

[Cite as *In re M.J.M.*, 2010-Ohio-1674.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94130

IN RE: M.J.M.

A Minor Child

Appeal By: S.E.S. (Mother)

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-09904432

BEFORE: Celebrezze, J., Stewart, P.J., and Cooney, J.

RELEASED: April 15, 2010

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, S.E.S. (“appellant” or “mother”), appeals the juvenile court’s award of legal custody of three-year-old M.J.M.¹ to her father (“father”). After a thorough review of the record, and based on the following law, we uphold the juvenile court’s determination.

{¶ 2} Prior to March 7, 2009, M.J.M. primarily stayed with her mother, but had a continuing relationship with her father. She often stayed at her father’s house and was looked after a great deal by her paternal grandmother. M.J.M. shared mother’s house with mother’s boyfriend, A.V., and her one-year-old half-brother, S.V.

{¶ 3} On March 7, 2009, S.V. was taken to the hospital suffering from severe, non-accidental injuries including irreparable brain damage, skull fractures, and blindness. S.V. had shaken baby syndrome and severe trauma. Appellant could offer no explanation as to how the injuries occurred while S.V. was in her and A.V.’s custody, and both were indicted and charged with felonious assault and domestic violence.

{¶ 4} After this incident, the Cuyahoga County Department of Children and Family Services (“CCDCFS”) sought an emergency temporary custody order of S.V. and M.J.M., which was granted by the magistrate on March 25, 2009. M.J.M., who had been staying with her father since the incident,

¹ The parties are referred to herein by their initials or title in accordance with this court’s established policy regarding non-disclosure of identities in juvenile cases.

continued to stay in the custody of her father. On April 27, 2009, the juvenile court transferred temporary custody of M.J.M. from CCDCFS to her father.

{¶ 5} An adjudicatory hearing was held on June 11, 2009. Appellant admitted to an amended complaint, including that she had a history of domestic violence, which included violence and emotional abuse in front of M.J.M. Also, appellant could not offer an explanation for S.V.'s injuries. Testimony was presented on the extent of appellant's anger management problem. Theresa Almusaad, a social worker with CCDCFS, testified about appellant's extensive history of domestic disturbance reports. The court found M.J.M. to be a neglected and dependant child pursuant to R.C. 2151.03(A)(2) and 2151.04(C), and found that her half-brother, S.V., was an abused and neglected child. Thereafter, M.J.M.'s father submitted a motion for legal custody pursuant to R.C. 2151.353(A)(3).

{¶ 6} At a dispositional hearing held on June 15, 2009, two CCDCFS social workers were called as witnesses. Ms. Almusaad and Thomas Mather both testified that M.J.M. had been residing with her father for more than three months, and they recommended that he be awarded legal custody. They discussed the father's ability to provide for M.J.M.'s basic needs, including details of his housing and employment. The guardian ad litem appointed for M.J.M. also testified and recommended that the father be granted legal custody. At the conclusion of the hearing, the magistrate

awarded temporary custody of M.J.M. to her father, finding it in her best interest. The magistrate wished to give M.J.M.'s mother an opportunity to work through her case plan before an award of legal custody was made; however, CCDCFS objected to this determination. The juvenile court agreed with CCDCFS and awarded legal custody to M.J.M.'s father. This appeal followed.

{¶ 7} Appellant assigns two errors for our review, claiming the juvenile court abused its discretion in overruling the magistrate's determination and that doing so was not in the best interest of the child.²

Rejection of the Magistrate's Decision

{¶ 8} The decision of the juvenile court to accept or reject the determination of a magistrate is reviewed under an abuse of discretion standard. "An award of legal custody shall not be reversed on appeal absent an abuse of [that] discretion." *In re Nice*, 141 Ohio App.3d 445, 2001-Ohio-3214, 455, 751 N.E.2d 552. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination

² Appellant's assignments of error state:

I. "The trial court erred in overruling the magistrate's decision to continue temporary custody, and instead grant legal custody to the father."

II. "The trial court erred in finding that legal custody was in the best interest of the child."

made between competing considerations.” *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.” *Id.*

{¶ 9} As an initial matter, the parties differ as to what standard the trial court must use in making its determination to award legal custody. Appellant claims that because parental rights are being terminated, the court must use a clear and convincing evidentiary standard. *In re Wise* (1994), 96 Ohio App.3d 619, 624, 645 N.E.2d 812. However, *Wise* dealt with an award of permanent custody, terminating all parental rights. The proper standard in the instant case is proof by a preponderance of the evidence, as argued by CCDCFS. *Nice*, *supra*, at 455, 751 N.E.2d 552. This lower standard of proof is applicable here because parental rights are not being permanently terminated. *In re J.O.*, Cuyahoga App. No. 87626, 2007-Ohio-407, ¶11.

{¶ 10} R.C. 2151.011(B)(19) defines legal custody to mean “a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with

food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities.” Whereas “[p]ermanent custody’ means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations.” R.C. 2151.011(B)(30).

{¶ 11} It is clear that when a juvenile court awards legal custody, it does so by examining what would be in the best interest of the child based on a preponderance of the evidence. This is because “an award of legal custody of a child does not divest parents of their residual parental rights, privileges, and responsibilities.” *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶17. See, also, R.C. 2151.011(B)(19); *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶8, fn. 1.

{¶ 12} Here, the court adjudicated M.J.M. to be neglected and dependent. “A juvenile court adjudication of abuse, neglect, or dependency is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child’s custodial and/or noncustodial parents. It does not, however, permanently foreclose the right of either parent to regain custody because it is not a termination of all residual parental rights, privileges, and responsibilities, and therefore a motion for a change of

custody could be filed in a proper case in accordance with law.” Id. at ¶23. See, also, *In re C.F.*, Cuyahoga App. No. 82107, 2003-Ohio-3260, ¶16.

{¶ 13} The award of legal custody is authorized by statute once a child has been adjudicated neglected and dependent. R.C. 2151.353(A)(3). Both social workers testified that it was their opinion that awarding legal custody of M.J.M. to her father was in her best interest. The guardian ad litem also testified that the award of legal custody to M.J.M.’s father was the proper choice. Therefore, the trial court did not abuse its discretion when it rejected the magistrate’s decision and awarded legal custody of M.J.M. to her father.

Best Interests of the Child

{¶ 14} Of paramount concern when making custody determinations is the best interest of the child. *In re A.W.-G.*, Butler App. No. CA2003-04-099, 2004-Ohio-2298, ¶6. Appellant argues that the juvenile court erred when it determined that an award of legal custody was appropriate because she should have been given the opportunity to work through her case plan before such a determination was made. Appellant cites her lack of prior history with CCDCFS, as well as the lack of allegations of abuse involving M.J.M. While allowing appellant to work through her case plan may be in appellant’s best interest, that is not a factor in the analysis of what is in the child’s best interest.

{¶ 15} Parents have a constitutionally protected interest in “the care, custody, and management of their child[ren].” *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. But those rights are “always subject to the ultimate welfare of the child.” *In re B.L.*, Franklin App. No. 04AP-1108, 2005-Ohio-1151, ¶7, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 106, 391 N.E.2d 1034.

{¶ 16} R.C. 2151.414(D) sets forth factors used to determine what is in the best interest of a child when a court is considering the award of permanent custody. These factors are instructive in this case. This statute steers the juvenile court to “consider all relevant factors, including, but not limited to, the following:

{¶ 17} “(a) The interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 18} “(b) The wishes of the child, as expressed directly by the child or through the child’s guardian ad litem, with due regard for the maturity of the child;

{¶ 19} “(c) The custodial history of the child * * * ;

{¶ 20} “(d) The child’s need for a legally secure permanent placement * *

*[.]”³

{¶ 21} Evidence exists in the record that demonstrates that M.J.M. interacted well with her half-sister in her father’s home; was well cared for by her father, her father’s fiancéé, and her grandmother; and wished to be placed in the legal custody of her father, as expressed through her guardian ad litem. Appellant stipulated that she had a history of domestic violence, that she subjected M.J.M. to displays of physical and mental abuse, and that M.J.M.’s half-brother was severely injured while in appellant’s care and custody. S.V. will likely require specialized care for the remainder of his life. Also, at the time of the dispositional hearing, appellant was in jail awaiting trial on charges related to S.V.’s injuries. This unavailability, along with all the other evidence adduced at the dispositional hearing, weighed in favor of awarding legal custody to a ready, willing, and able father.

³ R.C. 3109.04 instructs domestic relations courts when making parental rights determinations incident to divorce proceedings. R.C. 3109.04(C) advises that “[i]f the court determines * * * that either parent previously has been determined to be the perpetrator of the neglectful act that is the basis of an adjudication that a child is a neglected child, or that there is reason to believe that either parent has acted in a manner resulting in a child being a neglected child, the court shall consider that fact against naming that parent the residential parent and against granting a shared parenting decree.” In this case, M.J.M. was adjudicated dependent and neglected when in the custody of appellant. The Tenth District applied those factors set forth in R.C. 3109.04(F) in a similar case to the one at bar. See *In re Fulton*, Butler App. No. CA2002-09-236, 2003-Ohio-5984, ¶11.

{¶ 22} Testimony was adduced at the dispositional hearing that M.J.M.'s father had a stable, loving relationship with M.J.M., that he provided her with appropriate care and shelter, and that he wanted M.J.M. to stay in his custody. A preponderance of evidence existed in the record favoring an award of legal custody to M.J.M.'s father. Given this evidence, it was not an abuse of discretion for the juvenile court to grant legal custody to him.

Conclusion

{¶ 23} Contrary to appellant's claims, she remains free to visit M.J.M. and maintain their familial relationship. Her parental rights have not been terminated by the decision of the juvenile court. *In re C.R.*, supra, at ¶17.

{¶ 24} Here, the juvenile court reached the determination that it was in M.J.M.'s best interest to be placed in the legal custody of her father. That determination is supported by a preponderance of the evidence and is not arbitrary, unconscionable, or unreasonable; therefore, it will not be overturned by this court.

{¶ 25} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR