

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE:

S. R.  
C. R.

C. A. No.       24683

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE Nos.    DN 07-6-657  
                  DN 07-6-658

DECISION AND JOURNAL ENTRY

Dated: October 28, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} M.D. and her girlfriend, T.J., lived together with M.D.’s three daughters, J.R., C.R., and S.R. When J.R. inappropriately sexually touched her sisters, M.D. called the police, and the Summit County Children Services Board removed J.R. from the home. After M.D. and the girls’ father stipulated that all three girls were dependent, the juvenile court adjudicated them dependent. It placed J.R. in the temporary custody of her father, but let M.D. retain legal custody of C.R. and S.R. with protective supervision. A few months later, Children Services learned that C.R. and S.R. had been spending time alone with T.J.’s daughter, R.J., who had been adjudicated delinquent for gross sexual imposition. It also learned that M.D. and T.J. wanted R.J. to move into their house. It, therefore, placed C.R. and S.R. in the emergency temporary custody of their maternal grandfather. Children Services and C.R. and S.R.’s guardian ad litem

later moved the juvenile court to grant the grandfather legal custody. Following a hearing, a magistrate recommended that C.R. and S.R. be placed in the legal custody of the grandfather. M.D. objected, but the juvenile court overruled her objection and granted legal custody to the grandfather. M.D. has appealed, assigning as error that the juvenile court failed to determine that she was unsuitable before granting legal custody to a non-parent, in violation of her due process rights. This Court affirms because the juvenile court implicitly found M.D. unsuitable at the time it adjudicated her children dependent.

#### UNSUITABILITY FINDING

{¶2} “[N]atural parents have a fundamental liberty interest in the care, custody, and management of their children.” *In re Hockstok*, 98 Ohio St. 3d 238, 2002-Ohio-7208, at ¶16 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re Murray*, 52 Ohio St. 3d 155, 157 (1990)). “This interest is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution.” *Id.* “Since parents have constitutional custodial rights, any action by the state that affects this parental right, such as granting custody of a child to a nonparent, must be conducted pursuant to procedures that are fundamentally fair.” *Id.* “Ohio has attempted to ensure that [parents’] interests are protected by relevant statutes and case law, and has provided that a parent’s custodial rights may only be curtailed upon careful satisfaction of the prescribed procedures and standards.” *In re S.N.*, 9th Dist. No. 23571, 2007-Ohio-2196, at ¶25.

{¶3} Section 2151.23(A)(1) of the Ohio Revised Code “specifies that the juvenile court has exclusive original jurisdiction concerning children alleged to be abused, neglected, or dependent.” *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, at ¶12. The juvenile court also has exclusive jurisdiction “to determine the custody of any child not a ward of another court of

this state.” R.C. 2151.23(A)(2). “If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition: (1) Place the child in protective supervision; (2) Commit the child to the temporary custody of a . . . relative . . . ; (3) Award legal custody of the child to either parent or to any other person . . . . (4) Commit the child to the permanent custody of a public children services agency . . . . (5) Place the child in a planned permanent living arrangement with a public children services agency . . . . [or] (6) Order the removal from the child’s home until further order of the court of the person who committed abuse . . . .” R.C. 2151.35.3(A).

{¶4} The juvenile court placed C.R. and S.R. in the legal custody of their maternal grandfather. “‘Legal custody’ means 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. . . .” R.C. 2151.01.1(19). “[A]n 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, at ¶17. “Although the statutory scheme regarding an award of legal custody does not include a specific test or set of criteria, this Court has previously indicated that the trial court must base such a decision on the best interest of the child.” *In re S.N.*, 9th Dist. No. 23571, 2007-Ohio-2196, at ¶27. “The decision to grant or deny a motion for legal custody is within the sound discretion of the juvenile court,” which this Court will not reverse “absent an abuse of discretion.” *Id.* at ¶26.

{¶5} In *In re Perales*, 52 Ohio St. 2d 89 (1977), the Ohio Supreme Court held that, “[i]n an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the

hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability . . . .” *Id.* at syllabus. The same rule does not apply, however, in cases of abuse, dependency, or neglect. *In re D.R.*, 153 Ohio App. 3d 156, 2003-Ohio-2852, at ¶12. “[N]o statute requires a finding of parental unfitness as a prerequisite to an award of legal custody in cases where a child is adjudged abused, neglected, or dependent.” *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, at ¶21.

{¶6} In *In re C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, the Ohio Supreme Court considered whether, “[i]n a case in which a juvenile court has adjudicated a child to be abused, neglected, or dependent, is the court also required to make a separate determination of parental unsuitability as to each parent at the dispositional hearing before awarding legal custody to a nonparent?” *Id.* at ¶8. The Supreme Court “answer[ed] that question in the negative.” *Id.* It held that “[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.” *Id.* at paragraph two of the syllabus, ¶8. Accordingly, “[i]f a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody to a nonparent.” *Id.* at paragraph three of the syllabus.

{¶7} After the juvenile court adjudged C.R. and S.R. dependent, it placed them in protective supervision. Children Services also developed a case plan for the children under Section 2151.41.2(A) of the Ohio Revised Code. When Children Services had concerns about the children’s placement, the court reevaluated the circumstances and ordered them to be placed in M.D.’s father’s temporary custody.

{¶8} M.D. has argued that, because of the amount of time that passed between the juvenile court’s dependency finding and its ruling on the motions for legal custody, it had to find she was unsuitable before placing C.R. and S.R. in the legal custody of a non-parent. Her argument appears to be that the court’s implicit finding that she was unsuitable expired at some point. The court adjudged C.R. and S.R. dependent on August 31, 2007. It did not rule on M.D.’s objections to the magistrate’s decision regarding legal custody until February 25, 2009. According to M.D., unless the implicit finding of unsuitability expires or can be rebutted, the Ohio Supreme Court’s holding in *In re C.R.* allows a court to ignore the progress a parent has made toward becoming suitable.

{¶9} A couple of courts have considered how long the implication of unsuitability lasts after a child is adjudged dependent, neglected, or abused and whether it can be rebutted. In *In re Sorgen*, 11th Dist. No. 2005-L-121, 2006-Ohio-4180, the trial court found that a child was neglected. *Id.* at ¶6. Twenty months later, a magistrate recommended that legal custody be returned to the mother because she had complied with her case plan and could not be found unsuitable. *Id.* at ¶9. The trial court disagreed, concluding that, because the child had previously been adjudicated a neglected child, it was not necessary to determine whether his parents were unsuitable before deciding legal custody. *Id.* at ¶11. On appeal, the mother argued that, if a “parent has remedied the circumstances that led to the [neglect] adjudication, a trial court must . . . find the parent to be unsuitable before awarding custody to a nonparent.” *Id.* at ¶14. The Eleventh District affirmed the trial court’s decision, however, concluding that *In re C.R.* controlled. *Id.* at ¶16. Although the Court noted that the Supreme Court had left some issues unresolved, it concluded that, under the facts of the case, “the implication of unsuitability still existed at the time of the [legal] custody hearing.” *Id.* at ¶25. In particular, it noted that the

mother had refused to completely separate from the child's father, whose actions were the basis of the neglect finding. *Id.* at ¶24. It also noted that the juvenile court "had never relinquished . . . jurisdiction since it had originally adjudicated the child to be neglected." *Id.* at ¶25.

{¶10} In *In re Ray*, 7th Dist. Nos. 07-BE-14, 07-BE-15, 2008-Ohio-3250, the Seventh District recognized that, under *In re C.R.*, a non-custodial father is presumed unsuitable, even if the dependency adjudication did not involve any allegations against him. *Id.* at ¶35. After the adjudication, the Department of Family Services and the children's guardian ad litem stipulated that the father was a fit parent. *Id.* The Seventh District noted that "[a]n argument exists . . . that because both appellee and the GAL stipulated that appellant is fit, the implication of unsuitability was rebutted and the trial court should have been required to make an independent finding that appellant was unsuitable before granting custody of the children to [a maternal uncle]." *Id.* at ¶45. It determined, however, that the holding in *In re C.R.* "is unmistakably clear" and "does not leave any room for stipulations of 'fitness.'" *Id.* It concluded that "we have no choice but to apply the Court's holding [in *In re C.R.*] as stated." *Id.*

{¶11} M.D. has not directed this Court to any case in which the court determined that the implicit finding that a parent is unsuitable expired or was rebutted. Even if those circumstances could exist, they do not in this case. The trial court found that M.D. "failed to comply with the Court-ordered objectives of the case plan that were in effect for over a year at the time of the hearing." She "exposed the children to individuals such as [T.J.], who [she] knew had a history of child abuse and endangerment." She also "failed to demonstrate any insight into the risks to which she exposed her sexually abused daughters in allowing a known sex offender, [R.J.], to have contact with them." It found that she has not "demonstrate[d] the ability to protect her children from [T.J. or R.J.]" In addition, her decision "to allow her daughters to engage in

activities such as selling crafts in parking lots, demonstrates that she does not have the best interests of her daughters at heart.” While M.D. testified that the girls would sell items they had helped T.J. make during their homeschool art class, she said the only supervision she provided was to watch them from her car. Furthermore, the trial court found that “[M.D.’s] disparate treatment of the girls and reliance on the police and paramedics when [C.R.] acts out demonstrates her inability to parent [C.R. and S.R.]” Accordingly, the juvenile court correctly concluded that it did not have to make a separate finding of unsuitability before awarding legal custody of C.R. and S.R. to their maternal grandfather. M.D.’s assignment of error is overruled.

### CONCLUSION

{¶12} Because C.R. and S.R. were adjudged dependent, the juvenile court did not have to find that M.D. was unsuitable before awarding legal custody of her daughters to a non-parent. The judgment of the Summit County Common Pleas Court, Juvenile Division is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

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CLAIR E. DICKINSON  
FOR THE COURT

MOORE, P. J.  
CONCURS

BELFANCE, J.  
CONCURS, SAYING:

{¶13} I write separately to state that I share the concerns expressed by the dissenting justices in *In re C. R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, at ¶25 (Pfeifer, J., dissenting), that the implicit determination of unsuitability is “too sweeping.” However, given the facts of this particular case, I concur.

APPEARANCES:

MARTHA HOM, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.