

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

IN THE MATTER OF:

E.T.B.

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CASE NO. CA2014-07-051

OPINION
7/27/2015

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2010-JG-17960

Jamie L. Turner, 212 West 8th Street, Cincinnati, Ohio 45202, for appellant

R.D.M., 114 Shady Lane, Amelia, Ohio 45102, appellee, pro se

M. POWELL, J.

{¶ 1} Appellant, M.M.B. (Mother), appeals a decision of the Clermont County Court of Common Pleas, Juvenile Division, granting visitation rights to appellee, R.D.M. (Grandfather), the paternal grandfather of her son, E.T.B.¹

{¶ 2} Mother and C.M. (Father) are the parents of E.T.B. who was born in October

1. We note that Grandfather did not file an appellate brief. In such an instance, "in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C); *State v. Spicer*, 12th Dist. Butler No. CA2009-02-036, 2009-Ohio-6173, ¶ 6.

2009. Mother and Father never married. Mother and Father separated about six months after E.T.B. was born. Mother was named legal custodian and residential parent of E.T.B. in June 2010. Following a motion for visitation, Father was awarded parenting time in January 2011. However, because Father failed to exercise the parenting time he was awarded, it was suspended in December 2011. Father has not sought to re-establish his parenting time with E.T.B.

{¶ 3} Prior to the separation of Mother and Father, Grandfather regularly saw E.T.B. After Mother and Father separated, Grandfather continued to regularly see E.T.B. on the weekends when Mother was working or out of town visiting a former boyfriend. However, in August 2012, Mother stopped Grandfather's visitation with E.T.B. after she learned Father had visited Grandfather while E.T.B. was in Grandfather's care. As a consequence of Mother's refusal to permit Grandfather to continue visiting with E.T.B., Grandfather filed a complaint for visitation in the juvenile court on November 13, 2012. A hearing on Grandfather's complaint was held in April 2013.

{¶ 4} Regarding the incident precipitating Mother's termination of Grandfather's visitation with E.T.B., Grandfather testified he was watching E.T.B. at his home when Father with his young daughter unexpectedly stopped at Grandfather's house. Knowing that Mother did not want Father to be around E.T.B., Grandfather only allowed his granddaughter to enter the home. Father remained outside on his cellphone, trying to arrange for someone to pick him and his daughter up from Grandfather's house. Grandfather denied Father spent time with E.T.B. "at that time." Grandfather testified he did not know Father's parenting time was suspended and that he would honor a court order forbidding contact between Father and E.T.B. Grandfather also testified it was "unfair to keep a kid away from his father," no matter what the father did. Grandfather claimed that he and Father are estranged.

{¶ 5} Mother admitted stopping Grandfather's visitation after she "found out he was

letting [Father] see [E.T.B.] behind [her back]." Mother testified she does not trust Grandfather, does not believe he is estranged from Father as she has seen Grandfather at Father's work place, and is concerned Grandfather will continue to allow Father to visit with E.T.B. Nonetheless, following Grandfather's complaint for visitation, Mother eventually agreed to allow Grandfather to visit with E.T.B. at her home. However, after Grandfather and Mother's boyfriend got into a verbal altercation during a second visit in January 2013, Mother ended all visitation between Grandfather and E.T.B.

{¶ 6} With regard to the altercation, Mother testified Grandfather was already visiting with E.T.B. when she came home from work. Grandfather and E.T.B. were playing in E.T.B.'s bedroom. As Mother went to E.T.B.'s bedroom to see him, E.T.B. closed the bedroom door "in [her] face." After Mother unsuccessfully tried to discipline E.T.B., she reported the incident to her boyfriend. Mother testified that as her boyfriend was verbally disciplining E.T.B. for closing his bedroom door in Mother's face, Grandfather became angry, Grandfather and the boyfriend got into each other's faces, and Grandfather threatened to "bash [Mother's boyfriend's] face in."

{¶ 7} Grandfather testified the altercation occurred when Grandfather calmly told the boyfriend not to yell at E.T.B. as the boyfriend was verbally disciplining the child. Grandfather testified the boyfriend became angry, kicked and punched a door, and told Grandfather he was no longer allowed in Mother's home. Grandfather has not seen E.T.B. since the verbal altercation with Mother's boyfriend. Grandfather testified he loves E.T.B. very much, is attached to him, and misses him. Grandfather's sister testified E.T.B. has been a big part of their life and that the child was always happy when he was with Grandfather and his paternal relatives.

{¶ 8} Mother testified she has another son, L.B., who has spina bifida and requires 24-hour care. L.B. is two years younger than E.T.B. Mother works from 9:00 a.m. to 3:00

p.m. every day before picking up E.T.B. from daycare and returning home at 4:00 p.m. to care for L.B.

{¶ 9} Mother further testified she has other concerns regarding Grandfather. Specifically, Mother testified that (1) E.T.B. has come back from visitation with Grandfather with sunburns, (2) when E.T.B. was on a strict nutritional diet due to his low iron level, Grandfather did not follow the diet recommendations despite her request that he do so; as a result, Mother had to start "from square one every time [she] got [E.T.B.] back," and (3) on more than one occasion, Grandfather has made sexual comments to her. Mother testified that as a result of the January 2013 altercation and the foregoing concerns, she became more uncomfortable with Grandfather.

{¶ 10} Grandfather denied making any inappropriate or sexual comments to Mother. Grandfather admitted E.T.B. once suffered a sunburn while in his care but described the burn as "a little sun burnt." Mother admitted that both the animosity between her and Father and her concerns regarding Grandfather affect her relationship with Grandfather.

{¶ 11} On May 3, 2013, the magistrate granted Grandfather's complaint for visitation. Upon considering the applicable statutory factors and Mother's reasons for opposing visitation, the magistrate found that Grandfather "played a significant role in the life of [E.T.B.] from [the child's] birth until August 2012 and therefore should be awarded companionship rights with [E.T.B.]." The magistrate further found that "[t]he majority of [Mother's] issues are with [Father], not [Grandfather], although it is unclear what those issues are." Grandfather was awarded visitation on the second and fourth weekend of every month, from 10:00 a.m. on Saturday until 6:00 p.m. on Sunday. The magistrate's decision prohibited Grandfather from allowing any contact between Father and the child during visitation time.

{¶ 12} Mother filed objections to the magistrate's decision. After obtaining new counsel, Mother filed amended objections in which she raised, for the first time, the issue of

Grandfather's possible sexual abuse of E.T.B. After a hearing on Mother's objections, and "in view of the serious nature of the sexual abuse allegations," the juvenile court remanded the matter to the magistrate "for a full hearing to consider all evidence not previously presented to the Court."

{¶ 13} The hearing was held on February 26, 2014. Grandfather, his other son "Corey," Mother, and Mother's boyfriend all testified. The testimony of Mother and Grandfather at the hearing was largely duplicative of their testimony at the April 2013 hearing. The testimony indicated that Grandfather has not seen E.T.B. since January 2013; when Grandfather was able to visit with E.T.B., the two of them were bonded and had a close relationship; E.T.B. was always happy and excited to see Grandfather; and E.T.B. was able to see his paternal relatives often and develop relationships with them.

{¶ 14} Mother reiterated her distrust of Grandfather and her serious concern Grandfather will allow Father to visit with E.T.B. With regard to E.T.B.'s previous diet, Mother testified it was implemented to prevent E.T.B. from becoming anemic. Nonetheless, Grandfather told her the diet was ridiculous, he would not follow it, and instead would feed E.T.B. whatever he wanted. By contrast, Grandfather testified he took Mother's diet requests seriously and followed the diet. Grandfather reiterated he would not allow contact between Father and E.T.B. absent a court order.

{¶ 15} With regard to the January 2013 altercation, Mother's boyfriend testified it occurred when Grandfather became angry at the way the boyfriend was talking to E.T.B., got into the boyfriend's face, and threatened to beat him up. According to the boyfriend, the altercation took place inside Mother's home in front of E.T.B. and the boyfriend's child. The boyfriend testified that he does not trust Grandfather and that he fears for the health and safety of E.T.B. and Mother when they are around Grandfather.

{¶ 16} Both Mother and her boyfriend testified that E.T.B. and his brother L.B. are

closely bonded. With regard to L.B., Mother testified that given L.B.'s serious medical issues, the task of caring for him is a difficult, hands-on job. Mother takes over his care when she gets home at 4:00 p.m. during the week and takes care of him from 4:00 p.m. to 10:00 p.m. As a result, the only time she can spend quality time with E.T.B. is during the weekends. Mother works from 9:00 a.m. to 3:00 p.m. every week, Monday through Saturday, and every other Sunday from 2:00 p.m. to 5:00 p.m.

{¶ 17} The hearing also addressed the issue of Grandfather's possible sexual abuse of E.T.B. Mother testified that in May 2011, she took E.T.B. to the Mayerson Center for Safe and Healthy Children at Cincinnati Children's Hospital for an examination after noticing that E.T.B.'s bottom was red after visiting Grandfather. The result of the examination was that sexual abuse could neither be substantiated nor ruled out. The Mayerson Center's report was admitted into evidence and stated in relevant part:

Mom stated that a friend of her's [sic] brought her child to the Mayerson Center, and told her about it, so mom thought she would have her son examined. Mom stated that Pt is watched at times by his paternal grandfather. Mom stated that often when Pt comes home, his bottom is very red. Mom stated she understands that this can be just diaper rash, but feels that his bottom is not red like that when he is with her. * * * SW explained that a medical exam cannot really confirm or deny mom's concerns, and Mom expressed that she understood this.

{¶ 18} Grandfather testified the first time he learned of Mother's abuse allegations or of E.T.B.'s visit to the Mayerson Center was when Mother filed objections to the magistrate's decision. Both Grandfather and his son Corey testified that Mother never expressed concerns that Grandfather was abusing E.T.B., and that following E.T.B.'s May 2011 examination at the Mayerson Center, Grandfather continued to regularly have E.T.B. on the weekends until August 2012. Mother admitted that following the inconclusive report she started to mistrust Grandfather but continued to allow him to visit with E.T.B.

{¶ 19} Both Mother and Grandfather testified about E.T.B.'s diaper rash. According to

Grandfather, E.T.B. always had diaper rash when he was younger, and thus, Grandfather always used the ointment provided by Mother for the rash. Grandfather testified Mother never talked to him about E.T.B.'s red bottom. By contrast, Mother testified she talked to Grandfather about the child's red bottom, did not agree with his assessment it was diaper rash, and consequently took E.T.B. to the Mayerson Center for an examination.

{¶ 20} Grandfather believes that Mother is a good parent and that her concerns with Grandfather visiting with E.T.B. stem from her fear Father will be able to spend time with the child during Grandfather's visitation, notwithstanding Father's suspended parenting time. Mother testified that while Grandfather loves E.T.B., she worries about E.T.B.'s health and safety while in Grandfather's care. Believing it was in E.T.B.'s best interest, Mother started withholding Grandfather's visitation time with the child after she began not trusting Grandfather.

{¶ 21} On March 14, 2014, after considering the additional testimony, the magistrate once again granted visitation rights to Grandfather on the ground Grandfather "played a significant role in the life of [E.T.B.] from [the child's] birth until August 2012 and therefore should be awarded companionship rights with [the child.]" The magistrate's decision was also identical to its May 3, 2013 decision with regard to the visitation schedule and prohibiting Grandfather from allowing any contact between Father and the child during Grandfather's visitation time.

{¶ 22} Mother filed objections to the magistrate's decision; the juvenile court held a hearing on the objections. On June 30, 2014, the juvenile court overruled Mother's objections and granted visitation rights to Grandfather. After reviewing the evidence in the record under the applicable statutory factors, the juvenile court found that

The wishes and concerns of the mother are very clear. She does not want to co-parent with the child's grandfather, and she does not trust the grandfather. Case law indicates that her

wishes are to be given special consideration in determining whether to grant visitation. Even if companionship time is granted, her wishes as to the time and duration of the visitation should also be taken into consideration (internal citation omitted.)

* * *

Upon an analysis of the factors discussed above, and giving special weight to the wishes of the mother, the Court finds it would be in the best interest of the child to spend time with his grandfather on the weekends while his mother is working. Visitation with the grandfather will allow the child to spend time with the extended family on his father's side while not sacrificing too much time away from his mother. The testimony before this Court indicates that visitation with the extended family in the past was a very positive experience for the child. The Court believes it to be in the child's best interest to know his father's side of the family and share time with them even if the father himself chooses not to be in the picture.

Taking into consideration the mother's wishes, the child's age, and the mother's concerns, the Court believes it would be in the best interests of the child to modify the companionship time.

The juvenile court awarded Grandfather visitation time every Saturday from 8:00 a.m. until 7:00 p.m. while Mother is working, and every other Sunday from 1:00 p.m. until 7:00 p.m. while Mother is working. The juvenile court's decision continued to prohibit Grandfather from allowing any contact between Father and the child during visitation time.

{¶ 23} Mother appeals, raising one assignment of error:

{¶ 24} THE LOWER COURT ABUSED ITS DISCRETION IN FINDING THAT [GRANDFATHER'S] VISITATION WAS IN THE CHILD'S BEST INTEREST.

{¶ 25} Mother argues the juvenile court erred in awarding Grandfather visitation with E.T.B. against her wishes. Mother argues the juvenile court failed to give special weight to her wishes and concerns regarding Grandfather's visitation with E.T.B. In support of her argument, Mother cites *In re N.C.W.*, 12th Dist. Butler No. CA2013-12-229, 2014-Ohio-3381.

{¶ 26} An appellate court will not reverse a trial court's decision granting or denying visitation rights absent an abuse of discretion. *King v. King*, 12th Dist. Warren No. CA2006-

01-009, 2006-Ohio-5985, ¶ 8. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Id.*

{¶ 27} It is well-established that a parent has a fundamental right to make decisions regarding the care, custody, and control of her own child. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054 (2000); *In re N.C.W.*, 2014-Ohio-3381 at ¶ 18. By contrast, "grandparents have no constitutional right of association with their grandchildren." *In re Martin*, 68 Ohio St.3d 250, 252 (1994). In addition, "the law does not provide grandparents with inherent legal rights based simply on the family relationship." *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, ¶ 9. Grandparents may only be granted visitation rights with their grandchildren as provided for by statute. *In re Martin* at 252. "Given that a fit parent has a *fundamental right* to parent whereas the nonparent has only a statutory right to request visitation, the nonparent advocating visitation has the burden to prove that visitation will be in the child's best interest." (Emphasis sic.) *In re N.C.W.* at ¶ 25.

{¶ 28} R.C. 3109.12(A) provides, in relevant part, that "[i]f a child is born to an unmarried woman and if the father of the child has acknowledged the child * * * or has been determined * * * to be the father of the child, * * * the parents of the father and any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights to the child." A trial court may grant visitation rights to grandparents only if it determines that such visitation is in the best interest of the child. R.C. 3109.12(B); *In re Martin* at 252.

{¶ 29} In determining whether to grant visitation rights to a grandparent, the trial court is required to consider all relevant factors, including the 16 factors listed in R.C. 3109.051(D). Here, the juvenile court examined all of the statutory factors.² However, we agree with the

2. We note that in its decision, the juvenile court mistakenly stated that "the factors contained in R.C. 3109.051(D)(11)-(15) are not applicable to the case." Factor 15 refers to the wishes and concerns of a child's

juvenile court's primary focus on the factors set forth in R.C. 3109.051(D)(1), (3), (7), and (15), which are:

(1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;

* * *

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

* * *

(7) The health and safety of the child;

* * *

(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

{¶ 30} Although rebuttable, there is a presumption that "fit parents act in the best interest of their children." *Troxel*, 530 U.S. at 68; *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 44; *In re J.T.S.*, 12th Dist. Preble No. CA2014-09-009, 2015-Ohio-364, ¶ 26. Absent an allegation of parental unfitness, the parents' determination of their child's best interest must be afforded "special weight." *Troxel* at 69; *In re N.C.W.*, 2014-Ohio-3381 at ¶ 21. "In fact, special weight is required by R.C. 3109.051(D)(15), since the statute explicitly identifies the parents' wishes regarding the requested visitation * * * as a factor that must be considered when making its 'best interest of the child' evaluation." *Harrold* at ¶ 43. Consequently, a fit parent's decision regarding visitation should be afforded great deference. *In re J.T.S.* at ¶ 26; *Baker v. Baker*, 12th Dist. Brown No. CA2002-04-008, 2003-Ohio-731, ¶

parent. A review of the juvenile court's decision shows that the court considered Mother's wishes and concerns. We agree with the juvenile court that the factors set forth in R.C. 3109.051(D)(11)-(14) are not applicable here.

10. We note there are no allegations in the record that Mother is an unfit parent. To the contrary, Grandfather testified that Mother is a good parent.

{¶ 31} Under Ohio's nonparental visitation statutes, a trial court "afford[s] parental decisions the requisite special weight, [and] take[s] into consideration the best interest of the child and balance that interest against the parent's desires." *Harrold* at ¶ 43. When determining whether it is in the best interest of the child to grant nonparental visitation, the parent's wishes and concerns must also be weighed against the other factors listed under R.C. 3109.051(D). *Celek v. Celek*, 1st Dist. Hamilton No. C-08117, 2009-Ohio-4990, ¶ 10. "[T]he manner in which this standard is to be applied to each case must be 'elaborated with care.' Thus, there must be some meaningful rationale given for either abiding by or overriding the wishes of the parent." *Id.*, citing *Troxel*, 530 U.S. at 73.

{¶ 32} In ruling on Mother's objections to the magistrate's March 14, 2014 decision granting Grandfather visitation with E.T.B., the juvenile court evaluated the requisite statutory factors under R.C. 3109.051(D), acknowledged Mother's concerns and wishes and noted they were "very clear," and gave "special weight to the wishes of the mother." However, notwithstanding the court's reference to giving "special weight" to Mother's wishes and concerns, we find the juvenile court did not give great deference and the requisite special weight to Mother's wishes and concerns. Significantly, the juvenile court did not indicate that Mother's concerns were not credible, but misconstrued and discounted her concerns in favor of what it considered were the other best interest factors favoring visitation with Grandfather.

{¶ 33} Mother advances several legitimate reasons for opposing visitation.

{¶ 34} Mother testified she distrusts Grandfather and is very concerned that if granted visitation rights, Grandfather will allow Father to visit with E.T.B. Mother does not believe Grandfather's claim he is estranged from Father as she has seen Grandfather at Father's work place. Notwithstanding Grandfather's denial he has permitted Father to see E.T.B., this

is a substantial issue in view of Grandfather's expressed belief it is "unfair to keep a kid away from his father." In its decision, the juvenile court did not address this concern when evaluating the applicable factors under R.C. 3109.051(D). Apparently, the juvenile court did not give any weight to such concern, let alone special weight.

{¶ 35} Mother's other concerns regarding Grandfather's visitation included the fact that (1) E.T.B. typically had a red bottom following visitation with Grandfather, (2) Grandfather refused to follow E.T.B.'s strict high-iron diet, (3) there was an altercation between Grandfather and Mother's boyfriend in January 2013 at her home, and (4) Mother will lose her quality time with E.T.B. on the weekends. With regard to E.T.B.'s red bottom upon returning from visitation with Grandfather, the juvenile court found that given E.T.B.'s current age, "it appears that diaper rash would no longer be an issue." With regard to Mother's concern that Grandfather did not follow E.T.B.'s diet, the juvenile court noted that E.T.B. "is no longer on this diet."³

{¶ 36} By observing that E.T.B. was no longer on a special diet, and that due to his age, diaper rash was no longer an issue, the juvenile court misconstrued the import of Mother's concerns. The juvenile court referred to these as "isolated incidents involving the health and safety of the child." This characterization demonstrates that the juvenile court failed to appreciate the broader significance of these concerns. Specifically, and notwithstanding the fact that these particular issues are unlikely to recur, Grandfather's failure to follow E.T.B.'s diet and his apparent failure to use the diaper rash ointment provided by Mother (as evidenced by E.T.B.'s return from visitation with a red bottom) are in direct contravention of Mother's care instructions, and indicative of an attitude that disregards

3. We are aware, as pointed out in the dissent, that there was disputed testimony as to these issues. However, the juvenile court did not, as proposed in the dissent, settle this factual dispute in favor of Grandfather. Rather, the juvenile court merely found that Mother's concerns in this regard were resolved because E.T.B. was no longer in diapers or on a high-iron diet.

Mother's wishes and requests with regard to E.T.B.'s care. Such attitude raises legitimate concerns as to whether future requests by Mother will be followed or ignored. And while the juvenile court found that Grandfather "would look out for the welfare of [E.T.B.]" while caring for him and was "quite confident in his ability" to do so, the issue is what Mother wants with regard to E.T.B.'s care, and not what Grandfather wants.⁴ That Grandfather will attend to E.T.B.'s welfare while exercising his visitation time with him is quite different from doing so in the manner Mother directs. Grandfather never made such a commitment. The juvenile court did not give the requisite special weight to these concerns.

{¶ 37} Additionally, while the juvenile court mentioned the January 2013 altercation between Grandfather and Mother's boyfriend in its summary of the evidence, it was apparently not considered at all by the juvenile court in its decision. Mother's boyfriend was giving instructions to E.T.B. at Mother's direction and Grandfather interfered. It is for Mother, and not Grandfather, to decide how E.T.B. should be instructed and disciplined, particularly in her own home when she is present. Although there was a factual dispute as to exactly what happened, the evidence was unequivocal that Grandfather interceded with an effort by Mother to correct her child. This undermines Mother's parental authority and is another example of Grandfather's attitude that he knows best for E.T.B. regardless of Mother's views on the matter.

{¶ 38} We are especially mindful that Grandfather's failure to respect Mother's approach to rearing E.T.B. occurred in a context where his visitation with E.T.B. was solely dependent upon Mother's goodwill. Such an attitude of disrespect is more likely to worsen than improve if Grandfather's visitation is sanctioned by the force of a court order as opposed

4. In considering an award of visitation, the juvenile court noted that Mother does not want to "co-parent" with Grandfather. An award of visitation to a nonparent relative does not require a fit parent to co-parent with that relative. Yet, the juvenile court did not address this concern.

to Mother's discretion.

{¶ 39} Finally, while the juvenile court noted Mother's concern "about losing her free time with [E.T.B.] on the weekend," the court gave little weight to such concern. In its decision, the juvenile court simply found that granting visitation to Grandfather on the weekends when Mother is working "will allow the child to spend time with [his] extended [paternal] family while not sacrificing too much time away from his mother." The fact that the visitation schedule fashioned by the juvenile court is much greater than Mother's weekend work schedule shows that the juvenile court failed to give the requisite special weight to Mother's concern.⁵

{¶ 40} In the context of custody disputes between parents and non-parents, the Ohio Supreme Court has noted that the child's best interest is an important factor, but "the court's scope of inquiry must, of necessity, be broader in * * * proceedings between a parent and a nonparent, which bring into play the right of the parent to rear his own child." *In re Perales*, 52 Ohio St. 2d 89, 96 (1977). Although this case involves visitation as opposed to custody, it still implicates Mother's right to rear E.T.B. Neither the United States Supreme Court nor the Ohio Supreme Court has defined "the precise scope of the parental due process right in the visitation context." *Harrold*, 2005-Ohio-5334 at ¶ 46. But, whatever the precise scope of the right may be, Grandfather's repeated subversion of Mother's parental prerogatives certainly

5. The dissent asserts that "by awarding Grandfather visitation on the weekends when Mother has to work, the court limited the time that E.T.B. would be away from Mother and his younger brother." However, the number of visitation hours awarded to Grandfather exceeds the number of hours Mother is scheduled to work on the weekends. The dissent also asserts that the juvenile court "clearly took into consideration [Mother's concern about her weekend quality time with E.T.B.] as the juvenile court noted that the ordered visitation schedule was 'subject to modification based upon the [M]other's work schedule.'" However, the record shows that following the juvenile court's June 30, 2014 decision, Grandfather moved for a clarification of the visitation order. On July 14, 2014, the juvenile court clarified its visitation schedule order as follows: "[Grandfather] shall have companionship time with the child at the times listed in the Court's entry. These times are in full force and effect regardless of [Mother's] work schedule until such time as a bona fide schedule change would convince the Court that a modification of companionship time is warranted. Any change to the said hours of visitation provided to the grandfather can only be accomplished through a motion to modify the companionship time filed by either the mother or grandfather."

invades its parameters.

{¶ 41} We find that the juvenile court's failure to recognize that aspect of Mother's concerns relating to Grandfather's repeated failures to respect Mother's parenting style constitutes a failure to give Mother's concerns the requisite special weight required by law. In addition, Mother's fundamental right to parent E.T.B. derives from the Due Process Clause of the Fourteenth Amendment while Grandfather's right to visitation with E.T.B. is purely statutory. We do not question the juvenile court's determination that E.T.B. enjoys a good and positive relationship with Grandfather and his extended paternal family. However, in view of Mother's legitimate reasons for opposing visitation, something more is required in order for Mother's constitutional right to the care and management of E.T.B. to be subordinated to Grandfather's statutory right to visitation. See *Troxel*, 530 U.S. at 72-73. We therefore find that the juvenile court abused its discretion in granting Grandfather visitation with E.T.B.⁶

{¶ 42} In light of all of the foregoing, we reverse the judgment of the juvenile court and remand the matter for the juvenile court to accord special weight to Mother's concerns as set forth in this opinion and based upon the record before the juvenile court.

{¶ 43} Mother's assignment of error is sustained.

{¶ 44} Judgment reversed and cause remanded.

PIPER, P.J., concurs.

HENDRICKSON, J., dissents.

HENDRICKSON, J., dissenting.

6. The dissent chides us for starting down "a slippery slope of ignoring the express, written words of the juvenile court as a means of justifying the substitution of [our] judgment for that of the court below." Suffice it to say that the importance of the constitutional principle involved dictates that we look beyond what the juvenile court said and to what the juvenile court did.

{¶ 45} I respectfully dissent from the majority's opinion. I would affirm the juvenile court's decision granting Grandfather's complaint for visitation because the record demonstrates that the juvenile court considered all relevant R.C. 3109.051(D) factors and gave special weight to Mother's wishes before determining that it was in E.T.B.'s best interest to have visitation with Grandfather.

{¶ 46} I recognize that parents have a fundamental right to make decisions regarding the care, custody, and control of their children and that fit parents are presumed to act in the best interests of their child. See *Troxel v. Granville*, 530 U.S. 57, 66-68, 120 S.Ct. 2054 (2000).⁷ For this reason, if a fit parent's decision not to allow grandparent visitation becomes subject to judicial review, the trial court is required to accord "some special weight" to the parent's own determination. *Id.* at 70; *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, paragraph one of the syllabus. However, while a trial court must give special weight to a fit parent's wishes, "[this] requirement does not mean * * * that a parent's wishes regarding non-parent visitation must prevail." *In re H.A.*, 2d Dist. Montgomery No. 25832, 2013-Ohio-5457, ¶ 8. As the Ohio Supreme Court recognized, "while *Troxel* states that there is a presumption that fit parents act in the best interest of their children, nothing in *Troxel* indicates that this presumption is irrefutable. The trial court's analysis of the best interests of a child need not end once a parent has articulated his or her wishes." *Harrold* at ¶ 44. Indeed, "[b]y stating in *Troxel* that a trial court must accord at least some special weight to the parent's wishes, the United States Supreme Court plurality did not declare that factor to be the sole determinant of the child's best interest." *Id.* "[N]othing in *Troxel* suggests that a parent's wishes should

7. I do not take this fundamental right lightly. In the past, I have recognized and vigorously championed the need to protect parents' fundamental rights to make decisions regarding the care, custody, and control of their children. See *Cottrell v. Cottrell*, 12th Dist. Warren No. CA2013-07-065, 2014-Ohio-646 (Hendrickson, J., concurring in part and dissenting in part). In the present case, the juvenile court also did not take Mother's decisions regarding her parental rights lightly. The record reflects that the court gave the proper weight to her preferences and decisions.

be placed before a child's best interest." *Id.*

{¶ 47} Indeed, a trial court is required to consider the factors set forth in R.C. 3109.051(D) in addition to considering a parent's wishes about visitation. "Ohio's nonparental-visitation statutes not only allow the trial court to afford parental decisions the requisite special weight, but they also allow the court to take into consideration the best interest of the child and balance that interest against the parent's desires." *Harrold* at ¶ 43.

{¶ 48} Contrary to the assertions of the majority, the record in the present case demonstrates that the juvenile court not only considered the factors set forth in R.C. 3109.051(D) in considering Grandfather's complaint for visitation, but the court also gave special weight to Mother's wishes.⁸ The juvenile court ultimately found Mother's concerns and wishes outweighed by other considerations, stating:

[T]he [M]other expressed some concerns with respect to isolated incidents involving the health and safety of the child. The [M]other had the child evaluated for sexual abuse at the Mayerson Clinic, but the results of the evaluation were inconclusive. The [G]randfather continued to provide care for the child following the testing. The [G]randfather testified he used diaper rash ointment on [E.T.B.] when the [M]other provided it. Judging from the child's current age, it appears that diaper rash would no longer be a health issue for the child. The evidence indicates that [E.T.B.] once came home with a sunburn when his [G]randfather took him swimming at a relative's house. Although Mother had concerns that the [G]randfather was not following [E.T.B.'s] high-iron diet, he is no longer on this diet. The concern that the [G]randfather has expressed for the child throughout his testimony leads the Court to conclude the [G]randfather would look out for the welfare of the child during companionship time.

* * *

The wishes and concerns of the [M]other are very clear. She does not want to co-parent with the child's [G]randfather, and she does not trust the [G]randfather. Case law indicates that her

8. The majority concedes that the juvenile court "acknowledged Mother's concerns and wishes," and discussed the "special weight" to be given to her preferences. Nevertheless, the majority ultimately concludes that "great deference and the requisite special weight" were not given to Mother's wishes and concerns. In reaching this conclusion, the majority has started down a slippery slope of ignoring the express, written words of the juvenile court as a means of justifying the substitution of its judgment for that of the court below.

*wishes are to be given special consideration in determining whether to grant visitation. Even if companionship time is granted, her wishes as to the time and duration of the visitation should also be taken into consideration. * * **

* * *

Upon an analysis of the factors * * * and *giving special weight to the wishes of the [M]other*, the Court finds that it would be in the best interests of the child to spend time with his [G]randfather on the weekends while his [M]other is working. Visitation with the [G]randfather will allow the child to spend time with the extended family on his [F]ather's side while not sacrificing too much time away from his [M]other. The testimony before this Court indicates that visitation with the extended family in the past was a very positive experience for the child. The Court believes it to be in the child's best interest to know his [F]ather's side of the family and share time with them even if the [F]ather himself chooses not to be in the picture.

(Emphasis added.)

{¶ 49} Though the majority finds that the juvenile court "misconstrued and discounted" Mother's concerns with Grandfather having visitation, the record simply does not reflect this. Rather, the record reflects that the juvenile court heard contradictory evidence about Grandfather's care of E.T.B. and found the evidence that Grandfather abided by Mother's wishes and took good care of E.T.B. to be more credible. While Mother expressed concerns that Grandfather refused to follow E.T.B.'s special dietary needs, refused to use the diaper rash ointment she provided, and refused to abide by her wishes that E.T.B. not interact with Father, there was evidence specifically contradicting her statements. Grandfather testified he abided by Mother's parenting wishes and requests in caring for E.T.B. He stated that in the past, Mother "gave [him] letters and everything on that, what [E.T.B.'s] supposed to eat, what [E.T.B.] can't eat and everything, it was all posted on a two page letter that she gave [him]." Grandfather testified he not only followed these dietary restrictions, but he treated the restrictions "seriously" and would continue to follow any such restrictions in the future. Grandfather also testified that Mother had talked with him in the past about E.T.B.'s

consistent diaper rash. Grandfather explained that E.T.B. "always had diaper rash when he was younger" and Mother "brought big tubes of stuff for me to put on him when [E.T.B.] had diaper rash." Grandfather stated that he followed Mother's instructions and used the ointment.

{¶ 50} Grandfather also testified that though he thought it was "unfair to keep a kid away from his father," he was willing to abide by Mother's wishes and any court order that Father not be allowed around E.T.B. during Grandfather's visitation. Grandfather then described an incident where he purposefully kept Father from visiting with E.T.B. when Father unexpectedly stopped by Grandfather's house while Grandfather was caring for the child. Grandfather testified that he made Father remain outside while Father attempted to arrange for someone to pick him up from Grandfather's residence.

{¶ 51} The juvenile court clearly found Grandfather's testimony to be credible, stating that Grandfather has and would continue to "look out for the welfare of [E.T.B.]" while caring for the child. As a reviewing court, operating under an abuse of discretion standard of review, this court "must defer to the trial court as the finder of fact, because the trial court [was] in the best position to weigh the credibility of the witnesses." *Walter v. Agoston*, 12th Dist. Warren No. CA2003-03-039, 2004-Ohio-2488, ¶ 16, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). As this court has consistently held, "issues of credibility are for the trier of fact, not the appellate court, to determine." *In re K.B.*, 12th Dist. Butler Nos. CA2014-02-042, CA2014-02-043, and CA2014-02-044, 2014-Ohio-3654, ¶ 66. Because the juvenile court had the opportunity to "view witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony," deference should be given to the juvenile court's findings. *Id.*, citing *In re J.B.*, 12th Dist. Butler No. CA2011-10-192, 2012-Ohio-3127, ¶ 20. This is crucial, as "there may be * * * evidence in the parties' demeanor and attitude that does not translate

to the record well." *Davis v. Flickinger*, 77 Ohio St.3d 415, 419 (1997).

{¶ 52} In the present case, the majority has failed to give due deference to the juvenile court's findings, choosing instead to reweigh the evidence and come to its own conclusion. By doing so, the majority has usurped the role of the juvenile court. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. * * * Appellate courts can reverse on a finding of an error of law but not 'a difference of opinion on credibility of witness[es] and evidence.'" *McBride v. McBride*, 12th Dist. Butler No. CA2011-03-061, 2012-Ohio-2146, ¶ 11, quoting *Seasons Coal*, 10 Ohio St.3d at 80.

{¶ 53} Applying the R.C. 3109.051(D) factors to the present case, the record supports the juvenile court's findings that Grandfather and E.T.B. share a very close relationship and that Grandfather and E.T.B. have bonded and played well together from the time of E.T.B.'s birth until Mother terminated all contact in January 2013. During their time together, Grandfather provided E.T.B. with opportunities to visit his extended family on Father's side, something that the juvenile court found was "a very positive experience for the child." As Mother and Grandfather both live in Clermont County, their geographical locations do not present an impediment to visitation. Additionally, by awarding Grandfather visitation on the weekends when Mother has to work, the court limited the time that E.T.B. would be away from Mother and his younger brother. Mother testified that she spends "quality time" with E.T.B. primarily on weekends when she's not at work. Contrary to the assertions of the majority, the juvenile court clearly took this into consideration as the juvenile court noted that the ordered visitation schedule was "subject to modification based upon the [M]other's work schedule."⁹

9. After the juvenile court ordered visitation to Grandfather on the weekends while Mother was at work, Mother expressed her belief that she could change her work schedule as a way of depriving Grandfather and E.T.B.

{¶ 54} From the record, it is also apparent that the juvenile court took into consideration the possible sexual abuse of E.T.B. The juvenile court had before it Mother's testimony that she took E.T.B. to the Mayerson Center in May 2011 to be examined. The result of the exam was that sexual abuse could neither be substantiated nor ruled out. Mother acknowledged that the redness could have been from a diaper rash. Additionally, the Mayerson Center's report indicated that Mother brought E.T.B. in to be tested because "a friend of hers brought her child to the Mayerson Center, and told [Mother] about it, so mom thought she would have [E.T.B.] examined." As the juvenile court noted in its opinion, even though the abuse could not be ruled out, "[G]randfather continued to provide care for the child following the testing" from May 2011 to August 2012. The juvenile court was entitled to weigh Mother's concern in light of the fact that she continued to allow Grandfather to watch E.T.B. at least every other weekend for well over a year while she was at work or out of town visiting a former boyfriend.

{¶ 55} The juvenile court was also entitled to weigh the significance and sincerity of Mother's other concerns in light of the fact that she allowed Grandfather to frequently care for E.T.B. even after (1) he allegedly made sexually explicit comments to her about her appearance, (2) she began to doubt whether Grandfather was abiding by E.T.B.'s nutritional

companionship time together. On July 14, 2014, the juvenile court issued a Clarification of Judgment Entry on Objection to Magistrate's Decision, in which the court stated the following:

The Court held it was in E.T.B.'s best interests to have parenting time with his paternal grandfather. [Mother's] interpretation of the Court's order totally ignores the spirit of the Court's decision. The Court, while attempting to accommodate [Mother's] work schedule, had no intention of providing a means for [Mother] to evade the order. To accept [Mother's] interpretation of the order would render the order meaningless. [Grandfather] shall have companionship time with the child at the times listed in the Court's entry. These times are in full force and effect regardless of [Mother's] work schedule until such time as a bona fide schedule change would convince the Court that a modification of companionship time is warranted.

Therefore, contrary to the majority's assertions, the court clearly indicated its willingness to modify Grandfather's visitation with E.T.B. to work around Mother's work schedule so long as there was a "bona fide schedule change."

program for low iron and whether he was applying the rash ointment as directed, and (3) she believed that Grandfather was permitting E.T.B. to become sunburnt on his visits. See, e.g., *In re H.A.*, 2013-Ohio-5457 at ¶ 18 ("the trial court could have questioned the significance—possibly even the sincerity—of [Mother's] concerns in light of the fact that [Mother] (1) allowed her child to live in Grandmother's home for approximately fifteen months while Grandmother met all of [Mother's] and the child's needs and (2) continued to allow Grandmother to care for the child daily after [Mother] moved into an apartment with a new boyfriend").¹⁰ Here, the record reflects that Mother continued to allow Grandfather frequent and consistent visitation, including overnight visits, from the time of his birth until August 2012—when Mother began to fear that Grandfather was allowing Father visitation with E.T.B. against her wishes. Surely if Mother had legitimate concerns about Grandfather's ability to care for the child in accordance with her wishes, she would have ended Grandfather's visitation well before August 2012.

{¶ 56} The evidence presented at the April 24, 2013 and February 26, 2014 hearings demonstrates that up until August 2012, Mother encouraged and relied on Grandfather's relationship with E.T.B. to her benefit. While Mother was at work or on weekend-long trips out of town, E.T.B. was left in Grandfather's sole care. As a result of Grandfather and E.T.B.'s lengthy contact, the child bonded not only with Grandfather, but also with his paternal family. Allowing E.T.B. continued time with Grandfather and his paternal family is, as the juvenile court noted, in E.T.B.'s best interests.

{¶ 57} Accordingly, taking all the relevant factors set forth in R.C. 3109.051(D) into

10. Mother only identified one instance where Grandfather allegedly made an inappropriate comment to her. Mother testified that in January 2010, when she was dropping E.T.B. off at Grandfather's house, Grandfather said, "Your boobs look so good in that shirt." Grandfather denied making any inappropriate comment to Mother. In any event, Mother continued to regularly and frequently allow visitation between Grandfather and E.T.B. from January 2010 until August 2012—well after she developed concerns about Grandfather's care and interaction with E.T.B.

consideration, giving special weight to Mother's wishes, and giving due deference to the juvenile court's findings of fact, I would hold that the evidence introduced at the April 24, 2013 and February 26, 2014 hearings supports the juvenile court's decision to award Grandfather visitation with E.T.B. The juvenile court properly placed the burden on Grandfather to establish that it was in E.T.B.'s best interest to have visitation with Grandfather, and the juvenile court gave adequate deference and weight when considering Mother's wishes and concerns. The juvenile court started with the presumption that Mother, as a fit parent, acted in the best interest of her child when choosing to deny Grandfather visitation with E.T.B. The court then went on to consider *all* the relevant factors in R.C. 3109.051(D) and found that such a presumption was refuted and that visitation was in E.T.B.'s best interest. *See Harrold*, 2005-Ohio-5334 at ¶ 44. This decision was not arbitrary, unreasonable, or unconscionable. I therefore would overrule Mother's sole assignment of error and affirm the decision of the juvenile court.