

[Cite as *In re S.K.G.*, 2009-Ohio-4673.]

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

IN THE MATTER OF:

S.K.G.

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CASE NO. CA2008-11-105

OPINION
9/8/2009

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS,
JUVENILE DIVISION
Case No. 2006-JC-3701

Mark J. Tekulve, 785 Ohio Pike, Cincinnati, OH 45245, for plaintiffs-appellees, D. & J. W.

Fred S. Miller, 246 High Street, Hamilton, OH 45011, for defendant-appellant, R.K.G.

YOUNG, J.

{¶1} Defendant-appellant, R.K.G., appeals a decision of the Clermont County Court of Common Pleas, Juvenile Division, awarding custody of appellant's grandchild, S.K.G., to plaintiffs-appellees, D. & J. W., who are not biologically related to the child and reducing appellant's visitation with the child.

{¶2} S.K.G. was born in May 2006 to an unmarried mother. Shortly thereafter,

the child's putative father left town, and by August 2006, was incarcerated. In July 2006, S.K.G.'s mother was arrested on outstanding warrants and later incarcerated. Immediately prior to her arrest, the mother gave custody of S.K.G. to a neighbor, T.C. However, T.C. began experiencing health problems soon after receiving custody of S.K.G. As a result, T.C., with the consent of S.K.G.'s mother, gave custody of the child to appellees on July 20, 2006. Four days later, appellees filed an alleged dependent child complaint in the Clermont County Juvenile Court requesting that they be granted legal custody of S.K.G.

{¶3} Appellant, who is the mother of S.K.G.'s putative father, had a paternity test conducted to establish whether or not her son was the child's father, and after the testing established there was a 99.99 percent probability that he was, appellant moved for legal custody of S.K.G. On October 10, 2006, the juvenile court adjudged S.K.G. to be a dependent child and placed the child in appellees' temporary custody. Appellant was granted temporary visitation with the child on Sundays from 1:00 p.m. to 5:00 p.m. and Wednesdays from 5:30 p.m. to 8:00 p.m.

{¶4} A two-day hearing was held on the matter in December 2007. On July 16, 2008, the magistrate issued a decision awarding appellees legal custody of S.K.G. and awarding appellant grandparenting time with S.K.G. on the first and third Sunday of every month from 10:00 a.m. until 6:00 p.m. and "such other times as can be agreed." The trial court overruled appellant's objections to the magistrate's decision and affirmed the decision in its entirety.

{¶5} Appellant now appeals, assigning the following as error:

{¶6} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT, THE PATERNAL GRANDMOTHER, WHEN IT AWARDED CUSTODY OF THE CHILD TO APPELLEES, WHO ARE LEGAL STRANGERS TO THE CHILD."

{¶18} Appellant argues the trial court abused its discretion when it awarded appellees legal custody of S.K.G. because the evidence shows that both parties are good and competent caregivers, and therefore she should have been granted legal custody of S.K.G. by virtue of the fact that she is a blood relative of the child and appellees are not. We disagree.

{¶19} "Generally, the standard of review in custody cases is whether the trial court abused its discretion. *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-417, 1997-Ohio-260. Abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The appellate court must be mindful that the trial court is better equipped to examine and weigh the evidence, determine the credibility of the witnesses, and make decisions concerning custody. *Terry L. v. Eva E.*, Madison App. No. CA2006-05-019, 2007-Ohio-916, ¶9. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280." *Leeth v. Leeth*, Preble App. No. CA2009-02-0024, 2009-Ohio-4260, ¶6.

{¶10} R.C. 2151.353(A)(3) provides that if a child is adjudicated a dependent child, the court may award 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[.]" An award of legal custody "vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(B)(19).

{¶11} When a juvenile court makes a custody determination under R.C. 2151.353, it must do so in accordance with the "best interest of the child" standard set forth in R.C. 3109.04(F)(1). See *In re Poling*, 64 Ohio St.3d 211, 1992-Ohio-144, paragraph two of the syllabus, and R.C. 2151.23(F)(1) (requiring a juvenile court to exercise its jurisdiction in accordance with R.C. 3109.04 as well as other sections of the Ohio Revised Code). The factors a court must consider in determining a child's best interest include such things as the child's interaction and interrelationship with his parents or any other person who may significantly affect the child's best interest. R.C. 3109.04(F)(1)(c).

{¶12} A number of courts have held that while "blood relationship" and "family unity" are factors to consider when determining a child's best interest, neither one is controlling. See, e.g., *In the Matter of Mitchell*, Lake App. Nos. 2002-L-078, 2002-L-079, 2003-Ohio-4102, ¶18, and *In re T.W.*, Cuyahoga App. No. 86084, 2005-Ohio-6633, ¶15. Nevertheless, the *Mitchell* court went on to hold that while statutes like R.C. 2151.412, 2151.413 and 2151.414, which govern matters such as case plans and permanent custody, do not mandate that custody of an abused, neglected or dependent child be granted to a relative, those statutes "clearly indicate the intent of the legislature that appropriate relatives should generally be given priority consideration." *Mitchell*.

{¶13} Citing *Mitchell*, appellant essentially argues that she was entitled to "priority consideration" as to the custody determination because the evidence shows that both parties are competent and good caregivers and that, unlike appellees, she is one of S.K.G.'s blood relatives. However, *Mitchell* did not create a bright-line rule on this issue, but instead, simply indicated that "relatives should *generally* be given priority consideration" in cases where the evidence shows that both relatives and nonrelatives would be suitable caregivers. (Emphasis added.) *Id.*

{¶14} Furthermore, in *In the Matter of Halstead*, Columbiana App. No. 04CO37, 2005-Ohio-403, ¶4, the court of appeals noted that while there are statutes that indicate preference for awarding custody to relatives over nonrelatives, the language in those statutes was "precatory, not mandatory," and therefore the "trial court did not err by failing to rigidly apply those statutory preferences." The *Halstead* court also stated that "courts should not casually disregard the relationship a very young child has established with a foster family in order to give a relative legal custody of a child." *Id.* at ¶52.

{¶15} In this case, it appears from the record that the juvenile court considered all the required factors listed in R.C. 3109.04(F)(1) in awarding appellees custody of S.K.G. The fact that appellant is biologically related to the child while appellees are not was only one factor the juvenile court had to consider in making the custody decision. However, it was not the determining factor. There was ample evidence to show that appellees took the child in and have provided a nice, stable environment for the child. Consequently, we find no abuse of discretion in the juvenile court's decision to grant appellees custody of the child. *Davis*, 77 Ohio St.3d at 418-419.

{¶16} Appellant also points out that it took nearly two years for the trial court to

make a custody determination and essentially alleges that this delay gave appellees an unfair advantage because it allowed them to develop a strong bond with the child, which, in turn, provided a ready justification for granting them legal custody of the child. However, as appellant acknowledges, there is no evidence to show that appellees were responsible for the lapse in time that occurred before the custody determination was made in this case.

{¶17} Accordingly, appellant's first assignment of error is overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL ERRED [sic] TO THE PREJUDICE OF APPELLANT WHEN IT ORDERED ONLY LIMITED VISITATION BETWEEN APPELLANT AND HER [GRANDCHILD]."

{¶20} Appellant argues the trial court abused its discretion when it "drastically" reduced her visitation with S.K.G. since the record shows that she had had significant visitation with the child for about two years prior to the custody determination and there was no evidence of any problems between the parties or that the child had been harmed by the visitation. We find this argument unpersuasive.

{¶21} R.C. 3109.051(B) provides that a trial court may grant reasonable visitation rights to grandparents if the court determines that such visitation is in the child's best interests. The trial court has broad discretion as to visitation issues, and its decision will not be reversed absent an abuse of discretion, i.e., the decision is unreasonable, arbitrary or unconscionable. *Anderson v. Anderson*, 147 Ohio App.3d 513, 2002-Ohio-1156, ¶18.

{¶22} In this case, the evidence showed that S.K.G. had lived with appellees for

about two years at the time the magistrate issued its decision in the matter and that the child experienced emotional difficulty when separating from appellees. Therefore, it was not unreasonable for the juvenile court to conclude that it was in the child's best interest to issue a visitation schedule that would help ensure the child's stability and comfort in appellees' home. Consequently, the juvenile court did not abuse its discretion with respect to the amount of visitation with the child that it granted appellant.

{¶23} Therefore, appellant's second assignment of error is overruled.

{¶24} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.