

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re K.V.

Court of Appeals No. L-11-1087

Trial Court No. JC 07176869

DECISION AND JUDGMENT

Decided: January 20, 2012

* * * * *

Stephen D. Long, for appellant.

Shelby J. Cully, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the March 24, 2011 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which overruled objections to the magistrate's decision and affirmed and adopted the decision to transfer legal custody of K.V. to her paternal cousin. Upon consideration of the assignments of error, we affirm the decision

of the lower court. Appellant, the natural mother of K.V., asserts the following assignments of error on appeal:

{¶ 2} THE LOWER COURT ABUSED ITS DISCRETION IN
OVERRULING K.M.'S [APPELLANT'S] OBJECTIONS AND
AFFIRMING THE MAGISTRATE'S DECISION AS THE DECISION
WAS ARBITRARY AND/OR UNREASONABLE.

{¶ 3} THE LOWER COURT COMMITTED PLAIN ERROR WHERE IN
[sic] OVERRULED K.M.'S OBJECTIONS AND AFFIRMED THE
MAGISTRATE'S DECISION TO AWARD LEGAL CUSTODY TO A
RELATIVE WHERE THE GUARDIAN AD LITEM FAILED TO
COMPLY WITH SUP.R. 48(F)(1)(c).

{¶ 4} Following the filing of a complaint in dependency and neglect and an emergency shelter hearing, K.V. was removed from appellant's home in 2007 and temporary custody was granted to appellee, Lucas County Children's Services ("LCCS"). By July 2009, appellant had made significant progress with her case plan and temporary custody was terminated and K.V. was reunited with appellant. However, in January 2010, LCCS again moved for an emergency shelter hearing and sought temporary custody of the child. The agency alleged that K.V.'s health and behavior had markedly deteriorated. LCCS then sought to have legal custody transferred to the paternal cousin who had been caring for K.V. The guardian ad litem ("GAL") moved to appoint counsel for K.V. on April 9, 2010, because the child desired to return to appellant's home and the

GAL recommended that the legal custody be awarded to the current custodian, her paternal cousin.

{¶ 5} At the dispositional hearing, appellant, LCCS case supervisors, appellant's sister, and the paternal cousin who had temporary custody of K.V. on two occasions testified. The following evidence was presented.

{¶ 6} K.V.'s mother had a history of trauma and abuse as a child. As an adult, she struggled with properly parenting K.V. although she loved her greatly and K.V. was devoted to appellant. When K.V. was first removed from her mother's home she was placed with a paternal cousin for 20 months.

{¶ 7} The cousin testified that she had been caring for the child's needs even before custody was transferred to her because K.V. was always hungry and dirty. When K.V. was brought to the cousin's house, she had a severe case of lice, was performing poorly in school, and was socially withdrawn. Under the cousin's care, K.V.'s grades improved, she learned how to communicate with others, and she participated in athletic programs and plays. The cousin also helped K.V. deal with her worries about her mother's compliance with her treatment plans.

{¶ 8} While K.V. was living with the cousin, she made sure that appellant remained a part of K.V.'s life. Appellant showed little interest in K.V.'s successes, which upset K.V. Instead, appellant focused all of her interactions with K.V. on whether she wanted to come home again and whether she missed appellant. The agency even arranged for appellant to be able to be present and support her daughter's sports activities

by providing transportation, but the mother did not come to the games. An LCCS supervisor testified that she spent hours talking to the mother about appropriate visitation with her daughter. The agency continually had to deal with appellant discussing reunification plans, the mother's recovery, etc. with K.V. The agency eventually required all visitations to be highly supervised to avoid inappropriate adult conversations between the mother and child. Finally, telephone conversations had to be eliminated because K.V. would share all of her successes and her mother would not respond appropriately, causing K.V. distress about whether appellant was relapsing.

{¶ 9} Meanwhile, appellant was completing counseling and parenting programs provided by LCCS. LCCS struggled with getting appellant to obtain stable housing and public assistance. Appellant justified her inconsistent visitation with K.V. upon her problems and the time she was spending in LCCS programs. Nonetheless, appellant had completed all of the programs the agency had believed could enable appellant to parent K.V. properly and appellant's treatment for drug abuse appeared successful.

{¶ 10} Therefore, K.V. was reunited with appellant for about five months from August 2009 to January 2010. Because LCCS still had concerns about appellant's ability to properly parent K.V., the agency provided for a community advocate to help appellant be successful. Even with help, however, the detrimental effect of being placed with appellant became apparent shortly after she was back in appellant's custody. Even appellant acknowledged that having K.V. back in her home after such a long absence was overwhelming. Appellant struggled with discipline, appellant would take K.V. to

appellant's weekly AA meetings and keep K.V. out until 10:00 p.m. on school nights, K.V. gained at least 25 pounds, K.V.'s grades deteriorated, appellant failed to obtain glasses for K.V. even though an appointment had already been scheduled and insurance coverage obtained, appellant medicated K.V. daily for headaches (which ceased once K.V. was removed from her mother's care), and K.V. began to obsess about appellant's sobriety and safety. Appellant blamed the changes in K.V. upon her disinterest in school and sports and their desire to be together at all times. Despite the assistance of the agency in obtaining tutoring and sports programs for K.V., appellant did not follow through.

{¶ 11} Furthermore, during this five-month period, appellant failed on three separate occasions to comply with the order of the drug court to check in with a supervisor and to submit job applications. Although appellant understood that if she did not do these things, she would be incarcerated, she did not comply with the order. Appellant testified that she had failed to check in due to conflicts with the supervisor and had not completed job applications because she did not want to work.

{¶ 12} The LCCS case supervisor testified that she knew appellant did not get along with the drug court supervisor because she was questioning appellant about men frequenting her apartment. LCCS became concerned that appellant was associating with a certain man known to take advantage of women in recovery. Appellant denied the relationship. LCCS suspected that appellant was still seeing the man despite a court order. Caseworkers testified to seeing appellant walking on the street talking to the man.

At the hearing, caseworkers heard appellant admit for the first time that she had been with the man for two months after reunification and as late as October 2009. K.V. later told her cousin that this man had threatened to kill K.V. and her mother if K.V. told anyone that appellant was seeing him. After visiting her mother, K.V. changed her story to involve another man. The LCCS supervisor was even more certain about her decision to seek to change legal custody after hearing appellant's admission at trial of her continued relationship with this man and her description of him as a father figure, which meant that there must have been a lot more contact between the man and the child than the agency realized. K.V. also reported that she had seen text messages on her mother's phone regarding prostitution. Appellant denied that K.V. would have reported being threatened and denied ever receiving such text messages.

{¶ 13} Appellant's older sister testified that she became involved with the family during the reunification period. She assisted appellant with transportation while K.V. was living with her cousin. The sister testified that she observed appellant improve her ability to control K.V.'s eating habits. The sister also testified to the close bond between K.V. and appellant and their estrangement from the family because K.V.'s father forbid appellant from associating with her family. The sister did not approve of the paternal cousin having permanent legal custody because the cousin's 16-year-old daughter had a baby out of wedlock and because that daughter and her boyfriend were home when K.V. came home from school. Appellant also testified that K.V. had called one evening because she was afraid of the boyfriend.

{¶ 14} K.V. was again removed from her mother's home and returned to the cousin's care for the five months prior to the dispositional hearing. The cousin was shocked to see how much K.V. had reverted back to what she had been. Eventually, K.V. improved her grades, opened up, participated in activities, and lost the weight she had gained. Upon her initial return, K.V. was extremely distressed about what appellant was doing and whether she was complying with her treatment plans. The cousin worked to overcome this issue as well. The cousin was unsure why K.V. was much more distressed this time. The cousin testified that she would allow K.V. to maintain a supervised relationship with appellant and the child's father.

{¶ 15} While appellant had been able to successfully maintain her sobriety and had completed numerous parenting and counseling programs, her therapist and LCCS believed that appellant was unable to incorporate what she learned into her daily life and care for K.V. and herself at this time. However, because of the bond between the mother and child, LCCS was seeking only to transfer legal custody so that the child could grow up in a stable, healthy environment and maintain a relationship with her parents. LCCS retained some hope that appellant would be able to someday overcome her problems and again care for K.V. Appointed counsel for K.V. recommended against changing legal custody because of the devastating effect upon K.V. if she were permanently removed from appellant's home. The guardian ad litem was present at the hearing, but did not present an opinion on the placement issue. The guardian ad litem had filed a report in

January 2008 recommending that temporary custody remain with the paternal cousin but did not file another report prior to the final dispositional hearing.

{¶ 16} Appellant acknowledged her past failures, but asserted that she could now take on her parental role and take of K.V.'s needs. Appellant also asserted that she would follow the court orders even if it became difficult. Even though the child is thriving with her current caregiver, appellant believed that she should be given another chance to parent her child. However, she could not give a definitive time line of how long it would be before she could parent the child properly. LCCS caseworkers testified that once K.V. was removed a second time from appellant's care, she expressed only concerns about the loss of her housing, Medicaid, cash benefits, etc. and no concerns about K.V.'s welfare.

{¶ 17} Following the dispositional hearing and an interview with K.V., the magistrate issued a decision transferring legal custody to the paternal cousin. The magistrate found by a preponderance of the evidence that continued custody to appellant would be detrimental to the child. Appellant filed objections to the magistrate's decision arguing that the decision to transfer legal custody was not in the child's best interest. She also argued that the decision was contrary to the manifest weight of the evidence since appellant had been clean and sober for over two years and had maintained stable housing since July 2009. On March 24, 2011, the court found appellant's objections not well-taken. Upon examination of the evidence, the court concurred that continued custody to the mother would be detrimental to the child. Therefore, the trial court affirmed and adopted the decision of the magistrate.

{¶ 18} In her first assignment of error, appellant argues that the trial court abused its discretion when it overruled her objections and affirmed the magistrate's decision to transfer legal custody of K.V. to her paternal cousin. Appellant asserts that she had completed or substantially complied with all of the services offered through LCCS and the drug court and that both she and her child want to remain together. Appellant argues that the reasons for the change of legal custody all stemmed from her daughter's insecurity when the two were separated.

{¶ 19} On appeal, we review the trial court's decision to adopt a magistrate's decision awarding legal custody under an abuse of discretion standard. *In re Antwan J. and Antwane J.*, 6th Dist. No. L-07-1128, 2008-Ohio-477, ¶ 33. The trial court granted temporary custody to LCCS upon the adjudication of K.V. as a neglected, dependent, or abused child pursuant to R.C. 2151.353(A)(2). LCCS later moved to terminate its temporary custody and seek a final dispositional order transferring legal custody of K.V. to her paternal cousin pursuant to R.C. 2151.415(A)(3). In making a decision under this statute, the trial court's standard is the "best interest of the child as supported by the evidence." R.C. 2151.415(B) and *In re Katelynn M.*, 6th Dist. No. L-07-1354, 2008-Ohio-5296, ¶ 9. The trial court applies the lesser preponderance of the evidence standard rather than the clear and convincing evidence standard applicable to permanent custody hearings. *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist. 2001). Therefore, on appeal we apply an abuse of discretion standard, *Antwan J.*, and must find

that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 20} Upon a review of all of the evidence, we find that there was a preponderance of the evidence to support the trial court's dispositional order. Although appellant had completed the services in her case plan, she was still unable to provide for the physical and emotional needs of K.V. Clearly, it was appellant's parenting style and lifestyle that made the child insecure because she was able to function well when she lived with her paternal cousin. Upon a review of the facts of this case, we find that there is nothing to indicate that the trial court abused its discretion in determining that the best interest of the child, as supported by the evidence, was to grant legal custody to the paternal cousin. Appellant's first assignment of error is not well-taken.

{¶ 21} In her second assignment of error, appellant argues that the trial court erred as a matter of law when it adopted the magistrate's decision without reviewing a written report of the guardian ad litem ("GAL") as required by Sup.R. 48(F)(1)(c), which provides that:

{¶ 22} (1) In juvenile abuse, neglect, and dependency cases and actions to terminate parental rights:

{¶ 23} * * *

{¶ 24} (c) Unless waived by all parties or unless the due date is extended by the court, the final report shall be filed with the court and made available to the parties for inspection no less than seven days before the dispositional

hearing. Written reports may be accessed in person or by phone by the parties or their legal representatives. A copy shall be provided to the court at the hearing.

{¶ 25} In this case, the GAL did not file a written report close to the final dispositional hearing. She did, however, participate in all stages of the proceedings, including calling and examining witnesses. Appellant asserts that she was unable to call the GAL as a witness because she did not file a written report, but we find that there was nothing in the record to substantiate this claim that she intended to call the GAL as a witness or was unable to do so.

{¶ 26} Although appellant did not object to proceeding without the written GAL report and did not raise the issue in her objections to the magistrate's decision, she argues that proceeding to a hearing without the report constituted plain error and that this error seriously affected the fairness of the proceeding. She contends that the court must consider the GAL's recommendations to determine the best interest of the child and that when the GAL's recommendations were contrary to the wishes of the child, the court had a greater reason for knowing the details of the conflict.

{¶ 27} We find appellant's argument lacks merit. Rules of Superintendence are only general guidelines for the court to follow at its discretion and do not give rise to substantive rights. Many courts have considered this particular argument in the context of application of this rule in parental rights cases and have dismissed the argument. *Allen v. Allen*, 11th Dist. No. 2009-T-0070, 2010-Ohio-475, ¶ 29-31; *In re E.W.*, 4th Dist. Nos.

10CA18, 10CA19, 10CA20, 2011-Ohio-2123, ¶ 15; and *In re B.K.*, 12th Dist. No. CA2010-12-324, 2011-Ohio-4470, ¶ 23.

{¶ 28} Appellant contends that these cases are distinguishable on their facts because in this case, the GAL did not file any report at all. While the GAL did not file a report after 2008 in this case, it was clear from the record that she supported a transfer of legal custody of K.V. to the paternal cousin. It was the GAL who petitioned the court to appoint counsel for K.V. because the GAL's recommendation would conflict with the child's wishes. Therefore, appellant has failed to show any prejudice resulting from the failure of the GAL to file a formal final report.

{¶ 29} Furthermore, appellant argues that certain portions of some rules of superintendence have been found to have mandatory status. Appellant argues that the rule at issue here should also be given mandatory status because proceeding without the GAL's written recommendation violated the requirements of fairness, integrity, and public reputation of the judicial proceedings.

{¶ 30} Appellant cites to *State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs.*, 70 Ohio St.3d 94, 99, 637 N.E.2d 311 (1994). In that case, the Ohio Supreme Court suggested in dicta that some of the requirements of former M.C.Sup.R. 17 are mandatory. However, the issue of the case was whether the rule could be used to establish that courtroom facilities were inadequate. The Ohio Supreme Court held that it was appropriate to use the standards set forth in the rule as a guide to determining whether the

facilities at issue were adequate. The court did not hold that the Rules of Superintendence give rise to substantive rights.

{¶ 31} Appellant also cites to *Smith v. Dartt*, 6th Dist. No. L-05-1124, 2005-Ohio-1885, ¶ 3. In that case, this court addressed the right of an attorney to a writ of mandamus against a judge for failing to apply Sup.R. 41(B)(1), which provides that when an attorney is faced with two trials scheduled on the same day, the trial which was scheduled first shall have priority. While this case does support appellant's argument, we decline to apply the same principles to Sup.R. 48(F)(1)(c) when several other courts have already held that this rule does not give rise to substantive rights.

{¶ 32} Therefore, appellant's second assignment of error is not well-taken.

{¶ 33} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
