[Cite as *In re Adoption of A.M.*, 2014-Ohio-2833.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

In re The Adoption of A.M.

Court of Appeals No. H-14-007

Trial Court No. AD 2012 00005

DECISION AND JUDGMENT

Decided: June 27, 2014

* * * * *

John D. Allton, for appellant, Bri. M.

James J. Sitterly, for appellee, Bra. M.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas, Probate Division, that granted appellee/stepmother's petition for adoption of the minor child A.M. Appellant is A.M.'s natural mother and appellee is the child's stepmother. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Minor child A.M. was born in 2008. At that time, appellant and father E.M. were married and living in Lucas County, Ohio. When they divorced in March 2010, appellant agreed to father's being designated residential parent and legal custodian of A.M., their only child. Appellant was awarded parenting time but, approximately one month after the divorce, the court ordered that visitation be supervised. Appellant has attempted unsuccessfully to have the parenting time order modified and her last visit with A.M. was in February 2011.

{¶ 3} Father and appellee ("petitioner") have lived together with A.M. since August 2010, and were married in November 2010. On April 18, 2012, petitioner filed the petition to adopt. In an opinion filed December 3, 2012, the trial court found, pursuant to R.C. 3107.07, that appellant's consent was not required for the proposed adoption. In that decision, the trial court found that appellant could not be deemed to have failed to support the child for the year preceding the filing of the petition because there was no evidence that any support or maintenance was required from her by any law or judicial decree. However, the court found that appellant failed to provide more than de minimis contact with A.M. without justifiable cause during that same period. Specifically, the trial court found that during that one-year period, appellant had no visits or other "face-to-face contact" with the child, although, according to appellant's testimony, she did have four phone calls with A.M. which lasted five or ten minutes each. Appellant did not appeal the decision as to consent.

{¶ 4} On June 7, 2013, the trial court conducted an evidentiary hearing on the issue of whether the proposed adoption was in the child's best interest. The court heard testimony from appellant, a friend of appellant, petitioner, and the court's adoption assessor assigned to this case. The first witness was Adele Kozar, the adoption assessor. Kozar testified that prior to preparing and filing her home study, in which she recommended that petitioner be permitted to adopt A.M., she spoke to petitioner and the child's father as well as the couple's three other children. Kozar also visited the home. Kozar's report was accepted by the court as part of petitioner's case in chief as to the child's best interest.

{¶ 5} The trial court next heard testimony from Janine Smothers, a friend of appellant for the past ten years or so. Smothers testified that she believed appellant attempted to maintain a relationship with A.M. after the divorce although she did not provide any specific testimony in support of that statement. She further testified that she does not know petitioner.

{¶ 6} Appellant then testified on her own behalf. She detailed her marital history with A.M.'s father prior to the divorce and stated that her other son from a prior relationship lived with them along with A.M. Appellant testified that she has no criminal convictions and has never been party to a dependency, neglect or abuse case. Appellant described her supervised visitations with A.M. and said her last visit was in 2011. She further testified that she had a pending motion to modify the supervised visitation in Wood County. Appellant stated her belief that the least detrimental alternative for

safeguarding A.M.'s development and growth would be to make petitioner a party in the Wood County visitation case, so that appellant could continue to see the child. Appellant acknowledged that if petitioner were named a party in the Wood County case and something happened to father, she and petitioner would have to "fight it out in court." Appellant also testified as to her current employment as an "adult entertainer" or "dancer." She testified that she would never wish to take A.M. away from his father and would only want custody of the child if something were to happen to father. Appellant would be happy to continue the existing agreement which provided her with two days each week and alternate weekends with A.M.

{¶ 7} Petitioner testified as to her living arrangement and day-to-day family life with father, A.M. and two other younger children – one born of another relationship and one born to petitioner and father. Petitioner stated that she does not work outside the home and cares for the children while father works. She also testified that she, father and A.M. are in good health.

{¶ 8} On February 10, 2014, the trial court filed its "Final Decree of Adoption" in which it found that the best interest of A.M. would be served by granting this adoption. In so doing, the trial court considered and applied the factors set forth in R.C. 3107.161. Appellant has filed a timely appeal.

{¶ 9} Appellant sets forth two assignments of error in support of her appeal:

Assignment of Error I

The trial court violated appellant's due process rights and committed plain error when it permitted the appellee to present best interest evidence during her rebuttal to appellant's case-in-chief.

Assignment of Error II

The trial court abused its discretion when it permitted the appellee to present best interest evidence during her rebuttal after the appellant's case-in-chief.

{¶ 10} Appellant's two claimed errors are related and will be considered together. In support, appellant essentially argues that the trial court abused its discretion and violated her due process rights when it allowed appellee to testify as to matters beyond appellant's evidence.

{¶ 11} A probate court's decision in an adoption case, whether on the issue of consent or the best interest of the child, is reviewed under an abuse of discretion standard. *In re Adoption of C.B.*, 6th Dist. Lucas No. L-12-1153, 2013-Ohio-1354, ¶ 10. An abuse of discretion connotes more than a mere error of law or judgment; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140(1983). We also note at the outset that there is a due process requirement in all phases of an adoption proceeding. *In re A.N.B.*, 12th Dist. Preble No. CA2012-12-017, 2013-Ohio-2011, ¶ 16. Ohio courts have

held that the relationship between a parent and a child is a constitutionally protected liberty interest for which due process applies. *In re Adoption of Zschach*, 75 Ohio St.3d 648, 653, 665 N.E.2d 1070 (1996).

{¶ 12} As to the broad concept of due process, the record reflects, and it is not disputed, that appellant was provided with proper notice and an opportunity to participate in the best interest hearing in a meaningful manner, appropriate to the nature of the case. *Id*. at ¶ 12. As our review of the record shows, appellant had ample opportunity to cross-examine appellee and put on her own case.

{¶ 13} Specifically, appellant asserts that the trial court "reneged" on the trial sequence to which appellant claims the parties stipulated in a pre-hearing discussion held in-camera. That discussion, however, was not transcribed. Ensuring that a transcript is made of all relevant proceedings and later provided to a reviewing court is the responsibility of an appellant. App.R. 9(B)(1). Although there is no transcript of the initial discussion for this court to review, we do have the transcript of all ensuing discussions between both attorneys and the court when the issue was revisited during the best interest hearing. The best interest hearing transcript, however, does not allow this court to determine whether or not the court reneged on a particular trial sequence as allegedly agreed in chambers. Accordingly, we have carefully examined the transcript of the trial court's clarification and explanation of the parties' agreement as it transpired during the best interest hearing.

{¶ 14} Appellant argues that petitioner should not have prevailed because she testified only during rebuttal, contrary to a previously adopted trial presentation agreement between the parties. Appellant asserts that due process requires that the initial burden of proof is on the petitioner and must be satified during the petitioner's case in chief. To allow otherwise is an abuse of discretion by the trial court, appellant argues.

{¶ 15} The record before us reflects that, in response to an objection from appellant's counsel during the best interest hearing, the trial court addressed the issue of the parties' off-the-record agreement to stagger the production of evidence. The record reflects that the first to testify was the adoption assessor, who was petitioner's witness. Presentation of evidence then shifted to appellant, who offered the testimony of her friend Janine Smothers before testifying on her own behalf. Following that, petitioner testified.

{¶ 16} At the outset of the hearing, the trial court inquired of counsel as to any preliminary issues to be addressed before hearing evidence. In response, petitioner's counsel referred to the in-chambers discussion and stated:

> I don't know if we came to any firm conclusion, but we did agree on an order of how to present the case; that is, I would put the Adoption Assessor on the stand, ask for admission of the report and other documents that we filed in support of our adoption based on the recommendation of the Adoption Assessor, then we would rest. Mr. Sitterly [appellant's

counsel] then would call his witnesses, addressing the issue of best interest under Section 3107.161; and we would have the opportunity to rebut, if necessary.

{¶ 17} The court then asked appellant's counsel if he wished to be heard but counsel did not raise the issue of the order of evidence. The court stated, "And, as far as the presentation of evidence is concerned, I believe we had an agreement on the presentation, the order of presentation of evidence; is that correct?"

{¶ 18} Appellant's counsel responded, "If the court could state it on the record, I think, the Adoption Assessor was going to testify first; is that right?"

{¶ 19} The trial court responded:

> Right. [Petitioner's counsel] stated it on the record, the order of presentation as he understood it, and that is that he would be calling the Adoption Assessor, potentially introducing some exhibits, and would rest. And you would have the opportunity then to present your case; and, depending on witnesses and evidence you present, Mr. Allton may or may not offer rebuttal evidence, because as you pointed out, the burden of proof would be on Petitioner on the best interest issues.
>
> So, is there any objection to that order of presentation of evidence?

{¶ 20} Appellant's counsel replied that he "would agree with that." Thereafter, some additional preliminary matters were addressed and testimony was heard. After the adoption assessor testified, appellee rested. Appellant then called her first witness, after

which appellant testified. Following appellant's testimony, counsel rested her case. Petitioner then testified. There was no objection from appellant until the conclusion of petitioner's testimony, when appellant's counsel claimed petitioner was improperly testifying to matters that had not been testified to during appellant's case in chief. At that time, appellant's counsel argued that petitioner's testimony constituted rebuttal and that none of the matters testified to had come up during questioning in his case in chief. When asked by the court if he wished to be heard, petitioner's counsel stated:

> Well, I don't necessarily consider us in the traditional form of rebuttal; number one. I mean, we agreed to a sequence where I would do a [prima] facie case of best interest and they would put on their case of best interest. They're saying now I don't have a burden on best interest.

{¶ 21} The trial court overruled the objection and allowed the testimony. After more testimony from petitioner, appellant's counsel again objected, arguing that none of it constituted proper rebuttal to testimony given during his case in chief. In response, the trial court stated, in relevant part:

> This is a similar objection you've been making and I understand that. The Petitioner does bear the burden of proof. We established that. * * * We talked earlier about the sequence of the presentation here today. There were no objections to that order, that sequence of presentation of evidence; and that's what we're doing here, we're engaged in that right

now. The Petitioner does bear the burden of proof of best interest, so I'm allowing them the opportunity to try to meet that burden of proof.

{¶ 22} Then, at the conclusion of all testimony, petitioner's counsel reiterated his concern that in prior discussions "there was no discussion that I would be limited to rebutting, simply their definition of best interest * * *"

{¶ 23} The trial court responded by clarifying its understanding as to those earlier off-the-record discussions. The court's position is made clear by the following:

> Okay. And you know, clearly, before we began, we addressed some preliminary issues on the record, and not the least of those preliminary issues [was] the sequence of presentation of evidence here today. And the court has followed that sequence. And there was never any restriction in scope of presentation of evidence that was discussed on or off the record.
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> * * *
>
> Overall, the Petitioner does bear the burden of proof regarding whether or not a proposed adoption is in a child's best interest. The sequence of presentation of evidence here today was never in controversy. We talked about it on and off the record. It was raised as a preliminary issue, was consented to by all parties, and we're following that sequence of presentation of evidence and there was never a discussion about whether or not parties would be limited in the amount of evidence that could be presented when at least there was an opportunity to do so.

So, that was clearly the court's understanding. I'm certain for the portions that are on the record, the record will reflect that.

{¶ 24} Again, appellant's counsel emphasized his understanding that the parties agreed that any testimony subsequent to his case in chief would be considered rebuttal and restricted accordingly. Having heard counsel again, the trial court once more attempted to put the argument to rest:

So, whether we call it rebuttal or whether we call it the presentation of evidence related to the factors the court must consider, Mr. Allton has had the opportunity to present other evidence regarding whether or not this proposed adoption is in [A.M.'s] best interest; and it was clearly contemplated by our on-the-record and off-the-record discussions regarding the sequence of presentation of evidence here today. And, so, that's clearly the court's understanding and what we discussed both on and off the record.

{¶ 25} This court has thoroughly reviewed the record of proceedings in the trial court, with particular attention to the dialog between the court and counsel during the best interest hearing. As we have noted, there is no record of the in-chambers discussions to which the parties refer, which may or may not have bolstered appellant's arguments. What this court does see, however, from the transcript of the best interest hearing is that there was no restriction during that proceeding as to the scope of evidence appellant placed before the court. It appears that the presentation of evidence for both parties

proceeded exactly as contemplated and articulated during their on-the-record discussions. There is no indication that petitioner was meant to be prevented from addressing all issues relevant to the case after appellant presented her case. Petitioner was not limited to the scope of appellant's testimony as appellant claims and the trial court did not limit her to a classic rebuttal of appellant's arguments. Based on the foregoing, we find no fundamental violation of appellant's due process rights as the trial court allowed her full opportunity to cross-examine petitioner and put on her own evidence. Further, we find that the trial court did not abuse its discretion in allowing the hearing to proceed in the agreed-upon manner regarding presentation of the evidence.

{¶ 26} Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 27} Upon consideration whereof, the judgment of the Huron County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE