

[Cite as *In re G.J-R.T.*, 2015-Ohio-611.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 101636 and 101637

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**IN RE: G.J-R.T.**  
A Minor Child

[Appeal by the Father]

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**JUDGMENT:**  
REVERSED AND REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case Nos. CU 09109676 and AD 14901444

**BEFORE:** Blackmon, J., E.A. Gallagher, P.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** February 19, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} In this consolidated appeal, appellant V.T., who is the father of the child, appeals the juvenile court's refusal to modify the shared parenting plan that he had with the child's mother. He assigns the following three errors for our review:

I. The juvenile court erred and abused its discretion to the prejudice of the appellant, and failed to act in the best interests of the child, by denying his motion for legal custody, in that modification of the parties' shared parenting order is in the best interest of the child.

II. The juvenile court erred and abused its discretion when it prohibited appellant from presenting evidence in support of his motion for legal custody.

III. The decision of the juvenile court to dismiss V.T.'s motion to modify the shared parenting was against the manifest weight of the evidence.

{¶2} After reviewing the record and relevant law, we reverse the trial court's decision and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶3} The child was born on August 26, 2008. At the time, both the mother and father lived together, but were not married. On June 15, 2009, the parties entered into a shared parenting agreement pursuant to mediation, in which they agreed to share the rights and responsibilities of raising their child and that she would attend the school district where the parents lived. There was a provision that if "the parties no longer continue to reside together, [the child] will attend school in her mother's district" and the father would get visitation every other weekend.

{¶4} It appears their relationship drastically deteriorated soon after the above agreement was entered. The father filed multiple motions to show cause and to modify custody based on the mother's refusal to facilitate visitation and refusal to communicate with him regarding the child. The mother also filed motions to show cause and requested sole custody of

the child because the shared parenting plan was not workable with the father, who refused to abide by its terms.

{¶5} On June 8, 2011, the trial court concluded that there was a change of circumstances to require the modification of the original shared parenting plan because the parties no longer lived together; as a result, the parties needed a structured visitation plan. Father was to see the child every other weekend, certain holidays, and summer vacation. The details of the visitation were set forth in a visitation schedule attached to the trial court's decision. The court concluded there was no evidence to support the modification of residential custody, thus, the mother remained the residential custodian.

{¶6} The court further found both parties were in contempt for not complying with the court-ordered parenting time with the child. The court ordered each parent to spend three days in county jail, but added that the contempt could be purged by them strictly following the current shared parenting plan and visitation schedule.

{¶7} On January 28, 2013, the father filed a motion to show cause and to modify custody due to the mother's interference with parenting time with the child. On December 5, 2013, the mother filed a motion to modify custody and visitation. She asked for the shared parenting plan to be terminated and that she became the sole custodian of the child. She claimed that the father failed to follow the court ordered visitation agreement and believed that the father continually filed for custody to avoid having to pay support. The matter was continued several times due to the guardian ad litem ("GAL") not being prepared, the parties not appearing, and the mother's desire for the appointment of counsel.

{¶8} All of the above proceedings occurred in Case No. CU 09109676. While the matters in Case No. CU 09109676 were pending, on February 10, 2014, the Cuyahoga County

Division of Children and Family Services (“CCDCFS”) filed a complaint in Case No. AD 14901444 for the neglect of the child because she had 17 unexcused absences from school for the academic year. Although the child was attending kindergarten, the parents had the option of waiting a year to send her to school because of her age. However, because the mother started her in school, it was expected that the child attend.

{¶9} On March 19, 2014, the magistrate ordered that the parties’ pending motions in Case No. CU 09109676 would be heard at the same time as the CCDCFS’s action for neglect in Case No. AD 14901444.

{¶10} At the April 29, 2014 hearing, the magistrate addressed the complaint filed by CCDCFS regarding the child’s absence from school. Both the mother and father entered an admission to the complaint that the child had been absent from school and was, therefore, a neglected child.

{¶11} The magistrate then ordered the disposition. CCDCFS was to have protective custody, both parents would have legal custody, but the child was to continue to reside with the mother, with the father having visitation. However, because the father disagreed that the mother should remain the residential parent, he refused to agree with the disposition of the case. He, in fact, told the magistrate that “[i]t’s not my intention to withdraw my private case.” The trial court, responded:

Okay. Well, if this case is going to be continued for further dispositional hearing, then I am going to also continue the private custody matter. I am not going to hear that today.

Tr.18. The disposition hearing was continued to June 2, 2014.

{¶12} While the matter was pending, on May 15, 2014, the father filed a motion for legal custody in the CCDCFS case stating that given the parties’ history the court should grant him

legal custody and designate him as the residential parent. In support, he argued that the mother had “continuously and willfully” denied his right to parenting time, refused to communicate with him, and he disagreed with the mother’s decision to home school the child.

{¶13} At the June 2, 2014 hearing, the mother’s attorney requested that the father’s testimony be limited to the CCDCFS action. The magistrate agreed and refused to hear testimony regarding the problems with visitation and communication, stating these could be addressed when the motions to show cause were considered. The court then limited the father to discussing the school attendance issue. The father’s attorney strenuously objected to this limitation and tried to explain to the magistrate that although there was a motion to show cause, the father also had two motions to modify custody.

{¶14} After not permitting the father to give direct testimony in support of his motion to change custody, the magistrate allowed the GAL to cross-examine him about the visitation problems.

{¶15} The CCDCFS was at the hearing and stated that it had no opinion on which parent should have residential custody of the child. The agency’s only interest was that the child go to school.

{¶16} The magistrate found the child to be neglected and granted protective supervision to CCDCFS as stipulated by the parties. Legal custody was granted to both parties with the child’s mother retaining residential custody for school purposes.

{¶17} On the same date as the June 2, 2014 hearing, the magistrate issued a judgment entry in CU 09109676 stating that a “new custody decision was entered in AD 1490144 [the CCDCFS action], therefore, any new modifications would need to be handled under the agency

filing.” The court then found the parties’ pending motions to modify custody and visitation to be moot and set the issues surrounding the motions to show cause for hearing at a later date.

{¶18} The father filed objections to the magistrate’s decision arguing he should have been allowed to argue change of custody based on the mother’s failure to communicate or to facilitate visitation. The trial court overruled his objections on June 16, 2014, and adopted the magistrate’s decision.

### **Limitation of the Father’s Testimony**

{¶19} We will address the father’s second assigned error first because we find it is dispositive of the other assigned errors. The father argues that the trial court erred by not allowing him to present evidence in support of his motion to modify custody. He argued that the mother was not allowing him to visit the child and failed to communicate with him; consequently, she was violating the current shared parenting plan and he should have been allowed to show evidence to this effect.

{¶20} The trial court has discretion to control the mode and admission of evidence. Evid.R. 611. Such decisions will not be reversed absent an abuse of discretion. An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 481, 450 N.E.2d 1140 (1983).

{¶21} We conclude that the trial court abused its discretion by adopting the magistrate’s report because the magistrate erred by limiting the father’s testimony. The right to raise one’s child is an “essential” and “basic” civil right. *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Furthermore, a parent’s right to the custody of his or her child has been deemed “paramount.” *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977). Therefore, a

parent's right to the custody of a child "must be afforded every procedural and substantive protection the law allows." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991).

{¶22} A review of the record shows that the father understood that his motions in CU 09109676, would be addressed at the same hearing as the CCDCFS hearing in AD 14901444.

{¶23} On March 21, 2014, prior to the CCDCFS hearing, the magistrate issued the following entry:

[V.T.] filed a Motion to Modify Custody and/or Visitation and a Motion to Show Cause.

[L.H. the mother] filed a Motion to Modify Custody.

The Magistrate finds that this matter shall be heard at the time of the Agency case.

{¶24} The above referenced motions by both parties had nothing to do with the child not going to school. Instead, they dealt with noncompliance with the shared parenting plan. By stating these motions would be heard at the April 29, 2014 hearing, the magistrate should have been prepared to hear evidence on both issues, or else should have kept them separate. Further on May 1, 2014, the magistrate stated in pertinent part:

[V.T.] filed a Motion to Modify Custody and/or Visitation and a Motion to show cause.

[L.H. the mother] filed a Motion to Modify Custody and/or Visitation.

The Magistrate finds that this matter shall be continued to a later date as the Father intends on filing a Motion for Legal Custody under case number AD14901444.

{¶25} On May 15, 2014, the father filed in the AD 14901444 case a "motion for legal custody to father or to be residential parent under shared parenting agreement." In support of the motion, the father attached an affidavit detailing the mother's failure to comply with the



shared parenting agreement. Therefore, this motion raised the same concerns as his other motion for custody.

{¶26} Therefore, when the father appeared for the June 2, 2014 disposition, he validly understood he would be allowed to present evidence regarding the mother's noncompliance with the shared parenting plan. Instead, the magistrate restricted him solely to the issues surrounding the CCDCFS complaint. After the hearing, the magistrate entered a judgment entry in CU 09109676 in part as follows:

[V.T.] filed a motion to modify custody and/or visitation and a motion to show cause.

[L.H. the mother] filed a motion to modify custody and/or visitation. \* \* \*

A new custody decision was entered in Case number AD 14901444, therefore, any new modifications would need to be handled under the Agency filing.

IT IS SO ORDERED THAT: the motion to modify custody and/or visitation filed by [L.H. the mother] and [V.T.] is denied as moot.

{¶27} The father filed an objection to the magistrate's report and the trial court overruled the objections and adopted the magistrate's report.

{¶28} Based on the above, the father was effectively denied his right to present his prior motions. The magistrate would not permit him to testify regarding the motions even though it said he could in a prior judgment entry, and then after the hearing found his motion to change custody moot. We understand the magistrate was probably attempting to make matters less complicated. However, the magistrate should not have led the father to believe he could present Case No. CU 09109676 at the hearing for Case No. AD 14901444 case. Therefore, because the magistrate erred by limiting the father's testimony, the trial court abused its discretion by overruling the father's objections and adopting the magistrate's report.

{¶29} Our disposition of the second assigned error renders the father's remaining assigned errors moot. App.R. 12(A)(1)(c).

{¶30} Accordingly, we reverse the decision and remand the case for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and  
MARY EILEEN KILBANE, J., CONCUR