

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TAMI L. BYER :  
 : Hon. Julie A. Edwards, P.J.  
 : Hon. W. Scott Gwin, J.  
 Plaintiff-Appellee : Hon. William B. Hoffman, J.

-vs- :  
 :  
 : Case No. 2009-CA-00277

TIMOTHY BYER :  
 :  
 :  
 Defendant-Appellee : OPINION

-vs-  
  
MARY ANN BISSELL  
  
Intervenor-Appellant

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of  
Common Pleas, Domestic Relations  
Division, Case No. 2006DR01545

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2010

APPEARANCES:  
  
For Plaintiff-Appellee For Defendant-Appellant

ROSEMARY RUBIN ROBERT G. ABNEY  
1435 Market Ave. N. 116 Cleveland Ave. N.W.  
Canton, OH 44714 Suite 500  
Canton, OH 44702

TIMOTHY BYER  
164 W. 7<sup>th</sup> Street  
Brewster, OH 44613

*Gwin, P.J.*

{¶1} Intervenor-appellant Mary Ann Bissell appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, which overruled her motion for court-ordered visitation with her two minor grandchildren. Appellees are the children's parents: appellant's daughter, Tami Byer and her ex-husband, Timothy Byer. Appellant assigns a single error to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT COURT-ORDERED VISITATION."

{¶3} The magistrate to whom the matter was assigned made findings of fact and conclusions of law after conducting a hearing. The magistrate found the appellees were divorced in December 2007, and appellee Tami Byer has custody of the parties' two children. Appellee Timothy Byer has scheduled visitation on a regular basis and exercises the visitation. Appellant is the maternal grandmother. Appellant and appellee Tami Byer had an angry exchange on or about Christmas 2007, and do not have contact with each other as a result. The children visit with their maternal aunt through appellee Tami Byer. The maternal aunt has also had a falling out with the maternal grandparents.

{¶4} The magistrate found the children do have visitation with appellant and the maternal grandfather through appellee Timothy Byer. Appellee Timothy Byer permits the paternal grandparents and the maternal grandparent to visit with the children, and the children have a good relationship with their maternal grandparents. The magistrate found there was no information to indicate that appellee Tami Byer prohibits the children

from visiting with the maternal grandparents while they are with their father, or that she restricts their contact in any way.

{¶15} The magistrate found the guardian ad litem completed an investigation and found it is in the best interest of the children to be raised by their parents without interference from third parties. The guardian reported appellee Tami Byer has chosen to stop the relationship with her parents for many different reasons, but does not prohibit or restrict their father from taking the children to the maternal grandparents' home. The guardian ad litem recommended there not be any court-ordered visitation between the children and the maternal grandparents. The guardian ad litem advised the court the maternal grandparents were asking for one weekend a month and several weeks over the summer. The guardian suggested if the court was inclined to grant some type of visitation, it should be over the summer months for a week or two. However, the guardian cautioned that she believed the maternal grandparents will likely continue to pursue more and more visitation if the court orders any at this time.

{¶16} The magistrate found the relationship between appellee Tami Byer and the maternal grandparent continues to be strained by on-going continual litigation brought by the maternal grandmother, appellant.

{¶17} Appellee Tami Byer adamantly opposes court-ordered visitation between the children and the maternal grandparents during her parenting time. Appellee Timothy Byer does not want the court to order visitation between the children and the maternal grandparents during his companionship time.

{¶18} The magistrate stated she has reviewed the statutory factors, the report of the guardian ad litem, and the evidence taken, including exhibits, and concludes it

would not be in the children's best interest to have court-ordered visitation at this time. The magistrate found continued litigation between the parties appears to be driving the parties further apart and putting the children in the middle. The magistrate concluded appellant maternal grandmother's motion for companionship should be overruled.

**{¶9}** After hearing objections, the court accepted the magistrate's decision and adopted it as its own judgment.

**{¶10}** R.C. 3109.051 governs the decision to grant parenting time to parents, grandparents, relatives, or other persons. The statute provides in pertinent part:

**{¶11}** "(B)(1) In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply:

**{¶12}** "(a) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights.

**{¶13}** "(b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child.

**{¶14}** "(c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.

**{¶15}** \*\*\*

**{¶16}** "(D) In determining whether to grant parenting time to a parent pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights to a grandparent, relative, or other person pursuant to this section or section

3109.11 or 3109.12 of the Revised Code, in establishing a specific parenting time or visitation schedule, and in determining other parenting time matters under this section or section 3109.12 of the Revised Code or visitation matters under this section or section 3109.11 or 3109.12 of the Revised Code, the court shall consider all of the following factors:

**{¶17}** “(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;

**{¶18}** “(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person's residence and the distance between that person's residence and the child's residence;

**{¶19}** “(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;

**{¶20}** “(4) The age of the child;

**{¶21}** “(5) The child's adjustment to home, school, and community;

**{¶22}** “(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to

a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

**{¶23}** “(7) The health and safety of the child;

**{¶24}** “(8) The amount of time that will be available for the child to spend with siblings;

**{¶25}** “(9) The mental and physical health of all parties;

**{¶26}** “(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

**{¶27}** “(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

**{¶28}** “(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be

the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;

**{¶29}** “(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

**{¶30}** “(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

**{¶31}** “(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;

**{¶32}** “(16) Any other factor in the best interest of the child.”

**{¶33}** In the recent case of *Troxel v. Granville* (2000), 530 U.S. 57, the United States Supreme Court found there is a presumption that a fit parent acts in the best interest of his or her children, and when a trial court intervenes into the private realm of the family, it must accord special weight to the parent's wishes. The Ohio Supreme

Court has held the factors in R.C. 3109.051 allow the trial court to take into consideration the best interest of the child and to balance his or her interest against the parent's desires. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334, 836 N.E.2d 1165.

{¶34} In *Spivey v. Keller*, Allen App. No. 6-04-09, 2004-Ohio- 6667, the court of appeals for the Third District found the decision whether to order a grandparent visitation rights with a child is within the court's discretion. *Spivey* at paragraph 16. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Medical Board*, 66 Ohio St.3d 619, 621. 1993 -Ohio- 122, 614 N.E.2d 748.

{¶35} The guardian ad litem stated Timothy and Tami Byer get along relatively well considering the divorce. Since the divorce, each parent has the children 50% of the time. Appellee Tami Byer is opposed to court ordered visitation, but does not prevent Timothy Byer from allowing the children to see appellant. Although Timothy Byer has permitted the children to visit with appellant during his parenting time, he does not want the court to require him to do so. Numerous witnesses testified the children wish to visit with appellant.

{¶36} Appellant challenges the adequacy of the guardian ad litem's investigation and report, but the trial court accepted it and the guardian testified at the hearing. Appellant was able to cross-examine the guardian ad litem regarding her actions and

her report, and the trial court as the finder of fact assessed the weight to give her testimony and report. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180.

{¶37} We have reviewed the record, and we find the trial court's decision is supported by the manifest weight of the evidence, and is not contrary to Ohio law. We find the trial court did not err in finding it was in the best interest of the children for the court to refrain from ordering court-ordered visitation at the present time.

{¶38} The assignment of error is overruled.

{¶39} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed.

By Gwin, P.J.,

Edwards, J., and

Hoffman, J., concur

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HON. W. SCOTT GWN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

