

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

IN THE MATTER OF: :
M.A., et al. : CASE NO. CA2011-02-030
: OPINION
: 2/13/2012
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:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. JN2009-0307 and JN2009-0308

Meredith Schnug, 10 Journal Square, 3rd Floor, Hamilton, Ohio 45011, guardian ad litem

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HENDRICKSON, J.

{¶ 1} Appellant (Father), appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of his children, M.A. and N.S., to their

maternal aunt and uncle (Aunt and Uncle). For the reasons outlined below, we affirm the juvenile court's decision.

{¶ 2} M.A. and N.S. are the biological children of Father, an undocumented alien. N.S. was born on December 12, 2005, and M.A. was born on April 26, 2008. From their respective dates of birth until August 25, 2009, both M.A. and N.S. were in mother's care. Mother and Father were not married, and Father did not reside in the home with mother and the children. On August 25, 2009, the Hamilton police removed M.A. and N.S. from their home after it began an investigation into the death of the children's five-week-old half-brother.¹ On that same day, the Butler County Department of Jobs and Family Services, Children Services Division (the Agency), filed complaints alleging that M.A. and N.S. were abused, neglected, and dependent children. The complaint stated that the removal of M.A. and N.S. occurred after it was reported that the children's deceased brother was found in a garbage can in the alley beside the children's home. At the time of the complaint, it was believed that Father was residing in Guatemala. The children were placed in the temporary custody of Aunt and Uncle. On October 28, 2009, M.A. and N.S. were adjudicated dependent children; the neglect and abuse allegations were withdrawn. Temporary custody of both M.A. and N.S. remained with Aunt and Uncle. The court granted Father supervised visitation.

{¶ 3} The Agency moved for legal custody of M.A. and N.S. on behalf of Aunt and Uncle on October 20, 2009, because it believed Father had agreed to Aunt and Uncle receiving legal custody of the children. In February 2010, Father requested the court continue the hearing on the Agency's motion for legal custody, stating that he intended to seek custody of his children. As a result, the court continued the custody hearing and the

1. Mother was later convicted of the aggravated murder of the infant brother, and she is currently serving a life sentence.

case plan was amended to reflect the goal of reunification with Father. On September 13, 2010, Father also moved for legal custody of the children. The trial court held a hearing on the competing motions on September 21, 2010. The juvenile court heard testimony from Aunt, Father, two of Father's friends, and three Agency caseworkers. After considering the testimony and the guardian ad litem's report, the magistrate issued a written decision ordering M.A. and N.S. to be placed in the legal custody of Aunt and Uncle. The court also granted Father unsupervised visitation with the children. Father's objections to the magistrate's decision were overruled by the juvenile court. Father now appeals the trial court's decision, advancing two assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT'S DECISION TO GRANT LEGAL CUSTODY OF M.A. AND N.S. TO THEIR MATERNAL AUNT AND UNCLE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 6} Assignment of Error No. 2:

{¶ 7} APPLYING THE BEST INTEREST FACTORS UNDER R.C. 3109.04 TO A CUSTODY DISPUTE BETWEEN A PARENT AND A NON-PARENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AFTER *IN RE B.S.*

{¶ 8} For ease of discussion, we address Father's assignments of error out of order.

{¶ 9} In his second assignment of error, Father contends that in granting legal custody of the children to Aunt and Uncle, the trial court erred by applying the best interest factors found in R.C. 3109.04(F). He argues that in light of this court's decision in *In re B.S.*, 12th Dist. No. CA2010-05-007, 2011-Ohio-47, R.C. 3109.04 does not apply in this case, but rather the factors found in R.C. 2151.414(D)(1) apply.

{¶ 10} Father argues that the factors found in R.C. 2151.414(D)(1) should be applied in this case to determine the children's best interests because this was a *permanent* custody

case. However, permanent custody was not sought in this case. Instead, the issue here was legal custody. The juvenile court specifically stated in its judgment entry that it was awarding *legal* custody of M.A. and N.S. to Aunt and Uncle. Unlike permanent custody, legal custody does not terminate the parent-child relationship; rather the parent retains residual parental rights and responsibilities. *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, ¶ 7. Here, Father's parental rights were not terminated. He still retains residual parental rights and responsibilities of M.A. and N.S., including contact, visitation and the duty of support.

{¶ 11} Father further argues that the best interest factors in R.C. 3109.04(F) do not apply in this case because *In re B.S.* held that R.C. 3109.04(E)(1)(a) does not apply to custodial proceedings between a parent and nonparent.

{¶ 12} First, we note that the statute at issue in *In re B.S.*, R.C. 3109.04(E)(1)(a), is not applicable to the case at bar. R.C. 3109.04(E)(1)(a)² applies to a *modification* of a prior custodial order. *In re Brayden James*, 113 Ohio St. 3d 420, 2007-Ohio-2335, ¶ 14, 19. In the present case, this was the initial award of legal custody. However, in order to clarify the law that applies in a custodial proceeding between a parent and a nonparent, we take this opportunity to revisit our decision in *In re B.S.*

{¶ 13} In *In re B.S.* at ¶ 18 we stated:

R.C. 3109.04(E)(1)(a) governs the modification of a prior order allocating parental rights and responsibilities. Thus, by its very language, R.C. 3109.04(E)(1)(a) only applies to a modification of a custodial order between the two parents of a child, whether or not the child's parents are married. The case at bar involves custodial proceedings in juvenile court between a parent and nonparent. R.C. 3109.04(E)(1)(a), therefore, does not apply here.

2. "The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child." R.C. 3109.04(E)(1)(a).

{¶ 14} This is a misstatement of the law which we hereby acknowledge and reject.³ R.C. 3109.04(E)(1)(a) does apply in custodial proceedings between parents and nonparents. *In re Brayden James*, 113 Ohio St. 3d 420, 2007-Ohio-2335. In *In re Brayden James*, the Supreme Court of Ohio specifically applied R.C. 3109.04(E)(1)(a) and reversed a decision which returned a child to his parent's custody because the trial court failed to comply with R.C. 3109.04(E)(1)(a) and find a change of circumstance prior to moving to the best interest determination. *Id.* at ¶ 14, 18-20. Thus, it is clear that R.C. 3109.04(E)(1)(a) applies to the modification of custodial orders not only between two parents, but also between parents and nonparents. *Id.* Furthermore, a juvenile court must exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04. *In re Brayden James* at ¶ 25, quoting R.C. 2151.23(F)(1).

{¶ 15} Turning to the case at bar, we find, contrary to Father's assertion, the trial court did not err in applying the best interest factors found in R.C. 3109.04(F). The Agency moved for legal custody pursuant to R.C. 2151.353(A)(3), which governs the disposition of an abused, neglected or dependent child. Under R.C. 2151.353(A)(3), after a child is adjudicated abused, neglected, or dependent, the court may award legal custody to either parent or a nonparent who, prior to the dispositional hearing, files a motion requesting legal custody. Though the statute does not expressly set forth criteria that a juvenile court must consider when awarding legal custody, courts have agreed that the decision must be based on the best interest of the child. *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, ¶ 11; *In re S.H.*, 9th Dist. No. 10CA009945, 2011-Ohio-5335, ¶ 9; *In re A.P.*, 5th Dist.

3. The decision in *In re B.S.*, turned on the agreement of the parties, as set forth in the court's entry, as to the circumstances under which mother could regain custody of her son. Our statement regarding the application of R.C. 3109.04(E)(1)(a) between parents and nonparents had no effect on the outcome of the case. The court in *In re B.S.* properly affirmed the juvenile court's decision to return legal custody to mother.

No. 2010CA00302, 2011-Ohio-441, ¶ 33- 34; *In re Yates*, 11th Dist. No. 2008-G-2836, 2008-Ohio-6775, ¶ 36.

{¶ 16} Because the best interest of the child is the paramount concern, the juvenile court should consider the totality of the circumstances affecting the best interests of the child. *In re Cunningham*, 59 Ohio St.2d 100, 105 (1979); *In re Fulton* at ¶ 11. Although there is no statutory mandate that the factors in R.C. 3109.04(F)⁴ be expressly considered and balanced before fashioning an award of custody under R.C. 2151.353(A)(3), a juvenile court is certainly entitled to consider those factors, as well as any other relevant factors, in making its custody determination. *In re Fulton* at ¶ 11; *In re G.M.*, 8th Dist. No. 95410, 2011-Ohio-4090, ¶ 16. Accordingly, the juvenile court should consider all factors relevant to the best interest of the child, including, but not limited to any applicable factors in R.C. 3109.04(F) prior to granting legal custody pursuant to R.C. 2151.353(A)(3). *In re Fulton* at ¶ 11; *see also In re M.M.*, 12th Dist. No. CA2010-12-034, 2011-Ohio-3913, ¶ 9.

{¶ 17} Given that those factors expressly referenced in R.C. 3109.04(F) were relevant to the juvenile court's determination of the best interests of M.A. and N.S., and that the trial court was entitled to consider all such relevant factors, we find that the trial court did not err in considering those factors expressly mentioned in R.C. 3109.04(F). In addition, as explained more fully below, the record indicates the juvenile court considered all factors relevant to the best interests of the children. Therefore, Father's second assignment of error is overruled.

{¶ 18} In his first assignment of error, Father argues that the trial court erred in awarding legal custody of M.A. and N.S. to Aunt and Uncle. He asserts that the trial court's

4. These factors include: the wishes of the parents; the child's wishes and concerns, if interviewed; the child's interaction and interrelationship with other family members or others who may significantly affect the child's best interest; the child's adjustment to home, school and community; the mental and physical health of all persons involved; the likelihood that the caregiver would honor and facilitate or had honored and facilitated visitation and parenting time; whether support orders have been followed; whether household members or parents have been convicted or pled guilty to certain offenses; and whether a parent intends to establish an out of state residence. R.C. 3109.04(F)(1); *In re M.M.*, 12th Dist. No. CA2010-12-034, 2011-Ohio-3913, ¶ 9.

decision was against the manifest weight of the evidence. Father contends that the court did not adequately weigh the best interest factors because there was competent, credible evidence presented which favored granting custody to him rather than Aunt and Uncle.

{¶ 19} Generally, an appellate court reviews a juvenile court's custody decision for an abuse of discretion. *In re A.C.*, 12th Dist. No. CA2006-12-105, 2007-Ohio-3350, ¶ 15. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). The discretion afforded to a juvenile court in custody matters "should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *In re A. W.-G.*, 12th Dist. No. CA2003-04-099, 2004-Ohio-2298, ¶ 6, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988). Accordingly, an appellate court will not reverse a judgment as being against the manifest weight where the "award of custody is supported by a substantial amount of credible and competent evidence." *In re T.M.*, 12th Dist. No. CA2007-01-019, 2007-Ohio-6034, ¶ 28, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418 (1997).

{¶ 20} A review of the record indicates that the juvenile court considered all of the factors relevant to the best interest of the children, including the applicable factors set forth in R.C. 3109.04(F)(1) before awarding custody of M.A. and N.S. to Aunt and Uncle. Additionally, the court's finding that granting legal custody to Aunt and Uncle was in the children's best interests is supported by the evidence. The juvenile court considered the fact that Father opposed Aunt and Uncle's motion for legal custody, while mother approved of Aunt receiving custody of the children. Although the juvenile court did not interview M.A. and N.S. prior to rendering its decision, the court considered the guardian ad litem's recommendation that the children be placed in the legal custody of Aunt and Uncle.

{¶ 21} Further, the evidence demonstrated that the children are doing well in Aunt and Uncle's care. At the time of the hearing, the children had been in the temporary custody of Aunt and Uncle for 1 year and 21 days. It appears that in this time a positive bond has formed between Aunt and the children. Aunt testified that she was bonded to both M.A. and N.S. In fact, M.A. refers to her as "mom". Aunt further testified that she and Uncle love M.A. and N.S., want custody, and want to provide a good life for the children. Aunt further explained that M.A. and N.S.'s two older sisters also live in her home under the custody of another family member. The ongoing caseworker with the Agency, Scott Cole, testified that "the children have been placed with [Aunt and Uncle] for a year now, they are bonded, they're with their two older sisters and I feel like if they're removed from there right now it would probably be more traumatic for them."

{¶ 22} There was also testimony that both M.A. and N.S. are bonded to Father. Kelly Hurley, a family resource worker with the Agency, testified that N.S. was probably more bonded to Father than M.A. However, the record indicates that Father's attendance at his scheduled visitation has been sporadic. He attended 19 supervised visits and cancelled 15 visits. In addition, Hurley began transporting the children to the visits in April 2009 so that visitation could occur on more regular basis. Although the Agency often accommodated Father's work schedule, he still missed several visits. According to Hurley, although Father made improvements such as letting the Agency know when he would miss a visit, she explained that his attendance was still a consistent problem throughout the case. Work was often cited as the reason for Father's absence.

{¶ 23} The record also demonstrates that each child has adjusted well to Aunt and Uncle's home. M.A. and N.S. have their own rooms at the home. N.S. attends a nearby pre-school. Aunt testified that N.S. loves school, and Aunt stated she often helps N.S. with her school work. During the day while Aunt and Uncle are at work, M.A. is cared for by a family

member of Aunt. The Agency approved Aunt and Uncle's home study with no concerns.

{¶ 24} In contrast, Father was unsure where N.S. would go to school if placed in his custody. As to child care, Father stated that his boss's wife would care for the children while he was at work. The Agency never met this proposed babysitter. There was also concern as to how Father would transport the children to school or to the babysitter's home given that Father does not have a valid driver's license or car seats for the children.

{¶ 25} The Agency and the guardian ad litem also expressed concerns over Father's living arrangements as housing was an on-going concern throughout this case. According to Father's case plan, Father was to maintain stable housing. At the time of the hearing, Father lived in a home with five other males. The Agency was unable to complete background checks on any of the occupants of the home, including Father, because they did not have social security numbers. Consequently, Father's home study was denied. Father himself admitted that this home was unsuitable for his children. Although Father received a list of possible houses and apartments that might be appropriate for the children, Father did not pursue housing from any place on this list. Instead, Father sought to purchase a mobile home. This proved to be difficult because the seller of the home refused to sell it to an undocumented alien. Father testified that he is not working towards becoming a legal resident of the United States, but rather, he was going to purchase the mobile home under another person's name. When questioned who this person was, Father was only able to provide the man's first name. Father failed to complete this part of the case plan as he does not have appropriate housing for the children at this time.

{¶ 26} Father suggests that he would be able to provide better support and care for the children because he has more disposable income than Aunt and Uncle. The evidence presented at the hearing suggests otherwise. Cole testified that Aunt and Uncle are meeting the children's basic needs. Although Aunt and Uncle have sought out charitable

organizations to help meet their needs for items such as food, the Agency explained that it often recommends clients use such community resources. Further, as part of Father's case plan, he was to maintain sufficient income to care for his children. The evidence presented at the hearing indicates that Father failed to provide adequate child support for the children. The court ordered Father to pay \$426 per month to Aunt and Uncle in child support. Father instead paid anywhere from \$100 to \$300 dollars a month. He maintains that he failed to pay the court-ordered child support because he was saving to purchase the mobile home. As discussed above, Father has yet to purchase the mobile home or obtain any other housing approved by the Agency. In addition, his failure to pay the full amount of child support indicates he lacks sufficient income to properly care for the children.

{¶ 27} There were also concerns regarding Father's mental and physical health. Father participated in individual counseling sessions focusing on domestic violence based on his prior arrest and conviction for domestic violence against the children's mother. Father's progress in this program was reported as "good" and "guarded." There were also concerns that Father may abuse alcohol. Father indeed tested positive for alcohol metabolites on two occasions. Additionally, two different caseworkers reported finding empty beer cans and bottles on the porch at Father's home. Father testified, however, that he only drinks alcohol socially.

{¶ 28} As to the children's mental and physical health, there was testimony regarding N.S.'s dental problems. The record indicates that Aunt obtained dental care for N.S. and limited N.S.'s consumption of sweets and other junk food. Father, on the other hand, reportedly continued to provide N.S. with sweets after being told that N.S. needed to avoid these foods. Father asserts that the court improperly weighed this factor as there was evidence that N.S. was struggling with the absence of her mother. Father suggests that his home would be a "sanctuary from the turmoil" at Aunt and Uncle's house due to mother's

incarceration. However, there was no evidence which suggested that there were concerns for N.S.'s mental health by remaining in Aunt and Uncle's home. The agency discussed possible counseling options for N.S. with Aunt to deal with any issues N.S. might be facing as a result of her mother's absence. There is no indication in the record that Aunt would not heed this advice and place N.S. in counseling.

{¶ 29} Both Father and Aunt testified that they would allow the other to have contact and visitation with M.A. and N.S. Father, however, contends that Aunt will not in fact facilitate visitation between him and the children because she has been negative towards him. Despite any negative attitude towards Father, it does not appear from the record that Aunt has previously denied Father visitation. Rather, Aunt initially facilitated visits between Father and the children at her home, and when visits occurred outside of Aunt's home, Aunt and Uncle often transported the children to visit Father. Additionally, the guardian ad litem stated in her report that she believed both Father and Aunt's statements that they would facilitate visitation.

{¶ 30} Finally, Father asserts that Aunt and Uncle may relocate to California to be near other relatives. He suggests that this fact favors placing the children in his care. There is no evidence to suggest that Aunt and Uncle may move to California. Aunt testified that her mother and sister live in California, but that she has never thought about moving there. As noted by the juvenile court, although Father testified that he intends to reside in the area, he was previously deported to Mexico in 2008. Father testified that he was deported after pleading guilty to a domestic violence charge.

{¶ 31} After a thorough review of the record, we find the trial court's decision granting legal custody of the children to Aunt and Uncle was supported by a substantial amount of credible and competent evidence. As noted above, since being placed with Aunt and Uncle over a year ago, M.A. and N.S. have adjusted well. The children have their own rooms, M.A.

is cared for during the day by a family member and N.S. attends a nearby school. Aunt and Uncle are also able to meet the children's basic needs while providing them with love, comfort, and support. M.A. and N.S. are bonded to Aunt and Uncle as well as the other children living in the home. Finally, Aunt and Uncle have shown that they are able and willing to comply with Father's changing visitation schedule. Father, on the other hand, has not obtained appropriate housing for the children or shown that he has sufficient income to support the children. He has failed to complete his case plan for reunification with the children. Father also has demonstrated that he is incapable of balancing his work schedule to meet the needs of his children as he consistently missed visits due to work. Therefore, while Father's love and desire to parent his children is apparent and he has made some improvements, we cannot say the trial court's decision was against the manifest weight of the evidence or that the court abused its discretion by finding it was in the children's best interest to grant legal custody to Aunt and Uncle.

{¶ 32} Father's first assignment of error is overruled.

{¶ 33} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.