

[Cite as *In re Joshua Monroe*, 2004-Ohio-4988.]

STATE OF OHIO, BELMONT COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	CASE NO. 03 BE 50
JOSHUA MONROE, et al.,	)	
	)	OPINION
DEPENDENT CHILDREN.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Juvenile Division, Case Nos. 03 JC 141, 142 & 143.
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JUDGMENT:	Reversed and Dismissed without Prejudice.
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JUDGES:

Hon. Mary DeGenaro  
Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich

Dated: September 17, 2004

APPEARANCES:

For Appellant:	Attorney James L. Nichelsen 1002 Indiana Street Martins Ferry, OH 43935 Attorney for Dan Monroe
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For Appellees:	Attorney Frank L. Pierce Prosecuting Attorney Attorney Megan Baker
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DeGenaro, J.

{¶1} This timely, expedited appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Dan Monroe, appeals the decision of the Belmont County Court of Common Pleas, Juvenile Division that adjudicated three of his children as dependent and awarded legal custody of those children to their mothers. Monroe raises three assignments of error on appeal, but the resolution of his third assignment of error renders his other two assignments of error moot.

{¶2} Monroe claims the trial court erred by not holding a separate dispositional hearing. Both statutes and caselaw mandate that the trial court hold separate adjudicatory and dispositional hearings in a dependency action. The trial court in this case did not and Monroe objected to this at the end of the adjudicatory hearing. Thus, the trial court committed reversible error over objection and its decision must be reversed.

{¶3} R.C. 2151.35(B)(1) mandates that a trial court dismiss a dependency action without prejudice upon a party's motion if the dispositional hearing is not held

within ninety days after the complaint was filed. This is not a jurisdictional time limit, and therefore waivable but Monroe moved that the trial court dismiss the complaint and the trial court cannot now hold a dispositional hearing within that ninety-day time limit. It would be a vain act to remand this matter for a new dispositional hearing. Accordingly, the judgment of the trial court is reversed and this cause is dismissed without prejudice.

#### Facts

{¶14} On February 20, 2003, the Belmont County Department of Jobs and Family Services (DJFS) filed three complaints, which alleged that three of Monroe's children were dependent. When the complaints were filed, Monroe was the children's custodial parent. According to those complaints, the children were in danger of both physical and emotional abuse.

{¶15} After the complaint was filed, the trial court appointed a guardian ad litem for the children and set the matter for an adjudicatory hearing on March 14, 2003. That hearing was continued a couple of times until it was held on April 11, 2003. The magistrate heard the matter that day, but it did not complete the hearing and continued it once again. Eventually, the trial court completed that hearing on May 14, 2003.

{¶16} At the hearing, the magistrate noted that the ninety-first day after the complaints were filed was May 21, 2003. Thus, it stated it would enter both an adjudicatory and dispositional order without further hearings. Monroe objected, saying that there was more evidence that should be introduced regarding how the court should dispose of the matter.

{¶17} On May 19, 2003, the magistrate entered his decision. In that decision, the magistrate determined that all three children were dependent and awarded legal custody of the children to their mothers. Monroe objected to the magistrate's decision and moved to dismiss the complaints since the trial court did not hold a dispositional hearing within ninety days after the complaint was filed. The trial court denied the motion to dismiss and adopted the magistrate's decision over Monroe's objections. It is from this decision that Monroe timely appeals.

{¶8} On appeal, Monroe argues three assignments of error:

{¶9} "The court erroneously relied upon hearsay at an adversarial juvenile proceeding at which a parent could lose custody of a child."

{¶10} "The court erroneously failed to make mandatory Juv.R. 27(B) findings."

{¶11} "The court failed to hold a dispositional hearing within mandatory time limits of Juv.R. 34(A)."

{¶12} Because the issues raised in Monroe's third assignment of error dispose of this appeal, we will address those issues first.

#### Hearing Procedure

{¶13} In this case, the trial court did not hold a separate dispositional hearing within ninety days after the complaint alleging that the children were dependent was filed. Monroe's third assignment of error raises two distinct issues: 1) whether the trial court erred by not holding separate adjudicatory and dispositional hearings and 2) whether the trial court erred by not dismissing the complaint upon his motion by not holding a separate dispositional hearing within ninety days after the complaint was filed. The DJFS contends that Monroe waived each of these two arguments. It then argues that the trial court's decision not to hold a separate dispositional hearing was not error since it understood the distinction between the two stages when admitting dispositional evidence at the adjudicatory proceeding.

{¶14} In any action where parental rights are subject to termination, such as a dependency action, "both the Juvenile Rules and the Revised Code prescribe that such proceedings be bifurcated into separate adjudicatory and dispositional hearings." *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, paragraph one of the syllabus.

{¶15} "The law commands that the proceedings be bifurcated into separate adjudicatory and dispositional hearings because the issues raised and the procedures used at each hearing differ. The issue at the adjudicatory stage of a dependency case is whether petitioner has proven, by clear and convincing evidence, that the child is in fact dependent. The issue at the dispositional stage involves a determination of what is in the child's best interests. There must be strict adherence to the Rules of Evidence at the adjudicatory stage. Yet, 'any evidence that is material and relevant,

including hearsay, opinion and documentary evidence,' is admissible at the dispositional stage. Juv.R. 34(B)(2)." Id. at 233.

{¶16} Although the statutes do not contemplate that the two stages be merged into one proceeding, they do allow one to immediately follow the other in certain circumstances. "The court may hold the dispositional hearing for an adjudicated abused, neglected, or dependent child immediately after the adjudicatory hearing *if all parties were served prior to the adjudicatory hearing with all documents required for the dispositional hearing.*" (Emphasis added) R.C. 2151.35(B)(1).

{¶17} In this case, the parties were not served with the documents required for the dispositional hearing prior to the adjudicatory hearing. Nothing in the record prior to the adjudicatory hearing indicates that any of the parties intended to hold a dispositional hearing immediately after the adjudicatory hearing. In addition, even if the parties were served with the documents required for a dispositional hearing before the adjudicatory hearing, the trial court did not hold separate hearings. As the magistrate recognized, the parties introduced some dispositional material in the adjudicatory phase. The magistrate felt he had to issue both an adjudicatory and dispositional order before the ninety-day time limit expired.

{¶18} Thus, in this case there was not a separate dispositional hearing. This violates both the Juvenile Rules and statutes. See *Baby Girl Baxter* at paragraph one of the syllabus. When this happens, the trial court's order must be reversed. See *In re Knotts* (1996), 109 Ohio App.3d 267, 272. Nevertheless, the DJFS contends that Monroe implicitly waived his ability to raise this issue by failing to object to the procedure the trial court used in this case.

{¶19} The DJFS's contention is incorrect. Monroe's counsel twice objected when informed that the magistrate would not hold a separate dispositional hearing. True, Monroe did not object when the DJFS introduced dispositional evidence at the hearing. But this does not mean he was acquiescing to a single proceeding. His actions could be interpreted as a failure to object to irrelevant evidence. When Monroe was later informed that the magistrate would not hold a separate dispositional hearing, Monroe clearly objected. On two different occasions, the magistrate

indicated that it would not be holding a separate dispositional hearing. At each occasion, Monroe's counsel stated that he did not think it was the proper procedure since he was not given an opportunity to prepare and present dispositional evidence.

{¶20} The magistrate's, and by extension the trial court's, failure in this regard is troublesome. The record contains precious little evidence regarding what dispositional arrangements would be in the children's best interests. The trial court placed the children in their mothers' custody, but the little evidence produced at the hearing raised questions about whether or not this could be in the children's best interests. The mother of one of the children had only recently resumed contact with the child after an extended absence. At least one of the other children expressed reservations about staying at her mother's home. Without a full dispositional hearing addressing these issues, no one can know whether the trial court's disposition was in the children's best interests. The trial court's haste to correct its failure to timely dispose of this action has left us with an insufficient record to review whether its order is in the children's best interest.

{¶21} In this case, the magistrate admitted that he did not bifurcate the adjudicatory and dispositional hearings. As *Baby Girl Baxter* explicitly holds, the failure to bifurcate the proceedings is reversible error. Monroe's counsel objected to the lack of a dispositional hearing. Thus, Monroe's third assignment of error is meritorious.

#### Disposition of Appeal

{¶22} Our conclusion that Monroe's third assignment of error is meritorious leaves us in an unusual situation. Normally, we would reverse the trial court's decision and remand the matter so it can hold a proper dispositional hearing and enter a proper dispositional order. But Monroe asks that we dismiss the complaint since the trial court cannot enter a dispositional order within ninety days after the complaint was filed.

{¶23} Both Juv.R. 34(A) and R.C. 2151.35(B)(1) provide that the dispositional hearing "shall not be held more than ninety days after the date on which the complaint in the case as filed." "If the dispositional hearing is not held within the period of time

required by this division, the court, on its own motion or the motion of any party or the guardian ad litem of the child, shall dismiss the complaint without prejudice." R.C. 2151.35(B)(1); see also Juv.R. 34(A).

{¶24} In this case, the trial court entered its original dispositional order within the ninety-day time limit. Thus, when it entered its order, it had not violated either Juv.R. 24(A) or R.C. 2151.35(B)(1). But it has now been over eighteen months since the complaint was filed. It is impossible for the trial court to comply with the time limits if we remand this case.

{¶25} In the absence of an objection, we would not be concerned about whether to remand this case since the ninety-day time limit is not a self-executing, jurisdictional limit and may be waived either implicitly or explicitly. *In re Kimble Children*, 7th Dist. No. 99 517 CA, 2002-Ohio-2409, ¶26. But on the ninety-first day, Monroe moved to dismiss the complaint. That makes this situation different from those we have faced in the past. Remanding this case for further proceeding would be a vain act, as the trial court would be obligated to dismiss the complaint.

{¶26} According, the judgment of the trial court is reversed and this cause is dismissed without prejudice.

Waite, P.J., concurs.

Vukovich, J., concurs.