

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: M.S. C.S. M.C.

C.A. No.       24711

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE Nos.    DN 07-6-536  
                  DN 07-6-537  
                  DN 07-6-538

DECISION AND JOURNAL ENTRY

Dated: November 4, 2009

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BELFANCE, Judge.

{¶1} Kelley Cody (“Mother”) appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that placed her three minor children in the legal custody of their maternal great aunt. For the reasons that follow, we affirm.

FACTS

{¶2} Mother is the natural mother of M.C., born August 18, 1999, M.S., born February 1, 2002, and C.S, born September 12, 2004. On May 22, 2007, a caseworker from Summit County Children Services Board (“CSB”) visited Mother’s home after receiving a referral that Mother was not adequately bathing or feeding her children. When the caseworker arrived at the home, the door was answered by M.S., then five years old, who had been unable to awaken her mother. Mother finally woke up 20 minutes after police arrived.

{¶3} On June 1, 2007, CSB filed complaints, alleging that the children were neglected and dependent due to Mother’s failure to supervise them and by exposing them to domestic

violence and drug use in the home. The oldest child, M.C., also had excessive absences from school. Neither father of the children was living in the home at that time, nor was either involved in this case.

{¶4} After they were removed from Mother's home, the children were placed with their great aunt. The great aunt ensured that the two oldest children attended school regularly and eventually involved them in counseling to help them adjust to their removal from the home. The oldest child, M.C., revealed to her counselor that it made her sad to remember her life at Mother's home. She explained that Mother was often sleeping during the day, leaving the children to fend for themselves. Consequently, M.C., at only seven years old, often cared for her younger siblings and even changed her little brother's diaper. M.C.'s counselor worked with the great aunt to help remove M.C. from her role as parent to her younger siblings.

{¶5} M.C. further explained that she often had to stay in her bedroom all day and that she would be punished if she came out. M.C. recalled receiving frequent "whoopings" from Mother and her then-boyfriend. M.C. also told her counselor that Mother brought many different men into the home and that she and her brother would go into Mother's bedroom and watch her having sex. As M.C. explained, she had seen "lots of bad stuff." M.C. told her counselor that she had not felt safe in Mother's home.

{¶6} Mother and the great aunt eventually filed competing motions for legal custody of M.C., M.S., and C.S. Following a hearing before a magistrate, the magistrate found that it would be in the best interests of the children to be placed in the legal custody of their great aunt. The trial court adopted the magistrate's decision and entered judgment placing the children in the legal custody of their great aunt. Mother filed timely objections to the magistrate's decision, maintaining that legal custody to the great aunt was not in the children's best interests. After

evaluating the merits of Mother's challenge, the trial court overruled her objection and ordered that the children be placed in the legal custody of the great aunt. Mother appealed and raises one assignment of error.

#### BEST INTERESTS OF THE CHILDREN

{¶7} Mother challenges the trial court's determination that legal custody to the great aunt was in the best interests of these children. This Court must emphasize that the hearing on the legal custody motions filed by Mother and the great aunt was heard by a magistrate, who weighed the evidence and determined that it was in the best interests of Mother's children to be placed in the legal custody of Aunt. Mother has appealed from the trial court's judgment that overruled her objection and adopted the magistrate's decision. To the extent that she asks this Court to review the propriety of the magistrate's factual findings, that is beyond this Court's appellate standard of review. See *In re B.G.*, 9th Dist. No. 24187, 2008-Ohio-5003, at ¶6-7.

{¶8} Although the trial court must conduct an independent review of objections to the magistrate's factual findings, see Civ.R. 53(D)(4)(d), this Court applies a more deferential, abuse of discretion standard when reviewing the trial court's ruling on those objections. See *id.* at ¶7. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Love v. Love*, 9th Dist. No. 22976, 2006-Ohio-3559, at ¶15.

{¶9} Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852,

at ¶17. “Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child.” *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11. The juvenile court’s disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead “leaves intact ‘residual parental rights, privileges, and responsibilities.’” *In re Shepherd* (Mar. 26, 2001), 4th Dist. No. 00CA12, quoting R.C. 2151.011(B)(19).

{¶10} Mother maintains that the trial court’s decision to place her children in the legal custody of the great aunt was not in the children’s best interests because Mother had been complying with the reunification goals of the case plan. This Court has emphasized, however, that although a parent’s case plan compliance may be relevant to the trial court’s determination of the child’s best interest when evaluating competing motions for legal custody, “it certainly is not dispositive.” *In re B.G.*, at ¶21, citing *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶10.

{¶11} Moreover, although there was evidence that Mother had completed some of the reunification goals of the case plan, the trial court focused on evidence that she had not remedied the more serious problems that had caused her children to be placed outside her home. The reunification case plan goals for Mother focused primarily on Mother refraining from substance abuse, refraining from abusive relationships, and taking responsibility for the situation that had led to the removal of her children from the home. Mother consistently denied most of the problems that had been identified by CSB, however. Despite her children consistently telling others that Mother frequently slept during the day, often “whoop[ed]” them, and required them to

stay in their rooms most of the day, Mother repeatedly denied that she had done any of those things. The caseworker and M.C.'s counselor tended to believe what the children had told them because they had remained consistent in their recollections.

{¶12} Mother did not complete substance abuse counseling or otherwise resolve her substance abuse and alcohol problems. She initially began alcohol treatment at Community Health Center, but the center terminated her for lack of compliance. Mother eventually completed a group therapy program at the Akron Health Department, but after over one year on the case plan, she still had not completed her individual counseling. Although Mother testified at the hearing that she planned to stop using drugs and alcohol, she had recently told her chemical dependency counselor that she still drank on occasion and that she would typically consume “four to seven drinks” on each occasion. Moreover, Mother continued to test positive for drugs after her children were removed from her home. Mother tested positive for cocaine two months after she began her relationship with her current boyfriend, who had a prior conviction for possession of cocaine. The trial court reasonably concluded that Mother had not resolved her drug and alcohol problems.

{¶13} Mother also maintains that it was not in the children's best interests to be placed with the great aunt because her husband also had a drinking problem and, although he purported to be a recovering alcoholic, he still drank beer on occasion. The evidence further demonstrated, however, that the children had been living in the great aunt's home for 15 months and there was no evidence that the great uncle's drinking had caused any problems, either associated with the children or unrelated to them. Neither CSB nor the guardian ad litem was concerned about the great uncle's occasional drinking, particularly because he was not the one who was supervising

the children or providing for their basic needs. The great aunt was a stay-home caregiver who had been regularly providing for the children's day-to-day care.

{¶14} The evidence further demonstrated that the great aunt was providing a suitable and stable home for the children. CSB and the guardian ad litem found the home to be appropriate and were in support of the great aunt's request for legal custody. The children had been living there for the past 15 months, were adjusting well, and their school attendance had improved significantly. M.C. spoke very positively to her counselor about her great aunt's house. The child stressed that the great aunt fed her healthy food, always got her to school on time, and did not use "whoopings" to discipline her, but used time-outs instead. M.C. told her counselor that she felt safe living at the great aunt's house and that she wanted to stay there, but continue to have visits with her mother. M.S. had also told others that she wanted to stay at the great aunt's house.

{¶15} The great aunt testified that she believed that Mother should be a part of the children's lives and that she thought she could work with Mother to set up an appropriate visitation schedule. She further testified that she would be willing to work up to overnight and weekend visits. The guardian ad litem also emphasized the importance of the children having sufficient visitation with Mother to maintain a strong relationship with her.

{¶16} Mother has failed to demonstrate that the trial court abused its discretion in overruling her objection to the magistrate's factual findings and in adopting the recommendation to place her children in the legal custody of their great aunt. The assignment of error is overruled.

## CONCLUSION

{¶17} Mother's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, 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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EVE V. BELFANCE  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

LINDA BENNETT, Guardian ad Litem.