

[Cite as *In re J.D.*, 2010-Ohio-1344.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE:
 J. D.

C. A. No. 24915

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 07-02-209

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

BELFANCE, Judge.

{¶1} Teresa D. (“Mother”) appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that placed one of her minor children in the legal custody of his father, Ruben Craddock (“Father”). For the reasons that follow, we affirm.

FACTS

{¶2} Mother and Father are the natural parents of J.D., born January 21, 2006. On February 27, 2007, one-year-old J.D. was removed from Mother’s custody due to concerns that Mother had been neglecting J.D. and his two older half-siblings. On April 12, 2007, Mother stipulated that J.D. and his half-siblings were dependent children and the children were adjudicated accordingly. Mother later gave birth to another child, who was also joined in this dependency case. In addition, Mother had two other children who lived with their father and were not parties in this case. The only child at issue in this appeal is J.D., who is Father’s only child.

{¶3} Father, who had never resided with J.D., began requesting custody of the child shortly after this dependency case began. By the time of the dispositional hearing held on September 6, 2007, the guardian ad litem supported Father's request that J.D. be placed in his home. Because Father had developed a bond with J.D. and had demonstrated his commitment to his child, the trial court placed J.D. in Father's home on September 12, 2007.

{¶4} Eventually, Father and Mother each moved for legal custody of J.D. Following a hearing on the competing motions for legal custody, the magistrate decided that J.D. should be placed in the legal custody of Father, as that was in the child's best interest. The trial court adopted the magistrate's decision and entered independent judgment, pending the filing of timely written objections. Mother filed an objection to the magistrate's decision, maintaining that the magistrate erred in finding that it was in J.D.'s best interest to be placed in the legal custody of Father. The trial court overruled Mother's objection and placed J.D. in the legal custody of Father. Mother appeals and raises two assignments of error.

BEST INTEREST OF THE CHILD

{¶5} Mother's first assignment of error is that the trial court erred by placing J.D. in the legal custody of Father. This Court must emphasize that, although the legal custody decision was made by a magistrate, Mother appeals from the trial court's judgment that overruled her objections to the magistrate's decision. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093, at *2. Generally, this Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable, and not merely an error

of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In so doing, we consider the trial court's action with reference to the nature of the underlying matter. *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶9.

{¶6} Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, at ¶17. "Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child." *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11. The juvenile court's disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead "leaves intact 'residual parental rights, privileges, and responsibilities.'" *In re Shepard* (Mar. 26, 2001), 4th Dist. No. 00CA12, at *7, quoting R.C. 2151.011(B)(19). The trial court's decision to grant or deny a motion for legal custody is within its sound discretion and will not be reversed absent an abuse of discretion. *In re M.S.*, 9th Dist. No. 22158, 2005-Ohio-10, at ¶11.

{¶7} Mother initially maintains that the trial court applied the wrong best interest test in its evaluation of the legal custody motions filed by Mother and Father. Specifically, she contends that, in addition to the best interest factors set forth in R.C. 2151.414(D), the trial court should have considered the factors set forth in R.C. 3109.04(F)(1), which sets forth best interest factors for the allocation of parental rights in a domestic relations case. Although this Court has recognized that consideration of the best interest factors set forth in R.C. 3109.04(F)(1) may be appropriate in the juvenile court's evaluation of competing motions for legal custody, it also held

that a trial court does not abuse its discretion by confining its consideration to the best interest factors set forth in R.C. 2151.414(D). See *In re B.G.*, 9th Dist. No. 24187, 2008-Ohio-5003, at ¶9. This Court has repeatedly emphasized that the Ohio Revised Code fails to set forth a best interest test that is tailored to the disposition of legal custody following an adjudication of dependency, but that the best interest factors set forth in R.C. 2151.414(D) do provide guidance. See *id.* The relevant best interest factors set forth in R.C. 2151.414(D) include the interaction and interrelationship of the child with his parents and others; his wishes as expressed directly by him or through his guardian ad litem; and the custodial history of the child.

{¶8} The evidence before the trial court supported its decision to overrule Mother's objections and place J.D. in the legal custody of Father. At the time of the hearing, J.D. had been living with Father for well over a year, which represented nearly half of his young life, and had become assimilated into the family. The CSB caseworker and the guardian ad litem visited Father's home several times to check on J.D.'s well-being, including several visits that were unannounced to Father, and they were satisfied with the care that J.D. was receiving. Father had been residing in the same home for the past three years, which CSB found to be appropriate for J.D. Father was employed and, while he worked, either his mother or a family friend provided child care for J.D. Father testified that he loves J.D., as does his entire family. Both CSB and the guardian ad litem believed that Father had been providing a suitable home for J.D. and supported his request for legal custody.

{¶9} Father indicated his belief that J.D. needed to maintain a relationship with Mother and testified that he would try to facilitate visitation. Although Mother contends that Father willfully denied Mother visitation time with J.D., that argument is not supported by the record. Mother relied on others to handle transportation for the visits because she did not have a driver's

license and she did not always have people available to help her. Father testified that he did not believe that it was his responsibility to handle all of the transportation and that he preferred that some third party serve as an intermediary between Mother and him because they were not on good terms. Father further testified that either his mother or Mother's ex-husband could probably help with transportation in the future. There was no evidence that Father ever prevented Mother from visiting with J.D. Father admitted that he had not given Mother his new phone number, but he testified that Mother was able to contact him through the CSB caseworker.

{¶10} CSB continued to have many concerns about returning J.D. to Mother's custody. J.D., who was only three years old at the time of the hearing, had not lived with Mother for the past two years. During those two years, Mother had done little to work toward reunification. When J.D. was initially placed in Father's home in September 2007, six months after this case began, Mother was not complying with most of the reunification requirements of the case plan. She had completed a parenting assessment, but had failed to comply with the requirement that she complete parenting classes and engage in individual counseling. The caseworker also expressed concern at that time that Mother did not regularly visit J.D. For most scheduled visits, Mother either failed to come or left the visit early.

{¶11} By the time of the legal custody hearing in February 2009, Mother still had not completed parenting classes and was not engaged in counseling. She had recently been involved in legal trouble for driving a friend's car without a license. Mother also lacked stable housing and employment.

{¶12} In her merit brief, Mother challenges Father's ability to provide a suitable home for J.D. Her argument focuses primarily on her assertion that J.D. was exposed to violence while living in Father's home and that the trial court erred in failing to weigh Father's relationship to

Walter Reed, the man who raised Father and who Father considers to be his own father, and J.D.'s paternal grandmother. The only evidence of violence in the home was an isolated incident in which Father was stabbed by Reed. The incident occurred when Father returned home after 2:00 a.m. and found the door to his home locked. Reed was at the home at this time with J.D.'s paternal grandmother. An argument ensued between Father and Reed which culminated in Reed stabbing Father. The evidence revealed that Father was an innocent victim of Reed's violent act and J.D. did not witness any of the incident. After the stabbing, police responded to the home and the police officer testified that, although J.D. was in the home when the stabbing occurred, he was asleep in bed and was not at risk of harm because Reed had fled the home. Reed was later convicted and incarcerated and Father testified that he would not allow him back in the home. The caseworker and the guardian ad litem came to the home to check on J.D.'s well-being shortly after this incident and neither had any concerns about J.D. remaining in Father's home. Notwithstanding, Mother suggests that the trial court overlooked the fact that Reed has had contact with J.D. in the past and is likely to have contact with J.D. in the future. Although the record reflects that Reed did have contact with J.D., the contact was appropriate. Further, as Reed was incarcerated at the time the matter was before the court, there was no possibility that he would have any present interaction with J.D. With respect to J.D.'s relationship with his paternal grandmother, Mother did not provide any additional evidence that J.D. has been harmed or negatively impacted by this relationship.

{¶13} Mother also suggests that J.D. was exposed to drug and alcohol use by Father and other adults in the home, but this assertion is also not supported by evidence in the record. Father admitted that he used marijuana in the past, but he testified in September 2007 and again in February 2009 that he no longer used any drugs. Father had submitted several negative drug

screens to demonstrate his sobriety. Although he did not continue to submit weekly drug screens throughout this case, CSB and the guardian ad litem supported his request for legal custody. The only evidence of alcohol use was on the night of the stabbing incident. Father had returned home from a bar. Upon knocking at the door, he encountered Reed, who had been drinking. Neither man had been caring for J.D., however, because the child had been left in the care of the paternal grandmother. Although Mother also asserts that the paternal grandmother had consumed alcohol that evening, there was no evidence to support that allegation, other than the police officer's testimony that she might have been drinking but he could not say that she was intoxicated. Thus, the officer did not make any observations of the grandmother that caused him enough concern to have J.D. removed from the home.

{¶14} From the evidence presented, the trial court could reasonably conclude that placement with Father was in J.D.'s best interest. As the trial court noted in its judgment entry, while neither parent lived a perfect lifestyle, Father was in a better position to provide a suitable home for J.D. The trial court did not abuse its discretion by overruling Mother's objection to the magistrate's decision and ordering that J.D. be placed in the legal custody of Father. Mother's first assignment of error is overruled.

VISITATION

{¶15} Mother's second assignment of error is that the trial court erred in failing to grant her visitation pursuant to a standard order. The trial court ordered that Mother would have visitation with J.D. "on a weekly basis for 8 hours every Saturday and a minimum of 3 hours either on Tuesdays or Wednesdays." Mother maintains that the trial court erred in failing to grant her visitation time on holidays and other days of special meaning.

{¶16} We will not reach the merits of this challenge because Mother failed to preserve it for appellate review. Juv.R. 40(D)(3)(b)(iv) provides that “[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion *** unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b).” Although Mother filed an objection to the magistrate’s decision, she did not object to the magistrate’s recommendation that Mother have visitation with J.D. as provided above, without any specific provision for holidays and other special days. Consequently, she cannot assign this as error on appeal. Mother’s second assignment of error is overruled.

CONCLUSION

{¶17} The assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

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