

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

IN THE MATTER OF:

C.A.

:
:
:
:
:

CASE NO. CA2014-07-165

OPINION
4/13/2015

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2012-0133

Law Office of Nicole M. Stephenson, LLC, Nicole M. Stephenson, 30 North D Street,
Hamilton, Ohio 45013, Guardian Ad Litem

Garrett Law Offices, Dawn S. Garrett, 9435 Waterstone Boulevard, Suite 140, Cincinnati,
Ohio 45249, for appellant

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government
Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee, Butler
County Children's Services

Carl D. Faris, 225 Court Street, Hamilton, Ohio 45011, for appellee, M.C. and S.C.

John D. Treleven, 810 Sycamore Street, 2nd floor, Cincinnati, Ohio 45202, for B.A.

M. POWELL, P.J.

{¶ 1} Appellant, Mother of C.A., appeals a decision of the Butler County Court of
Common Pleas, Juvenile Division, granting legal custody of her child to appellees,

Grandmother and Grandfather. For the reasons stated below, we affirm the decision of the juvenile court.

{¶ 2} On April 2, 2012, Butler County Department of Job and Family Services (Agency) filed a complaint alleging C.A. was an abused, neglected, and dependent child. The complaint was filed after Mother took two-year-old C.A. to Cincinnati Children's Hospital and several suspicious bruises were found on the child including a blackened eye, bruises on his penis, and bruises on both of his ears. C.A. was placed in the emergency custody of Great Aunt and Uncle.

{¶ 3} The suspects of the abuse were Mother, Grandfather, and Mother's boyfriend.¹ Grandmother was not a suspect because she had recently moved several hours away after receiving a job in Kentucky. Law enforcement conducted an investigation into the abuse and excluded Grandfather as a suspect. However, law enforcement was unable to further identify the perpetrator of the abuse. A no-contact order prohibited Boyfriend from having any contact with C.A. Mother and Father were permitted to have parenting time with C.A.

{¶ 4} On August 28, 2012, Mother and Father stipulated that C.A. was an abused and dependent child. Thereafter, Grandparents, Mother, and Father all separately filed for legal custody of C.A. A magistrate conducted a hearing regarding the motions for legal custody. During the hearing, Mother's credibility was questioned. Evidence was presented suggesting that Mother has lied to protect Boyfriend and that she continues to have a relationship with him despite believing he was involved in the abuse. At the time of the hearing, both Grandmother and Grandfather had moved to Paducah, Kentucky which is approximately six hours away from Mother and Father.

1. Mother notes that the magistrate used the incorrect last name for Boyfriend in its decision and order. Whether or not the incorrect last name for Boyfriend was used is not germane to this appeal and therefore we will not address this issue.

{¶ 5} On February 21, 2014, the magistrate found it was in the best interest of C.A. for legal custody to be granted to Grandparents. In its decision, the magistrate noted that Grandparents have a bonded relationship with C.A. and have been his primary caregivers for a large portion of his life. The magistrate also stated that despite Mother's denial of her relationship with Boyfriend, there was "substantial and credible evidence" that Mother continues to have contact with Boyfriend. Based on this evidence, and other evidence demonstrating Mother has lied during the case, the magistrate found Mother not credible. The magistrate also found C.A. should not be placed with Father because Father has not completed the recommended substance abuse program and does not have independent housing. The magistrate noted its concerns that Grandparents live several hours away from Mother, Father, and C.A.'s extended family but noted Mother's family members who live in between Grandparents and Mother have offered to facilitate parenting time. Therefore, the magistrate granted Grandparents' motion for legal custody of C.A.

{¶ 6} Following objections to the magistrate's decision, the juvenile court affirmed the decision granting legal custody to Grandparents. The court amended the visitation order to allow for a "reasonable" visitation schedule as arranged by agreement of the parties.

{¶ 7} Mother now appeals, asserting two assignments of error. For ease of discussion, we will address Mother's assignments of error together.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE COURT PREJUDICIALLY ERRED IN ITS FACTUAL FINDINGS AS APPLIED TO THE STATUTORY BEST INTEREST FACTORS AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO MATERNAL GRANDPARENTS, DID NOT MAKE A SPECIFIC PARENTING TIME ORDER, AND FOUND SUCH TO BE IN THE CHILD'S BEST INTERESTS.

{¶ 10} Assignment of Error No. 2:

{¶ 11} THE COURT'S CUSTODY ORDER IS NOT IN THE CHILD'S BEST INTERESTS AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 12} Mother argues the juvenile court abused its discretion by granting legal custody of C.A. to Grandparents instead of Mother as it was not in the child's best interest. Mother also argues the juvenile's court decision awarding legal custody to Grandparents was against the manifest weight of the evidence. Mother maintains that it is not in the best interest of C.A. to be in Grandparents' legal custody because Grandparents live several hours away from Mother and Father. Instead, Mother argues she should be designated legal custodian or at the very least, if it is in the best interest of C.A. for Grandparents to have legal custody, then the juvenile court should have provided a more specific parenting time order.

{¶ 13} Legal custody proceedings vest in the custodian the right to have physical care and control of the child, subject to any residual parental rights and responsibilities that remain intact with the birth parents. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, ¶ 14-15. R.C. 2151.353(A)(3) provides that if a child has been adjudicated abused, dependent, or neglected, a juvenile court may 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." A juvenile court, therefore, "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 L.A.B.*, 12th Dist. Fayette No. CA2012-03-008, 2012-Ohio-5010, ¶ 12. "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." *Id.*

{¶ 14} A juvenile court's custody determination under R.C. 2151.353 must be based on the best interests of the child. *In re K.B.*, 12th Dist. Butler No. CA2012-03-063, 2013-Ohio-858, ¶ 11. In determining the best interests of the child, the juvenile court must consider all relevant factors, including, but not limited to the applicable factors set forth in

R.C. 3109.04(F)(1). *Id.* at ¶ 11; see R.C. 2151.23(F)(1). Such factors include the following: the wishes of the parents; 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 the caregiver or parent has established or is planning to establish a residence outside the state. R.C. 3109.04(F)(1).

{¶ 15} An appellate court reviews a juvenile court's custody determination for an abuse of discretion. *In re S.K.*, 12th Dist. Butler No. CA2013-06-108, 2014-Ohio-563, ¶ 12. 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 which a juvenile 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.*, 12th Dist. Warren No. CA2008-12-148, 2009-Ohio-4824, ¶ 17, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988). Thus, "an appellate court affords deference to a judge or magistrate's findings regarding witnesses' credibility." *In re D.R.*, 12th Dist. Butler Nos. CA2005-06-150 and CA2005-06-151, 2006-Ohio-340, ¶ 12.

{¶ 16} Moreover, a manifest weight challenge concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In a manifest weight challenge "a reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the

finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Schneble v. Stark*, 12th Dist. Warren Nos. CA2011-06-063 and CA2011-06-064, 2012-Ohio-3130, ¶ 67. "[E]very reasonable presumption must be made in favor of the judgment and the finding of facts." *Eastley* at ¶ 21. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment * * *." *Id.*

{¶ 17} At the hearing, Erin Jackson, an Agency caseworker, testified that while the abuse complaint was filed in April 2012 and Boyfriend was a suspect, Mother did not evict Boyfriend from her residence until February 2013. However, after February 2013, the Agency has not discovered evidence that Mother is in a relationship with Boyfriend. The Butler County Sheriff's Office has spontaneously visited Mother and has not observed Boyfriend at her residence. Mother has completed her case plan, attended parenting classes and therapy, has a full-time job, stable housing, and regularly attends her weekly seven hours of unsupervised parenting time with C.A. Jackson noted that Mother has provided conflicting information regarding who was responsible for C.A.'s abuse. Initially, Mother denied that Boyfriend was ever alone with C.A. but then conceded that Boyfriend watched C.A. and was primarily responsible for C.A.'s potty-training. She also noted that Mother lied during an Agency psychological evaluation regarding having an abortion. Jackson stated she would be "concerned" if Mother continued to see Boyfriend.

{¶ 18} Mother testified that she has a loving and close relationship with C.A., has always been his primary caregiver until the abuse complaint was filed, and she wishes to have legal custody of her son. Mother acknowledged that she did not evict Boyfriend until several months after the abuse complaint was filed, but stated she no longer has a relationship with Boyfriend. She now believes C.A. was abused and that Boyfriend and Grandfather were involved in the abuse. She explained that the parenting classes and

therapy have made her a better parent and taught her how to be alone. Mother stated that if Grandparents are granted legal custody it will be difficult for her to consistently see C.A. due to the long distance between Grandparents and Mother.

{¶ 19} Mother admitted that during the abuse investigation she told multiple stories about what happened to C.A. Children's Hospital medical records indicate that Mother told medical personnel that Boyfriend was never alone with C.A. and that she noticed bruising on C.A.'s penis a week prior but believed the bruise was caused by being too tightly strapped into a car seat. Mother also explained C.A. received the black eye when he fell off the toilet and hit the sink counter. However, at the hearing, Mother stated she didn't notice the bruise on C.A.'s penis until the morning she took C.A. into Children's Hospital. She also admitted that Boyfriend was alone with C.A. because he was primarily responsible for potty-training. Mother explained the inconsistency by stating she was misquoted in the hospital records.

{¶ 20} Other evidence was also admitted into the record questioning Mother's credibility. As part of her case plan, Mother completed a psychological evaluation where she stated that she was once pregnant with twins and miscarried due to alcohol abuse. In the evaluation, it also states Mother reported Father abused her during their marriage. At the hearing, Mother admitted that she lied about the miscarriage and instead had an abortion to terminate the pregnancy. However, Mother denied telling the evaluator Father abused her and reiterated her desire for Father to have legal custody of C.A. if she is not granted custody. Mother also acknowledged that during one of her days of unsupervised parenting time, she left C.A. alone in a car that was running while she went into a store and that she subsequently lied to an Agency caseworker about this incident.

{¶ 21} Several witnesses testified that Mother continues to see Boyfriend despite denying her involvement with him. According to Great Aunt, C.A. reported to her that Boyfriend appeared in a tow truck during Mother's visitation time. Great Aunt also indicated

that C.A. often sees two girls at Mother's house and explained that Boyfriend has two daughters. Edward Opp, a private investigator hired by Grandparents, observed Mother and Boyfriend together at a bar and at Mother's home after the time Mother stated she ended her relationship with Boyfriend. Opp submitted pictures of a man leaving Mother's residence on August 4, 2012. Opp and Mother's sister identified the man as Boyfriend. Further, Mother's Step-Great Grandfather testified that he observed Mother and Boyfriend outside Mother's home on several occasions in 2012 and 2013.

{¶ 22} Mother's neighbor testified that Mother is a great mom and she has never seen Boyfriend at Mother's house. The neighbor explained that Boyfriend is sometimes in Mother's neighborhood because he has friends across the street from Mother's house. Additionally, the neighbor identified the man in Opp's pictures as her husband, who often helps Mother with things around her house. Mother's co-worker also testified that she has observed Mother with C.A. and she is kind and loving. The co-worker stated Mother kicked out Boyfriend in April 2012 and the man in the pictures was the neighbor's husband.

{¶ 23} Great Aunt testified that Grandparents have a close and loving relationship with C.A., the child looks forward to Grandparents' visits, and is sad when Grandparents leave. Great Aunt explained that when temporary custody was granted to her and Great Uncle, Mother dropped C.A. off at their house with very little supplies and Mother did not return with additional items. While C.A. has been in the custody of Great Aunt and Uncle, Grandparents have bought groceries, clothing, toys, medicine, and diapers for the child. Additionally, Grandparents assisted with C.A.'s birthday party. Great Aunt also stated that C.A. reports to her that Mother allows Father to see C.A. unsupervised. She stated C.A. has had difficulty potty-training and does not want to tell them when he goes to the bathroom in his pants. C.A. reportedly told Great Aunt that during potty-training, Boyfriend hurt his penis and "flicked" his penis. Lastly, Great Aunt stated C.A. has behavioral issues before and after his

parenting time with Mother.

{¶ 24} Grandmother stated that she and Grandfather have been actively involved in the care of C.A. since his birth in January 2010. At the time of C.A.'s birth, Mother and Father were married and Grandparents assisted Mother and Father by providing child care five days a week, four hours a day. After Mother and Father separated in late 2010, C.A. lived with Grandparents during the week and then on a full-time basis for the next year and a half. Mother did not always live with Grandparents while C.A. was staying there. When Grandmother got a job in Kentucky, C.A. continued to stay with Grandfather full-time and was beginning to transition to staying with Mother on the weekends.

{¶ 25} Grandmother testified that she and Grandfather have provided for most of C.A.'s material needs. While Mother paid some rent to Grandparents while she was living at their house, she did not make any contribution to C.A.'s housing or other expenses when she was not living with Grandparents. After C.A. was placed in the temporary custody of Great Aunt and Uncle, Grandparents continued to see C.A. every month to six weeks. Both Grandmother and Grandfather now live in Kentucky and maintain contact with C.A. by talking to him over the telephone or "Skyping" him.

{¶ 26} Grandmother acknowledged that she and Grandfather live six hours away from Mother, but stated Mother could visit C.A. at their home in Kentucky or Mother could stay with extended family. Grandmother also stated they would drive to Ohio monthly to allow Mother and Father visitation time with the child. Grandmother conceded that moving C.A. to Kentucky would take him away from most of his extended family.

{¶ 27} Father testified that he wished to have legal custody of C.A., but if he could not have custody, then he desired Grandparents be designated legal custodians. Father admitted he has tested positive for marijuana and has not completed an outpatient drug treatment program recommended by the Agency. Finally, the guardian ad litem

recommended that legal custody be awarded to Grandparents.

{¶ 28} Upon a thorough review of the record, we find the juvenile court did not abuse its discretion in granting legal custody of C.A. to Grandparents, nor do we find the juvenile court's decision was against the manifest weight of the evidence. Grandparents have a close relationship with C.A., have served as his primary caregivers for an extended period, and provided for his material needs. It is apparent that Mother loves C.A. and has attended parenting classes and therapy as recommended by the case plan. However, C.A. was abused when in Mother's custody and while Mother suspects Boyfriend was the perpetrator of some of the abuse, Mother has repeatedly lied and continues to have a relationship with Boyfriend despite the potential danger he presents to C.A. Father has failed to complete a drug treatment program or obtain independent housing.

{¶ 29} The juvenile court's visitation order allowing Mother and Father "reasonable" visitation as arranged by the parties was also not in error. Because this case involved granting legal custody of an abused and neglected child to Grandparents, Mother's and Father's residual parenting rights only included "the privilege of reasonable visitation." R.C. 2151.011(B)(48). R.C. Chapter 21 does not require the reasonable parenting time order to be specific. See *In re M.E.*, 10th Dist. Franklin No. 12AP-684, 2013-Ohio-2562, ¶ 20-25; R.C. 3109.051 (specific parenting time schedule in divorce, dissolution, legal separation, or annulment). The juvenile court's order was reasonable as the evidence demonstrated that Grandparents will facilitate Mother and Father's parenting time despite living several hours away. The juvenile court also stated that "failure of the parties to set a reasonable visitation schedule shall constitute a 'change of circumstances' and any party may file a motion with the Court accordingly."

{¶ 30} While the grant of legal custody to Grandparents means that C.A. will live several hours away from Mother, Father, and extended family members, granting

Grandparents legal custody was in C.A.'s best interest. The juvenile court's parenting time order was also in C.A.'s best interest. Therefore, having found no abuse of discretion in the juvenile court's decision awarding Grandparents legal custody of C.A., and concluding the juvenile court's decision was not against the manifest weight of the evidence, Mother's first and second assignments of error are overruled.

{¶ 31} Judgment affirmed.

S. POWELL and HENDRICKSON, JJ., concur.