

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN RE:	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
B.S. and T.S.	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
	:	
	:	Case Nos. 14-CA-46 and 14-CA-47
	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case Nos. 2013-AB-7 and 2013-AB-8
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	February 9, 2015
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APPEARANCES:

For Appellant-Father

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For Mother

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For Children

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*Farmer, J.*

{¶1} On January 11, 2013, appellee, Fairfield County Job & Family Services, filed complaints for temporary custody of T.S., born March 10, 2009, and B.S., born June 3, 2011, alleging T.S. to be dependent and B.S. to be abused (Case Nos. 2013-AB-0007 and 2013-AB-0008). Mother of the children is Alison McConkey; father is appellant, John Scott.

{¶2} On February 19, 2013, the children were found to be dependent and were placed in appellee's temporary custody.

{¶3} On December 2, 2013, appellee filed motions requesting legal custody of the children be granted to the children's maternal aunt and uncle, Alissa and Robert Born.

{¶4} A hearing on the legal custody motions was held on April 24, 2014. By entries filed July 25, 2014, the trial court granted legal custody of the children to the Borns.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD BE IN THE BEST INTEREST OF B.S. AND T.S. TO PLACE THE MINOR CHILDREN IN THE LEGAL CUSTODY OF ROBERT AND ALISSA BORN."

II

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PLACING B.S. AND T.S. INTO THE LEGAL CUSTODY OF ROBERT AND ALISSA BORN WITHOUT CONSIDERING THE WISHES OF THE MINOR CHILDREN."

I, II

{¶8} Appellant claims the trial court erred and abused its discretion in finding the children's best interest was best served with granting legal custody to Alissa and Robert Born, and erred and abused its discretion in not considering the children's wishes. We disagree.

{¶9} We note only appellant-father has objected to the legal custody placement as mother was supportive of appellee's motion, confirmed by her counsel at the start of the motion hearing. T. at 5-6.

{¶10} R.C. 2151.353(A)(3) states the following:

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

{¶11} In *In re D.T.*, 8th Dist. Cuyahoga Nos. 100970 and 100971, 2014-Ohio-4818, ¶ 19-22, we agree with the analysis set forth by our brethren from the Eighth District:

Legal custody is significantly different than the termination of parental rights in that, despite losing legal custody of a child, the parent of the child retains residual parental rights, privileges, and responsibilities. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, ¶ 14, citing R.C. 2151.353(A)(3)(c). In such a case, a parent's right to regain custody is not permanently foreclosed. *In re M.J.M.* [8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674] at ¶ 12. For this reason, the standard the trial court uses in making its determination is the less restrictive "preponderance of the evidence." *Id.* at ¶ 9, citing *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001). "Preponderance of the evidence" means evidence that is more probable, more persuasive, or of greater probative value. *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7.

Unlike permanent custody cases in which the trial court is guided by the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court should consider in determining the child's best interest in a motion for legal custody. *In re G.M.* at ¶ 15. We must presume that, in the absence of best interest factors in a legal custody case, "the legislature did not intend to require the consideration of certain

factors as a predicate for granting legal custody." *Id.* at ¶ 16. Such factors, however, are instructive when making a determination as to the child's best interest. *In re E.A.* [8th Dist. Cuyahoga No. 99065, 2013-Ohio-1193] at ¶ 13.

The best interest factors include, for example, the interaction of the child with the child's parents, relatives, and caregivers; the custodial history of the child; the child's need for a legally secure permanent placement; and whether a parent has continuously and repeatedly failed to substantially remedy the conditions causing the child to be placed outside the child's home. R.C. 2151.414(D).

Because custody determinations " 'are some of the most difficult and agonizing decisions a trial judge must make,' " a trial judge must have broad discretion in considering all of the evidence. *In re E.A.* at ¶ 10, quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). We therefore review a trial court's determination of legal custody for an abuse of discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

*Accord, In re L.D.*, 10th Dist. Franklin No. 12AP-985, 2013-Ohio-3214; *Stull v. Richland County Children Services*, 5th Dist. Richland Nos. 11CA47 and 11CA48, 2012-Ohio-738.

{¶12} In its entries filed July 25, 2014, the trial court found the following as to appellant:

a) Fairfield County Child Protective Services has made reasonable efforts to prevent the need for placement, to include but not limited to the following:

case management, screening, referrals to alcohol or drug treatment, obtain housing, obtain employment.

b) However, said services have not and do enable the child to return safely to the home of father because:

missed screens/calls, positive drug screens, failure to obtain stable housing, and failure to obtain employment.

c) Court finds that for the child to [be] placed with father would be contrary to the welfare of the child, and therefore, removal continues to be in the best interest of the child. Court finds Fairfield County Child Protective Services has made reasonable efforts to reunify the child.

{¶13} It is important to note the reason for appellee's involvement was because of mother and her live-in boyfriend. T. at 219-220. Appellant did not have custody of the children, and claimed mother withheld visitation. T. at 150.

{¶14} The case began in January 2013 and a case plan was filed on February 7, 2013. Included in the case plan for appellant were the requirements of education and

training/parent education, employment/job search, diagnostic/drug diagnostic services, and obtain/maintain housing.

{¶15} Appellant had been referred to The Recovery Center by appellee for assessment and treatment and by Family Court for drug screens. T. at 25, 33-34. Appellant entered into The Recovery Center program in May 2013. T. at 25. The program included assessment and treatment. T. at 23-26, 33. Appellant's counselor, Jason Jones, diagnosed appellant with "cannabis dependence, alcohol dependence, a depressive disorder not otherwise specified, an anxiety disorder not otherwise specified, and then John reported symptoms of post-traumatic stress disorder." T. at 29. Appellant's treatment plan included "individual sessions; that he enter and complete the education group at The Recovery Center; that he enter and complete the men's treatment group.\*\*\*I recommended that he attend 12-step meetings to develop support, look to obtain legal employment and then provide random urine drug screens as requested by CPS." T. at 33.

{¶16} From May 2013 to November 2013, appellant was compliant with the individual counseling, but then his participation became sporadic. T. at 32, 34, 46. Appellant completed the education group, but did not enter or complete the men's treatment group, and continued to test positive for marijuana "the majority of that time." T. at 35-39, 44-45, 63. Appellant was suspended from the Family Court program in December 2013 for consistently screening positive for marijuana. T. at 49, 160. Mr. Jones did not have any individual counseling with appellant from November 2013 to February 2014 as appellant canceled appointments or failed to show; however, appellant did attend an appointment with a clinical nurse practitioner in November 2013

and attended the last education group meeting in December 2013. T. at 48-50. Appellant returned for appointments in February 2014, but canceled or failed to show for his four scheduled appointments in March 2014 and two in April 2014. T. at 50, 54-55. Mr. Jones opined appellant "has learned a lot of tools to assist him in maintaining his abstinence in developing sober support for himself and making healthier choices for himself," but he does not have any evidence that appellant has put these tools into practice because of his limited contact with appellant. T. at 59. Mr. Jones testified he was concerned about appellant's "instability and lack of consistency with his appointments." T. at 60. He opined individual counseling needs to be resumed, as well as participation in the men's treatment group. T. at 64-65.

{¶17} Appellant admitted to self-medication and his emotional problems with marijuana. T. at 38-40, 150-151. He also admitted to unsuccessful involvement in the Family Court program and missing nineteen out of twenty-six drug screens. T. at 160-161. However, when asked if he had a drug or alcohol problem, appellant responded "I really don't think I do." T. at 149. Appellant's attitude is that marijuana is not a drug it's a plant; "a green-bearing seed" sanctioned by God. T. at 156-157. Appellant testified to having two jobs through temporary placement of less than four weeks, and excused his lack of employment on his prior criminal record and being told to work on his recovery. T. at 138-140, 145. Appellant did not have a driver's license, and most of his housing, until the housing in Rose Jones's mobile home, consisted of shelters and with friends. T. at 127-129, 137, 146.

{¶18} Appellant's caseworker, Leah Miller, testified about appellant successfully completing parent education and putting the skills he learned into practice. T. at 226.



However, he failed to comply with drug screens (49 missed out of 111 requests with 25 positive for marijuana), lacked suitable, stable housing up to one week prior to the hearing, and lacked consistent employment "throughout the life of the case." T. at 227, 229-231, 234-236, 237.

{¶19} The children were placed with the Borns in October 2013. T. at 240. Ms. Miller did not have any concerns with their ability to care for the children. T. at 242. Although the Borns currently live in North Carolina, they would encourage visitation with both parents via Skype and physical visitations when they visited Ohio. T. at 88, 92-93, 243. The Borns hope to move back to Ohio in May 2016. T. at 90, 103. The Borns have the ability to protect the children and have the financial ability to care for them. T. at 243-244. When asked to describe the children's need for a legally secure permanent placement, Ms. Miller stated the following (T. at 245):

The children, they require consistent housing, drug-free environment, violence, domestic violence and unsafe people around them, they require an [environment] requirement that's free of all that, where they can have consistent food and clothing and all of their needs provided for, access to medical care and education. And I believe the Borns can provide that for them.

{¶20} Ms. Miller opined based upon the parents' case plan completion or success up to the hearing date, neither parent could provide those things to the children in the foreseeable future. T. at 246.

{¶21} All of the issues relied upon by the trial court are clearly established in the record. Upon review, we find the trial court did not abuse its discretion in finding the best interest of a five year old and a three year old is to be in a stable, nurturing home environment. The trial court did not abuse its discretion in granting legal custody of the children to the Borns.

{¶22} Assignments of Error I and II are denied.

{¶23} The judgment of the Court of Common Pleas of Fairfield County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.