[Cite as *In re J.B.S.*, 2010-Ohio-1974.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

IN THE MATTER OF:	:	
	:	Case No. 09CA3316
J.B.S.	:	
Alleged Abused/Neglected/ Dependent Child.	:	DECISION AND JUDGMENT ENTRY

APPEARANCES:

COUNSEL FOR APPELLANTS: Marcia Shedroff, P.O. Box 1602, Portsmouth, Ohio 45662

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-26-10

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court, Juvenile Division, judgment that awarded custody of J.B.S., born May 13, 2007, to John and Karon Hannah, appellees herein.

{¶ 2} Appellants Carl and M. Ann Collier, the child's paternal grandparents, raise the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE LOWER COURT ERRED BY DENYING APPELLANTS' MOTION TO DISMISS FILED JULY 9, 2008."

SECOND ASSIGNMENT OF ERROR:

"THE LOWER COURT ERRED BY PROCEEDING TO DISPOSITIONAL HEARING WHEN THERE HAD BEEN NO ADJUDICATION OF ABUSE, NEGLECT, OR DEPENDENCY."

THIRD ASSIGNMENT OF ERROR:

"THE LOWER COURT ERRED BY EXERCISING JURISDICTION PURSUANT TO R.C. 2151.23(A)(2) WHEN IT AWARDED CUSTODY OF J.B.S. TO APPELLEES HANNAH AFTER APPELLEES STEINER HAD PREVIOUSLY CONSENTED TO CUSTODY REMAINING WITH APPELLANTS, THUS RENDERING R.C. 2151.23(A)(2) UNCONSTITUTIONAL AS APPLIED."

FOURTH ASSIGNMENT OF ERROR:

"THE LOWER COURT ABUSED ITS DISCRETION BY DENYING APPELLANTS' PETITION FOR CUSTODY AND GRANTING CUSTODY TO APPELLEES HANNAH."

{¶ 3} Within their fourth assignment of error, appellants list the following as "assignments of error":

"A. THE LOWER COURT'S DECISION IS AN ABUSE OF DISCRETION IN THAT IT IS BASED UPON FUTURE POSSIBILITIES AND CONTINGENCIES WHICH ARE NOT SUPPORTED BY THE EVIDENCE, RATHER THAN ON PRESENT CIRCUMSTANCES; AND IN THAT THE COURT FAILED TO CONSIDER THE CHILD'S AGE AND BOND WITH HER PRESENT CAREGIVERS/FAMILY."

"B. THE LOWER COURT'S DECISION IS AN ABUSE OF DISCRETION IN THAT IT IS BASED UPON FINDINGS AND RULINGS THE COURT WOULD HAVE MADE BUT DID NOT MAKE."

"C. THE LOWER COURT'S DECISION IS AN ABUSE OF DISCRETION BECAUSE THE COURT CONSIDERED

FACTORS ENUMERATED IN R.C. 2151.414."

"D. THE LOWER COURT'S DECISION IS AN ABUSE OF DISCRETION BECAUSE THE COURT FAILED TO GIVE DUE WEIGHT TO THE WISHES OF THE CHILD'S NATURAL PARENTS."

"E. THE LOWER COURT'S DECISION IS AN ABUSE OF DISCRETION IN THAT THE COURT FAILED TO CONSIDER THE FACTORS ENUMERATED IN R.C. 3109.05(D) WITH RESPECT TO ITS GRANDPARENT VISITATION ORDER."

{¶ 4} The instant case involves a custody dispute between the child's paternal grandparents and appellees, third-party non-relatives. In March 2007, the child's natural parents, Gary and Angela Steiner, entered into an adoption agreement with appellees. After the child's birth, they changed their minds. They soon discovered, however, that they were unable to properly care for the infant. Thus, on September 10, 2007, the Steiners placed the infant with appellees. In early October, the Steiners told appellees that they wanted the infant returned to them. On October 10, 2007, appellees voluntarily, but unwillingly, returned the child to the Steiners. On that same date, appellants filed a petition for custody and a motion for ex parte emergency custody. The trial court awarded emergency custody to appellants.

{¶ 5} On November 15, 2007, appellees also filed a motion for custody of the child. The Steiners subsequently filed affidavits with the court attesting that due to financial difficulties, they requested appellees to care for child between September 10, 2007 and October 10, 2007. They asserted that they did not intend "to give away permanently, sell, or abandon" the child.

{¶ 6} On March 19, 2008, the trial court held a probable cause hearing. Mr.

Steiner testified that on March 12, 2007, he and Mrs. Steiner entered into an agreement to allow appellees to adopt the child. In September 2007, they still intended to permit appellees to adopt the child, but once Mr. Steiner obtained employment and a vehicle, he changed his mind. Mrs. Steiner testified similarly.

{¶ 7} On April 28, 2008, the Steiners executed consents to permit appellants to retain temporary legal custody of the child. On July 9, 2008, appellants filed a motion to dismiss appellees' motion for custody.

{¶ 8} On August 11, 2007, the trial court found that appellees waived an adjudicatory hearing and that the natural parents consented to granting appellants temporary legal custody of the child. On November 4, 2008, the court denied appellants' motion to dismiss.

{¶ 9} On December 15, 2008, the guardian ad litem filed his report. He explained that he visited both appellants' and appellees' home and found both suitable. The guardian ad litem reported that (1) the child resided with appellants in a home with three of the child's siblings, ages 16, 11, and 9; and (2) the child has a good relationship with her siblings, has adjusted well to this home, and "is thriving." He further explained: "While it is true that [appellees] could provide a safe and stable home for [the child], this GAL is of the opinion that uprooting her from this home and taking her away from her siblings and grandparents would not be in her best interests." The guardian ad litem thus recommended that the court designate appellants as the child's legal custodian and deny appellees' motion for custody.

{¶ 10} On December 16, 2008, the trial court held a hearing. At the hearing, Mr.

Collier testified that he enjoys having the child in his home and that he shares a close relationship with her. He stated that although he is in his late fifties and suffers from chronic obstructive pulmonary disorder, he has no concern that his "health may prevent [him] at some point from giving good care to [the child]." He stated that his health has not affected his ability to care for the child and that he is not concerned about the future "[b]ecause I would always find a way to take care of the children[, even if it] took hiring somebody * * *."

{¶ 11} Mrs. Collier testified that she has established a strong bond with the child over the fourteen months that the child has been in her care. She stated that she does not work outside the home and that she stays home to care for the child. Mrs. Collier explained that when she has to leave, "sometimes I have to sneak out because [the child] cries for me and grabs her coat and wants to go. * * * [T]hen when I come home, she runs to the door and grabs me, and gets between my legs and hangs on and then I can't go out and get the groceries."

{¶ 12} Appellees, who are in their late thirties, testified that they would also provide a good home for the child. They stated that they have two boys, ages 13 and 19. Both appellees work outside the home.

{¶ 13} On September 22, 2009, the trial court awarded custody of the child to appellees. The court first found that the Steiners are unsuitable parents. The court then determined that both appellants and appellees would provide good homes. The court observed that appellants are approximately twenty years older than appellees and that Mr. Collier has health issues. The court placed much emphasis on appellants' ages, noting that when the child turns sixteen, appellants will be 72. The court found

that either couple could care for the child. The court determined, however, that "the child's best interest over the long term trumps blood relationship, siblings in [appellants] home and the period of time that [appellants] have had temporary custody. To be blunt, the Court is concerned about the Steiner's [sic] contact with the child, the possibility of death or debilitating sickness of each Collier, and the Steiner's [sic] then being in the child's life again. None of these problems exist with [appellees]."

{¶ 14} Thus, the court awarded appellees custody of the child and granted Mrs. Collier grandparent visitation one weekend per month. This appeal followed.

{¶ 15} Because we find appellants' fourth assignment of error dispositive, we address it first. In their fourth assignment of error, appellants assert that the trial court abused its discretion by denying their petition for custody and by granting custody to appellees. We agree.

{¶ 16} Generally, an appellate court reviews a trial court's custody decision with the utmost deference. See Davis v. Flickinger (1995), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159; Miller v. Miller (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. An appellate court may, however, reverse a trial court's decision if the trial court abused its discretion. Davis, supra. An abuse of discretion exists when a trial court decision is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The abuse of discretion standard does not, however, permit an appellate court to simply substitute its judgment for that of the trial court. See, e.g., Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶ 17} Ordinarily, an appellate court will not find an abuse of discretion in a

custody case if some competent, credible evidence supports the trial court's judgment. See Davis, supra.

{¶ 18} R.C. 2151.23(A)(2) vests jurisdiction for custody disputes in the juvenile court for "any child not a ward of another court of this state." The case sub judice arose upon the filing of a custody petition and involves a custody dispute between two non-parents. Again, we note that the child's natural parents do not assert a right to the custody of the child. In this situation, despite some confusion during the trial court proceedings regarding the particular statute that provides the court with jurisdiction,[1] we believe that R.C. 2151.23(A)(2) supplies the appropriate jurisdiction. Even if, however, jurisdiction vests under some other statute, all parties agree that the ultimate focus in the case at bar is the child's best interest.

{¶ 19} R.C. 2151.23(A)(2) does not explicitly provide a test or standard by which a trial court is to determine custody. Instead, R.C. 2151.23(F)(1) states that "[t]he juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 * * * of the Revised Code." In In re Bonfield, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, however, the Ohio Supreme Court seemingly disagreed with the proposition that a trial court must apply R.C. 3109.04 when the custody dispute is between two non-parents. Instead, the court held: "the trial court shall exercise its discretion in giving due consideration to all known factors in determining what is in the best interest of the children." Id. at ¶49, citing In re Adoption

[1] Appellants' custody petition contained an allegation that the child is abused, neglected, and dependent. The trial court referred to certain stages of the proceeding as "adjudication" and "disposition." The natural parents did not contest any aspect of the proceedings and consented to granting appellants custody of the child.

of Charles B. (1990), 50 Ohio St.3d 88, 552 N.E.2d 884, paragraph three of the syllabus. One other court has interpreted Bonfield to mean that in a custody dispute involving two non-parents, the trial court should consider the totality of the circumstances and may consider the R.C. 3109.04(F) factors. See In re R.N., Franklin App. No. 04AP-130, 2004-Ohio-4420, at ¶22.

{¶ 20} In the case sub judice, we use R.C. 3109.04(F)(1) as a reference point for the trial court's best interest analysis. The statute states:

> In determining the best interest of a child * * * the court shall consider all relevant factors, including, but not limited to:
> (a) The wishes of the child's parents regarding the child's care;
> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
> (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
> (d) The child's adjustment to the child's home, school, and community;
> (e) The mental and physical health of all persons involved in the situation;
> * * * *

{¶ 21} Regarding the natural parents' wishes, we observe that in the case at bar, the natural parents consented to placing the child with appellants. An "agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child." We fully agree with the trial court's conclusion on this point. Bonfield at ¶48. Despite this rule, the trial court afforded little weight to the natural parents' consent. The court found that the natural parents were unfit and unsuitable and, in essence, are

incapable of making a responsible decision concerning the child. The court further found, however, that appellants would provide the child with a suitable home.

{¶ 22} With respect to the child's wishes, we recognize that the child is too young to express her wishes. However, the guardian ad litem recommended that the trial court award custody to appellants.

{¶ 23} The child has also had minimal interaction with appellees and little to no interrelationship. She lived with appellees for only thirty days of her nearly three-year old life. It is difficult to understand how the child could have forged any bond with appellees. On the other hand, the child has been in appellants' continuous care and custody since she was five months old. During that time, she has established a strong and loving bond with appellants and with her other siblings who live in the home. All of the evidence shows that she has adjusted well to appellants' home and that she has become part of the family.

{¶ 24} Regarding the parties' mental and physical health, no evidence exists that any of the parties suffer from any mental health issues. Appellees apparently are in fine physical health. Furthermore, the evidence does not show that either Mr. or Mrs. Collier suffer from physical health problems that affect their ability to care for the child. Mr. Collier suffers from chronic obstructive pulmonary disorder, but stated that his condition does not negatively affect his ability to care for the child. Although appellants may be twenty years older than appellees, no evidence exists to suggest that their age affects their ability to adequately care for the child.

{¶ 25} We note that an additional relevant and important factor in the case sub

judice is appellants'[2] blood relationship with the child. We recognize, however, that although "blood relationship" and "family unity" are factors to consider when determining a child's best interest, neither one is controlling. See, e.g., In re S.K.G., Clermont App. No. CA2008-11-105, 2009-Ohio-4673, at ¶12; In re Mitchell, Lake App. Nos.2002-L-078, 2002-L-079, 2003-Ohio-4102, at ¶18; In re T.W., Cuyahoga App. No. 86084, 2005-Ohio-6633, at ¶15. For example, in abuse, neglect, and dependency proceedings, the legislature has "clearly indicate[d] the intent of the legislature that appropriate relatives should generally be given priority consideration." Mitchell. We believe that a similar priority consideration should apply when the custody determination arises in a dispute between two non-parents, one of whom is a relative to the child. For example, "'courts should not casually disregard the relationship a very young child has established with a foster family in order to give a relative legal custody of a child.'" S.K.G., at ¶14, quoting In re Halstead, Columbiana App. No. 04CO37, 2005-Ohio-403, at ¶52. Courts are in nearly uniform agreement that when a child has established a bond with a foster family, a trial court should not disturb that arrangement in favor of a relative placement due to the upheaval and potential emotional damage the removal would cause to a child of tender years. See Halstead (noting that "very young child" had been in foster parents' care for the majority of his life); In re Harris (Nov. 2, 2000), Cuyahoga App. No. 76631 (observing that young child had developed strong bond with foster family and had only spent first four months of her life with relative). We see no reason why the converse of this proposition also would not hold

[2] Mrs. Collier is the child's natural grandmother. Mr. Collier is the child's step-grandfather and, thus, is not a blood-relative.

true; that is, trial courts should not casually disregard the relationship a very young child has established with relatives in order to award legal custody to a non-relative.

{¶ 26} We again note that ordinarily, we afford discretion to a trial court's custody decision. In the case at bar, however, we believe that it would be unreasonable to uphold the trial court's decision. It will be traumatic to this almost three-year old child to be torn from the only family that she has ever known. When the trial court issued its decision in September 2009, the child had been with appellants for approximately two years of her two and one-half year existence. Absent adequate justification, the child should not be removed from the only stable family life that she has known and placed into the care of non-relatives. Although we recognize the appellees' good intentions and we do not doubt their desire and suitability to raise this child, we do not believe that they can compete with the strong bond that appellants have established with the child in her young life and with the blood relationship appellants share with the child. Furthermore, the child has established a strong bond with her other siblings that live in appellants' home. We find no evidence that the child shares any such strong bond with appellee. Consequently, we believe that it will do this child more harm than good to remove her from appellants' care and place her with appellees. The main rationale for the trial court's decision appears to rest upon its view that appellants may not be able to care for the child over the long-term. We, however, disagree. Although appellants are older than appellees, we find no clear or competent evidence that their age or health affects their ability to provide proper care for the child.

{¶ 27} We further observe that the trial court is concerned, and rightly so, that the child's natural parents may have contact with the child if the child is placed in

appellants' care. Although no one disputes that the natural parents are unsuitable, the evidence does not show that the risk of some contact with her natural parents outweighs any harm that would result upon her traumatic removal from appellants' care. Although we recognize and understand that appellees may be heartbroken over our decision, we cannot in good conscience uphold the decision to remove this child of tender years from an established family bond.

{¶ 28} Accordingly, based upon the foregoing reasons, we hereby sustain appellants' fourth assignment of error. Our resolution of this assignment of error also renders the remaining assignments of error moot. See App.R. 12(A)(1)(c). Therefore, we hereby reverse the trial court's judgment.

JUDGMENT REVERSED.

Kline, J., dissenting.

{¶ 29} I respectfully dissent. I would overrule the fourth assignment of error and proceed to address the remaining three assignments of error.

{¶ 30} This is a very, very tough case. If we were reviewing this case under a de novo standard, instead of an abuse of discretion standard, I would probably sustain the fourth assignment of error. But I cannot agree that the trial court abused its

discretion because, in my view, some competent, credible evidence supports the trial court's decision. First, it is undisputed that the Hannahs can provide a suitable home for the child. Second, it is undisputed that the Colliers suffer from more health problems than the Hannahs – especially Carl Collier, who has C.O.P.D. (chronic obstructive pulmonary disorder), diabetes, and various other physical and mental health issues. (Carl testified that he takes Prozac, which is a prescription anti-depressant.) The Hannahs, in contrast, have no apparent health problems. Finally, there is substantial evidence that the child's biological parents are not suitable. And because the child's biological father is M. Ann Collier's son, the biological parents will likely have more contact with the child if the Colliers get custody.

{¶ 31} Of course, some competent, credible evidence also supports awarding custody to the Colliers. But under the abuse of discretion standard of review, it is not our place to "weigh" the evidence.

{¶ 32} In conclusion, I do not necessarily agree with the trial court's decision. However, when applying the abuse of discretion standard of review, an appellate court may not substitute its own judgment for the judgment of the trial court. See *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-38. And because some competent, credible evidence supports the trial court's decision, I cannot find that the trial court abused its discretion.

{¶ 33} Accordingly, I dissent.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and that appellants recover of

appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment Only & Kline, J: Dissents with Dissenting Opinion.

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.