[Cite as *In re C.H.*, 2011-Ohio-1386.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
C.H.,	:	No. 10AP-579 (C.P.C. No. 01JU06-07230)
(M.N.H.,	:	
		(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on March 24, 2011

Yeura R. Venters, Public Defender, and *Paul Skendelas*, Guardian ad Litem.

Paula J. Copeland, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶1} Appellant, M.N.H., appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, granting the motion of the guardian ad litem to suspend visitation between appellant and her biological daughter, C.H.

{¶2} As gleaned from the record, this matter originated in Richland County, Ohio, with allegations that C.H., born on April 30, 1999, was a dependent child. At the time C.H. was born, appellant was 16 years old and a ward of the state due to neglect and dependency issues. C.H. was taken from appellant's care when C.H. was approximately two months of age due to concerns of C.H.'s failure to thrive. While C.H. was initially placed in foster care, she was subsequently placed with appellant's uncle, D.M., on or about January 30, 2000.

{¶3} This matter was filed in Franklin County on June 19, 2001, upon the filing of a complaint alleging dependency of C.H. At the time the complaint was filed, C.H. was two years old and continuing to reside with D.M. In the complaint, D.M. asked to be made a party to the action and for legal custody of C.H.

{¶4} On August 20, 2001, C.H. was found to be a dependent minor and placed in the temporary custody of D.M. Appellant was allowed visitation with C.H., and it was ordered that the visitation would take place at D.M.'s residence. Thereafter, D.M. sought, and on March 5, 2002 was granted, legal custody of C.H. Appellant was permitted a minimum of two hours of weekly supervised visitation. Since the time legal custody of C.H. was granted to D.M., numerous court hearings and mediations have occurred pertaining to appellant's visitation, and have included matters such as location and length of visitation. Under the most recent visitation provision, appellant was permitted two hours of visitation every Sunday for three consecutive Sundays and four hours of visitation on each fourth Sunday. The visitation was to occur in a public place until appellant's home was approved by the guardian ad litem.

{¶5} On July 9, 2008, appellant filed a motion for contempt alleging D.M. had not allowed her to visit or communicate with C.H. since August 2, 2007. On August 21, 2008, the guardian ad litem filed a motion to suspend appellant's visitation with C.H. until an upcoming court matter scheduled for October 16, 2008. On September 22, 2008, the magistrate issued a decision suspending appellant's visitation with C.H. pending further court hearings.

{¶6} A hearing on appellant's July 2008 motion for contempt was held before a magistrate on December 1, 2008. The magistrate's decision states appellant refused to cooperate in the proceedings by repeatedly refusing to answer questions. The magistrate instructed appellant that her continued refusal to answer questions would result in a dismissal of her motion. Having no cooperation from appellant, the magistrate ultimately dismissed appellant's motion for contempt. Appellant left the courtroom resulting in the motion to suspend visitation being addressed in her absence. However, because appellant left the proceedings, the magistrate proceeded informally. On December 11, 2008, the magistrate issued a decision dismissing the July 9, 2008 motion for contempt, suspending appellant's visitation with C.H. until C.H. requests such visitation be reinstated, and ordering that C.H. have unlimited telephone contact with appellant provided that appellant make available a cellular phone for C.H.

{¶7} Appellant filed objections to the magistrate's decision, which were heard on May 2, 2009, and the trial court sustained the objections in part. In particular, the trial court found no error in the dismissal of the motion for contempt, but did find error in the magistrate's decision to proceed informally on the motion to suspend visitation.

Therefore, the trial court remanded the matter to the magistrate for the sole purpose of determining the motion to suspend visitation based on sworn testimony and evidence.

{¶8} Pursuant to the remand, a hearing was held on September 30, 2009. By decision filed October 15, 2009, the magistrate suspended appellant's visitation with C.H., "until modified by mediation agreement or court order." (Oct. 15, 2009 Decision at 2.) Further, the magistrate granted appellant the right to make a weekly telephone call to C.H. Specifically, the magistrate stated:

> For the reason that the court, in eight years of attending to fashion safe and non-conflictual visitations between [C.H.] and [appellant] has been unsuccessful and because the child is not in agreement with continued visitations, the Magistrate finds it is in the child's best interest to suspend visitations between mother and child until such time as the child wishes a relationship with her mother. At that time either [C.H.] or her legal custodian shall contact the Guardian ad litem to schedule mediation to modify the visitation order.
>
> [Appellant] shall have the right to make one weekly telephone call to [C.H.].

(Oct. 15, 2009 Decision at 2.)

{¶9} Appellant filed objections to the magistrate's decision, and after a hearing on February 3, 2010, the trial court issued a decision on May 21, 2010, overruling appellant's objections and adopting the decision of the magistrate.

{¶10} This appeal followed, and appellant brings the following assignment of error for our review:

> THE TRIAL COURT ERRED BY INDEFINITELY SUSPENDING THE NATURAL MOTHER'S VISITATION WITH HER CHILD AND RESTRICTING CONTACT TO WEEKLY TELEPHONE CALLS, AS AN INDEFINITE SUSPENSION OF VISITATION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶11} In her sole assignment of error, appellant contends the trial court's suspension of visitation was against the manifest weight of the evidence. Under this assignment of error, appellant argues the trial court gave improper weight to the wishes of C.H., and failed to make the required finding of extraordinary circumstances to justify a suspension of visitation. In support, appellant relies on *Pettry v. Pettry* (1984), 20 Ohio App.3d 350, which held:

> A noncustodial parent's right of visitation with his children is a natural right and should be denied only under extraordinary circumstances, such as unfitness of the noncustodial parent or a showing that visitation with the noncustodial parent would cause harm to the children. The burden of proof in this regard is on the party contesting visitation privileges.
>
> If a child is actually unwilling to see the noncustodial parent and no useful purpose would be served by forcing visitation, visitation privileges may be denied. However, until a child can affirmatively and independently decide not to have any visitation with the noncustodial parent, the relationship between the child and the noncustodial parent should not be totally severed.

Id. at paragraphs one and two of the syllabus. In addition, appellant argues the trial court was required to consider the 16 factors of R.C. 3109.051(D) when determining visitation matters.

{¶12} However, appellant's reliance on both *Pettry* and R.C. 3109.051 is misplaced. *Pettry* is distinguishable from the instant matter as the parenting time determination in *Pettry* arose out of a domestic court's modification of an existing custody decree issued by that court pursuant to the parties' divorce. In contrast, the matter before us involves visitation of a non-custodial parent with a child who has been adjudicated a dependent child in a dependency proceeding under R.C. 2151.353(A)(3), and does not

concern an existing custody decree from either a domestic court or other court order covered by R.C. Chapter 3109. Thus, as will be explained infra, the appropriate standard for the trial court to apply is whether a suspension in visitation is in the best interest of the child.

{¶13} The Second District Court of Appeals has held that where a case originates as a juvenile proceeding, and not a domestic matter, the trial court is not required to consider the factors set forth in R.C. 3105.051(D). *In re Haywood*, 2d Dist. No. 21276, 2006-Ohio-576, ¶9. Similarly, the Fourth District Court of Appeals held that when determining visitation of a non-custodial parent, there is no statutory mandate to apply R.C. 3901.051 when the matter arises out of a dependency proceeding under R.C. 2151.353(A)(3). *In re Knisley* (May 26, 1998), 4th Dist. No. 97CA2316. See also *In re C.C.*, 2d Dist. No. 21707, 2007-Ohio-3696; cf., *In re Poling*, 64 Ohio St.3d 211, 1992-Ohio-144 (where a child is subject to a divorce decree granting custody pursuant to R.C. 3109.04, a juvenile court making a custody determination under R.C. 2151.23 and 2151.353 must do so in accordance with R.C. 3109.04).

{¶14} R.C. 2151.417(A) provides:

> Any court that issues a dispositional order pursuant to section 2151.353 * * * of the Revised Code may review at any time the child's placement or custody arrangement, * * * and any other aspects of the child's placement or custody arrangement. * * * Based upon the evidence presented at a hearing held after notice to all parties and the guardian ad litem of the child, the court may require the agency, the parents, guardian, or custodian of the child, and the physical custodians of the child to take any reasonable action that the court determines is necessary and in the best interest of the child or to discontinue any action that it determines is not in the best interest of the child.

{¶15} As previously noted, C.H. was adjudicated a dependent child and D.M. was awarded legal custody of C.H. under R.C. 2151.353, and the matter presently before us arises out of the guardian ad litem's motion to amend that order. In accordance with R.C. 2151.417(A), the trial court properly applied the best interest of the child standard in determining whether appellant's visitation with C.H. should be suspended. On appeal, we will not reverse a trial court's visitation order made pursuant to R.C. 2151.417(A) absent an abuse of discretion. *Haywood*; *Knisley*. See also *In re Farrow*, 10th Dist. No. 01AP-837, 2002-Ohio-3237, ¶35 (noting that, pursuant to R.C. 2151.417(A), the trial court in its discretion may discontinue any action it determines is not in the best interest of the child). Abuse of discretion connotes more than an error of law or judgment. Rather, it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} At the September 30, 2009 hearing before the magistrate, the trial court heard testimony from Michelle Whaley, C.H.'s lay guardian ad litem. Ms. Whaley testified she has been the lay guardian ad litem in this case for approximately two years, that C.H.'s needs are being met by D.M., and they are "clearly very bonded" to each other. (Sept. 30, 2009 Tr. 7.) Ms. Whaley testified she has not seen C.H. interact with appellant, and explained that it was because appellant has not visited with C.H. since Ms. Whaley has been the lay guardian ad litem. According to Ms. Whaley, C.H. does not wish to visit or have any type of contact with appellant at this time, and that C.H. has been consistent in her position since Ms. Whaley has been lay guardian ad litem.

{¶17} In Ms. Whaley's opinion, it was best for visitation to be suspended at this time because C.H. was unwilling to engage in even supervised visitation as "she's afraid

to have someone else there because she's afraid they will get in trouble somehow, for something that may occur during the visit." (Sept. 30, 2009 Tr. 10.) Ms. Whaley explained that C.H. also fears appellant will follow her and try to take her and that C.H. has nightmares about this. According to the testimony, C.H.'s fears are related to an incident that occurred at the library during one of her visits with appellant that resulted in the police being called.

{¶18} Ms. Whaley admitted on cross-examination that she has not interviewed appellant and has only met with C.H. approximately three times during her time as lay guardian ad litem. Additionally, Ms. Whaley testified that she was not recommending that appellant not ever have visitation with C.H., but only that it would be best that appellant not have visitation at this time.

{¶19} D.M. testified that C.H. has been in his home since January 2000, and that while C.H.'s visits with appellant "have always been sporadic," there have been no visits in the prior two years. (Sept. 30, 2009 Tr. 30.) According to D.M., at the last visit, appellant wanted to take C.H. from the library, and when D.M. prohibited this, appellant began physically assaulting him, and then stood in front of their car to prevent them from leaving while she called the police. In D.M.'s opinion, C.H. seems more secure since there have not been any visits with appellant in the last two years.

{¶20} In addition to the lay guardian ad litem, C.H.'s guardian ad litem, Edward Gemmer, recommended that C.H. not be forced to visit with appellant because overall the visits were not going well, and C.H. has repeatedly expressed her desire not to visit with appellant. According to the guardian ad litem, it would be in C.H.'s best interest to suspend visitation at this point in time.

{¶21} The magistrate found it was in the best interest of C.H. to suspend visitation with appellant until C.H. desires to have a relationship with appellant, at which time either C.H. or D.M. shall contact the guardian ad litem to schedule a mediation to modify the visitation order. The magistrate also recommended that appellant have the right to make one weekly telephone call to C.H.

{¶22} In her objections to the magistrate's decision filed on October 28, 2009, appellant summarily argued the magistrate's decision was against the manifest weight of the evidence, but did not include any specific objection to any portion of the magistrate's decision. Appellant also asserted the magistrate awarded her a right to make a weekly telephone call to C.H., but failed to provide any "direction" as to how this would be accomplished.

{¶23} At the February 3, 2010 hearing on the objections, the trial court stated:

> It's really an unusual situation and it's really unusual for a Magistrate to order that, which when I look at the two inches of the file and look at her history; it's not the Magistrate's fault and it's not the dad's fault; and it's not the kid's fault. I mean I look at how the case started and there had been numerous, numerous, numerous, numerous – you know – attempts to try to do something. So, you're right it isn't normal for a biological parent not to see their child, but – but when I look at this case, sometimes that's a rare occasion of what it may come down to. And that's apparently what the Magistrate who has been on this case for nine years had – had determined. I mean there's Children Services involvement in this case from way back. And, it doesn't really surprise me, I guess I would say that – I don't know if you folks have here today a phone number, but they should provide a phone number, you know – she may or may not call her mom back. You know – I don't know – she's – there's obviously not really much relationship or bonding that is in existen[ce], which is sad. But, this does – this doesn't look like your – you know – alienation/parental alienation case; there's enough issues with unfortunately, the

> mother that – I can't – I can't look at it like it is somebody's fault.

(Feb. 3, 2010 Tr. 12-13.)

{¶24} Upon the filing of the transcript of the proceedings before the magistrate, the trial court issued a written decision on May 21, 2010, finding it was in C.H.'s best interest to suspend appellant's visitation. Therefore, the trial court overruled appellant's objections and adopted the magistrate's decision, which recommended that visitation be suspended "until modified by mediation agreement or court order." (Oct. 15, 2009 Decision at 2.)

{¶25} The trial court considered whether continued visitation with appellant in light of C.H.'s opposition to the same would be in C.H.'s best interest, and our review of the record reveals no abuse of the trial court's discretion in suspending visitation at this time. The record reflects that appellant has not sustained consistent visitation with C.H. at any time and that appellant has visited with C.H. only once since August 2007. It was at the August 2007 visit that appellant reportedly assaulted D.M. in front of C.H., which has increased C.H.'s reluctance to see appellant. Additionally, there is evidence in the record that both C.H.'s mental health and school performance have improved since her visits with appellant have stopped. Moreover, both the guardian ad litem and the lay guardian ad litem recommended that visitation be suspended in accordance with C.H.'s wishes.

{¶26} In light of the evidence presented and the recommendation of the guardian ad litem, we find that the trial court's determination that suspending visitation between C.H. and appellant would at this time be in C.H.'s best interest is supported by some

competent credible evidence. Thus, we cannot conclude the trial court abused its discretion in suspending the visitation as set forth above.

{¶27} For the forgoing reasons, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.

_____