[Cite as *In re J.R.A.*, 2014-Ohio-4463.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

IN THE MATTER OF:	:	Case No. 13CA18
J.R.A. Jr.,	:	DECISION AND JUDGMENT ENTRY
a minor child.	:	

APPEARANCES:

J.R.A., Little Hocking, Ohio, pro se appellant.

Anita L. Newhart, Marietta, Ohio, for appellee.

Hoover, J.

{¶1} Appellant, J.R.A., appeals the trial court's judgment that awarded his mother, appellee, Terri McGoye, legal custody of his biological son, J.R.A., Jr.

{¶2} Appellant first argues that abuse and neglect were not proven by clear and convincing evidence and that clear and convincing evidence did not support the state's or McGoye's case. Appellant's argument lacks merit because in a custody dispute between a parent and a nonparent under R.C. 2151.23(A)(2), the trial court's determination does not require a preliminary finding that the child is abused, neglected, or dependent. Further, the burden of proof that the trial court bases its determination upon is a preponderance of the evidence, not clear and convincing evidence. The record establishes that the trial court did not abuse its discretion in awarding legal custody of the child to McGoye. The trial court found that appellant was unsuitable because he is unable to care for the child; that awarding him custody would be detrimental to the child; and that awarding McGoye legal custody would be in the best interests of the child.

{¶3} Appellant next asserts that the trial court erred by allowing McGoye to file for temporary custody and custody while it refused to allow him to apply for custody. We reject this assertion because McGoye was permitted to seek custody of the child pursuant to R.C. 2151.23(A)(2) and Juv.R. 10(A). In addition, the trial court specifically authorized appellant to apply for custody of his son, which he did; and the court considered his application in its custody determination. Insofar as appellant complains about the initial grant of temporary custody to McGoye, he waived the issue by failing to timely appeal it.

{¶4} Appellant next claims that the trial court erred by allowing the state to be involved in the case; that the court denied his request for a record of this; and that the court erred in allowing the state's case to be opened without any reason. The record does not support appellant's claim that the state was involved in the underlying case other than the preparation of an initial case plan that was closed when the trial court granted McGoye's petition for temporary, emergency custody of the child. The record does not demonstrate that the trial court denied any request for a record or that these contentions prejudiced appellant in any way.

{¶5} Appellant finally claims that he was denied his right to file for custody and be heard first and have the court hire an investigator to look into the facts before proceeding. As noted previously, the trial court did not deny appellant his right to seek custody of his son; he did so; and the court considered his request. Moreover, appellant cites no authority and we are aware of none that would have required the court to hire an investigator.

{¶6} Therefore, because appellant's claims are meritless, we overrule his assignments of error and affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL BACKGROUND

{¶7} In early May 2011, Karen Rairden gave birth to J.R.A., Jr. at Marietta Memorial Hospital in Washington County, Ohio. The child was born prematurely and was transferred to hospitals in Columbus, Ohio. Appellant is the father of the child, although the parents were not married at the time of his birth or thereafter. Rairden suffered severe medical complications from the delivery and was transferred to a hospital in Columbus for additional treatment.

{¶8} A few weeks after the child was born, appellant and the child returned to the Washington County home of Terri McGoye, paternal grandmother. McGoye lives with her disabled husband, Steve, and their young son, Matthew. Since that time, McGoye has been the child's primary custodian. McGoye and her husband have provided the child's financial support. Appellant took the child out with him that same night when he went partying and drinking and did not return until the next morning at 4:00 a.m. After a couple of weeks, appellant left the child in McGoye's care when he went to return to the hospital to be with Rairden.

{¶9} Shortly thereafter, in July 2011, McGoye filed a petition in the Washington County Court of Common Pleas, Juvenile Division, for temporary custody and emergency custody of the child until the child's mother, Rairden, recovered physically and was in a position to assume custody of the child. The juvenile court entered an ex parte order granting McGoye temporary custody. Following a hearing, the trial court found that both parents were unsuitable—Rairden because she suffered from a serious temporary medical condition that prevented her from being physically able to care for the child, and appellant because he was unable to care for the child, had no employment or independent housing, had a volatile relationship with Rairden, and said disparaging things about both Rairden and the child—and that it was in the best interests of the child to place him in McGoye's temporary custody. The juvenile court designated McGoye the child's temporary legal custodian.

{¶10} A year later, in November 2012, the trial court conducted a review hearing at which it instructed the parties that if they wanted a more permanent legal custody, they could file motions requesting it. Based on appellant's conduct during the hearing, the juvenile court determined that he suffered from a serious mental disorder because he was “mentally unstable and unruly” throughout the proceeding and that he remained unsuitable to have custody of the child. Rairden, the child’s mother, had passed away in the interim.

{¶11} McGoye filed a complaint for legal custody of the child, and appellant subsequently filed a motion for custody of the child. The juvenile court held a hearing on the competing motions for custody at which the parties represented themselves without counsel. At the hearing, evidence established that appellant had no history of being able to maintain stable employment or independent housing for any length of time. Shortly after he returned with the child from Columbus to stay with McGoye, he worked 10 hours for two weeks for one company, and then was let go after he went back to Columbus to stay with Rairden while she was in the hospital. Before that, when Rairden was pregnant, appellant did “as needed” farm and construction work for one person. He claimed that at the time of the hearing, he did some unspecified farm work, was trying to get a job at some place, and had a job offer from another place. Appellant had lived in a homeless shelter before he moved into McGoye’s home, in which Rairden moved in March 2010, before she became pregnant. In December 2011, after McGoye had been granted temporary custody of the child, she evicted appellant; appellant then stayed with a friend for a while. He then stayed with another friend and her children at the time of the hearing. According to McGoye, appellant had been kicked out of several homes. She did not believe that he had a stable living arrangement.

{¶12} Evidence demonstrated that appellant had mental-health and substance-abuse problems. For example, the juvenile court detailed that his unruly conduct during the first two temporary custody hearings indicated that he suffered from a serious mental-health disorder. McGoye testified that she was concerned about his mental health. McGoye explained that appellant had been hospitalized twice as a teenager for unspecified mental-health conditions. Appellant admitted that two and a half years before the hearing, he had undergone counseling and received medication for depression. At the time of the hearing, a resisting arrest charge against appellant was dismissed and a domestic violence charge was still pending. Suggestions of his incompetence to stand trial had been filed in both cases. McGoye also testified that she caught appellant using marijuana several times in their home. She further testified that appellant was "like two different people" and that "when he takes drugs and drinks, he's completely irrational." The initial case plan prepared by the Washington County Children Services Board had noted concerns regarding substance abuse and mental health for appellant.

{¶13} According to McGoye, during the period that appellant and the child lived in McGoye's home, he refused to take care of the child, instead stating that it was McGoye's responsibility because she had temporary custody. She further testified that appellant and Rairden had sold Rairden's prescription pain medication to others when Rairden was still alive.

{¶14} Finally, McGoye testified that she is a service coordinator for Help Me Grow in Washington County; that she had provided most of the care for the child since his birth; and that she had an in-home provider who provides care for the child when she is at work. Other witnesses testified that McGoye had provided a stable and loving environment for the child, who has certain special needs.

{¶15} The juvenile court found that appellant was unsuitable because he is unable to care for the child and it would be detrimental to place the child in his custody. The court further found that placing the child in the legal custody of his paternal grandmother, McGoye, was in the child's best interest. The court designated McGoye the legal custodian of the child.

II. ASSIGNMENTS OF ERROR

{¶16} On appeal, appellant assigns the following errors:

1. ABUSE AND NEGLECT WERE NEVER PROVEN BY CLEAR AND CONVINCING EVIDENCE.

2. A THIRD PARTY WAS ALLOWED TO FILE FOR TEMPORARY CUSTODY AND CUSTODY AND THE JUDGE REFUSED TO ALLOW ME TO APPLY IN HIS COURT.

3. THERE WAS NEVER CLEAR AND CONVINCING EVIDENCE SUPPORTING THE STATE OR TERRI'S CASE.

4. THE PRETRIAL HEARINGS ALLOWED THE STATE TO BE INVOLVED IN MY CASE AND MY SON'S CASE. I REQUESTED A RECORD OF THIS AND THE JUDGE DENIED MY REQUEST AND ALLOWED A CASE TO BE OPENED WITHOUT REASON FOR DOING SO.

5. I WAS DENIED MY RIGHT TO FILE FOR CUSTODY AND BE HEARD FIRST AND HAVE THE COURT HIRE AN INVESTIGATOR TO LOOK INTO THE FACTS OF THE CASE FIRST BEFORE PROCEEDING.

III. LAW AND ANALYSIS

A. Standard of Review

{¶17} "A trial court has broad discretion in proceedings involving the care and custody of children." *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 14. "Consequently, we will not reverse a trial court's custody decision absent an abuse of discretion." *In re C.J.L.*, 4th Dist. Scioto No. 13CA3545, 2014-Ohio-1766, ¶ 12, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). "When applying the abuse of

discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe I*, 57 Ohio St.3d 135, 566 N.E.2d 1181 (1991). "The term 'abuse of discretion' implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, 7 N.E.3d 1173, ¶ 8.

{¶18} Moreover, the Supreme Court of Ohio "has consistently held that the determination of whether 'a parent relinquishes rights to custody is a question of fact which, once determined, will be upheld on appeal if there is some reliable, credible evidence to support the finding.' " *Mullen* at ¶ 15, quoting *Masitto v. Masitto*, 22 Ohio St.3d 63, 66, 488 N.E.2d 857 (1986). And we review whether a custody determination is against the manifest weight of the evidence by weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and determining whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *See In the Matter of B.E.*, 4th Dist. Highland No. 13CA26, 2014-Ohio-3178, ¶ 28, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

B. Failure to Comply with App.R. 16(A)(7)

{¶19} Initially, we note that appellant has failed to argue his assigned errors separately, as required by App.R. 16(A)(7). Although we could summarily overrule his assignments of error and affirm the trial court's judgment based on this defect, we typically afford "some degree of leniency to pro se litigants." *State v. Evans*, 4th Dist. Pickaway No. 11CA24, 2012-Ohio-4143, ¶ 7, fn. 2. Therefore, in the interests of justice and considering that this case involves a parent's

fundamental right to the custody of his child, we address the merits of his assigned errors. *Ogle v. Kroger Co.*, 4th Dist. Hocking No. 13CA22, 2014-Ohio-1099, ¶ 14.

C. Custody Determination

{¶20} In his first assignment of error, appellant asserts that the trial court erred in its custody determination because abuse and neglect were never proven by clear and convincing evidence. In his third assignment of error, appellant contends that the trial court erred in its custody determination because there was not clear and convincing evidence supporting either the state's or McGoye's case. Because these assignments raise related issues and are not argued separately, we consider them jointly.

{¶21} " Parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their children is paramount to any custodial interest in the children asserted by nonparents." *Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, at ¶ 11. " 'The right of a parent to the custody of his or her child is one of the oldest fundamental liberty interests recognized by American courts.' " *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 33, quoting *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 10. " 'Within the framework of the statutes, the overriding principle in custody cases between a parent and a nonparent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children.' " *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 16, quoting *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16.

{¶22} Nevertheless, a parent's paramount right to custody of his or her children is not unlimited. *Mullen* at ¶ 11. If a parent is unsuitable, the parent forfeits his or her paramount right to custody. *In re Perales*, 52 Ohio St.2d 89, 98-99, 369 N.E.2d 1047 (1977) ("Once the court determines that the parent has forfeited custody or that parental custody would be detrimental to the child, it must indicate that a preponderance of the evidence militates against parental custody by making a finding of unsuitability"). In a child-custody proceeding between a parent and a nonparent, a court may not award custody to the nonparent without first determining that the parent is unsuitable to raise the child, i.e., without determining by a preponderance of the evidence that the parent abandoned the child, contractually relinquished custody of the child, or 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. *C.J.L.*, 4th Dist. Scioto No. 13CA3545, 2014-Ohio-1766, ¶ 15, citing *Perales* at the syllabus.

{¶23} Appellant claims that the trial court's custody determination was erroneous because abuse and neglect were not proven by clear and convincing evidence and clear and convincing evidence does not support the state's or McGoye's case. Under R.C. 2151.23(A)(1), a juvenile court has exclusive original jurisdiction of an abused, neglected, or dependent child, and pursuant to R.C. 2151.23(A)(2), a juvenile court has exclusive, original jurisdiction to determine the custody of any child not a ward of another Ohio court. These sections are independent of each other, and "[t[he juvenile court has jurisdiction to determine the custody of any child not a ward of another court, even though the court has not first found the child to be delinquent, neglected, or dependent." *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, ¶ 42, citing *In re Torok*, 161 Ohio St. 585, 120 N.E.2d 307, paragraphs one and two of the

syllabus; Sowald and Morganstern, *Baldwin's Ohio Domestic Relations Law*, Section 15:75 (4th Ed. 2013).

{¶24} Therefore, "a custody decision made under R.C. 2151.23(A)(2) does not require a preliminary finding that the child is abused, neglected, or dependent and is based on a lesser standard of proof—preponderance of the evidence rather than clear and convincing evidence." *See, generally*, Giannelli and Salvador, *Ohio Juvenile Law*, Section 45:11 (2014); *see also In re C.V.M.*, 8th Dist. Cuyahoga No. 99426, 2013-Ohio-3361, ¶ 6, citing *In re D.P.*, 10th Dist. Franklin No. 05AP-117, 2005-Ohio-5097 ("Because legal custody where parental rights are not terminated is not as drastic a remedy as permanent custody, the trial court's standard of review in a legal custody proceeding is not clear and convincing evidence as in permanent custody proceedings, but merely preponderance of the evidence").[1] The trial court, which made a determination granting legal custody of the child to his paternal grandmother, McGoye, pursuant to R.C. 2151.23(A)(2), was thus not required and did not find the child to be abused, neglected, or dependent and did not have to make its findings based on clear and convincing evidence. Consequently, appellant's first and third assignments of error lack merit because they are based on flawed premises.[2]

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[1] Unlike a grant of permanent custody to an agency, the grant of legal custody to a nonparent does not automatically divest the natural parents of all parental rights, privileges, and obligations towards their children. *See* R.C. 2151.011(B)(21) (defining "legal custody" as a "legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all *subject to any residual parental rights, privileges, and responsibilities*" [emphasis added]).

[2] Because the trial court had previously granted temporary custody of the child to McGoye and had continued that temporary custody, it is arguable that the trial court should have applied the modification standard requiring a change of circumstances, at least insofar as appellant's motion sought to modify the temporary custody order in favor of McGoye to grant him custody. *C.J.L.*, 4th Dist. Scioto No. 13CA3545, 2014-Ohio-1766, ¶ 15, quoting *Purvis v. Hazelbaker*, 181 Ohio App.3d 167, 2009-Ohio-765, 908 N.E.2d 489, ¶ 10 (4th Dist.) (" '[O]nce custody has been awarded to a nonparent, the court will not apply the *Perales* unfitness standard to a later request for custody modification. Instead, custody modification in that situation is determined under the R.C. 3109.04 change-

{¶25} Moreover, the record supports the trial court's findings that appellant is an unsuitable parent; that it would be detrimental to place the child in appellant's custody; and that it would be in the best interests of the child to place him in the legal custody of McGoye. This evidence included appellant's history of being unable to maintain either stable employment or housing; concerns about his mental health and substance abuse; and his inability to provide care for his child in the past. The record further demonstrates that McGoye had provided most of the care for the child since a few weeks following the child's birth. It shows McGoye's stable employment and her provision of a loving, stable home environment for the child. This is not an exceptional case in which the trier of fact clearly lost its way or created such a miscarriage of justice so as to require a new trial. The trial court did not abuse its broad discretion in awarding legal custody of the child to McGoye.

{¶26} Therefore, we overrule appellant's first and third assignments of error.

D. Motions for Custody

{¶27} In his second assignment of error, appellant contends that the trial court erred in permitting McGoye to file for temporary custody and custody, but refused to permit him to file for custody.

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of-circumstances/best-interest standard. * * * In other words, if a parent has custody of her minor child, a custody dispute with a nonparent is determined under the *Perales* standard; but if a custody award has previously been made to a nonparent, the party seeking to modify that award must show a change-in-circumstances/best-interest issue even if the noncustodial party is a parent and the custodial party is a nonparent' "); *see also In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467. It is less clear whether this standard would apply to McGoye's request for legal custody, where she had previously been granted only temporary custody. *See In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514 (applying *Perales* unsuitability standard instead of change-of-circumstances standard to a case where the nonparent custodian had been granted temporary custody and sought legal custody of the child and noncustodial parent sought custody). Nevertheless, because neither party raises this issue, we need not address it in the context of this appeal.

{¶28} Appellant's claim lacks merit because McGoye was authorized to seek custody of her grandson pursuant to R.C. 2151.23(A)(2) (juvenile court has exclusive, original jurisdiction to determine the custody of any child not a ward of another court of this state) and Juv.R. 10(A) ("Any person may file a complaint to have determined the custody of a child not a ward of another court of this state"). Nonparents can bring custodial claims for children who are not wards of another court of this state under R.C. 2151.23(A)(2). *Rowell v. Smith*, 133 Ohio St.3d 288, 2012-Ohio-4313, 978 N.E.2d 146, ¶ 14.

{¶29} The record does not establish that the trial court prevented appellant from filing a motion for custody of the child. Instead, the trial court advised him that if he sought custody, he needed to file a motion. Appellant did subsequently file a motion for custody; and the trial court considered it and McGoye's complaint for legal custody in its determination. Insofar as appellant complains about the trial court not permitting him to file a motion for joint custody during the hearing on McGoye's initial petition for temporary custody and emergency custody, that complaint is not properly before us. Appellant did not timely appeal from the trial court's November 17, 2011 judgment, following a hearing at which he appeared, designating McGoye as the temporary legal custodian for the child. *See In re Murray*, 52 Ohio St.3d 155, 556 N.E.2d 1169 (1990), syllabus (juvenile court temporary custody order constituted a final, appealable order).

{¶30} We overrule appellant's second assignment of error.

E. State's Involvement in Case

{¶31} In his fourth assignment of error, appellant asserts that the trial court erred in allowing the state to be involved in the pretrial hearings of the case; in denying his request for a

record of this; and in allowing the state to open a case without any reason. Without an expanded argument concerning this assigned error, it is difficult to discern his claim. Nevertheless, the record does not support appellant's contention that the state was involved in the underlying case other than the preparation of an initial case plan for the child that was closed when the trial court granted McGoye's petition for temporary and emergency custody of the child. The record also does not support his contention that the trial court denied any request for records relating to any involvement by the state in the case. Lastly, no indication exists that these contentions prejudiced appellant in the case. Therefore, we overrule his fourth assignment of error.

F. Motion for Custody and Investigator

{¶32} In his fifth assignment of error, appellant again claims he was denied his right to file for custody and to be heard first. He further claims that the court should have hired an investigator to look into the facts of the case first before proceeding. As we noted in our disposition of his second assignment of error, the trial court did not deny appellant his right to seek custody of his son. Appellant indeed did seek custody of his son; and the court considered his request. He cites no authority that he had the right to have his motion heard before McGoye's motion, which had been filed before his motion; and he asserts no prejudice therefrom. In fact, it appears that the trial court held a hearing on both his motion and McGoye's complaint for custody, although McGoye's witnesses and evidence were submitted first. Although a juvenile court arguably has the discretion to appoint an investigator in a custody dispute between a parent and a nonparent, *see James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 7 (noting that the juvenile court had appointed an investigator in the custody dispute between the child's parents and maternal grandparents), appellant cites no authority and we are aware of none that required the trial court to do so here. We overrule appellant's fifth assignment of error.

G. Remaining Arguments

{¶33} Appellant also raises several other arguments regarding evidentiary rulings; alleged bias on the part of the magistrate; purported illegal actions by his mother and the judge; and various other contentions that are unrelated to his assigned errors. " 'Appellate courts review assignments of error, not mere arguments.' " *Keltz v. Enchanted Hills Community Assn.*, 4th Dist. Highland No. 12CA11, 2014-Ohio-866, ¶ 21, quoting *State v. Gwinn*, 196 Ohio App.3d 296, 2011-Ohio-5457, 963 N.E.2d 212, ¶ 26 (4th Dist.). Because appellant did not specifically assign these various claims as error, we need not address these improperly raised arguments. *See State v. Lamb*, 4th Dist. Highland No. 14CA3, 2014-Ohio-2960, ¶ 13.

IV. CONCLUSION

{¶34} Accordingly, appellant has not established that the trial court erred in granting legal custody of the child to his mother. Having overruled his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.