

[Cite as *In re B.J.*, 2017-Ohio-315.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104800 and 104801

IN RE: B.J., ET AL.

[Appeal by Mother and Father]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 16905802 and AD 16905803

BEFORE: McCormack, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 26, 2017

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GUARDIAN AD LITEM

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TIM McCORMACK, J.:

{¶1} The Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”) filed a complaint alleging that the educational needs of 16-year-old B.J. (“daughter”) and 12-year-old M.H. (“son”) were not met by their parents, K. J.-H. (“mother”) and E.H. (“father”).¹ Son suffered from cleft palate and had not been attending school regularly. Daughter had also attendance and truancy problems. The agency sought protective supervision of the children to ensure that they would be properly educated. In a rare instance of cooperation and consensus, the agency, parents, Court-Appointed Special Advocate (“CASA”), and the guardian ad litem (“GAL”) all agreed that protective supervision by the agency with the children remaining in the home was in the children’s best interest.

{¶2} The magistrate presiding over this matter, however, placed the children in the temporary custody of the agency and ordered the agency to contact the Cleveland Police Department to help remove the children from their home. Both the agency and the parents objected to the magistrate’s decision. The court overruled the objections, adopted the magistrate’s decision, and ordered the children removed from their home immediately. For the following reasons, we reverse the juvenile court’s judgment and remand this matter for further proceedings consistent with this opinion.

¹The complaint also alleged father failed to establish paternity. Father testified he and mother were married since 2004, he was the father of both children, and the children resided with them all their life. Father had taken a genetic testing relating to son’s cleft palate condition, but had not taken a paternity test. His failure to take the paternity test is not an issue in this appeal. For purposes of this opinion, we refer to him as “father.”

Substantive Facts and Procedural History

{¶3} The record reflects that 12-year-old M.H. suffered from cleft palate. Because of the condition, he had problems communicating and was being bullied at school. As a result, he did not attend school regularly. A prior complaint was filed by CCDCFS against his parents for educational neglect, and protective supervision was ordered for son from July to November 2015. The protective supervision was terminated on November 30, 2015, after mother enrolled him in the Electronic Classroom of Tomorrow (“ECOT”), an online school. However, the agency found that son did not log on regularly and it was reported that father was doing son’s homework for him. The agency also learned that his sister, who was enrolled in a Cleveland public school, frequently missed school.

{¶4} As a result, CCDCFS filed a complaint on April 8, 2016, regarding the two children pursuant to R.C. 2151.03(A)(3), alleging mother and father failed to ensure that the children’s educational needs were met. The agency sought protective supervision of the children.

{¶5} On June 28, 2016, a magistrate for the juvenile court held a hearing for adjudication. Mother and father admitted to educational neglect of their children. They also agreed to enroll son in a “brick-and-mortar” school for the summer. The magistrate found the children to be neglected and dependent.

{¶6} On July 5, 2016, the magistrate held a hearing for disposition.² The magistrate heard testimony from Erica Baker, the social worker in this case. The social worker confirmed that the agency's concern for the children only related to educational neglect and there were no other concerns about these children or their parents. The social worker testified that the issue with daughter's schooling had been successfully resolved since the agency's filing of the complaint: her attendance had improved, and she passed all her classes for the 2015-2016 school year. Son's placement with the online school, however, did not work out well.

{¶7} The social worker testified that mother and father now both recognized that the online school was not appropriate for son and that he needed to be enrolled in a traditional brick-and-mortar school. Son was currently enrolled in a remedial summer school, and the parents had also agreed to enroll their son in a traditional school for the new school year. Services for the family included ensuring that the children's educational needs were met and addressing son's special needs relating to his cleft palate.

The social worker stated she would be working with the family to ensure son's attendance at school and working with the school to set up an Individualized Education Program ("IEP") for the son. The social worker also testified that protective supervision would be effective to ensure that the children's educational needs were met, and that

²Father did not appear at the July 5, 2016 hearing. Mother arrived late. Counsel for the parents reported to the court that father had gone to the hospital for chest pains.

mother and father had agreed to cooperate with the agency. She testified that removing the children from the home would be harmful to the children.

{¶8} Counsel for the parents reported that the parents had agreed to protective supervision, and mother had provided her approval for son's participation in an IEP and had indicated her willingness to work with the agency and engage in services provided. The GAL for the children also recommended that the children remain in the home with protective supervision by the agency, stating that temporary custody would "do more harm than good and alienate this family further." The children's CASA made the same recommendation.

{¶9} The magistrate remarked that father was deceiving the agency by logging on to the computer and doing son's work, although there was no testimony on that allegation at the July 5, 2016 hearing. Despite the agreement of all involved, the magistrate ordered the children immediately removed from the home and placed the children into temporary custody of the agency.

{¶10} Both the agency and counsel for the parents filed an objection to the magistrate's decision. The court overruled the objection and adopted the magistrate's decision. Mother and father separately appealed from the decision in Appeal Nos. 104800 and 104801, respectively.³ We consolidate the two appeals for purposes of disposition.

³We note that CCDCFS did not file an appellee's brief opposing the parents' appeals and was not present at the oral argument.

{¶11} Mother raises two assignment of error, which states:

1. The decision was against the sufficiency of the evidence in violation of due process.
2. The decision was against the manifest weight of the evidence.

Father raises three assignments of error, which state:

1. The juvenile court erred to the prejudice of the appellant and contrary to the best interests of the children in ordering that the children be placed in the temporary custody of the Cuyahoga County Department of Children and Family Services, as this decision is not supported by clear and convincing evidence.
2. The father was deprived of effective assistance of counsel by reason of the failure to request a continuance due to father's medical emergency.
3. The juvenile court erred to the prejudice of the appellant by failing to continue the trial upon learning that father had had a medical emergency, and was unable to be present.

Mother's first and second assignment of error and father's first assignment of error raise the same issue. We address them together.

Analysis

{¶12} We begin our review with the recognition that the right to parent one's children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). See also *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997) ("a parent's right to raise a child is an essential and basic civil right).

{¶13} Pursuant to R.C. 2151.353, when a child is adjudicated abused, neglected, or dependent, as here, the juvenile court is authorized to order a disposition for the child, which includes (1) placing the child in protective supervision, (2) committing the child to

the temporary custody of the agency, (3) awarding legal custody of the child to either parent or another person, or (4) committing the child to the permanent custody of the agency. R.C. 2151.353(A). When choosing among these alternatives, the juvenile court is to be mindful of the stated purpose of R.C. Chapter 2151, which is to provide for the “care, protection, and mental and physical development of children.” R.C. 2151.01(A). Whenever possible, the child is to remain in a family environment and the child should be separated from the child’s parents only when necessary for the child’s welfare. R.C. 2151.01(A). *See also In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 29. “To that end, various sections of the Revised Code refer to the agency’s duty to make reasonable efforts to preserve or reunify the family unit.” *Id.*

{¶14} Furthermore, in choosing among the alternative dispositions authorized by R.C. 2151.353, the court’s primary concern remains the best interest of the child. *In re Ka.C.*, 8th Dist. Cuyahoga Nos. 102000, 102002, 102005, 102006, 2015-Ohio-1158, ¶ 19, citing *In re S.M., C.M., & D.M.*, 2d Dist. Montgomery No. 24539, 2011-Ohio-6710, ¶ 3. *See also In re K.B.*, 12th Dist. Butler No. CA2012-03-063, 2013-Ohio-858, ¶ 11 (the juvenile court’s custody determination under R.C. 2151.353 must be based on the best interest of the child); *In re J.D.*, 5th Dist. Richland No. 12-CA-108, 2013-Ohio-2187, ¶ 29 (a juvenile court must consider the best interest of the child when it considers the various dispositions enumerated in R.C. 2151.353(A)); *In Re Cunningham*, 59 Ohio St.2d 100, 107, 391 N.E.2d 1034 (1979).

{¶15} For our part, we review the juvenile court’s decision to adopt a magistrate’s decision in custody matters for an abuse of discretion. *In re S.E.*, 8th Dist. Cuyahoga No. 96031, 2011-Ohio-2042. This is also, more specifically, the standard of review for a juvenile court’s decision for temporary custody. *See In re H.G.*, 12th Dist. Clinton No. CA2014-11-014, 2015-Ohio-1764. An abuse of discretion exists where the trial court’s decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). An abuse of discretion has also been used to described as a judgment “neither comporting with the record nor reason.” *In re Wiley*, 11th Dist. Lake No. 2007-P-0013, 2007-Ohio-7123, ¶ 17. If the court’s decision on the children’s best interest is not supported by competent, credible evidence, then it is unreasonable and may be reversed. *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.).

{¶16} We also note that while the higher “clear and convincing” standard does not apply in cases such as the instant one where the right of the parents to custody is not permanently foreclosed, the court’s decision still must be supported by a “preponderance of the evidence.” *In Re Ka.C.* at ¶ 20. That standard means the existence in the record of ““evidence that is more probable, more persuasive, or of greater probative value.”” *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7, quoting *In re D.P.*, 10th Dist. Franklin No. 05AP-117, 2005-Ohio-5097, ¶ 52. *See also In re M.D.*, 12th Dist. Butler No. CA2006-09-223, 2007-Ohio-4646, ¶ 26.

{¶17} Here, the social worker testified that the parents have been cooperative and willing to work with the agency to achieve the educational goals for the children. Daughter had completed the 2015-2016 school year as a freshman. The services for the children included achieving their educational goals and meeting son's special educational needs by an IEP, which would address his speech delay due to the cleft palate. Son was currently enrolled in a traditional brick-and-mortar summer school and would also be enrolled in such a school for the coming school year. The social worker would continue to work with the parents and the school to help with son's special education needs. The social worker testified that the services for the children should be implemented with the children in the home and that removal from the home would be unnecessary and would be indeed harmful. The GAL also recommended protective supervision. She also believed removal at this juncture would do more harm than good. The CASA representative shared the same belief.

{¶18} We recognize that government has broad authority to intervene to protect children from abuse or neglect. In this case, however, the drastic measure of forcibly removing the children from their home — with the aid of law enforcement officers — was unsupported and unnecessary. The evidence reflects that the agency made diligent efforts in offering reasonable case planning to keep the children in the home while ensuring their educational needs would be met; the parents had shown a willingness to achieve the educational goals for their children; and the children's GAL and CASA shared the same belief that protective supervision by the agency best served the children's

interest. No competent, credible evidence supports the juvenile court's finding that continued residence in the home was against the best interest of the children. Rather, the preponderance of evidence shows the children's best interest is served by allowing them to remain in the home with their parents while granting protective supervision to CCDCFS, as requested by all who participated in this case.

{¶19} The overriding, controlling legal principle that dictates all that follows when the state becomes officially involved in private family matters is that all parties involved must pursue only those remedies that are in the best interests of the affected children. While the removal of children from a home that appears to pose a real risk of harm to the children is a remedy that at all times is available to the state, this most extreme remedy can and should only be utilized when the evidence is clear that only separation of family members can assure the safety and viability of the children. To tear apart a viable family for reasons short of the essential safety and fundamental well-being of the affected children is among the most serious abuses of authority and discretion within reach of public servants.

{¶20} We find this record to be devoid of compelling reasons that led to this unnecessary, unwarranted, extreme, and harmful removal of these two children from their parents.

{¶21} The juvenile court abused its discretion in ordering temporary custody of the children to CCDCFS. Mother's first and second assignments of error and father's first

assignment of error are sustained. Father's remaining assignments relating to his absence from the July 5, 2016 hearing are moot.

{¶22} We reverse the trial court's judgment. We order the children immediately returned to the parents' home. We remand the matter for further proceedings consistent with this opinion.

It is ordered that appellants recover of said 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.

TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR