[Cite as *In re J.S.*, 2012-Ohio-4461.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF: J.S., JR., ALLEGED ABUSED CHILD	:	**O P I N I O N**
	:	**CASE NO. 2011-L-162**
	:	

Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2006AB00747.

Judgment: Affirmed.

John P. O'Donnell, John P. O'Donnell, L.L.C., 37225 Euclid Avenue, Willoughby, OH 44094 (For Appellants-Eugene and Bridget Golnick).

Stephanie Geib, pro se, 23446 Emmons Road, Columbia Station, OH 44028 (Appellee).

Mark A. Ziccarelli, Ziccarelli & Martello, 8754 Mentor Avenue, Mentor, OH 44060 (For Appellee-John P. Schaming).

Darya Jeffreys Klammer, The Klammer Law Office, Ltd., Lindsay II Professional Center, 6990 Lindsay Drive, #7, Mentor, OH 44060 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellants, Eugene and Bridget Golnick, appeal from the Judgment Entry of the Lake County Court of Common Pleas, Juvenile Division, granting Appellee, Stephanie Geib's, Motion to Modify Visitation and ordering that Geib and Appellee, John Schaming, have an additional weekend per month of visitation with their son, J.S. The issue to be determined by this court is whether a juvenile court properly applies a best interest standard when making a visitation determination in a case where the child has

been adjudicated an abused child. For the following reasons, we affirm the decision of the trial court.

{¶2} Geib and Schaming are the biological parents of J.S., who was born on March 10, 2006.

{¶3} On April 18, 2006, the Lake County Department of Job and Family Services (LCDJFS) filed for protective supervision of J.S., asserting that he was an abused child, due to allegations that Geib smoked cocaine to induce labor and that J.S. tested positive for cocaine.

{¶4} In a May 24, 2006 Magistrate's Decision, the magistrate found that both parents were present in court, they waived their right to trial, and agreed that J.S. was abused. J.S. was adjudicated an abused child. The trial court adopted this decision on May 25, 2006.

{¶5} J.S. was placed in the protective supervision of LCDJFS and a case plan was established. On January 19, 2007, LCDJFS filed a Motion to Request an Emergency Review Hearing, indicating that Geib may still be using cocaine. The Motion indicated that Geib agreed to sign a safety plan, allowing J.S. to be cared for by his paternal aunt and uncle, Eugene and Bridget Golnick. On February 6, 2007, the court ordered that J.S. be temporarily placed with the Golnicks.

{¶6} On May 25, 2007, the Golnicks filed a Motion for Custody of J.S.

{¶7} Pursuant to an Agreed Judgment Entry, filed on January 17, 2008, the parties agreed for custody to be granted to the Golnicks. Regarding the issue of parenting time, or visitation, it was decided that Geib and Schaming would have

visitation every other Sunday, that this visitation would be reviewed on a later date, and that Geib and Schaming would be subject to urine screens as a condition of visitation.

{¶8} Following the filing of a Motion to Modify Visitation by Geib, on August 31, 2009, a Judgment Entry was issued, granting Geib and Schaming visitation on a graduated schedule, with Rule V visitation beginning on January 8, 2010.

{¶9} On June 7, 2010, Geib filed a Motion to Modify Custody and Visitation.

{¶10} On October 25, 2010, and December 17, 2010, the Golnicks filed two Motions to Modify Visitation, requesting the suspension of overnight visitation of J.S. with Geib and Schaming, due to their alleged failure to comply with court-ordered drug testing requirements.

{¶11} On January 31, 2011, Geib dismissed the custody portion of her Motion to Modify Custody and Visitation.

{¶12} A hearing before a magistrate was held on the matter of visitation and several show cause motions on April 1, 2011 and August 22, 2011. Testimony was given by several witnesses, including Eugene Golnick, Schaming, and the guardian ad litem.

{¶13} A Magistrate's Decision was rendered on September 22, 2011, finding Geib's Motion to Modify Visitation to be well-taken. In the Decision, the magistrate found that in order for Geib or the Golnicks to prevail on their motions to modify visitation, they must establish that modification was in J.S.'s best interests. The magistrate considered the best interest factors found in R.C. 3109.051(D) in order to determine whether parenting time should be granted and noted that a "party requesting

a change in visitation rights need make no showing that there has been a change in circumstances in order for the court to modify those rights."

{¶14} The magistrate found that it was in J.S.'s best interests to modify visitation in favor of Geib and Schaming. The Decision granted Geib and Schaming unsupervised parenting time for one additional weekend per month, in lieu of their midweek visit, provided they complied with drug testing requirements. The Golnicks' Motions to Modify Visitation were denied.

{¶15} On September 26, 2011, the Golnicks filed an Objection to the Magistrate's Decision, arguing that the court should have utilized a change of circumstances standard instead of a best interest standard in reaching its ruling on the Motion to Modify Visitation.

{¶16} On November 11, 2011, the trial court adopted the Magistrate's Decision. The trial court issued a Judgment Entry on November 14, 2011, overruling the Golnicks' Objections.

{¶17} The Golnicks timely appeal and raise the following assignment of error:

{¶18} "The Court committed prejudicial error in granting appellee Stephanie Geib's Motion to Modify Visitation in utilizing the best interest standard contained in R.C. 3109.051 instead of utilizing the change in circumstances standard as set forth in R.C. 2151.42 and related statutes."

{¶19} Generally, we review a trial court's decision on visitation under an abuse of discretion standard. *Clark v. Clark*, 11th Dist. No. 2009-P-0096, 2010-Ohio-3967, ¶ 27; *Lake v. Lake*, 11th Dist. No. 2009-P-0015, 2010-Ohio-588, ¶ 66. However, in the present matter, the error raised by the Golnicks is purely a legal issue, in that it is

related only to the applicable legal standard. "Courts review questions of law de novo." (Citation omitted.) *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, ¶ 48; *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2nd Dist.1992) ("where a trial court's order is based on an erroneous standard or a misconstruction of the law, * * * an appellate court may properly substitute its judgment for that of the trial court").

{¶20} The Golnicks argue that the trial court improperly evaluated Geib's Motion to Modify Visitation under a best interest standard. They assert that the Motion should have been considered under a change of circumstances standard, pursuant to R.C. 2151.42(B). They do not dispute the factual findings of the lower court but instead only the applicable standard.

{¶21} Schaming asserts that the best interest standard is applicable in cases involving modification of visitation and that the change of circumstances standard raised by the Golnicks applies only to modification of custody, not visitation.

{¶22} In the present matter, the proceedings related to the custody of J.S. were initially precipitated when he was adjudicated an abused child. He was not the subject of custody proceedings based on divorce or separation but instead based on a motion for custody filed by the Golnicks. Pursuant to R.C. 2151.353, a child who is adjudicated to be abused may be subject to several types of orders of disposition, including placing the child in protective supervision or awarding legal custody of the child to a party who files a motion requesting custody under certain circumstances. R.C. 2151.353(A)(1) and (3). The visitation requested is by his biological parents, while J.S. remains in the custody of the Golnicks.

{¶23} The Golnicks assert that, pursuant to R.C. 2151.42(B), the standard to be applied to the visitation order that is the subject of this case is a change of circumstances standard and emphasize that this is the appropriate interpretation of the statute based on its clear and unambiguous language. *See Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880, ¶ 16. We disagree.

{¶24} Pursuant to R.C. 2151.42:

{¶25} "(A) At any hearing in which a court is asked to modify or terminate an order of disposition issued under section 2151.353, 2151.415, or 2151.417 of the Revised Code, the court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child.

{¶26} "(B) An order of disposition issued under division (A)(3) of section 2151.353, division (A)(3) of section 2151.415, or section 2151.417 of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child."

{¶27} The language of R.C. 2151.42(B) states that the change of circumstances standard applies when a court acts to "modify or terminate an order *granting legal custody*," not when a court issues an order granting or modifying visitation. It also specifically discusses the justification for applying the change of circumstances standard, that legal custody is presumed to be permanent in nature. Under that

rationale, change of circumstances is the applicable standard because some degree of permanence or finality is necessary in custody determinations. Although R.C. 2151.42(B) provides the standard for a court to modify or terminate an order granting legal custody, it does not address the issue of visitation for parents who are not seeking custody of their children. As has been noted by several districts, "[t]here is no provision within R.C. Chapter 2151 addressing motions for visitation filed by a parent who has lost legal custody of a child after a finding of" abuse, neglect, or dependency. *In re G.M.*, 8th Dist. No. 95410, 2011-Ohio-4090, ¶ 1, fn.1, citing *In re C.J.*, 4th Dist. No. 10CA681, 2011-Ohio-3366, ¶ 15. In the present matter, the issue of visitation was before the court on a motion to modify the current visitation schedule, not the order granting legal custody to the Golnicks. The subject Judgment Entry issued by the trial court altered the visitation schedule but had no effect on the issue of custody.

{¶28} Additionally, this interpretation of visitation and custody as distinct issues is consistent with the Ohio Supreme Court, which, in addressing custody and visitation in a divorce proceeding, emphasized that "'[v]isitation' and 'custody' are related but distinct legal concepts. 'Custody' resides in the party or parties who have the right to ultimate legal and physical control of a child. 'Visitation' resides in a noncustodial party and encompasses that party's right to visit the child." *Braatz v. Braatz*, 85 Ohio St.3d 40, 44, 706 N.E.2d 1218 (1999), citing *In re Gibson*, 61 Ohio St.3d 168, 171, 573 N.E.2d 1074 (1991).

{¶29} This court has found, in divorce proceedings, that "[t]he party requesting a change in visitation rights need make no showing that there has been a change in circumstances in order for the court to modify those rights" and, instead, the court must

decide whether visitation is in the child's best interest. *In re S.B.*, 11th Dist. No. 2010-A-0019, 2011-Ohio-1162, ¶ 101, citing *Braatz* at paragraph two of the syllabus. While this statement of law was made in relation to visitation under R.C. 3109.051, it is necessary to emphasize that this further supports the finding that the Golnicks have failed to raise any contrary case law or statute stating that a change of circumstances, rather than best interests, is the appropriate standard to apply to in any proceedings related to the determination of visitation, including a visitation dispute in proceedings related to an abused child under R.C. 2151.353.

{¶30} In addition, other districts have also held that a change of circumstances standard is inapplicable in similar situations. It has been held that a court that orders parental visitation following an adjudication of dependency pursuant to R.C. 2151.353, in response to a motion for visitation, must base that determination "on the totality of circumstances as they relate to the child's best interest." *C.J.*, 2011-Ohio-3366, at ¶ 15; *In re Knisley*, 4th Dist. No. 97CA2316, 1998 Ohio App. LEXIS 2347, *6 (May 26, 1998) (in dependency proceedings, "the juvenile court should consider the issue of visitation under the totality of the circumstances, considering, to the extent they are applicable, those [best interest] factors set forth in R.C. 3109.051(D)").[1] In *In re C.H.*, 10th Dist. No. 10AP-579, 2011-Ohio-1386, the Tenth District held that in a matter initiated by a motion to suspend a non-custodial parent's visitation "with a child who has been adjudicated a dependent child * * * under R.C. 2151.353(A)(3), and [that did] not concern an existing custody decree from either a domestic court or other court order

1. While the adjudication in the foregoing cases was of dependency, the statutes related to the current matter, in Chapter 2151, discuss abuse, neglect, and dependency in conjunction with each other, such that the foregoing case law is applicable not only in dependency proceedings, but also in abuse proceedings.

covered by R.C. Chapter 3109, * * * the appropriate standard for the trial court to apply is whether a suspension in visitation is in the best interest of the child." *Id.* at ¶ 12. *See also In re C.C.*, 2nd Dist. No. 21707, 2007-Ohio-3696, ¶ 8 (affirming the court's grant of visitation with a dependent child when it was evaluated under a best interest standard).

{¶31} While the provisions related to the best interest standard and factors contained in R.C. 3109.051 may not explicitly state that they apply to abuse cases under R.C. Chapter 2151, there is no statement in the statute that such factors cannot be applied to evaluate whether a court's determination is in a child's best interest in such cases. Even if the trial court in the present matter was not required to evaluate each of the factors under R.C. 3109.051, it did not err by conducting a thorough review of the best interest factors. *See C.J.* at ¶ 15 (in making a best interest determination regarding visitation in an abuse proceeding, "[t]he court can, but is not required to, consider the factors listed in R.C. 3109.051(D)").

{¶32} The Golnicks argue that the Legislature determined that all orders of disposition under R.C. 2151.353 could be modified under a change of circumstances standard since it failed to enact a statute providing a best interest standard, as it did in R.C. 3109.051. However, as discussed above, such an interpretation has not been adopted by the courts which have addressed this matter. Moreover, even if the statutes enacted do not directly state that the best interest standard is applicable, it does not follow that change of circumstances is the applicable standard, especially given that visitation and custody matters have generally not been evaluated under that standard.

{¶33} The Golnicks' assertion that only a change of circumstances standard can be used to determine the modification of dispositional orders under R.C. 2151.353(A)(3)

is also contrary to R.C. 2151.417, which allows a court that has issued an order under R.C. 2151.353 to "review at any time the child's placement or custody arrangement, * * * and any other aspects of the child's placement or custody arrangement," and "require the agency, the parents, guardian, or custodian of the child, and the physical custodians of the child to take any reasonable action that the court determines is necessary and in the best interest of the child or to discontinue any action that it determines is not in the best interest of the child." When reading these statutes together, it is apparent that a change of circumstances standard was not the only standard intended to be applied by the Legislature in abuse, neglect, and dependency matters. *See Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35, 567 N.E.2d 1018 (1991) ("statutes which relate to the same general subject matter must be read *in pari materia*").

{¶34} Based on the foregoing, we hold that the trial court did not err in applying a best interest standard in ruling on Geib's Motion to Modify Visitation and, therefore, did not err in granting the Motion in favor of Geib and Schaming.

{¶35} The sole assignment of error is without merit.

{¶36} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, Juvenile Division, granting Geib's Motion to Modify Visitation, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.