[Cite as *In re B.L.*, 2009-Ohio-6341.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
IN THE MATTER OF:	:	Hon. Sheila G. Farmer, P.J.
B.L.,B.L.,B.L.,B.R.,	:	Hon. W. Scott Gwin, J.
K.S.,K.S.,M.R.,	:	Hon. William B. Hoffman, J.
AND M.R.	:	
	:	
	:	Case No. 09-CA-54
	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Juvenile Division, Case Nos. C2008-0760,C2008-0761, C2008-0762, C2008-0763, C2008-0764,C2008-0765,C2008-0766,C2008-0767

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 2, 2009

APPEARANCES:

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Gwin, J.

{¶1} Appellant-mother, T.S.[1], appeals the finding of dependency as to her eight children entered on March 24, 2009 in the Licking County Court of Common Pleas, Family Court Division. Appellee is the Licking County Department of Jobs and Family Services ("LCDJFS").

{¶2} This case comes to us on the expedited calendar. App. R. 11.2, which governs expedited calendar cases, provides, in pertinent part:

{¶3} "(D) Dependent, abused, neglected, unruly, or delinquent child appeals

{¶4} "Appeals concerning a dependent, abused, neglected, unruly, or delinquent child shall be expedited and given calendar priority over all cases other than those governed by App. R. 11.2(B) and (C)".

{¶5} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE FACTS AND CASE

{¶6} The following facts were adduced at the adjudicatory hearing held on December 17, 2008.

{¶7} Appellant is the natural mother of all the children involved in this matter: B.L. [D.O.B. 09/06/1993]; B.L. [D.O.B. 09/24/1995]; B.L. [D.O.B. 04.09.1997]; B.R. [D.O.B. 06/27/1998]; K.S. [D.O.B. 09/21/1999]; K.S. [D.O.B. 07/14/2001]; M.K. [D.O.B. 04/20/2007]; and M.K. [D.O.B. 08/06/2008]. There are three fathers of said children.

[1] For purposes of anonymity, initials designate appellant's name only. See, e.g., *In re C.C.,* Franklin App. No. 07-AP-993, 2008-Ohio-2803 at ¶ 1, n.1. Counsel should adhere to Rule 45(D) of the Rules of Supt. for Courts of Ohio concerning disclosure of personal identifiers.

{¶8} LCDJFS filed a Complaint in Licking County Common Pleas Court, Juvenile Division, on October 8, 2008 alleging that all of the children were dependent children.

{¶9} The facts that gave rise to the dependency complaint were the traumatic head injuries suffered by the child, M. R. [DOB: 08/06/2008]. M. R.'s injuries included bleeding in the head, bleeding in the eyes, and swelling of the brain tissue. At the time M. R.'s injuries occurred L. R., putative father of M. R., and appellant-mother, were the only people taking care of M. R., as well as the seven other children. Medical testimony established that M.R.'s injury was the result of child abuse. Appellant and L. R. are both suspects in the ongoing criminal investigation.

{¶10} M. R. was taken to Children's Hospital on the evening of October 6, 2008 due to the above-noted injuries. The parents attempted to minimize any domestic violence within the home. L.R. denied any history of domestic violence to M. R.'s physicians. However, he testified at the adjudicatory hearing that he had been convicted of Domestic Violence in Coshocton County in October 2006. The appellant sustained injuries during this incident, including "two large lumps on her head and also scratches and abrasions on her neck." The children were in the home during this incident.

{¶11} Additionally, there was testimony from a social worker in Coshocton County that physical abuse was indicated with B. L. [D.O.B. 09/24/1995] because of the October 2006 incident. During the investigation of B. L.'s injuries, the mother admitted to the domestic violence incident, but claimed she was unsure as to how B. L. received a black eye.

{¶12} The social worker from Coshocton County also testified to having contact with the appellant in the spring of 2007 due to another domestically violent incident between the appellant and L. R. This incident involved a "lot of yelling and screaming" and the appellant reported that L.R. reached out of a van and grabbed hold of her and tried to choke her. At the time, appellant stated that she was fearful and was "in fear of her own funeral."

{¶13} On April 6, 2008, Newark Police officers were dispatched to the home on a domestic violence call. When they arrived appellant refused to tell police L.R.'s name, and denied the officers access to the home. When appellant did finally reveal that it was L. R. in the home, the police were able to ascertain that a felony warrant for drug trafficking out of Coshocton County and a warrant out of Heath had been issued for L.R. L.R. did not voluntarily come out of the house and was eventually found hiding in the attic.

{¶14} Social workers attempted to interview the remaining children regarding M. R.'s injuries on October 7, 2008, but found that the children had either not gone to school or the family came to remove them from school shortly after their arrival. The children were later located at home. Testimony revealed that appellant was observed with two of her children at the Newark Police Department. The children were overheard telling appellant that they were asked a lot of questions, but they did not tell them anything and were not going to talk to them at all (in regards to Miah). Appellant was overheard telling the children that they did a good job and that she was proud of them.

{¶15} The Magistrate denied appellant's Motion for a Continuance and further denied appellant's Motion to have an Independent Medical Expert appointed to her at state's expense.

{¶16} On December 31, 2008, the magistrate issued his four-page decision adjudicating the children as dependent children. Appellant timely objected to the magistrate's decisions challenging the children's adjudication as dependent children and alleging an unconstitutional denial of appellant's fundamental liberty interest in raising her child. Appellant further objected to the magistrate's denial of her motion to appoint an independent medical expert.

{¶17} On March 24, 2009, the juvenile court issued a seven-page judgment entry overruling appellant's objections.

{¶18} Appellant timely appeals, raising two assignments of error for review.

{¶19} "I. THE DECEMBER 31, 2008 MAGISTRATE'S DECISION FINDING THAT [THE CHILDREN] WERE DEPENDANT CHILDREN WAS AGAINST BOTH THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶20} "II. THE MAGISTRATE ERRED BY DENYING THE MOTHER'S MOTION FOR A CONTINUANCE AND BY DENYING THE MOTHER ACCESS TO PUBLIC FUNDS TO ENGAGE AN INDEPENDENT MEDICAL EXPERT."

I.

{¶21} In her first assignment of error, appellant maintains that the trial court's finding the children to be dependant pursuant to R.C. 2151.04(B) and (C) is based upon insufficient evidence and is against the weight of the evidence. We disagree.

{¶22} As this Court recently stated in *In re Pierce* (Dec. 19, 2008), Muskingum App. No. CT2008-0019, 2008-Ohio-6716, a trial court's adjudication of a child as abused, neglected, or dependent must be supported by clear and convincing evidence. R.C. 2151.35. The Supreme Court of Ohio has held that "[c]lear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate; being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118, citing *Merrick v. Ditzler* (1915), 91 Ohio St. 256, 267, 110 N.E. 493. In addition, when "the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross,* supra. 477.

{¶23} R.C. 2151.04(B) defines a dependent child as one “[w]ho lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian.” R.C. 2151.04(C) defines a dependent child as one “[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship.”

{¶24} A finding of dependency under R.C. 2151.04 focuses on whether the child is receiving proper care and support. *In re Walling,* 1st Dist. No. C-050646, 2006-Ohio-810, ¶ 16 citing, *In re Bibb* (1980), 70 Ohio App.2d 117, 120, 435 N.E.2d 96. Therefore, the determination must be based on the condition or environment of the child, not the

fault of the parents. *In re Bishop* (1987), 36 Ohio App.3d 123, 124, 521 N.E.2d 838; *In re Birchfield* (1988), 51 Ohio App.3d 148, 156, 555 N.E.2d 325. "That being said, a court may consider a parent's conduct insofar as it forms part of the child's environment. See *In re Burrell* (1979), 58 Ohio St.2d 37, 39, 12 O.O.3d 43, 388 N.E.2d 738. The parent's conduct is significant if it is demonstrated to have an adverse impact on the child sufficient to warrant state intervention." *In re Ohm,* 4th Dist. No. 05CA1, 2005-Ohio-3500 at ¶ 21. See, also, *In re: Colaner,* (5th Dist. 2006), 166 Ohio App.3d 355, 360, 850 N.E.2d 794, 798, 2006-Ohio-25404 at ¶ 26.

{¶25} Upon review of the record in this matter, we conclude the trial court's finding that the children were dependent is supported by clear and convincing evidence.

{¶26} Non-verbal infant M. R., DOB 8/6/08 and 2 months old at the filing of the complaint, suffered brain damage and a life-threatening injury. When asked about a domestic violence history, the appellant laughed. (T. at 198); L.R. (M.R.'s father) denied any domestic violence history. (T. at 46). The injuries the infant sustained are found only in abuse situations. (T. at 51; 55; 62; 77). Appellant and L.R. were caring for M.R., either alternatively or simultaneously, during all relevant times. (T. at 45). These two adults also were the regular caregivers of the other seven (7) children.

{¶27} Appellant argues, however, "[t]here is no evidence whatsoever that the children had any adverse impact upon them other than sheer speculation that because one child was seriously injured the other are likely to be injured in the future --- when there is no present evidence as to any lack of proper parental care or supervision." [Appellant's Brief at 8-9]. We disagree. The evidence also supports the finding by the

trial court that the other children were dependent within the meaning of R.C. 2151.04(C).

{¶28} This Court in *In re Bishop, supra,* noted,

{¶29} "Finally, the child does *not* first have to be put into a particular environment before a court can determine that that environment is unhealthy or unsafe. *In re Campbell, supra* (13 Ohio App.3d), at 36, 13 OBR at 38-39, 468 N.E.2d at 96; *In re Turner* [12 Ohio Misc. 171, 41 O.O.2d 264, 231 N.E.2d 502], *supra.* The unfitness of a parent, guardian or custodian can be predicted by past history.

{¶30} "'* * * [A] child should not have to endure the inevitable to its great detriment and harm in order to give the * * * [parent, guardian, or custodian] an opportunity to prove her suitability. To anticipate the future, however, is at most, a difficult basis for a judicial determination. The child's present condition and environment is the subject for decision not the expected or anticipated behavior of unsuitability or unfitness of the * * * [parent, guardian, or custodian]. * * * The law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm.' *In re East,* supra (32 Ohio Misc.), at 69, 61 O.O.2d at 41, 288 N.E.2d at 346. See, also, *In re Custody of Minor* (1979), 377 Mass. 876, 882-883, 389 N.E.2d 68, 73 (court need not wait until presented with maltreated child before it decides the necessity of 'care and protection'); *In re Interest of J.A.J.* (Mo.App.1983), 652 S.W.2d 745, 749 (to wait until child suffers harm to terminate parental rights would be 'a tragic misapplication of the law'); *New Jersey Div. of Youth & Family Services v. A.W.* (1986), 103 N.J. 591, 616, 512 A.2d 438, 451, at fn. 14 (to wait until injury to decide issue of health and development of child makes no sense)." (Emphasis *sic.*).

{¶31} In the case at bar, the record established a history of domestic violence between appellant and L.R. Appellant herself admitted she was in fear of a fatal result. Physical abuse of B.L. [D.O.B. 09/24/1995] was also reported. L.R. who was living in the home with the children had outstanding warrants involving drug trafficking. L.R. was provided an opportunity to attend counseling to address the domestic violence issues; however he refused to attend.

{¶32} Appellee has established by clear and convincing evidence that the environment was such that the state was warranted in intervening and taking temporary custody of all eight (8) children.

{¶33} For the foregoing reasons, appellants' first assignment of error is overruled.

II.

{¶34} In her second assignment of error, appellant argues that the trial court erred in denying her motion for a continuance and by denying her access to public funds to engage an independent medical expert. We disagree.

{¶35} The decision to grant or deny a motion to continue a hearing is a matter entrusted to the broad discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, 615 N.E.2d 617. Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921; *State v. Wheat,* Licking App. No. 2003-CA-00057, 2004-Ohio-2088. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. An abuse of discretion connotes more

than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

{¶36} In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test that takes into account a variety of competing considerations:

{¶37} "A court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 21 O.O.3d 41, 423 N.E.2d 1078.

{¶38} In the case at bar, appellant requested a continuance together with a request for funds to hire an expert to assist her to cross-examine the medical doctor who treated M.R. for her injuries and who subsequently testified at trial. (T. at 11-16).

{¶39} In *Ake v. Oklahoma* (1985), 470 U.S. 68, 105 S.Ct. 1087, the United States Supreme Court acknowledged that due process and fundamental fairness require the state to provide an indigent criminal defendant with "access to the raw materials integral to the building of an effective defense." *Ake,* 470 U.S. at 77, 105 S.Ct.

1087. As we stated in *State v. Mason* (1998), 82 Ohio St.3d 144, 149, 694 N.E.2d 932, "[w]hile *Ake* involved the provision of expert psychiatric assistance only, the case now is generally recognized to support the proposition that due process may require that a criminal defendant be provided other types **676 of expert assistance when necessary to present an adequate defense."

{¶40} The Ohio Supreme Court has repeatedly recognized that "due process and fundamental fairness require the state to provide an indigent criminal defendant with 'access to the raw materials integral to the building of an effective defense.' “State *v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 21, quoting *Ake v. Oklahoma*; see also *State v. Mason* (1998), 82 Ohio St.3d 144, 149, 694 N.E.2d 932. Specifically, the Ohio Supreme Court has recognized that "due process * * * requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *Mason* at 150, 694 N.E.2d 932.

{¶41} Pursuant to *Ake* and *Mason,* it is appropriate for a court to consider the following factors in determining whether the provision of an expert witness is necessary: "(1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided." *Mason,* 82 Ohio St.3d at 149, 694 N.E.2d 932, citing *Ake,* 470 U.S. at 78-79, 105 S.Ct. 1087. In the absence of a

particularized showing of need, due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution does not require the provision of an expert witness. *Mason* at 150, 694 N.E.2d 932.

{¶42} In the case at bar, the expert called by the state to testify during appellant's trial was the attending physician who treated M.R. when she was brought to the emergency room. (T. at 11; 37). The appellant made no particularized showing to the trial court detailing her reasons for the need of her own expert. In fact, appellant admitted that she had equal access to the witness before trial. (T. at 12-13). There was no disputing the fact that M.R. did in fact suffer severe head trauma. The Appellant did not offer any explanation concerning the cause of M.R.'s injuries during the investigation of the case.

{¶43} "Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need. Nor does it require the government to provide expert assistance to an indigent criminal defendant upon mere demand of the defendant." *Mason*, 82 Ohio St.3d at 150, 694 N.E.2d 943, 1998-Ohio-370.

{¶44} In the case at bar we find that funds were not necessary to ensure the fairness of appellant's trial, nor did appellant's request point to more than a mere possibility that such an expert might have been relevant to the defense. *State v. Mason* supra. As such, appellant's request for funds, as well as her request for a continuance in order to secure an expert was properly denied by the trial court.

{¶45} Appellant's second assignment of error is denied.

{¶46} The judgment of the Licking County Court of Common Pleas, Juvenile Division is affirmed.

By Gwin, J.,

Farmer, P.J., and

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN

WSG:clw 1118

[Cite as *In re B.L.*, 2009-Ohio-6341.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:
B.L.,B.L.,B.L.,
B.R.,K.S.,K.S.,
M.R., AND M.R.

: JUDGMENT ENTRY

: CASE NO. 09-CA-54

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas, Juvenile Division is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN