

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN THE MATTER OF: :

 C.K. : CASE NO. CA2008-12-303

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O P I N I O N
10/26/2009

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2006-0032

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BRESSLER, P.J.

{¶1} Appellant, Kenneth McIntosh, appeals the decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of a minor child to the child's

grandparents.

{¶2} Appellant is a nonrelative friend of the child's biological mother. The child's biological mother is not a party to this appeal and the child's biological father is unknown, has failed to make any appearances in this matter, and is also not a party to this appeal. On January 19, 2006, appellee, the Butler County Department of Job and Family Services (BCDJFS), filed a complaint alleging the child is neglected and dependent. BCDJFS filed this complaint after it received a referral claiming the child's mother had been abusing alcohol and prescription medication and had threatened harm to the child and the child's half-sibling. The complaint indicated that the referral was based on an incident in which appellant left the child and her half-sibling in a car with mother, and then mother left the children alone in the car and did not return until two days later. The complaint further alleged the child and her half-sibling previously had been adjudicated neglected and dependent children in 2001 due to mother's alcohol abuse, mental health issues, and concerns over domestic violence between mother and appellant, who were then living together.

{¶3} On January 19, 2006, the juvenile court granted an emergency ex parte order granting BCDJFS emergency temporary custody of the child. On April 25, 2006, the juvenile court adjudicated the child neglected and dependent. Subsequently, the child's maternal grandparents, Eric and Paulette Wolf, of New Smyrna Beach, Florida, contacted BCDJFS and requested the county consider placing the child in their home. After a home study through the Florida Department of Children and Families pursuant to the Interstate Compact for Placement of Children, the juvenile court permitted BCDJFS to place the child on an extended visit with her grandparents.

{¶4} On February 6, 2007, BCDJFS moved to terminate its award of temporary custody of the child and to grant temporary custody of the child to her grandparents. At a shelter care hearing on February 7, 2007, the juvenile court terminated BCDJFS's award of

temporary custody and granted temporary custody of the child to her grandparents. Notably, appellant did not appear at this hearing, nor did he object to this order.

{¶5} On May 25, 2007, BCDJFS moved for the juvenile court to grant legal custody of the child to her grandparents. After a series of hearings, the juvenile court magistrate issued a decision and order granting BCDJFS's motion and awarding legal custody of the child to her grandparents. Appellant filed objections to the magistrate's decision and order. The juvenile court overruled the objections and adopted the magistrate's decision and order as the final appealable order of the court. Appellant appeals the juvenile court's decision raising three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION WHEN IT ANALYZED THE STATUTORY FACTORS AND AWARDED LEGAL CUSTODY TO THE MATERNAL GRANDPARENTS."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT'S DECISION WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT IN THE CHILD'S BEST INTEREST."

{¶10} After a child is adjudicated abused, neglected, or dependent, the trial court may award legal custody to a nonparent upon a demonstration by a preponderance of the evidence that granting legal custody to the nonparent is in the child's best interest. R.C. 2151.353(A)(3); *In re Nice* (2001), 141 Ohio App.3d 445. A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶26.

{¶11} In general, appellate review of custody cases is limited to whether the trial court abused its discretion. *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-417, 1997-Ohio-260. Abuse of discretion implies

that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *In re J.M.*, Warren App. No. CA2008-12-148, 2009-Ohio-4824, ¶17, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶12} R.C. 3109.04(F)(1) requires the trial court to consider all relevant factors in determining the best interest of a child. These factors include, but are not limited to: the wishes of the parents; the child's interactions and interrelationships with parents, siblings, and other persons who may significantly affect the child's best interest; the child's adjustment to home, school and community; and the mental and physical health of all persons involved in the situation. See R.C. 3109.04(F)(1); *In re J.W.*, Greene App. No. 2009 CA 8, 2009-Ohio-4605.

{¶13} According to the record, the juvenile court considered all of the required factors listed in R.C. 3109.04(F)(1) in awarding custody of the child to her grandparents. The court found that the child's mother expressed her desire for the child to be placed with the child's grandparents. The court did not interview the child, but the child's guardian ad litem (GAL) recommended placement of the child with her grandparents. Despite appellant's doubts as to the credibility of the GAL's report, the court noted that the GAL conducted numerous interviews, appeared at annual reviews, cross-examined witnesses, and traveled to Florida to visit the child, her grandparents, and to speak to the child's teachers.

{¶14} The juvenile court detailed the child's custodial history, and found that the child had been adjudicated neglected and dependent first in 2001 and again in 2006. The court found that the child's primary caregivers from 1999 until 2006 were her mother and appellant. Further, the court found that the reasons for the child's removal were based on mother's

mental health, substance abuse, and alleged recurring domestic violence involving appellant.

{¶15} Also, the juvenile court found that while the child was in appellant's care, he formed a "loving father-like" relationship with the child. The court also found that while in appellant's care, the child formed positive relationships with her classmates, teachers, family members, and friends. The court noted that BCDJFS conducted a home study on appellant and that the result was favorable. Further, the court found that the child developed a good relationship with appellant's son, who is also the child's half-brother, and that this relationship has been significantly compromised since the child's placement in Florida.

{¶16} The juvenile court was troubled over appellant blaming the child's removal on her mother and others, such as BCDJFS and the GAL. The evidence indicates appellant has repeatedly voiced this blame during visits with the child and his son, despite being advised against doing so.

{¶17} Also, the juvenile court found that although the child's grandparents were not involved much in the child's life before this case began, the grandparents quickly sought custody of the child once the case was filed. Further, the court found that the child is thriving in her grandparents' home, excelling in school, and involved in many school and community activities. The court also found that the child has developed a good relationship with her half-sister who also lives with the child's grandparents.

{¶18} The juvenile court noted that appellant has a history of alcoholism and alcohol related arrests dating from 1970 to 1996. Appellant's psychological evaluation diagnosed appellant with depression and alcohol abuse in remission. However, the court found that appellant has participated in therapy for a number of years. The court further noted that appellant is a smoker and suffers from emphysema and that his smoking in the home while using an oxygen tank is a safety concern. The court also found that the child's grandmother has some undefined heart condition.

{¶19} Further, the juvenile court found that appellant and the child's grandparents dislike each other. The court found that regardless of whether the child is placed with appellant or with her grandparents, she would not have meaningful contact with the other. However, the juvenile court found that its concerns with respect to the grandparents are significantly outweighed by the quality of care the child has received while in their care.

{¶20} Upon thoroughly reviewing the record, we find the evidence presented supports the juvenile court's findings. While appellant's love for the child is apparent, the evidence indicates the child has thrived while in the care of her grandparents, the child wishes to remain in their custody, and the child's mother and GAL both support awarding legal custody of the child to her grandparents. Accordingly, we also find that the juvenile court did not abuse its discretion in finding that granting legal custody of the child to her grandparents is in her best interest.

{¶21} Appellant's first and second assignments of error are overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE CHILD WAS DENIED CONSTITUTIONAL AND STATUTORY INDEPENDENT ASSISTANCE OF COUNSEL."

{¶24} In his third assignment of error, appellant argues the court erred in allowing the child's GAL to also act as the child's attorney. Appellant alleges the GAL's recommendations did not align with the child's wishes and the child's wishes were not adequately represented to the court.

{¶25} As appellant properly notes, a child is entitled to counsel pursuant to R.C. 2151.352. See *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶29; *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 48. Further, R.C. 2151.281(H) and Juv.R. 4(C)(2) permit a trial court to appoint a single attorney to serve as both GAL and attorney for the child. However, a GAL's duty to her ward and an attorney's duty to her client are not

always identical and, in fact, may conflict. *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232.

{¶26} Initially, we note that appellant failed to raise this issue before the juvenile court. "[A]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *In re C.M.*, Franklin App. No. 07AP-933, 2008-Ohio-2977, quoting *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus.

{¶27} Moreover, even assuming for the sake of argument appellant has standing to assert the child's rights as a nonparent, appellant lacks standing to assert this issue because he has failed to demonstrate that his interests and the interests of the child are aligned. *Williams*, 2004-Ohio-1500, ¶25. Notably, the child's mother supports the juvenile court's decision awarding legal custody of the child to her grandparents, and there is ample evidence in the record indicating the child's wishes are to remain in the custody of her grandparents.

{¶28} Appellant's third assignment of error is overruled.

{¶29} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.

[Cite as *In re C.K.*, 2009-Ohio-5638.]