

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

| | | |
|----------------------------|---|-------------------------------|
| IN THE MATTER OF: | : | O P I N I O N |
| S.A., A.A., M.N., AND L.M. | : | CASE NOS. 2011-T-0098, |
| | : | 2011-T-0099, |
| | : | and 2011-T-0100 |

Civil Appeals from the Trumbull County Court of Common Pleas, Juvenile Division, Case Nos. 2010 CH 108, 2010 CH 109, and 2010 CH 110.

Judgment: Affirmed.

Carlo A. Ciccone, Ciccone Law Office, L.L.C., Reisman's Theater Building, Suite 1000, 42 South Main Street, Niles, OH 44446-5012 (For Appellant-Kesha Frazier).

Susan Porter Collins, Trumbull County Children Services Board, 2282 Reeves Road, N.E., Warren, OH 44483 (For Appellee-Trumbull County Children Services Board).

MARY JANE TRAPP, J.

{¶1} Kesha Frazier appeals from the judgment of the Trumbull County Court of Common Pleas, Juvenile Division, granting legal custody of her minor children, S.A., A.A., M.N., and L.M., to Denise and Donald Hogan ("Hogans"), her maternal aunt and uncle. After agreeing, on the record, at the dispositional hearing to the grant of custody to the Hogans, Ms. Frazier now challenges the manifest weight of the court's judgment, and argues that the trial court erred in finding that placement with the Hogans was in the best interest of her four children. Because the trial court's judgment is supported by a

preponderance of the evidence, we affirm the decision of the Trumbull County Court of Common Pleas, Juvenile Division.

Substantive Facts and Procedural History

{¶2} This matter came before the trial court in December 2010, when Trumbull County Children Services (“TCCS”) filed a complaint alleging four of Ms. Frazier’s children, S.A., A.A., M.N., and L.M, were dependent. Ms. Frazier was incarcerated on January 13, 2010, and is not set for release until October 25, 2016. The four children had been residing in the home of their maternal great aunt, Denise Hogan, and her husband, Donald, when the situation was brought to the attention of TCCS in November of 2010. TCCS was informed that the girls had been in the custody of the Hogans since the summer; that Cuyahoga County Department of Jobs and Family Services had been involved with the family; and that the Hogans had been unable to obtain medical care and other services and benefits for the girls, without a custody order.

{¶3} The trial court held an adjudicatory hearing on the complaint, at which the fathers of the oldest three children, S.A., A.A., and M.N., appeared and expressed support for their daughters’ placement with the Hogans. Lorenzo Marshall, the father of the youngest child, L.M., did not appear at the adjudicatory hearing; and concerns were raised at the hearing regarding his immigration status and the legality of his presence in the United States. The trial court issued a judgment entry finding all four children dependent.

{¶4} A dispositional hearing was held. Mr. Marshall did attend this proceeding, and acknowledged he did not have a green card and was unable, at that time, to establish legal residence in the country. The trial court entered a temporary custody

order placing all four children with the Hogans. The Hogans' temporary custody of the girls was continued until May 2011, when TCCS filed a motion seeking legal custody of all four children.

{¶5} The trial court held a hearing on the legal custody motion at the end of May. Present at the hearing were: Mrs. Hogan; Cathi Beck, the TCCS caseworker; Anne Marie Mendenhall, a TCCS supervisor; Mr. Marshall; and Ms. Frazier, via telephone. Testimony was taken from Ms. Beck, Ms. Hogan, Ms. Frazier, and Mr. Marshall.

{¶6} Ms. Beck established that TCCS had conducted a complete full home evaluation of the Hogans for legal custody purposes and that they had been approved. She further testified that the children had been thriving under the Hogans' care, and she had no concerns about their placement with them. Ms. Beck also discussed the meager contact she had had with Mr. Marshall, who had only just recently formally established paternity of L.M. via a DNA test. It was her understanding that he did not possess a green card and was in the United States illegally, his visa having expired.

{¶7} Mrs. Hogan testified to her continued interest in taking legal custody of the girls, and her continued commitment to facilitating visitation with their mother, as permitted by their school schedule. She indicated her willingness to permit telephone contact between the four girls and their mother.

{¶8} Although Mr. Marshall and Ms. Frazier both also testified, the proceedings devolved at that point into what may be described as a family squabble. However, during her testimony, Ms. Frazier made it very clear she did not object to placement of the girls with the Hogans, so long as she had continued visitation and telephonic contact

with them. She also expressed willingness to allow Mr. Marshall to take custody of his daughter, L.M., if he so chose, and declared that she desired him to have contact with his daughter, regardless of her placement. As to the issue of Mr. Marshall taking custody of L.M., the magistrate made it clear on the record that the court could not grant him custody of L.M., given his immigration status.

{¶9} At the conclusion of the hearing, TCCS formally renewed the motion for a grant of legal custody of all four girls to the Hogans. The attorney for Ms. Frazier stated in response that “based upon my client’s wishes * * * it would be our hope that [if] the Court were to grant custody of the youngest child to Mr. Marshall; and * * * we are in agreement with custody of the oldest three * * * going to the aunt. If Mr. Marshall is in agreement with the youngest going, then, we are, of course, in agreement as well.”

{¶10} Ms. Frazier also requested a specific order regarding visitation for both herself and Mr. Marshall. Specifically, she requested that the children be transported to the location of Ms. Frazier’s incarceration, and be provided the opportunity to make and receive telephone calls, as well as exchange written correspondence with her.

{¶11} The magistrate issued a decision the same day, granting legal custody to the Hogans. The order also indicated that if visitation could not be agreed upon between Ms. Frazier and the Hogans, the parties would need to file a formal motion. Despite having agreed to the children’s placement with the Hogans, Ms. Frazier filed objections to the magistrate’s decision challenging the jurisdiction of the Trumbull County Court of Common Pleas, the trial court’s finding of dependency, the change in custody from whoever had physical custody of the children prior to the Hogans taking them in, the lack of case plan as related to L.M., and any findings of fact concerning Mr.

Marshall's illegal presence in the United States. Mr. Marshall, pro se, also filed objections to the magistrate's decision; they were identical to those submitted by Ms. Frazier, with the addition of an objection to his not having been assigned counsel.

{¶12} The trial court reviewed both Ms. Frazier's and Mr. Marshall's objections, and overruled them in an opinion dated August 30, 2011. The trial court found the following:

{¶13} 1. "The time to object to venue here in Trumbull County and the dispositional temporary orders has passed."

{¶14} 2. Mr. Marshall "has not demonstrated that he has stable housing or legal income;" he is an illegal immigrant waiting disposition of his immigration case.

{¶15} 3. "The only stability is the mother's aunt and uncle. In the best interest of the minor children, they should be custodians. They have passed a CSB homestudy and have already demonstrated their ability to care for the girls, both with housing and taking care of their needs. But for the aunt and uncle, the children could very well have been placed for permanent custody with an agency and adoption."

{¶16} 4. "The aunt and uncle have done their best, without financial support from [the natural parents]. * * * Mother desires a regular visitation schedule, which is unavailable due to resources. There has been no showing that the aunt does not do her best to make the girls available."

{¶17} 5. "In light of Mr. Marshall's illegal status and risk of flight raised by the aunt, the visitation should be supervised as she requested."

{¶18} The trial court determined it had jurisdiction to consider the matter and approved the magistrate's May 31, 2011 decision.

{¶19} Ms. Frazier timely appealed, and now brings the following assignments of error:

{¶20} “[1.] The trial court committed reversible error when it overruled appellant’s objections to magistrate’s decision and found that it was in the best interest of the minor children to be placed with material aunt and uncle.”

{¶21} “[2.] The trial court’s decision to place the minor children in the legal custody of maternal aunt and uncle was against the manifest weight of the evidence.”

{¶22} Because both of Ms. Frazier’s assignments of error challenge the trial court’s ultimate grant of legal custody to the Hogans, we will review them together.

Standard of Review

{¶23} “On appeal, a trial court’s adoption of a magistrate’s decision will not be overruled unless the trial court abused its discretion in adopting the decision.” *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullet*, 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6 (July 29, 2001). Furthermore, “[a] juvenile court’s grant of legal custody is reviewed under an abuse of discretion standard.” (Citations omitted.) *In re Yates*, 11th Dist. No. 2008-G-2836, 2008-Ohio-6775, ¶32. *Accord In re Nice*, 141 Ohio App.3d 445, 455 (7th Dist.2001) (“[a]n award of legal custody shall not be reversed on appeal absent an abuse of discretion”); *Bechtol v. Bechtol*, 49 Ohio St.3d 21, syllabus (1990) (“[w]here an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court”).

{¶24} As this court recently stated, the term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error [of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review]. By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* at ¶67.

Evidence Supports the Decision

{¶25} Through both assignments of error, Ms. Frazier challenges the trial court’s decision to grant legal custody to the Hogans. “[T]he applicable standard for granting legal custody at the dispositional phase of the proceedings is preponderance of the evidence.” *In re J.F.*, 11th Dist. No. 2010-T-0029, 2011-Ohio-3295, ¶40, citing *In re Nice*, *supra*, at 455. A trial court must determine the appropriateness of legal custody “in accordance with the best interest of the child as supported by the evidence presented at the dispositional hearing.” R.C. 2151.415. A review of the trial court record, including a transcript of the May 31, 2011 motion hearing, reveals that the trial

court was presented with an abundance of competent, credible evidence with which to support the determination that a grant of legal custody to the Hogans was in the best interest of all four girls. We find no abuse of discretion by the trial court in adopting the magistrate's decision and entering an order of legal custody.

{¶26} The following evidence was submitted in support of a grant of legal custody to the Hogans:

{¶27} 1. Ms. Frazier, natural mother of all four girls, was incarcerated, and would likely remain incarcerated for the next seven years. At the hearing, she supported a grant of legal custody to the Hogans, provided she was guaranteed visitation with her daughters and continued telephonic contact.

{¶28} 2. Diego Nelson, natural father of M.N., and Sean Ayers, natural father of S.A. and A.A., did not object to the original placement of their daughters with the Hogans, and did not appear at the legal custody hearing to object. Mr. Ayers has had continued contact with his daughters, facilitated by Mrs. Hogan, and provides financial support for them when possible. Thus, he appears content to allow S.A. and A.A. to remain in the custody of the Hogans.

{¶29} 3. Lorenzo Marshall, natural father to L.M., expressed interest in taking custody of his daughter, but acknowledged that he did not currently have a green card and was still working to determine his immigration status. He has been unable to secure employment on account of his immigration status, and did not have independent housing.

{¶30} 4. TCCS conducted a home evaluation of the Hogans and they were approved. Furthermore, caseworker, Cathi Beck, stated that she supported the grant of

legal custody to the Hogans and had no concerns about the girls' welfare in the Hogans' home. The girls have been attending school, participating in extracurricular activities, and are generally thriving.

{¶31} 5. Mrs. Hogan expressed her and her husband's continued interest in caring for the girls. They did not want to see the girls split up. She made clear she did not oppose the girls' visitation with Ms. Frazier, or L.M.'s with Mr. Marshall. She indicated a willingness to take the girls to see their mother as often as possible.

{¶32} Armed with this competent and credible evidence, the trial court did not err in determining that a grant of legal custody to the Hogans was, by a preponderance of the evidence, in the best interest of all four girls. Vesting legal custody in the Hogans would allow the girls to remain together and continue thriving in a supportive and safe family environment. Furthermore, no viable alternatives were presented to the trial court. Therefore the trial court did not abuse its discretion, and the Trumbull County Court of Common Pleas, Juvenile Division, grant of legal custody is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.