

[Cite as *In re M.B.J.*, 2017-Ohio-299.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104834

**IN RE: M.B.J.
A MINOR CHILD**

[Appeal By P.J., Mother]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU 14108338

BEFORE: E.T. Gallagher, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 26, 2017

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EILEEN T. GALLAGHER, P.J.:

{¶1} Appellant, Mother, appeals an order of the Cuyahoga County Juvenile Court designating Father as the residential parent and legal custodian of the parties' child, M.B.J. She raises four assignments of error:

1. The trial court erred in not granting appellant's motion to remove guardian ad litem.
2. The trial court erred in denying appellant due process of law by not mandating the guardian ad litem to comply with the Ohio Rule of Superintendence 48.
3. The trial court erred in failing to rule on appellant's motion to remove guardian ad litem until trial.
4. The trial court's judgment was against the manifest weight of the evidence.

{¶2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶3} M.B.J. was born on March 4, 2014, and the parties agreed to share parenting time with the child equally. Unfortunately, the parties were unable to share parenting without conflict and, in June 2014, Father filed an application in the Cuyahoga County Juvenile Court to determine the parties' respective rights to parenting and visitation. While the motion was pending, Mother moved to Chicago and took M.B.J. with her. Conflicts between the parents continued, and both parties filed a flurry of motions for temporary custody, to show cause, and to suspend each other's parental rights until trial.

{¶4} In the meantime, the court appointed two guardian ad litem. Four months before trial, Mother filed a motion to remove the second guardian ad litem ("GAL"),

alleging she (1) failed to visit Mother's home in Chicago, (2) failed to study expert evaluations of M.B.J.'s development, (3) failed to respond to Mother's emails and phone calls, and (4) failed to file a timely GAL report.

{¶5} The GAL submitted a report at the time of a pretrial hearing, which was after the report's due date. The magistrate who requested the report nevertheless accepted it, despite its untimeliness. The GAL filed a timely supplemental GAL report of her complete investigation for trial.

{¶6} With respect to the GAL's failure to return Mother's phone calls and emails, the GAL advised the court that Mother's emails were "excessive" and that they repeatedly implored her to "spy on father's house, spy on father's house, spy on father's house." The GAL explained: "There's nothing to respond to about that." The GAL opined that Mother was "obsessed with th[e] idea that somebody should act as a private investigator and continually watch Father's house." (Tr. 13.)

{¶7} Mother also argued the GAL should have been removed because she never visited Mother's home. The GAL explained that Father was the only one who cooperated with her and that Mother refused to do a home visit with her. The first GAL resigned and withdrew from the case because she could not obtain approval of funds for her travel to Chicago to visit Mother's home. (Tr. 13.) Like the first GAL, the second GAL applied for funds to finance a two-day trip to Chicago in order to visit Mother's apartment and the child's daycare facility. However, Mother refused to pay her share of the cost for the visit. Mother asserted she was not opposed to the GAL's visit, but

claimed the visit could be accomplished in a single day at a significantly reduced cost. The parties never approved a reduced amount of travel funds, and the GAL never requested funds for a shorter trip to Chicago.

{¶8} The GAL advised the court that Mother never made it possible for her to observe Mother with M.B.J. during one of her many visits to Cleveland. The GAL stated:

I get an e-mail from [Mother's lawyer] several weeks ago saying, mom's been in Cleveland a bunch of times, you never saw her. No way of knowing that. I've made it clear to both parents, the onus is on you for these visits.

Dad moved a couple of weeks ago. I got an e-mail from him like that. Hey, I moved. He has complied with four home visits. She has complied with none.

(Tr. 15.) The GAL further informed the court that she had seen a video recording of M.B.J. waiting calmly in a police station for his mother to pick him up. When Mother entered the station to collect the child, M.B.J. "fell apart." (Tr. 16.) The GAL explained:

I need to explore that dynamic. And I've been thwarted at every turn in the road. And instead of dealing with the most basic, fundamental, simple part of the investigation, which is making your client available to me with her child, we're listening to a smokescreen.

(Tr. 16.) Based on the parties' oral statements, the trial court denied Mother's motion to remove the GAL and proceeded directly to trial on the parties' motions to determine their respective rights to parenting and visitation. (Tr. 17.)

{¶9} On cross-examination, Mother admitted she did not like the every other week visitation schedule and that she withheld the child for two months without the court's permission. (Tr. 41-42, 75.) Mother withheld the child from Father because Father returned him to her with a bump on his head. Mother also complained that Father caused M.B.J. to receive a double vaccination because he had the child vaccinated for something he had already been vaccinated for in Chicago.

{¶10} Yet, Mother admitted that each parent is required by court order to notify the other parent within 24 hours of any medical treatment the child received through a parent communication portal called Our Family Wizard ("OFW"). (Tr. 140.) Father testified that he was not aware that M.B.J. ever received duplicate immunizations because the Cleveland pediatrician had access to both the Chicago and Cleveland medical records when the doctor recommended the vaccination. (Tr. 202.)

{¶11} Mother testified that she lives in a one-bedroom apartment in Chicago and that M.B.J. sleeps with her in the same bed. Father testified that he and his wife and daughters live in a five bedroom house. In Father's house, M.B.J. has his own bedroom, furnished with a bed, bookshelves, a basketball hoop, and a toy bin. Father's house also has a front and backyard as well as riding toys, a ball, and a dog.

{¶12} When M.B.J. was in Cleveland, he was cared for by Father, Father's wife, Father's mother, and Big Momma Ray's Daycare. Father testified that KinderCare was his first choice daycare center, but it would not accept M.B.J. because Mother never produced his vaccination record. Although Mother initially denied that she withheld the

record, she admitted that a magistrate ordered her to turn over the child's immunization record.

{¶13} Eventually, Father and his wife rearranged their work schedules in order to make themselves available to personally care for M.B.J. at home. When Father was working, his wife was home with the child. While his wife was working, Father was home with the child. (Tr. 230.) Father's wife is a police officer.

{¶14} Although Father notified Mother through OFW that M.B.J. was cared for partly by Father, partly by his wife, and partly by Big Momma Ray's Daycare, Mother repeatedly asked who was watching the child. (Tr. 185-186.) When asked how many times Mother asked Father about who was watching the child, Father replied, "Too many to count." When asked if the number could be over 50, he replied, "It's possible." (Tr. 186.)

{¶15} Both Mother and Father complained to the GAL that there were conflicts every time they exchanged custody of M.B.J. The court issued an order requiring the exchanges to take place at local police departments. According to Father's wife, the exchanges in Chicago took place in the presence of a police officer and were "mostly civil." (Tr. 232.) Exchanges in the Shaker Heights Police Department took place in the lobby and were "sometimes disturbing." (Tr. 232.)

{¶16} On one occasion, Mother failed to appear to drop off the child in Cleveland when the GAL was scheduled to observe the exchange. Mother was supposed to drive from Chicago and drop off the child at 3:00 p.m. in Shaker Heights. While Father and

the GAL were waiting for Mother to arrive at the scheduled time, Mother notified Father at 3:00 p.m that she was not coming. (Tr. 47.) Consequently, the GAL was unable to observe the exchange.

{¶17} The court ordered Mother to deliver the child to Father at 3:00 p.m. every other Wednesday to allow the child to attend therapy sessions in Chicago on Monday and Tuesday afternoons. Mother unilaterally rescheduled a therapy session for Wednesday, which made it impossible for her to make a 3:00 p.m. drop-off time. Mother testified that she notified her lawyer that she would be arriving at approximately 11:00 p.m. (Tr. 290-291.) Father apparently did not receive the message and failed to be present at 11:00 p.m. when Mother arrived. (Tr. 125-133.) Mother stayed the night at an aunt's house in Summit County and never contacted Father about dropping the child off in the morning. She simply returned to Chicago with the child. (Tr. 130-133.) Mother admitted that she never told the therapist that the child could not attend therapy on Wednesdays because a court order required him to be in Cleveland every other Wednesday afternoon. (Tr. 126.)

{¶18} Mother was held in contempt for failing to comply with the court's visitation order as a result of this incident. A magistrate's order, dated August 28, 2016, states, in relevant part:

The Court reviewed the transcript from the April 7, 2015 hearing and finds that Mother was well aware of the visitation times for the Father. Furthermore, mother's request to alter the prior order was denied.

The Court finds that Counsel for Father persuasively argued that there was [sic] many indications that mother had behaved as if the original order of

January 2015 was still in effect. Mother claimed that the continued visits were voluntary. The [sic] makes no sense in light of the fact that she was trying to restrict/terminate Father's visitation. Thus, it is implausible that Mother would have volunteered visits unless ordered.

IT IS ORDERED that Mother is in contempt and subjected up to a \$250 fine and up to three (3) days in jail. The sentence is suspended.

{¶19} Despite having been held in contempt of court, Mother admitted that she made multiple attempts to restrict Father's biweekly visits with the child. (Tr. 306.) She filed motions for emergency custody, possession, and modification of the visitation schedule, alleging that Father's wife was videotaping the biweekly exchanges of the child. (Tr. 307.) None of these motions were granted.

{¶20} Dionne Fontemelle ("Fontemelle"), a speech pathologist, testified that she evaluated M.B.J., determined he has speech delays, and recommended that he receive speech therapy once a week. She further stated that weekly therapy would be more successful if the child received therapy from the same therapist each week.

{¶21} The GAL testified that both parents are capable of appropriately caring for the child, and both parents agree the child has speech delays that require therapy. However, the GAL recommended that Father be designated the residential parent because he is more likely to obey court orders regarding visitation. (Tr. 349.)

{¶22} The trial court found that both parents love the child, but engaged in childish behavior that is detrimental to the child. The court also noted that both parents ignored court orders. However, the court concluded that "Father will best facilitate visitation between the Child and the Mother and will best look out for the child's emotional and

medical needs.” Accordingly, the court designated Father as the residential parent and legal custodian of M.B.J. with orders that he facilitate visitation with Mother. The court also ordered that Father share all of the M.B.J.’s medical and school information with Mother. Mother now appeals the trial court’s judgment.

II. Law and Analysis

A. Guardian Ad Litem

{¶23} Mother’s first three assignments of error challenge the trial court’s judgment denying her motion to remove the GAL. We review the trial court’s decision declining to remove a GAL for an abuse of discretion. *I.C.-R. v. N.R.*, 9th Dist. Summit No. 27671, 2016-Ohio-1329, ¶ 60.

{¶24} In the first assignment of error, Mother argues the trial court erred in not granting her motion to remove the GAL. In the second assignment of error, she argues the trial court violated her right to due process by not mandating that the GAL comply with Ohio Sup.R. 48. Finally, in the third assignment of error, Mother argues the trial court erred in failing to rule on her motion to remove the GAL until the time of trial. We discuss these assigned errors together because they are interrelated.

{¶25} Mother argues the GAL’s investigation of the case fell below the minimum standards established in the Rules of Superintendence for the Courts of Ohio. For example, Mother argues the GAL failed to maintain objectivity as required by Sup.R. 48(D)(2). Sup.R. 48(D)(2) states:

In order to provide the court with relevant information and an informed recommendation regarding the child’s best interest, a guardian ad litem

shall perform, at a minimum, the responsibilities stated in this division, unless impracticable or inadvisable to do so.

* * *

(2) A guardian ad litem shall maintain independence, objectivity and fairness as well as the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom and shall have no ex parte communications with the court regarding the merits of the case.

{¶26} There is no evidence that the GAL engaged in any ex parte communications.

Although the GAL seemed to favor Father because she recommended he be designated the residential parent and legal custodian, she explained that Father cooperated with her investigation and Mother did not. The GAL explained that in endeavoring to investigate Mother's home and interactions with M.B.J., she was "thwarted at every turn in the road."

In her second report, the GAL states, in relevant part:

The prior report noted that the GAL could not see the child at the Mother's home because the parties refused to post bond. That has never been remedied; the GAL has been thwarted in her attempts to complete a balanced investigation.

The Mother views the GAL investigation as something akin to a private investigator whose job is "catch" Father in what she believes are lies. * * *

To this date, the GAL has been prevented from seeing this child in the presence of Mother.

The record, which shows that Mother violated several court orders, corroborates the GAL's claim that Mother failed to cooperate with the GAL's investigation.

{¶27} Mother also asserts the GAL failed to properly investigate the case.

Sup.R. 48(D)(13) sets forth the GAL's duties with respect to her investigation of a custody matter, and provides:

(13) A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest, a guardian ad litem shall, at a minimum, do the following, unless impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case:

(a) Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present;

(b) Visit the child at his or her residence in accordance with any standards established by the court in which the guardian ad litem is appointed;

(c) Ascertain the wishes of the child;

(d) Meet with and interview the parties, foster parents, and other significant individuals who may have relevant knowledge regarding the issues of the case;

(e) Review pleadings and other relevant court documents in the case in which the guardian ad litem is appointed;

(f) Review criminal, civil, educational and administrative records pertaining to the child and, if appropriate, to the child's family or to other parties in the case;

(g) Interview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records;

(h) Recommend that the court order psychological evaluations, mental health and/or substance abuse assessments, or other evaluations or tests of the parties as the guardian ad litem deems necessary or helpful to the court; and

(i) Perform any other investigation necessary to make an informed recommendation regarding the best interest of the child.

{¶28} Mother argues the GAL failed to return her phone calls and emails. She also asserts the GAL's reply that "they didn't merit a response," demonstrates the GAL purposely failed to communicate with Mother. However, the record shows the GAL attempted to communicate with Mother and arranged to observe M.B.J. during an exchange, but Mother failed to appear.

{¶29} The record also corroborates the GAL's claim that Mother's communications were repetitive and excessive and therefore unreasonable. The GAL testified:

[T]here are so many e-mails from your client. There are emails obsessing over, does his brother watch the kid, does the mother — she sent me so many emails and so many questions — whose [sic] watching my child? Whose [sic] watching my child — that I honestly had to stop and think whether we needed a psychological evaluation in this case.

(Tr. 360.) Nothing in Sup.R. 48 requires the GAL to respond to repetitive and excessive communications.

{¶30} The GAL spoke with Mother twice in person on important issues. (Tr. 360.) The GAL also advised Mother that part of the investigation includes an assessment of the parent's ability to take responsibility. The GAL testified:

One of the things I tell people at the very beginning of a case as their GAL is, I'm watching to see your follow through, to see your sense of responsibility and see your sense of how seriously you need to take this. I'm not going to [be] a babysitter. I'm not going to be a hand holder. If you know, okay, that I need to see you with your son and you don't make yourself available and your excuse is, well, you should have asked my lawyer to ask me, that's not a good enough answer.

(Tr. 363.)

{¶31} As previously stated, the GAL was the second guardian ad litem appointed to represent M.B.J.'s interest. The first GAL resigned because Mother made it impossible for her to visit Mother's apartment in Chicago and to observe Mother with M.B.J. The second GAL experienced the same difficulties. (Tr. 351, 360.) Yet, the second GAL managed to interview a speech pathologist, a therapist, and daycare providers in M.B.J.'s daycare center in Chicago. (Tr. 346, 359.) Although the GAL did not interview these witnesses immediately, she completed the interviews prior to preparing her final GAL report for trial, which was timely filed. Therefore, any alleged delay in completing the interviews did not affect the evidence at trial.

{¶32} The record shows the GAL endeavored to comply with the duties outlined in Sup.R. 48, but Mother made it impossible for her to conduct a thorough investigation of Mother's relationship with M.B.J. By contrast, Father notified the GAL every time he moved to a new residence and cooperated with home visits and interviews. Any apparent preference in favor of Father resulted from the difference in each parent's level of cooperation. Under these circumstances, we cannot say the trial court abused its discretion in declining to remove the GAL. Therefore, we find no error in the trial court's decision to overrule Mother's motion to remove the GAL on the day of trial as opposed to some earlier point in time.

{¶33} The first, second, and third assignments of error are overruled.

B. Manifest Weight of the Evidence

{¶34} In the fourth assignment of error, Mother argues the trial court erred in modifying the parties' parenting time and visitation. She contends the trial court's judgment designating Father as the residential parent and legal custodian of M.B.J. was against the manifest weight of the evidence.

{¶35} R.C. 3109.051, which governs the modification of parenting time or visitation rights, requires that court orders addressing visitation be "just and reasonable." *In re I.A.G.*, 8th Dist. Cuyahoga No. 103656, 2016-Ohio-3326, ¶ 15. "The party requesting a change in visitation rights need make no showing that there has been a change in circumstances in order for the court to modify those rights." *Id.*, quoting *In re Bailey*, 1st Dist. Hamilton Nos. C-040014 and C-040479, 2005-Ohio-3039, ¶ 25.

{¶36} "Under R.C. 3109.051, a trial court is permitted to modify visitation rights if it determines that the modification is in the child's best interest." *Lisboa v. Lisboa*, 8th Dist. Cuyahoga No. 92321, 2009-Ohio-5228, ¶ 11; *see also In re A.J.*, 8th Dist. Cuyahoga No. 99881, 2013-Ohio-5737, ¶ 10. In determining whether a modification is in the child's best interest, the court must consider the following relevant factors set forth in R.C. 3109.051(D):

- (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;
- (2) The geographical location of the residence of each parent and the distance between those residences * * * ;

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

(4) The age of the child;

(5) The child's adjustment to home, school, and community;

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

* * *

(13) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

* * *

(16) Any other factor in the best interest of the child.

{¶37} Mother contends the evidence showed she was “a caring, nurturing, and omnipresent caregiver in her son’s life,” whereas Father was “absent.” (Appellant’s br. at 12.) When Mother contacted Father regarding her concerns for M.B.J.’s development, Father initially scoffed at her remarks, stating: “You have your way of parenting and I have mine.” However, as time progressed, Father conceded that M.B.J. had developmental delays that required the intervention of a therapist and he was willing to ensure that M.B.J. received the appropriate therapies.

{¶38} Mother argues Father failed to properly tend to M.B.J.’s medical needs and caused him to receive double vaccinations. However, Father testified that he was unaware of any double vaccinations and that the child’s Cleveland-based pediatrician checked the records of the Chicago pediatrician before he recommended the alleged repeat immunization. Clearly, Father did not neglect the child’s medical needs. And if there was a double immunization, it was the result of a miscommunication as opposed to incompetent parenting.

{¶39} Mother asserts the evidence showed she was the better residential parent because she took M.B.J. to a daycare center that was accredited by The National Association For the Education of Young Children whereas the child’s Cleveland daycare was “an unaccredited place.” However, Father’s wife testified that KinderCare was Father’s first choice daycare center, but they lost the opportunity to enroll M.B.J. in KinderCare because Mother failed to produce a copy of M.B.J.’s immunization record

pursuant to Father's request. Indeed, Mother did not turn over a copy of M.B.J.'s immunization record until ordered by the court to do so.

{¶40} Finally, Mother argues the court erroneously accepted and relied on the GAL's opinion that Father was the more suitable residential parent. The GAL recommended Father be designated as the residential parent because Father "would be the most likely person to obey the court orders." (Tr. 349.) The trial court noted in its judgment entry that while both parents love and care for M.B.J., "Father will best facilitate visitation between the Child and Mother and will best look out for the child's emotional and medical needs."

{¶41} The record supports the court's conclusion. There is no evidence that Father ever prevented Mother from receiving the child when it was her turn. Mother admittedly took the child and moved to Chicago without the court's permission and refused to give the child to Father for two consecutive months even though he was entitled to visitation every other week. There was also evidence that Mother harassed Father with questions on OFW and made exchanges of the child difficult. Therefore, the court's conclusion that Father was more likely to comply with court orders and facilitate Mother's right to visitation is supported by competent, credible evidence and is not against the manifest weight of the evidence.

{¶42} The fourth assignment of error is overruled.

{¶43} The trial court's judgment is 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 the Cuyahoga County 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR