

[Cite as *In re T.P.*, 2015-Ohio-1628.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: T.P.

C.A. No. 27483

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. LC-12-11-0275

DECISION AND JOURNAL ENTRY

Dated: April 29, 2015

WHITMORE, Judge.

{¶1} Appellant, Father, appeals from the trial court’s decision: (1) granting legal custody of his minor daughter, T.P., to Appellee, her Maternal Grandmother; (2) finding insufficient grounds for removal of the guardian ad litem (“GAL”); and (3) awarding Father supervised visitation. We affirm.

I

{¶2} This appeal arises from the order of the Summit County, Ohio Court of Common Pleas, Juvenile Division, granting Maternal Grandmother’s motion for legal custody of minor child T.P.

{¶3} After four days of hearings that included testimony from Father, Mother, and GAL Linda Sell, a magistrate recommended granting legal custody to Maternal Grandmother on

February 28, 2014.¹ The magistrate also denied Father's motion to remove the GAL based on alleged conflict of interest and bias, and granted Father supervised visitation "as the parties may agree."²

{¶4} Both Father and Mother filed objections to the magistrate's decision. Thereafter, on July 23, 2014, the Juvenile Court judge issued a judgment entry overruling all objections and granting legal custody to Maternal Grandmother. The trial court also denied Father's motion to remove the GAL and granted him supervised visitation.

{¶5} Testimony at hearing revealed that Father and Mother resided as a couple prior to T.P.'s birth and for about six months thereafter. The child, who was born in August 2011, has lived with her Maternal Grandmother since her parents' separation.

{¶6} The child's parents had a volatile relationship that involved domestic violence, including multiple incidents of Father battering Mother in front of the child. Moreover, Mother testified that, after the relationship ended, Father lured her to a hotel with the promise of money, where he beat her again. Father was arrested for domestic violence following this incident. He eventually pled to a lesser charge.

{¶7} At the hearing, Father denied, rationalized, or minimized some of the violence that multiple witnesses attributed to him. He has refused to acknowledge anger issues or seek help through anger management.

{¶8} The GAL expressed concern with regard to the violence in the home and Father's purported gang-related activity, as reported to her by Mother. Based on her own observations of

¹ Ms. Sell has 33 years of guardian ad litem work and over 500 hours in training on child development and family dynamics.

² Father contends that he was only permitted two hours of visitation per week.

Father during supervised visits, the GAL also indicated that she was concerned that Father's parenting skills were limited in that he did not know how to act with T.P. in a manner that would facilitate their relationship and build her trust in him.

{¶9} The GAL further testified to Father's ongoing hostility toward the child's primary caretakers, Maternal Grandmother and great grandmother. Father refused additional visitation with his daughter because it would take place in the downstairs community room of the maternal great grandmother's apartment building.

{¶10} The GAL also testified to concern about altercations in Father's home between Father, his brother, and his mother, and further that the child would be sharing a bedroom with her Father in the home. According to the GAL, the bedroom was furnished as a "man's bedroom," was not child proofed, had lighters and ash trays easily accessible to the child, and in general was not set up for a young child to be sleeping and playing in. Father's primary response to the GAL was that she was lying about everything.

{¶11} Father is in his thirties, unemployed, and lives with his mother and developmentally disabled brother, who has emotional and behavioral problems. Father receives monthly income from an annuity and social security. Father has failed to obtain his GED.

{¶12} Father lacked insight into the financial sacrifice required to raise a child. He testified that he believes that \$50.00 a month is sufficient to support a child in preschool. When asked whether the money he had spent on tattoos and piercings would have been better spent on his daughter's care, he replied, "I can spend my money on me sometimes. What, I can't go out here and spend my money on myself? It's my money."

{¶13} Father has not sought medical treatment for his seizure disorder. Moreover, he is not involved in his daughter's medical care, and has failed to obtain her medical information and

vaccination records. He testified that he did not ask Mother or Maternal Grandmother for that information because, “I just feel that she taken care of over there. They handling all that.”

{¶14} Father failed to pursue visitation with his daughter from September 2012 through January 2013. According to Father, he was “busy” and “trying to find a good lawyer.” By “busy” he meant that he was “not going to go nowhere where I’m not comfortable at.”

{¶15} The GAL testified that Mother had not demonstrated that she can maintain a household and attend to the child’s needs. While in a diversion program for felony theft, Mother was arrested for another offense.

{¶16} Following the trial court’s judgment entry granting legal custody of T.P. to Maternal Grandmother, declining to remove the GAL, and ordering supervised visitation for Father, Father now raises four assignments of error for our review. We will discuss the first two assignments of error together, because they assert the same basis for a finding of error by the trial court.

II

Assignment of Error Number One

IT IS AN ABUSE OF DISCRETION TO AWARD CUSTODY TO A NON-PARENT WITHOUT DETERMINING THAT THE BIOLOGICAL FATHER WAS UNSUITABLE TO BE AWARDED CUSTODY.

Assignment of Error Number Two

THE COURT ABUSED ITS DISCRETION BY VIOLATING THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF THE BIOLOGICAL FATHER TO REAR HIS CHILDREN, ABSENT A FINDING OF UNSUITABILITY.

{¶17} In his first and second assignments of error, Father argues that the trial court did not make a separate, required finding that he was “unsuitable” to be awarded custody of T.P. We disagree.

{¶18} We generally review a trial court’s action regarding a magistrate’s decision for an abuse of discretion. *In re D.M.*, 9th Dist. Lorain No. 14CA010587, 2015-Ohio-141, ¶ 9. But, we also “consider the trial court’s action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. Medina No. 08CA0049-M, 2009-Ohio-3139, ¶ 18.

{¶19} A trial court’s determination of whether a parent is unsuitable is within the court’s sound discretion. *Reynolds v. Goll*, 75 Ohio St.3d 121, 124 (1996). The power of the trial court to exercise discretion in child custody determinations is particularly important, and should be accorded the utmost respect. *Id.* Because the trial court observed the witnesses and the parties, a reviewing court should be guided by the presumption that the trial court’s findings were correct. *Id.* Absent an abuse of discretion, an appellate court will not reverse a trial court’s determination in a child custody matter. *Davis v. Flickinger*, 77 Ohio St.3d 415, 417-418 (1997).

{¶20} In Ohio, a finding of parental unsuitability is a necessary first step in a child custody proceeding where custody is awarded to a nonparent over a natural parent. *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶ 18. A parent is unsuitable if the court determines by a preponderance of the evidence that the natural parent abandoned the child, contractually relinquished custody, 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.” *Id.* at ¶ 17, quoting *In re Perales*, 52 Ohio St.2d 89 (1977), syllabus. “If a court concludes that any one of these circumstances describes the conduct of a parent, the parent may be adjudged unsuitable,

and the state may infringe upon the fundamental parental liberty interest of child custody.” *In re Hockstok* at ¶17.

{¶21} Father is patently mistaken that the trial court did not make a separate determination that he was unsuitable to be awarded custody of his daughter. First, the magistrate, whose recommendation was adopted by the trial judge over Father’s objections, specifically based her decision on one of the bases for finding unsuitability – detriment to the child if placed with either of her natural parents. The magistrate explicitly found that “it would be a detriment for the child to be placed in either [parent’s] care.” She reached her conclusion after finding that: (1) the parents’ volatile relationship resulted in multiple domestic violence incidents that occurred in the presence of the child; (2) Father lured Mother to a motel where she was again assaulted; (3) while on probation the Mother committed another criminal act; (4) both parents had a history of unstable living situations; (5) Father had a history of a seizure disorder and developmental issues; (6) Father appeared unable to provide comprehensive care for his daughter; and (7) Father was inclined to minimize his own shortcomings. Only after determining that it would be detrimental to place T.P. with either parent did the magistrate determine that it would be in the child’s best interest to be placed in the legal custody of Maternal Grandmother, “who has provided a home for the child.”³ Father was determined to be “unsuitable” because an award of custody to him would be detrimental to the child. *See Hockstok* at ¶ 17.

{¶22} Likewise, in overruling Father’s objections to the magistrate’s decision, the trial court made an explicit determination of unsuitability based on detriment to the child. The trial court determined “by a preponderance of the evidence” that “an award of custody to Father

³ We base our ruling on an abuse of discretion review of the trial court’s order, but find it helpful by way of background to understand that the magistrate, like the trial judge, also made a separate finding of unsuitability, which was adopted by the trial court in its judgment entry.

would be detrimental to the child and, therefore, determines him to be unsuitable.” The trial court reached its determination of unsuitability based on findings that:

- (1) numerous witnesses, including the paternal grandmother, testified about Father’s violence toward Mother;
- (2) the paternal grandmother admitted to calling the police on several occasions due to altercations between Father and others in the home;
- (3) Father lacked patience and emotional control which was illustrated by his behavior in the courtroom;⁴
- (4) Father denied certain events of physical violence against Mother, even though those events were substantiated by multiple witnesses;
- (5) Father denied any need for anger management counseling;
- (6) Father failed to request visits with T.P. from September 2012 to January 2013;
- (7) Father failed to request additional visitation after he was granted supervised visitation despite the length of time that had elapsed since the filing of Maternal Grandmother’s motion for custody (over one year from the date of filing to the final hearing date);
- (8) Father failed to inquire about the child’s health care providers, medical care, vaccination records, or activities;
- (9) Father failed to obtain medical care for his own seizure disorder;
- (10) Father failed to purchase clothes, diapers, food or supplies for the child, and believed that \$50.00 monthly was enough to support his daughter; and
- (11) Father’s home lacked adequate living space for Father, his daughter, and other individuals living in the home.

⁴ Indeed, Father’s lack of emotional control in the courtroom appears to have made an impression on the magistrate, who stated, “Father’s demeanor during questioning, even at times by his own attorney, was a spectacle of belligerence complete with eye-rolling, slouching, refusals to answer questions and outright hostility.” After “ample time to observe all witness [sic] and weigh their credibility over the course of four days of trial” the magistrate “could just not find Father’s testimony credible, believable or reliable.”

Only after determining Father to be an unsuitable placement based on all of these findings did the trial court conclude that placement with Maternal Grandmother was in the child's best interest.

{¶23} Father's entire argument in his first two assignments of error is that the trial court did not make a separate determination as to unsuitability. The plain language of the trial court's judgment entry shows that the court did in fact find that Father would be an unsuitable placement based on detriment to the child if placed in his custody. Notably, Father does not challenge whether there is sufficient evidence to establish his unsuitability. Accordingly, there is no basis to find an abuse of discretion by the trial court. Father's first two assignments of error are overruled.

Assignment of Error Number Three

THE COURT ABUSED ITS DISCRETION IN REFUSING TO DISMISS THE GUARDIAN AD LITEM ONCE EVIDENCE WAS PRESENTED WHICH DEMONSTRATED CONFLICT.

{¶24} In his third assignment of error, Father contends that the GAL was biased against him, or that a conflict existed which prevented her from objectively evaluating the parties. Father filed a motion to remove the GAL on August 14, 2013. The magistrate denied the motion, and found "especially credible" the GAL's testimony at trial and her written report. Father objected to the magistrate's denial of his motion to remove the GAL. The trial court did

“not find sufficient ground for removal of the [GAL] and, therefore, overrule[d] [F]ather’s objection to the magistrate’s denial of his motion.”⁵

{¶25} It appears that Father’s claim of bias or conflict on the part of the GAL is based solely on the fact that the GAL had numerous concerns about awarding custody to Father. Father failed to present any evidence to show bias or a conflict on the part of the GAL, however. To the contrary, the GAL’s testimony at trial and written report showed remarkable objectivity. Even after Father repeatedly testified that she was a liar, the GAL continued to have many positive things to say about him and his relationship with the child, including that he was loving toward his daughter. There is no basis to conclude that the trial court abused its discretion in declining to remove the GAL. This assignment of error is overruled.

Assignment of Error Number Four

THE COURT ABUSED ITS DISCRETION BY AWARDING UNEQUAL VISITATION TO THE APPELLANT.

{¶26} In his fourth assignment of error, Father argues that the trial court abused its discretion in ordering supervised visitation with his daughter in an amount and manner that was “unequal” to the visitation awarded to Mother. We disagree.

{¶27} A court may consider any factor in the “best interest of the child” when determining visitation rights. R.C. 3109.12; R.C. 3109.051(D). Here, all of the reasons that

⁵Maternal Grandmother claims that the magistrate held a hearing on Father’s motion to remove the GAL on August 29, 2013, and that Father has failed to provide a transcript of that hearing. However, there is no indication in the trial court record that any hearing in fact took place on August 29, 2013, or, if the hearing did take place, that there is a transcript of that hearing. In any event, Father did not file a transcript in support of his objection to the magistrate’s denial of his motion to remove the GAL. Absent a transcript, the trial court, and this Court, accept the magistrate’s findings of fact as correct. *Tillman v. Hyde Park Condominium # 3 Owners Assoc.*, 9th Dist. Summit No. 26455, 2013-Ohio-2432, ¶ 6.

support the trial court's finding of unsuitability support its decision that requiring Father to have supervised, limited visitation with his daughter is in the best interest of T.P. This assignment of error is overruled.

III

{¶28} Father's 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(C). 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.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

KENNETH C. MARTIN, Attorney at Law, for Appellant.

JOY S. WAGNER, Attorney at Law, for Appellee.