

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

IN THE MATTER OF:

A.B. : CASE NO. CA2009-10-255  
: OPINION  
: 6/28/2010  
:  
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. JN2007-0234

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**RINGLAND, J.**

{¶1} Appellant, the biological father of A.B., appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of the child to appellee, her biological mother. We affirm.

{¶2} From her date of birth on June 2, 2001 until May 2, 2007, A.B. had been in the custody of her father. On April 18, 2007, the Butler County Department of Jobs and

Family Services, Children Services Division, received a complaint alleging that the father and A.B.'s stepmother were abusing methamphetamine, father was "cooking" methamphetamine, and that A.B., her half-sibling and step-siblings were present and witnessed domestic violence between father and his wife on April 13, 2007. On April 30, 2007, police removed A.B. and her siblings due to the allegations of substance abuse, domestic violence, and a claim that the family was planning to leave Ohio. Father was arrested for driving under suspension. The children were placed in the care of relatives.

Both father and stepmother tested positive for methamphetamine and marijuana following a drug screen on April 30, 2007. On May 2, 2007, the agency filed a complaint in the Butler County Juvenile Court alleging that A.B. was a neglected and dependent child. The complaint further stated that father and stepmother did not have stable housing and had been living with grandparents, family friends, or in a camper. The agency moved for temporary custody to be placed with a paternal aunt.

{¶13} On August 10, 2007, A.B. was adjudicated a dependent child and the neglect allegations were withdrawn. Temporary custody of A.B. was placed with her stepmother. Mother<sup>1</sup> received supervised visitation and telephone contact. Father was given supervised visitation only and was not permitted in the family home except for the purposes of the case plan services. On November 8, 2007, a motion to change custody and affidavit were filed alleging that father was living in the home in violation of court orders and that, on November 4, 2007, A.B.'s 12-year-old stepbrother had been left alone at the residence with the siblings while father and stepmother went to a bar. When they returned intoxicated, the couple were physically abusive with one another. Emergency orders were issued to remove the children from the home and they were

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1. Mother, who was residing in New York at the time, was sent notice and made a party of the proceedings on May 10, 2007. She obtained appointment of counsel and participated in all proceedings thereafter. She relocated to South Bend, Indiana shortly joining the proceedings.

once again placed with the paternal aunt.

{¶14} On January 18, 2008, mother filed a motion for legal custody of A.B. and father filed an opposing motion requesting that A.B. be returned to his legal custody. Following a hearing, the magistrate issued a written decision ordering A.B. be placed in the legal custody of her mother. Father filed objections to the magistrate's decision which were overruled by the juvenile court. Father timely appeals, raising two assignments of error.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION WHEN IT ANALYZED THE STATUTORY FACTORS AND AWARDED LEGAL CUSTODY TO MOTHER."

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT'S DECISION WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT IN THE CHILD'S BEST INTERESTS."

{¶19} Under both assignments of error, father argues that the magistrate and the juvenile court improperly analyzed the statutory factors in awarding legal custody of A.B. to mother. Under the first assignment of error, father argues that the court abused its discretion, while, in her second assignment of error, father argues the decision is against the manifest weight of the evidence. Since father presents the same argument under both assignments, we will combine our analysis of the assignments of error.

{¶110} After a child is adjudicated abused, neglected, or dependent, the trial court may award legal custody to a nonparent upon a demonstration by a preponderance of the evidence that granting legal custody to the nonparent is in the child's best interest. R.C. 2151.353(A)(3); *In re Nice* (2001), 141 Ohio App.3d 445. A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence

which is offered in opposition to it." *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶26.

{¶11} In general, appellate review of custody cases is limited to whether the trial court abused its discretion. *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-417, 1997-Ohio-260. Abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "The discretion which a trial court enjoys 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." *In re J.M.*, Warren App. No. CA2008-12-148, 2009-Ohio-4824, ¶17, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶12} R.C. 3109.04(F)(1) requires the trial court to consider all relevant factors in determining the best interest of a child. These factors include, but are not limited to: the wishes of the parents; the child's interactions and interrelationships with parents, siblings, and other persons who may significantly affect the child's best interest; the child's adjustment to home, school and community; and the mental and physical health of all persons involved in the situation. See R.C. 3109.04(F)(1); *In re J.W.*, Greene App. No. 2009 CA 8, 2009-Ohio-4605.

{¶13} Father argues it was improper to award custody of A.B. to mother because she has been absent for most of A.B.'s life, urging that A.B. has a comfortable life in Ohio and will miss her paternal family since she has lived with her father her entire life. Father also lists several criticisms of mother, characterizing her as irresponsible and "a flighty woman who has multiple children by multiple men." Father also suggests that mother's criminal history makes her unsuitable as the custodial parent because she has used drugs, been incarcerated, and went to jail for serving alcohol to minors.

{¶14} A review of the record indicates that the juvenile court engaged in a detailed evaluation of the relevant factors set forth in R.C. 3109.04(F)(1) before awarding custody of A.B. to her mother. In a written decision, the magistrate found that A.B. has a good relationship with her mother, father, and stepmother as well as her half-siblings. Since A.B. began visiting her mother in Indiana in March 2008, she has developed a relationship with the mother's side of her family. The magistrate further reasoned that father was uncooperative in following the court's case plan after the dependency determination and did not begin complying with the plan until 14 months after the complaint had been filed. The magistrate stated that concerns remain about father's decision-making. Although father completed substance abuse treatment, the Behavioral Health Services report indicated that he "remained in denial concerning the seriousness of his disease and that his prognosis was 'guarded.'" On November 24, 2008, father tested positive for marijuana. Father did submit to another urine screen on December 2, 2008 which was negative for all illegal substances. Nevertheless, the report did delineate that the specimen was "dilute."

{¶15} Finally, the magistrate viewed father's history of being unable to maintain housing and income for an extended amount of time. Although father has recently acquired stable housing for the family in Ohio, the magistrate found that his history of "unstable housing both in Michigan and Ohio [is] troubling." Ultimately, the magistrate concluded based upon the analysis of the relevant factors that "[w]hile the court realizes that placement in Indiana will be a major change in [A.B.]'s life, the court finds that based upon the evidence presented that this placement is in her best interest in the long-term."

{¶16} The juvenile court adopted the magistrate's decision in its entirety. After review of the record, we cannot say that the juvenile court abused its discretion in

granting custody to mother. In the instant appeal, father suggests that mother is unsuitable due to her admissions of prior drug use and serving alcohol to minors. However, these acts are much more remote when compared to similar conduct by father. Specifically, mother indicated that she had smoked marijuana in the past, but stopped when she became pregnant with her oldest daughter, who is now 13 years of age. Mother also admitted to "dropp[ing] a couple hits of acid" during her lifetime, but has not done so since she was 19, and she is now 32 years old. Finally, mother testified that she has never been convicted of any offense involving drugs or violence and that her "incarceration" occurred 11 years ago, when she was 21, involving a charge of drinking at a party when minors were present. She stated that she was held in jail for two hours before being released.

{¶17} In contrast, father tested positive for drug use much more recently; for methamphetamine and marijuana on April 30, 2007 with a second positive test for marijuana on November 24, 2008. Father has also been suspected of committing domestic violence in the presence of the children, and alcohol abuse with an arrest for driving under suspension. After father was allowed to return to the family home, he and stepmother left A.B.'s 12-year-old stepbrother alone at the residence with A.B.'s siblings while they went to a bar. When they returned intoxicated, the couple were physically abusive with one another in the children's presence, which prompted the children to be removed again from the home. The prognosis of Behavioral Health Services following father's substance abuse treatment was that he remains in denial about his disease.

{¶18} Additionally, father chastises mother for her absence from A.B.'s life between 2004 and 2007. However, mother as well as A.B.'s maternal grandmother made many efforts to locate father to exercise her visitation rights during this period. Due to father's erratic relocations between Ohio and Michigan during that period and

failure to provide contact information, mother was unable to locate A.B. Mother attempted to contact A.B.'s paternal grandmother, but her calls were ignored and not returned. Father now wishes to use mother's absence against her. While we note mother could have taken further action to remain in contact with A.B. during this period of time, father and his family were at least partially responsible for mother's inability to locate her child.

**{¶19}** Finally, father urges it is hypocritical for the juvenile court to return A.B.'s three paternal half-siblings to his and stepmother's care, but not A.B. However, the children are in dissimilar positions. The court returned A.B.'s half-siblings to the care of their biological parents despite substantial concerns. A different option exists in A.B.'s situation due to the possibility of placing A.B. with her biological mother. "In short, the dissimilar treatment between [A.B. and her half-siblings] evidences not a lack of consistency but a lack of alternatives [for placement of the half-siblings]." *In re Pryor* (1993), 86 Ohio App.3d 327, 342.

**{¶20}** Based upon the foregoing, appellant's assignments of error are overruled.

**{¶21}** Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.