

[Cite as *In re B.W.*, 2015-Ohio-2768.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102475

**IN RE: B.W., Z.W., AND C.W.
Minor Children**

[Appeal by the Cuyahoga County Division
of Children and Family Services]

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 14906841, AD 14906842, and AD 14906843

BEFORE: Kilbane, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 9, 2015

ATTORNEYS FOR APPELLANT

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Joseph M. Cordiano
Assistant County Prosecutor
4261 Fulton Parkway
Brooklyn, Ohio 44144

ATTORNEYS FOR APPELLEES

For Mother

Robert L. Tobik
Cuyahoga County Public Defender
Sarah E. Gatti
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

Guardian Ad Litem

Tyrone C. Fazio
1370 Ontario Street
The Standard Building, Suite 1
Cleveland, Ohio 44113

Also listed:

For Father

William T. Beck
2308 Canterbury Road
University Heights, Ohio 44118

MARY EILEEN KILBANE, P.J.:

{¶1} Complainant-appellant, the Cuyahoga County Division of Children and Family Services (“CCDCFS”) appeals the judgment of the juvenile court, issued in connection with protective supervision proceedings, that orders CCDCFS to take emergency custody of B.W., Z.W., and C.W., in the event that the children have “even one unexcused absence or tardy or if the mother removes the child[ren] from the maternal grandmother’s home [without prior CCDCFS approval].” Appellee-mother concurs with CCDCFS and joins in its arguments. For the reasons set forth below, we reverse the juvenile court’s order, and we remand for further proceedings consistent with this opinion.

{¶2} On May 28, 2014, CCDCFS filed a complaint alleging that 16-year-old B.W., 14-year-old C.W., and 13-year-old Z.W. are neglected. In relevant part, CCDCFS alleged that: (1) the parents failed to ensure that the children’s educational needs were being met because the children had over 100 unexcused absences in the 2013-2014 school year; (2) the children have previously been adjudicated neglected because of the mother’s failure to ensure that they attend school and because of deplorable living conditions, as well as domestic violence and mental health issues of the mother; and (3) the father, C.W., Sr., has legal custody of the children, but permits the children to remain with the

mother.¹ CCDCFS asked the juvenile court to grant it protective supervision of the children.

{¶3} On May 30, 2014, the court appointed attorney Tyrone Fazio (“Fazio”) to serve as guardian ad litem (“GAL”) for all three children. On June 18, 2014, CCDCFS issued a comprehensive case plan for the three children. In relevant part, the case plan required the parents to enroll the children in school, ensure their attendance at school, and properly maintain the children’s home.

{¶4} On July 30, 2014, the GAL issued a report in which he indicated that he had spoken with the mother, the father, the children, and their social workers, but all of his attempts to conduct a home visit were unsuccessful. He indicated that the mother informed him that she believed the complaint for neglect was the result of a misunderstanding because she had home schooled the children, but she did not provide proper documentation to the school district. She and the children also informed the GAL that the oldest child was recently enrolled in high school for the upcoming term and the younger children were recently enrolled in an elementary school. The GAL recommended continuing protective supervision over the children in order to ensure proper compliance with the terms of the case plan.

{¶5} At a hearing before a magistrate on September 29, 2014, CCDCFS amended the complaint in order to strike the allegations of past domestic violence and

¹The record indicates that after C.W., Sr. was awarded legal custody of the children, he moved outside of Cuyahoga County, and for the past four years, the children have resided with the mother, by agreement of both parents.

mental health issues of the mother. The mother, through counsel, stipulated to the amended complaint. The magistrate adjudicated the children neglected, concluding that the allegations of the amended complaint were proven by clear and convincing evidence. At a follow-up hearing the next day, the matter was continued in order for CCDCFS to investigate placement of the children with the maternal grandmother. On October 14, 2014, the trial court approved the magistrate's decision.

{¶6} A dispositional hearing was held before the magistrate on November 3, 2014, to determine whether CCDCFS should be awarded protective supervision of the children. Social Worker Jameela Mason ("Mason") testified that she conducts weekly visits with the family and regularly monitors the children's school attendance. Mason stated that the family has recently moved in with the maternal grandmother, and their basic needs are being met. As to school attendance, Mason testified that the children attend school regularly, but have missed a few days because of excused absence. Mason opined that it is in the best interest of the children to continue protective supervision to CCDCFS.

{¶7} The GAL testified that the mother was cooperative and the father has improved communication with the children. The GAL also testified that he verified the children's school attendance and it has "vastly improved * * * and their grades have improved dramatically." The GAL opined that protective supervision is in their best interest and should continue, but he stated that the family had made substantial strides in

addressing their issues. He also stated that the children have a unique bond, and that it is important that they stay together in the same household.

{¶8} At the close of the hearing, CCDCFS indicated that if the mother continued to address the issues noted in the amended complaint, CCDCFS would file a motion to terminate protective supervision. The magistrate then placed the children in the legal custody of the mother, with an order of protective supervision of CCDCFS. The magistrate noted that the goal of the permanency plan for the children is the termination of protective supervision. The magistrate ordered the mother and the children to maintain their residence with the maternal grandmother. The magistrate also ordered Mason to conduct a home visit each week and to investigate the children's school attendance each week. The magistrate included a provision for immediate removal of the children as follows:

If the child[ren] [have] even one unexcused absence or tardy or if the mother removes the child[ren] from the maternal grandmother's home without the necessary approvals, CCDCFS is to remove the child from the mother's custody and place the child[ren] in the emergency custody of CCDCFS. Failure of CCDCFS to abide by this order will be deemed a direct violation and will subject the social worker and/or any legal representative to a finding of direct contempt.

{¶9} CCDCFS filed objections to the magistrate's decision.² In relevant part, CCDCFS argued that the contingent order for emergency removal is contrary to the terms of R.C. 2151.31 and Juv.R. 6. CCDCFS also argued that pursuant to R.C. 2151.33, the

²By operation of Juv.R. 40, CCDCFS's objections operated as an automatic stay of the magistrate's decision. An additional stay was also granted by this court on April 28, 2015.

trial court is required to make a finding, at the time of removal, that continued residence in the home is contrary to the children's best interest and welfare. On November 21, 2014, the trial court overruled the objections of CCDCFS and affirmed, approved, and adopted the magistrate's decision in its entirety.

{¶10} CCDCFS appeals, assigning the following error for our review:

Assignment of Error

The trial court abused its discretion in requiring the immediate removal of the children from the home upon the occurrence of a future event as the decision was not supported by the evidence and was contrary to law.

{¶11} In its sole assignment of error, CCDCFS asserts that the trial court erred in ordering the children into immediate emergency custody in the event that they have one unexcused absence, or are tardy, or in the event that the mother removes them from the grandmother's home. CCDCFS argues that the order lacks support in the Revised Code and it violates the guarantee of due process. The mother concurs with CCDCFS and joins in its arguments.

Standard of Review

{¶12} A juvenile court's custody decision will not be reversed absent an abuse of discretion. *In re T.G.*, 8th Dist. Cuyahoga No. 96546, 2011-Ohio-5504, ¶ 31, citing *In re Awkal*, 95 Ohio App.3d 309, 642 N.E.2d 424 (8th Dist.1994).

Revised Code Provisions

{¶13} With regard to CCDCFS’s initial argument that the juvenile court’s order for contingent emergency removal of the children lacks support in the Revised Code, we note that R.C. 2151.01 provides that

the stated purpose of R.C. Chapter 2151 is to provide for the care and development of the child, separating him from his parents “only when necessary for the child’s welfare or in the interests of public safety;” and to provide judicial procedures in which the parties are assured of a fair hearing and of having their constitutional and other legal rights enforced.

In re L.F., 9th Dist. Summit Nos. 27218 and 27228, 2014-Ohio-3800, ¶ 21, quoting R.C. 2151.01(A) and (B).

{¶14} Pursuant to R.C. 2151.011(B)(42), a trial court may order protective supervision of a child who has been adjudicated abused, neglected, or dependent. Protective supervision is defined as

an order of disposition pursuant to which the court permits an abused, neglected, dependent, or unruly child to remain in the custody of the child’s parents, guardian, or custodian and stay in the child’s home, subject to any conditions and limitations upon the child, the child’s parents, guardian, or custodian, or any other person that the court prescribes, including supervision as directed by the court for the protection of the child.

{¶15} We further note that, pursuant to R.C. 2151.353(D), the juvenile court may impose conditions upon the protective supervision and

may place any reasonable restrictions upon the child, the child’s parents, guardian, or custodian, or any other person, including, but not limited to, any of the following:

- (1) Order a party, within forty-eight hours after the issuance of the order, to vacate the child’s home indefinitely or for a specified period of time;

(2) Order a party, a parent of the child, or a physical custodian of the child to prevent any particular person from having contact with the child;

(3) Issue an order restraining or otherwise controlling the conduct of any person which conduct would not be in the best interest of the child.

{¶16} With regard to the issue of taking the children into custody, R.C. 2151.31(A)(3) sets forth the conditions under which a child may be taken into custody, including those conditions where there are reasonable grounds to believe that the removal is necessary to prevent immediate or threatened physical or emotional harm. In addition, a child may be taken into emergency custody when necessary to prevent the physical injury, emotional harm, or neglect of the child. R.C. 2151.31(G).

{¶17} Moreover, in all matters involving child custody, including matters undertaken pursuant to R.C. 2151.353, the welfare of the child remains the primary consideration. *In re Pryor*, 86 Ohio App.3d 327, 334, 620 N.E.2d 973 (4th Dist.1993). Under this standard, a court “should consider the totality of the circumstances, including, to the extent they are applicable, the best interest factors set forth in R.C. 3109.04(F).” *Id.* at 336.

{¶18} In addition, pursuant to R.C. 2151.353(J), if the trial court enters an order of removal pursuant to R.C. 2151.353(A)(6), it must, prior to the issuance of the order, provide all of the following:³

³This statute permits the “removal from the child’s home until further order of the court of the person who * * * caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, or who is the parent, guardian, or custodian of a child who is adjudicated a dependent child and order any person not to have contact with the child or the child’s siblings.”

- (1) Notice and a copy of the motion or application;
- (2) The grounds for the motion or application;
- (3) An opportunity to present evidence and witnesses at a hearing regarding the motion or application;
- (4) An opportunity to be represented by counsel at the hearing.

{¶19} A trial court is therefore clearly vested with discretion to impose conditions upon parents whose children are subject to protective supervision and order a child to be taken into emergency custody. The court's discretion is still defined by the best interest of the child, and the court must also provide meaningful notice and an opportunity to be heard. Therefore, by application of the foregoing statutory provisions, emergency removal requires more than the threat of future harm and requires consideration of the factors that exist at the time of removal. Such orders, therefore, cannot be preadjudicated.

{¶20} In this matter, the parties acknowledge, and this court agrees, that the order issued by the magistrate was designed to force the mother and the children to take their educational responsibilities seriously and to ensure that proper living arrangements were maintained. These are clearly laudable goals. In addition, the improvement in attendance and the living arrangements may ultimately be because of the court's directive.

Indeed, the record reveals that in its December 15, 2014 semi-annual review, CCDCFS noted that the family had made significant progress. All of the children were enrolled in

school and attended “daily and on time,” and housing is appropriate. Nonetheless, we are compelled to conclude that such orders are outside of the framework established by R.C. Chapter 2151.

Due Process

{¶21} With regard to CCDCFS’s argument that the juvenile court’s order for contingent emergency custody violates due process guarantees, we note that the “right to parent one’s children is a fundamental right.” *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28, citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This fundamental right is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16. Because a deprivation of custody, even temporarily, infringes on a parent’s fundamental interest in the custody of his or her child, the procedure used must be narrowly tailored to serve a compelling state interest in order to satisfy constitutional due process guarantees. *In re M.D.*, 10th Dist. Franklin No. 07AP-954, 2008-Ohio-4259, ¶ 9. A fundamental requirement of due process is the “opportunity to be heard” at a “meaningful time and in a meaningful manner.” *In re L.F.*, 9th Dist. Summit Nos. 27218 and 27228, 2014-Ohio-3800, ¶ 39, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Further, “[t]he stated purpose of R.C. Chapter 2151 is to provide judicial procedures in which the

parties are assured of a fair hearing and of having their constitutional and other legal rights enforced.” R.C. 2151.01; *In re L.F.* at ¶ 21.

{¶22} In this matter, the juvenile court’s order for immediate emergency custody, contingent upon an unexcused absence, tardiness, or the moving of the family, does not meet the foregoing requirements and, therefore, does not provide due process protections.

{¶23} For all of the foregoing reasons, the sole assignment of error is sustained.

{¶24} Accordingly, judgment is reversed and the matter is remanded for the continuation of protective supervision.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANITA LASTER MAYS, J., CONCUR