

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

K.H. (DOB: 01/31/2008)

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Earle E. Wise, Jr., J.

Case No. CT2017-0059

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Juvenile Division, Case No.  
21730167

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT:

March 16, 2018

APPEARANCES:

For Plaintiff-Appellee

GERALD V. ANDERSON, II  
27 North Fifth Street  
P.O. Box 189  
Zanesville, OH 43702-0189

For Defendant-Appellee

BRIAN W. BENBOW  
605 Market Street  
Zanesville, OH 43701

*Wise, Earle, J.*

{¶ 1} Appellant, Bret Dean Snow, appeals the August 21, 2017 judgment entry of the Court of Common Pleas of Muskingum County, Ohio, Juvenile Division, dismissing his complaint. Appellee is Muskingum County Children Services.

#### FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 16, 2017, appellant filed a complaint seeking temporary and legal custody of K.M., a juvenile. According to the complaint, K.M.'s father is deceased and K.M.'s mother is incarcerated, serving a fifteen year sentence. K.M. is currently in foster home placement. Appellee is involved with K.M., and a case plan is in effect.

{¶ 3} Appellant is not blood-related to K.M. However, he alleged K.M. lived in his residence every other weekend during the first two years of life. He alleged he stood in loco parentis to K.M., and qualified as a custodian to K.M. under Ohio Adm.Code 5101:2-38-05(E) for purposes of participating in the case plan. Appellant alleged K.M. appeared to be a dependent and abused child.

{¶ 4} According to the complaint, appellee stated appellant was never treated as a party to the case plan. Appellant disputes this and attaches to his complaint a portion of a purported case plan which shows that he made some progress toward the case plan goals. Appellant alleged he was an active participant in the case plan, and attended meetings and underwent a psychological evaluation at the direction of the case plan.

{¶ 5} On August 17, 2017, appellee filed a motion to dismiss, claiming there is a pending case before the court wherein K.M. was adjudicated neglected, abused, and dependent in December 2016 (Case No. 21630145) while living in appellant's residence, and the case is continuing. By judgment entry filed August 21, 2017, the trial court

granted the motion, finding the motion to be well taken and was in the best interest of the child.

{¶ 6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶ 7} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISMISSING APPELLANT'S COMPLAINT WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING OR BY GIVING APPELLANT THE OPPORTUNITY TO RESPOND TO THE STATE'S MOTION TO DISMISS IN VIOLATION OF THE JUVENILE RULES OF PROCEDURE AND THE OHIO REVISED CODE. THE TRIAL COURT'S DISMISSAL ALSO VIOLATED THE OHIO AND FEDERAL CONSTITUTIONS IN THAT THE TRIAL COURT'S ACTIONS AFFORDED NO PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND DENIED APPELLANT EQUAL PROTECTION OF THE LAW."

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{¶ 8} In his sole assignment of error, appellant claims the trial court erred in dismissing his complaint. We agree.

{¶ 9} Specifically, appellant claims the trial court erred in dismissing his complaint without a hearing and an opportunity to respond, thereby denying him due process and equal protection under the law.

{¶ 10} Appellee's motion to dismiss appears to argue appellant's complaint failed to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6), as the complaint does not allege anything new given the pending case wherein K.M. was already adjudicated a neglected, abused, and dependent child. The rules of civil procedure apply

to juvenile court proceedings except when they are clearly inapplicable. *State ex rel. Fowler v. Smith*, 68 Ohio St.3d 357, 360, 626 N.E.2d 950 (1994).

{¶ 11} Appellee filed its motion to dismiss on August 17, 2017. Four days later, the trial court filed its judgment entry granting the motion and dismissing the complaint.

{¶ 12} Juv.R. 19 governs motions and states the following:

An application to the court for an order shall be by motion. A motion other than one made during trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority and may be supported by an affidavit.

To expedite its business, unless otherwise provided by statute or rule, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

{¶ 13} Clearly the rule contemplates a response in opposition to a motion if so desired by the opposing party. The juvenile rules, as well as the Muskingum County local rules, are silent as to the timeframe in which to file a response. Civ.R. 6(C) states: "Unless otherwise provided by these rules, by local rule, or by order of the court, a response to a written motion, other than a motion that may be heard ex parte, shall be served within

fourteen days after service of the motion, and a movant's reply may be served within seven days after service of the response to the motion."

{¶ 14} We find in granting the motion to dismiss four days after the motion was filed, appellant was not afforded an opportunity to respond according to rule. The trial court ruled prematurely.

{¶ 15} Upon review, we find the trial court erred in granting the motion to dismiss. We remand the matter to the trial court to afford appellant the opportunity to file a response in opposition.

{¶ 16} The sole assignment of error is granted.

{¶ 17} The judgment of the Court of Common Pleas of Muskingum County, Ohio, Juvenile Division is hereby reversed, and the matter is remanded to said court for further proceedings consistent with this opinion.

By Wise, Earle, J.

Gwin, P.J. and

Hoffman, J. concur.