

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

IN THE MATTER OF: :

M.M. : CASE NO. CA2010-12-034

: OPINION

: 8/8/2011

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: :

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 10AND0266

David B. Bender, Fayette County Prosecuting Attorney, James B. Roach, 110 East Court Street, Washington Court House, Ohio 43160, for appellee,

Joshua W. Beasley, 8 East Main Street, West Jefferson, Ohio 43162, for appellant B.L.

Everett Merriman, 3015 Gallia Street, Portsmouth, Ohio 45662, father, pro se

Janice Paine, 170 West County Road 500 South, Clayton, Indiana 46118, legal custodian,
pro se

Renae Zabloudil, 58 East High Street, Suite B, London, Ohio 43140, guardian ad litem

PIPER, J.

{¶1} Appellant (Mother), appeals the decision of the Fayette County Court of Common Pleas, Juvenile Division, granting legal custody of her biological daughter, M.M., to appellee, Janice Paine, a nonrelative family friend. For the reasons outlined below, we affirm

the juvenile court's decision.

{¶2} Approximately seven years ago, Mother surrendered care and custody of M.M., and a case plan to reunify Mother with her child was established. M.M., who was born on August 6, 1995, was placed in the custody of her great aunt. On March 31, 2010, temporary custody of M.M. was awarded to the Fayette County Department of Job and Family Services, Children Services Division (Children Services) after Children Services filed a complaint and emergency ex parte motion for temporary custody upon a report by M.M.'s great aunt that her husband had engaged in sexual activity with the child. M.M. was adjudicated an abused and neglected child, and on April 12, 2010, the juvenile court ordered that temporary custody of M.M. would remain with Children Services until a more permanent placement could be found. On June 28, 2010, M.M. was placed in the home of Paine, who resides in Indiana.

{¶3} Mother filed a motion for custody of M.M. on May 4, 2010. Thereafter, Children Services filed a motion requesting that legal custody be granted to Paine. A hearing on the competing motions was held on November 9, 2010. The juvenile court heard testimony from Mother, Paine, and Kelly Sword, a caseworker with Children Services. After considering the testimony and the guardian ad litem's report, the court determined that it was in M.M.'s best interest to designate Paine as the residential and legal custodian. Children Services' protective supervision was terminated, and Mother was awarded visitation rights.

{¶4} Mother timely appealed, alleging a sole assignment of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED WHEN IT FOUND CLEAR AND CONVINCING EVIDENCE THAT A GRANT OF PERMANENT [sic] CUSTODY WAS IN THE CHILDREN'S [sic] BEST INTEREST."

{¶7} As an initial matter, the court notes that Mother has incorrectly referred to the juvenile court's award of custody as permanent rather than legal. However, Children

Services only sought legal custody on behalf of Paine. Further, the juvenile court specifically stated in its judgment entry that it was awarding *legal custody* to Paine. "Legal custody vests in the custodian the physical care and control of the child while residual parental rights and responsibilities remain intact. See R.C. 2151.011(B)(17). Unlike permanent custody, granting legal custody does not terminate the parent-child relationship." *In re Fulton*, Butler App. No. CA2002-09-236, 2003-Ohio-5984, ¶7. In the present case, Mother's parental rights were not terminated. She has retained residual parental rights and responsibilities towards M.M., including contact and visitation rights and a duty of support.

{¶8} R.C. 2151.353(A)(3) provides that if a child has been adjudicated abused, neglected, or dependent, the juvenile 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." *In re A.L.H.*, Preble App. No. CA2010-02-004, 2010-Ohio-5425, ¶8, quoting *In re C.K.*, Butler App. No. CA2008-12-303, 2009-Ohio-5638, ¶10. "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." (Internal quotation marks omitted.) *In re A.L.H.*, 2010-Ohio-5425, ¶8.

{¶9} In order to determine the best interest of a child, R.C. 3109.04(F)(1) requires that the juvenile court consider all relevant factors. These factors include, but are not limited to: 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. See R.C. 3109.04(F)(1).

{¶10} An appellate court reviews a juvenile court's custody determination for an abuse of discretion. *In re Brown* (2001), 142 Ohio App.3d 193, 198. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *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.

{¶11} In her assignment of error, Mother argues that the juvenile court's decision awarding custody to Paine is not supported by the evidence. Mother contends that awarding custody to a nonparent third party is improper when there is evidence that Mother was ready, willing, and able to provide for the child. Mother further contends it was an error to award custody to Paine when the evidence demonstrates that the guardian ad litem did not fully investigate Mother's progress in meeting her case plan for reunification.

{¶12} A review of the record indicates that the juvenile court considered all of the relevant factors set forth in R.C. 3109.04(F)(1) before awarding custody of M.M. to Paine. Although the juvenile court did not have the opportunity to interview M.M. in chambers prior to rendering its decision, the guardian ad litem's report and testimony by Paine indicated that M.M. expressed a desire to remain in Paine's care. Further, the evidence demonstrated that M.M. was doing well in Paine's care and that a positive bond had formed between the two. Both the guardian ad litem's report and Paine's testimony described instances where M.M. had referred to Paine as "Mom" and times where the child had confided in Paine about her concerns and hopes for the future.

{¶13} The record further indicates that M.M. has adjusted well to her new life in

Indiana. While under Paine's care, M.M. has started attending church and has become involved with the church's youth group. M.M. is enrolled in high school as a freshman and has joined the cross country team. M.M.'s school grades are improving, and Paine has played an active role in the improvement. For example, when Paine discovered M.M. was failing a computer course, Paine arranged for M.M. to take typing tutorials and receive additional tutoring from her computer teacher. M.M.'s computer skills have progressed, and she is now passing the course. Further, Paine is teaching M.M. how to budget and save money for the future and the two have started a college fund for M.M.

{¶14} Paine, who is employed as a commercial real estate broker, is able to provide for M.M.'s health and physical needs. Paine and M.M. reside in a three bedroom condominium that has been approved by a children services agency in Indiana.¹ The child has her own room, clothing, and personal belongings. Paine has obtained counseling, a medical card, dental and orthodontic care for M.M.

{¶15} Paine testified that she encourages M.M. to maintain contact with her family members. Paine takes M.M. to see extended family members who reside in Indiana. Paine testified that she permits M.M. to contact Mother by phone and would allow M.M. to see Mother if Mother wished to visit the child in Indiana. Mother testified that Paine even brought M.M. to a park in Ohio on one occasion so that M.M. could attend a birthday party Mother threw for the child.

{¶16} The record demonstrates that M.M.'s relationship with Mother is complex. By Mother's own admission, M.M. had not resided with Mother for more than seven years. Although Mother and M.M. have had some telephone contact since June 28, 2010, Mother had not visited the child in Indiana, despite the fact that visitation has been made available to

1. At the November 9, 2010 hearing, Sword testified that a children services agency in Indiana was doing courtesy visits of Paine's home and providing quarterly progress reports to Fayette County's Children Services.

her. Both Paine and Mother testified that during Mother's initial phone conversations with M.M., the child appeared upset and angry with Mother. However, both Paine and Mother agree that M.M.'s attitude towards Mother has improved.

{¶17} The record further indicates that although Mother wishes to have M.M. reside with her, Mother has failed to complete the necessary requirements set forth in her Children Services' case plan. Although Mother testified that she recently moved into a two bedroom home that has working utilities, Mother failed to give notice of her move to Children Services. Consequently, a home study could not be completed to determine the safety of the home for M.M. Mother also failed to comply with her case plan as she did not attend the required parenting classes. Mother testified that she was unable to travel to attend the parenting classes because her motor vehicle broke down, and she did not have the funds to repair it. Mother understood the potential consequences of failing to complete her case plan, and admitted on direct examination that "I would like to have custody. I'm not going to lie. But with me not completing the case plan, I cannot see it."

{¶18} The record also indicates that there is cause for concern regarding Mother's ability to take care of M.M.'s basic needs if the child were placed in Mother's custody. Mother does not have reliable transportation. Although Mother works approximately seventeen hours a week at Burger King, Mother's salary does not always meet her expenses. Further, Mother is currently in arrearages for child support.

{¶19} While Mother has made strides towards improving her relationship with M.M., based on the evidence in the record, we cannot say that the juvenile court abused its discretion in finding it was in the best interest of the child to grant legal custody to Paine. While Mother's desire to have custody of M.M. is apparent, the evidence indicates that Mother has not met her case plan for reunification with the child. Further, M.M. is doing very well in Paine's care, M.M. desires to remain in Paine's custody, and the guardian ad litem

supports awarding legal custody of M.M. to Paine.

{¶20} Accordingly, Mother's assignment of error is overruled.

{¶21} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

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