

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

In re: D.P.,	:	No. 12AP-557
(E.F.,	:	No. 12AP-655
	:	(C.P.C. No. 12JU-04-05241)
Appellant).	:	(REGULAR CALENDAR)
In re: T.H.,	:	No. 12AP-558
(E.F.,	:	No. 12AP-656
	:	(C.P.C. No. 12JU-04-05243)
Appellant).	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on January 24, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Jeanne M. Newkirk*,  
for appellee State of Ohio.

*CASA of Franklin County*, and *David Schutte*, Guardian ad  
Litem.

*Joy L. Marshall*, for M.P., father of D.P.

*Giorgianni Law LLC*, and *Paul Giorgianni*, for appellant E.F.

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APPEALS from the Franklin County Court of Common Pleas,  
Division of Dometic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} Appellant, E.F., appeals from judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that denied her motion to dismiss the complaints alleging her two sons, T.H. and D.P., to be dependent children. For the reasons that follow, we affirm the judgments of the trial court.

## **I. BACKGROUND**

{¶ 2} In addition to T.H., born on October 1, 1999, and D.P., born on November 21, 2002, appellant has a daughter, J.H., born on January 17, 2001. On October 31, 2011, Franklin County Children Services ("FCCS") filed complaints alleging T.H. and D.P. to be dependent minor children and alleging J.H. to be an abused, neglected, and dependent minor child. According to the complaints pertaining to T.H. and D.P., the children's stepfather, L.F., had been sexually abusing J.H. during times that appellant was either asleep or away from the residence. The complaints also alleged J.H. was disciplined when she contacted law enforcement regarding the incidents, and that J.H. is fearful of returning home because L.F. would hit her. Additionally, the complaints alleged appellant has indicated she does not believe the allegations, and she has not asked L.F. to leave the family's residence. FCCS was awarded emergency custody of all three children that same day. Due to statutory time constraints, the complaints were refiled on January 25, 2012, and then again on April 17, 2012. Each refiled complaint contained allegations that were substantially similar to those asserted in the previously filed complaints.

{¶ 3} After the filing of the April 17 complaints, appellant filed a motion to dismiss the complaints pertaining to T.H. and D.P. The basis of appellant's motion to dismiss was that the complaints were insufficient because the complaints lacked specific facts to constitute dependency under R.C. 2151.04(C). A magistrate denied the motion, and appellant filed objections to the magistrate's decision. After review, the trial court overruled appellant's objections to the magistrate's decision and denied appellant's motion to dismiss.

{¶ 4} Adjudicatory hearings began on June 19, 2012, and the first witness called to testify was a medical forensic interviewer employed at Children's Hospital's Center for Family Safety and Healing. Other witnesses testifying at the hearing were J.H., one of J.H.'s teachers, a Reynoldsburg police officer, and appellant. However, prior to the completion of the adjudicatory hearing, the parties indicated that they would be proceeding uncontested on the complaints with respect to J.H. and T.H. Counsel for appellant stated they were proceeding uncontested "with the caveat that we preserve our notice of appeal on the issue of mo – dismissing." (July 9, 2012 Tr., 3.) When the hearing

resumed, the parties indicated they would also be proceeding uncontested on the complaint with respect to D.H., and the matter proceeded as a dispositional hearing. At the conclusion of the hearing, T.H. and D.P. were adjudicated to be dependent minor children, and J.H. was adjudicated to be an abused, neglected, and dependent minor child. Temporary custody of T.H. and J.H. was awarded to FCCS, and temporary custody of D.P. was awarded to D.P.'s father.

## II. ASSIGNMENT OF ERROR

{¶ 5} Appellant appealed from the trial court's judgments regarding T.H. and D.P. and brings the following assignment of error for our review:

In each of the cases, the Juvenile Court erred in overruling Appellant's April 17, 2012 motion to dismiss.

## III. DISCUSSION

{¶ 6} At the adjudication hearing, appellant proceeded uncontested, and on appeal, appellant does not challenge the trial court's finding of T.H. and D.P. to be dependent minor children. Rather, appellant contends the trial court erred in denying her motion to dismiss the complaints alleging the boys dependent, pursuant to R.C. 2151.04(C), because, according to appellant, the complaints provided insufficient facts to allow the trial court to find them dependent under that section.<sup>1</sup>

{¶ 7} Specifically, appellant frames the issue for review as "[w]hether a complaint sufficiently pleads dependency under R.C. 2151.04(C) with respect to a boy, when the complaint alleges only that the boy's adolescent sister was sexually abused by a man residing in the household." (Appellant's Brief, v.) According to appellant, there are three reasons why the complaints at issue fail to plead dependency under R.C. 2151.04(C): (1) to assert dependency of a boy based on the sexual abuse of his sister, a complaint must be brought under R.C. 2151.04(D) rather than (C); (2) to construe R.C. 2151.04(C) to allow

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<sup>1</sup> FCCS asserts that, because appellant chose to proceed uncontested with respect to the dependency of T.H. and D.P., appellant's arguments regarding the sufficiency of the complaint are now moot. We disagree, as generally an issue becomes moot when it is or has become " 'fictitious, colorable, hypothetical, academic or dead' " or a judgment, when rendered, " 'cannot have any practical legal effect upon a then-existing controversy.' " *In re Brown*, 10th Dist. No. 03AP-1205, 2005-Ohio-2425, ¶ 15, quoting *Grove City v. Clark*, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶ 11, quoting *Culver v. Warren*, 84 Ohio App. 373, 393 (11th Dist.1948). Given that our judgment can have a practical legal effect on the existing controversy, we do not find that appellant's challenge to the sufficiency of the complaint has been rendered moot.

the state to take custody of a child based upon an allegation of abuse of a sibling renders the statute unconstitutionally vague; and (3) scientific research of child sexual abuse does not support a judicial presumption that a man accused of sexually abusing an adolescent girl is a danger to a boy.

{¶ 8} Though appellant first argues under her assigned error that this matter should have been brought under R.C. 2151.04(D), we note that our focus is the statutory provision upon which this matter was filed, which is R.C. 2151.04(C). Whether or not facts giving rise to an allegation of dependency under one subsection of R.C. 2151.04 may also give rise to an allegation of dependency under another subsection of R.C. 2151.04 is not the issue currently before us. Instead, our focus is on R.C. 2151.04(C), as this matter was filed under that provision, and appellant has challenged the facts set forth in the complaint by asserting that said facts are insufficient to support a claim of dependency under R.C. 2151.04(C). Therefore, our analysis focuses on R.C. 2151.04(C), and we do not consider whether or not the facts asserted in the complaint herein are sufficient to state a claim of dependency under R.C. 2151.04(D).

{¶ 9} R.C. 2151.04 provides:

As used in this chapter, "dependent child" means any child:

\* \* \*

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship.

{¶ 10} Regarding the filing of complaints alleging dependency, R.C. 2151.27(A)(1) provides in pertinent part:

[A]ny person having knowledge of a child who appears \* \* \* to be an unruly, abused, neglected, or dependent child may file a sworn complaint with respect to that child. \* \* \* The sworn complaint may be upon information and belief, and, in addition to the allegation that the child committed the violation or is an unruly, abused, neglected, or dependent child, the complaint shall allege the particular facts upon which the allegation that the child committed the violation or is an unruly, abused, neglected, or dependent child is based.

{¶ 11} Additionally, Juv.R. 10(B) provides in relevant part:

The complaint, which may be upon information and belief, shall satisfy all of the following requirements:

(1) State in ordinary and concise language the essential facts that bring the proceeding within the jurisdiction of the court, and in juvenile traffic offense and delinquency proceedings, shall contain the numerical designation of the statute or ordinance alleged to have been violated.

{¶ 12} The basis of R.C. 2151.27(A)(1) and Juv.R. 10(B)(1) is twofold. " 'First, in an action involving the possible severance of custody rights, a respondent to such a complaint is entitled to be apprised of the basis of the state's claim in order to properly prepare a defense. \* \* \* Second, the juvenile court, being a court of limited jurisdiction, must be able to ascertain at an early state of the proceeding whether or not it has jurisdiction over the subject matter of the claim.' " *In re Johnson*, 10th Dist. No. 00AP-691 (Mar. 22, 2001), quoting *In re Sims*, 13 Ohio App.3d 37, 42-43 (12th Dist.1983).

{¶ 13} As held in *In re Hunt*, 46 Ohio St.2d 378 (1976), "[a] complaint under Juv.R. 10 and R.C. 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the court." *Id.* at paragraph one of the syllabus. In *Hunt*, the Supreme Court of Ohio rejected the notion that a complaint could sufficiently allege dependency by simply using the word "dependent" and directly quoting the statutory language. The complaint examined in *Hunt* stated:

"The undersigned, [L.H.], says that she has knowledge of certain children, to-wit: [C.S.] and [D.M.H.] age 7 and 5 years, respectively \* \* \* who appear to be dependent in that their condition or environment is such as to warrant the state, in the interests of the children, in assuming their guardianship, \* \* \*." Much of this language is a direct quotation of R.C. 2151.04(C), one of the statutory definitions of a dependent child.

*Id.* at 379.

{¶ 14} Because it contained no particular facts as required by R.C. 2151.27 and Juv.R. 10(B)(1), the court in *Hunt* found the complaint before it insufficient. After *Hunt* was decided, this court reviewed the sufficiency of a complaint alleging neglect and dependency in *Johnson*, where the complaint alleged:

Parents are divorced. Mother, [E.J.]'s whereabouts are unknown to the complainant at the time of filing. Father, [P.H.]'s whereabouts are known. The family first became known to Franklin County Children Services in 1995. On or about November 29, 1999 Children Services received a referral stating mother has dropped this child off at the paternal grandparents' home. On November 23, 1999 mother dropped this child off at the paternal grandparents' home requesting they take care of him for a few days. Mother did not provide any clothing for this child. A bag of clothes were left on the paternal grandparents' front porch on November 26, 1999 however these clothes were not suitable. Mother has a history of continually moving between, Franklin, Pickaway, Ross and Hocking counties and has also been involved with the child welfare agencies of these counties. Father will be incarcerated at Franklin County Community Based Correctional Facility until May 2000, case number 96CR5534 and 97CR5887.

{¶ 15} This court concluded in *Johnson* that the complaint contained particular facts upon which the allegations of neglect and dependency were based, and, therefore, the complaint sufficiently stated causes of action for neglect and dependency in accordance with *Hunt*.

{¶ 16} In the case sub judice, the complaints state:

On or about October 27, 2011, Franklin County Children Services received a referral regarding the well being of [T.H.'s and D.P.'s] sibling, [J.H.]. It was reported that stepfather, [L.F.], has placed his hands in [J.H.]'s pants, and has touched her genitals and buttocks. Reportedly, [L.F.] has forced [J.H.] to touch his penis and makes her hands move up and down until he ejaculates. [L.F.] has inappropriately touched [J.H.] on multiple occasions and that when she contacted law enforcement regarding the incidents, she was disciplined. It was further reported that the incidents have been occurring while mother is asleep or away from the residence. [L.F.] had knee surgery recently and has not had sexual contact with [J.H.] since that time. It is unclear when the knee surgery occurred. [J.H.] has expressed fear of returning home and that [L.F.] would hit her. [J.H.] has urinated in her pants on several occasions, as well. Mother has indicated that she does not believe the allegations and has not asked stepfather to leave the family's residence.

(Complaints, 1.)

{¶ 17} Appellant argues that a finding of sufficiency of these complaints renders R.C. 2151.04(C) unconstitutionally vague. In prior cases, this and other courts have rejected arguments challenging R.C. 2151.04(C) as being void for vagueness. *In re Burrell*, 10th Dist. No 77AP-899 (June 27, 1978), *rev'd on other grounds*, 58 Ohio St.2d 37 (1979); *In re Lloyd*, 5th Dist. No. 2005 AP 01 0003, 2005-Ohio-2380; *In re Barzak*, 24 Ohio App.3d 180 (11th Dist.1985); *In re Siniard*, 6th Dist. No. L-78-063 (Feb. 9, 1979); *In re Johnson*, 1st Dist. No. C-810516 (Apr. 28, 1982).

{¶ 18} Appellant also asserts scientific research of child sexual abuse does not support a judicial presumption that a man accused of sexually abusing an adolescent girl is a danger to a boy; therefore, the facts alleged herein are insufficient to allow a dependency finding under R.C. 2151.04(C). In support, appellant has attached a variety of resources providing percentages and probabilities concerning the sexual abuse of children. These resources, however, are not part of the record in this matter. App.R. 9(A)(1) provides that the record on appeal, in all cases, constitutes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." An exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal. *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 10. Accordingly, for purposes of determining the merits of this appeal, we will not consider the new resources appellant attached to her brief.

{¶ 19} The essence of appellant's challenge to the complaint alleging dependency of T.H. and D.P. is that a male child cannot be alleged dependent under R.C. 2151.04(C) based upon an allegation of the child's stepfather currently sexually abusing the child's sister in the home or, in other words, that unless a sibling has already been adjudicated abused, the alleged ongoing sexual abuse of a sibling by a stepfather residing in the household cannot constitute a condition or environment that warrants the state, in the interests of the child, to assume guardianship. Despite appellant's attempts to broaden the issue before us, the issue here, i.e., whether the complaints concerning T.H. and D.P.

sufficiently plead an action for dependency under R.C. 2151.04(C), is dependent upon the complaints filed and the particular facts asserted therein.

{¶ 20} The complaints at issue allege not only that J.H. has been sexually abused by the children's stepfather, but also that said abuse occurred in the home when appellant was either asleep or away from the residence. The complaints also alleged J.H. was disciplined when she contacted law enforcement regarding the incidents. Additionally, the complaints alleged appellant has indicated she disbelieves the allegations and has not asked the stepfather to leave the family's residence. The unwillingness of a mother to sever ties with a father who presents a danger to their child can present an environment requiring state intervention to protect the child. *In re B.K.*, 6th Dist. No. L-10-1053, 2010-Ohio-3329, ¶ 34, citing *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 54.

{¶ 21} We conclude the complaints alleging dependency of T.H. and D.P. contain particular facts, concerns, and allegations leading to their filing and were thereby filed in accordance with R.C. 2151.27 and Juv.R. 10(B)(1). Further, the complaints adequately apprised appellant of the basis of the claims in order that she could properly prepare a defense. *Johnson*. See also *In re M.E.G.*, 10th Dist. No. 06AP-1256, 2007-Ohio-4308 (permanent custody granted to agency based on R.C. 2151.04(C) dependency action alleging sexual abuse of the children's sibling by the child's father); *In re A.B.C.*, 5th Dist. No. 2011 CA 00073, 2011-Ohio-6570 (complaint sufficiently stated a claim for dependency under R.C. 2151.04(C) where complaint stated facts, concerns, and allegations that led to their filing). Our conclusion has no bearing on whether or not the allegations of sexual abuse of J.H. by the children's stepfather will be substantiated; rather, our conclusion is that this complaint sufficiently pleaded particular facts upon which the court could make a finding of dependency under R.C. 2151.04(C) based on a finding that the condition or environment of T.H. and D.P. warrants the state, in the interests of the children, to assume guardianship. R.C. 2151.04(C). *Hunt*.

{¶ 22} Because we have concluded the complaints challenged herein sufficiently state a claim for dependency under R.C. 2151.04(C), we overrule appellant's sole assignment of error.

**IV. CONCLUSION**

{¶ 23} Having overruled appellant's sole assignment of error, the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, are hereby affirmed.

*Judgments affirmed.*

TYACK and CONNOR, JJ, concur.

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