

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

IN THE MATTER OF: :

LEO CASSIDY, : CASE NO. CA2011-03-006

Plaintiff, : OPINION

- vs - : 11/14/2011

EMILY WAGNER, :

Defendant-Appellee. :

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2005-4370

Leo Cassidy, Adams County Jail, 110 West Main Street, Ripley, Ohio 45167, plaintiff, pro se

Emily Wagner, 3411 Oakland Locust Ridge, Bethel, Ohio 45106, defendant-appellee, pro se

Tresa G. Gossett, 200 West Plane Street, P.O. Box 150, Bethel, Ohio 45106, for appellant,
Alba Chamblin

Julie Steddom, 134 North Front Street, Ripley, Ohio 45167, guardian ad litem

HUTZEL, J.

{¶1} Appellant, Alba Chamblin, appeals the decision of the Brown County Court of Common Pleas, Juvenile Division, dismissing her motion for visitation with her grandson. For the reasons that follow, we reverse the juvenile court's decision and remand for further

proceedings.

{¶2} The child was born in May 2004. Appellant is his paternal grandmother (Grandmother). Grandmother's son is the child's biological father (Father); paternity was established in August 2005. The child's parents were never married. In May 2006, the juvenile court granted Father supervised visitation at the residence of Grandmother at the discretion of the child's mother (Mother).

{¶3} In October 2010, Grandmother moved the juvenile court "for an order modifying the parenting [time]; for an order establishing her rights as paternal grandmother; [and] for a change of custody." Grandmother alleged that Mother was denying Father his parenting time. Grandmother did not cite any statutory provisions in support of her motion and did not explain what she meant by "establishing her rights as [a] grandmother."

{¶4} Mother moved to dismiss Grandmother's motion on the ground Grandmother lacked standing to file for either visitation under R.C. 3109.11 because Father was alive, or for custody because there were no allegations one or both of the child's parents were unsuitable. On December 14, 2010, the juvenile court summarily dismissed Grandmother's motion for lack of standing. Grandmother did not challenge the juvenile court's decision. At some point during the proceedings, Father became incarcerated.

{¶5} On December 30, 2010, Grandmother moved for visitation with her grandson and his sister under R.C. 3109.12(A). She further moved the juvenile court to conduct an in-camera interview of the children under R.C. 3109.051(C). Grandmother explained that Father and Mother were the parents of both her grandson and his sister; thus, she was the little girl's paternal grandmother; and a paternity action was pending with regard to her granddaughter.

{¶6} In a memorandum in opposition, Mother asserted she was opposed to grandparent visitation and suggested Grandmother see her grandson during Father's

parenting time. Mother also filed a motion to dismiss Grandmother's motion on the ground Grandmother's two motions were "essentially the same pleading[s]." The juvenile court agreed and on February 15, 2011, dismissed Grandmother's second motion. The juvenile court found that Grandmother's second motion "cit[ed] no new or different cause for the court to grant the relief requested and * * * included * * * references to another child who is not before the court as of this date." The juvenile court also vacated a hearing that was scheduled for March 10, 2011.

{¶7} Grandmother appeals, raising seven assignments of error which will be addressed out of order.

{¶8} At the outset, we note that our decision only addresses Grandmother's visitation with her grandson, and not with both her grandchildren. As the juvenile court correctly stated, the granddaughter was not properly before the juvenile court, notwithstanding the pending paternity action.

{¶9} Assignment of Error No. 5:

{¶10} "THE TRIAL COURT ERRED [IN] FINDING GRANDMOTHER WITHOUT STANDING TO FILE A COMPLAINT FOR COMPANIONSHIP RIGHTS."

{¶11} The juvenile court's December 14, 2010 judgment entry unequivocally dismissed Grandmother's first motion on the ground she lacked standing to file for either visitation under R.C. 3109.11 or for custody. Grandmother did not challenge that decision. By contrast, the juvenile court's February 15, 2011 judgment entry dismissing Grandmother's second motion does not mention standing at all.

{¶12} Assuming, arguendo, that the juvenile court dismissed Grandmother's second motion on the implicit ground she lacked standing, the decision is erroneous. Grandmother specifically moved for visitation with her grandson pursuant to R.C. 3109.12(A). This statutory provision clearly states that if a child is born to an unmarried woman and paternity

of the father has been established, "any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child." Because Mother was unmarried at the time of the child's birth, and because Father's paternity has been established, Grandmother has standing to seek visitation with her grandson under R.C. 3109.12. Thus, to that extent, we sustain Grandmother's fifth assignment of error.

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT ERRED [IN] DIMISSING GRANDPARENT'S COMPLAINT FOR COMPANIONSHIP WITHOUT COMPLYING WITH [R.C.] 3109.051."

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE BEST INTEREST FACTORS IN [R.C.] 3109.051(D) 1-16."

{¶17} Assignment of Error No. 7:

{¶18} "THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH [R.C.] 3109.12."

{¶19} Under these assignments of error, Grandmother argues the juvenile court erred in dismissing her second motion for visitation without holding a hearing and without considering the factors listed in R.C. 3109.051. We agree.

{¶20} At the outset, we disagree with the juvenile court's determination that Grandmother's second motion is essentially the same pleading as her first motion. Grandmother's first motion generally sought to change the parents' parenting time, to establish grandparent rights (without specifying what they were), and custody of the child, and failed to cite any statutory provision in support. By contrast, her second motion explicitly and solely sought visitation with her grandson and specifically cited R.C. 3109.051 and 3109.12 in support.

{¶21} As stated above, pursuant to R.C. 3109.12(A), when a child is born to an

unmarried woman and paternity of the father has been established, "any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child." Under R.C. 3109.12(B), a court may grant companionship or visitation rights to a relative of the father "if it determines that the granting of the [] companionship or visitation rights is in the best interest of the child. In determining whether to grant [] reasonable companionship or visitation rights with respect to any child, the court shall consider all relevant factors, including, but not limited to, the factors set forth in [R.C.] 3109.051(D)."

{¶22} R.C. 3109.051(C) states that when determining whether to grant companionship or visitation rights to a grandparent pursuant to R.C. 3109.12, the court "shall consider all [] relevant factors, including, but not limited to, all of the factors listed in [R.C.] 3109.051(D)." In turn, R.C. 3109.051(D) provides that in determining whether to grant companionship or visitation rights to a grandparent pursuant to R.C. 3109.12, the court must consider all of the factors listed in R.C. 3109.051(D). See R.C. 3109.051(D)(1) through (16).

{¶23} The trial court has broad discretion as to visitation issues, and its decision will not be reversed absent an abuse of discretion. See *In re S.K.G.*, Clermont App. No. CA2008-11-105, 2009-Ohio-4673. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The trial court's discretion must be exercised in a manner which protects the best interest of the child. *In re A.M.*, Butler App. No. CA2005-11-492, 2006-Ohio-5986, ¶8.

{¶24} In *Harlow v. Stevens* (Aug. 29, 1994), Preble App. No. CA94-03-004, we reversed a juvenile court's decision granting visitation to a paternal grandmother under R.C. 3109.051. This court found that "[a]lthough [mother] fails to cite any specific authority that would require an evidentiary hearing on the visitation issue, and we have not found any, we hold that it is preferable for courts to conduct evidentiary hearings before grandparent

visitation is granted. * * * Because we fail to see how the trial court considered the mandatory factors of R.C. 3109.051(D) without a hearing, * * * we hold that the trial court erred in granting visitation to [the grandmother] without a hearing." Id. at 12-14.

{¶25} We find that the foregoing reasoning applies here. The statutes relevant to the case at bar, R.C. 3109.12 and 3109.051, unequivocally require a trial court to consider several factors and to make a best interest determination when ruling on a grandparent's motion for visitation. Yet, although ruling on a grandparent's motion for visitation, the juvenile court did not conduct a hearing and did not follow R.C. 3109.051 and 3109.12. Instead, it summarily dismissed Grandmother's second motion on the ground the motion was essentially the same as her first motion. As a result, Grandmother was denied the opportunity to fully and fairly litigate her claim for visitation.

{¶26} In light of the foregoing, we find that the trial court abused its discretion when it dismissed Grandmother's second motion without holding a hearing, without addressing the factors listed in R.C. 3109.051(D), and without determining whether granting visitation to Grandmother would be in the child's best interest, in violation of R.C. 3109.051 and 3109.12. Accordingly, we reverse the trial court's dismissal of Grandmother's second motion for visitation and remand the case for the juvenile court to hold an evidentiary hearing and to determine, after considering the factors listed in R.C. 3109.051(D), whether granting visitation to Grandmother would be in the child's best interest.

{¶27} We are mindful that during the proceedings below, Grandmother filed two affidavits setting forth facts in support of her motions. However, in her memorandum in opposition to Grandmother's first motion, Mother asserted she was opposed to grandparent visitation. By conducting a hearing on Grandmother's motion for visitation, the juvenile court will ensure that Mother has the opportunity to fully and fairly litigate her opposition to Grandmother's request for visitation. See R.C. 3109.051(D)(15) (listing as a factor, the

wishes and concerns of the child's parents, as expressed by them to the court, in relation to a nonparent's request for companionship or visitation); *Harold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334 (Ohio courts are obligated to afford some special weight to the wishes of parents of minor children when considering petitions for nonparental visitation made pursuant to R.C. 3109.12).

{¶28} Grandmother's first, second, and seventh assignments of error are sustained.

{¶29} Assignment of Error No. 3:

{¶30} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO DETERMINE IF THE GRANDPARENT HAS AN INTEREST IN THE WELFARE OF THE CHILDREN."

{¶31} Assignment of Error No. 4:

{¶32} "THE TRIAL COURT'S DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO THE CHILDREN'S BEST INTEREST IN VIOLATION OF THE OHIO REVISED CODE."

{¶33} Assignment of Error No. 6:

{¶34} "THE TRIAL COURT ERRED IN FAILING TO CONDUCT THE IN-CAMERA INTERVIEW OF RECORDS."¹

{¶35} In light of our holding under Grandmother's previous three assignments of error, Grandmother's third, fourth, and sixth assignments of error are moot.

{¶36} Judgment reversed and remanded for further proceedings.

POWELL, P.J., and PIPER, J., concur.

1. On November 3, 2010, two weeks after her first motion, Grandmother moved the juvenile court to conduct an in-camera review of the records held by the Brown County Department of Job & Family Services (BCDJFS) regarding her grandson. On December 14, 2010, the juvenile court dismissed Grandmother's first motion for lack of standing. Thereafter, Grandmother did not renew her motion for an in-camera review of the records held by the BCDJFS.