

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: L. W.

C.A. Nos. 24855
 24856

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 07-08-749

DECISION AND JOURNAL ENTRY

Dated: March 24, 2010

MOORE, J.

{¶1} Appellants, Mother and Father, individually appeal from the judgment of the Summit County Court of Common Pleas, Juvenile Division, overruling their objections to the magistrate’s decisions. We affirm.

I.

{¶2} On August 3, 2007, Summit County Children Services (“Children Services”) filed a complaint alleging that L.W., a three-year old at the time, was an abused, neglected and dependent child and that her half-brother, A.M., a newborn at the time, was a dependent child. The complaint stemmed from alleged sexual abuse inflicted upon L.W. by Mother’s then-boyfriend. Under Juv.R. 6, Children Services sought and was granted emergency custody of L.W. and A.M. On August 7, 2007, the Summit County Court of Common Pleas, Juvenile Division, issued a magistrate’s order releasing A.M. to Mother but maintaining L.W. in Children Services’ custody.

{¶3} On October 2, 2007, the magistrate issued a decision in which he found that L.W. was an abused and dependent child and that A.M. was a dependent child. The trial judge adopted the magistrate's decision that same day. On October 16, 2007, Mother objected to the magistrate's decision. On November 8, 2007, the magistrate issued a decision placing L.W. and A.M. in the temporary custody of Children Services. The case plan included placing L.W. and A.M. in the temporary custody of their maternal grandmother. The trial judge adopted the magistrate's decision that same day. On November 13, 2007, the trial judge issued a judgment entry overruling Mother's objection to the magistrate's decision of October 2, 2007 and finding L.W. to be an abused and dependent child and A.M. to be a dependent child. Custody and visitation with regard to L.W. are the only issues salient to this appeal; A.M. is not involved.

{¶4} On September 7, 2007, Father filed a motion for legal custody of L.W. On January 15, 2008, Father filed a second motion for legal custody of L.W. On February 11, 2008, Mother filed a motion for legal custody of L.W. and A.M. On February 19 and February 22, 2008, the magistrate conducted a hearing on Father's and Mother's motions for legal custody. On March 5, 2008, the trial judge issued a judgment entry and order holding Father's and Mother's motions for legal custody in abeyance. On July 31, 2008, the trial court returned A.M. to Mother's custody. On October 22, 2008, the trial court held a second hearing regarding Father's and Mother's motions for legal custody of L.W. The parties stipulated that the court should consider the evidence from the February hearings in addition to the October hearing. On November 25, 2008, the magistrate issued a decision granting custody of L.W. to Father and visitation to Mother every other weekend in the "Order" section and every weekend in the body of the decision and for half of each summer. On November 25, 2008, the trial judge adopted the magistrate's decision and granted Mother visitation every other weekend. Mother objected to the

magistrate's decision. On December 5, 2008, the magistrate issued a supplemental decision clarifying Mother was to have visitation *every* weekend. The trial judge adopted the decision that same day. Father objected to the supplemental magistrate's decision. On June 16, 2009, the trial judge filed a judgment entry overruling each party's objections, granting custody of L.W. to Father and granting visitation to Mother every weekend during the school year and for half of each summer.

{¶5} Mother and Father each timely filed a notice of appeal, and they raise a total of three assignments of error for our review. The appellate court magistrate consolidated the cases for the purposes of briefing, filing the record and oral argument.

II.

MOTHER'S ASSIGNMENT OF ERROR I

"THE COURT ABUSED ITS DISCRETION BY GRANTING FATHER'S MOTION FOR LEGAL CUSTODY AND DENYING MOTHER'S MOTION FOR LEGAL CUSTODY BECAUSE IT FAILED TO PROPERLY WEIGH THE REQUIRED STATUTORY FACTORS TO DETERMINE WHAT WAS IN THE CHILD'S BEST INTEREST AS THE EVIDENCE WAS CLEAR THAT THE CHILD'S BEST INTEREST WOULD BE BEST SERVED TO REMAIN IN MOTHER'S LEGAL CUSTODY."

{¶6} Mother's first assignment of error contends that the trial court abused its discretion in granting Father's motion for legal custody by failing to properly weigh the statutory best interest factors. We disagree.

{¶7} Generally, this Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable – not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In so doing, however, "we consider the trial court's

action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18.

{¶8} Following an adjudication of neglect, dependency, or abuse, the juvenile court’s determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, at ¶17. “Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child.” *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11. The trial court’s decision to grant or deny a motion for legal custody is within its sound discretion and will not be reversed absent an abuse of that discretion. *In re M.S.*, 9th Dist. No. 22158, 2005-Ohio-10, at ¶11.

{¶9} The court below clearly engaged in a comprehensive analysis of L.W.’s best interests in arriving at its custody and visitation decision. The circumstances of this case created a close question as to whether custody with Mother or Father served L.W.’s best interests. L.W. was adjudicated abused and neglected while in Mother’s care, including allegedly suffering sexual abuse at the hands of Mother’s then-boyfriend.

{¶10} The record reflects that Father was absent from L.W.’s life until this case began. However, he did make efforts to contact Mother prior to the inception of this case. He spoke with L.W.’s maternal grandmother, who refused to provide Mother’s contact information. Aside from the time spent in her maternal grandmother’s custody as a result of this case, L.W. has lived her entire life with her mother. Mother and Father are each appropriate caregivers. Mother does not have a vehicle or driver’s license, although she does have family members that are willing to provide transportation when necessary. Each parent has established appropriate housing. Father

has lived in the same home for four years and was working on a plan to purchase it from his landlord. Father is married and has four other children that reside with him and his wife, including H.B. and J.B., who were seven-years old as of the hearing on February 19, 2008, L.B., who was six-years old, and G.B., who was 13 months old. The guardian ad litem, Gina D'Aurelio ("GAL"), noted that although L.W. has a bond with A.M., she now shares similar bonds with each of Father's children.

{¶11} Mother and Father are both employed. Mother works approximately two days per week at Giant Eagle, earning \$6.25 per hour. Although the job provides no benefits, she receives food stamps and medical insurance through the Ohio Department of Job and Family Services. Father is employed as a subcontractor, working 30 to 50 hours per week at \$8 to \$12 per hour. Father's wife is currently working towards an associate's degree.

{¶12} As a result of a report that Mother was depressed and took a quantity of pills on August 7, 2007, she was ordered to undergo a mental health evaluation. There, it was determined that Mother had developed adjustment disorder as a result of losing custody of L.W. and A.M. to Children Services. However, she was not prescribed medication and seeks treatment only as necessary. Father may be developing multiple sclerosis but does not suffer severe or frequent symptoms.

{¶13} At this time, A.M. has been returned to Mother's custody. Mother has completed parenting classes at Catholic Social Services. Mother has completed Little Ones Hope Group, a group class dealing with sexual abuse through Child Guidance and Family Solutions. Mother and Father have each participated in counseling sessions with L.W. Mother and Father have followed through with their respective case plans.

{¶14} Angela Jackson, a caseworker with Children Services, testified that the agency has no recommendation for custody. The GAL testified that this case has been difficult and adversarial. She further testified that “my recommendation today is by literally one strand of hair that [L.W.] be placed with her mother.” She noted that when L.W. is with Father, she is happy and wants to be with Father. Conversely, when L.W. is with Mother, she is happy and wants to be with Mother. The GAL later observed, “I am extremely, extremely disturbed, and I can’t say this enough, about the interference that I feel [Mother] and her family is [sic] providing in [Father’s] visitation.” The GAL believed this interference would continue if Mother was granted custody of L.W. The GAL testified that she did not believe Father would create visitation problems if he were awarded custody of L.W. Finally, the GAL recommended that whichever parent did not receive custody of L.W. should be granted visitation exceeding the standard order.

{¶15} The record presents a close question as to whether placing L.W. in the custody of Father rather than Mother was in L.W.’s best interest. L.W. was allegedly sexually abused by Mother’s former boyfriend while the two cohabited. The record makes clear that Father had no contact with L.W. prior to the filing of this case on August 3, 2007. However, as this matter progressed he steadily increased his visitation with L.W. to the point where she has now bonded as closely with Father’s other children as she has with A.M. Father works steadily and has lived in the same home for four years. Mother has not been steadily employed, works only part time and does not have a vehicle or driver’s license. Mother does have family support. The GAL recommended Mother by “one strand of hair” based on the fact that L.W. has lived with Mother her entire life, but also testified to the interference Mother’s family caused, and would likely continue to cause, with Father’s visitation. The GAL did not believe that Father would create

any interference with Mother's visitation if he were granted custody. Accordingly, we cannot say that the trial court was arbitrary, unreasonable, or unconscionable in awarding custody of L.W. to Father. *Blakemore*, 5 Ohio St.3d at 219.

{¶16} Mother's first assignment of error is overruled.

MOTHER'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING MOTHER AT LEAST THE STANDARD ORDER OF VISITATION IN REGARDS TO HOLIDAYS AND DAYS OF SPECIAL MEANING, SPRING BREAK, WINTER BREAK, AND THE LIKE."

{¶17} Mother's second assignment of error contends that the trial court abused its discretion in failing to grant her, at a minimum, the standard order of visitation with regard to holidays, days of special meaning, spring break and winter break. We disagree.

{¶18} We decline to address Mother's second assignment of error because she did not raise this issue in her objection or her supplemental objection to the magistrate's decision.

Juv.R. 40(D)(3)(b)(iv) provides that:

"Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Juv.R. 40(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b)."

{¶19} Mother has not argued plain error on appeal. She contends only that the trial court needs to include holidays and days of special meaning in the final entry, apparently under the belief that the trial court was obligated to separately set forth provisions for these days. Despite common practice, the trial court is not required to make provisions for holiday time in a visitation schedule. *In re A.R.*, 8th Dist. No. 90055, 2008-Ohio-582, at ¶19. Accordingly, Mother's second assignment of error is overruled.

FATHER’S ASSIGNMENT OF ERROR

“THE TRIAL COURT ABUSED ITS DISCRETION AND ERRORED [SIC] IN GRANTING MOTHER VISITATION EVERY WEEKEND FROM FRIDAY AFTER SCHOOL UNTIL MONDAY FOR RETURN TO SCHOOL AS AGAINST THE BEST INTERESTS OF THE CHILD AND [R.C.] 3109.051.”

{¶20} Father’s assignment of error contends that the trial court abused its discretion in granting Mother visitation with L.W. for the entirety of each weekend due to the fact that his work schedule, L.W.’s school schedule and homework requirements leave little time for bonding during the week. Father contends that Mother, on the other hand, has “unfettered free time *** to further her bond with [L.W.]” We disagree.

{¶21} We recognize that the standard visitation order is a guideline that informs rather than limits the discretion of the trial court. *Little v. King* (Nov. 5, 1990), 2nd Dist. Nos. 89-CA-85, 90-CA-39 at *6. The trial court clearly adopted the GAL’s recommendation that the non-custodial parent receive expanded visitation, in excess of the standard visitation order. Although Father now bears the responsibilities attendant to maintaining employment while ensuring L.W.’s school attendance and preparedness throughout the week, he has no weekend time with L.W. However, because the trial court’s visitation order for Mother does not otherwise specify visitation for holidays and days of special meaning, the other provisions of the visitation order control. Under the visitation order set forth in this case those holidays that fall Monday through Friday will be spent with Father. Those holidays include, by way of example, Martin Luther King Day, President’s Day and the weekdays during Spring Break. Those holidays that fall on weekends will be spent with Mother. Mother will have visitation on, for example, Mother’s Day and Easter Sunday. For those holidays or days of special meaning that do not fall on the same day every year Father has a five in seven, or approximately 71%, chance of spending that day

with L.W. Therefore, Father is not entirely deprived of free time in which to bond with L.W. Accordingly, we cannot say that the trial court's visitation order constitutes an abuse of discretion. *Blakemore*, 5 Ohio St. 3d at 219.

{¶22} Father's assignment of error is overruled.

III.

{¶23} Mother's first and second assignments of error are overruled. Father's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, P. J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶24} I concur in the majority's resolution of Mother's first assignment of error.

{¶25} I respectfully dissent in regard to the resolution of Mother's second assignment of error and Father's assignment of error. As the issue of visitation is properly before this Court, and because consideration of Father's assignment of error necessarily implicates issues raised in Mother's second assignment of error, I would consolidate those assignments of error for consideration. I further believe that the juvenile court abused its discretion when it failed to consider holidays when it determined the issue of visitation. Therefore, I would reverse and remand the matter for determination of a visitation schedule based on the appropriate consideration of holidays and days of special meaning.

APPEARANCES:

RONALD T. GATTS, Attorney at Law, for Appellant.

BRENDON KOHRS, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

GINA D'AURELIO, Guardian Ad Litem.