on the duty to support as required by law? Because the legislature did not differentiate between the two means by which a parent can provide support, there is no meaningful distinction indicating that it intended for compliance with one form of support to be analyzed or scrutinized more strictly than the other. For this reason, I believe it is a mistake to construe a child-support payment, even a partial one, made pursuant to a judicial decree as anything other than providing

1. Effective April 7, 2009, the relevant language in R.C. 3107.07(A) was amended to its current version. 2008 Sub.H.B. No. 7. The General Assembly changed the law to require that courts find that a parent has failed without justifiable cause to maintain contact with a minor child or to provide for the maintenance and support of a minor child by "clear and convincing evidence." Additionally, the General Assembly changed "communicate" to "provide more than de minimis contact." In so doing, it shifted from an objective to a subjective test regarding a parent's communication or contact with a child. Yet the legislature made no such change to a parent's maintenance-and-support requirement.

maintenance and support for purposes of preserving a parent's right to withhold consent to the adoption of his or her child under R.C. 3107.07(A).

{¶ 59} Admittedly, the facts of this case engender little sympathy for B.D. as a parent. But neither sympathy for B.D. nor the derision the majority exhibits for B.D.'s payment history is a factor to be considered in this analysis. B.D. readily acknowledged his lack of full compliance with the child-support order. But suppose B.D. had come close to 100 percent compliance with the judicial decree, missing only 5 percent of his court-ordered support payments. Under the majority's view, B.D. would still have failed to provide support for his child under the statute, necessitating a determination by the probate court whether B.D.'s failure to pay the 5 percent was justifiable. And suppose, as found by the probate court in this case, B.D. had no justifiable cause for falling 5 percent short of his obligations. Under the majority's view, despite the fact that B.D. paid 95 percent of his court-ordered support payments, he would have failed to provide maintenance and support as required by judicial decree and would have no justifiable cause for his failure. Could the probate court find justifiable cause when there is none?

{¶ 60} I recognize the value of a probate court making justifiable-cause determinations on a case-by-case basis. But under this statute, has a parent who has made less than 100 percent of his court-ordered child-support payments, with no justifiable cause for falling short, forfeited his right to withhold consent to the adoption of his child? Or has he just not fully complied with the court's child-support order? The majority finds the former.

{¶ 61} I acknowledge a court's trepidation in appearing to countenance or permit de minimis or sporadic payments of child support, particularly in instances when a parent has the financial ability to comply fully with a child-support order. But as previously mentioned, there are statutes in place to remedy the failure to fully comply with court-ordered support. Potentially having one's parental rights terminated is not one of those remedies. I also acknowledge that, in isolation, the

majority's view of the meaning of the phrase "as required by * * * judicial decree" is not unreasonable. By the majority's analysis, support required by judicial decree is easily and objectively measured. Yet, support "as required by law" remains an entirely subjective measure. This distinction further underscores why the majority's position, in context, is not in keeping with recognizing a parent's fundamental right to raise and care for his or her child. Any exception to the consent requirement for adoption must be strictly construed to protect that right. The majority's position wholly fails to do so.

{¶ 62} Furthermore, the majority's interpretation of the statute renders the phrase "for a period of at least one year immediately preceding * * * the filing of the petition" meaningless. Under the majority's view, once a payment—or even part of a payment—required pursuant to a support order is missed, the parent has failed to provide maintenance and support as required by judicial decree. Knowing the parent has missed a payment or any portion of a payment, a petitioner can, and probably should, immediately file the adoption petition referencing that missed or partial payment, which would inherently be within the one-year period preceding the petition. This would of course render the one-year period illusory. *See Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21, quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917) (we must "evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative' ").

{¶ 63} R.C. 3107.07(A) establishes the criteria courts must use to determine whether a parent has forfeited his or her parental rights. The right to parent is a fundamental one, and this court must strictly construe any exception to a parent's right to object to the adoption of his or her child. *In re Adoption of Holcomb*, 18

Ohio St.3d at 366, 481 N.E.2d 613. I would hold that under R.C. 3107.07(A), in the context of a case with court-ordered child support, a parent who makes a child-support payment or a portion of a child-support payment pursuant to a judicial decree during the one-year period at issue has not failed to provide maintenance and support and thus maintains the right to withhold consent to the adoption of his or her child. Because the majority holds otherwise, I dissent.

The University of Toledo College of Law Legal Clinic, Robert S. Salem, and April Johnson and Brianna Stephan, Certified Legal Interns, for appellant.

Semro Henry & Barga, Ltd., James L. Rogers, and Katrin E. McBroom for appellee.

IN THE MATTER OF THE ADOPTION OF Y.E.F.

IN THE MATTER OF THE ADOPTION OF M.M.F.

[Cite as *In re Adoption of Y.E.F.*, 163 Ohio St.3d 521, 2020-Ohio-6785.]

Constitutional law—Because indigent parents facing the termination of their parental rights in adoption proceedings in probate courts are similarly situated to indigent parents facing termination of their parental rights in permanent-custody proceedings in juvenile courts, indigent parents in adoption proceedings must be afforded the same right to appointed counsel that is statutorily provided to indigent parents in permanent-custody proceedings—Court of appeals' judgment reversed and cause remanded to probate court.

(Nos. 2019-0420 and 2019-0421—Submitted January 28, 2020—Decided December 22, 2020.)

APPEALS from the Court of Appeals for Delaware County,
Nos. 18 CAF 09 0069, 2019-Ohio-448, and 18 CAF 09 0070, 2019-Ohio-449.

SYLLABUS OF THE COURT

Indigent parents are entitled to counsel in adoption proceedings in probate court as a matter of equal protection of the law under the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

DONNELLY, J.

{¶ 1} Although indigent parents faced with losing parental rights in a custody proceeding in juvenile court are entitled to appointed counsel, indigent parents faced with losing parental rights in an adoption proceeding in probate court

are not entitled to appointed counsel. Appellant, E.S., argues that this disparate treatment is a violation of the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution. We agree.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} E.S. is the mother of twin boys, Y.E.F. and M.M.F. In April 2015, when the boys were under a year old, their father, R.H., fled their home to avoid apprehension for federal criminal charges. With no funds, because R.H. had allegedly emptied their bank account, E.S. asked R.H.'s sister, C.F., and C.F.'s husband, D.F., to care for her sons while she sought shelter for herself and her daughter. E.S. contends that the arrangement with C.F. and D.F. was supposed to be temporary. But in May 2015, C.F. filed a complaint in juvenile court for allocation of parental rights.

{¶ 3} C.F. was awarded temporary custody, and then, based on an agreed judgment entry dated September 9, 2016, C.F. and D.F. were granted final custody. The entry set E.S.'s and R.H.'s child-support obligations at zero. E.S. received visitation rights, but only at the discretion of C.F. and D.F., who denied her visitation requests based on their belief that E.S. had a substance-abuse problem and could not provide a safe environment at her home for the boys.

{¶ 4} In April 2018, C.F. and D.F. filed petitions in the Delaware County Probate Court to adopt Y.E.F. and M.M.F., alleging that the consent of E.S. and R.H. was not required because neither parent had had more than de minimus contact with the boys nor provided financial support in the year preceding the filing of the adoption petitions. On August 22, 2018, E.S. filed a request for appointed counsel and attached a letter from the Legal Aid Society of Columbus raising equal-protection and due-process arguments in support of her request. The court denied E.S.'s request on August 27 and instead confirmed that it would proceed with a

previously scheduled hearing on August 29 to determine whether E.S.'s consent to the boys' adoption was necessary.

{¶ 5} At the hearing, E.S. struggled to understand the process. After her own testimony (elicited through cross-examination by C.F. and D.F.'s attorney) and that of C.F. and D.F., E.S. vocalized her realization that she was in over her head, stating, "I didn't know that this would be a whole cross-examination and the whole thing would take place. Because maybe I should get an attorney, because I don't know how to cross-examine." The magistrate disregarded her request and the hearing proceeded. At the conclusion of the hearing, the probate court continued the case for further hearing, which it set for September 12, 2018. On September 10, E.S. appealed the court's August 27 denial of her request for appointed counsel.

{¶ 6} The Fifth District Court of Appeals affirmed, concluding that equal-protection and due-process guarantees are inapplicable to requests for appointed counsel in adoption cases brought by private petitioners. We granted E.S.'s discretionary appeals, 155 Ohio St.3d 1467, 2019-Ohio-2100, 122 N.E.3d 1298, and 155 Ohio St.3d 1467, 2019-Ohio-2100, 122 N.E.3d 1297, and consolidated the cases for review, 156 Ohio St.3d 1401, 2019-Ohio-2126, 123 N.E.3d 1023, and 156 Ohio St.3d 1401, 2019-Ohio-2126, 123 N.E.3d 1022.

II. ANALYSIS

A. R.C. 2505.02(B)(2)

{¶ 7} After oral argument, this court sua sponte requested that the attorney general file an amicus brief addressing, among other issues, whether the probate court's denial of E.S.'s request for appointment of counsel constituted a final, appealable order. 157 Ohio St.3d 1409, 2019-Ohio-3749, 131 N.E.3d 87; 157 Ohio St.3d 1409, 2019-Ohio-3749, 131 N.E.3d 88. Accordingly, we will address that issue first.

{¶ 8} Pursuant to R.C. 2505.02(B)(2), an order is a final, appealable order when it "affects a substantial right made in a special proceeding." Adoption

proceedings are "special proceeding[s]," *see In re Adoption of Greer*, 70 Ohio St.3d 293, 297, 638 N.E.2d 999 (1994), a point that the attorney general concedes in his amicus curiae brief urging affirmance of the Fifth District's judgment. Thus, the question that remains for purposes of resolving this issue is whether E.S.'s claim that she has a right to counsel in these adoption proceedings involves a substantial right. We conclude that it does. *See Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 8-11 (observing that we had previously held that orders *disqualifying* counsel were immediately appealable), citing *Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 39, 472 N.E.2d 695 (1984); *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, syllabus.

{¶ 9} Moreover, E.S. has a "fundamental liberty interest" in parenting her children, grounded in the Fourteenth Amendment to the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990). This fundamental liberty interest is also a substantial right under R.C. 2505.02(B)(2). *See* R.C. 2505.02(A)(1) (defining "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect"); *see also Thomasson v. Thomasson*, 153 Ohio St.3d 398, 2018-Ohio-2417, 106 N.E.3d 1239, ¶ 13, 21. The entire adoption proceeding is aimed at determining whether E.S. can continue to have a role in the lives of her children.

{¶ 10} In *Guccione v. Hustler Magazine, Inc.*, 17 Ohio St.3d 88, 89, 477 N.E.2d 630 (1985), we held that "an order denying permission for out-of-state counsel (otherwise competent) to represent a litigant is a final appealable order." We reasoned that effective review of the denial after the case reached completion in the trial court would not be possible because "[t]he burden on that party at the end of the case to show that he was prejudiced would in effect be an 'insurmountable burden.' " *Id.* at 90, quoting *Armstrong v. McAlpin*, 625 F.2d 433,

441 (2d Cir.1980). This case is potentially worse because, without adequate funds for an attorney, E.S. is left to protect a fundamental right without *any* counsel, not merely without her preferred counsel.

{¶ 11} Without counsel, E.S.'s acknowledged inability to understand the process and to properly cross-examine and her likely inability to properly preserve issues for appeal, among other limitations common among nonattorneys, will render effective appellate review unlikely, perhaps even impossible. *See State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 49, 693 N.E.2d 794 (1998) (recognizing that a party "lack[ed] an adequate remedy in the ordinary course of law to challenge [the lower court's] refusal to appoint her counsel").

{¶ 12} We conclude that the denial of E.S.'s request for appointed counsel affects a substantial right in a special proceeding. Accordingly, the trial court's order denying E.S.'s request for appointed counsel is a final, appealable order pursuant to R.C. 2505.02(B)(2).

B. R.C. 2151.352

{¶ 13} R.C. 2151.352 provides, "A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided * * *." We have stated that R.C. 2151.352 means that indigent parents "are entitled to appointed counsel in all juvenile proceedings," which includes custody proceedings. *Asberry* at 48; *see also In re R.K.*, 152 Ohio St.3d 316, 2018-Ohio-23, 95 N.E.3d 394, ¶ 5 ("a parent has the right to counsel at a permanent-custody hearing, including the right to appointed counsel if the parent is indigent"), citing R.C. 2151.352.

{¶ 14} Indigent parents in adoption proceedings in probate court, governed by R.C. Chapter 3107, are not statutorily entitled to appointed counsel. Although this court used broad language in *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232,

479 N.E.2d 257 (1985), stating, "R.C. 2151.352 and Juv.R. 4(A) provide for the appointment of counsel in cases where parental rights are subject to termination," that case involved a juvenile-court proceeding and did not extend to adoption proceedings. E.S. argues that Ohio denied her equal protection of the law when it failed to provide appointed counsel in the underlying adoption proceedings involving her twin sons. She contends that there is no material substantive difference between a custody proceeding in juvenile court, in which a parent is at risk of losing custody of her child, and an adoption proceeding in probate court, in which a parent faces termination of her parental rights. Even if the proceedings involving parental rights occur in different courts, E.S. asserts that the same interest is at risk: the parent-child relationship.

C. Equal Protection

1. The Fourteenth Amendment

{¶ 15} The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Ohio Constitution likewise guarantees to the people the equal protection of the laws; it states, "All political power is inherent in the people. Government is instituted for their equal protection and benefit." Article I, Section 2, Ohio Constitution. The essence of the Equal Protection Clauses "require[s] that individuals be treated in a manner similar to others in like circumstances." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6; *see also State ex rel. Patterson v. Indus. Comm.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008 (1996) (the constitutional guarantee of equal protection requires that "laws are to operate equally upon persons who are identified in the same class").

{¶ 16} The United States Constitution, when applicable to the states, provides a floor of protection with respect to individual rights and civil liberties; states may not deny individuals the minimum level of protection prescribed by the

federal constitution. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). States possess authority to grant broader protections under their own constitutions than those granted by the federal constitution. *Id.* at 41-42.

{¶ 17} The Fourteenth Amendment's guarantee of equal protection does not forbid the state from treating different classes of persons differently. *Eisenstadt v. Baird*, 405 U.S. 438, 446-447, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), citing *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). But a classification must not be arbitrary; it " 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Reed* at 76, quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

{¶ 18} In determining whether state legislation violates the federal Equal Protection Clause, we " 'apply different levels of scrutiny to different types of classifications.' " *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13, quoting *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). "[A]ll statutes are subject to at least rational-basis review, which requires that a statutory classification be rationally related to a legitimate government purpose." *Id*., citing *Clark* at 461. But when a statutory classification affects a fundamental constitutional right, we conduct a more demanding strict-scrutiny inquiry, which requires that the classification "be narrowly tailored to serve a compelling state interest." *Id.* When a statutory classification affects a fundamental right, "the state must assume the heavy burden of proving that the legislation is constitutional." *Beatty v. Akron City Hosp.*, 67 Ohio St.2d 483, 492, 424 N.E.2d 586 (1981), citing *Eisenstadt* at 447, fn. 7.

2. Involuntary Termination of a Parent-Child Relationship

{¶ 19} Ohio law provides alternative statutory proceedings that may result in the involuntary termination of a parent-child relationship. Under R.C. 2151.414,

a juvenile court may grant a motion for permanent custody of a child; a grant of permanent custody permanently divests the parents of their parental rights. *Id.* Alternatively, a parent-child relationship may be terminated by a judicial decree granting a private adoption in proceedings before a probate court under R.C. Chapter 3107. A final decree of adoption has the effect of terminating the biological parents' parental rights and creating new parental rights in the adoptive parents. R.C. 3107.15(A). Whether in custody proceedings in juvenile court or in adoption proceedings in probate court, parents who contest the involuntary and permanent termination of their parental rights fight the same battle against " 'the family law equivalent of the death penalty.' " *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991).

{¶ 20} In proceedings in juvenile court under R.C. Chapter 2151, the child and the child's parents are statutorily entitled to legal representation, including a right to appointed counsel if they are indigent, at all stages of the proceedings. R.C. 2151.352. An indigent parent who opposes the termination of his or her parental rights in adoption proceedings in probate court, on the other hand, has no statutory right to appointed counsel. Thus, Ohio's statutory scheme distinguishes between indigent parents facing termination of their parental rights in juvenile court and indigent parents facing termination of their parental rights in adoption proceedings in probate court, affording only the former class of parents the right to appointed counsel.

{¶ 21} E.S. maintains that Ohio's different treatment of indigent parents facing termination of their parental rights in juvenile-court proceedings and indigent parents facing termination of their parental rights in probate-court proceedings violates federal and state constitutional guarantees of equal protection.

3. Lower-Court Decision

{¶ 22} The court of appeals concluded that equal protection does not require that indigent parents subject to losing parental rights in an adoption proceeding in probate court be afforded appointed counsel. First, it determined that equal-protection concerns are not applicable in adoption cases because the proceedings are initiated by private parties and "[t]he Equal Protection Clause provides protection against governmental, not private, action." 2019-Ohio-448 at ¶ 22 and 2019-Ohio-449, 130 N.E.3d 1044, at ¶ 22, both citing *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Further, even assuming the Equal Protection Clause is a relevant consideration here, the court of appeals observed that "adoption and permanent custody are 'distinct concepts under Ohio law.' " 2019-Ohio-448 at ¶ 24 and 2019-Ohio-449, 130 N.E.3d 1044, at ¶ 24, both quoting *In re Adoption of J.L.M-L*, 5th Dist. Muskingum No. CT2016-0030, 2017-Ohio-61, ¶ 12. The court reasoned that "adoption and permanent custody are each contained within different statutes with different purposes and each with different tests involved before a court can grant them. Thus, biological parents in adoption actions and permanent custody actions are not 'similarly situated individuals [that] are treated differently.' " (Brackets sic.) 2019-Ohio-448 at ¶ 24; 2019-Ohio-449, 130 N.E.3d 1044, at ¶ 24.

{¶ 23} We declined jurisdiction in *J.L.M-L*. *See* 148 Ohio St.3d 1446, 2017-Ohio-1427, 72 N.E.3d 658. Thus, the court of appeals in the present cases was appropriately following its own precedent. Nevertheless, for the following reasons, we conclude that equal protection is applicable in this context and further, that indigent parents in custody proceedings in juvenile courts and indigent parents in adoption proceedings in probate courts are similarly situated.

4. Application of Equal-Protection Standards

a. State Action

{¶ 24} "The Constitution's protections of individual liberty and equal protection apply in general only to action by the government." *Edmonson* at 619, citing *Natl. Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988). An act that violates the federal Constitution when committed by a government actor does not necessarily also violate the Constitution when committed by a private actor. *Id.* And because the Fourteenth Amendment is directed at the states, "it can be violated only by conduct that may be fairly characterized as 'state action.' " *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). However, the Fifth District's focus on the character of the underlying adoption proceedings and that private parties initiated these proceedings is misplaced.

{¶ 25} E.S. challenges the General Assembly's distribution of the right to appointed counsel among indigent parents. The statutory entitlement to appointed counsel, which the General Assembly extended to parents facing termination of their parental rights in juvenile court but not to parents facing termination of their parental rights in probate court, stems from legislative action. Enactment of legislation qualifies as state action, *see In re Adoption of L.T.M.*, 214 Ill.2d 60, 74-75, 824 N.E.2d 221 (2005), and it is that state action, not any conduct by a private party, that purportedly justified the trial court's denial of E.S.'s request for appointed counsel.

{¶ 26} Additionally, a challenge to the extinguishment of a parent-child relationship is a challenge to state action, even when a private party initiates the judicial process, because only the state has the power to extinguish the parent-child relationship. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), fn. 8. Even though private parties may initiate adoption proceedings, adoption itself is a "function of the state" and may be accomplished only by the

exercise of government authority. *State ex rel. Portage Cty. Welfare Dept. v. Summers*, 38 Ohio St.2d 144, 150, 311 N.E.2d 6 (1974). The mere fact that private parties initiated the adoption proceedings in which E.S. requested appointed counsel to defend her parental rights does not demonstrate the absence of state action, so as to preclude her equal-protection challenge. The Fifth District erred in holding otherwise.

b. Similarly Situated Parents

{¶ 27} The Fifth District independently rejected E.S.'s equal-protection challenge based on its determination that biological parents facing termination of their parental rights in adoption proceedings are not similarly situated to biological parents facing termination of their parental rights in permanent-custody proceedings. 2019-Ohio-448 at ¶ 24; 2019-Ohio-449, 130 N.E.3d 1044, at ¶ 24. The Equal Protection Clauses in both the United States and Ohio Constitutions require that state laws treat similarly situated individuals in a similar manner. *McCrone*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶ 6. In other words, the law must "operate equally upon persons who are identified in the same class." *Patterson*, 77 Ohio St.3d at 204, 672 N.E.2d 1008. "The comparison of only similarly situated entities is integral to an equal protection analysis," *GTE N., Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984, 770 N.E.2d 65, ¶ 22, because equal protection does not " 'require things which are different in fact * * * to be treated in law as though they were the same,' " (ellipsis added in *T. Ryan Legg*) *T. Ryan Legg Irrevocable Trust v. Testa*, 149 Ohio St.3d 376, 2016-Ohio-8418, 75 N.E.3d 184, ¶ 73, quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124 (1940).

{¶ 28} The Fifth District based its conclusion that biological parents in adoption proceedings are not similarly situated to biological parents in permanent-custody proceedings on the fact that the "concepts of adoption and permanent custody are each contained within different statutes with different purposes and

each with different tests involved before a court can grant them." 2019-Ohio-448 at ¶ 24; 2019-Ohio-449, 130 N.E.3d 1044, at ¶ 24. Despite those differences, however, indigent parents in both proceedings face the same termination of their fundamental constitutional right to parent their children as a result of judicial action.

{¶ 29} We conclude that under Ohio's dual statutory scheme for terminating parental rights, indigent parents facing termination of their parental rights by adoption in probate court are similarly situated to indigent parents facing termination of their parental rights in juvenile court. *See In re Adoption of A.W.S. and K.R.S.*, 377 Mont. 234, 238, 339 P.3d 414 (2014) (parents facing the loss of parental rights in either state-initiated abuse-and-neglect proceedings or in adoption proceedings initiated by private parties are similarly situated); *In re Adoption of K.A.S., D.S., and B.R.S.*, 499 N.W.2d 558, 566 (N.D.1993); *In the Interest of S.A.J.B.*, 679 N.W.2d 645, 650-651 (Iowa 2004) (citing *K.A.S.* with approval); *In re Adoption of Fanning*, 310 Or. 514, 522-523, 800 P.2d 773 (1990).

c. Strict Scrutiny

{¶ 30} The rejection of the Fifth District's dual rationales—that this case does not implicate the constitutional guarantees of equal protection because adoption proceedings do not involve state action and because E.S. is not similarly situated to a parent facing termination of her parental rights in a permanent-custody proceeding in juvenile court—is but a prelude to the substantive application of the Equal Protection Clause. Because Ohio's statutory distinction between indigent parents facing the involuntary termination of their parental rights based on the type of proceeding in which they challenge such a termination implicates a fundamental right, the Equal Protection Clause requires equal treatment of those two classes of parents absent a compelling interest to treat them differently and a statutory mechanism narrowly tailored to address only that interest. *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (the right to parent one's own child is a "fundamental liberty interest"); *see also In re Murray*, 52 Ohio St.3d at 157, 556

N.E.2d 1169, quoting *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977) ("suitable persons have a 'paramount' right to the custody of their minor children").

{¶ 31} The state has offered no compelling justification for affording parents facing termination of their parental rights in juvenile court a right to appointed counsel while withholding that benefit from parents facing termination of their parental rights through adoption proceedings in probate court. The putative adoptive parents, as appellees here, did not file a merit brief in this court, and the attorney general does not purport to demonstrate a compelling state interest and instead argues that rational-basis review applies. The state interest proffered by the attorney general—the "responsible management of taxpayer funds"—is a legitimate state interest. *See Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 353-354, 639 N.E.2d 31 (1994). But it is not a compelling interest, especially when compared to the fundamental right at stake.

{¶ 32} Moreover, the appointment of state-funded counsel for indigent parents in adoption cases will serve purposes—beyond not violating equal protection—that are both legitimate and salutary. It will help ensure that a probate court's decision is in the best interests of the child by testing the relevant facts and law in the crucible of the adversarial process. *See In re Adoption of J.E.V.*, 226 N.J. 90, 109-110, 141 A.3d 254 (2016). It will also help ensure "that the adoption process is completed in an expeditious manner," which we have stated is in the best interests of children. *In re Adoption of Zschach*, 75 Ohio St.3d 648, 651, 665 N.E.2d 1070 (1996). Finally, it is probable that appointed counsel for indigent parents will lower the risk of error, just as it does now in juvenile-court proceedings.

III. CONCLUSION

{¶ 33} We conclude that R.C. 2151.352 is unconstitutionally underinclusive as applied to indigent parents facing the loss of their parental rights in probate court. Instead of declaring the statute unconstitutional on its face, and significantly disrupting the multifarious juvenile-court proceedings in the state, we

declare that indigent parents are entitled to counsel in adoption proceedings in probate court as a matter of equal protection of the law under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

{¶ 34} Because we base our conclusion on the Equal Protection Clauses of the United States and Ohio Constitutions, we need not address E.S.'s claims that she was deprived of due process under the United States Constitution and the Ohio Constitution. We reverse the judgment of the Fifth District Court of Appeals and remand this cause to the Delaware County Probate Court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and KENNEDY and FRENCH, JJ., concur.

FISCHER, J., concurs in judgment only.

DEWINE, J., dissents, with an opinion joined by STEWART, J.

DEWINE, J, dissenting.

{¶ 35} This case comes to us by way of an interlocutory appeal. In most situations, appellate courts lack jurisdiction over interlocutory appeals—the ordinary rule is that a party must pursue all claims of error in one appeal following trial on the merits. Today, the majority provides only a cursory analysis of the jurisdictional question and then announces that the legislature has violated the equal-protection guarantees of the United States and the Ohio Constitutions by providing appointed counsel for indigent parents in permanent-custody proceedings in juvenile courts without, at the same time, providing appointed counsel for indigent parents in adoption proceedings held in probate courts. As eager as the majority may be to get to the merits, we cannot do so without a proper grant of jurisdiction. Because I do not believe that the trial court's interlocutory order was

immediately appealable, I would vacate the decision of the court of appeals and order the matter dismissed for lack of appellate jurisdiction. I dissent from the majority's decision to do otherwise.

The Order at Issue

{¶ 36} The order being appealed was issued in an adoption proceeding involving twin siblings. A week before the proceeding was scheduled to begin, E.S., the biological mother of the twins, filed a request for the appointment of counsel. The probate court denied the request and the adoption hearing proceeded as scheduled. Both potential adoptive parents testified, and E.S. was called to the stand and cross-examined. Near the end of the proceeding, E.S. indicated to the court that she would like a continuance "[t]o possibly get an attorney." The court continued the case based on E.S.'s oral motion. Before the hearing resumed, however, E.S. appealed the probate court's denial of her request for the appointment of counsel.

{¶ 37} The Fifth District Court of Appeals affirmed the probate court's order denying E.S.'s request for appointed counsel but never addressed its jurisdiction over the interlocutory appeal. After oral argument in this court, we asked the parties to provide supplemental briefing addressing whether the probate court's denial of E.S.'s request constituted a final, appealable order. 157 Ohio St.3d 1409, 2019-Ohio-3749, 131 N.E.3d 87.

Ohio's Final-Order Requirement

{¶ 38} The Ohio Constitution grants the courts of appeals "such jurisdiction as may be provided by law to review * * * judgments or final orders." Ohio Constitution, Article IV, Section 3(B)(2). The "provided by law" part of this constitutional grant is effectuated by R.C. 2505.02, which defines what constitutes a final order. "An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction." *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997

N.E.2d 490, ¶ 10, citing *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9, citing *Gen. Acc. Ins. Co v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 39} The requirement of a final order reflects the general principle that "all judgments in a case should be reviewed in a single appeal." *State v. Craig*, 159 Ohio St.3d 398, 2020-Ohio-455, 151 N.E.3d 574, ¶ 9, citing *Anderson v. Richards*, 173 Ohio St. 50, 55, 179 N.E.2d 918 (1962); *see also Ashtabula v. Pub. Util. Comm.*, 139 Ohio St. 213, 215, 39 N.E.2d 144 (1942); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (the "general rule [is] that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of [trial] court error at any stage of the litigation may be ventilated" [citation omitted]).

{¶ 40} The final-order requirement is a long-standing feature of appellate jurisdiction with its origins in the English common law. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 541-544 (1932). By requiring most appeals to wait until the conclusion of litigation in the trial court, the rule emphasizes the deference that appellate courts owe to the trial judge and "minimiz[es] appellate-court interference with the numerous decisions [a trial judge] must make in the prejudgment stages of litigation." *Flanagan v. United States*, 465 U.S. 259, 263-264, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984). It also prevents the harassment and excessive costs that could result from successive appeals during a single piece of litigation. *Id.* at 264. And by preventing piecemeal appeals, the rule promotes efficient judicial administration. *Id.*

{¶ 41} E.S. argues that this case is an exception to the general principle because the probate court's denial of her motion for the appointment of counsel falls within the definition of "final order" provided in R.C. 2505.02(B)(2). That provision defines "[a]n order that affects a substantial right made in a special proceeding" as a final order. *Id*.

{¶ 42} Everyone agrees that an adoption proceeding is a "special proceeding": it is an action "specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." *See* R.C. 2505.02(A)(2). The issue is whether the probate court's order "affects a substantial right."

If an Order Does Not Foreclose Appropriate Relief in the Future, It Does Not Affect a Substantial Right

{¶ 43} Our precedent provides the framework for answering this question. In *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993), we held that "[a]n order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." To meet this requirement, an order has to be one that "must be appealed immediately or its effect will be irreversible." *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 10. An order's effect is irreversible if it cannot be meaningfully or effectively remedied by an appeal following a final judgment. *See In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17, 95 N.E.3d 389, ¶ 18.

{¶ 44} In most cases, an appeal following final judgment at the conclusion of the case will provide a sufficient remedy for a trial error. The appellate court can simply order a new trial. Certain things—such as litigation cost, inconvenience to the parties, and potential harms caused by delays in resolution—are almost always part and parcel of waiting for final judgment before an appeal. But these types of harms are inherent in the final-order rule and have never been considered to be the type of irreversible effects requiring immediate appeal. *See, e.g.*, *In re D.H.* at ¶ 21 ("passage of time and speculation about its effect" will not render appeal after final judgment ineffective); *Gardner v. Ford*, 1st Dist. Hamilton No. C-150018, 2015-Ohio-4242, ¶ 8 ("the prospect of high litigation costs" that might be avoided by an immediate appeal does not make appeal following final judgment ineffective).

{¶ 45} In only a very limited number of cases have we concluded that a trial error could not be fixed following an appeal from a final judgment. These are cases in which " 'the proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage' suffered by the appealing party." *State v. Muncie*, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001), quoting *Gibson-Myers & Assocs., Inc. v. Pearce*, 9th Dist. Summit No. 19358, 1999 WL 980562, *2 (Oct. 27, 1999). The prototypical case is the administration of forced medication to an incompetent criminal defendant; reversal on appeal could not remedy the effects of the medication once administered. *Id*. at 451-452. Similarly, an immediate appeal is available to protect the right against double jeopardy because the constitutional guarantee protects against being placed on trial for a second time: absent an immediate appeal, the right cannot be vindicated. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 53-59. And we have found the denial of an order preventing disclosure of confidential information to be immediately appealable, because once the information was disclosed, there could be "no remedy," the confidentiality of the information having been "irretrievably lost." *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197, 898 N.E.2d 589, ¶ 12-13.

The Denial of an Immediate Appeal Would Not Foreclose E.S. from Receiving Appropriate Relief in the Future

{¶ 46} Under this rubric, it is evident that the effect of the trial court's order denying appointed counsel would not foreclose E.S. from receiving effective relief in the future. If the trial court rules against E.S. and allows the adoption of her children over her objection, she could appeal and raise the equal-protection and due-process claims that she advances here. If she is successful on those claims, a new adoption hearing would be in order and she would be entitled to court-appointed counsel. The right E.S. seeks to vindicate would be fully protected—if successful, she would obtain exactly what she is asking for here: an adoption

hearing with representation by court-appointed counsel. This is by no means a case in which the bell cannot be unrung.

{¶ 47} In reaching a contrary conclusion, the majority never squarely addresses the standard established by our case law: whether the order, "if not immediately appealable, would foreclose appropriate relief in the future." *Bell*, 67 Ohio St.3d at 63, 616 N.E.2d 181. Instead, it notes that E.S. has a " 'fundamental liberty interest' in parenting her children," majority opinion at ¶ 9, quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), and points to a 1985 opinion, in which we held that the disqualification of a litigant's chosen counsel is a final, appealable order because the " ' "insurmountable burden" ' " of demonstrating prejudice after completion of the trial-court proceedings prevents effective review without an immediate appeal. Majority opinion at ¶ 10, quoting *Guccione v. Hustler Magazine, Inc.*, 17 Ohio St.3d 88, 90, 477 N.E.2d 630 (1985), quoting *Armstrong v. McAlpin*, 625 F.2d 433, 441 (2d Cir.1980).

{¶ 48} The fundamental right allegedly affected here, though, is E.S.'s right to appointed counsel, not her right to raise her children. Moreover, *Guccione* is of questionable relevance to the question in front of us. At the time *Guccione* was decided, we protected the interests underlying the final-judgment rule by defining "special proceeding" through a test that balanced "the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Amato v. Gen. Motors Corp.*, 67 Ohio St.2d 253, 258, 423 N.E.2d 452 (1981). We relied on that test in deciding *Guccione*. *Guccione* at 89-90. Subsequently, though, in *Polikoff v. Adam*, 67 Ohio St.3d 100, 616 N.E.2d 213 (1993), syllabus, we overruled *Amato*, disavowed the balancing test, and adopted a bright-line definition of "special proceeding" now embodied in R.C. 2505.02(A)(2). The same day we decided *Polikoff*, we announced in *Bell* that an order affects a substantial right only if the

unavailability of immediate appeal would preclude effective relief in the future. *Bell* at 63. Remarkably, the majority doesn't even bother to mention *Bell* today.

{¶ 49} Even aside from its dubious precedential value, *Guccione* is distinguishable. The *Guccione* holding was motivated by this court's concern about the burden a litigant would face in showing prejudice, that is, that the outcome of the trial would have been different but for the erroneous disqualification of counsel. *Id*. at 90. The concern was about the difficulty in establishing prejudice from a comparison between how disqualified counsel might have performed versus how replacement counsel actually performed. *Id*. This case does not present that kind of problem, because the issue here is whether E.S. is entitled to appointed counsel at all.

{¶ 50} Indeed, the need for immediate appeal of decisions denying court-appointed counsel is belied by the facts of this case. By the time that E.S. filed her appeal, the proceeding was near its end and she had already been subject to cross-examination. The remedy that the majority awards her today—a new adoption hearing—could just as easily have been issued following a final judgment. The violence the majority does to the final-order rule is completely unnecessary.

The Impact of the Majority Decision

{¶ 51} The majority's resolution of the jurisdictional issue fails to consider the deleterious impact its decision will have on the final-judgment rule. The final-order rule is categorical: whether something is a final order depends not on the exigencies of a particular case but on whether that order falls within a class of orders that has been deemed final. Here, the class consists of orders denying the appointment of court-appointed counsel. Under the precedent established by the majority today, any time a litigant requests a court-appointed attorney—whether there is any arguable merit to the claim of entitlement or not—and that request is denied, the litigant will be entitled to an immediate appeal. Thus, if a court finds that a criminal defendant fails to meet indigency requirements, the defendant can

immediately appeal and the criminal proceeding must halt until the appeal is adjudicated. Similarly, a party in any civil lawsuit can ask for court-appointed counsel even if no such right has previously been thought to exist. If the request is denied, then the party can stop the proceedings and pursue an immediate appeal. Thus, by concluding that this category of decisions is immediately appealable, the majority invites many of the problems that the final-order rule is meant to avoid—piecemeal litigation, strategic delay, harassment of opponents, and premature review of trial-court decisions.

{¶ 52} One wonders what the state of the law is for final orders in Ohio following today's decision. The majority doesn't explicitly overrule the standard established in *Bell*, 67 Ohio St.3d at 63, 616 N.E.2d 181—that to affect a substantial right an order must foreclose appropriate relief in the future—but it does ignore the standard altogether. I don't envy future appellate courts and litigants who will have to try to make sense of R.C. 2505.02(B)(2)'s "affects a substantial right" requirement in the face of this court's inconsistent treatment of the provision.

{¶ 53} The majority's decision today cannot be explained by our precedent; it can be explained only by the majority's desire to immediately reach the result it finds most efficacious. And no doubt, forcing a litigant to wait for a final order before challenging the denial of counsel can impose a hardship on that individual. But that is not sufficient justification to ignore the jurisdictional barriers. It would be " 'a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste of piecemeal litigation in every instance of temptation.' " *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985), quoting *Bachowski v. Usery*, 545 F.2d 363, 373 (3d Cir.1976). Moreover, ignoring the jurisdictional requirements in those cases " 'where the merits of the dispute may attract the deep interest of the court' " will lead to " 'a lack of principled

adjudication' " and " 'perhaps the ultimate devitalization of the finality rule.' " *Id.*, quoting *Bachowski* at 373-374.

Conclusion

{¶ 54} Under the rule that we announced in *Bell* at 63, the court of appeals did not have jurisdiction over E.S.'s interlocutory appeal. The trial court's order refusing to appoint counsel for E.S. did not affect a substantial right because it did not foreclose appropriate relief in the future. Thus, I would vacate the decision of the court of appeals and order the appeal dismissed.

STEWART, J., concurs in the foregoing opinion.

Welch Legal Services, L.L.C., and Porter R. Welch, for appellees.

Staci K. Thomas, Legal Aid Society of Columbus; and James M. Daniels, and Matthew P. Waigand, Southeastern Ohio Legal Services, for appellant.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, and Stephen P. Carney, Deputy Solicitor General, urging affirmance for amicus curiae Ohio Attorney General Dave Yost.

Legal Aid Society of Cleveland, Katherine Hollingsworth, Thomas Mlakar, and Joseph Tomino; McDonald Hopkins, L.L.C., R. Jeffrey Pollock, and Amy Wojnarwsky; Legal Aid of Western Ohio, Inc., Lucinda Weller, Frank Catanzariti, Cara Williams, and Sarvani Nicolosi; Advocates for Basic Legal Equality, Inc., and Heather Hall; Legal Aid Society of Southwest Ohio, L.L.C., and John Schrider; Community Legal Aid Services, Inc., and Jennifer van Dulmen, urging reversal for amicus curiae Legal Aid Society of Cleveland, Legal Aid of Western Ohio, Inc., Legal Aid Society of Southwest Ohio, L.L.C., Advocates for Basic Legal Equality, Inc., Community Legal Aid Services, Inc., National Coalition for a Civil Right to Counsel, and National Association of Counsel for Children.

THE STATE EX REL. ALLEN COUNTY CHILDREN SERVICES BOARD *v.* MERCER COUNTY COURT OF COMMON PLEAS, PROBATE DIVISION, ET AL.

[Cite as *State ex rel. Allen Cty. Children Servs. Bd. v. Mercer Cty. Court of Common Pleas, Probate Div.*, 150 Ohio St.3d 230, 2016-Ohio-7382.]

Prohibition—Adoption—Probate court's authority to order preadoption placement pursuant to R.C. 5103.16(D) is within its exclusive, original jurisdiction over adoption proceedings even while child is subject to juvenile court's continuing jurisdiction—Probate court acted within its jurisdiction and in accordance with statutory authority in placing child for adoption with foster parents with mother's consent—Reconsideration granted, peremptory writ rescinded, and writ denied.

(No. 2016-0723—Submitted August 31, 2016—Decided October 20, 2016.)

IN PROHIBITION.

O'DONNELL, J.

{¶ 1} The issue in this case is whether a probate court may exercise its *exclusive* jurisdiction over adoption proceedings while a juvenile court is concurrently exercising *continuing* jurisdiction over a child custody proceeding.

{¶ 2} The Allen County Children Services Board ("Board") commenced this action seeking a writ of prohibition barring the Probate Division of the Mercer County Common Pleas Court ("Probate Court") and Judges Mary Pat Zitter and James Rapp from exercising jurisdiction over M.S., a minor child.[1] At that time, the child was in the temporary custody of the Board by order of the Juvenile Division of the Allen County Common Pleas Court ("Juvenile Court"). The

[1] Judge Zitter is a common pleas judge in Mercer County. Judge Rapp is presiding over the case pursuant to assignment No. 16JA0734 by the chief justice, effective April 1, 2016.

Probate Court and the Juvenile Court both assert jurisdiction over the child's residential placement.

{¶ 3} On June 1, 2016, this court granted a peremptory writ of prohibition precluding the Probate Court from "exercising jurisdiction in the case captioned *In the Matter of the Placement and Adoption of M.A.S.A.*, Mercer County Common Pleas Court, Probate Division, case No. 2016 5005, consistent with the opinion to follow." 146 Ohio St.3d 1404, 2016-Ohio-3255, 50 N.E.3d 571. Before this court issued an opinion, the Probate Court and Judges Zitter and Rapp moved for reconsideration.

{¶ 4} We grant the motion for reconsideration, hold that the Probate Court acted within its jurisdiction and in accordance with its statutory authority in placing M.S. for adoption with Brian and Kelly Anderson with the consent of her mother, and rescind the peremptory writ of prohibition issued on June 1, 2016. Accordingly, for the reasons stated in this opinion, we deny the requested writ.[2]

Facts and Procedural History

{¶ 5} M.S. was born on July 24, 2014, and she tested positive for cocaine at or about the time of her birth. On August 7, 2014, the Board removed the child from her mother pursuant to an ex parte emergency custody order and placed her in the foster care of Brian and Kelly Anderson.

{¶ 6} At a hearing on August 8, 2014, the Juvenile Court found probable cause to believe that M.S. was subject to immediate harm from abuse or neglect and placed her in the shelter care of the Board. After the Board filed a dependency complaint on M.S.'s behalf, the Juvenile Court declared her to be dependent and abused and subsequently ordered the child placed in the temporary custody of the Board.

[2] Based on this disposition, we deny the motion for leave to supplement the motion for reconsideration as moot.

{¶ 7} On November 13, 2015, the Andersons moved to intervene in the Juvenile Court case and sought legal custody of M.S. That same day, M.S.'s mother filed a document agreeing to the Andersons' intervention and objecting to any plan that would place M.S. in the care or custody of the mother's sister, who resides in Indiana and has custody of M.S.'s half-brother by order of a West Virginia court. The Board on January 4, 2016, moved to modify the temporary-custody order and place M.S. in the legal custody of M.S.'s aunt and to terminate "all Court-ordered services" by the Board. In response, M.S.'s mother asked the court to designate the Andersons as legal custodians.

{¶ 8} On or about March 16, 2016, the Board removed M.S. from the Andersons' home and placed her with her aunt.

{¶ 9} On March 28, 2016, M.S.'s mother filed an application in the Probate Court, asking the court to place M.S. "for the purpose of adoption" with the Andersons. The Andersons petitioned the Probate Court to adopt M.S. on March 31, 2016, submitting an application for placement for the purpose of adoption signed by M.S.'s mother, who appeared before the Probate Court and executed her consent to the adoption. The Probate Court approved the application for placement that same day and ordered the Board to release M.S. to the custody of the Andersons' attorney.

{¶ 10} In response to this order, the Board filed an emergency ex parte motion in the Juvenile Court seeking an order preventing removal of the child from her current placement. On April 1, 2016, the Juvenile Court granted the motion, asserting exclusive, original, and continuing jurisdiction over the child. It also denied the Andersons' motion to intervene in the Juvenile Court case, stating that "[f]oster parents have no right under the rules of juvenile procedure to participate as parties in the adjudication of the rights of natural parents." The Juvenile Court expressed concern that the Andersons, who as foster parents serve as agents of the Board, were instead "acting as independent free agents and well outside their role

as caregivers" by contemplating adoption of the child despite the Board's goal of placing her in the legal custody of her aunt.

{¶ 11} Based on the Juvenile Court's order, the Board did not release the child and instead moved to stay proceedings in the Probate Court. The Andersons then sought to have the Board held in contempt of court for its failure to surrender custody of M.S. as ordered.

{¶ 12} Meanwhile, on April 26, 2016, the Juvenile Court denied the Andersons' renewed motion to intervene. In its order, the court quoted *In re Adoption of Asente*, 90 Ohio St.3d 91, 92, 734 N.E.2d 1224 (2000), for "the bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter." It then observed that the Juvenile Court exercised jurisdiction over the child first, that it was exercising its continuing jurisdiction under R.C. 2151.415(E) and there were "two separate motions relating to the custody of the Child" pending, and that the Probate Court's approval of a placement for adoption did not confer party status on the Andersons in the Juvenile Court.

{¶ 13} On April 27, 2016, the Probate Court ruled that it had jurisdiction to proceed with the adoption, denied the Board's motion for stay, scheduled a hearing on the motion for contempt, and set the adoption petition for final hearing.

{¶ 14} The Board filed this complaint for a writ of prohibition against the Probate Court and Judges Zitter and Rapp on May 10, 2016. This court granted a peremptory writ of prohibition on June 1, 2016, with an opinion to follow announcement of the decision. 146 Ohio St.3d 1404, 2016-Ohio-3255, 50 N.E.3d 571.

{¶ 15} It is not clear what actions, if any, the Juvenile Court has taken since release of our decision in this case. Pursuant to R.C. 2151.415(D)(4), the Juvenile Court's temporary-custody order would have expired, at the latest, on August 8, 2016, which is two years from the date of the shelter-care order.

{¶ 16} The Probate Court and Judges Zitter and Rapp now seek reconsideration of our June 1, 2016 entry, asserting that prohibiting the Probate Court from exercising jurisdiction has deprived M.S.'s mother of her constitutional rights, that Ohio law provides for the Juvenile Court and the Probate Court to have concurrent jurisdiction in these circumstances, and that the adoption statutes were intended to ensure the child a permanent home in an expeditious manner. They contend that until the Board has terminated parental rights, it has no right to select the adoptive family for the child, because the adoption statutes expressly provide that parents retain the right to consent to an adoption notwithstanding the grant of temporary custody to the Board. They contend that granting the writ in this case has therefore prevented M.S.'s mother from exercising her residual rights.

{¶ 17} The Board responds that this court's writ did not affect the mother's right to consent to an adoption but rather reflected that the Juvenile Court had authority to divest her of the right to decide where M.S. will live once it found that M.S. was an abused, neglected, or dependent child. The Board asserts that the mother has not been deprived of due process, because the Revised Code precludes the Probate Court from adjudicating an adoption petition only while M.S. is subject to the Juvenile Court's temporary-custody order. The Board notes that it is not necessary for M.S. to be adopted in order to provide her a permanent and stable home, because a grant of legal custody to her biological aunt may be in the child's best interest. And it asserts that this court should not permit "a biological parent who has failed to adequately care for his/her children and who does not like the decisions of the public children services agency and the juvenile court to collude with others to adopt the very same children who the parents have abused, neglected, or caused to be dependent."

{¶ 18} Accordingly, we are called upon to reconcile the conflicting claims of jurisdiction asserted by the Juvenile Court and the Probate Court.

Law and Analysis

{¶ 19} To be entitled to a writ of prohibition, the Board must establish the exercise of judicial power, that the exercise of that power is unauthorized by law, and that denying the writ would result in injury for which no adequate remedy exists in the ordinary course of law. *State ex rel. Elder v. Camplese*, 144 Ohio St.3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶ 13. Even if an adequate remedy exists, a writ may be appropriate when the lack of jurisdiction is patent and unambiguous. *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 9.

{¶ 20} The Board contends that the Probate Court's exercise of jurisdiction is unauthorized by law because the Juvenile Court has original, exclusive jurisdiction over M.S.

{¶ 21} A juvenile court has "exclusive original jurisdiction * * * [c]oncerning any child who on or about the date specified in the complaint * * * is alleged * * * to be a * * * delinquent, unruly, abused, neglected, or dependent child." R.C. 2151.23(A)(1). The juvenile court must hold an adjudicatory hearing—generally within 30 days after the complaint was filed—to determine whether the child is abused, neglected, or dependent. R.C. 2151.28(A)(2) and (B). If it determines that the child is an abused, neglected, or dependent child, the court must hold a dispositional hearing within 30 days after the adjudicatory hearing and within 90 days after the complaint was filed. R.C. 2151.28(B)(3) and 2151.35(A)(1) and (B)(1). Following the dispositional hearing, the court must issue one of the dispositional orders authorized by R.C. 2151.353(A), which include: (1) committing the child to the temporary custody of a public children-services agency, a private child-placing agency, a parent, a relative, or a probation officer, (2) awarding legal custody to either parent or to a person who moves for legal custody prior to the dispositional hearing, or (3) committing the child to the permanent custody of a public children-services agency or private child-placing agency. R.C. 2151.353(A)(2) through (4).

{¶ 22} The juvenile court "shall retain jurisdiction over any child for whom the court issues an order of disposition" pursuant to R.C. 2151.353(A) until the child reaches the age of 18 or 21 years or until "the child is adopted and a final decree of adoption is issued." R.C. 2151.353(F)(1). The retained jurisdiction following a dispositional order issued pursuant to R.C. 2151.353(A)—including an order of temporary custody under R.C. 2151.353(A)(2)—is "continuing jurisdiction," R.C. 2151.417(B), subject to termination by an adoption decree.

{¶ 23} Thus, a juvenile court's exclusive jurisdiction terminates upon the issuance of a dispositional order pursuant to R.C. 2151.353(A). At that time, the juvenile court will have conducted at least two hearings, adjudicated the child an abused, neglected, or dependent child, issued a disposition, and retained continuing jurisdiction pursuant to R.C. 2151.353(F)(1) and 2151.417(B). The fact that temporary custody cannot extend beyond two years, *see* R.C. 2151.415(D)(4), does not alter the nature of the continuing jurisdiction remaining with a juvenile court that issues a disposition of temporary custody. The Juvenile Court's exclusive jurisdiction over M.S. granted by R.C. 2151.23(A)(1) therefore ended after it adjudicated her an abused, neglected, or dependent child and issued a disposition of temporary custody, and it is now exercising continuing jurisdiction over the child.

{¶ 24} In contrast to the juvenile court's continuing jurisdiction over an abused, neglected, or dependent child, "the original and exclusive jurisdiction over adoption proceedings is vested in the probate court," *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, ¶ 9, and the adoption statutes broadly permit "[a]ny minor" to be adopted by "[a] husband and wife together, at least one of whom is an adult," R.C. 3107.02(A) and 3107.03(A).

{¶ 25} A prerequisite to adoption is the placement of the child with the prospective adoptive parents. *See* R.C. 3107.051(A) (requiring filing of adoption petition within 90 days after the child is placed in the petitioner's home); R.C.

3107.11(A) (stating that adoption hearing may take place 30 days after the child is placed with the petitioner). Generally, only a public children-services agency or a state-certified child-placement institution or association may place a child for adoption. R.C. 5103.16(D). Here, no public children-services agency or state-certified child-placement institution or association placed M.S. for adoption with the Andersons.

{¶ 26} However, R.C. 5103.16(D)(1) permits the parent or parents of a child to arrange a private adoption without going through an authorized agency by appearing personally and applying to the probate court for approval of a proposed adoptive placement. Upon application, and if other statutory conditions are met, the probate court may approve the placement, R.C. 5103.16(D)(1) through (3), at which time "the prospective adoptive parent with whom the child is placed has care, custody, and control of the child pending further order of the court," R.C. 5103.16(D).

{¶ 27} After 30 days following the date on which the child was placed in the home of the petitioner, the probate court must conduct a hearing. R.C. 3107.11(A). If all required consents have been obtained and the adoption is in the best interest of the child, then the court may issue a final or interlocutory decree of adoption. R.C. 3107.14(C). An interlocutory decree permits further observation and investigation of the adoptive home to determine the suitability of the adoptive parents, *id.*, and a final decree terminates the parental rights of both parents, R.C. 3107.15(A)(1). If the probate court does not approve the adoption, its options include returning the child to the agency or person that had custody prior to the filing of the adoption petition or certifying the matter to the juvenile court "for appropriate action and disposition." R.C. 3107.14(D).

{¶ 28} We have recognized that a parent need not have physical custody of the child to utilize the procedure for private adoptive placement in R.C. 5103.16(D). *In re Adoption of J.A.S.*, 126 Ohio St.3d 145, 2010-Ohio-3270, 931 N.E.2d 554,

¶ 21 ("Although the statute requires the biological parents to seek court approval of placement, this does not mean that the children must physically be with the biological parents in order for them to file").

{¶ 29} Rather, the parent's right to consent to an adoption of a child subject to the juvenile court's continuing jurisdiction depends on the dispositional order that the court entered and whether it grants temporary or permanent legal custody.

{¶ 30} "Temporary custody" means "legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court * * *." R.C. 2151.011(B)(56).

{¶ 31} "Legal custody" is "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all *subject to any residual parental rights*, privileges, and responsibilities." (Emphasis added.) R.C. 2151.011(B)(21). In turn, "residual parental rights, privileges, and responsibilities" is defined to mean "those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, *consent to adoption*, the privilege to determine the child's religious affiliation, and the responsibility for support." (Emphasis added.) R.C. 2151.011(B)(49).

{¶ 32} "Permanent custody" is different from legal custody. It means "a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, *including the right to consent to adoption*, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, *including all residual rights* and obligations." (Emphasis added.) R.C. 2151.011(B)(32).

{¶ 33} As we recognized in *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, "[t]he important distinction is that an award of legal

custody of a child *does not* divest parents of their residual parental rights, privileges, and responsibilities." (Emphasis added.) *Id*. at ¶ 17. Legal custody is "subject to" residual parental rights, R.C. 2151.011(B)(21), which include the parents' right to consent to an adoption, and the phrase "subject to" denotes "a contingent relation" that may be "conditioned, affected, or modified in some indicated way," *Webster's Third New International Dictionary* 2275 (1986). Thus, a third party takes legal custody of a child *subject to* a parent's residual right to consent to an adoption, and the exercise of the right to consent to adoption necessarily affects a temporary legal custodian's right to determine the child's placement.

{¶ 34} Importantly, nothing in the statutes expressly precludes the probate court from exercising its jurisdiction in adoption proceedings regarding a child who is the subject of custody proceedings in the juvenile court. Rather, because R.C. 2151.353(F)(1) provides that a final adoption decree terminates the juvenile court's jurisdiction, the General Assembly necessarily granted the probate court jurisdiction to conduct adoption proceedings during the pendency of custody proceedings in the juvenile court.

{¶ 35} Moreover, in contrast to the right the statute grants to parents, the legislature has not granted temporary legal custodians a statutory right to consent to an adoption. Had the legislature intended a temporary dispositional order to be a barrier to adoption in these circumstances, it could have required the consent of the temporary custodian or the juvenile court, but it did not. And although a prospective adoptive parent need not obtain consent from "[a]ny guardian, custodian, or other party who has temporary custody of the child," R.C. 3107.07(L), a temporary custodian *is* entitled to notice from the probate court of a hearing on an adoption petition, R.C. 3107.11(A)(3). Thus, the General Assembly envisioned that adoption proceedings may overlap with juvenile court proceedings when a temporary custody order is in place.

{¶ 36} Accordingly, the authority of the probate court to order preadoption placement pursuant to R.C. 5103.16(D) is therefore within its exclusive, original jurisdiction over adoption proceedings, notwithstanding the fact that the child is subject to the continuing jurisdiction of the juvenile court.

{¶ 37} This view is consistent with our decision in *Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, which held that "[w]hen an issue concerning parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child," *id.* at the syllabus. Notably, we did not hold that the probate court lacked jurisdiction—*Pushcar* was not a prohibition action, and we did not question the appellate court's recognition that "the probate court did have jurisdiction to consider the petition for adoption," *id*. at ¶ 7. Rather, the point in *Pushcar* was that pursuant to the adoption statutes, the probate court could not proceed with the adoption without the consent of the putative father, and only the juvenile court could decide the question of the child's paternity. *See generally* R.C. 2151.23(B)(2) and 3111.06. We therefore concluded that "the probate court should have *deferred* to the juvenile court and *refrained* from proceeding with the adoption petition until the juvenile court had adjudicated the pending matter." (Emphasis added.) *Pushcar* at ¶ 14.

{¶ 38} Notably, we have since clarified in *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 10 and fn. 2, that *Pushcar* required the probate court to refrain from proceeding while there was a question of *parentage*—i.e., paternity—pending in the juvenile court.

{¶ 39} Nor is our holding that the Probate Court has jurisdiction to proceed in this matter inconsistent with this court's decision in *Asente*, 90 Ohio St.3d 91, 734 N.E.2d 1224. There, we stated that it was a "bedrock proposition that once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter." *Id.* at 92. However, *Asente* concerned an interstate custody dispute and the

application of the former Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Protection Act to determine whether Kentucky or Ohio had jurisdiction over a child, because the courts of only one state, the child's "home state," had *exclusive* jurisdiction over child-custody proceedings. This case involves different statutes that grant the probate court jurisdiction to proceed on the adoption of abused and dependent children who are the subject of a temporary-custody order and the continuing jurisdiction of the juvenile court. Thus, *Asente* does not guide our decision in this case.

{¶ 40} Here, the Juvenile Court exercised exclusive jurisdiction over M.S. when it adjudicated her a dependent and abused child and when it issued a dispositional order awarding temporary custody of M.S. to the Board. Thereafter, the Juvenile Court retained continuing jurisdiction, which will terminate when M.S. reaches the age of 18 or 21 or when she is adopted, *see* R.C. 2151.353(F)(1). The Juvenile Court's continuing jurisdiction does not, however, divest the Probate Court of its exclusive, original jurisdiction over adoption proceedings. And M.S.'s mother's residual parental right to consent to adoption and preadoption placement therefore supersedes the Board's right to decide M.S.'s residential placement as part of its temporary custody.

{¶ 41} Accordingly, we recognize that the Probate Court has jurisdiction to consider the adoption of M.S., and we therefore rescind the peremptory writ of prohibition issued on June 1, 2016, and deny the requested writ.

Motion for reconsideration granted
and writ denied.

PFEIFER, LANZINGER, and FRENCH, JJ., concur.

O'CONNOR, C.J., dissents, with an opinion joined by O'NEILL, J.

O'NEILL, J., dissents, with an opinion joined by O'CONNOR, C.J.

KENNEDY, J., not participating.

O'CONNOR, C.J., dissenting.

{¶ 42} To achieve the result it desires in this case, the new majority reframes the question in such a way that it can be answered only in the affirmative: "The issue in this case is whether a probate court may exercise its *exclusive* jurisdiction over adoption proceedings while a juvenile court is concurrently exercising *continuing* jurisdiction over a child custody proceeding." (Emphasis sic.) Majority opinion at ¶ 1.

{¶ 43} The actual question before us, however, is whether a probate court may exercise its exclusive jurisdiction over adoption proceedings while a juvenile court is exercising *its* exclusive jurisdiction over a child-custody proceeding. The answer to this question is, as it was when we first considered this case, "no." 146 Ohio St.3d 1404, 2016-Ohio-3255, 50 N.E.3d 571.

{¶ 44} As set forth in our rules, "A motion for reconsideration shall not constitute a reargument of the case * * *." S.Ct.Prac.R. 18.02(B). But respondents, the Probate Division of the Mercer County Court of Common Pleas ("Probate Court") and its judges Mary Pat Zitter and James Rapp, have offered no new fact or legal argument that we failed to consider initially and, accordingly, their motion for reconsideration should be denied. *See, e.g., State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 9; *Toledo Edison Co. v. Bryan*, 91 Ohio St.3d 1233, 1234, 742 N.E.2d 655 (2001) (Pfeifer, J., concurring).

{¶ 45} Without a word of explanation of how the onerous standard for granting a motion for reconsideration is met here, a majority of this court abandons this court's prior ruling, grants the motion to reconsider, and rescinds our previous writ of prohibition against respondents so that the Probate Court may proceed with the adoption of the minor child, M.S., by nonparties Brian and Kelly Anderson.

{¶ 46} It is one thing to ignore the standard for reconsideration. It is far more dangerous and disheartening, however, for the majority to ignore the realities of adjudicating cases of child abuse or neglect in Ohio's juvenile courts. Yet in its

rush to permit the Andersons' adoption of M.S., the majority presents an unprecedented holding under the guise of statutory analysis. That analysis supports the majority's bottom line but casts aside every practitioner's understanding of Ohio's previously well-functioning juvenile court system, which must both protect dependent, neglected, and abused children and respect the fundamental constitutional rights of their parents.

{¶ 47} At best, the majority fails to understand the significant differences between the early stages of a child-abuse, neglect, or dependency action and the latter stages of such an action. The focus in the initial stages is on ascertaining whether the child has been imperiled and, if so, what orders must be entered immediately to protect the child. During the latter stages of the proceedings, the court must determine whether a parent's misconduct contributed to the child's peril and warrants the termination of the parent's rights to continued custody and care of the child. *See In re Bishop*, 36 Ohio App.3d 123, 124, 521 N.E.2d 838 (5th Dist.1987) (noting that the focus of a dependency charge is on the child and the child's conditions, and not on the child's parents' faults); Giannelli and Salvador, *Ohio Juvenile Law*, Section 43:2, at 578 (2015 Ed.).

{¶ 48} Before proceeding with an explanation of the failings of the majority's statutory analysis and its sophistry with notions of juvenile and probate courts' respective jurisdictions, I pause to address important factual points that are not mentioned, let alone addressed, by the majority but that should inform our understanding of this case.

THE ANDERSONS' MISREPRESENTATIONS

{¶ 49} On March 31, 2016, the Andersons filed a petition for the adoption of M.S., in the Mercer County Probate Court. They intentionally deceived, twice, in that application.[3]

[3] Standard Probate Form 18.0, Petition for Adoption of Minor, issued per Sup.R. 51, is in use in Mercer County. The petition form asks for the identity of the party with *permanent* custody as well

{¶ 50} First, they asserted that M.S. "is living" in their home. In truth, M.S. was not living in the Andersons' home on that date; the Allen County Children Services Board ("the Agency") had removed M.S. from their home at least two weeks earlier, on or about March 16, 2016, and placed her with her aunt in Indiana.

{¶ 51} Second, the Andersons swore that M.S. had been placed in their home "for adoption" on August 7, 2014, by the Agency. In truth, M.S. had been placed in the Andersons' home pursuant to an ex parte emergency custody order two weeks after M.S.'s birth.

{¶ 52} Notably, M.S.'s emergency placement with the Andersons was precipitated by the fact that M.S. had tested positive for cocaine shortly after her birth. That test result, of course, was due to the child abuse M.S. suffered from her mother's use of cocaine during her pregnancy. *See In re Baby Boy Blackshear*, 90 Ohio St.3d 197, 736 N.E.2d 462, syllabus (a newborn baby who was exposed while a fetus to an illegal substance like cocaine is per se an abused child). Whether M.S.'s mother's cocaine use was due to an inability to resolve an addiction or an unwillingness to abstain is not clear, but this was not her first experience with the juvenile court system due to concerns over her parenting.[4] Her misconduct with M.S. alone was enough to establish that M.S.'s mother was not a suitable parent, and there is no showing that she is now suitable even though parental suitability is a necessary prerequisite to custody. *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977), syllabus; *see Clark v. Bayer*, 32 Ohio St. 299 (1877), paragraph one of the syllabus.

---

as the name of the attorney who represented the minor and the name of the guardian ad litem in the *permanent*-custody proceedings, suggesting that the form was drafted with the expectation that an adoption petition will not be filed until a permanent-custody order is in place. The Andersons avoided this problem by striking through the word "permanent" on their petition and typing above it "temporary." This unilateral rewording of the adoption petition did nothing to change the requirement that a permanent-custody order be presented in order to show capacity to place the child and inform the probate court as to whose consent is necessary to an adoption.

[4]Although the circumstances are not before us, a West Virginia court previously awarded custody of M.S.'s half-sibling to M.S.'s aunt, who currently has physical custody of M.S.

{¶ 53} In any event, there is not a scintilla of evidence in the record suggesting, yet alone establishing, that M.S. was placed with the Andersons with an eye toward adoption. Nor should there be.

{¶ 54} Significantly, at the time the Agency placed M.S. with the Andersons, it had an obligation to protect the child but work toward her reunification with her mother. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28-33. And the Andersons, as foster parents, also were obliged to strive for reunification of mother and child. *See In re R.W.*, 2015-Ohio-1031, 30 N.E.3d 254, ¶ 17 (8th Dist.) (noting that foster parents act as agents of the state). Instead, as the Juvenile Division of the Allen County Court of Common Pleas ("Juvenile Court") found, the Andersons began "acting as independent free agents and well outside their role as caregivers," by contemplating adoption of the child despite the Agency's goal of placing M.S. in the legal custody of her aunt—a placement consistent with Ohio's public policy favoring placement with a relative or family member over placement in foster care,[5] Ohio Adm.Code 5101:2-42-05(E) and (F).

{¶ 55} Notwithstanding M.S.'s mother's parental unsuitability and per se abuse of M.S. or the fact that she retains only residual parental rights that do not permit her to control M.S.'s adoption, the majority nevertheless finds that her consent to the Andersons' adoption of M.S. is sufficient to destroy the Juvenile Court's exclusive jurisdiction and to permit the Probate Court to proceed with the

[5] On November 13, 2015, the Andersons moved to be made parties to the Juvenile Court case and for legal custody of M.S. On the same day, M.S.'s mother expressed her consent to intervention by the Andersons and voiced objection to any plan that would place M.S. in the care or custody of M.S.'s aunt. The Juvenile Court expressed concern that the Andersons, who as foster parents serve as agents of the Agency, were improperly "acting as independent free agents and well outside their role as caregivers" by hiring a private investigator, retaining a psychologist to offer expert testimony, and contemplating adoption of the child fostered with them despite the Agency's goal of placing the child in the legal custody of her aunt. The Juvenile Court properly denied the Andersons' motion to intervene, because "[f]oster parents have no right under the rules of juvenile procedure to participate as parties in the adjudication of the rights of natural parents."

Andersons' adoption petition, even if it contains lies or, at best, self-defeating statements.[6]

{¶ 56} The tragedy wrought by the majority's holding may or may not befall M.S. But it will certainly befall many of the neglected or abused children whom the law entrusts to our juvenile courts, the attorneys and guardians who represent those children, and the judges who preside over their cases. That docket is not an insignificant one: last year, there were nearly 22,000 cases of abuse, neglect, or dependency on the dockets of Ohio's juvenile courts. Supreme Court of Ohio, *2015 Ohio Courts Statistical Report* 125, available at http://www.supremecourt.ohio.gov/Publications/annrep/15OCSR/2015OCSR.pdf (accessed Sept. 14, 2016).

ANALYSIS

The proper understanding of a juvenile court's exclusive jurisdiction

{¶ 57} The majority's analysis offends the General Assembly's equipoise of two sometimes-competing fundamental rights: a parent's right to the custody and care of her or his child and a child's right to be free from abuse and neglect.

{¶ 58} The rights of a parent may be fundamental, but they are not absolute. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979). The state has broad authority to intervene to protect children from abuse and neglect. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, at ¶ 28, citing R.C. 2151.01.

{¶ 59} As we have explained previously,

[6] At a minimum, the petition filed in the Probate Court cannot serve as the petition that would actually grant adoption to the Andersons because it was untimely. R.C. 3107.051(A) (requiring that adoption petitions generally be filed within 90 days after the child is placed in the petitioner's home).

> [u]ltimately, parental interests are subordinate to the child's interest when determining the appropriate resolution of a petition to terminate parental rights. [*Cunningham* at 106.] [The child's] private interest, at least initially, mirrors his mother's, i.e., he has a substantial interest in preserving the natural family unit. But when remaining in the natural family unit would be harmful to him, [the child's] interest changes. His private interest then becomes a permanent placement in a stable, secure, and nurturing home without undue delay. *See In re Adoption of Zschach*, 75 Ohio St.3d 648, 651, 665 N.E.2d 1070 (1996). "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513-514, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982).

In re B.C., 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 20.

{¶ 60} Because "[p]ermanent termination of parental rights has been described as the 'family law equivalent of the death penalty in a criminal case,' " parents " 'must be afforded every procedural and substantive protection the law allows' " before termination of a parent's rights. *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). The General Assembly thus crafted an extensive and strict structural framework in the Revised Code for juvenile courts to follow in making a termination decision. *In re Z.R.*, 144 Ohio St.3d 380, 2015-Ohio-3306, 44 N.E.3d 239, ¶ 20 ("The General Assembly has made clear that the central purpose of the juvenile court system is '[t]o provide for the care, protection, and mental and physical development of children' "), quoting R.C. 2151.01(A); *In re T.R.*, 52 Ohio

St.3d 6, 15, 556 N.E.2d 439 (1990) ("The mission of the juvenile court is to act as an insurer of the welfare of children and a provider of social and rehabilitative services"); *Children's Home of Marion Cty. v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914) (recognizing that the legislature established the juvenile courts "in order to protect children"). The process of adjudicating a child-welfare case ensures the graduated restriction of parental rights in cases in which it is necessary to do so, typically starting with protective supervision of the child at home, then removal and temporary custody of the child outside the home.

{¶ 61} The process begins with the filing of the dependency complaint, which triggers the *exclusive* original jurisdiction of the juvenile court to adjudicate cases involving any child alleged to be abused, neglected, or dependent.[7] *In re Z.R.* at ¶ 16; *State ex rel. Jean-Baptiste v. Kirsch*, 134 Ohio St.3d 421, 2012-Ohio-5697, 983 N.E.2d 302, ¶ 18, citing R.C. 2151.23(A)(1).

{¶ 62} Within 30 days of the filing of the complaint, the juvenile court must conduct an adjudicatory hearing to determine whether the child is abused, neglected, or dependent and whether the child should remain in (or be placed in) shelter care. R.C. 2151.28(A)(2) and (B). And the court must hold an additional hearing no more than 30 days after the adjudicatory hearing. R.C. 2151.35(B)(1).

{¶ 63} The court then has seven days in which to issue a judgment that includes one of six temporary or interim disposition orders, *see* R.C. 2151.353(A)(1) through (6). R.C. 2151.35(B)(3). Here, the Juvenile Court entered such an order by giving temporary custody of M.S. to the Agency.[8]

---

[7] A dependent child is "essentially [one] whose 'condition or environment is such as to warrant the state, in the interests of the child, in assuming [the child's] guardianship.' " *State ex rel. Easterday v. Zieba*, 58 Ohio St.3d 251, 254, 569 N.E.2d 1028 (1991), fn. 1, quoting R.C. 2151.04(C).

[8] The Agency filed a dependency complaint on M.S.'s behalf on August 11, 2014. The Juvenile Court declared her to be dependent and abused on October 8, 2014. On November 4, 2014, following a hearing, the court ordered M.S. placed in the temporary custody of the Agency.

{¶ 64} R.C. 2151.353 expressly confers to the juvenile court the authority to "commit the child to the *temporary* custody of" a children-services or private child-placing agency. (Emphasis added.) R.C. 2151.353(A)(2). Despite the fact that the Juvenile Court's order is for only *temporary* custody, the majority holds that the Juvenile Court's exclusive jurisdiction terminated at that point, and will always terminate at that point, regardless of which dispositional order a juvenile court elects. But the majority's conclusion is entirely arbitrary. Based on the analysis the majority proffers, the majority could just as easily have concluded that the juvenile court loses exclusive jurisdiction when it completes the adjudicatory hearing and declares the child dependent.

{¶ 65} Both conclusions are incorrect. In either scenario, the majority deprives the juvenile court of its exclusive jurisdiction to do the critical work the General Assembly charged to it—ensuring the safe care of the child—before that critical work is complete. The General Assembly plainly did not intend this result, because the scheme it created and placed in the Revised Code considers the final dispositional order in the abuse, neglect, or dependency case to be the judgment ending the juvenile court's adjudicatory process.

{¶ 66} A temporary-custody order is an interim disposition intended to serve only as a temporary, rather than final, disposition. We know this because the statutory language specifies that the temporary-custody order terminates one year after the complaint's filing or the child's placement in shelter care, whichever is earlier, R.C. 2151.353(G); that the agency receiving temporary custody must file, no later than 30 days before the temporary-custody order (or an extension) expires, a motion in the juvenile court seeking one or more final dispositional orders for the child, R.C. 2151.415(A); and that the juvenile court must schedule a hearing on the motion for final disposition in the very same dispositional order that creates the temporary custody, nearly a year before the hearing will occur, R.C. 2151.35(B)(3).

{¶ 67} In its rush to permit the Probate Court to assert its exclusive jurisdiction over a case pending in juvenile court, the majority ignores that temporary dispositions in juvenile court are just that: temporary, i.e., "not a determination of the merits of the complaints, but a temporary order pending determination of the merits of the complaint," *In re Spears*, 4th Dist. Athens No. 1200, 1984 WL 5682, *4 (Dec. 10, 1984). *See also Black's Law Dictionary* 1131 (8th Ed.2004) (defining "temporary order" as a "court order issued during the pendency of a suit, before the final order or judgment has been entered"). Those interim orders serve as temporal and substantive guideposts along the path of adjudicating parental rights in neglect and abuse cases, not final orders that resolve the rights of the parent and the child.

{¶ 68} The majority seizes on the fact that those guideposts are referred to as "dispositions" to summarily declare, without authority, that "[t]he retained jurisdiction following a dispositional order issued pursuant to R.C. 2151.353(A)—including an order of temporary custody under R.C. 2151.353(A)(2)—is 'continuing jurisdiction,' R.C. 2151.417(B), subject to termination by an adoption decree." Majority opinion at ¶ 22. In so holding, the majority ignores that the General Assembly extensively revised its statutory scheme in the late 1980s to provide specific deadlines for holding shelter-care, adjudicatory, dispositional, and other hearings in cases of child abuse, neglect, or dependency in order to protect children from languishing needlessly in the foster-care system. As one appellate court explained,

> [b]ecause of apparent dissatisfaction with the results of prior legislative efforts and in order to ensure Ohio's compliance with federal mandates, the General Assembly enacted Am.Sub.S.B. No. 89, effective January 1, 1989 (142 Ohio Laws, Part I, 198), which provided comprehensive changes in the laws governing neglect,

> dependency, and abuse proceedings. Kurtz & Giannelli, Ohio Juvenile Law (2 Ed.1989) 21, T 1.04. The overall intent of the legislation was to prevent "foster care drift" by, among other things, establishing maximum time limits under which children may remain in the custody of public and private child care agencies, and increasing the responsibilities of juvenile courts to review and oversee the permanency planning efforts of these agencies. *Id.* at 22; see, also, Legislative Service Commission Analysis of Am.Sub.S.B. 89, Baldwin's 1988 Laws of Ohio, at 5-5.71.

In re Collier, 85 Ohio App.3d 232, 235, 619 N.E.2d 503 (4th Dist.1993). *See also In re Murray*, 52 Ohio St.3d 155, 157-158, 556 N.E.2d 1169 (1990) (describing "the sweeping reforms made to the juvenile court system" by Am.Sub.S.B. No. 89, including amendments to R.C. 2151.353).

{¶ 69} The majority's conclusion that the Juvenile Court judges' interim dispositional orders end the Juvenile Court's exclusive, original jurisdiction is not supported by the legislative history of the 1989 amendments.

{¶ 70} Granted, there is an unfortunate lack of precision in the use of the term "disposition" in the legislative history, in which the term is used to denote both initial and final dispositions. *See, e.g.*, Legislative Service Commission Analysis of Sub.S.B. 89, as reported by H. Children & Youth (1989), at 21 and 37; Legislative Service Commission Analysis of Sub.S.B. 89, as passed by the Senate (1989), at 2 and 11-12. Given that lack of clarity, we should interpret the statute consistently with its purpose and with common sense and hold that the General Assembly intended that a juvenile court's final dispositional hearing and subsequent ruling serves as the culminating event that extinguishes a juvenile court's exclusive jurisdiction, and not the interim dispositions reflected in the

juvenile court's temporary-custody orders.[9] After all, the final dispositional order of a juvenile court is the only order that could terminate parental rights and give rise to making a child available for adoption. (Here, of course, the Juvenile Court has not determined the status of the mother's rights to M.S.)

{¶ 71} Moreover, the majority ignores the significance of the very specific manner in which the statutory provisions it relies on were drafted, including the General Assembly's express mention of R.C. 2151.414 and 2151.415 in R.C. 2151.417(B).

{¶ 72} R.C. 2151.417(B) provides that if a juvenile court "issues a dispositional order *pursuant to R.C. 2151.353, 2151.414, or 2151.415*, the court has continuing jurisdiction over the child" until the child turns 18 or is adopted. (Emphasis added.) *See* R.C. 2151.353(F)(1). The juvenile court necessarily must have *continuing* jurisdiction for purposes of determinations made under the authority of R.C. 2151.353(F) in order to permit the juvenile court to continue considering the family—including the biological parents' progress with parenting skills that could lead to reunification with their child—before rendering a final disposition about the care and custody of the child.

{¶ 73} But what, then, is the relevance of R.C. 2151.414 and 2151.415? Under the majority's interpretation of the statute, there was no reason for the General Assembly to have referred to R.C. 2151.414 and 2151.415 in R.C. 2151.417(B) because children subject to orders issued under R.C. 2151.414 and

[9] Our appellate courts often distinguish between the preliminary dispositions of temporary custody of the child as orders of "*temporary* disposition" rather than as final adjudications. (Emphasis added.) *E.g.*, *In re S.W.E.*, 8th Dist. Cuyahoga No. 91057, 2008-Ohio-4234, ¶ 12; *In re A.D.*, 8th Dist. Cuyahoga No. 87510, 2006-Ohio-6036, ¶ 11 and 16; *In re S.G. & M.G.*, 8th Dist. Cuyahoga No. 84228, 2005-Ohio-1163, ¶ 9-13 and 19; *In re Hale*, 2d Dist. Clark No. CA2163, 1986 WL 554, *3 (Oct. 16, 1986); *In re Miller*, 1st Dist. Hamilton No. C-830919, 1984 WL 7022, *1 (Oct. 24, 1984); *In re Parker*, 3d Dist. Van Wert No. 15-79-16, 1981 WL 6774, *1 (Jan. 26, 1981); *In re Feiler*, 1st Dist. Hamilton No. C-780549, 1979 WL 208767, *2 (Oct. 17, 1979). And our juvenile courts similarly characterize an initial custody ruling as a "temporary disposition," *e.g.*, *In re A.A.*, 8th Dist. Cuyahoga No. 85002, 2005-Ohio-2618, ¶ 23, or as "pre-dispositional," *e.g.*, *In re Hennen*, 11th Dist. Trumbull No. 2002-T-0028, 2002-Ohio-7282, ¶ 10.

2151.415 would already be subject to the juvenile court's continuing jurisdiction by operation of the temporary orders issued under R.C. 2151.353. The majority's analysis ignores the General Assembly's express mention of R.C. 2151.414 and 2151.415 in R.C. 2151.417(B).

{¶ 74} When construing a statute, we must give effect to all the enacted language. *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, 918 N.E.2d 981, ¶ 30. As we explained in *Boley v. Goodyear Tire & Rubber Co.*, a construction that renders statutory words meaningless and without effect is an improper analysis. 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21 (noting that the court's role is to evaluate a statute as a whole and interpret the statutory language in a way that gives effect to every word and clause in it, not treat any part as superfluous, and to avoid a construction that renders a provision meaningless or inoperative). *See also Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus (statutes "may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act").

{¶ 75} To be sure, the statutory scheme at issue here is labyrinthine. But the complexity of the statutes is not an invitation to import our own judicial philosophies and preferences into the analysis. " ' "A court should not place a tenuous construction on [a] statute to address a problem to which the legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation." ' " *State v. Gray*, 62 Ohio St.3d 514, 518, 584 N.E.2d 710 (1992), quoting *People v. Hardy*, 188 Mich.App. 305, 310, 469 N.W.2d 50 (1991), quoting *People v. Gilbert*, 414 Mich. 191, 212-213, 324 N.W.2d 834 (1982).

{¶ 76} Rather, our duty is to construe the statutes according to legislative intent, harmonizing them in a proper and reasonable fashion and giving the provisions their proper force and effect. *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶ 29 (O'Connor, C.J., concurring), citing *D.A.B.E., Inc. v. Toledo–Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 20; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996); and *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph two of the syllabus.

{¶ 77} The General Assembly, having established a specific and mandatory process for both initial decisions about the protection of the child and those finalizing a juvenile court's judgment, clearly extended the juvenile court's exclusive jurisdiction through to the end of the juvenile court's adjudication process.[10] At *that* point, the juvenile court has continuing, but not exclusive, jurisdiction over the child. Neither a probate court nor a litigant in the probate court can deprive a juvenile court of its exclusive jurisdiction before final disposition. *State ex rel. Hitchcock v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 97 Ohio App.3d 600, 604, 647 N.E.2d 208 (8th Dist.1994) ("If a court has exclusive jurisdiction over a proceeding, it is difficult to imagine how another court may divest it of the authority to hear such a proceeding").

The proper understanding of a probate court's exclusive jurisdiction

{¶ 78} There is no dispute that the probate courts have exclusive original jurisdiction over adoption proceedings. *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, ¶ 9; *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 21; *State ex rel. Portage Cty. Welfare Dept. v. Summers*, 38 Ohio St.2d 144, 311 N.E.2d 6 (1974), paragraph two of the syllabus.

[10] To be sure, interim dispositional orders *may* terminate a juvenile court's exclusive jurisdiction, depending on the order, *see* R.C. 2151.353(A)(5) and (6), but only in limited cases.

{¶ 79} The process of adoption begins with the filing of a petition for adoption. R.C. 3107.05(A). Subject to exceptions, an adoption petition must be filed no later than 90 days after the date the minor is placed in the home of the person seeking to adopt the minor. R.C. 3107.051(A).

{¶ 80} The majority emphasizes that preadoption placement (that is, placement of the child before the final order of adoption) is governed by R.C. 5103.16(D). That section establishes a general rule that adoption placements must be made by a public children-services agency or other certified agency, subject to an exception: prior to the placement of the child, the parent or parents of the child may petition the probate court for approval of a specified placement, and if certain conditions are met, the probate court may order the placement. R.C. 5103.16(D)(1) through (3). "If the court approves a placement, the prospective adoptive parent with whom the child is placed has care, custody, and control of the child pending further order of the court." R.C. 5103.16(D).

{¶ 81} The majority seizes on this statutory scheme and summarily concludes that it is sufficient to permit the Probate Court to proceed with M.S.'s adoption. And that might have been the case if M.S.'s mother had legal custody of M.S., because legal custody includes the right to control how and where a child shall live. R.C. 2151.011(B)(21). But M.S.'s mother does not have legal custody; she possesses only the residual rights set forth in R.C. 2151.011(B)(49), including the right to consent to an adoption.

{¶ 82} The right to consent to an adoption is not a right to control placement of the child pending adoption. Rather, it is a legislatively crafted protective measure that ensures that no adoption can be initiated without a biological parent's consent as long as a court of competent jurisdiction has not permanently terminated that parent's parental rights. For this reason, the consent of a biological parent with residual parental rights is, for a probate court, a jurisdictional prerequisite. R.C. 3107.06; *McGinty v. Jewish Children's Bur.*, 46 Ohio St.3d 159, 161, 545 N.E.2d

1272 (1989). But M.S.'s mother cannot unilaterally vest the Probate Court *with jurisdiction* it otherwise lacks *merely by consenting* to an adoption. *See In re Palmer*, 12 Ohio St.3d 194, 197, 465 N.E.2d 1312 (1984).

{¶ 83} I would hold, consistent with *Palmer*, that as long as a temporary-custody order is in effect, the parent of a child who has been declared dependent has no legal authority to direct the child's placement, whether by consenting to an adoption, a preadoption placement, or otherwise. Nevertheless, the judicial fiat rendered by the majority today expands the scope of residual parental rights, which evidently now permit a parent to control placement of the child and to divest a juvenile court of its exclusive jurisdiction to adjudicate a complaint that the parent abused or neglected her or his child.

{¶ 84} The majority does not cite a single case that actually supports that result.[11] The paucity of authority is not surprising, however, because until today, no such authority existed.

CONCLUSION

{¶ 85} From this day forward, parents who face termination of their parental rights due to their suspected abuse or neglect of their children need not worry. To avoid the intruding eye of the juvenile court judge, the parent alleged to be abusive or neglectful can simply find a trusted ally or private adoption agency, then proceed to probate court, where the adoption can occur without any finality to the allegations of abuse or neglect. And once the adoption is final, nothing can be done to protect the child except, of course, return to juvenile court on a new dependency

[11] Although the majority suggests that *Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, 853 N.E.2d 647, and *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, support its analysis, that suggestion is dubious. If those cases stand for the proposition that a probate court must refrain from proceeding with an adoption while there is a question of parentage, how can they not support the notion that a probate court must refrain from proceeding with an adoption when there is a question of the parent's rights to the child? The result of this case would be the same under *Pushcar*: resolution of the three motions pending before the Juvenile Court will have a significant impact on the parental rights of M.S.'s biological mother, and therefore they concern the parentage of M.S.

action. But child-protective services would be no more successful there than the daughters of Danaus for, upon arrival in juvenile court to face the allegations of abuse or neglect, the parent could simply abscond to probate court and again avoid adjudication.

{¶ 86} The majority's holding promotes the precise sort of turf war that has occurred in this case, to the detriment of M.S. We should be cognizant that we previously adopted as our own the words of then Judge O'Neill, albeit in a slightly different context, when he cautioned against permitting courts to be playing fields in which children are the pawns:

> The current litigation at this appellate level is not about good parents or bad parents. Further, this court is also not determining custody, an issue to be decided later by a court with competent jurisdiction. Rather, this court has a very solemn role to play, and that is to determine which court * * * has jurisdiction over this matter. As this case demonstrates, the best interest of a child is never served when adults turn to seemingly endless litigation to resolve their disputes. In this case, the parties have staked out a position and have waited for the courts to schedule hearings where it is hoped that the Wisdom of Solomon will come down on the winning side. In the interim, the life of a child and two families are left in turmoil and uncertainty to no one's benefit. Litigation of these matters is already difficult when one court in one state is involved in the controversy. It becomes unwieldy when multiple [courts] become embroiled in the dispute and cannot agree on the basic issue of jurisdiction.

In re Adoption of Asente, 90 Ohio St.3d 91, 91-92, 734 N.E.2d 1224 (2000).

{¶ 87} The memories of the justices in the majority are evidently as limited as the majority opinion's analysis here.

{¶ 88} I dissent.

O'NEILL, J., concurs in the foregoing opinion.

O'NEILL, J., dissenting.

{¶ 89} I join Chief Justice O'Connor's well-written dissent.

{¶ 90} I write separately to clarify what happens next. It is beyond dispute that there are at least two courts that can have exclusive jurisdiction over events that may occur in the fragile life of any child in Ohio. The juvenile court has exclusive jurisdiction over abuse, neglect, or dependency, and the probate court has exclusive jurisdiction should someone file a petition to adopt the child.

{¶ 91} No one disputes that when there is even a suggestion of abuse, neglect, or dependency, the juvenile court has not only the right but the duty to step in. At that point, the juvenile court's exclusive jurisdiction—to immediately take charge of the situation and to protect the child from whatever dangers exist—is triggered. That is what happened here. A drug-exposed child was born and a children-services agency, exercising its statutory authority, immediately stepped in to protect the child. At birth. As we said in *In re Adoption of Asente*, "once a court of competent jurisdiction has begun the task of deciding the long-term fate of a child, all other courts are to refrain from exercising jurisdiction over that matter." 90 Ohio St.3d 91, 92, 734 N.E.2d 1224 (2000). Had someone instead filed an adoption petition at birth in this matter, indeed the same result would have followed. The probate court would then have exercised its exclusive jurisdiction, and all others in the free world would have been required to acquiesce in the probate court's exclusive jurisdiction. *Id.* at 104. In this case, the child was placed in the Andersons' home pursuant to an ex parte emergency custody order of the Allen County Juvenile Court on August 7, 2014, two weeks after the child's birth. On

March 31, 2016, the Andersons filed a petition to adopt their foster child in Mercer County, where they lived. It is readily apparent that at the time the adoption petition was filed in a foreign county, the Allen County Juvenile Court was clearly exercising its exclusive jurisdiction to guarantee the safety and long-term stability of the child.

{¶ 92} At its core, that was the basis of the peremptory writ that we issued on June 1, 2016. We instructed the Mercer County Probate Court to refrain from acting until further notice, not forever. Just stop for now, and let the first court figure out what is happening here. Common sense, case precedents, and the statutory framework clearly support what this court did on an interim basis.

{¶ 93} Nowhere in our entry issuing the writ did we question the jurisdiction, wisdom, or motives of the Mercer County Probate Court. However, it is preposterous to even suggest that the birth mother, having first exposed her newborn to cocaine, would have the temerity on her own to wander across county lines and attempt to consent to her child being put up for adoption. Once the juvenile court and the Allen County Children Services Board ("the Agency") became aware of the peril this child was in from the actions of this mother, they immediately commenced their statutorily mandated job of finding a safe home for this child.

{¶ 94} I write separately because I believe the majority does not adequately address the following salient facts, which are undisputed:

1. The mother is not the custodial parent of this child today.
2. The Agency had temporary legal custody of the child at the time we issued the peremptory writ.
3. The Agency was not named as a party in the Mercer County Probate Court's order for adoptive placement.
4. This child *is* a resident of Allen County, Ohio, living in Indiana. That is a fact that all the pleadings in the world will not change.

{¶ 95} On June 1, 2016, this court granted the peremptory writ of prohibition. 146 Ohio St.3d 1404, 2016-Ohio-3255, 50 N.E.3d 571. The Allen County Juvenile Court's temporary-custody order was set to expire by operation of law on August 8, 2016, at which time the exclusive jurisdiction of the juvenile court would have ended. With that statutory milestone crossed, that court still has continuing jurisdiction not inconsistent with the probate court's exclusive jurisdiction over any adoption that has been or will be filed. R.C. 2151.353(F)(1).

{¶ 96} As Chief Justice O'Connor points out, respondents, the Mercer County Probate Court and its judges, have offered no new fact or legal argument to warrant reconsideration. We got this case right the first time. A motion for reconsideration is not the vehicle by which a party should be permitted to reargue earlier positions. The motion to reconsider should be denied.

{¶ 97} I dissent.

O'CONNOR, C.J., concurs in the foregoing opinion.

Juergen A. Waldick, Allen County Prosecuting Attorney, and Terri L. Kohlrieser, Assistant Prosecuting Attorney, for relator.

Matthew K. Fox, Mercer County Prosecuting Attorney, and Amy B. Ikerd and Andrew J. Hinders, Assistant Prosecuting Attorneys, for respondents.

David W. Haverfield, urging denial of the motion for reconsideration for amicus curiae, Public Children Services of Ohio.

[Cite as *In re B.N.S.*, 2020-Ohio-4413.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN RE:	:	
B.N.S., et al.	:	CASE NOS. CA2020-03-034
	:	CA2020-03-035
	:	CA2020-03-036
	:	
	:	O P I N I O N
	:	9/14/2020
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JS2014-1000

Law Offices of Jason A. Showen, LLC, Jason A. Showen, 324 East Warren Street, Lebanon, Ohio 45036, for appellants

The Lampe Law Office, LLC, M. Lynn Lampe, Stephen J. Otte, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069, for appellees

S. POWELL, J.

{¶ 1} Appellants, the biological mother of B.S., K.S., and H.L. ("Mother") and the biological father of B.S. and K.S. ("Father" or collectively referred to with Mother as "Parents"), appeal the decision of the Butler County Court of Common Pleas, Juvenile Division ("the Juvenile Court"), granting Appellee's ("Grandfather") motion to stay the proceedings in the Juvenile Court pending the outcome of related adoption proceedings in

the Warren County Court of Common Pleas, Probate Division ("the Probate Court").[1] H.L.'s biological father ("R.L.") did not appeal the Juvenile Court's decision.

{¶ 2} In September 2014, Grandfather filed for the temporary custody of B.S., K.S., and H.L. in the Juvenile Court. The complaints indicated that Grandfather sought the temporary custody of the children "until [Mother] gets back on her feet." Parents consented to the change in custody of B.S. and K.S., and Mother and R.L. consented to the change in custody of H.L.

{¶ 3} In October 2014, after a hearing, the Juvenile Court placed the children in the legal custody of Grandfather. In its written decision, the Juvenile Court also indicated Parents' and R.L.'s visitation with the children would be "at the discretion of [Grandfather]."

{¶ 4} In June 2019, Grandfather initiated adoption proceedings for the children by filing petitions of adoption in the Probate Court ("the Adoption Case"). In the petitions, Grandfather claimed the consent of neither Parents nor R.L. was required due to their lack of contact with the children over the preceding year.

{¶ 5} In September 2019, three months after Grandfather initiated the Adoption Case in the Probate Court, Parents moved the Juvenile Court to modify their visitation and parenting time ("Visitation Case"). In their motion, Parents requested the Juvenile Court to order an alternate parenting schedule with the children that is in the children's best interests, and not solely controlled by Grandfather.

{¶ 6} In December 2019, Grandfather moved the Juvenile Court to stay any further hearings regarding parenting issues and to relinquish its jurisdiction to the Probate Court.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

In his motion, Grandfather indicated such a stay was proper in light of the pending Adoption Case in the Probate Court. Grandfather further claimed that it was "likely" his petitions for adoption would be granted in the Adoption Case, and that "it would not be in the minor [children's] best interest[s] to proceed with * * * the motion for visitation while that matter is pending." The Juvenile Court held a hearing on Grandfather's motion, and ordered the parties to submit written memoranda regarding Grandfather's request for stay and relinquishment. Thereafter, in January 2020, Parents filed a memorandum in opposition to Grandfather's motion, and Grandfather filed a memorandum in response.

{¶ 7} In February 2020, the magistrate issued a decision and order granting Grandfather's motion to stay and to relinquish jurisdiction. The magistrate's decision ordered that all further proceedings in the Visitation Case were to be stayed, and that the Juvenile Court "hereby relinquishes jurisdiction of [the Visitation Case] to the [Probate Court], pending the outcome of the adoption proceedings in said court." The decision further stated that "if the matter is not resolved with finality in the Probate Court, counsel may at that time file to reset the pending matters for further proceedings before [the Juvenile Court]."

{¶ 8} Parents filed objections to the magistrate's decision. The Juvenile Court overruled their objections and adopted the magistrate's decision in its entirety.

{¶ 9} Parents now appeal, raising two assignments of error for our review.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED IN STAYING JUVENILE COURT PROCEEDINGS, PENDING THE OUTCOME OF AN ADOPTION IN A NEIGHBORING COUNTY'S PROBATE COURT.

{¶ 12} In their first assignment of error, Parents claim the trial court abused its discretion and committed plain error in staying the Visitation Case in Butler County pending the resolution of the Adoption Case in Warren County.

{¶ 13} The determination of whether to issue a stay rests within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *In re Goff*, 11th Dist. Portage No. 2003-P-0068, 2003-Ohio-6087, ¶ 19. An abuse of discretion is more than an error in judgment or law and connotes that the trial court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 14} In granting Grandfather's motion to stay, the Juvenile Court stated the following:

> In this case, the filing in the [P]robate [C]ourt occurred first. Nothing has been filed with this court between 2014 and the present. If [Parents] had filed in this court prior in time to the filing of the adoption petition in [P]robate [C]ourt, then this court would exercise its continuing jurisdiction, and the [P]robate [C]ourt would be mandated to consider the parent's legal action as part of its deliberations. To permit the converse is tantamount to allowing the filing of peripheral motions to delay an otherwise proper determination of the rights of the parties. The [J]uvenile [C]ourt is not mandated to go forward with the visitation motion. Instead, it makes more sense to await the determination of the probate court regarding the adoption proceedings.

Parents initially argue the Juvenile Court's decision to stay the Visitation Case until a determination has been made in the Adoption Case is an abuse of discretion and plain error because its decision is based upon inapplicable and irrelevant case law, i.e., *In re Adoption of M.G.B.-E.*, 154 Ohio St.3d 17, 2018-Ohio-1787.

{¶ 15} In *In re Adoption of M.G.B.-E.*, the appellant-father filed a motion in the domestic relations court to reestablish parenting time with his two children. Four days later,

the children's stepfather filed adoption petitions in the probate court. While both matters remained pending, the probate court determined that the father's consent to the adoption was not required, and did not mention the father's pending motion to reestablish parenting time or the proceedings in the domestic relations court that preceded the probate court's hearing.

{¶ 16} On appeal to the Ohio Supreme Court, the court rejected the father's argument that "a probate court may not proceed with an adoption petition if any pending parenting matter is proceeding in another court." *Id*. at ¶ 1. Instead, the court reiterated that "when a parenting issue pending in a juvenile or domestic-relations court does not affect a probate court's ability to determine the statutory prerequisites for adoption, we have not required the probate court to refrain from exercising its exclusive jurisdiction over adoption proceedings." *Id*. at ¶ 35, citing *State ex rel. Allen Cty. Children Servs. Bd. v. Mercer Cty. Common Pleas Court, Probate Div.,* 250 Ohio St.3d 230, 2016-Ohio-7382, ¶ 41. The court continued and indicated that although the probate court could proceed in the adoption case, it was required to take into account the father's efforts to reestablish his parental rights and responsibilities through the domestic relations court during the year preceding the filing of the adoption petitions. *Id*. at ¶ 40, citing *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24 (1976).

{¶ 17} The Ohio Supreme Court also concluded that the jurisdictional-priority rule, which applies when cases in multiple courts of concurrent jurisdiction involve the same parties and when either the causes of action are the same or the cases present part of the same whole issue, did not apply. *Id.* at ¶ 25, citing *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, ¶ 24, 29. Specifically, the court stated that because the

probate court and the domestic relations court are not courts of concurrent jurisdiction; the domestic-relations court lacks the ability to adjudicate adoption petitions; and the proceedings did not involve the same parties; the jurisdictional-priority rule did not apply, and the probate court was not precluded from proceeding on the adoption petitions. *Id*.

{¶ 18} Based upon the court's holding in *In re Adoption of M.G.B.-E*., Parents argue the jurisdictional-priority rule does not apply here and that the Juvenile Court was not precluded from proceeding in the Visitation Case. After review, we agree. Specifically, the priority doctrine does not apply where two courts have exclusive jurisdiction over different issues. *Id*. at ¶ 27. It is well settled that the probate court has exclusive jurisdiction over adoption petitions. *In re Adoption of Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, ¶ 9. By contrast, the juvenile court has jurisdiction of issues related to custody and parenting time. R.C. 2151.23(A)(2). Consequently, because the Probate Court has jurisdiction over Grandfather's adoption petitions, and the Juvenile Court has jurisdiction over Parents' motion, the two courts are not courts of concurrent jurisdiction and the jurisdictional-priority rule does not apply in this case. As a result, we find the Juvenile Court was not precluded from proceeding in the Visitation Case or from considering Parents' motion. *In re Adoption of M.G.B.-E.,* 2018-Ohio-1787 at ¶ 27.

{¶ 19} However, although the Juvenile Court was permitted to consider Parents' motion, it was not required to continue the Juvenile Court proceedings after learning of the Adoption Case. Rather, we find that it was within the court's discretion to defer consideration of Parents' motion, and to stay the Visitation Case entirely, until the resolution of the Adoption Case. First, although Parents claim the Juvenile Court's reasoning is "not explained," it is clear the court elected to stay the Visitation Case pending the outcome of

the Adoption Case because Grandfather filed his petitions for adoption first, and the Probate Court's decision on those petitions could be dispositive of the issues raised in Parents' motion. That is, if the Probate Court grants Grandfather's adoption petitions, the final adoption decree will terminate the Juvenile Court's jurisdiction and will permanently terminate Parents' parental rights. *In re Adoption of A.L.S.*, 12th Dist. Butler No. CA2017-09-146, 2018-Ohio-507, ¶ 13. Because such an outcome is possible, it would be unnecessary to continue proceedings in the Juvenile Court which could be rendered moot by the outcome of the Adoption Case in Probate Court. As stated by the Juvenile Court in its decision and entry, such simultaneous proceedings in the Juvenile Court would simply delay an otherwise proper determination of the rights of the parties and could subject the children to more litigation than necessary. Consequently, because Grandfather's petitions for adoption were filed first, and a determination regarding those petitions could dispose of the parenting issues pending before the Juvenile Court, we find it was within the Juvenile Court's discretion to stay the proceedings in the Juvenile Court pending the outcome of the Adoption Case.

{¶ 20} We also reject Parents' argument that the trial court's decision to stay the Visitation Case interferes with Parents' fundamental right to a hearing and their right to seek parenting time with their children. We recognize that the right of a natural parent to the care and custody of his child is one of the most precious and fundamental in law. *In re Adoption of: A.N.L.*, 12th Dist. Warren Nos. CA2004-11-131 and CA2005-04-046, 2005-Ohio-4239, ¶ 50. However, that right must be balanced against the state's interest in protecting the welfare of the children. *Id*.

{¶ 21} In 2014, Grandfather was granted legal custody of the children and any

visitation with Parents was at Grandfather's discretion. Despite the change in legal custody to Grandfather, Parents retained certain rights related to the children, including the privilege of reasonable visitation, consent to adoption, the privilege to determine the children's religious affiliation, and the responsibility for support. R.C. 2151.011(B)(48).

{¶ 22} According to the record, Parents did not seek a modification of their parenting time or the custody order for approximately four years. After filing their motion in 2019, Grandfather moved the Juvenile Court to stay its proceedings and to relinquish its jurisdiction to the Probate Court, as his adoption petitions were already pending. The Juvenile Court held a hearing, and ultimately ordered the parties to submit written arguments regarding Grandfather's request for stay and relinquishment. After consideration of the parties' written memoranda and the record, the Juvenile Court elected to stay the proceedings in the Juvenile Court pending the outcome of the adoption proceedings in Warren County. The Juvenile Court further noted that "[i]f the matter is not resolved with finality in the Probate Court, counsel may at that time file to reset the pending matters for further proceedings before this court."

{¶ 23} Based on the above, we do not find the Juvenile Court abused its discretion or deprived Parents of any fundamental rights when it stayed the proceedings. Specifically, although the Juvenile Court deferred consideration of Parents' motion at this time, it did so after Parents had an opportunity to be heard on Grandfather's motion to stay and in order to allow the adoption proceedings to conclude before addressing Parents' motion. As noted above, if the Probate Court grants Grandfather's adoption petitions, the final adoption decree will terminate the Juvenile Court's jurisdiction and will permanently terminate Parents' parental rights. Thus, continuing the proceedings in both the Probate Court and

Juvenile Court could be unnecessary and subject the children to more litigation than necessary. Such an outcome is not in the children's best interest.

{¶ 24} Furthermore, in allowing the Probate Court to proceed in the Adoption Case, the Juvenile Court has not eliminated Parents' ability to be heard on the matter. Rather, due to the finality and serious import of adoption, the law accords protections to a natural parent when the adoption of a child is proposed, including an opportunity to be heard, before any parental rights are terminated. *In re Greer*, 70 Ohio St.3d 293, 298 (1994). Thus, Grandfather's adoption petitions can only be granted, thereby terminating Parents' parental rights and the Juvenile Court's jurisdiction, after Parents have an opportunity to be heard in the Probate Court.

{¶ 25} Moreover, while the Juvenile Court deferred consideration of Parents' motion, it expressly afforded Parents the ability to reset the matter for further proceedings in the Juvenile Court if the matter was not resolved in its entirety in the Probate Court. Thus, although the outcome of the Adoption Case may render Parents' motion moot, Parents have the ability to be heard in the Juvenile Court in the event all parenting time and visitation issues are not resolved. As such, we conclude the Juvenile Court did not violate Parents' fundamental rights, or limit their ability to be heard, in issuing the stay order.

{¶ 26} Lastly, we are not persuaded by Parents' argument that, based upon the holding in *In re Adoption of M.G.B.-E.*, Parents' motion must be considered in the analysis of the of the Adoption Case in Warren County.

{¶ 27} According to the record, Grandfather alleged in his adoption petitions that Parents' consent to the adoption was not required because Parents had "failed without justifiable cause to provide more than de minimis contact with [the children] or to provide

for the maintenance and support of [the children] 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). Because adoption terminates fundamental rights of the natural parents, the Ohio Supreme Court has held that any exception to the requirement of parental consent to adoption must be strictly construed so as to protect the right of natural parents to raise and nurture their children. *In re Adoption of B.I.*, 157 Ohio St.3d 29, 2019-Ohio-2450, ¶ 12. Thus, in construing R.C. 3107.07(A), a court is obliged to protect the interests of the non-consenting parent who may be subjected to the forfeiture or abandonment of his or her parental rights. *Id*.

{¶ 28} In *In re Adoption of M.G.B.-E.*, the court indicated that when "strictly construing R.C. 3107.07(A) in [the father's] favor, and remaining cognizant that parents facing the termination of their parental rights must be afforded every protection the law allows, we conclude that [the father's] efforts to enforce his parental rights, *prior to the filing of [stepfather's] adoption petitions*, are relevant [to the adoption proceedings]." *Id*. (Emphasis added.) Thus, based upon the holding in *In re Adoption of M.G.B.-E.*, Parents claim the resolution of their motion, which is an effort to enforce their parental rights, is relevant to the Adoption Case. We disagree.

{¶ 29} First, as noted by the Juvenile Court, *In re Adoption of M.G.B.-E.* is factually distinguishable from the case at hand. Specifically, that case discusses the authority of a probate court to proceed on an adoption petition when preexisting matters concerning the parenting or parentage of a child are pending in another court. Due to the timing of the adoption petition, the court indicated that the probate court was required to consider all of the father's efforts to enforce his parental rights before the filing of the stepfather's adoption

petitions. As such, the father's visitation motion filed in the domestic relations court prior to the filing of the adoption petition was deemed relevant. Similar facts are not present here. Rather, in the instant matter, Parents' filed their motion to modify their parenting time several months after Grandfather had filed his adoption petitions in Warren County. Thus, unlike the father's motion for visitation in *In re the Adoption of M.G.B.-E.*, Parents' motion has no bearing on whether Parents failed without justifiable cause to provide more than de minimis contact with the children in the year preceding the filing of the adoption petitions. Moreover, because Parents filed their motion after Grandfather filed the adoption petitions, their motion is not indicative of any effort by Parents to enforce their parental rights before the filing of the Adoption Case and is therefore, not relevant to the adoption proceedings. As a result, the Probate Court is not required to consider the outcome of Parents' motion in the Adoption Case, and the Juvenile Court's decision not to immediately consider or rule upon Parents' motion was not unreasonable.

{¶ 30} In light of the above, we find the Juvenile Court did not abuse its discretion in staying the Juvenile Court's proceedings pending the outcome of the Adoption Case. Accordingly, Parents' first assignment of error is overruled.

{¶ 31} Assignment of Error No. 2:

{¶ 32} THE TRIAL COURT ERRED IN RELINQUISHING JURISDICTION OF THIS CASE TO THE WARREN COUNY (SIC) PROBATE COURT PENDING THE OUTCOME OF THE PENDING ADOPTION PROCEEDINGS.

{¶ 33} In their second assignment of error, Parents argue the Juvenile Court abused its discretion and committed plain error in relinquishing jurisdiction of the Visitation Case to the Probate Court pending the outcome of the Adoption Case.

{¶ 34} In the Juvenile Court's decision, the court states it "hereby orders that further proceedings, in this case, shall be stayed, and the court hereby relinquishes jurisdiction of this case to the [Probate Court], pending the outcome of the adoption proceedings in said court." Parents claim this language effectively transfers the Visitation Case to the Probate Court, and thereby gives the Probate Court unauthorized authority to determine Parents' motion. We disagree with Parents' interpretation of the Juvenile Court's order. Rather, when considering the Juvenile Court's order in its entirety, we find the order does not "relinquish its jurisdiction" to the Probate Court, but merely affords the Probate Court the opportunity to proceed on Grandfather's adoption petitions, which were filed before Parents' motion, and stays the Juvenile Court proceedings until the adoptions are either granted or denied by the Probate Court. In the event the adoptions are denied by the Probate Court, thereby leaving the issues set forth in Parents' motion undecided, the Juvenile Court expressly retained jurisdiction and directed Parents to reset the pending matters for further proceedings in the Juvenile Court. Such an order does not allow the Probate Court to determine Parents' motion, but instead, recognizes that the outcome of the adoption proceedings may render Parents' motion moot in its entirety. Thus, although the Juvenile Court utilizes the phrase "relinquishes jurisdiction," it is evident from a reading of the court's order in its entirety that it is simply deferring its ability to proceed until the adoption proceedings conclude. Such a deferral is not unreasonable or arbitrary, nor is it an abuse of discretion. Accordingly, Parents second assignment of error is overruled.

{¶ 35} Judgment affirmed.

M. POWELL, P.J., and PIPER, J., concur.