[Cite as *In re A.J.*, 2015-Ohio-543.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

IN THE MATTER OF: A.J. & B.J.	:	
	:	
	:	C.A. CASE NO. 2014-CA-28
	:	
	:	T.C. NO. 20930286
	:	
	:	(Civil Appeal from Common Pleas
	:	Court, Juvenile Division)
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O P I N I O N

Rendered on the ___13th___ day of ____February____, 2015.

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FROELICH, P.J.

{¶ 1} L.W. ("Lori"), a maternal aunt of minor children A.J. and B.J., appeals from a judgment of the Court of Common Pleas of Miami County, Juvenile Division, which returned custody of A.J. and B.J. to their father.[1]

{¶ 2} In August 2011, the juvenile court placed A.J., age 4, and B.J., age 2, in the custody of a different maternal aunt, D.F. ("Deborah"), pursuant to an agreement entered into between Deborah and Father. Pursuant to the agreement, Deborah was named residential parent and legal custodian of the children, and Father was entitled to unsupervised visitation with them, provided that Father abstained from all drug abuse, continued psychiatric treatment and medication for his psychiatric conditions, which included schizophrenia, and submitted to drug testing at Deborah's request. Father acknowledged in the agreement that his children could be "in danger" if he failed to comply with his mental health regimen. The agreement included a detailed visitation schedule, including the division of holidays and school breaks. Father was ordered to pay child support to Deborah under the "normal guidelines" or to surrender his Social Security Disability check to her. The agreement was signed by Father, Deborah, their attorneys, the magistrate, and the trial judge. Lori was not a signatory to the agreement, nor was she mentioned in the agreement.

{¶ 3} Despite the agreement between Father and Deborah that Deborah would care for both girls, A.J. subsequently lived with Lori, while B.J. lived with Deborah. In

[1] In Juvenile Court cases, this court generally does not identify in its opinions the names of minors, nor the names of other individuals from which the identification of minors is likely to be revealed. For the sake of clarity, we will refer to some of the parties by their first names, rather than their initials.

October 2012, Lori filed a motion for child support, on the basis that A.J. resided with her. In November 2012, Lori filed a complaint for custody of A.J.; in December, she amended the complaint to seek custody of both girls and, in the alternative, sought visitation with both girls. On December 11, 2012, Father filed a motion to modify the 2011 custody order, alleging that circumstances had "substantially changed" since the agreement was entered, and asking that the children be placed in his custody. Deborah had sustained a stroke by this time, and she did not seek to maintain custody of the children.

{¶ 4} In December 2013, a magistrate conducted a hearing on the motions. The magistrate concluded that Father was entitled to custody of the children unless Lori could demonstrate that he was an unsuitable parent; it rejected Lori's argument that the best interest of the children was the proper basis for the resolution of the custody dispute. The magistrate also found that Lori could not enforce the 2011 agreement between Father and Deborah, because she was not a party to that agreement. Having found that Father was not unsuitable, the magistrate overruled Lori's motion for custody, named Father the girls' legal custodian and residential parent, and ordered that the girls be returned to his care.[2]

{¶ 5} Lori filed objections to the magistrate decision, challenging the legal standards applied by the magistrate; she also objected to the magistrate's failure to rule on her motion for visitation rights. The trial court overruled the objections and adopted the magistrate's decision, except that it sustained Lori's objection related to her motion for visitation. The trial court granted Lori's request for visitation, awarding her one weekend

[2] The girls' mother, C.J., had stated to the court that she was unable to have custody of the children "at this point in time."

per month.

{¶ 6} Lori appeals from the trial court's judgment, raising two assignments of error. The first assignment states:

The trial court erred in the standard of review applied to the reallocation of parental rights.

{¶ 7} Lori argues that, having relinquished his parental rights by agreement with Deborah in 2011, Father was not thereafter entitled to the preference generally afforded a parent in a custody determination; "[o]nce there is a valid relinquishment, the analysis is done." She asserts that the relinquishment based on unsuitability, which she believes was contained in Father's agreement with Deborah, should remain in effect, i.e., the trial court should not have reconsidered that issue, and that, if Father's unsuitability were presumed, the best interest standard would have been the proper standard to apply to the new custody determination. Lori's argument suggests that she believes she would have been named the custodial parent of the two girls if the best interest test had been applied.

{¶ 8} In custody cases between a parent and non-parent, there is an overriding principle "that natural parents have a fundamental liberty interest in the care, custody, and management of their children." *Hockstok v. Hockstok,* 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16, citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Evans v. Evans*, 2d Dist. Champaign No. 2012 CA 41, 2013-Ohio-4238, ¶ 32, quoting *In re D.C.J.,* 2012-Ohio-4154, 976 N.E.2d 931, ¶ 56-59 (8th Dist). The right of a parent to raise his or her own child is an "essential" and "basic civil right." *Alexander v. Alexander*, 2d Dist. Champaign No. 2013 CA 3, 2013-Ohio-2349, ¶ 15, citing *In re Murray,* 52 Ohio St.3d 155, 157, 556 N.E.2d 1169

(1990). Thus, "[t]he general rule in Ohio regarding original custody awards in disputes between a parent and a non-parent is that parents who are 'suitable' persons have a 'paramount' right to the custody of their minor children unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children." *Masitto v. Masitto,* 22 Ohio St.3d 63, 65, 488 N.E.2d 857 (1986), citing *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977). As such, "a finding of parental unsuitability has been recognized * * * as a necessary first step in child custody proceedings between a natural parent and nonparent." *Hockstok* at ¶ 18. Whether someone else is more suitable is not the appropriate analysis. *Evans* at ¶31, quoting *In re S.M.,* 160 Ohio App.3d 794, 2005-Ohio-2187, 828 N.E.2d 1044, ¶ 31 (8th Dist.).

{¶ 9} R.C. 2151.23(A) generally governs child custody proceedings between a parent and a non-parent, and it provides that the court may not award custody to a non-parent without first making a finding of parental unsuitability, that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child. *Perales* at 98.

{¶ 10} R.C. 3109.04, which sets forth the best interest standard upon which Lori relies, typically deals with custody disputes arising out of divorce actions; the opposing parties in R.C. 3109.04 custody disputes are usually the children's parents, who may have nearly equal emotional, financial and educational advantages to offer the children and who are on an equal footing before the law. *Perales* at 86; *see also* R.C. 3109.03 (giving parents equal rights to custody of minor children). Since both parents may be

"eminently qualified" to raise the child, requiring a finding of unsuitability in a divorce action is not appropriate, and the welfare - or best interest - of the child(ren) is the only consideration before the court. *Perales* at 96; *Hockstok* at ¶ 19.

{¶ 11} Lori urges us to conclude that, because Father agreed to allow Deborah to serve as the children's residential parent and legal guardian in the 2011 agreement between Father and Deborah, he permanently "forfeited" his "paramount" right, as a parent, to custody of the girls, even in relation to other persons who were not parties to the agreement. We are unpersuaded by this argument. Lori was not a party to the 2011 agreement, and there is no legal basis to conclude that she was entitled to enforce it or to step into the shoes of one of the parties (Deborah) without further agreement by Father and/or court involvement. Also, although Father acknowledged in the 2011 agreement that his children could be "in danger" if he failed to comply with his mental health regimen (which he committed to do), it is not alleged and he did not concede that he was an unsuitable parent, as Lori suggests, and no court has ever found him to be an unsuitable parent.

{¶ 12} The agreement provides that Deborah "shall be named the residential and legal custodian of the minor children, [A.J.] and [B.J.]." This language, together with the agreement of Father to participate in certain medical and psychological treatments, is not consistent with an agreement by Father to grant permanent legal custody to Deborah, and certainly not to any other non-parent, such that future custody determinations would be based only on a best interest determination as between the adults seeking custody. Father had not relinquished custody to Lori, and no evidence was presented that he had implicitly or explicitly consented to the children living with her. Under the circumstances

presented in this case, the trial court properly required a finding of unsuitability, rather than a best interest determination.

{¶ 13} At the hearing on Father's and Lori's motions for custody, Father testified to his progress in dealing with his mental health issues and his desire to have his daughters back with him. He testified that he would not have signed the agreement with Deborah if he had thought the girls would continue to live separately. His wife (not the girls' mother) testified that, although Father had been unstable in the past, his health had improved a great deal and she trusted her own children to be with him.

{¶ 14} Father stated that the girls, particularly B.J., had lice on numerous occasions when they came to his house. Lori testified to her belief that the lice originated during visits with Father, but she admitted that she did not have any knowledge of the condition of Father's home or the source of the lice. Lori stated that she believed Father was "somewhat" able to provide for the girls, but that she wanted A.J. to have "the best of everything." Lori and Deborah acknowledged that the girls had little contact with each other while in their care, aside from when they visited with Father.

{¶ 15} The guardian ad litem testified that she did not observe any problems with Father's parenting; she did note that he had moved three times while she had been working with the family, but one of the moves had been out of a trailer on his father's property, and she (the guardian ad litem) had recommended one of the other moves. The guardian ad litem stated that her "main concern" was the children's having lice, but she viewed that as a "different issue" from stability. The guardian ad litem was unable to determine the source of the lice problems. The guardian ad litem believed that Lori provided a more stable environment than Father, and she testified that the girls' mother

preferred that the girls be placed with Lori.

{¶ 16} After the hearing on Father's and Lori's motions, the magistrate found that, although Deborah had obtained custody of both girls pursuant to her agreement with Father, she had "never had physical possession, care and control" of A.J., who had lived almost exclusively with Lori. The magistrate further found that, when he entered the 2011 custody agreement with Deborah, Father knew that A.J. had previously lived almost exclusively with Lori, but he believed that the girls would live together with Deborah once the agreement was signed and filed with the court.

{¶ 17} The magistrate concluded that Father and Deborah had entered a contract to care for his children and that contractual principles applied. Under these principles, when one party breaches the contract without legal excuse, the other party may treat the contract as terminated or rescinded, which puts the parties back to their original positions before the contract was entered. The magistrate found that Deborah had breached the contract by never obtaining actual custody of A.J., which entitled Father to rescind it; she explicitly found that, in such circumstances, "the paramount right of custody reverts back to the parent. The court must then make a new finding of unsuitability even as to those same parties."

{¶ 18} The magistrate further noted, however, that Lori was not a party to the original contract and that any "contractual relinquishment" was "simply inapplicable" to her. She concluded that Father's right to preferential treatment with respect to raising his children "reattached" when the agreement was broken, and that "[t]his natural right to preferential treatment would apply as between [Deborah] and [Father] and also between [Father] and any other third party, i.e. [Lori]." Based on this determination, the

magistrate required Lori to prove that Father was "unsuitable" in order to obtain custody of the girls, rather than that it was in the girls' best interest to be in Lori's custody (the standard which Lori sought to apply).

{¶ 19} The magistrate concluded that Lori had failed to prove that Father was unsuitable. She found that Father had not abandoned the girls and had complied with all of the conditions for visitation set forth in his agreement with Deborah: he had abstained from illegal drugs, continued his psychiatric treatment, and been compliant with all of his doctors' recommendations, including the use of psychotropic medication. Further, Father had demonstrated mental stability, had gotten married, and was attending school. The magistrate concluded that there was "no evidence that an award of custody to [Father] would be detrimental to the children." Finally, the magistrate stated that, although she did "not doubt that [Lori] can give the girls access to opportunities, and perhaps a wider world view, [Father's] circumstances as they concern [A.J.] and [B.J.] do not rise to the level of detriment required for a finding of parental unsuitability."

{¶ 20} The trial court agreed with the magistrate's conclusions that the agreement between Father and Deborah had been breached and the contract nullified, and that in any subsequent determination of custody, Father's rights as a parent were paramount. The trial court also agreed with the magistrate's finding that "overwhelming" evidence supported the conclusion that Father now showed "a mature mental stability" that had previously been lacking, that no evidence was presented that placement with Father would be detrimental to the girls, and that there was insufficient evidence to conclude that Father was unsuitable. The trial court agreed with the magistrate's assessment that, under these circumstances, the "best interest" standard was "not an issue." The trial

court properly concluded that, as between Father and Lori, Father was entitled to custody of his children unless he was shown to be an unsuitable parent; the best interest standard did not apply. The court had no concern about Father's suitability.

{¶ 21} Lori argues on appeal, as she did in the trial court, that, because Father ceded his parental rights to Deborah in a 2011 agreement between those two parties, she (Lori) – and presumably anyone else – can stand in the shoes of Deborah in future proceedings involving Father's rights. The cases on which Lori relies provide no support for such a position, and we are aware of none. The cases she cites deal with grandparents who were awarded custody of grandchildren with the consent of the parent(s), and subsequent motions by a parent to modify that arrangement. *See, e.g., Masitto*, 22 Ohio St.3d 63, 488 N.E.2d 857 (1986) (where father requesting change of custody had previously consented, in a separate agreement and in his divorce decree, to appointment of maternal grandparents as guardians of the child, he "forfeited his natural rights to custody * * *, making the child's best interest the appropriate test for a change in custody"); *Bragg v. Hatfield*, 152 Ohio App.3d 174, 2003-Ohio-1441, 787 N.E.2d 44 (4th Dist) (where father agreed to allocate parental rights and responsibilities for son to son's step-grandparents, a subsequent motion by father for change of custody was governed by need to show change of circumstances, not parental suitability).

{¶ 22} In those cases, the grandparents had legal custody of the child(ren) under a prior agreement, which the parent sought to change. This fact alone differentiates the custodial non-parents (grandparents) in those cases from Lori, who never had legal custody of the children at issue in this case. The cases cited by Lori also do not deal with the designation of a new, non-parent custodian for a child, due to the infirmity or

unwillingness of the custodian to continue in that role or due to a breach by the custodian of the parties' agreement.

{¶ 23} With the parties' agreement – and the trial court's finding – that Deborah was no longer able to care for the children due to a stroke, and the trial court's finding that Deborah had breached the agreement by not keeping the girls together, the case was before the court as if in the first instance for a determination of a new custody arrangement. In such a procedural posture, a parent's rights are paramount to any non-parent seeking custody of the child(ren) for the first time. Although we recognize that one of the children, A.J., has apparently lived with Lori in the past, that arrangement was in contravention of the agreement entered by Father and Deborah, with the court's approval, and Lori had no legal standing as the legal custodian of either child. Having found that Father was a suitable parent, the trial court properly awarded custody to Father.

{¶ 24} The first assignment of error is overruled.

{¶ 25} Lori's second assignment of error states:

> **The court erred in finding that the relinquishment of parental rights in 2011 was void due to fraud.**

{¶ 26} Lori contends that the trial court erred in concluding that she and Deborah had "fraudulently violated" the 2011 agreement by allowing the girls to live separately, and thus in finding Father's "contractual relinquishment" of his parental right to be void or voidable.

{¶ 27} Although the trial court found that Deborah had breached her agreement with Father by failing to keep the girls together, this finding was not central to its custody

determination. Aside from the alleged breach, which may have permitted Father to rescind the agreement, there was no dispute that Deborah was no longer able to care for the girls and did not seek to retain custody of them. Thus, the enforcement or rescission of the original agreement was not at issue; a new custody determination was required. Lori was not a party to the original agreement; thus, she could neither breach it nor enforce it. She did not have standing to challenge the trial court's conclusion that the agreement had been breached. These arguments are rooted in Lori's erroneous belief that the agreement could remain in effect, with Lori assuming the role of Deborah. Neither contract law nor the statutes pertaining to child custody provide for such a procedure.

{¶ 28} The second assignment of error is overruled.

{¶ 29} The judgment of the trial court will be affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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