

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

IN THE MATTER OF:	:	
	:	CASE NOS. CA2003-11-113
J.D.M.	:	CA2004-04-035
	:	CA2004-04-040
	:	
	:	<u>O P I N I O N</u>
	:	10/11/2004
	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. 01P00607

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Sherry Davis, 8 W. Ninth Street, Cincinnati, Ohio 45202, for petitioner-appellant, Jennifer McKettrick

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**WALSH, J.**

{¶1} Petitioners-appellants, Jennifer McKettrick and Cheryl McKettrick, appeal the decisions of the Warren County Court of Common Pleas, Juvenile Division, dismissing their petition for shared custody and denying their motion for relief from judgment. We reverse the decision of the trial court and

remand this matter for further proceedings.

{¶2} Appellants are co-habiting, same sex partners since June 1998. Appellants aver that Cheryl donated an ovum which was fertilized and implanted in Jennifer. Jennifer gave birth to J.D.M. on March 16, 2001. Appellants assert that, pursuant to R.C. 3111.95(B),<sup>1</sup> J.D.M. has no legal, presumed, or alleged father. Since J.D.M.'s birth, both have participated in his rearing and care. Jennifer works part-time so that she can be home with J.D.M. According to a clinical psychologist involved with the family, J.D.M. appears in all respects to be happy, loved and well-cared for, and both parties are fit parents.

{¶3} In April 2003 appellants petitioned the trial court seeking entry of a shared custody agreement which named the parties co-custodians of J.D.M. Following a hearing, the trial court dismissed appellants' petition finding that it was not in the child's best interest for the following reasons:

{¶4} "(1) the Shared Custody Agreement did not provide [J.D.M.] any present benefit from that offered by his current situation; (2) the Shared Custody Agreement's terms were so general that it was not apparent what benefits it might provide [J.D.M.] in the event of Petitioners' separation or decease; (3) it could not be determined if [J.D.M.] would actually benefit from the Shared Custody Agreement based upon unknown future circumstances; and (4) the Shared Custody Agreement

circumscribed the discretion of [J.D.M.]'s mother<sup>2</sup> to determine what might be in his best interest."

{¶5} The parties then filed a Civ.R. 60(B) motion for relief from judgment along with a petition to adopt an amended shared custody agreement in an attempt to placate the trial court's concerns with the first shared custody agreement. In the amended agreement, the parties agreed that "the legal responsibility of the care and upbringing of [J.D.M.] should be shared by them both now and in the future." To this end, appellants agreed that each "has at least a colorable claim to the exclusive or paramount right of care, custody and control of [J.D.M.] as a matter of law" and each "relinquishes any right she might otherwise have to exclusive paramount care, custody, and control of [J.D.M.]." The agreement further provides for the mutual financial support of J.D.M., and contains provisions regarding his health care, discipline, education, and contact with his extended family.

{¶6} The trial court denied the motion for relief from judgment and dismissed the petition for shared custody. The trial court again concluded that the amended shared custody agreement was not in J.D.M.'s best interest. The trial court noted that the custody agreement "serves no purpose" while the couple resides in the same household, and that the agreement

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1. R.C. 3111.95(B) provides that a nonspousal semen donor shall not be treated in law as, or regarded as, the natural father of a child conceived as the result of artificial insemination.

may in the future, circumvent J.D.M.'s mother's ability to decide what is in his best interest. The trial court further noted that the parties could achieve their intended result while protecting J.D.M.'s mother's interests by executing a combination of powers of attorney, wills, and releases.

{¶7} The parties appealed both the dismissal of the petition to adopt the amended shared custody agreement and the denial of the Civ.R. 60(B) motion. The matters have been consolidated on appeal. Appellants raise three assignments of error related to the trial court's dismissal of their petition for shared custody. Because appellants have not raised any assignment of error specific to the motion for relief from judgment, this court need not review its denial. See App.R. 16(A).

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY REFUSING TO FOLLOW SETTLED LAW THAT ENTRY OF CUSTODY AGREEMENTS PRIOR TO ANY CONFLICT IS LAWFUL AND DESIRABLE."

{¶10} Appellants' first assignment of error alleges that the trial court erred in refusing to enter the shared custody agreement because of the absence of a conflict between the parties. The trial court rejected appellants' petition for shared custody in part, because "[t]he purpose of shared custody/shared parenting is to preserve a custodial

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2. The trial court does not make a finding as to which petitioner is the child's "mother," but does conclude that J.D.M.'s mother is the petitioner

relationship for custodians no longer residing together in the child's household."

{¶11} Contrary to the trial court's suggestion, however, the lack of a present controversy between parties is not an impediment to consideration of a shared custody petition. See In re Bonfield, 97 Ohio St.3d 387, 2002-Ohio-6660. In Bonfield, the Ohio Supreme Court specifically noted that the petition at issue remained unopposed throughout the proceedings. Id. at ¶47. Review of Ohio case law further supports the conclusion that a conflict between parties is not a necessary predicate to consideration of an agreed custody arrangement. See, e.g., Masitto v. Masitto (1986), 22 Ohio St.3d 63; In re Perales (1977), 52 Ohio St.2d 89. We conclude that the trial court's reasoning on this issue was erroneous, and sustain the assignment of error.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED IN REFUSING TO ENTER THE AMENDED AGREEMENT ON THE FACTUAL RECORD IN THIS CASE; APPELLANTS ARE FIT AND PROPER CUSTODIANS AND THE AGREEMENT SERVES [J.D.M.]'S BEST INTERESTS NOW AND IN THE FUTURE."

{¶14} Appellants' second assignment of error alleges that the trial court erred by dismissing the petition for shared custody since both parties are fit and proper parents, and the custody agreement is in J.D.M.'s best interest.

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to whom he is genetically related.

{¶15} Pursuant to R.C. 2151.23(A)(2), the juvenile court has exclusive, original jurisdiction over the determination of "the custody of any child not a ward of another court of this state," including disputes between parents and nonparents. See In re Hockstok, 98 Ohio St.3d 238, 2002-Ohio-7208, at ¶15. A trial court is granted broad discretion in deciding custody matters. Reynolds v. Goll, 75 Ohio St.3d 121, 124, 1996-Ohio-153.

{¶16} The Ohio Supreme Court recently decided a case factually similar to the present matter. See In re Bonfield, 97 Ohio St.3d at 387, 2002-Ohio-6660. In Bonfield, same-sex cohabitants petitioned the juvenile court for an allocation of parental rights and responsibilities, due to concerns regarding the legal rights of the cohabitant who was neither a biological nor an adoptive parent of the other cohabitant's children. The trial court found that it was without statutory authority to make such an allocation, and, on appeal, the court of appeals agreed.

{¶17} While finding that the cohabiting, same-sex partner of the children's biological mother was not the children's "parent" for purposes of entering into a shared parenting agreement pursuant to R.C. 3109.04, the Ohio Supreme Court held that the juvenile court had jurisdiction to consider the petition for an allocation of parental rights and responsibilities between the parties under R.C. 2151.23(A)(2).

The court noted that "it is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered nonparents at law." Id. at ¶43, citing In re Perales (1977), 52 Ohio St.2d 89.

{¶18} In Bonfield, the Ohio Supreme Court set forth two criteria to consider when determining whether to accept a petition for shared custody. It first stated that an "agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child." Bonfield at ¶48, citing Masitto at 65-66. The court further directed that the decision whether to grant such a petition should be made "giving due consideration to all known factors in determining what is in the best interest of the children." Bonfield at ¶49, citing In re Adoption of Charles B. (1990), 50 Ohio St.3d 88, paragraph three of the syllabus.

{¶19} Our review of the trial court's decision reveals that the lower court failed to exercise its discretion in determining whether to adopt the petition for shared custody.

{¶20} We first note that the trial court did not make a conclusive finding as to who is J.D.M.'s mother. It is axiomatic that a natural parent has a paramount right to the custody of his or her children. In re Murray (1990), 52 Ohio St.3d 155, 157, citing Santosky v. Kramer (1982), 455 U.S. 745,

753, 102 S.Ct. 1388. Even so, natural parents may voluntarily relinquish custody to a third party. See Bonfield at ¶48.

However, a nonparent has no such rights to relinquish. In the present matter a question remains as to which party is the child's legal mother. Upon remand, the trial court should first determine which party is relinquishing parental rights, and which party is assuming parental rights, a necessary requisite before considering the present shared custody petition.

{¶21} In support of its conclusion that the shared parenting agreement is not in J.D.M.'s best interest, the trial court noted in particular that it could not determine the present and future benefit the agreement would provide to J.D.M., and the fact that the agreement "circumscribed the discretion of [J.D.M.]'s mother to determine what might be in his best interest." The court concluded that the provision regarding J.D.M.'s financial support was in his best interest, but was outweighed by his mother's relinquishment of her parental rights.

{¶22} The trial court's consideration of the mother's relinquishment of some of her parental rights is misguided, as the court failed to correlate this finding with J.D.M.'s present best interest. The present benefits of the agreement were ignored by the trial court and are apparent from a simple review of the document. J.D.M. benefits from having two caregivers, legally responsible for his welfare. Both will

have the ability to make medical decisions on his behalf and be able to interact with teachers and school administrators without executing additional documents. The remaining evidence in the record further supports the conclusion that entry of the agreement is in J.D.M.'s best interest. The evaluation conducted by a clinical psychologist and submitted by appellants concluded that both parties are effective parents, committed to J.D.M.'s well being. The testimony of both parties also confirms this conclusion. This evidence was in large part overlooked by the trial court.

{¶23} We consequently conclude that it was error for the trial to deny the petition on the basis provided in its decision. The court failed to consider the factors weighing in J.D.M.'s best interest, and further failed to make a finding whether the proposed custodian is a "proper person to assume the care, training, and education of the child." See Bonfield at ¶48. Because the trial court failed to exercise its discretion when determining the present custody matter, we sustain the second assignment of error and remand this matter to the trial court for further proceedings.

{¶24} On remand, the trial court is first to determine the identity of the child's mother; second, to determine whether the proposed custodian is a proper person to assume the care, training and education of the child; and third, to adopt the shared parenting plan if supported by the factors weighing in the child's best interest.

{¶25} Assignment of Error No. 3:

{¶26} "THE TRIAL COURT ERRED BY FINDING A CONSTITUTIONAL BAR TO ENTRY OF APPELLANTS' VOLUNTARY AGREEMENT TO RELINQUISH PARAMOUNT CUSTODIAL RIGHTS IN FAVOR OF SHARED CUSTODY."

{¶27} We agree with appellants' general contention that there is no constitutional bar to the voluntary relinquishment of parental rights. See Bonfield at ¶48, citing Masitto at 65.

However, we disagree with appellants' characterization of the trial court's conclusion. The portion of the trial court's decision to which appellants object states as follows:

{¶28} "The Courts have long recognized the importance of the fundamental right of parents to the care, custody and control of their children. The shared custody agreement may be interpreted to circumscribe [J.D.M.]'s mother's discretion as to [his] care, custody and control at some future time and in circumstances that cannot now be known."

{¶29} While the trial court erroneously considered the mother's relinquishment of her parental rights as a best interest factor, the trial court did not recognize a constitutional bar to so doing as appellants suggest. Consequently, we overrule the third assignment of error.

{¶30} The decision of the trial court is reversed and this matter is remanded for the trial court for further proceedings.

The trial court shall determine which party is the parent relinquishing parental rights, and consider the petition for

shared custody in accordance with the Ohio Supreme Court's decision in Bonfield. The trial court should 1.) determine whether the proposed custodian is a proper person to assume the care, training, and education of the child; and 2.) giving due consideration to all known factors, adopt the shared parenting plan if it is in the best interest of the child.

{¶31} Judgment reversed and cause remanded.

YOUNG, P.J., and POWELL, J., concur.