

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

In re M.S., S.S., B.S.

Court of Appeals Nos. WD-15-061
WD-15-062
WD-16-063

Trial Court Nos. 14 JB 001
14 JB 002
14 JB 003

DECISION AND JUDGMENT

Decided: June 10, 2016

* * * * *

Jeffrey P. Nunnari, for appellants.

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PIETRYKOWSKI, J.

{¶ 1} Appellants, Ma.S. and K.S., parents of the minor children, M.S., S.S., and B.S., appeal from the August 31, 2015 judgment of the Wood County Court of Common Pleas, Juvenile Division. In that judgment, the court found the parents had neglected their minor children and had not provided for their basic needs, the parents had not

complied with the case plan provided by the “Wood County Child Support Bureau (WCCSB),” the parents had showed total disregard for the “WCCSB” case plan and the trial court’s orders, and the parents left the United States in order to avoid the jurisdiction of the trial court. Therefore, the court granted “full legal custody” of the minor children to appellee, R.M., an older sibling of the minor children and daughter of Ma.S. and K.S. Warrants were issued to secure physical custody of B.S. and S.S., who had been taken overseas by their parents. After consideration of appellants’ assignments of error, we affirm.

{¶ 2} On appeal, the parents assert the following assignments of error:

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY NOT AFFORDING THEM ALL OF THE PROCEDURAL SAFEGUARDS ATTENDANT TO R.C. 2151.23(A)(2) CUSTODY PROCEEDINGS, THEREBY DENYING THEM DUE PROCESS OF LAW.

ASSIGNMENT OF ERROR II

THE TRIAL COURT’S FINDINGS AND CONCLUSIONS SUPPORTING ITS AWARD OF CUSTODY OF APPELLANTS’ CHILDREN TO A THIRD-PARTY RELATIVE ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

ASSIGNMENT OF ERROR III

THE TRIAL COURT’S JUDGMENT IS AGAINST THE

MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 3} We note initially that upon a review of the record, it is clear the trial court failed to comply with the statutory procedures and time restrictions for neglect actions. As a result, the court did not make an adjudication of neglect or disposition orders until almost two years after the initial complaints were filed. The court also held a joint adjudication and disposition hearing, which is clearly contrary to the statutory process. However, the parties never objected to any of the trial court’s deviations from the statutory procedure and have, therefore, forfeited the right to challenge these errors on appeal. R.C. 2151.28(K); R.C. 2151.414(A)(2). The only issue that might have been raised on appeal was whether holding a joint adjudication and disposition hearing constituted plain error because no objection was made in the juvenile court. Juv.R. 34(A); *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 479 N.E.2d 257 (1985), paragraph one of the syllabus (bifurcated hearing required where parental rights are subject to termination). As an appellate court, however, we are constrained by the assignments of error presented and address only the assignments of error raised. App.R. 12(A).

{¶ 4} Prior to R.M. filing neglect complaints in this case, the Wood County Department of Job and Family Services (“JFS”) filed complaints alleging that M.S., B.S., and S.S. were neglected children. The court initially granted JFS protective supervision. The court required R.M.’s complaint, filed a few days later, to be filed in the JFS case

and that she move to intervene in the JFS cases. R.M. sought legal custody alleging the same minor children were neglected because of their lack of education and social development, their mother's verbal abuse; the lack of protection from an older brother's sexual abuse; the lack of counseling for M.S. after she was sexually abused by her older brother; the lack of medical care; and the physical abuse by their father and lack of protection by the mother. The present appeal involves solely the neglect actions filed by R.M.

{¶ 5} JFS dismissed its complaints in January 2014, after having filed a second set of complaints on December 31, 2013. R.M. again moved to intervene in the second set of JFS cases. The juvenile court, over the parents' objection, transferred R.M.'s complaint for legal custody into the second set of JFS cases finding R.M.'s initial complaint had remained pending after the dismissal of the first JFS complaint.

{¶ 6} After a January 2, 2014 hearing, JFS was granted protective supervision of the children and R.M. was to have one weekly hour of telephone visitation. The magistrate ordered no contact to be allowed between the older sibling Be.S. and the minor children. An adjudication hearing was scheduled but before it occurred, JFS dismissed its second set of complaints on March 18, 2014.

{¶ 7} On August 14, 2014, R.M. moved to enforce visitation and for reappointment of the guardian ad litem because her parents had not complied with the trial court's prior order for visitation. The parents objected to visitation and moved to dismiss the motion on the procedural ground that R.M.'s action had already been

dismissed. Following a hearing on the matter, on October 1, 2014, the juvenile court denied the motion to dismiss and appointed a guardian ad litem for the children.

{¶ 8} On October 31, 2014, R.M. filed a motion seeking emergency temporary custody of her siblings alleging her mother had taken the minor children, B.S. and S.S., to Austria, Germany, on October 29, 2014, for the purpose of escaping the court's jurisdiction. M.S. feared believe she would be forced to leave two weeks later.

{¶ 9} The court granted temporary custody of all three siblings to R.M. without taking any evidence on November 7, 2014. A full hearing on the emergency temporary custody motion was held on November 20, 2014. R.M. presented three witnesses in support of her request for temporary custody. The parents did not appear, but they did present three witnesses in opposition.

{¶ 10} Following the hearing, the trial court issued a judgment on November 25, 2014, granting temporary custody of M.S. to R.M., conditioned upon the completion of a favorable home study. The trial court denied her motion for temporary custody of B.S. and S.S., conditioned upon the children being enrolled in school as soon as possible and the older brother, Be.S., have no unsupervised "physical presence" with the minor child, B.S. The court further ordered the parents to allow unrestricted contact amongst the minor children. The court continued its order allowing R.M. to have contact with the minor children, B.S. and S.S. A review hearing was scheduled for March 23, 2015.

{¶ 11} On March 12, 2015, R.M. moved for legal custody of M.S. in order to obtain medical insurance coverage. She alleged that her father dropped coverage for

M.S. on January 7, 2015. Since temporary custody is “legal custody,” R.C. 2151.011(B)(56), we presume R.M. actually needed a final order of legal custody in order to add M.S. to her insurance policy.

{¶ 12} A hearing on the motion was held on March 23, 2015, without the parents present. The attorney who had represented the parents in the past had not had any contact with the parents and had no directions from them as to how to proceed.

{¶ 13} In a judgment of May 6, 2015, the trial court found R.M.’s motion regarding visitation well-taken. The court found the parents intentionally violated the court’s prior orders to allow R.M. telephone or email contact with B.S. and S.S., and a show cause hearing was scheduled for August 5, 2015. R.M. was awarded legal custody of M.S. so that health insurance could be provided for M.S. A further hearing on her custody was scheduled for August 5, 2015.

{¶ 14} On July 30, 2015, the attorney for the parents moved to withdraw as their counsel because the parents had left the country with no intention of returning despite counsel’s notification of the pending hearing. Counsel further indicated that the parents had not cooperated with the guardian ad litem investigation. The trial court granted the motion on August 10, 2015.

{¶ 15} A hearing was held on August 5, 2015, without the parents or their representative present. R.M. presented evidence in support of her complaint for legal custody of all three of the minor children. Also present were the guardian ad litem and counsel for M.S. No evidence was presented on behalf of appellants.

{¶ 16} In a judgment of September 9, 2015, the court found the children to be neglected. The court further found that the parents had not complied with the JFS case plan, that their actions showed a total disregard to completing the case plans and compliance with the court's orders, and that they left the court's jurisdiction to avoid the court orders. Therefore, the court granted full legal custody of B.S. and S.S. to R.M. and continued its prior order of legal custody of M.S. to R.M. The issue of contempt was continued. The parents appealed from this judgment.

{¶ 17} In their first assignment of error, appellants argue that the trial court denied them due process of law by failing to provide them with the procedural safeguards required for custody proceedings arising under R.C. 2151.23(A)(2) to protect the constitutional right of parents to raise their children. Appellants assert that when the trial court dismissed the JFS neglect complaints, the trial court could only consider the placement of the children pursuant to R.C. 2151.23(A)(2), as a ward of the court, which requires that the court first find the parents were unsuitable.

{¶ 18} Appellants' argument is premised on the assertion that R.M.'s neglect complaints were dismissed when the agency dismissed their actions. We disagree. The trial court specifically addressed this issue on two separate occasions and held that R.M. had filed separate complaints for neglect seeking legal custody of the children as well as intervening in the agency actions. We find the trial court did not err in making this finding.

{¶ 19} Recognizing the natural right of parents to parent their children, the General Assembly set forth specific instances in which the juvenile court has jurisdiction to interfere with parental rights. *State ex rel. Clark v. Allaman*, 154 Ohio St. 296, 302-303, 95 N.E.2d 753 (1950). Pursuant to R.C. 2151.27(A), “*any person* having knowledge of a child who appears to * * * be an * * * abused, neglected, or dependent child may file a sworn complaint with respect to that child in the juvenile court of the county in which the child has a residence or legal settlement or in which the violation, unruliness, abuse, neglect, or dependency allegedly occurred.” (Emphasis added.) The complaint must indicate if temporary or permanent custody is sought. R.C. 2151.27(C).

{¶ 20} In the case before us, R.M. filed neglect complaints seeking legal custody. Therefore, the juvenile court had full authority to adjudicate the allegation of neglect and issue a disposition order.

{¶ 21} Once a child has been adjudicated an abused, neglected, or dependent child, the trial court may award legal custody to a non-parent who sought legal custody pursuant to R.C. 2151.27(A) and (C); R.C. 2151.353(A)(3); *In re M.N., E.N., B.N.*, 6th Dist. Ottawa Nos. OT-12-002, OT-12-003, OT-12-004, OT-12-016, 2013-Ohio-836, ¶ 30. An award of legal custody does not permanently terminate a parent’s parental rights and the parent retains residual parental rights. R.C. 2151.011(B)(21); *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 22, citing *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶ 23. But, legal custody is designed to be a final custody award. R.C. 2151.42(B); *Brayden James* at ¶ 26.

{¶ 22} The trial court does not need to make a specific finding that a parent is unsuitable before awarding legal custody to a non-parent if a child has been adjudged neglected, abused, or dependent. *Id.* at ¶ 22; *In re C.R.*, at paragraphs two and three of the syllabus. The adjudication of neglect is sufficient to establish that the parents are unsuitable to have custody of the child. *Id.* Because the juvenile court found the children in this case were neglected, the court had authority to award legal custody to R.M.

{¶ 23} Appellants further argue that the juvenile court erred by applying a best interest standard for determining whether to give R.M. legal custody of the children. We find this argument lacks merit because best interest is the appropriate standard. After a child has been declared neglected, the court must determine, based on a preponderance of the evidence, whether the child's best interest warrants an award of legal custody to the person seeking legal custody. *In re B.L., L.L.*, 6th Dist. Lucas No. L-15-1030, 2016-Ohio-738, ¶ 7.

{¶ 24} Therefore, we find appellants' first assignment of error not well-taken.

{¶ 25} In their second assignment of error, appellants argue that the juvenile court's findings and conclusion to award legal custody to a non-parent were not supported by the evidence. In their argument, appellants merely assert that the court should not have applied a best interest standard. We disagree. As stated above, once a child has been declared neglected, the court must determine, based on a preponderance of the evidence, whether it would be in the child's best interest to award legal custody to the person seeking legal custody. *In re B.L.*

{¶ 26} Appellants' second assignment of error is not well-taken.

{¶ 27} In their third assignment of error, appellants argue that the juvenile court's judgment is contrary to the manifest weight of the evidence. Appellants argue that the trial court should not have given much weight to the testimony of R.M. and failed to consider that the parents financed all their children's intermittent education at private primary and high schools, and their college educations, as well as traveling overseas. Appellants argue the only evidence of maltreatment came from R.M. and M.S., and the guardian ad litem did not report any abuse and recommended the parents retain custody.

{¶ 28} The adjudication that a child was neglected must be supported by clear and convincing evidence. R.C. 2151.35(A)(1). "[T]he trial court may award legal custody to a non-parent upon a demonstration by a preponderance of the evidence that legal custody is in the child's best interest. *In re Katelynn M.*, 6th Dist. Lucas No. L-07-1354, 2008-Ohio-5296, ¶ 9, citing *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (2001). An appellate court will not reverse an award of legal custody absent a showing of an abuse of discretion. *Id.*; *In re B.L.*

{¶ 29} Appellants do not clarify whether they were objecting to only the adjudication of neglect or to both the adjudication of neglect and disposition of legal custody to R.M. However, because their arguments are focused solely on the weight of the evidence and not on the court's exercise of its discretion to determine the best interest of the children, we will address only the adjudication of neglect.

{¶ 30} The following evidence was presented at the August 5, 2015 hearing. M.S. testified her mother and father earned sufficient income to provide for their children. Nonetheless, based on the testimony of R.M. and M.S., there was evidence the parents had not sufficiently provided for the needs of their children.

{¶ 31} M.S. and R.M. testified that all the children attended private school intermittently because her mother did not believe formal education was necessary. When they were not in school, some of them would enroll in online classes, but they were never supervised by their parents and their mother gave them access to the parent account so they did not have to actually do the homework. Sometimes, if teachers sent home schoolwork for the kids to do while they were out of school, their mother would throw it away.

{¶ 32} Appellants argue that the lack of formal education was insufficient unless it caused harm to the children. They argue the fact that the older children all attended college and are employed is evidence that no harm occurred. We disagree.

{¶ 33} Both R.M. and M.S. testified that the sons had trouble learning to read and all of them were stressed by having to catch up while they were in school. R.M. had to advocate to her parents for the right to attend public high school. Their brother, Be.S., threatened suicide because the homework at a private high school was too difficult. M.S. only attended private school from kindergarten through half of second grade and returned for seventh and eighth grade. The private high school she attended was too hard, but she convinced her mother to allow M.S. to finish her sophomore year through an online class

and then move to a public high school. M.S. was never homeschooled. She was enrolled in online classes, but testified she did not do the homework. When the older four children attended private school, R.M. testified they would receive additional assistance from teachers and catch up on their education. R.M. testified that she and some of the other children were socially impaired because of their lifestyle. R.M. testified S.S. and B.S. had no friends and other children thought S.S. was odd. B.S. did not seem to know appropriate boundaries.

{¶ 34} S.S. only attended kindergarten and was supposed to be held back so their mother took him out of school. M.S. never saw S.S. taking online classes. S.S. still had a first grade reading ability at age 14 and JFS required that S.S. attend school. The child was enrolled by their father but the mother pulled S.S. out of school two weeks later. S.S. was unable to do the homework sent home. The mother told S.S. he was stupid. B.S. attended first or second grade for a short time, but was going to be held back for missing too many days. Homework sent home with B.S. when she withdrew was discarded.

{¶ 35} The current two younger siblings are now living in Austria, Germany, and there was no evidence presented of their current education. During a prior hearing there was evidence presented that the children were enrolled in a special school for one or two days a week. R.M. and M.S. testified that online photographs gave them concern the children were still not in school.

{¶ 36} Both R.M. and M.S. testified the children went to a doctor only if they were extremely ill and if antibiotics were prescribed, their mother would attempt to prevent them from taking it. The children had to hide their use of fluoride toothpaste. The children did not receive immunizations. M.S. testified she had a tooth filling fall out in high school that was never replaced until she went to live with R.M. M.S. then learned she had 13 cavities. Their sister, B.S., had trouble with lice, which the mother would not treat with chemicals.

{¶ 37} R.M. and M.S. also testified that they were the primary caregivers for their younger siblings. Their mother worked nights and during the day worked on the computer. Their father occasionally cooked. When R.M. lived in the household, she was primarily responsible for the care of the younger children, the meals, cleaning, and the laundry. S.S. was responsible for getting B.S. up on time to attend private school and often failed to do so. M.S. was worried about her siblings because she was no longer there to care for them. R.M. and M.S. described a home that lacked love and attention, although the siblings were close. R.M. testified her relationship with her mother was strained when R.M. obtained a job while in high school. Their father was described as being either mad, troubled, or drunk. M.S. testified he would grab them and throw them around when he was mad. There was no evidence of the degree of physical aggression or the harm caused by it. However, R.M. testified that S.S. had confided to her in 2013 that he did not feel safe at home.

{¶ 38} M.S. testified that her parents never complied with the case plan because her mother would say JFS had no jurisdiction and the requirements were ridiculous. When the caseworker would visit, S.S. and B.S. would tell the caseworker everything was fine and they were learning as they had been coached to do by their mother who was nearby and could hear their answers. The parents deliberately kept the three younger children away from R.M. and moved out of the country to avoid having the two younger children taken away from them. R.M. testified her mother posted a “go fund me page” on the internet that they were running away from the courts. Both R.M. and M.S. testified the parents had not complied with the court’s order for visitation amongst the siblings.

{¶ 39} When M.S. was 10 or 11 years old, she alleged her older brother, Be.S., had molested her. She immediately told her mother who said M.S. must have been dreaming. Her parents did not get counseling for her. Her mother was more worried about Be.S. getting in trouble. Even though Be.S. eventually moved to Austria to go to college, he would come home to visit on breaks. M.S. accused him of molesting her younger sister, B.S. R.M. observed incidents with Be.S. and sister, B.S., and a younger, female cousin that seemed inappropriate and questionable. R.M. raised concerns with parents and her brother, but her parents were not concerned.

{¶ 40} The guardian ad litem agreed with leaving legal custody of M.S. with R.M., but the guardian had no recommendation regarding the other two siblings because she had never met them.

{¶ 41} Upon a review of the evidence we find that while there was evidence the children did not receive proper nutrition or clothing, their mother had strict beliefs about chemicals, etc., and that this was not a loving home, we find these matters did not rise to the level of neglect. However, there were areas of the children's lives where neglect did exist.

{¶ 42} First, the instability of the education of the children affected their education, socialization, and mental health. For whatever reason, the older children were able to overcome the lack of a consistent education and proper socialization. However, their successes do not mean that S.S. and B.S. will have the same outcome. It is clear that S.S. has some learning difficulties that are not being addressed. Neither S.S. nor B.S. have attended private school as much as the other children and it does not appear that they have ever taken online classes. Both younger siblings appear to have socialization issues because of their isolated lives.

{¶ 43} Third, the children lacked regular medical care and M.S. was in desperate need of dental care at the time her custody was transferred to R.M.

{¶ 44} Fourth, there was evidence that the sexual abuse incident was not taken seriously and there was concern B.S. was not being protected from abuse. Neither the abusing sibling nor M.S. were given sufficient counseling.

{¶ 45} Fifth, there was evidence that the children were the primary caregivers rather than the parents. There was also evidence the parents did not respect the jurisdiction of the juvenile court and left the country to avoid the court's jurisdiction.

{¶ 46} Sixth, there was evidence the parents almost entirely failed to provide for the basic daily needs of their children and imposed those burdens on the older siblings.

{¶ 47} Therefore, we conclude there was clear and convincing evidence the parents had neglected the children's education, medical care, and socialization, as well as the parents' day-to-day basic parental responsibilities regarding the care of the children. There was also clear and convincing evidence of the parents' disregard for JFS, the court, and the prior court orders regarding visitation. Therefore, there is little reason to believe any of the concerns raised by JFS or the court are being addressed by the parents while they are outside the court's jurisdiction. Therefore, we find appellant's third assignment of error not well-taken.

{¶ 48} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Wood County Court of Common Pleas, Juvenile Division, is affirmed. Appellants are ordered to pay the 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.

In re M.S.
C.A. Nos. WD-15-061
WD-15-062
WD-15-063

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

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:
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