ARKANSAS COURT OF APPEALS

DIVISION IV & I
No. CACR10-687

JAMIE R. MAHONE APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES and MINOR CHILDREN APPELLEES	**Opinion Delivered** February 23, 2011 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. J2008-1046-3] HONORABLE STACEY A. ZIMMERMAN, JUDGE DISSENTING OPINION ON DENIAL OF REHEARING

JOSEPHINE LINKER HART, Judge

On rehearing, Arkansas Department of Human Services (ADHS), as it did at the trial court and on appeal, has *joined* the appellant in asking that he be given custody of his natural children. Despite the named parties on both sides of the case having agreed on the disposition, the trial court chose a different course. I submit that this court's decision to affirm the trial court is based on significant errors of law.

Jamie Mahone is the natural father of T.M. and K.M., ages 12 and 9 respectively. Although he was a noncustodial parent, he had standard visitation, which he always exercised. Faith Charity Randolph is the mother of T.M. and K.M. as well as D.R., their two-year-old half-sibling. Mahone has been married since February 2003, and has three children with his current wife, J.M., age 12; A.M., age 10; and C.M., age 8. Mahone has no current relationship with Randolph.

On December 2, 2008, police raided Randolph's apartment and arrested her, along with her crack-selling boyfriend and six other men. T.M. and K.M., who were present in the apartment, were taken into ADHS custody. Later, ADHS collected D.R. from the maternal grandmother, Teresa Taylor. The sole reason for taking the children into custody was Randolph's arrest for drug possession.

Although Mahone was in no way responsible for the children being taken into ADHS custody, he nonetheless did everything asked of him to get custody of his children. Conversely, Randolph and D.R.'s putative father never followed the case plan and did not even show up at their T.P.R. hearing.

ADHS recommended that Mahone be given custody of his children. The trial court found that Mahone "has paid child support [and] his home is clean and safe." Nonetheless, the trial court gave permanent custody to Teresa Taylor, purportedly so as not to separate T.M. and K.M. from their half-sibling D.R. and to give them "stability."[1] Mahone only received visitation.

On rehearing, ADHS has joined Mahone in asserting that the court of appeals made

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[1]That the trial court should decide to give Taylor permanent custody of the minor children is curious indeed. Taylor's home study states that while her home was "appropriate," it belonged to her son and his wife and that she had only been living there for two weeks. Prior to that, Taylor had lived with a "boyfriend." Taylor's monthly income was $700 "in cash," and she was actively seeking disability after several failed back surgeries. Taylor was taking Hydrocodone for the pain. Remarkably, the court of appeals has affirmed the termination of parental rights where the parent did not have his or her own home and had involvement with narcotics. *Clingenpeel v. Arkansas Dep't of Human Servs*, 2011 Ark. App. 84; *Williams v. Arkansas Dep't of Human Servs.*, 2010 Ark. App. 449. The court of appeals's rationale in those cases was that the best interest of the child was "stability."

a mistake of law in not returning the children to the nonoffending, fit natural parent. The mistake of law complained about on rehearing is that the trial court—and the court of appeals—misinterpreted Arkansas Code Annotated section 9-27-338. The court of appeals's opinion holds as follows: "As the biological father, Mr. Mahone falls within the same statutory preference that Ms. Taylor falls within: 'a fit and willing relative.' Ark. Code Ann. § 9-27-338(c)(5)." In his petition Mr. Mahone asserts that this is error. I agree.

The statutory subsection (c)(5) states as follows: "Authorizing a plan to obtain a permanent *custodian*, including permanent custody with a fit and welling relative." (Emphasis added.) "Custodian," in our juvenile code, "means a person *other than a parent*." Ark. Code Ann. § 9-27-303(14). (Emphasis added.) Thus, Mr. Mahone is not a "custodian," as he is a parent. Thus, Mr. Mahone is correct in arguing that this court committed an error of law.

The court of appeals's opinion also dismisses Mr. Mahone's argument that *Ideker v. Short*, 48 Ark. App. 118, 892 S.W.2d 278 (1995), applies. The court describes *Ideker*, stating that the case "was governed by the body of common law developed in other custody matters, including the natural-parent preference which provides that 'as between a parent and a grandparent, the law prefers the former unless the parent is incompetent or unfit.' *Ideker*, 48 Ark. App. at 121, 892 S.W.2d at 280." The court of appeals further concludes that § 9-27-338(c) controls, stating that the "statute does not require a showing of parental incompetence or unfitness of the previously non-custodial parent before a court places a juvenile removed from the custody of a parent with another relative."

A plain reading of section 9-27-338(c) indicates that the statute is silent with regard to

the situation in the case at bar where there is a nonoffending parent who is identified and active in the lives of the minor children. Section 9-27-338 does not state that the child cannot be placed with the nonoffending parent, which should be no surprise to anyone. I have found no law granting the State of Arkansas the right to deny a nonoffending parent custody of his or her own child. Given the lack of a grant of statutory authority over such matters, we must turn to the common law, which grants a parent preference over a grandparent, as Mr. Mahone argues.

The statute's silence with regard to nonoffending natural parents is well grounded in the Constitution, which guarantees the right to parent one's child in a manner free from governmental interference. I quote extensively from a recent law review article:

> It is settled law that parents have a fundamental right to parent their children without interference by the state. This fundamental right is protected by the liberty interest inherent in the Due Process and Equal Protection clauses of the Fourteenth Amendment and by the Ninth Amendment's grant of residual liberties to the people. As a matter of constitutional law, the government may not restrict fundamental rights unless it demonstrates a compelling interest. In the relationship between parent and child, the state's compelling interest exists if the parent is unfit to make decisions regarding his or her own children. Without a showing that a parent is unfit, the state normally has no justification to interfere with the family unit.
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> Unfitness cannot be presumed by the parent's circumstances; the state must make an individualized assessment of the parent's ability to care for his children. Thus, the fact that one parent is unfit does not alter the state's burden to prove the other parent is also unable to care for the child before it may interfere in the family. The United States Supreme Court has made clear that when both parents are available for their children, the state must prove that each parent is unfit before it may take custody of the children or otherwise interfere with the family. According to the *Stanley* Court, the individualized assessment of each parent is necessary to prevent the arbitrary and unjustified interference with a parent's important fundamental right. To rule otherwise would lead to a situation where one parent's actions negate the constitutional rights of the other.

> States protect this fundamental right by specifically defining parental unfitness in state child neglect and dependency laws. These unfitness definitions are not standardized. However, each has in common the goal of using the state's *parens patriae* power to protect the child while maintaining, when possible, the family unit. No matter the particulars of the various state laws, once the parents have been found to have committed an act or failed to take an action, as defined under state law, that risks or leads to harm to their children, the parents are also found constitutionally unfit to exercise the fundamental right to care for and have custody of their children. At this point, the state's compelling interest in the welfare of children overrides the parents' rights, and the state is authorized to exercise its *parens patriae* power by taking action to protect the child.
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> Without a finding of unfitness, the state has no constitutional authority to exercise that power. Furthermore, each parent is entitled to the same rights. In other words, under current Supreme Court authority, the existence of a single fit parent, regardless of the acts of the other parent, negates the state's ability to interfere in the family unit.
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> Adjudication of a child as dependent or neglected, even when a fit parent is present and able to care for the child, unconstitutionally trumps the fit parent's fundamental right to parent his or her child without state interference. With a fit parent present, the state lacks any compelling interest sufficient to justify state involvement in the family. Thus, adjudication of a child as dependent or neglected, without a finding of unfitness on the part of both parents, is unconstitutional because it permits the court to interfere with the family unit without the requisite compelling interest.

Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 Alaska L. Rev. 173, 17–79 (2007) (footnotes omitted).

Thus, as discussed in the quoted text, the United States Supreme Court has stated that it is a fundamental right to parent a child without interference by the state. Accordingly, there first must be a showing of unfitness before the state may intervene. The fact that one parent is unfit does not alter the state's burden to prove that the other parent is also unable to care for the child before it may interfere in the family. The Supreme Court of the United States

has made clear that when both parents are available for their children, the state must prove that each parent is unfit before it may take custody of the children or otherwise interfere with the family. Without a finding of unfitness, the state has no constitutional authority to exercise that power. Under current Supreme Court authority, the existence of a single fit parent, regardless of the acts of the other parent, negates the state's ability to interfere in the family unit. With a fit parent present, the state lacks any compelling interest sufficient to justify state involvement in the family.

The Arkansas Juvenile Code recognizes this constitutional fact by not interfering in custodial determinations when there is a fit parent. The purpose of the statute is to

> protect a juvenile by considering the juvenile's health and safety as the paramount concerns in determining whether or not to remove the juvenile from the custody of his or her parents or custodians, removing the juvenile only when the safety and protection of the public cannot adequately be safeguarded without such removal.

Ark. Code Ann. § 9-27-302(2)(B). The purpose of the statute is to remove the juvenile only when the child is not safe. The state cannot deprive a non-offending parent if that parent has not been found unfit.

Further, there is black-letter common law, recently noted in *Devine v. Martens*, where the supreme court stated:

> Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life.

371 Ark. 60, 71, 263 S.W.3d 515, 524 (2007) (quoting *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). Further, the *Devine* court noted:

> Our State's policy [in dependency-neglect cases] strongly favors reunification with the natural parents above all other alternatives for dependent-neglected juveniles. . . . Parents whose children are adjudicated dependent-neglected are generally offered family services and an opportunity to prove they have made improvements that are in keeping with their children's best interests. Additionally, parents who make improvements are, almost without exception, reunited with their children.

Id. at 72, 263 S.W.3d at 524 (citations omitted). Contrary to the court of appeals opinion, the right to parent one's children derives not from the largess of the State; rather, the State's right to intervene and direct the parenting of a child arises only if the parent demonstrates an unwillingness and inability to do so.