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

CLIFF HOOFMAN, Judge

I agree with Judge Hart that the trial court's award of custody in this case to the grandmother should be reversed but write separately to note my agreement with the majority opinion's interpretation of Ark. Code Ann. § 9-27-338(c) (Repl. 2009). Based upon our prior decision in *Judkins v. Duvall*, 97 Ark. App. 260, 265, 248 S.W.3d 492, 496 (2007), section 9-27-338(c)(1) does not apply to a nonoffending, noncustodial parent such as Mahone from whom custody was not removed by DHS. Rather, we found in *Judkins* that the trial court properly analyzed the noncustodial father in that case as "any other fit and willing relative" under section 9-27-338(c)(5). *Id.* This particular subsection states that the trial court at the permanency-planning hearing may authorize "a plan to obtain a permanent custodian, including permanent custody with a fit and willing relative." Ark. Code Ann. § 9-27-338(c)(5). According to the full definition found in Ark. Code Ann. § 9-27-303(13)

(Repl. 2009), "'Custodian' means a person other than a parent or legal guardian who stands in loco parentis to the juvenile *or a person, agency, or institution to whom a court of competent jurisdiction has given custody of a juvenile by court order*[.]" (emphasis added.) Thus, if the trial court in this case had ordered that permanent custody be awarded to Mahone, instead of the grandmother, he would then be the "custodian" under these statutory sections.

Despite Mahone's and DHS's arguments in their petitions for rehearing, my issue lies not with either this court's or the trial court's failure to analyze Mahone under subsection (c)(1). Instead, while Mahone and the grandmother were both properly analyzed as "any fit and willing relative" under subsection (c)(5), I find that the trial court clearly erred in its application of the law to the facts by awarding the grandmother permanent custody over Mahone, the father. While the trial court in its findings appropriately recited the applicable law, including the common-law parental preference, it clearly did not apply this preference to Mahone.

I agree with Judge Hart's dissent that there is a fundamental right to parent a child without state interference, where that parent is shown to be fit. *Troxel v. Granville*, 530 U.S. 57, 68 (2000). This fundamental right has been recognized by our state in our common-law parental preference. *See, e.g.*, *Devine v. Martens*, 371 Ark. 60, 72, 263 S.W.3d 515, 524 (2007) (our state's policy strongly favors reunification with the natural parents above all other alternatives); *see also Ideker v. Short*, 48 Ark. App. 118, 121, 892 S.W.2d 278, 280 (1995) ("[A]s between a parent and a grandparent, the law prefers the former unless the parent is proven to be incompetent or unfit.")

In this case, the trial court did not find that Mahone was unfit. The court did note that, years ago, while Mahone was still married to the children's mother, one child had to be removed by DHS for a short time, and that Mahone's infidelity by having children with his now current wife while still married to the children's mother showed a lack of stability. However, both of these issues occurred years prior to the initiation of this case by DHS, when the children were removed from their mother due to her drug use. At the permanency planning hearing several months prior to the hearing at issue, the trial court noted that while Mahone was not in full compliance because there was evidence that he had missed a couple of phone calls to the counselor, Mahone was in "substantial compliance," as "he's done most everything that he was ordered to do." Thus, the trial court stated that the *goal* was still reunification with Mahone and that "we need to look at Mr. Mahone in three months."

At the 15-month hearing in March, the trial court found that Mahone was in "full compliance," that he "has met the needs of the children by paying his child support," and that "his home is safe and it's clean." However, noting that the overriding consideration is the best interests of the children, the trial court awarded custody to the children's grandmother, based primarily upon the fact that it did not want to separate the children from their half-sibling. This was clearly erroneous and contrary to the trial court's previously stated goal of reunification with Mahone. At the time of this hearing, Mahone had been in full compliance with all court orders and was married to the same woman, Amber, with whom he had the half-siblings to the children involved here; in fact, the trial court stated that Amber was "a great stepmom" and that it wished that she "was their biological mom."

In short, there was no evidence that Mahone was unfit to parent these children. While the trial court was correct in stating that the primary concern is the best interests of the children, it is also presumed that a natural parent acts in the best interests of his children. *Troxel v. Granville*, 530 U.S. at 69. Further, "it is not in a child's best interests to take custody from a natural parent who has rectified all issues related to his or her fitness, and grant custody to a third party, such as that child's grandparent." *Devine*, 371 Ark. at 74, 263 S.W.3d at 526. The doctrine of sibling separation may be a proper factor to consider, but as this court has previously found, it cannot rise to the level of a presumption that then subsumes the entire notion of best interest. *Atkinson v. Atkinson*, 72 Ark. App. 15, 32 S.W.3d 41 (2000). Because the trial court clearly erred in applying the applicable law to the facts of this case, and also in contravening its own stated goal of reunification with Mahone, I would grant the motion for rehearing and reverse the trial court's award of custody.