Cite as 2010 Ark. App. 819

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-687

JAMIE R. MAHONE
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILDREN
APPELLEES

Opinion Delivered DECEMBER 8, 2010

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[J2008-1046-3]

HONORABLE STACEY A. ZIMMERMAN, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Jamie Mahone, father of T.M. and K.M., appeals the circuit court's permanency-planning order of April 7, 2010, in this dependency-neglect case. In its order, the court awarded permanent custody of the children to their maternal grandmother and awarded standard visitation to Mr. Mahone. Mr. Mahone raises two points on appeal. First, he contends that the circuit court erred by using the sibling-separation concept applicable in domestic-relations cases rather than applying the preferred goals set forth in Ark. Code Ann. § 9-27-338 (Repl. 2009). Second, Mr. Mahone argues that, even if the court properly used concepts from domestic-relations cases, the circuit court erred in interpreting those concepts and should have awarded custody to him. We affirm.

The Arkansas Department of Human Services removed T.M., a son born on November 10, 1997, and K.M., a daughter born on November 17, 2000, from the custody

of their mother, Faith Randolph, on December 2, 2008, after she was arrested for cocaine possession. On December 11, 2008, the court entered a probable cause order placing custody of T.M. and K.M. with their maternal grandmother, Teresa Taylor. The children's two-year-old half-brother, D.R., was also placed with Ms. Taylor. Mr. Mahone is not the father of D.R. and D.R. is not the subject of this appeal. On February 19, 2008, the court entered an adjudication and disposition order, finding that the children were dependent-neglected due to the actions of their mother and, after conducting a home study of Mr. Mahone's home, allowing Mr. Mahone to continue having unsupervised weekend visitation with T.M. and K.M. Ms. Randolph was granted supervised visitation of her three children in Ms. Taylor's home. The court set reunification with their mother or father as the goal of the case.

The court changed the goal of the case in a permanency-planning hearing order entered on November 18, 2009, to termination of Ms. Randolph's rights to all three of her children and continued the goal of reunification with Mr. Mahone for T.M. and K.M. The court recognized that Mr. Mahone was in compliance with some of the court orders but stated that he had not called DHS every Friday or called the counselor as ordered. The court found that he had submitted to and passed all random drug screens and that his visits with the children had gone well. DHS filed a petition for termination of the parental rights of Ms. Randolph and Mr. Price (D.R.'s father) on November 28, 2009.

In the order being appealed, entered April 7, 2010, the circuit court entered a permanency plan for the children pursuant to Ark. Code Ann. § 9-27-338. At the hearing,

DHS recommended placement with Mr. Mahone, and the attorney ad litem recommended placement with Ms. Taylor. The court placed permanent custody of the children with Ms. Taylor and continued standard visitation with Mr. Mahone. In addition to the standard visitation, the court ordered that Mr. Mahone got "first choice" regarding whether the children would be with him on "snow days" if he was off work. The court also provided that Mr. Mahone could have more visits as he and Ms. Taylor could arrange. Mr. Mahone appeals from this order.

In equity matters, such as juvenile proceedings, the standard of review on appeal is de novo, although we do not reverse unless the circuit court's findings are clearly erroneous. *Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 34–35, 233 S.W.3d 172, 174 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Judkins v. Duvall*, 97 Ark. App. 260, 266, 248 S.W.3d 492, 497 (2007). We give due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.* This deference is even greater in cases involving child custody, as a heavier burden is placed on the judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.* at 267, 248 S.W.3d at 497.

Mr. Mahone's first point on appeal is that the circuit court erred by employing the goal of not separating siblings, a concept applicable in domestic-relations cases, rather than

by applying the preferred goals set forth in Ark. Code Ann. § 9-27-338(c) (Repl. 2009). He argues that the strong preference expressed in the statute is for reunification with the parent over placing the child with a relative, as occurred in this case. He argues that the circuit court's desire not to separate T.M. and K.M. from their half-sibling, D.R., prevented the court from correctly applying the preferences set forth in section 338(c).

First, this is a dependency-neglect case. It did not arise out of a divorce or other custody matter but arose because the children were removed from their mother's home by DHS. Thus, the court's permanency placement plan was governed solely by the Juvenile Code, specifically Ark. Code Ann. § 9-27-338. While concepts from domestic-relations cases may aid the court in making a determination regarding the children's best interests, those concepts do not govern dependency-neglect cases. *See, e.g.*, *Judkins*, 97 Ark. App. at 265–66, 248 S.W.3d at 496–97.

We now turn to the governing statute and its stated preferences. Section 338(c) provides that "based upon the facts of the case, the circuit court shall enter one (1) of the following permanency planning goals, listed in order of preference, in accordance with the best interest of the juvenile." Pertinent to this case, the first goal listed is "[r]eturning the juvenile to the parent . . . if it is in the best interest of the juvenile and the juvenile's health and safety can be adequately safeguarded if returned home." And the fifth listed preference is "[a]uthorizing a plan to obtain a permanent custodian, including permanent custody with a fit and willing relative."

Mr. Mahone contends that reunification with him was the first preference set forth in the governing statute. Because he was fit to take his children, he argues that the court erred in choosing the fifth preference listed on the basis of its desire not to separate T.M. and K.M. from their sibling, D.R. While the first statutory preference is "[r]eturning the juvenile to the parent," it does not include awarding custody of the child to any parent. It means returning the child to the parent "from whom he had been taken." *Judkins*, 97 Ark. App. at 265, 248 S.W.3d at 496. That parent in this case, Ms. Randolph, was not an appropriate alternative. Mr. Mahone, the biological father, is not the parent to whom the statute refers in the first stated preferred goal. As the biological father, Mr. Mahone falls within the same statutory preference that Ms. Taylor falls within: "a fit and willing relative." Ark. Code Ann. § 9-27-338(c)(5); *see Judkins*, 97 Ark. App. at 265, 248 S.W.3d at 496. Mr. Mahone has failed to demonstrate that the circuit court erred in applying the statutory preferences.

The statute requires the circuit court to choose one of the permanency-planning goals "in accordance with the best interest of the juvenile." Ark. Code Ann. § 9-27-338(c). In this case, the court found that Mr. Mahone had complied with the court orders and the case plan, exercised his visitation, paid child support, and provided a clean and safe home. The court also recognized that DHS recommended that the children be placed with Mr. Mahone. The court stated, however, that custody was not a reward for a parent in compliance and that its primary consideration was the best interests of the children. Finally, the court found that Mr. Mahone had been unstable at times throughout the case. It was "troubling" to the court that

T.M. was placed in foster care for a short time when he was living with Mr. Mahone years ago. The testimony established that Mr. Mahone and his wife, Amber, have three children who are half-siblings of T.M. and K.M. One child is several months older than T.M., one child is several months older than K.M., and one child is almost two years younger than K.M. The court found that Mr. Mahone's having children with two women and going back and forth between Amber and Ms. Randolph did not demonstrate stability. The court found that the children were happy with Ms. Taylor, were doing well in school, and had stability in their home life for the first time in their lives. The court also found that T.M. and K.M. had always lived with their brother, D.R., and found it would be very hard on them to be separated. After reviewing the evidence, we are not left with a definite and firm conviction that a mistake has been committed.

For his second point on appeal, Mr. Mahone contends that he should have been awarded custody even if domestic-relations concepts apply in this case. He cites our decision in *Ideker v. Short*, 48 Ark. App. 118, 892 S.W.2d 278 (1995), to support his contention. He argues that the child in *Ideker* was born to Ideker and a woman to whom he was not married. The child's maternal grandmother took care of the child when the child's mother left shortly after birth. Ideker and the grandmother agreed to joint custody, which they shared for three years, at which time Idekar married, purchased his own home, and filed a petition seeking primary custody. The circuit court denied Ideker's petition. On appeal, we reversed and ordered the circuit court to grant the petition, concluding that, on the facts of the case, the law's preference for a parent in custody matters required reversal.

First, *Ideker* was not a dependency-neglect case but a domestic-relations proceeding concerning the custody of a child over whom both parties in the case had shared joint custody since birth. That case was governed by the body of common law developed in other custody matters, including the natural-parent preference which provides that "as between a parent and a grandparent, the law prefers the former unless the parent is incompetent or unfit." *Ideker*, 48 Ark. App. at 121, 892 S.W.2d at 280. The case at bar is governed by the Arkansas Juvenile Code, specifically Ark. Code Ann. § 9-27-338(c). The statute does not require a showing of parental incompetence or unfitness of the previously non-custodial parent before a court places a juvenile removed from the custody of a parent with another relative.

Moreover, the court in this case did recognize that the law in custody matters prefers a natural parent, but the court stated that this preference applied only when it was in the best interests of the children that they be placed with their parent. In *Ideker*, although the court recognized the parent preference, the court held that the "primary consideration in awarding the custody of children is the welfare and best interest of the children involved; other considerations are secondary." *Id.* at 121, 892 S.W.2d at 280. In this case, the court found that the best interests dictated placement with Ms. Taylor. We cannot say that the court's decision was clearly erroneous.

Affirmed.

PITTMAN and GLOVER, JJ., agree.