



in awarding custody to the Barnetts.

I

{¶ 3} A brief outline of the parties' connections with J.W. and his biological parents will be helpful to our discussion of the case. None of the parties seeking custody is biologically related to J.W.

{¶ 4} J.W.'s biological parents are A.H. and Jaden W. ("Jaden"), who were never married. When J.W. was an infant, Jaden caused a spiral fracture of J.W.'s femur and was convicted of two counts of child endangering. He was sentenced to two concurrent terms of imprisonment of four years each and was still in jail at the time of the custody proceedings.

{¶ 5} Jaden had been adopted and raised by Marsha W., who is deceased. Borst was Marsha W.'s partner when Jaden was adopted but, according to Borst, both women could not legally be named as parents. Borst lived with Jaden and Marsha for four years and maintained a relationship with Jaden thereafter. Marsha W. died of cancer when Jaden was 13, and she left Jaden in Borst's custody.

{¶ 6} A.H., J.W.'s mother, is the step-granddaughter of the Barnetts; A.H.'s mother, C.B., is married to the Barnetts' son, R.B. A.H. has, for the most part, been unable to meet J.W.'s needs or those of her daughter, C.H., age 3, notwithstanding Children Services' efforts to work with her on case plans. C.H. lives with C.B. and R.B.

{¶ 7} In 2004, J.W. was removed from A.H. and Jaden's home when he was five-months old as a result of Jaden's abuse, and Children Services developed a case plan for A.H. In the interim, J.W. lived with the Barnetts, and A.H. visited

with J.W. whenever she wanted. The Barnetts resisted Borst's attempts to have contact with the child during this period, but A.H. would sometimes facilitate visits with Borst. A.H. eventually completed her case plan, and J.W. returned to living with her in July 2006. By May 2007, however, A.H. was again unstable and unable to cope with J.W., and she placed him back in the Barnetts' custody without court intervention.

{¶ 8} In October 2007, Borst and the Barnetts each filed complaints seeking custody of J.W., who was four years old. In January 2008, A.H. abruptly transferred custody of J.W. from the Barnetts to Borst at the end of a weekend visit with Borst, notwithstanding advice from the caseworkers that J.W. would greatly benefit from a transition period. J.W. lived with Borst and her life partner through the time of the trial court's decision, and he had court-ordered visitation with the Barnetts during this period.

{¶ 9} The trial court conducted a hearing on April 30, and September 24, 2008, at which each of the parties testified, as well A.H., A.H.'s step-father R.B., the caseworker, and Borst's partner. The court also considered a psychological evaluation of the parties prepared by Dr. Esther S. Battle and the guardian ad litem's Report and Recommendations. On February 2, 2009, the trial court awarded custody to the Barnetts and concluded that it lacked the authority to award visitation to Borst because she was not related to J.W. or his biological parents.

{¶ 10} Borst raises four assignments of error on appeal.

II

{¶ 11} Borst's first assignment of error states:

{¶ 12} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING CUSTODY OF THE MINOR CHILD TO THE APPELLEES, AS THE SAME IS NOT IN THE BEST INTEREST OF THE MINOR CHILD AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 13} Borst asserts that the trial court’s judgment was not in J.W.’s best interest and was against the manifest weight of the evidence.

{¶ 14} Before these proceedings began, the trial court had found J.W. to be an abused and dependent child. In the case of an abused or dependent child, R.C. 2151.353(A)(3) provides that a court may “[a]ward 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.” “[W]hen determining whether or not to grant an individual or couple legal custody of a dependent child, a court can do so if it finds by a preponderance of the evidence that it is in the best interests of the concerned child. Preponderance of the evidence simply means ‘evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it.’” *In re A.W.*, Montgomery App. No. 21309, 2006-Ohio-2103, at ¶6, citing *In the Matter of Kaylee Starks*, Darke App. No. 1646, 2005-Ohio-1912. An appellate court may overrule a trial court’s determination regarding child custody only upon finding an abuse of discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260.

{¶ 15} 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.

{¶ 16} In its decision, the trial court observed that there were "positive and negative factors" about both parties, but it concluded that it was in J.W.'s best interest to be in the legal custody of the Barnetts. It discussed several relevant statutory factors. The court found that J.W. had had close contact with the Barnetts throughout most of his life and that he had lived with them for extended periods. The court also observed that J.W. had formed a particularly close relationship with his great-grandfather, Phillip Barnett. The trial court emphasized the psychologist's conclusion that it would be "devastating" to J.W. to lose this bond, and that the psychologist, Dr. Battle, "expressed no similar observation" of the relationship between J.W. and Borst. The trial court also noted that Dr. Battle had observed greater warmth, affection, and spontaneity between J.W. and the Barnetts than in J.W.'s interactions with Borst. Dr. Battle's concern about Borst's denial of Jaden's culpability in J.W.'s abuse and about A.H.'s perception that Borst would follow A.H.'s wishes with respect to J.W. also led the court to conclude that Borst "would be less likely to protect [J.W.] from the negative parenting characteristics of [his biological parents], than would the Barnetts."

{¶ 17} The trial court also found that J.W.'s best interest would be served by having ongoing contact with his sister, C.H. The court concluded that the opportunity for such contact would be "significantly enhanced" if the Barnetts were

awarded custody. As mentioned above, C.H. was in the custody of R.B. and C.B., the Barnetts' son and daughter-in-law, because C.B. was A.H.'s mother. At the time of the hearing, the two Barnett families lived in very close proximity. In her brief, Borst emphasizes that foreclosure proceedings were pending against R.B. and C.B., such that they may not, in fact, continue to live in close proximity to Phillip and Donna Barnett. The trial court, however, did not specifically rely on the close proximity of the residences in concluding that placement with the Barnetts would enhance J.W.'s relationship with C.H. Even if R.B. and C.B. move to a different location, the familial bond supports the trial court's conclusion that J.W. would be more likely to maintain a relationship with C.H. while living with the Barnetts.

{¶ 18} The trial court stated that Jaden and A.H., J.W.'s biological parents, had signed forms consenting to J.W.'s placement with Borst, but the court found that these preferences were "insignificant" in light of Jaden's and A.H.'s past disregard for J.W.'s well-being.

{¶ 19} The trial court referred to the guardian ad litem's participation in the proceedings, but did not specifically rely on the guardian ad litem's recommendations. We note, however, that the guardian ad litem recommended placement with the Barnetts for many of the same reasons cited in the trial court's decision: the closeness of their relationship, the significant amount of time that J.W. had spent with the Barnetts, and the Barnetts' ability to facilitate a relationship with C.H.

{¶ 20} The trial court's judgment contains a thorough review of the evidence presented and well-reasoned bases for its conclusion that J.W.'s best interest

would be served by placing him in the custody of the Barnetts. We cannot conclude that the trial court erred in resolving the custody dispute as it did.

{¶ 21} The first assignment of error is overruled.

### III

{¶ 22} Borst's second assignment of error states:

{¶ 23} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ADMITTED A TAPE RECORDING OF THE MINOR CHILD, IN VIOLATION OF THE RULES OF EVIDENCE."

{¶ 24} Borst claims that the trial court erred in admitting an audiotape of J.W.'s voice, made by Donna Barnett, which was recorded when he was allegedly extremely upset over returning to Borst's home after visiting with the Barnetts. Borst claims that the tape had not been properly authenticated, was irrelevant, and was inadmissible hearsay. The Barnetts claim that the tape was admissible because it was properly authenticated by Donna Barnett and that it was not hearsay because it showed J.W.'s state of mind. The Barnetts also assert that any error in the admission of the tape was harmless.

{¶ 25} The tape recording was allegedly made in February 2008, shortly after J.W. had been transferred from the Barnetts' custody to Borst's. It was described as depicting J.W. "totally freaking" out, screaming, crying, and begging not to go. Although Donna Barnett claimed that such behavior was "typical" of the drop-offs at the time, the parties agreed that, by the time of the hearing, J.W. no longer reacted to the transfers in this manner. Borst objected to the admission of the tape at the hearing as a violation of the hearsay rule, Evid.R. 802. The trial court sustained

the objection as to the statements J.W. made on the tape; it allowed the tape for the limited purpose of demonstrating J.W.'s behavior, about which someone who observed the behavior would be allowed to testify.

{¶ 26} In our view, the trial court properly addressed the hearsay objection. Borst did not challenge the tape's authenticity at trial and thus waived this argument. However, even if we assumed, for the sake of argument, that the tape should have been excluded, we would conclude that any error in the admission of the tape was harmless. The parties admitted that the behavior demonstrated on the tape represented an extreme example of J.W.'s reaction to the transfers, that it was recorded during one of the first transfers after a change in custody, and that J.W.'s behavior during the exchanges had greatly improved since that time. Moreover, the trial court did not mention the tape or rely upon it in any way in its decision. Because it appears that the trial court gave little, if any, weight to the tape, any error in its admission was harmless.

{¶ 27} The second assignment of error is overruled.

#### IV

{¶ 28} Borst's third assignment of error states:

{¶ 29} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS FAILURE TO FOLLOW THE RECOMMENDATION SET FORTH BY DR. BATTLE IN THE REPORT CONSTRUCTED AS A RESULT OF THE PSYCHOLOGICAL EVALUATION CONDUCTED ON THE PARTIES AND THE CHILD."

{¶ 30} Borst contends that the trial court erred and abused its discretion in

disregarding Dr. Battle's emphasis on J.W.'s need for stability and ordering that his living arrangements change again by awarding custody to the Barnetts. She claims that J.W. is "ingrained in a home, school, and community" and that another change in environment could cause him irreparable harm.

{¶ 31} Borst's argument oversimplifies the observations and conclusions contained in Dr. Battle's Psychological Evaluation and Recommendation Regarding Custody. Dr. Battle recognized that there was "no clear-cut, ideal placement solution for this child" among the options presented.

{¶ 32} Dr. Battle observed that J.W. suffered from separation anxiety due to the numerous changes in his living arrangements, especially the precipitous change orchestrated by A.H. and Borst, which removed him from the Barnetts' home in early 2008 without any transition period. She also noted that J.W. sensed the antagonism between the Barnetts and Borst and was confused as to who was his mother. She placed great emphasis on his need for the "security of a non-compromised, secure attachment to his primary care-givers."

{¶ 33} In her report, Dr. Battle stated that a particularly "close and positive bond" existed between Phillip Barnett and J.W. and that this relationship was a very important one for J.W. "Losing that relationship would be devastating for both of them," she concluded. She stated that J.W. had a warm and affectionate relationship with both of the Barnetts, although Donna Barnett had some difficulty with physical mobility. "For [the Barnetts] to suddenly 'disappear' from [J.W.'s] life would be threatening to all three of them and would compound [J.W.'s] existing anxiety about separation and loss." She concluded that J.W. showed signs of an

“anxious attachment style” as a result of his prior, abrupt, and “unfortunate” removal from their primary care in 2008. Dr. Battle placed great emphasis on J.W.’s need for a continuing relationship with the Barnetts.

{¶ 34} With respect to Borst, Dr. Battle concluded that she and her partner provided J.W. with “safe, predictable, and enriched experience[s]” while he was in their care and that they were likely to meet his needs “more adequately” in the long run because they were somewhat younger than the Barnetts and had more financial resources. However, Dr. Battle stated that Borst did not comprehend that J.W.’s primary attachment was to the Barnetts and that the precipitous disruption in 2008 of his placement with the Barnetts had compromised J.W.’s ability to establish a firm and secure attachment to Borst and her partner. Dr. Battle also expressed concern about Borst’s denial of the veracity of the charges for which Jaden had been convicted and her failure to recognize the risks to J.W. associated with Jaden’s impending release from prison.

{¶ 35} Dr. Battle concluded that J.W.’s relationship with the Barnetts provided a vital emotional attachment for him and that, especially in the next five years, he would “thrive under [their] affection and care” as long as they were physically able to care for him. In the longer term, particularly from ages 10-18, Dr. Battle believed that Borst and her partner would be more likely to be able to meet J.W.’s needs for physical, intellectual, academic, and social stimulation. Because all of the parties were “well beyond conventional child-rearing years,” Dr. Battle expressed concern about the need for J.W. to “assume undue responsibility in caring for aging and infirm parents.” She observed that Borst and the Barnetts had

been unable to put aside their own negative feeling toward one another in order to provide J.W. with the benefits of healthy relationships with all of them. Based on all of these considerations, Dr. Battle concluded that J.W. needed parenting time with both families. More specifically, Dr. Battle encouraged the trial court not to immediately enter a permanent order awarding custody to either party, to continue the guardian ad litem's involvement in the case for two more years, to give primary custody to Borst at the end of two years if she had allowed and supported J.W.'s relationship with the Barnetts in the interim, and to give visitation to the Barnetts conditioned on their cooperation and encouragement of J.W.'s relationship with Borst and her partner. She also recommended that he continue at the same child care center, which had provided stability for him through some of the changes in his life.

{¶ 36} The responsibility of determining what specific parenting structure will serve a child's best interests rests with the trial court, not a psychologist's report and recommendation. *Cross v. Cross*, Preble App. No. CA2008-07-015, 2009-Ohio-1309, at ¶25; *Dannaher v. Newbold*, Franklin App. No. 03AP155, 2004-Ohio-1003, at ¶91. Thus, a trial court is free to deviate from a psychologist's recommendation, and does not abuse its discretion in doing so. In this case, the fact that the trial court did not adopt Dr. Battle's recommendation does not mean that it did not give the recommendation due consideration. In her report, Dr. Battle emphasized the vital role that the Barnetts played in J.W.'s emotional well-being. Her report can in no way be construed as recommending an award of custody to Borst under circumstances where the Barnetts would be excluded from J.W.'s life.

The trial court recognized, as Dr. Battle apparently did not, that the court did not have the authority to compel visitation with a non-relative. The court also held out little hope – based on the parties’ prior interactions – that the Barnetts and Borst would cooperate with visitation in the absence of a court order requiring such visits.

The trial court could also have reasonably concluded that a two-year delay in making the decision on J.W.’s custody was not in his best interest, especially considering that he already suffered from attachment issues and that the trial court could not order visitation as part of its permanent order. For the foregoing reasons, the trial court did not abuse its discretion in deviating from Dr. Battle’s recommendations.

{¶ 37} The third assignment of error is overruled.

V

{¶ 38} Borst’s fourth assignment of error states:

{¶ 39} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN IGNORING THE WISH OF THE NATURAL PARENTS TO PLACE [J.W.] IN THE CUSTODY OF THE APPELLANT.”

{¶ 40} Borst claims that the trial court failed to give sufficient weight to the wishes of J.W.’s biological parents, both of whom had indicated a desire for Borst to have custody.

{¶ 41} The trial court acknowledged that the parents’ wishes are one of the statutory factors under R.C. 3109.04(F), but it found that their wishes were “insignificant” in this case because of their past disregard for J.W.’s safety and well-being. Specifically, the court stated:

{¶ 42} “Jaden severely abused [J.W.]. Except for a few months in late 2006 and early 2007, [A.H.] has never put [J.W.’s] needs ahead of her wants. She instigated the abrupt ending of [J.W.’s] contact with Dr. Borst for several months and the Barnetts in January, 2008, with no concern about the trauma this might cause the child. [A.H.] switches allegiances to suit her needs, regardless of the impact on [J.W.]. Both Jaden and [A.H.] are unsuitable parents.”

{¶ 43} The trial court’s conclusions are supported by the record, which is devoid of any evidence that A.H. ever acted with J.W.’s interest as her primary motivation in her dealings with the Barnetts and Borst. Indeed, she appears to have contributed to the animosity between them by playing them against one another for her own purposes. Although A.H. maintained a relationship with J.W., there is no evidence that this relationship was particularly beneficial or meaningful to J.W. Under the circumstances presented, the trial court acted within its discretion in giving little or no weight to the wishes of J.W.’s parents.

{¶ 44} The fourth assignment of error is overruled.

VI

{¶ 45} The judgment of the trial court will be affirmed.

.....

FAIN, J. and GRADY, J., concur.

Copies mailed to:

David M. McNamee  
Christ Theodor  
Hon. Robert W. Hutcheson