[Cite as *In re M.E.*, 2013-Ohio-2562.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
		No. 12AP-684
M.E.,	:	(C.P.C. No. 08JU-02-2513)
(J.E.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on June 20, 2013

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellant.

Roger Warner, for appellees R.B. and K.B.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

DORRIAN, J.

{¶ 1} Appellant, J.E. ("Father"), is the father of M.E., a child born on December 7, 2007, and adjudicated a dependent child on May 28, 2008. Father, who is divorced from M.E.'s mother ("Mother"), is incarcerated following his conviction of rape of a minor under the age of ten years. M.E.'s maternal grandparents, R.B. and K.B. ("appellees"), are M.E.'s legal custodians.

{¶ 2} On March 18, 2011, when M.E. was three years of age, Father filed a motion in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("juvenile court"), seeking an order allowing him visitation with M.E. at the prison where he is incarcerated. The appellees contested the motion. The juvenile court denied Father's motion, finding that visitation with Father in prison would not be in M.E.'s best interest. For the following reasons, we affirm the court's denial of Father's motion for visitation.

I. Facts and Procedural History.

{¶ 3} On February 22, 2008, Franklin County Children Services ("FCCS") initiated this case by filing a complaint in the juvenile court alleging that M.E. was an abused, neglected, and dependent child. The trial court granted temporary custody of M.E. to FCCS on February 25, 2008, and the agency placed M.E. with appellees. On March 6, 2008, the court issued a temporary order granting temporary custody to appellees. On May 28, 2008, FCCS dismissed its claims that M.E. was abused and neglected and the court adjudicated M.E. to be a dependent child. In its dispositional order, the court awarded temporary custody of M.E. to appellees and issued an order of protective services to FCCS. As a result of these legal proceedings, M.E. has lived with appellees continuously since her initial placement with them as an infant. Throughout most of M.E.'s life, Mother has also resided at the home of her parents, the appellees.

{¶ 4} Father was a member of the armed services at the time of M.E.'s birth through his discharge from the Army on May 24, 2008. During this period, Father saw M.E. for only short periods of time. After Father's discharge from the Army, Mother and Father visited M.E. on a regular basis, but M.E. remained in the temporary custody of appellees. Father testified that, during the period between May 24 through July 2, 2008, he spent approximately five hours a day at appellees' household. Mother and Father eventually divorced.

{¶ 5} On July 2, 2008, Father was arraigned on a rape charge based on an incident that occurred on or about June 30, 2008. His victim, who was seven years of age on the date of the offense, was a step-grandson of appellee grandfather, R.B. The extended family regards the victim as they do all of M.E's other cousins.

{¶ 6} After the criminal charge was filed, the court ordered that Father's visits with M.E. be supervised by appellees. On December 16, 2008, the trial court reduced Father's supervised visitation to three hours per week. On July 22, 2009, Father entered a guilty plea to the indictment and began serving a five-year sentence. His expected release date is July 19, 2014. Father has not seen M.E. since his incarceration.

{¶ 7} On June 10, 2009, appellees moved for legal custody of M.E., which neither Mother nor Father opposed. One day prior to Father's guilty plea, on July 21, 2009, the court held a hearing on appellees' motion for legal custody of M.E. Following the

hearing, which Father attended, the court terminated appellees' temporary custody of M.E., granted them legal custody, dismissed FCCS from the case, and continued its jurisdiction over M.E.

{¶ 8} Appellees have afforded Father's parents regular visitation with M.E., and M.E. has a positive relationship with both sets of grandparents. M.E. generally has been permitted monthly three-night visits with her paternal grandparents at their home in Newport, Ohio, which is a town on the Ohio River near Marietta, Ohio.

{¶ 9} At the hearing on Father's March 18, 2011 motion for visitation, M.E.'s paternal grandmother testified that, if the visitation motion were granted, she and paternal grandfather would transport M.E. to the prison in which Father is incarcerated once each month for a two-hour visit. She acknowledged that Father's prison is surrounded by barbed wire, located approximately three and one-half hours from their home in Newport, and that M.E. would be required to pass through prison security to reach the visitation room. She further testified that the prison accommodated visits by inmates' children and had established a reading room where inmates may read to their visiting children. She had personally observed other children visiting inmates. She further testified that Father and M.E. have spoken to each other on the telephone during M.E.'s visits at their home and that Father has sent greeting cards to M.E. at their home. She believed it would be in M.E.'s best interest to visit Father in prison because M.E. "needs to know who her father is," the visits would allow M.E. to recognize that he "does have a lot of good qualities, not just bad things" and that it would be good for M.E. to begin knowing her father at her current age, rather than waiting until later. (Tr. 49.)

{¶ 10} Appellee maternal grandmother, K.B., testified that, during the period between Father's discharge from the Army and the filing of the criminal charges against him, Father visited M.E. three or four times a week for periods up to fifteen minutes. She further testified that, after the rape charge was filed against him and the court limited his visitation, Father did not visit M.E. for the maximum three hours per week available to him. Rather, during the approximate year that the charges were pending, Father visited M.E. at appellees' home approximately one time each week for periods up to 20 minutes. K.B. further testified that the fact that Father had victimized another of their 15 grandchildren created a "very emotional issue" in the family and she believed that M.E.'s

visitation with her Father, if permitted, might create stress and confusion for M.E, and negatively impact the extended family. She did not believe that visiting with Father in prison would be in M.E.'s best interest. She testified that she had consulted with M.E.'s pediatrician and a family therapist and that these discussions had not changed her mind on that question. She testified that M.E. knew she had a father, as she had spoken to him and received letters and cards from him and had been told that her daddy lived far away "in jail" but that M.E. did not know what a jail is.

{¶ 11} Appellee maternal grandfather, R.B., testified that he is a pediatrician sub-specializing in pediatric allergy. In his view, prison visits would detrimentally affect M.E. as it would bring up questions beyond her comprehension. He also testified of his concern that M.E.'s mother, who receives treatment for depression and other mental health issues, might be negatively impacted should M.E. begin prison visits with Father, which might, in turn, negatively affect Mother's relationship with M.E.

{¶ 12} The magistrate of the juvenile court denied Father's motion for visitation. In his decision, the magistrate found that Father's place of incarceration "is a somewhat foreboding structure, as any prison would be." (Feb. 1, 2012 Magistrate's Decision, 3.) He also found that travel time for M.E. to the facility would be approximately one and one-half hours each way for a visit that would last no more than two hours. He further found that Father's criminal offense had produced a negative, disruptive effect on appellees' family and that renewed contact between M.E. and Father at prison at this time would have an adverse effect on M.E.'s relationship with her extended custodial family. He concluded that prison visitation would not be in the best interest of four-year-old M.E.

{¶ 13} The court appointed a guardian ad litem for M.E. in connection with Father's visitation motion. After the magistrate issued his decision, the guardian ad litem filed a written memorandum concurring with the magistrate that it would not be in M.E.'s best interest to visit Father in prison.

{¶ 14} The court undertook an independent review and ascertained that the magistrate had properly determined the factual issues and appropriately applied the law. It therefore denied Father's objections to the magistrate's decision, expressly finding that "the negative effects of visits with Father greatly outweigh the potential positive effects that could occur under the circumstances." (July 20, 2012 Decision, 10.)

{¶ 15} In this court, Father presents two assignments of error, as follows:

> [1.] THE TRIAL COURT ERRED IN ITS DECISION WHEREIN CERTAIN CRITICAL EVIDENCE AND FACTS CONSISTENT WITH PERMITTING PARENTING TIME BETWEEN THE FATHER AND HIS CHILD WERE NOT DISCUSSED OR MENTIONED CORRECTLY THEREBY FAILING TO CONSIDER THE TOTALITY OF THE EVIDENCE PRESENTED AT THE TRIAL BEFORE THE MAGISTRATE.
>
> [2.] THE TRIAL COURT ERRED RULING THAT, IN FACT, THE FATHER SHOULD NOT HAE PARENTING TIME WITH THE CHILD FOR EVEN VERY LIMITED PERIODS OF TIME WHILE SUPERVISED BY BOTH THE DEPARTMENT OF REHABILITATION AND CORRECTIONS AND HIS PARENTS WHICH DOES NOT COMPLY WITH THE MANDATES OF THE OHIO REVISED CODE WITH REGARD TO PARENTING TIME BETWEEN A CHILD AND ITS PARENT.

{¶ 16} Father acknowledges that these two assignments of error overlap and, therefore, he has argued them together. The crux of his argument is that the trial court erred in (1) evaluating the evidence and applying the factors established in R.C. 3109.051(D) relative to determination of parental visitation, and (2) considering whether prison visitation might adversely affect M.E.'s relationship with members of her extended custodial family.

II. Legal analysis

{¶ 17} We begin our analysis by acknowledging the statutes that govern custody and visitation issues concerning a child who, like M.E., has been adjudicated to be a dependent child. As relevant to the case before us, R.C. 2151.353 provides:

> (A) If a child is adjudicated * * * [a] dependent child, the court may make any of the following orders of disposition:
>
> * * *
>
> (2) Commit the child to the temporary custody of * * * a relative * * *;
>
> (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child * * *;

> * * *
>
> (E)(1) The court shall retain jurisdiction over any child for whom the court issues an order of disposition pursuant to division (A) of this section * * * until the child * * * attains the age of eighteen years * * *;
>
> (2) Any * * * party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section * * *. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing[.]

{¶ 18} R.C. 2151.011(B)(21) defines "legal custody," as follows:

> "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, *all subject to any residual parental rights, privileges, and responsibilities.*

(Emphasis added.)

{¶ 19} Pursuant to these statutes, the court adjudicated M.E. a dependent child in May 2008. In July 2009, the court granted appellees' motion to terminate their temporary custody of M.E. and replace it with an award of legal custody. In granting that motion and terminating the involvement of FCCS, the court significantly impacted Father's legal rights concerning M.E. Appellees, as legal custodians, thereafter possessed the primary right to make decisions concerning M.E.'s upbringing, care, and supervision, subject to review by the juvenile court.

{¶ 20} In contrast to an award of permanent custody, however, which deprives a parent of all legal rights and responsibilities, Father did not lose all of his legal rights as a result of the award of legal custody of M.E. to appellees. Rather, Father retained his "residual parental rights, privileges, and responsibilities," including the privilege of

reasonable visitation. This is so because R.C. 2151.011(B)(48) defines residual parental rights, privileges, and responsibilities, as follows:

> "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, *including, but not necessarily limited to, the privilege of reasonable visitation*, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(Emphasis added.)

{¶ 21} Accordingly, in considering Father's motion for visitation at his place of incarceration, the trial court was required to determine whether the privilege of *reasonable* visitation retained by Father mandated that appellees, against their will, allow Father's parents to transport M.E. to his place of incarceration—the only place where visitation between M.E. and Father may legally occur during Father 's imprisonment.

{¶ 22} R.C. Chapter 21, which governs proceedings relative to dependent children such as M.E., does not define "reasonable visitation" as that term is used in R.C. 2151.011(B)(48). Moreover, "there does not appear to be any definitive test or set of criteria to apply in determining whether, and/or on what terms, to grant visitation rights to the non-custodial parent in parental custody proceedings incident to a dependency action." *In re Knisley*, 4th Dist. No. 97CA2316 (May 26, 1998).

{¶ 23} In contrast, R.C. 3109.051(D) outlines 16 factors that a court shall consider when "establishing a specific parenting time or visitation schedule, and in determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under [R.C. 3109.051] or section 3109.11 or 3109.12 of the Revised Code." By its own terms, therefore, the 16 factors described in R.C. 3109.051 apply to matters arising under R.C. 3109.051, 3109.11, and 3109.12. R.C. 3109.051 does not provide that the 16 subsection (D) factors are applicable in an R.C. Chapter 21 dependency case.

{¶ 24} Thus, a trial court is not required to consider the factors set forth in R.C. 3109.051(D) in a case involving visitation of a non-custodial parent "with a child who has been adjudicated a dependent child in a dependency proceeding under R.C. 2151.353(A)(3), and does not concern an existing custody decree from either a domestic

court or other court order covered by R.C. Chapter 3109." *In re C.H.*, 10th Dist. No. 10AP-579, 2011-Ohio-1386, ¶ 12. In support of that conclusion, we observed that "when determining visitation of a non-custodial parent, there is no statutory mandate to apply R.C. 3901.051 when the matter arises out of a dependency proceeding under R.C. 2151.353(A)(3)." *Id.* at ¶ 13, citing *In re Knisely*. *See also In re Haywood*, 2d Dist. No. 21276, 2006-Ohio-576, ¶ 9. In *In re Knisely*, the Fourth District Court of Appeals similarly recognized that "literal, technical compliance with R.C. 3109.051 is not required" in cases involving a parent's motion for reasonable visitation with a dependent child whose legal custody has been awarded to a non-parent.

{¶ 25} Moreover, the Fourth District has observed that, where a motion for visitation is filed by a parent who has lost legal custody of a child after a finding of dependency, the trial court must base its decision on "the totality of circumstances as they relate to the child's best interest. * * * The court can, but is not required to, consider the factors listed in R.C. 3109.05(D)." *In re C.J.*, 4th Dist. No. 10CA681, 2011-Ohio-3366. In *In re C.J.*, the court acknowledged that a biological parent retained a residual privilege of reasonable visitation with a dependent child in the legal custody of a non-parent and applied an abuse-of-discretion standard in reviewing a trial court order granting a parent supervised visitation over the objections of the child's legal custodian. *Accord In re J.S.*, 11th Dist. No. 2011-L-162, 2012-Ohio-4461, ¶ 27, quoting *In re G.M.*, 8th Dist. No. 95410, 2011-Ohio-4090, fn. 1 (in reviewing request for order allowing parental visitation the court employed test of whether the "totality of the circumstances as they relate to the child's best interest" supported the request, and observed that "[a]s 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.").

{¶ 26} We therefore find that where a child has been adjudicated dependent and the child's legal custody has been granted to a non-parent, a natural parent's retained privilege of reasonable visitation does not include visitation that the court finds to be contrary to the child's best interest in light of the totality of the circumstances. The court of appeals, in reviewing a trial court's determination whether a parent's visitation motion

is contrary to the child's best interest in light of the totality of the circumstances, must apply an abuse-of-discretion standard of review.

{¶ 27} The trial court in this case engaged in an analysis of the 16 factors set forth in R.C. 3109.051(D) and concluded that visitation in prison would not be in M.E.'s best interest. While review of the R.C. 3109.051(D) factors was not statutorily mandated, use of those factors was consistent with our decision in *In re C.H.* and the other cases cited above, and it was not error for the trial court to use those factors as an analytical framework for determining whether prison visitation was in M.E.'s best interest in light of the totality of the circumstances.

{¶ 28} In the case before us, the trial court found that "the negative effects of visits with Father greatly outweigh the potential positive effects that could occur under the circumstances." (July 20, 2012 Decision, 10.) In reaching that conclusion, the trial court observed that M.E.'s interaction and interrelationship with Father since her birth had been minimal; that M.E. was four years old at the time of the hearing and was well-adjusted to her home and community; and that the seven-year-old victim of Father's criminal offense was a regular and ongoing visitor of M.E., with whom she shared a bonded, cousin relationship. The trial court found that visitation with Father in prison could substantially impact her adjustment in her family and community due to Father's having pled guilty to rape of her cousin. It observed that M.E.'s family community had been traumatized by the acts of Father and that M.E.'s mother suffers from post-traumatic stress disorder as the result of interactions with Father. The court further noted the long distance between Father's prison and the residence of M.E.'s paternal grandparents, who would have transported M.E. to the prison for any visits authorized by the court.

{¶ 29} The trial court thus examined the totality of the circumstances and determined that granting Father's motion for monthly prison visits with M.E. at a facility located a substantial distance from the home of her paternal grandparents was not in M.E.'s best interest. Moreover, the guardian ad litem was of the same opinion. And Father failed to present any evidence demonstrating whether, or how, postponement of visitation with M.E. prior to his expected release from prison in July 2014 would detrimentally impact their ability to form a positive father-daughter relationship after his

release. Specifically, we do not find it impermissible for the court to consider, as part of the totality of the circumstances, whether prison visitation might detrimentally affect M.E.'s relationships with other members of her family. In short, we do not find that the trial court's denial of Father's visitation motion was unreasonable, arbitrary or unconscionable. It did not represent an abuse of discretion.

{¶ 30} Our decision is consistent with that of this court in *In re Hall*, 65 Ohio App.3d 88 (10th Dist.1989). In that case, we recognized that transporting a young child to a prison on a regular, frequent basis to visit with a non-custodial parent gives rise to an inference of harm to the child so that such visitation is not in the child's best interest. Just as in *In re Hall*, Father in the case before us failed to offer proof to overcome that inference. *See also Calhoun v. Calhoun*, 12th Dist. No. CA95-11-024 (June 10, 1996) (trial court did not abuse its discretion in denying visitation between an incarcerated father and his four-year-old daughter where father failed to satisfy burden of proving that visitation in prison was in the child's best interest); *In re Carpenter*, 4th Dist. No. 01CA26, 2002-Ohio-509; *Edwards v. Spraggins*, 5th Dist. No. 04CA54, 2005-Ohio-2416. It is true that the foregoing cases were decided prior to the 2006 adoption of S.B. No. 238, which expressly provided that a parent retains only residual rights, including the right of reasonable visitation, where legal custody of the child is awarded to a non-parent. We find, however, that these cases are of precedential value as, both before and after the adoption of S.B. No. 238, the award of visitation rights turns on determination of the best interest of the child.

{¶ 31} Father has suggested that the appropriate legal test to be applied in this case is that enunciated in *Tobens v. Brill*, 89 Ohio App.3d 298 (3d Dist.1993). That case did not, however, involve a child who had been adjudicated dependent, as had M.E. Rather, the incarcerated father in *Tobens* appealed an order that the father, a prison inmate, pay child support but which did not include a visitation schedule. The court held that "[t]he trial court's failure to specifically provide any visitation schedule in the child support order constitutes reversible error, as R.C. 3113.215(C)'s[1] terms are mandatory in nature that a visitation schedule be devised." *Id.* at 303. But the case before us does not involve a claim of a non-residential parent seeking a visitation order issued by a domestic

[1] The 123rd General Assembly repealed R.C. 3113.215 in S.B. No. 180, 2000, Ohio Laws File 291.

relations court in a divorce action. Rather, it involves a claim by a parent who possesses only residual parental rights and privileges following an award of legal custody of a dependent child to non-parents. *Tobens* is distinguishable from the case before us.

{¶ 32} Father also argues that the trial court did not reference in its decision several circumstances that Father deemed significant. Those circumstances included the fact that M.E. had expressed to the guardian ad litem that she would like to see her father. In addition, the mother of M.E.'s cousin, who was the victim of Father's crime of rape, testified that M.E. had mentioned to her son on more than one occasion that her father was in jail and that those comments did not appear to impact her son. Similarly, she testified that her son was not reluctant to visit appellee's home, as the incident in question had not happened at that location. Father has not suggested a reason to believe that the trial court was unaware of the circumstances described above and nevertheless concluded that it was not in M.E.'s best interest to visit her father in prison. Moreover, the trial court specifically indicated that it had "thoroughly, carefully, and independently reviewed the *Objections* of Father, the *Magistrate's Decision*, pleadings, transcripts, entire file, and applicable law." (July 20, 2012 Decision, 10.) Consistent with that recitation, we therefore presume that, in considering the totality of the circumstances, the trial court considered all of the evidence, including that which Father points out. We therefore reject Father's argument that the trial court's findings must be reversed based on its failure to expressly discuss these circumstances in its decision. *Compare In re J.B.*, 8th Dist. No. 97995, 2012-Ohio-3087, ¶ 21-22 (rejecting argument in a permanent custody case that the juvenile court did not set forth an adequate factual analysis in its judgment and concluding that "[a]s long as the record affirmatively reflects that the trial court considered the factors and the record supports the trial court's decision, we will find no reversible error.").

III. Conclusion

{¶ 33} In view of the evidence presented and the recommendation of the guardian ad litem, the trial court determined that it would not be in M.E.'s best interest to order her legal custodians to allow M.E. to visit Father in prison during his incarceration. That determination was supported by competent, credible evidence and did not represent an abuse of discretion.

{¶ 34} For the foregoing reasons, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

KLATT, P.J., and CONNOR, J., concur.
