[Cite as *In re D.M.W.*, 2021-Ohio-4657.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

IN THE MATTER OF:

D.M.W.,

MINOR CHILD.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0037

Civil Appeal from the
Court of Common Pleas, Juvenile Division, of Belmont County, Ohio
Case No. 17 JG 398

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Reversed and Remanded in part, Affirmed in part.

Atty. Michael J. Shaheen and *Atty. Kristina Herman*, Shaheen Law Group, 128 S. Marietta Street, P.O. Box 579, St. Clairsville, Ohio 43950, for Appellant

D.M.W., *Pro-se Respondent*, 2960 Manaleo Lane, Schofield Barracks, Hawaii 96857.

Dated: December 27, 2021

WAITE, J.

{¶1} Appellant, D.G. ("Grandmother"), appeals the judgment of the Belmont County Court of Common Pleas, Juvenile Division, on a number of issues relating to grandparent visitation with her grandchild, D.M.W., d.o.b. March 14, 2016. For the following reasons, the judgment entry of the juvenile court is reversed in part and the matter is remanded for further proceedings, including a best interest analysis.

Factual and Procedural History

{¶2} J.B. ("Mother") was the natural mother of D.M.W. and D.W. ("Father") is the natural father. Since the child's birth, Father has had little to no contact with the child. He did not reside with Mother or child. On November 17, 2017, they entered into a shared parenting plan which designated Mother as the residential parent and legal guardian of the child for school placement and public services purposes. Despite the provisions of the shared parenting plan, D.M.W. resided with Mother and Grandmother/Appellant exclusively since birth. According to the record, Father had virtually no contact with the child. Father sent no gifts and attempted no regular communication. According to the record, the only visitation prior to Mother's death was a few hours spent with the child during a two-week military leave. Father resided in Louisiana.

{¶3} On April 1, 2018, Mother filed a motion seeking an order to abolish the shared parenting plan based on Father's absence from the child's life. According to the record, Mother had entered into the shared parenting plan only because she was assured by Father that the couple would reunite. When Mother discovered that Father had a child with his girlfriend who was residing with him in Louisiana, this prompted her motion to terminate shared parenting.

{¶4} On June 5, 2018, while that motion was pending before the court and one day prior to a scheduled hearing on a motion to establish child support, Mother died unexpectedly. The circumstances surrounding her death resulted in a criminal homicide investigation. According to the record, Father was named a person of interest in the investigation but repeatedly refused to be interviewed or to cooperate in the investigation.

{¶5} Sometime in early June of 2018, after Mother's death, Father arrived at Appellant's home requesting a one-day visitation with the minor child. Although he assured Appellant he would return with the child that evening, the child was never returned to Appellant's home, the child's residence since birth, and Father absconded with the child to Louisiana.

{¶6} On June 8, 2018, Appellant filed an emergency ex parte motion for custody and request for other relief, and a motion to intervene, seeking an order granting Appellant temporary custody of the child during the pendency of the action. On June 11, 2018, Father filed a suggestion of death and determination of custody. On June 12, 2018, Appellant filed another emergency ex parte motion seeking temporary visitation with the child so the child could attend Mother's funeral. On June 18, 2018, the trial court issued an order stating that, with Father's consent, Appellant was granted visitation with the child to attend Mother's funeral from June 13–18, 2018.

{¶7} As the parties had competing motions before the trial court, on June 20, 2018, the court issued another judgment entry, providing:

1) Mother's motion filed April 1, 2018, is dismissed.

2) Father's Motion for Determination of Custody is scheduled for hearing on August 24, 2018, at 1:00 o'clock P.M. In the interim, based on Mother's death, Father is the custodial parent.

3) Father granted fourteen (14) days to respond to Maternal Grandmother's Motion to Intervene.

4) Branches I, II and IV of Maternal Grandmother's motion of June 8, 2018, seeking ex-parte relief are overruled. Branches III and V, which do not seek ex-parte relief, will be addressed after Maternal Grandmother's Motion to Intervene is resolved.

5) Maternal Grandmother's Ex-Parte Motion filed June 12, 2018, is sustained in part. Father and Maternal Grandmother shall cooperate to allow Maternal Grandmother reasonable and appropriate visitation with the minor child for Mother's funeral.

(6/20/18, J.E.)

{¶8} In a July 17, 2018 judgment entry, the trial court addressed Appellant's motion for temporary custody of the child while the final hearing was pending. Both parties had submitted proposed grandparent visitation schedules to the court. Appellant sought visitation throughout most of the remainder of the summer, to include a previously scheduled medical procedure for the child in Columbus, Ohio. Father proposed that Appellant be granted only two weeks of visitation beginning the day after the final hearing

in the matter. Father indicated that he sought medical treatment for the child closer to his home in Louisiana. The trial court concluded:

> As to a temporary order, Grandmother has played a role in the minor child's life. The child has tragically lost his mother in recent weeks. He is also becoming reacquainted with his father, his father's immediate family, and home in Louisiana. To grant Grandmother her proposed time would not be in the child's best interest. However, to wait another six weeks for the minor child to spend time with a person who was probably directly involved with his day-to-day care is also not in his best interest, based on the current circumstances.
>
> Therefore, at this time, Grandmother is granted visitation, on a temporary basis, for one week, beginning July 22, 2018 and ending July 29, 2018. Grandmother is responsible for all transportation related to the visitation period. Grandmother is, also, granted an additional week of visitation beginning August 25, 2018 and concluding September 2, 2018. Father will transport the minor child to the local area for the drop-off of visitation and Grandmother will return the child to Father at the conclusion of visitation. The parties shall coordinate the exchange time. They can also coordinate an agreed meeting location for exchange.

(7/17/18 J.E.)

{¶9} On September 25, 2018, the trial court issued the following interim orders:

> Maternal Grandmother, [D.G.] shall have temporary Grandparent visitation with the minor child for a period of seven (7) days, beginning October 20, 2018, at 9:00 o'clock A.M. until October 26, 2018, at 6:00 o'clock P.M. As Father will be transporting the child to Ohio, Maternal Grandmother shall be responsible for returning the child to Father at his home or an agreed location at the conclusion of Maternal Grandmother's visitation.

(9/25/18 J.E.)

{¶10} On October 9, 2018, Appellant filed a motion seeking an order converting the final hearing, scheduled for October 19, 2018, to a motion hearing as a result of Father's failure to respond to discovery requests. On October 16, 2018, Father filed a motion in response and filed a motion to stay proceedings due to his active military service, under the Servicemembers' Civil Relief Act ("SCRA"). On October 23, 2018, the trial court granted Father's 90-day stay request and modified Appellant's visitation time to November 11, 2018 through November 18, 2018. Appellant filed objections and a motion for contempt due to Father's failure to provide the October visitation, as she was apparently not yet in receipt of the entry modifying the visitation time.

{¶11} In May of 2019, counsel for Father filed a motion to withdraw. On May 31, 2019, Appellant filed an emergency ex parte motion and request for other relief seeking an order prohibiting Father from relocating the child from Louisiana or from Belmont County, Ohio. Appellant had become aware that Father voluntarily sought a transfer to a different military base located in Hawaii while the matter was pending. Despite its ex parte nature, a pretrial hearing before the magistrate was held the same day and both parties presented arguments on the motion. On June 3, 2019, the magistrate issued an

order granting counsel's motion to withdraw and overruling Appellant's motion. The magistrate issued temporary visitation orders for Appellant, granting her visitation from June 4, 2019 through July 4, 2019. Both parties filed objections. Appellant also filed a petition to reallocate custodial rights and responsibilities on June 6, 2019. On June 24, 2019, the trial court adopted the June 3, 2019 magistrate's decision. Appellant filed a motion for relief from judgment on July 1, 2019 seeking to set aside the June 24 judgment. On August 23, 2019 the magistrate issued a decision addressing the multiple motions before the court. It ordered that Appellant's petition to reallocate custodial rights and responsibilities be set for a final hearing on October 25, 2019. It ordered Father to respond to proper discovery requests. The trial court overruled Appellant's motion for relief from judgment, as it sought to set aside temporary orders that were not properly subject to a Civ.R. 60(B) motion. It sustained Appellant's request to take Father's deposition electronically from Hawaii.

{¶12} Appellant subsequently filed another motion for contempt because Father failed to abide by the court-ordered weekly telephone calls. A hearing was held on October 25, 2019 on multiple pending motions, including Appellant's motion seeking extended visitation; motion for reallocation of custodial care; and motion for contempt. Appellant appeared at the hearing with counsel. Father did not appear in any fashion. On December 27, 2019, a magistrate's decision and judgment entry was issued concluding that it was in the best interest of the child for the court to grant visitation to Appellant but overruling her motion for contempt. The court also concluded that Appellant failed to meet her burden for reallocation of custodial rights and responsibilities and dismissed her petition.

{¶13} Appellant filed objections to the magistrate's decision. On March 27, 2020, the trial court issued a judgment entry, adopting the magistrate's decision with the exception of three issues which were remanded back to the magistrate. These issues included: (1) whether Father was in contempt for failing to provide Appellant with court-ordered visitation in November of 2018; (2) whether Father was in contempt for failing to allow for telephone visitation; and (3) whether Father should be sanctioned for failing to cooperate with discovery.

{¶14} Pursuant to remand, on April 30, 2020, the magistrate issued a decision and judgment entry, concluding: (1) Appellant failed to present clear and convincing evidence that Father denied her court-ordered visitation; (2) Father was in contempt for failing to allow weekly telephone contact as previously ordered by the court and was sentenced to three days in jail with a 90-day purge period to cooperate with telephone visitation; and (3) Father failed to provide certain discovery information as ordered by the court and was ordered to pay Appellant's partial attorney fees in the amount of $500.

{¶15} On the same day, April 30, 2020, Appellant filed a notice of appeal with this Court appealing only the March 27, 2020 judgment entry, and not the subsequent judgment entry on remand issued that day. On May 11, 2020, Father filed objections to the magistrate's decision. On May 15, 2020, Appellant filed a response motion and Father filed a reply five days later. On May 29, 2020, the trial court issued a judgment entry adopting the April 30, 2020 magistrate's decision and overruling all objections.

{¶16} On October 27, 2020 we issued an entry concluding that since the March 27, 2020 judgment unequivocally stated there were three matters left to be resolved by

the magistrate on remand, it was not a final, appealable order, and the appeal was dismissed. *In re D.M.W.,* 7th Dist. Belmont No. 20 BE 0012.

{¶17} Appellant filed a request for immediate hearing with the trial court. On November 10, 2020, the trial court overruled Appellant's request, determining that since the magistrate's decision on the remanded issues was filed on April 30, 2020 no further proceedings were necessary.

{¶18} Appellant subsequently filed this appeal from the March 27, May 29, and November 10, 2020 judgment entries.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION THAT DISMISSED MATERNAL GRANDMOTHER'S PETITION TO REALLOCATE CUSTODIAL RIGHTS AND RESPONSIBILITIES ON THE GROUNDS THAT MATERNAL GRANDMOTHER FAILED TO PROVE FATHER WAS AN UNSUITABLE PARENT.

{¶19} In her first assignment of error Appellant challenges the trial court's determination that she failed to prove by a preponderance of the evidence that Father was unsuitable.

{¶20} We review a trial court's judgment in child custody matters under an abuse of discretion standard. *In re N.W.F.,* 7th Dist. Jefferson No. 18 JE 0030, 2019-Ohio-3956, 147 N.E.3d 86, ¶ 15, citing, *Davis v. Flickinger,* 77 Ohio St.3d 415, 418-419, 674 N.E.2d 1159 (1997). It is well established that a parent's right to raise his or her own child is an essential and basic civil right. *In re Hayes,* 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). In a child custody hearing between a parent and a nonparent, a court cannot award

custody to the nonparent, "without first making a finding of parent unsuitability—that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child." *In re Perales,* 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977), syllabus. As there is a presumption under Ohio law that either parent is suitable to care for their own child, the burden is on the nonparent to prove by a preponderance of the evidence that a parent is unsuitable before the court may determine whether it is in the best interest of the child for custody to be awarded to the nonparent. *Perales,* 97-98. A preponderance of the evidence is that which is of greater weight, or more convincing, than the evidence which is offered in opposition. In other words, evidence that shows that the fact sought to be proved is more probable than not, or is evidence that is more credible. *JAD Rentals of Youngstown, LLC v. Cox,* 7th Dist. Mahoning No. 19 MA 0096, 2021-Ohio-304, ¶ 20. If a court concludes that a parent is unsuitable, the trial court must proceed under the "best interest of the child" test set forth in R.C. 3109.04.

{¶21} A hearing was held on October 25, 2019. Appellant appeared with counsel. Father was given notice of the hearing but did not appear. The matter was heard, and at its conclusion, the magistrate determined that Appellant failed to establish by a preponderance of the evidence that Father was unsuitable. Appellant filed an objection. In adopting the magistrate's decision, the trial court held:

> As to the maternal grandmother's Petition to Reallocate Parental Rights and Responsibilities, said objection is overruled. The Court, again, finds that the

> Magistrate applied the appropriate standard of law and the maternal grandmother does not contest the same; rather, the maternal grandmother suggests that the evidence established that it would be detrimental for the child to remain under the care, custody and control of his father. Upon review of the transcript, the Court notes that much of the evidence presented on this matter is based on suspicion, inuendo [sic] and hearsay. Although there was some direct evidence on the issue, the Court's Magistrate made the appropriate conclusion with respect to a finding that it would not be detrimental for the child to remain with his father. In light of said conclusion there was no need for the Magistrate to consider the child's best interests.

(3/27/20 J.E.)

{¶22} Again, although Father was notified of this hearing, he failed to appear in any fashion. Thus, he offered no evidence to rebut the evidence presented by Appellant, and her evidence was uncontroverted. Appellant did appear and presented testimony from several witnesses. A review of the transcript from the hearing contains testimony from D.B., the child's maternal aunt. She testified that Father rarely saw the child prior to the Mother's passing:

> Q When he was in Louisiana let's just say for the six, eight months prior to [Mother's] passing do you ever remember [Father] coming up to see his child?

A I remember a visit. He was on a leave. I think it was about a two week leave and I want to say he maybe seen him a few hours.

(10/25/19 Tr., pp. 17-18.)

{¶23} D.B. testified that after Mother died, she was present when Father came for his visitation. She testified that she watched as Father called the child names for crying after falling down saying, "[g]et up. You're not a sissy. You're not a punk. Quit crying like a little b-i-t-c-h." (10/25/19 Tr., p. 18). When confronted by D.B. about his treatment of the child, Father responded, "You're not going to tell me how to parent." (10/25/19 Tr., p. 19). D.B. also testified that Father was physically violent with Mother during their relationship:

Q Do you know of [Father] to be violent?

A I do.

Q Tell me your understanding of that or your concern about that.

A There was two occasions where my sister had came to me and was scared. It was months after they had happened, closer to when they were breaking up is when she started to tell, you know, he had put his hands on her on more than one occasion.

Q Did you have any reason to doubt that your sister was telling you the truth?

A No.

(10/25/19 Tr., pp. 19-20).

{¶24} D.B. testified that Father had been violent with other girlfriends who were also friends with Mother. (10/25/19 Tr., p. 20). Importantly, D.B. testified that the child had returned from one of the rare visits with Father with bruises:

> Q Do you believe [the child] will be safe with his father?
>
> A No. I fear for his safety.
>
> Q Have you -- when the child returns from being with his dad since all the court proceedings kind of evolved, is it accurate that he returned with bruises once?
>
> A Yes.
>
> Q Did you witness those yourself?
>
> A Yes.
>
> * * *
>
> Q I'm going to hand you what's been marked as Exhibit 2. Is that [the child] in the photograph?
>
> A Yes.
>
> * * *
>
> Q Does that appear to be kind of a large bruise above his right eye?

A Yes.

Q Is that what you're referencing?

A Yes.

Q Can you say for certain that he arrived in that condition and he didn't suffer it in your mom's supervision?

A I can.

(10/25/19 Tr., pp. 21-22).

{¶25} D.B. testified that Father never sent any money or gifts to the child after the parties entered into the shared parenting agreement. She testified that she witnessed changes in the child's behavior after a rare visit with Father, including that the child acted out frequently and began eating food off of the floor. Finally, D.B. testified about Mother's belief that she and the child would be reunited with Father, which was the sole reason she agreed to the shared parenting plan:

Q Did you ever have a conversation with [Father] about providing for [Mother] and the child before her death?

A No, I just witnessed -- read the letters that he wrote to her from basic training.

Q Tell me about that.

A Where he was, you know, pretty much promising her that he was sending for her and the baby to come down to live on the base but he could only do so with the shared parenting that way he could get housing before she came.

Q I assume have you had conversations with your sister about her future plans, right?

A Yes.

Q Did she think she was going down there to live with him and be happily ever after?

A She believed so.

Q Did she share with you that that was a consideration for her entering into that agreement?

A Yes.

(10/25/19 Tr., pp. 23-24).

{¶26} Appellant's sister, C.G.H., a Master Sergeant in the Army based in Newport News, Virginia also testified. She testified that she never formally met Father until after Mother's death but that she talked to him about transitioning the child into spending time with him slowly, to make it easier on the child, but that Father refused. She also testified that she was aware that law enforcement had been trying to contact Father for an

interview as part of the investigation of Mother's death, but that Father failed to cooperate with those requests:

> Q Have you been present for interactions, discussions, meetings with law enforcement officials regarding [Mother's] passing?
>
> A I have.
>
> Q Have those included Ohio County Prosecutor's office?
>
> A Yes.
>
> Q FBI? Or let me back up, the federal prosecutor's office in Wheeling?
>
> A Yes.
>
> Q Any other agency or administration?
>
> A Yes, the military criminal investigation division, the CID.
>
> Q Based upon those conversations do you believe that [Father] is a person of interest in her passing?
>
> A Yes.
>
> Q Are you aware of efforts that were made by law enforcement to interview or talk to [Father]?
>
> A Yes.

Q To the best of your knowledge did he ever cooperate with those requests?

A No, no, sir.

Q Do you agree or disagree that when those requests were being set forth that was about the time he left Louisiana for Hawaii?

A Correct.

(10/25/19 Tr., pp. 33-34.)

{¶27} As a Master Sergeant in the Army, the witness testified that she was familiar with the enlistment process. Counsel for Appellant presented the witness with a re-enlistment statement for Father. C.G.H. confirmed that when a soldier nears the end of his or her enlistment term, they file an application to re-enlist. On that application, they can request a specific military base to which they want to be transferred. In reviewing Father's statement, C.G.H. testified that Father filed his re-enlistment papers well ahead of the expiration of his term in order to request transfer to the base in Hawaii. (10/25/19 Tr., pp. 34-36.)

{¶28} Finally, Appellant testified at the hearing. She said that Mother had told her Father was repeatedly violent towards her during their relationship.

Q Were you aware of any problems or issues with the relationship between [Mother] and [Father]?

A I know he was violent with her. After he did that to her he tricked her. She broke down and told me everything. Asked me to get her help. She needed to talk to someone, a therapist. And she just started telling me things how he had -- I think the baby was three months, he had pushed her down on the floor with the baby in her arms and she couldn't believe he did that.

Q Were there ever other [sic] any incidents of violence that she shared with you?

A She told me that they had little fights. She come home with a bruise on her one time.

Q So you saw a bruise.

A Uh-huh.

Q She told you it was from him?

A Not at that time but she end [sic] up telling me everything after all this happened.

Q You understand it's important for you to be truthful today because [Mother] is not here to testify.

A Yes.

Q So when I ask you these questions I'm trying to be very specific.

A Okay.

Q When she finally broke down and shared with you their whole relationship situation, is that fair?

A Uh-huh.

Q Was it that once in a while they had a fight or was it consistently turmoil between the two of them?

A It end [sic] up being consistently.

Q And do you believe the bruise and shoving her down were just the only incidents or with your conversations with [Mother] did she confirm that there was regular violence or aggressiveness by [Father]?

A She told me they end [sic] up being regular. She would be on the phone with my nieces or her friends and they all told me that they would be on Facetime and he would walk by and just hang up on them, like she would be talking to them or he would be like "Tell them goodbye," hang the phone up, or he would talk nasty to her friends or my family. He would get real nasty with them for no reason.

(10/25/19 Tr., pp. 53-55).

{¶29} Appellant testified that Father was known for "beating on women" and that she confronted Father about being physically violent with her daughter. (10/25/19 Tr., p. 56.) Appellant also testified that Father was a person of interest in the investigation of

her daughter's death. She testified that as soon as law enforcement tried to contact him for an interview, he filed to relocate to Hawaii. (10/25/19 Tr., p. 59.) Appellant said the child's behavior changed and that after he went into Father's care he regressed, and began having tantrums. She also played for the court short videos of the child after Father's visit, showing the child upset, uncooperative and licking food off of the floor.

Q Your sister testified that she has been present for numerous meetings with various law enforcement officials.

A Yes.

Q Were you present for all those?

A Majority of them, 90 percent of them.

Q Were there other ones that you attended that she wasn't there?

A Yes.

Q I asked her if it was Ohio County Prosecutor, federal prosecutor's office, Ohio County Sheriff.

A Uh-huh.

Q Are those the entities?

A Yes.

Q Anybody else I'm missing?

A No. I spoke with the CID.

Q What's that?

A The Criminal Investigation Department with the military.

Q Do you believe that they consider [Father] as a person of interest in your daughter's passing?

A They have all the evidence that we gave them and they're just finally moving on a case now which I'm upset about.

Q My question was did you believe or is it your understanding, forget about what you believe -- have you been advised that currently he is a person of interest?

A Yes.

Q Is it your understanding that there are concerns about his whereabouts the day before your daughter's passing?

A Yes.

Q To the best of your knowledge has he cooperated with law enforcement?

A No.

Q Do you agree or disagree that at or about the time law enforcement started to reach out to him is about the time he made the move to Hawaii?

A Yes. Can I say something?

Q Go ahead.

A All the parties that were involved in my daughter's death they all started moving away. Everyone when I would approach them and told them things and things just didn't look right, didn't seem right, they packed up within a week or two weeks just their things. They left their furniture and all. They packed up and moved to Atlanta.

(10/25/19 Tr., pp. 58-60.)

{¶30} Appellant testified that she had been successfully potty training the child but that after he went with Father, he regressed and began soiling himself. She also testified that he had rarely had tantrums, but that his behavior worsened after spending time with Father, with frequent tantrums and eating food directly off the floor, behaving like "[a] whole different kid." (10/25/19 Tr., p. 69.)

{¶31} Towards the conclusion of the hearing, the magistrate stated, "I want to state for the record, the testimony that is hearsay although is not being objected to is not going to be given weight in a decision. I'm just placing that on the record." (10/25/19 Tr., p. 57.) The trial court judgment entry also noted:

Upon review of the transcript, the Court notes that much of the evidence presented on this matter is based on suspicion, inuendo [sic] and hearsay. Although there was some direct evidence on the issue, the Court's Magistrate made the appropriate conclusion with respect to a finding that it

> would not be detrimental for the child to remain with his father. In light of said conclusion there was no need for the Magistrate to consider the child's best interests.

(3/27/20 J.E.)

{¶32} Following the hearing, the court, relying heavily on the existing shared parenting agreement, concluded that Appellant had failed to demonstrate by a preponderance of the evidence that Father was unsuitable.

{¶33} In determining whether a parent has abandoned a child and is thus unsuitable, the Ohio Supreme Court has affirmed a finding of unsuitability where the evidence presented at hearing showed the father had a lack of interest in the child, leaving the child with family friends when mother passed away shortly after childbirth. *Reynolds v. Goll,* 75 Ohio St.3d 121, 661 N.E.2d 1008 (1996). The *Reynolds* court found that although father was grief-stricken, his conduct demonstrated abandonment by lack of interest. *Id.* at 124. The Eighth District was presented with a similar case, where a custody action between a father and grandmother was filed after the mother had passed away. *In re S.M.,* 160 Ohio App.3d 794, 2005-Ohio-2187, 828 N.E.2d 1044 (8th.Dist.). Similar to the instant case, the grandmother had been the primary caregiver for the children and the father demonstrated a limited interest in the children's care and well-being. The Eighth District held that legal custody was properly awarded to the grandmother because the father rarely attended the children's extracurricular activities, did not attend parent/teacher conferences, and did not maintain child support. *Id.,* ¶ 16. In addition, and most notably, the Court concluded that because of the recent death of the children's mother, awarding legal custody to father after grandmother had been the

children's primary caregiver would be detrimental to the children. *Id.,* ¶ 17. Specifically, the Court noted, "[l]osing their mother and being moved from place to place to live with family members caused traumatic change in the children's lives. Thus, the amount of time the children spent with their grandmother had established stability in their lives." *Id.,* ¶ 18

{¶34} A review of the transcript in this matter reveals Appellant presented testimony from multiple witnesses that Father had little to no contact and provided no support to the child since birth. Moreover, both Mother's sister and Appellant testified that they had witnessed Father's abusive nature toward Mother first-hand and that, prior to her death, Mother disclosed additional information about Father's abusive behavior. Additionally, both testified that they had personally witnessed and documented bruises on the child, after the child was returned from Father's care. Perhaps most alarmingly, Appellant and Mother's aunt testified that they attended interviews with multiple law enforcement agencies and were informed that Father was a person of interest in the investigation of Mother's homicide. Further, they both testified that Father had continually evaded investigation by police and ultimately decided to reenlist prematurely in order to relocate to Hawaii, apparently to avoid cooperating in the investigation. Also, we note that Father did not attend any hearings in Belmont County in the instant action, failing to ask for a continuance in all but one instance and failing to provide explanation or send counsel. In addition to witness testimony, Appellant presented both photos of the child's bruises after visitation with his Father and videos showing the child's erratic behavior and eating food off of the floor after visiting with Father.

{¶35} While the trial court was correct that some of the evidence offered by the witnesses was hearsay, particularly regarding Father's alleged history of violence toward previous girlfriends, not all or even a majority of the evidence was "suspicion" or "innuendo" as the court held. Certainly the most troubling fact is that Father was a person of interest in the death of the child's mother and was evading law enforcement. Apparently relying on the existence of a shared parenting plan, a plan Mother sought to terminate and was killed one day before a hearing on the matter, the trial court elected to disregard this disturbing fact. Father had notice of the hearing and so was certainly capable of appearing and presenting his own evidence or at least of seeking a continuance or sending counsel to represent his interests, but it appears once Father absconded to Hawaii he chose to refuse to participate in the custody proceedings. It is also important to note that, not only was Father a person of interest in Mother's death, but the only possible witnesses Appellant could present were her close family who had first-hand knowledge of the circumstances. While it is correct that a shared parenting plan existed, Appellant presented credible testimony that Mother was duped into signing the shared parenting plan so Father could avoid further child support obligations. In addition, the record shows that just before her death, Mother filed a motion to terminate the shared parenting plan, a factor that should also have been considered by the trial court.

{¶36} Moreover, the trial court appears to have completely disregarded testimony regarding Father's failure to have any contact with the child until after Mother's death, including the evidence that Father coerced Mother into the shared parenting plan with the promise that the couple would be reunited. The court has also completely disregarded

the fact that Father is a potential suspect in Mother's death and refuses to cooperate with law enforcement's investigation.

{¶37} While it is axiomatic that "the overriding principle in custody cases between a parent and nonparent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children," that interest is not absolute. *Hockstok,* ¶ 15. Although some of the testimony at trial may have been hearsay, there was certainly credible evidence to support Appellant's assertions regarding Father's unsuitability.

{¶38} This record reflects that the trial court abused its discretion in finding that Appellant failed to meet her burden that Father was unsuitable. The evidence presented at trial established, by a preponderance of the evidence, that Father had essentially abandoned the child, that Father was an uncooperative person of interest in the investigation of Mother's death, and that the child's behavior changes when under Father's care. The matter is hereby remanded in order for the trial court to conduct a best interest analysis pursuant to R.C. 3109.04.

{¶39} Appellant's first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION AND COMMITTED REVERSIBLE ERROR.

{¶40} Should the trial court, on remand, order custody to Appellant, this assignment of error would be moot. As there remains a question of custody, however, we will address Appellant's second assignment.

{¶41} Appellant's second assignment of error is comprised of essentially four separate assignments of error presented as issues Appellant urges amount to reversible error. First, Appellant argues the trial court's judgment with regard to her visitation time is against the manifest weight of the evidence. Appellant concedes that she was given visitation time by the trial court but argues that the amount of visitation ordered is "clearly not in the child's best interest." (Appellant's Brf., p. 17.)

{¶42} R.C. 3109.11 provides for grandparent visitation rights when an unmarried parent is deceased. The trial court may grant a grandparent reasonable visitation when it is in the best interest of the child. The court should consider all relevant factors including, but not limited to, the factors set forth in R.C. 3109.051. R.C. 3109.051 sets forth sixteen factors, including a catch-all provision, for the court to consider when conducting a best interest analysis:

> (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;
>
> (2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

(4) The age of the child;

(5) The child's adjustment to home, school, and community;

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe

that the person has acted in a manner resulting in a child being an abused child or a neglected child;

(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

(16) Any other factor in the best interest of the child.

{¶43} In the instant matter, the magistrate noted the primary role that Appellant played in the child's life and weighed it against a relationship with Father and the existence of a shared parenting plan. The magistrate concluded that it was important for the child to establish a relationship with Father but to remain in contact with Appellant, who had been his primary caretaker. To that end, the trial court awarded grandparent visitation to Appellant for two-week periods with the transportation costs as Appellant's responsibility. Given the evidence in the record that Father failed to cooperate with both visitation and phone calls, and our conclusion that the trial court abused its discretion in finding Appellant failed to prove Father was unsuitable, we conclude that the trial court abused its discretion in determining grandparent visitation.

{¶44} Appellant also takes issue with the trial court ordering Appellant to be responsible for transportation costs associated with her grandparent visitation time. Particularly, Appellant argues that Father voluntarily relocated to Hawaii from Louisiana, an even further distance from Belmont County, causing her an additional hardship. The undisputed evidence presented at trial was that Father was a member of the active military and had reenlisted and transferred from Louisiana to Hawaii prematurely while the matter was pending in an apparent aid in his effort to continue to evade law enforcement in the investigation of Mother's murder.

{¶45} The trial court has broad discretion in determining grandparent visitation and associated issues such as transportation costs while still considering the best interest of the child. R.C. 3109.51(D); *Gatliff v. Gatliff,* 89 Ohio App.3d 391, 396-397, 624 N.E.2d 779, (3d Dist.1993). However, that discretion must be tempered by the facts in the record. Here, the trial court relied on the fact that Father had custody and was an active member of the military, requiring Appellant to bear the burden of transportation costs in order to exercise her visitation. However, this is a rather myopic view of the evidence presented. This is not simply a matter where Father had custody under a shared parenting agreement and his active military status inhibited his ability to travel with the child to assist in grandparent visitation. To the contrary, there was a shared parenting agreement that Mother sought to terminate after Father essentially abandoned the child. She was murdered prior to the hearing on the matter. Father, a person of interest in the murder, voluntarily transferred a greater distance away from Appellant prematurely and, according to the uncontroverted evidence, the transfer may have been motivated to aid him in evading law enforcement and hinder investigation into Mother's death after he was named

a person of interest. Under these circumstances, the trial court abused its discretion in requiring Appellant to be responsible for the transportation costs associated with her visitation.

{¶46} Appellant also claims the trial court misapplied 50 U.S.C. App. 522, or the Servicemembers' Civil Relief Act ("SCRA") in granting a 90-day stay in the proceedings due to Father's deployment. As the trial court noted, this is a temporary order that was granted in a judgment entry dated October 23, 2018. Appellant filed an objection to that order and the trial court determined that the stay was properly granted in a judgment entry dated November 9, 2018. The SCRA provides that it "applies to any civil action or proceeding, including any child custody proceeding." *Id.* Further, it permits a stay "for a period of not less than 90 days" if two conditions are met. First, a letter or other communication that sets forth facts stating how current military duty requirements materially affect the servicemember's ability to appear and when the servicemember will be available to appear. Second, a letter or communication from the servicemember's commanding officer stating that military service prevents an appearance and that military leave has not been authorized. *Id.*

{¶47} Appellant asserts, without citing to any evidence in the record, that Father sought the stay in proceedings in an effort to prevent grandparent visitation. However, Father presented the required documentation that he would be deployed on active military duty during the dates the hearing was originally scheduled. The SCRA requires a minimum of a 90 day stay in such instances which was what was granted by the trial court. Therefore, the trial court did not abuse its discretion in granting Father's 90-day stay of the proceedings under the SCRA.

{¶48} The last issue presented by Appellant under the second assignment of error is that the trial court abused its discretion in failing to require Father to file a notice of an intent to relocate prior to transferring from Louisiana to Hawaii. The trial court held:

> With respect to Maternal Grandmother/Petitioner's objection to the Ex-Parte motion being overruled, the Court notes that the sole issue in said motion was based upon an alleged violation of O.R.C. 3109.051(G). As to this legal issue, the Court finds that the Father/Respondent was not required to file the Notice described in said statute. In this case there is not a non-residential "parent" and a plain reading of the statute establishes that the notice is required so as to put a non-residential parent on notice of an intended relocation by the residential parent.

(3/27/20 J.E.)

{¶49} R.C. 3109.051 governs parenting time rights, including the requirement that a custodial parent intending to relocate must file a notice of intent in order to provide the nonresidential parent with notice. The trial court correctly noted that the notice requirement pertains only to parents, and not grandparents. Grandparent visitation rights are set forth in R.C. 3109.11, which sets forth no such requirement that notice be given. Therefore, the trial court did not abuse its discretion in concluding Father was not required to file a notice of intent to relocate but this is tempered by the evidence of Father's unsuitability under the first assignment of error.

{¶50} Appellant's second assignment of error is sustained in part and overruled in part. If, on remand, custody is not granted to Appellant, the trial court must enter a new visitation award, in compliance with our Opinion.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY FAILING TO FIND FATHER IN CONTEMPT FOR HIS FAILURE TO PROVIDE MATERNAL GRANDMOTHER WITH HER COURT ORDERED VISITATION.

{¶51} In Appellant's final assignment error, she challenges the trial court's finding in the April 30, 2020 judgment entry that she failed to provide clear and convincing evidence that Father denied her visitation from November 11, 2018 through November 21, 2018. Appellant maintains the trial court should have found Father in contempt for denying her visitation.

{¶52} It is well-established that an appellate court's jurisdiction over trial court judgments extends to final, appealable orders. Ohio Const.Art.IV., §3(B)(2). R.C. 2505.02(B)(2) defines a final order as one "that may be reviewed, affirmed, modified, or reversed," as one that "affects a substantial right made in a special proceeding." R.C. 2505.02(B)(2). Divorce and custody proceedings are recognized as special proceedings under the statute. *State ex rel. Papp v. James,* 69 Ohio St.3d 373, 379, 632 N.E.2d 889 (1994); R.C. 2505.02(A)(2). An order affects a substantial right if, in the absence of the opportunity for an immediate appeal, one of the parties would be precluded from appropriate relief in the future. *Koroshazi v. Koroshazi,* 110 Ohio App.3d 637, 640, 674

N.E.2d 1266 (9th Dist.1996). A final order is one that disposes of a whole case or some distinct portion of the case. *Noble v. Colwell,* 44 Ohio St.3d 92, 94, 540 N.E.2d (1989).

{¶53} As a rule, temporary orders in child custody matters, including visitation orders that remain subject to modification or final ruling by the trial court, do not constitute final appealable orders pursuant to R.C. 2505.02(B). *Overmyer v. Halm,* 6th Dist. Summit No. S-08-021, 2009-Ohio-387, ¶ 13. However, where a party files a contempt motion for failure to abide by the court-ordered temporary orders, the denial of the motion is final and reviewable by an appellate court for an abuse of discretion. *Williamson v. Cooke,* 10th Dist. Franklin No. 05AP-936, 2007-Ohio-493.

{¶54} In a judgment entry dated September 25, 2018, the trial court granted Appellant grandparent visitation with the child from October 20, 2018 through October 26, 2018. Due to the stay in the proceedings related to Father's military service, Appellant's visitation time was modified to occur from November 11, 2018 through November 21, 2018. Appellant highlights her testimony at the hearing on October 25, 2019, where she testified that she never received visitation, in either October or November of 2018. She also notes that other witnesses testified that the visitation never occurred. In the judgment entry dated April 30, 2020, the trial court concluded that Appellant had failed to present clear and convincing evidence that Appellee had denied her the court-ordered visitation. However, the uncontroverted evidence presented at the hearing was that Appellant was denied the court-ordered visitation with the child during the months of October and November of 2018. The mother's aunt also testified that no visitation occurred with the child during that time period. Therefore, the trial court abused its discretion in finding that Appellant did not meet her burden to establish contempt. It is clear that Appellee was in

contempt of court for failing to abide by the trial court's visitation order. However, any attempt at ordering such visitation at this point would be a vain act. On remand, the trial court is to consider Appellee's contempt as one more factor regarding Appellee's unsuitability when it undertakes its best interest analysis.

{¶55} Appellant's third assignment of error has merit and is sustained.

{¶56} Based on the foregoing, Appellant's first and third assignments of error have merit. Appellant's second assignment has partial merit and is sustained in part. Because we conclude the trial court abused its discretion in finding Appellant had not established unsuitability and abused its discretion in finding Appellant failed to establish contempt by clear and convincing evidence, the judgment of the trial court is reversed and the matter is remanded to the trial court for a best interest analysis pursuant to R.C. 3109.04. Should custody not be awarded to Appellant, a new visitation order must be entered granting Appellant additional visitation and addressing the cost factor of such visitation.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first and third assignments of error are sustained and her second is sustained, only in part. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Juvenile Division, of Belmont County, Ohio, is reversed in part and affirmed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.