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Charles R. Pinzone Jr.

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Note

OHIO'S EXCEPTION TO CONSENT IN ADOPTION PROCEEDINGS: A NEED FOR LEGISLATIVE ACTION

Under Ohio law, both natural parents must consent to their child's adoption by another. However, according to Section 3107.07(A) of the Ohio Revised Code, a natural parent's consent rights may be forfeit when that parent has failed without just cause to communicate with, or provide maintenance and support for, the child for a period of one year. This Note demonstrates that the judicial interpretations of this section have rendered it meaningless by requiring the virtual "abandonment" of the child before parental consent rights can be waived. These interpretations are directly contrary to the legislative intent that, in this section, the interests of the child be paramount to the rights of the parent. In order to remedy this situation, the Note suggests a new Section 3107.07(A). This new section properly balances the rights of the parents, the needs of the child, and the interests of the state in providing a method by which parental consent rights can be deemed waived when the circumstances so warrant.

INTRODUCTION

IMAGINE THE following scenario: A man and a woman get married and have a child. Later, for one of any number of reasons, the couple gets a divorce. Under the terms of the divorce decree the mother gets custody of the child, and the father is required to pay a certain amount of child support every month. Still later,

1. It is only for convenience that the mother, instead of the father, of the child in this hypothetical is granted custody and remarries, with the stepfather wishing to adopt the child. Whether the father or mother is granted custody of the child depends on the best interests of the child based on the surrounding circumstances.

When a husband and wife are living apart and seek the care, custody and control of their offspring, they stand in equality as far as parenthood is involved. Ohio Rev. Code Ann. § 3109.03 (Page 1983). The court decides who gets custody of the children. The court must take into account the best interest of the child, and shall consider all relevant factors, including: (1) the parent's wishes; (2) the wishes of a child who is 11-years-old or older; (3) the child's interaction and interrelation with his parents, siblings and any other person who may significantly affect the child's interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all of the parties involved. Id. § 3109.04.

2. The relevant factors utilized by a court in making a judicial decree with regard to child support are set forth in the Ohio Revised Code and include:

(1) the financial resources of the child; (2) the financial resources and needs of the custodial parent and non-custodial parent, when the custody is not joint; (3) the standard of living that the child would have enjoyed had the marriage not ended; (4) the physical and emotional needs of the child and his educational needs; (5) the financial needs and resources of both parents, if custody is joint; (6) the educational
the mother remarries, and her new husband, with her consent, wishes to adopt her child.3

Under current Ohio law, in order for the new husband to adopt his wife's child, the family must go through a two-step adoption proceeding.4 First, the court makes an inquiry into the issue of consent.5 Unless a statutory exception applies, both natural parents must consent to the adoption.6 It is only after the question of consent has been resolved that the court investigates the issue of the best interests of the child.7 Thus, under normal circumstances, if the natural father refused to give his consent in the above scenario, the adoption petition would be denied before the court ever examined the question of the best interests of the child.

However, the Ohio Revised Code prescribes certain circumstances requiring the court order not arisen. The court shall include a provision that one or both of the parents provide for the child's health care needs. In addition the court can establish visitation rights.

Id. § 3109.05.

3. The following is a brief synopsis of the basic procedural requirements for adoption in Ohio as set forth in Chapter 3107 of the Code.

The stepparent (or petitioner) begins by filing a petition for adoption in the court in the county where the minor to be adopted was born or resides, or in the county where the petitioner or the parent of the minor resides. The petition must include, among other things, basic information concerning the minor and the petitioner, as well as the financial status of the petitioner and his or her ability to provide for the well-being of the minor.

A petition for adoption also requires the written consent of the parents of the minor to be adopted and of the minor, if over the age of twelve years, unless the court determines that the consent of the latter is unnecessary. In certain limited circumstances, the consent of a parent is not necessary.

After the petition is filed, the court will set a hearing and notice will be given by the court to all interested parties. The department of human services, an agency, or other court-appointed person will then conduct an investigation to determine whether the adoptive home is suitable for the minor to be adopted. A written report of the investigation will include a recommendation as to the granting or denial of the petition and will also be filed in court prior to the date of the hearing.

Ordinarily, the petitioner and the minor to be adopted must attend the hearing. If, at the conclusion of the hearing(s), the court determines that all requirements have been met and that the adoption is in the best interest of the minor, it may issue a final decree of adoption or interlocutory order of adoption; however, this decree will not be issued until at least six months after the filing of the petition and until the minor has lived in the adoptive home for at least six months. Id. §§ 3107.01-19.

4. In re Adoption of Salisbury, 5 Ohio App. 3d 65, 65, 449 N.E.2d 519, 521 (1981). The effects of a final decree of adoption are: (1) the natural parents are relieved of all parental rights and responsibilities and all legal relationships between the adoptee and his relatives are terminated such that the child becomes a stranger to the relatives for all purposes, including inheritance; and (2) the relationship of parent and child is created between the adopter and adoptee. OHIO REV. CODE ANN. § 3107.05.

5. Salisbury, 5 Ohio App. 3d at 65, 449 N.E.2d at 521.

6. OHIO REV. CODE ANN. § 3107.06(A)-(B).

7. Salisbury, 5 Ohio App. 3d at 65, 449 N.E.2d at 521.
stances in which the requirement of parental consent can be disregarded. One of these circumstances is set forth in Ohio Revised Code § 3107.07(A), which 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 finds after . . . hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition . . . .

This Note discusses section 3107.07(A) and what constitutes communication with, and provision of maintenance and support for, a child. It provides a brief synopsis of background material concerning adoption in Ohio, sets forth the distinguishing factors between section 3107.07(A) and its immediate predecessor, and makes an inquiry into the effects of the interpretations of section 3107.07(A) by three Ohio appellate court cases. It demonstrates how those decisions have rendered this section virtually meaningless by interpreting the statute to signify that the virtual "abandonment" of a child is necessary before the requirement of parental consent can be ignored. In addition, the significance of a recent Ohio Supreme Court case, which in effect approves the lower court interpretations, is investigated. Finally, this Note suggests alternative language for a new section 3107.07(A) which, if enacted, would cure the problems that the judicial interpretations of section 3107.07(A) have engendered.

I. BACKGROUND

The United States Supreme Court has declared that the right of a natural parent in the custody, care and control of his children is a fundamental liberty interest protected by the fourteenth amendment. However, that right is not inalienable. As the Ohio
Supreme Court stated:

While the rights of the natural parents should always have full consideration, and be carefully guarded and protected, the rights and interests of the child are paramount, and, where there is a conflict between the rights of the parent and the interests of the child, the state may act by and through appropriate legislation.\(^1\)

Thus, while all of the states have adoption statutes that require the natural parents’ consent before an adoption can take place,\(^1\) those same statutes also provide for certain circumstances in which the promotion of the child’s welfare mandates that the requirement of parental consent be ignored.\(^2\) Ohio Revised Code § 3107.07(A) is such a provision. It provides that a parent’s consent will not be needed in an adoption proceeding if that parent fails to communicate with, or to provide maintenance and support for, his child for one year without justifiable cause.\(^2\)

II. THE STATUTORY EVOLUTION OF OHIO’S EXCEPTION TO CONSENT PROVISION

In order to fully appreciate this Note’s discussion of the current state of Ohio law, a review of the history of Ohio’s adoption statute, as it relates to dispensing with the requirement of parental consent, is necessary. This presentation will trace the significant changes that have occurred from the first statute, which used the term “abandoned,”\(^2\) to the present statute, from which this term was omitted.\(^2\)

A. 1859-1921: Original Language

The first adoption statute in Ohio was passed on March 29, 1859.\(^2\) That statute required consent by the natural parents before must be provided because “the result of the judicial proceeding [would be] . . . permanently to deprive a legitimate parent of all that parenthood implies”).


20. Id.
22. 1859 Ohio Laws 82, 83.
23. OHIO REV. CODE ANN. § 3107.07(A).
24. 1859 Ohio Laws 82, 83.
an adoption could take place. However, it specifically provided that if a child was "abandoned," the consent of the parent who abandoned the child would not be necessary.

From 1859 through 1921, this statute went through a variety of changes and codifications. After each change, "abandoned" remained one of the grounds for dispensing with the requirement of parental consent. Unfortunately, at no time did the statute define what circumstances constituted "abandonment" of a child, and Ohio has no case law which establishes such a definition. Other states, however, have developed a definition of the term "abandoned" as used in their own adoption statutes. A survey of the cases in those states reveals the definition to be "any conduct on the part of a parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." This will be the definition of "abandoned" for purposes of this Note.

B. 1921-1977: Statutory Contraction and then Expansion of the Exception

In 1921, the word "abandoned" was deleted from the Ohio adoption statute; no comparable term was put in its place. This had the effect of making parental consent practically indispensable, because the statute required some positive act, such as voluntary surrender of the child to an adoption institution, before the requirement could be disregarded.

The year 1931 marked the passage of a new probate code in Ohio, including a new adoption statute. As was the case in 1921, the word "abandoned" was omitted. However, the new statute lessened the severity of the 1921 statute by providing that the re-

25. Id.
26. Id.
27. See, e.g., 1870 Ohio Laws 14, 14; 1911 Ohio Laws 305, 305.
29. Id.
31. Wedl, 65 Ohio L. Abs. at 234, 114 N.E.2d at 312. This language originally appeared in the case of Winams v. Luppie, 47 N.J. Eq. 302, 305, 20 A. 969, 970 (1890). For an extensive listing of the cases adopting this language, see Annot., 35 A.L.R.2d 662 (1954). See also Nev. Rev. Stat. § 128.012(1) (1979) (abandonment constitutes "any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child.").
32. Wedl, 65 Ohio L. Abs. at 234, 114 N.E.2d at 312; 1921 Ohio Laws 177, 177-81.
34. Id.; 1931 Ohio Laws 471, 471.
35. Wedl, 65 Ohio L. Abs. at 235, 114 N.E.2d at 313; 1931 Ohio Laws 471, 472.
quirement of parental consent could be ignored if that parent “failed or refused to support the child for two consecutive years.” 36 This language established two situations in which a parent’s right to withhold consent to an adoption would be forfeit: (1) by actively refusing to provide support when asked or ordered to do so; or (2) by passively failing to provide child support. 37

The language of the statute remained the same until 1943 when “failed or refused to support” was replaced with “willfully neglected.” 38 The following year, the language was changed again, becoming, “willfully failed to properly support and maintain.” 39 This language was unaltered until 1977 when the Ohio General Assembly enacted the present statute, Revised Code § 3107.07(A). 40 Note that none of these changes involved a reintroduction of the word “abandoned.”

C. 1977: Ohio’s Current Provision

In 1977, the Ohio legislature enacted the present provision, Revised Code § 3107.07(A), which states that parental consent to an adoption is unnecessary when a 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 ...” 41 A review of the components of the current statute discloses substantial differences from prior law. 42

The first change made by the enactment of Revised Code § 3107.07(A) involved an addition to the obligations which a parent must fulfill in order to maintain his consent rights. Not only must a parent maintain and support the child, but he must also communicate with him. 43 Failure of either of these requirements can result in the forfeiture of parental consent rights. 44 Prior statutes did not contain a communication requirement; the parent’s only obligation

36. Wedl, 65 Ohio L. Abs. at 235, 114 N.E.2d at 313; 1931 Ohio Laws 471, 472.
37. Wedl, 65 Ohio L. Abs. at 235, 114 N.E.2d at 313; 1931 Ohio Laws 471, 472.
38. 1943 Ohio Laws 434, 437.
40. 1976 Ohio Laws 1839, 1845.
41. OHIO REV. CODE ANN. § 3107.07(A).
42. See In re Adoption of Holcomb, 18 Ohio St. 3d 361, 366, 481 N.E.2d 613, 619 (1985).
43. OHIO REV. CODE ANN. § 3107.07(A).
44. See In re McDermitt, 63 Ohio St. 2d 301, 304, 408 N.E.2d 680, 682-83 (1980) (it is not necessary to prove both a failure to communicate and a failure to support and maintain; failure of either can result in the forfeiture of parental consent rights).
was to "support and maintain" the child.\textsuperscript{45} Thus, it is apparent that the new statute was meant to require more from a parent than did prior statutes.

The second change concerns a shortening of the time span involved before a parent's consent rights are considered to have been waived. The present statute provides that when there has been a failure to communicate with or provide support for a child for one year, parental consent is not needed.\textsuperscript{46} In contrast, the prior statute required the failure to have occurred for two years.\textsuperscript{47}

The third change made by the new statute is in the standard of culpability. Under the new statute, any "failure" that is "without justifiable cause" can result in loss of parental consent rights.\textsuperscript{48} In contrast, prior statutes had a standard of "willfullness."\textsuperscript{49} Whether the new standard of culpability requires more of the parent than did the old standard may be debatable. Nevertheless, the two standards are not comparable.\textsuperscript{50} Under the new statute, a parent can willfully fail to support a child, but that parent will not lose parental consent rights if there was justifiable cause to do so. On the other hand, a negligent or reckless failure would not have met the prior standard, while currently such a failure will result in the forfeiture of parental consent rights if it is without justifiable cause.

The fourth change made by the new statute is in the method of judging the sufficiency of the maintenance, support and communication which has been provided by the noncustodial parent. Section 3107.07(A) requires maintenance, support and communication to be made "as required by law or judicial decree."\textsuperscript{51} Earlier law dictated that the consent of a parent would be forfeit only if the parent failed "properly" to support and maintain the child;\textsuperscript{52} in other

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\textsuperscript{45.} In re Adoption of Hupp, 9 Ohio App. 3d 128, 130, 458 N.E.2d 878, 882 (1982) ("failure to communicate" is new to the statute).

\textsuperscript{46.} OHIO REV. CODE ANN. § 3107.07(A).

\textsuperscript{47.} 1945 Ohio Laws 448, 451. One interesting note: when the word "abandoned" was part of the statute, no time period was established. Thus, the legislature allowed the judiciary to determine the point at which abandonment occurred. However, once "abandoned" was taken out of the statute, this time span was statutorily fixed. In 1931, the time period was first set at two years. 1931 Ohio Laws 471, 472. It was not until the present statute was passed that the time period was lowered to one year. 1976 Ohio Laws 1839, 1845.

\textsuperscript{48.} OHIO REV. CODE ANN. § 3107.07(A).

\textsuperscript{49.} See McDermitt, 63 Ohio St. 2d at 305, 408 N.E.2d at 683.

\textsuperscript{50.} Compare McDermitt, 63 Ohio St. 2d at 305-06, 408 N.E.2d at 683, with Hupp, 9 Ohio App. 3d at 131, 458 N.E.2d at 883.

\textsuperscript{51.} OHIO REV. CODE ANN. § 3107.07(A). See also McDermitt, 63 Ohio St. 2d at 305, 408 N.E.2d at 683.

\textsuperscript{52.} See 1945 Ohio Laws 448, 451.
words, "that which is appropriate to all of the circumstances of the child's life situation." The question of what was "proper" was thus a question of fact. By omitting the adjective "properly" and avoiding the subjective application and analysis that this term engenders, the new statute establishes a more objective standard of determining what amount of maintenance and support is required. If the parent fails to provide the minimum amount of child support mandated by a judicial decree, it automatically constitutes failure to support. If, however, no prior judicial decree exists, the tribunal must ascertain the necessary amount based on the facts of the case and the appropriate precedent. As such, the sufficiency of the maintenance and support provided by the noncustodial parent is no longer left entirely to the opinion of the presiding judge.

Finally, it is important to note that the new statute maintains a fifty-six-year tradition; the term "abandoned" continues to be omitted from use.

This brief chronicle of the statutory development of Ohio's exception to consent provision reflects the legislature's increasing interest in protecting the best interests of the child. The changes that the legislature has made in the statute have, over time, expanded the circumstances in which a parent's consent rights are forfeit; thus, the legislature, after balancing the importance of the rights and interests of the parent with those of the child, has evinced its intent that those of the child should be paramount.

III. THE NEW STATUTE INTERPRETED

As previously detailed, Revised Code § 3107.07(A) appears to have made several basic changes in the law concerning parental consent to adoption. However, appellate court interpretations have not given effect to those changes. The rationale for straying from the plain meaning of the statute is far from clear; however, the

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55. See supra note 2.
56. Cf. McDermitt, 63 Ohio St. 2d at 305, 408 N.E.2d at 683 (parent of a minor not only has the duty of support as required by judicial decree, but also has a duty to support under common law).
57. See, e.g., State ex rel. Booth v. Robinson, 120 Ohio St. 91, 95, 165 N.E. 574, 576 (1929) (promotion of the child's welfare is the primary purpose of legislative acts dealing with juvenile court action, including adoption statutes).
58. See infra notes 61-163 and accompanying text.
59. One court offered this rationale: [T]he statute provides for cutting off the right of a parent to withhold his consent to
consequences are obvious. According to the way it has been interpreted, section 3107.07(A) does not mean what it says.

A. Failure to Support and Maintain

Under Revised Code § 3107.07(A), one of the grounds for dispensing with the requirement of parental consent is the failure to provide for the maintenance and support of a child as required by law or judicial decree. However, recent interpretations of this part of the statute have made it virtually meaningless.

1. In re Adoption of Anthony

The case of In re Adoption of Anthony involved, among other things, a determination of whether a father had failed to provide for the maintenance and support of his children for a period of one year. Anthony, the adopting parent, was married to the natural mother of the two children he wished to adopt. In his adoption petition, Anthony alleged that the natural father's consent was unnecessary because the natural father had failed to communicate with, or to provide maintenance and support for, his children for a period of one year.

Arick, the natural father, admitted that he had communicated with his children only once during the previous year, and that was merely a chance occasion. Arick also admitted that he stopped making child support payments; he had made only one month's child support payment during the prior twelve months. On the other hand, Arick claimed that he had justifiable cause for not communicating with his children and for failing to make child support payments. He alleged that there was tremendous animosity between Anthony and himself, and that Anthony had threatened

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the adoption of his child by another, and is in abrogation of the common-law rights of natural parents, [therefore,] the provisions of the statute must be strictly construed to protect the rights of the natural parent.

In re Adoption of Anthony, 5 Ohio App. 3d 60, 62, 449 N.E.2d 511, 515 (1982). Unfortunately, the courts which have adopted this rationale have forgotten that the primary purpose for the existence of this adoption statute is to provide for "the best interests of the child." See supra note 18 and accompanying text.

60. OHIO REV. CODE ANN. § 3107.07(A).
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
physical violence when Arick had attempted to visit his children. Barred from visiting his children, Arick alleged that he withheld his child support payments until he was allowed to visit them again.

Based on these facts, the probate court found that Arick had failed to: (1) communicate with his children; (2) provide maintenance and support for his children for one year; and (3) establish justifiable cause for his actions. Consequently, the court held that Arick's consent was not needed. Arick appealed, claiming that the finding of "no justifiable cause" was against the weight of the evidence, and also that, as a matter of law, he had provided support and maintenance during the period of one year prior to the adoption petition.

The appellate court reversed the probate court's decision. It held that the burden of proving no justifiable cause was on the potential adopting parents and not on the nonconsenting parent. The court did not base its decision, however, on this reversible error. Rather, the court held that the payment of only one month's child support during the previous twelve months was sufficient to preserve Arick's parental consent rights. In so holding, the court stated that "so long as the parent complies with his duty to support . . . for any period during the [immediately preceding year] . . . then he has not failed to provide support as required by law, or judicial decree . . . ."

The court in Anthony cited two cases to support its interpretation of section 3107.07(A): Johnson v. Varney and In re Adoption of Costakos. The court did so despite the fact that both cases were interpreting the statute as it existed prior to the substantial 1976 changes. In addition, even under the pre-1976 statute, John-

68. Id. at 61, 449 N.E.2d at 513. In fact, Arick had been beaten by Anthony and his brothers on a prior occasion. Id.
69. Id.
70. Id. at 61, 449 N.E.2d at 513-14.
71. Id., 449 N.E.2d at 514.
72. Id.
73. Id. at 64, 449 N.E.2d at 516-17.
74. Id. at 62, 449 N.E.2d at 515.
75. Id.
76. Id. at 64, 449 N.E.2d at 515-16. Although the language of the opinion appears to suggest that there was justifiable cause, that issue was never decided. Id., 449 N.E.2d at 515.
77. Id. at 63, 449 N.E.2d at 515 (emphasis added).
78. Id.
79. 2 Ohio St. 2d 161, 207 N.E.2d 558 (1965).
80. No. 73 AP-133 (Franklin App. filed Aug. 21, 1973).
81. Id. slip op. at 3; Johnson, 2 Ohio St. 2d at 162, 207 N.E.2d at 560.
son does not support the Anthony court’s interpretation.

In Johnson, the nonconsenting parent had neglected to visit or write to her child for three years prior to the filing of the adoption petition. In reviewing the lower court’s findings, the Ohio Supreme Court stated:

[c]omplete failure to give the child any care and attention for more than two years before the filing of the petition for adoption would justify a finding that [the nonconsenting parent] willfully failed to properly maintain the child and would thus do away with the necessity of securing her consent to his adoption.

Thus, the court held that complete failure to support and maintain a child on the part of the nonconsenting parent would be sufficient to disregard his consent rights; it did not hold that there “had to be complete failure to support and maintain during the then specified two year period immediately preceding the filing of the petition” in order for a parent’s consent rights to be forfeit. As such, the holding of the Ohio Supreme Court in Johnson fails to support the Anthony court’s interpretation of section 3107.07(A). The holding of Costakos only supports Anthony in that it also misinterpreted the Johnson court as requiring a complete failure before parental rights would be forfeit.

If the appellate court had simply reversed the probate court because the burden of proving justifiable cause had been placed on the wrong party, or had the court simply found justifiable cause, then the decision would be palatable. Unfortunately, the court did not do either. Instead, it held that one month’s child support out of every twelve is sufficient to preserve parental consent rights. Such an interpretation severely diminishes the vitality of section 3107.07(A). As a result of the holding in Anthony, in order to maintain parental consent rights, a parent does not have to provide enough support for a child to live on—which would appear to be

82. 2 Ohio St. 2d at 162, 207 N.E.2d at 560.
83. Id. at 165, 207 N.E.2d at 561.
84. Anthony, 5 Ohio App. 3d at 63, 449 N.E.2d at 515.
85. In Costakos, No. 73 AP-133, slip op. at 2447, the natural father was granted the custody of his two children after his divorce from their natural mother. Id. at 2448. The father remarried and, three years later, his new wife filed for adoption of the children. Id. In the two years prior to the adoption petition, the natural mother visited the children a total of several times, never staying more than 10-20 minutes at a time. Id. at 2450. When she visited, the mother usually brought small gifts for the children. Id. As the result of misreading the holding of Johnson to require a complete failure to maintain and support before consent rights were forfeit, the Costakos court held that the negligible attention of the natural mother was sufficient to preserve her consent rights. Id. at 2451.
86. Anthony, 5 Ohio App. 3d at 63, 449 N.E.2d at 515.
what "law or judicial decree" should require; rather, a parent need only provide one monthly support payment each year, an amount undoubtedly too small to meet the needs of a child.\textsuperscript{87}

The anomaly of allowing a parent to preserve his consent rights by making only one monthly support payment per year may be beneficial for the parent who must pay support. It is tremendously unfair, however, for the parent having custody of the child who must actually support him. If there is a bright side to the holding in \textit{Anthony}, it is that the court required \textit{at least} one monthly payment per year. In a later case, an Ohio court of appeals required even less.\textsuperscript{88}

2. \textit{In re Adoption of Salisbury}\textsuperscript{89}

As in \textit{Anthony}, \textit{In re Adoption of Salisbury} involved the question of what circumstances constitute the "failure to support" which results in denial of parental consent rights in adoption proceedings.\textsuperscript{90} In \textit{Salisbury}, the court made the finding that two children were being neglected by their natural parent.\textsuperscript{91} As a result, the children were placed in the home of their maternal grandfather, Salisbury.\textsuperscript{92} Later attempts by the court to reestablish the children with their natural mother were unsuccessful, and the children were returned to Salisbury by an emergency court order.\textsuperscript{93} Thirteen months later, Salisbury filed a petition in probate court seeking to adopt the two children.\textsuperscript{94}

Salisbury alleged in the adoption petition that the consent of the natural parents was unnecessary under section 3107.07(A), claiming that neither natural parent had made any contribution to the support of the children during the year immediately preceding the filing of the original petition, in spite of the fact that both parents could work.\textsuperscript{95} After an initial hearing, the probate court dismissed the original petition, but allowed Salisbury to file an amended peti-

\textsuperscript{87} For example, a judicial decree requiring child support payments of $65 per week would amount to $3380 per year, a relatively small amount. However, after \textit{Anthony}, a payment of $260 ($65 \times 4) would fulfill the maintenance and support obligations set forth in the judicial decree—at least with respect to maintaining one's parental consent rights.

\textsuperscript{88} See infra notes 89-122 and accompanying text.

\textsuperscript{89} \textit{Salisbury}, 5 Ohio App. 3d 65, 449 N.E.2d 519 (1981).

\textsuperscript{90} \textit{Id.} at 66, 449 N.E.2d at 521-22.

\textsuperscript{91} \textit{Id.} at 65, 449 N.E.2d at 521.

\textsuperscript{92} \textit{Id.} at 66, 449 N.E.2d at 521.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.}
Approximately three months after the original hearing, a second hearing was held. At this hearing the probate court made a preliminary announcement that the parent's consent was not necessary. The natural mother protested the decision, alleging that, at some time after the filing of the original petition, she had made some meager contribution to child support.

The probate court made its final decision more than three years after the original adoption petition was filed. It held that, although the adoption was in the best interests of the child, the petition for adoption had to be dismissed. The probate court admitted that the natural parents had failed to provide support. However, the court stated that there was no way of knowing whether she was aware of her duty to provide support to her children. As such, the probate court rationalized that it could not be certain that the natural mother would have failed to provide child support had she known of her duty. Therefore, the petition was dismissed. In dicta, the court added that if the natural mother, with knowledge of her duty to support, later failed to provide support, then Salisbury could petition for adoption of the children and the mother's consent would not be necessary. Salisbury, however, decided to appeal the decision.

The court of appeals upheld the probate court's decision on two very tenuous grounds. First, the court pointed out that "[t]he [probate] court did not . . . make a finding that the mother knowingly abandoned her children, since it found there was no way to determine at that time that she was aware of her duty to support them." In effect, the court stated that there was a duty to support the children, but in order to fail to discharge that duty, the mother must have actual knowledge of her obligation and still fail to discharge it. In setting forth its second reason for upholding the probate court, the appellate court implied that the only way a par-

96. Id. at 65, 449 N.E.2d at 521.
97. Id.
98. Id. at 66, 449 N.E.2d at 521.
99. Id.
100. Id. at 65-66, 449 N.E.2d at 521.
101. Id. at 66, 449 N.E.2d at 521.
102. Id. at 67, 449 N.E.2d at 522.
103. Id.
104. Id.
105. Id.
106. Id. at 66, 449 N.E.2d at 521.
107. Id. at 66-67, 449 N.E.2d at 522-23.
108. Id. at 67, 449 N.E.2d at 522.
ent can fail to discharge the duty to support is by "abandon ment." The court stated that the natural mother's consent was needed because "she made some contribution, although meager, for the support of her children within the pertinent time span established by statute." In other words, under Salisbury, nothing short of total abandonment would cause the forfeiture of parental consent rights.

In reaching its decision, the Salisbury court quoted Anthony to support its holding. As was demonstrated earlier, Anthony was based upon a misinterpretation of prior case law—insofar as the Salisbury court relied on Anthony to support its conclusion, the holding of Salisbury is also suspect.

The Salisbury opinion is disturbing in several other ways. As an initial matter, the discussion concerning "duty to support" and "knowledge" of that duty appears misplaced. Under the statute which was replaced by Revised Code § 3107.07(A), consent rights would be lost if there was a "willful" failure to support a child. In interpreting that earlier statute, the Ohio Supreme Court held that there had to be knowledge of the duty to support, combined with a failure to support, in order for there to be a willful failure. Clearly, under that earlier statute, the actual outcome of Salisbury was correct. However, that earlier statute was not in effect at the time of the hearing. "Willful" failure had been replaced by failure "without justifiable cause." Therefore, the question should not have been: "Does the parent know of the duty to support?" Rather, it should have been: "Is it justifiable for a parent to be unaware of the duty to support his child; and, if so, was the failure to provide support based on that lack of awareness?"

109. The court did not expressly hold that abandonment was necessary in order to fail to provide support to children. However, the court's use of the word "abandoned," combined with the holding that a "meager" support payment discharges the duty to support, strongly suggests that abandonment will be required before consent is to be dispensed with in future adoption proceedings. See id. at 67, 449 N.E.2d at 522-23.

110. Id. at 67, 449 N.E.2d at 523.

111. Id.

112. See supra notes 78-85 and accompanying text.

113. See supra notes 48-49 and accompanying text.

114. In re Adoption of Biddle, 168 Ohio St. 209, 152 N.E.2d 105 (1958) (if a parent knows of the duty to support and voluntarily and intentionally fails to provide it, there is willful failure).


Another disturbing aspect of Salisbury is the court's use of the word "abandonment." As stated earlier, that term has not been a part of the Ohio adoption statute for over fifty years; it has no place in an interpretation of section 3107.07(A).

Finally, the court's decision not only takes the life out of the "failure to support" requirement of section 3107.07(A) by holding that any "meager" amount of support will be sufficient to preserve a parent's consent rights, it also flies in the face of the patent legislative intent that the interests of the child be paramount to those of the parent. The Salisbury court's indication that maintenance of parental consent rights be the primary interest protected in an adoption proceeding is evinced in two ways: the statement that its construction of the statute "favors the parent," and the court's refusal to dispense with the natural mother's consent in spite of the probate court's finding that "the best interests of the children would be served by having them remain with [Salisbury]." The court rationalized its holding by stating that:

[T]his is an adoption proceeding which involves the actual termination of the parent-child relationship. Therefore, the parents' rights are materially more crucial in an adoption than in a custody action. Further, since the children are not in [the natural mother's] custody, their welfare is not actually in jeopardy.

It is difficult to conceive of any situation in which a nonconsenting parent will be unable to safeguard his parental rights when any "meager" amount will suffice; thus, the holding of Salisbury has evicerated the "maintenance and support" requirement of section 3107.07(A).

It has been demonstrated that the interpretations of section 3107.07(A) provided in Anthony and Salisbury have severely strained the plain meaning of the language used in the statute. A parent who does not want to pay a substantial amount of the necessary child support, but who does not want someone else to adopt his child, need only make a "meager" contribution, or at most one month's support payment per year, in order to make the "failure

117. Salisbury, 5 Ohio App. 3d at 67, 449 N.E.2d at 522.
118. See supra text following note 56.
120. Id. at 67, 449 N.E.2d at 523.
121. Id. at 66, 449 N.E.2d at 521.
122. Id. at 67, 449 N.E.2d at 523.
123. When a child is adopted, all rights and obligations of the natural parents towards the child are terminated. See OHIO REV. CODE ANN. § 3107.15.
124. See supra note 109-10 and accompanying text.
125. See supra notes 76-77 and accompanying text.
to provide support” phrase inoperative. Allowing this extremely narrow interpretation of section 3107.07(A) is contrary to the clear intent of the framers of this statute—to provide a statutory framework for dispensing with the requirement of parental consent when it would be in the best interests of the child—because it would be virtually impossible to meet the necessary requirements. Of course, it should be remembered that section 3107.07(A) provides two circumstances in which parental consent can be ignored. The first situation—failure to support—has not survived judicial interpretation. As will be seen, the second situation—failure to communicate—has not fared any better.

B. Failure to Communicate Without Justifiable Cause

Revised Code § 3107.07(A) provides a second circumstance in which a parent can lose his parental consent rights. If, for one year, a parent fails without justifiable cause to communicate with his child, then that parent’s consent will not be required in order to proceed with an adoption. This provision is new to the parental consent statute, and only one appellate court decision has interpreted it. In the case of In re Adoption of Hupp, the children’s stepfather, Hupp, wished to adopt them. Hupp filed an adoption petition alleging that the natural father’s consent was not needed because of his failure to communicate with his children without justifiable cause for one year. The natural father admitted that he had not seen his children during the previous year, but he alleged that he had sent Christmas cards and a small gift to the children during the year. Moreover, he argued that his failure to visit his children was justified because “his ex-wife and [Hupp] had turned the children against him.”

The natural mother admitted that she did not want her children to see their natural father. She also admitted threatening the natural father, telling him that she would seek an order increasing

126. OHIO REV. CODE ANN. § 3107.07(A).
127. See supra notes 61-125 and accompanying text.
128. See infra notes 129-97 and accompanying text.
129. OHIO REV. CODE ANN. § 3107.07(A).
130. In re Adoption of Hupp, 9 Ohio App. 3d 128, 130, 458 N.E.2d 878, 882 (Cuyahoga Co. 1982).
131. Id.
132. Id. at 129, 458 N.E.2d at 881.
133. Id.
134. Id.
135. Id.
child support if he tried to see the children. Finally, she acknowledged the fact that the children did receive some Christmas cards and a small gift from their natural father during the prior year.

Based on these facts, the probate court determined that the natural father's consent was not necessary. It held that the natural father had failed to communicate with the children, and that there was no justifiable cause for that failure. The natural father appealed, arguing that the probate court had erred in determination of what constituted "failure to communicate" and "without justifiable cause."

The appellate court reversed the probate court and found that the natural father's consent was necessary because the father had not failed to communicate with his children within the meaning of section 3107.07(A). The court pointed out that there were no prior Ohio appellate court cases defining "failure to communicate." As a result, the Hupp court looked to the Alaska Supreme Court's interpretation of the same phrase in the Alaska adoption statute. In the case of In re Adoption of K.M.M., the Alaska

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136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id. at 130-31, 458 N.E.2d at 880, 882-83.
142. Id. at 130, 458 N.E.2d at 882.
143. Id.
144. 611 P.2d 84 (Alaska 1980). There are some problems with the court citing this case. First, the father in K.M.M. had faithfully sent Christmas cards, birthday cards and letters to his children prior to the filing of the adoption petition. Id. at 88. He was forced to send cards because the natural mother had no phone. She had married and was living with the father's best friend, so personal visits were unrealistic. Id. Finally, the father's work had kept him away for long periods of time, so cards and letters were the only feasible means of communication. Id. It is also interesting to note that the children had been scheduled to stay with their father for six weeks, but the mother cancelled the visit when her new husband filed the adoption petition. Id. Also, the Alaska adoption statute was different from the Ohio statute. Alaska's statute stated that parental consent was not needed when a parent failed significantly to communicate meaningfully with a child. ALASKA STAT. § 20.15.050(a) (1985) (emphasis added). This difference in the statute, combined with the difference in the fact pattern, makes the use of this case suspect. Hupp, 9 Ohio App. 3d at 133, 458 N.E.2d at 885 (Patton, J., dissenting).

The dissent in Hupp also pointed out that Hawaii has an adoption statute similar to Ohio's; no modifiers are used to describe the type of communication or the type of failure (i.e., meaningful or significant). Id. Thus, it would appear more suitable to refer to a Hawaii case in interpreting the Ohio statute. In the case of In re Adoption of Male Child, 56 Hawaii 412, 539 P.2d 467 (1975), the Supreme Court of Hawaii, in dicta, suggested that they "might deem a single card, a single brief letter or note, or a single telephone call to a child within a
Supreme Court made the determination that "'presents, cards, and letters' were acts which 'communicate meaningfully' within the meaning of its adoption statute."\(^{145}\) Citing the Alaska case for support, the Ohio appellate court held that there is a failure to communicate "only if there has been a complete failure to communicate, in the nature of complete abandonment of current interest in the child."\(^{146}\)

After discussing "failure to communicate," the court examined the meaning of the phrase "justifiable cause." The court disposed of this issue summarily, stating that "'without justifiable cause' is equivalent in meaning and effect to . . . 'willfully failed'"\(^{147}\)—the very words the legislature had taken out when "without justifiable cause" was inserted.\(^{148}\) With that determination, the court looked to pre-1977 cases to find the meaning of "willfully failed,"\(^{149}\) and concluded that it meant "voluntarily and intentionally."\(^{150}\) Finally, the court considered cases decided under the present statute\(^{151}\) and determined that it had not been established that the father's acts were "without justifiable cause."\(^{152}\) As a result, the court allowed him to retain his parental consent rights.\(^{153}\)

Although the court in *Hupp* reached the proper result, it rewrote Revised Code § 3107.07(A) in doing so. Before the *Hupp* case, the statute provided that parental consent rights would be forfeit if a "parent failed without justifiable cause to communicate" with a child.\(^{154}\) After *Hupp*, however, the statute has been reinterpreted to mean that parental consent can be dispensed with only if a

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\(^{145}\) *K.M.M.*, 611 P.2d at 88.

\(^{146}\) *Hupp*, 9 Ohio App. 3d at 130, 458 N.E.2d at 882.

\(^{147}\) *Id.* at 131, 458 N.E.2d at 883.

\(^{148}\) See *supra* notes 48-49 and accompanying text.

\(^{149}\) *Hupp*, 9 Ohio App. 3d at 131, 458 N.E.2d at 883. The cases the court cited were *In re Adoption of Biddle*, 168 Ohio St. 209, 152 N.E.2d 105 (1958), and *In re Adoption of Lewis*, 8 Ohio St. 2d 25, 222 N.E.2d 628 (1966). Admittedly, these cases are Ohio Supreme Court cases, but they interpret a statute which no longer exists. See *supra* notes 41-57 and accompanying text.

\(^{150}\) *Hupp*, 9 Ohio App. 3d at 132, 458 N.E.2d at 883.

\(^{151}\) *Id.* The cases cited by the court are two unreported cases decided after 1977. The court gives no indication why it looked at pre-1977 cases in order to define "without justifiable cause," but looked to post-1977 cases in order to apply "without justifiable cause."

\(^{152}\) *Id.*

\(^{153}\) *Id.* at 132, 458 N.E.2d at 884. The court gives no indication as to why it decided the "without justifiable cause" issue when it had already decided that there was no failure to communicate.

\(^{154}\) *Ohio Rev. Code Ann.* § 3107.07(A).
parent "willfully abandoned" a child. Consequently, a few cards sent during the course of a one-year period will prevent parental consent rights from being lost.

Rather than implicitly rewriting the statute, Hupp could have reached the same result under the express terms of the statute. The court could have deemed the mother's threat of increased child support as justifiable cause for the father's failure to communicate with his children. This reasoning would have avoided distorting the statute. By holding that "without justifiable cause" signified "willful failure," the court negated the legislative intent behind Revised Code § 3107.07(A). The earlier statute used the words "willful failure." If the legislature had meant to keep this element as a part of the statute, it would have left that segment of it unchanged. However, the legislature chose to use different terms. It follows naturally that the legislature intended a different meaning, and the court should have respected that intent.

If the court in Hupp had used the proper "justifiable cause" analysis, rather than deciding that sending a few cards was not "failure to communicate," then the court could have strengthened section 3107.07(A). Interpreting "communication" as more than sending a few cards during the year would have put a significant duty on parents in order to maintain parental consent rights. This is exactly what section 3107.07(A) appeared to do when enacted. Unfortunately, the court did not place a meaningful duty on parents; instead, Hupp finished what Anthony and Salisbury started; Revised Code § 3107.07(A) is now meaningless. As stated earlier, there is no failure to support as long as a "meager" contribution to child support is made. After Hupp, there is no failure to communicate as long as a few cards are sent each year to a child.

IV. THE COMPLETE DEMISE OF THE CONSENT EXCEPTION

In August of 1985, the Supreme Court of Ohio decided In re Adoption of Holcomb. This case dealt with the meaning of the

155. See supra notes 141-46 and accompanying text.
156. See supra notes 129-46 and accompanying text.
157. See supra notes 147-48 and accompanying text.
158. See supra notes 48-49 and accompanying text.
159. See supra notes 147-48 and accompanying text.
160. See supra notes 41-57 and accompanying text.
161. See supra notes 61-128 and accompanying text.
162. See supra note 110 and accompanying text.
163. See supra notes 129-46 and accompanying text.
164. 18 Ohio St. 3d 361, 481 N.E.2d 613 (1985).
phrase "failure to communicate" in Revised Code § 3107.07(A). In *Holcomb*, Edmund Holcomb (Holcomb) and Gloria Holcomb (respondent) were granted a divorce after approximately ten years of marriage.\(^{165}\) Originally, respondent was granted custody of the couple's two children, but two years after the divorce Holcomb filed a motion for change of custody, which was granted.\(^{166}\)

In the years following the change of custody, Holcomb and respondent engaged in an extended game of "hide and seek."\(^{167}\) Respondent refused to give her address and telephone number to Holcomb, alleging that she did not want to be harrassed by him.\(^{168}\) Holcomb, on the other hand, allegedly thwarted respondent's attempts to visit her children.\(^{169}\) In addition, when Holcomb and his new wife (petitioner) moved into a new home, they refused to give respondent their address and telephone number.\(^{170}\)

In 1982, Holcomb and petitioner filed a petition in probate court seeking to adopt Holcomb's two children.\(^{171}\) Respondent was served by publication, allegedly because her "address could not be ascertained with reasonable diligence."\(^{172}\) She did not attend the adoption hearing and the adoption was granted without her consent.\(^{173}\)

When respondent discovered that the adoption had occurred, she filed a motion to have it set aside.\(^{174}\) She alleged that she should have been given actual notice of the original hearing because her address was readily obtainable from her parents, both of whom Holcomb knew.\(^{175}\) The probate court held a hearing and deter-

\(^{165}\) *Id.* at 362, 481 N.E.2d at 616. This case was actually a consolidation of two cases, the second case being *In re Adoption of Bradford*. For brevity, only the facts of the *Holcomb* case will be discussed.

\(^{166}\) 18 Ohio St. 3d at 362, 481 N.E.2d at 616.

\(^{167}\) *Id.* at 362-63, 481 N.E.2d at 616. This "game" actually began prior to the change in custody. Holcomb had been granted extended visitation rights for the summer of 1980, but before he picked up the children, respondent moved to California with them and left no forwarding address. *Id.* at 362, 481 N.E.2d at 616. Through the use of a private investigator, Holcomb was able to find the children. *Id.* It was after this episode that Holcomb petitioned for, and was granted, custody of the children. *Id.*

\(^{168}\) *Id.* at 362, 481 N.E.2d at 616.

\(^{169}\) *Id.* at 362-63, 481 N.E.2d at 616.

\(^{170}\) *Id.*

\(^{171}\) *Id.* at 363, 481 N.E.2d at 617.

\(^{172}\) *Id.* It should be noted that when Holcomb petitioned the court for custody of his two children, service by publication was also used. *Id.* at 362, 481 N.E.2d at 616.

\(^{173}\) *Id.* at 363, 481 N.E.2d at 617.

\(^{174}\) *Id.* Respondent's motion to set aside the adoption was filed almost ten months after the adoption was granted. *Id.*

\(^{175}\) *Id.*
mined that "although service had been improper, [respondent's] consent to the adoption was not required because she had failed [without justifiable cause] to communicate with the children for at least one year prior to the filing of the petition for adoption."\textsuperscript{176}

Respondent appealed the probate court's decision, and the court of appeals reversed.\textsuperscript{177} The court held that respondent had justifiable cause for her failure to communicate with the children; therefore, respondent's consent was necessary for the adoption.\textsuperscript{178}

The Supreme Court of Ohio affirmed the decision of the court of appeals,\textsuperscript{179} and in doing so, it attempted to clarify the meaning of section 3107.07(A). The court prefaced its decision with the statement that section 3107.07(A) "substantially modifies its predecessor."\textsuperscript{180} The court went on to assert that "the legislature intended to adopt an objective test for analyzing failure of communication."\textsuperscript{181} Finally, the court held that the statute should be strictly construed; therefore, a parent's consent would be necessary to an adoption unless there was a "complete absence of communication for the statutorily defined one-year period."\textsuperscript{182}

With these considerations in mind, the court addressed the facts of the case. It agreed with both the court of appeals and the probate court that respondent had completely failed to communicate with the children for a period of over one year.\textsuperscript{183} Thus, the case turned on whether respondent had justifiable cause for the failure.\textsuperscript{184}

Although the court did not establish a precise definition of "justifiable cause,"\textsuperscript{185} it held that Holcomb and petitioner "had significantly interfered with and discouraged" respondent's attempts to communicate with the children.\textsuperscript{186} The Holcombs' moving, their unlisted phone number, and their failure to provide any means by

\begin{footnotes}
\item[176] Id.
\item[177] Id.
\item[178] Id.
\item[179] Id. at 370, 481 N.E.2d at 622.
\item[180] Id. at 366, 481 N.E.2d at 619. The court noted that "former R.C. 3107.06(B)(4) . . . authorized adoption without consent by a parent who ' . . . willfully failed to properly support and maintain the child for a period of more than two years immediately preceding the filing of the petition . . .' Under the new [statute, however], a parent forfeits his or her right to object to an adoption if that parent failed to communicate with the child for the lesser period of one year prior to the filing of the adoption petition." \textit{Id.}
\item[181] Id.
\item[182] Id. at 366-67, 481 N.E.2d at 619.
\item[183] Id. at 368-69, 481 N.E.2d at 621.
\item[184] Id. at 369, 481 N.E.2d at 621.
\item[185] Id. at 367, 481 N.E.2d at 620.
\item[186] Id. at 369, 481 N.E.2d at 621.
\end{footnotes}
which respondent might be able to communicate with her children showed "a significant, deliberate, and concerted effort . . . to interfere with respondent's communication with her children."\textsuperscript{187} Therefore, respondent's failure to communicate with her children was justifiable.\textsuperscript{188}

In reaching its conclusion, the court stated that it "in no way condone[d] the actions of the uncaring, unworthy, or unscrupulous parent who, after a period of sustained absence, makes an infrequent communication for the sole purpose of frustrating or preventing adoption."\textsuperscript{189} Instead, the court believed that it was paying "due deference" to the perceived legislative intent to protect the "fundamental liberty interest of natural parents in the care, custody and management of their children."\textsuperscript{190}

The court cited \textit{Santosky v. Kramer}\textsuperscript{191} in support of its determination that "failure to communicate" must be strictly construed in order to effectuate the legislature's intended protection of natural parents' fundamental liberty interests as mandated by the Constitution.\textsuperscript{192} However, \textit{Santosky} merely holds that when parental rights are being terminated in a judicial proceeding, the standard of proof that is required by due process is at least "clear and convincing evidence."\textsuperscript{193} No mention is made in the case that adoption statutes must be strictly construed. In addition, the standard of "clear and convincing evidence" for adoption proceedings in which parental consent has been deemed waived is the established norm in Ohio.\textsuperscript{194}

\begin{itemize}
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{189} \textit{Id.} at 367, 481 N.E.2d at 619. Although the court may not condone this, the decision makes it possible. Of course, a meager amount of child support will also be necessary in order for parental consent rights to be kept intact. \textit{See supra note 109} and accompanying text.
  \item \textsuperscript{190} \textit{Id.}, citing \textit{Santosky v. Kramer}, 455 U.S. 745 (1982).
  \item \textsuperscript{191} 455 U.S. 745, 753 (1982).
  \item \textsuperscript{192} 18 Ohio St. 3d at 367, 481 N.E.2d at 619. \textit{See supra note 16} and accompanying text.
  \item \textsuperscript{193} \textit{Santosky}, 455 U.S. at 747-48. At issue in \textit{Santosky} was a New York statute which allowed parental rights to be terminated upon a showing that the child was "permanently neglected." \textit{Id.} at 747. However, the statute also provided that the standard of proof was only "preponderance of the evidence." \textit{Id.}
  \item \textsuperscript{194} \textit{See Anthony}, 5 Ohio App. 3d at 62, 449 N.E.2d at 515 (standard of proof required in Ohio adoption proceedings is "clear and convincing evidence"); \textit{Holcomb}, 18 Ohio St. 3d at 365-67, 481 N.E.2d at 619 (in Ohio "clear and convincing evidence" is the standard of proof in adoption cases). The \textit{Holcomb} court suggested a comparison with Revised Code § 2151.35, which states, in part:
  \begin{quote}
    If the court finds from \textit{clear and convincing evidence} that the child is an abused, neglected, or dependent child, or finds beyond a reasonable doubt that the child is a delinquent or unruly child or a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear evidence as to the proper disposi-
  \end{quote}
Therefore, the *Santosky* requirements have already been satisfied.\(^\text{195}\) As such, the Ohio Supreme Court's citation of *Santosky* to justify strict construction of section 3107.07(A) is misplaced.\(^\text{196}\)

As a result of the Ohio Supreme Court's misguided concern with protecting the due process rights of parents in adoption proceedings, the court in *Holcomb* has approved of the decisions in *Anthony*, *Salisbury* and *Hupp*. Consequently, the emasculation of Revised Code § 3107.07(A) is now complete and binding upon the courts of Ohio.\(^\text{197}\)

**V. A SUGGESTED SOLUTION**

Although Revised Code § 3107.07(A) has been interpreted into a virtual nullity,\(^\text{198}\) it is possible to salvage the intent of that section.\(^\text{199}\) However, to do so, the Ohio state legislature must amend the statute.\(^\text{200}\) This Note suggests that the state legislature adopt the following proposed section 3107.07(A).\(^\text{201}\) Its language is con-

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18 Ohio St. 3d at 368 n.2, 481 N.E.2d at 620 n.2 (emphasis added).

195. This Note is not suggesting that if *Santosky* is satisfied, then all due process requirements have been satisfied. Rather, this Note merely suggests that the Ohio Supreme Court's reliance on *Santosky* is misguided.

196. There are other constitutional cases which deal with the issue of termination of parental rights. However, those cases also fail to justify the court's decision. For example, *Armstrong v. Manzo*, 388 U.S. 545 (1982), held that due process requires a natural parent to be given prior notice of a judicial proceeding which might terminate his parental rights. In Ohio, that requirement is fulfilled by Revised Code § 3107.11(A), which states:

> After the filing of a petition to adopt . . . a minor, the court shall fix a time and place for hearing the petition . . . At least twenty days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the court to all of the following: . . . (3) A person whose consent is dispensed with upon any ground mentioned in divisions (A), (E), (F) or (G) of section 3107.07 of the Revised Code, but who has not consented.

197. As this Note argues, *Anthony*, *Salisbury* and *Hupp* have made Revised Code § 3107.07(A) virtually meaningless. *Holcomb* intensifies that effect because that decision is binding upon all lower courts.

198. See supra notes 61-197 and accompanying text.

199. The intent of section 3107.07(A), as this Note argues, is to provide a mechanism by which parental consent rights may be dispensed with when circumstances so warrant. See supra notes 41-57 and accompanying text. Ohio courts do not appear to disagree with this proposition but do disagree with the circumstances under which the section becomes operative.

200. The Ohio Supreme Court has made a determination concerning the meaning of section 3107.07(A), and lower courts are bound by that determination. See supra notes 164-97 and accompanying text.

201. This proposed section 3107.07(A) is not based on any single, cognizable source.
sistent with the remainder of Ohio's adoption statute, and it has been tailored so that it can be placed directly into Revised Code § 3107.07 without change. 

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

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has substantially failed without just cause, for a period of at least 12 months, either to communicate meaningfully with the minor; or to visit with the minor; or to provide for the maintenance and support of the minor (1) as is commensurate with the parent's ability or (2) if there is a judicial decree, as is required by the judicial decree. In determining whether there has been a substantial failure under this subsection, the court shall disregard token or isolated visits, communications or contributions to maintenance and support. Failure for 12 months to provide at least 70% of any court ordered child support for that 12-month period shall constitute a substantial failure to provide maintenance and support for a minor for a 12-month period.

The proposed section 3107.07(A) is intended to operate as follows:

(1) A party wishing to utilize this section must allege in an adoption petition that there has been a substantial failure without just cause to do any one or more of the listed acts.

(2) The court will hold a hearing at which the allegations must be proven by at least clear and convincing evidence. If this is done, then:

(3) The party against whom this section is being used will have the opportunity to show that the allegations are false, or else that there was just cause for any substantial failure that did occur.

(4) If the court finds that there has been no substantial failure, then the court may not dispense with the consent of the parent. If

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Rather, various sources were read and analyzed, and the final form of the proposed section draws the better elements from them in order to create the most useful section possible. The sources consulted in order to draft this proposed section were:

A. Draft ABA Model State Adoption Act, 19 Fam. L.Q. 103 (Summer 1985).

203. The italicised portion of the proposed section is the new language proposed by this Note.
204. See supra notes 193, 194 and accompanying text.
the court finds that there has been a substantial failure, but that there is just cause, then the court may not dispense with the consent of the parent; however, if the court does not find that there is just cause, then the court may dispense with the consent of the parent.

The proposed section is intended to accomplish two goals: (a) provide a means for dispensing with parental consent when circumstances so warrant; and (b) safeguard parental consent rights when it would be unjust for those rights to be taken away. The first goal is accomplished by providing that a substantial failure to do certain listed acts will be grounds for dispensing with parental consent. The second goal is accomplished by providing that parental consent rights will remain intact if a parent has just cause for any substantial failure that has occurred.

The phrase “just cause” is not defined. It is to be a question of fact for the court to determine after looking at all of the circumstances.

Similarly, the phrase “substantially failed” is not defined. It is a question of fact for the court to determine, except in one situation. When there exists a judicial decree which requires a certain amount of child support to be paid, at least 70% of that amount per year must be paid, or else, as a matter of law, there will be a substantial failure to provide maintenance and support for a child. In such a situation, the issue becomes whether the substantial failure was with just cause. This provision is intended to prevent decisions such as Anthony and Salisbury.

The word “failed” is modified by the adverb “substantially” in order to make it clear that there need not be a complete failure in order for parental consent rights to be dispensed with. A less-than-complete failure will be sufficient, and the court will concentrate on the issue of just cause. Thus, the decision in Hupp will be legislatively modified.

Finally, the proposed section mandates that a court disregard incidental or token visits, communications, or contributions to

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205. As an illustration:

A is ordered to pay $25 per week in child support to B. That would amount to $1300 per year ($25 \times 52). If A pays less than 70% of $1300 (i.e., $910) during a 12-month period, then A will have substantially failed to provide maintenance and support as a matter of law. A court would then inquire into the reasons for the substantial failure in order to determine whether there is just cause for the substantial failure.

206. The final decisions might not be different, but rather than finding no substantial failure, a court will have to find just cause for the substantial failure under the facts of those cases. See supra notes 61-128.

207. See supra notes 129-63 and accompanying text.
maintenance and support when the court is determining whether there has been a substantial failure. Instead of using incidental contacts to find that there has been no substantial failure, a court will turn to the issues of just cause. This mandate will prevent decisions such as Anthony, Salisbury, Hupp and Holcomb.\textsuperscript{208}

VI. CONCLUSION

This Note has demonstrated that recent interpretations of Ohio Revised Code § 3107.07(A) have made that statute virtually meaningless.\textsuperscript{209} Moreover, because the Ohio Supreme Court has made a final determination regarding the interpretation of this statute,\textsuperscript{210} judicial reinterpretation is unlikely. Therefore, any solution to the judicially created problem must come from the legislature.

This Note has suggested the enactment of a new section 3107.07(A),\textsuperscript{211} which, although limited in its scope, would provide a legislative solution. The proposed section would allow natural parents to safeguard their own parental rights, and provide a method by which parental consent rights could be dispensed when the circumstances so warrant. Thus, a balancing of the rights of the parents, the needs of the child, and the interest of the state would be achieved.

CHARLES R. PINZONE, JR.

\textsuperscript{208} See supra notes 61-197 and accompanying text.
\textsuperscript{209} See supra notes 58-163 and accompanying text.
\textsuperscript{210} See supra notes 164-97 and accompanying text.
\textsuperscript{211} See supra notes 198-208 and accompanying text.