

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: I. S.
 A. S.
 T. S.
 K. S.

C. A. No. 24763

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 04-07-0635
 DN 04-07-0636
 DN 04-07-0865
 DN 06-04-0295

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} This appeal involves the legal custody of four minors. On April 20, 2006, following prior adjudications that the children were dependent and that two of them were also abused, the trial court placed them in the legal custody of their mother. In 2008, the maternal grandparents moved the court to place the children in their legal custody. Following a hearing, the trial court awarded the grandparents legal custody of the children. The issue raised on appeal by the mother is whether the evidence supported the trial court’s decision to change the legal custody of her children. This Court reverses the judgment on a different basis, however, because the trial court failed to make the legal findings that were required before it had statutory authority to modify or terminate the 2006 legal custody order. Specifically, the trial court failed to find

that there had been a change of circumstances of the children or the mother since the 2006 legal custody order and that a change in legal custody was necessary to serve the children's best interests. This Court reverses the judgment and remands the matter for a new hearing because the parties and the trial court focused on the wrong legal standard throughout the proceedings in the trial court.

FACTS

{¶2} Sarah S. is the natural mother of the children at issue in this appeal: I.S., born December 2, 2002, A.S., born November 17, 2003, T.S., born October 10, 2004, and K.S., born April 4, 2006. Tim and Laurie Tucker are the children's maternal grandmother and step-grandfather. The children's father is not a party to this appeal.

{¶3} On July 21, 2004, Summit County Children Services Board filed complaints alleging that I.S. and A.S., the mother's only children at that time, were abused, neglected, dependent, and endangered children. The complaints alleged that the children had been exposed to domestic violence perpetrated by their father against the mother and the children. The trial court later adjudicated the children abused and neglected children and placed them in the temporary custody of Children Services. T.S. and K.S. were later added to the case after their respective births, and both were adjudicated dependent children.

{¶4} While living in the temporary custody of Children Services, the children were placed in the home of the Tuckers. The Tuckers eventually moved for legal custody of the children, as did the paternal grandparents and each of the parents. A hearing was held before a magistrate on the various motions for legal custody. At that hearing, according to the unchallenged findings of the magistrate, the father and all grandparents withdrew their motions

for legal custody. All parties agreed that the children should be returned to the custody of the mother.

{¶5} On April 20, 2006, the trial court ordered that the children be placed in the legal custody of the mother under an order of protective supervision by Children Services. On July 24, 2006, following a hearing before a magistrate, the trial court terminated the order of protective supervision of the oldest three children. The case of K.S., who was born in April 2006 and who had not been removed from the mother's home, remained open under an order of protective supervision. On November 13, 2006, the trial court terminated protective supervision of K.S. and closed the case.

{¶6} On January 3, 2008, the Tuckers filed a "MOTION FOR CHANGE OF LEGAL CUSTODY" in each child's original case. They alleged that the mother had left the children in their care on a temporary basis, that she was planning to return soon to take them, and that they were concerned for the children's safety. The Tuckers requested that the trial court terminate its prior dispositional order and place the children in their legal custody.

{¶7} Following an evidentiary hearing, the magistrate recommended that the Tucker's motion for legal custody be granted. The magistrate reasoned that the children's parents were unfit and that legal custody to the Tuckers was in the children's best interests. The trial court adopted the magistrate's decision, entered an independent judgment, and indicated that that judgment would be stayed upon the filing of timely written objections. Both the mother and the guardian ad litem filed timely objections. The trial court overruled the objections and ordered that the children be placed in the legal custody of the Tuckers. The trial court also reasoned that the parents were unfit and that legal custody to the Tuckers was in the children's best interests. The mother has appealed and raised one assignment of error.

TERMINATION OF LEGAL CUSTODY ORDER

{¶8} Although the mother has asserted that the trial court's decision to remove the children from her legal custody was not supported by the evidence presented at the hearing, this Court cannot review whether the evidence supported the trial court's decision because the trial court evaluated the evidence under the wrong legal standard. If it is obvious that a trial court applied the wrong legal standard to the evidence before it, this Court must reverse and remand for the trial court to apply the appropriate legal standard in the first instance. See, e.g., *In re Johnson*, 166 Ohio App. 3d 632, 2006-Ohio-1125, at ¶24; *Copley Twp. Bd. of Trs. v. Lorenzetti*, 146 Ohio App. 3d 450, 2001-Ohio-1662, at ¶20.

{¶9} The trial court used the legal custody standard that was set forth in *In re Perales*, 52 Ohio St. 2d 89 (1977), which involved a motion for legal custody filed by a non-parent against a presumptively-fit parent. The *Perales* standard requires that, before awarding legal custody to a non-parent, the trial court find that the parent is unfit and that it is in the best interests of the children to be placed in the legal custody of the non-parent. Significantly, unlike this case, *Perales* was not a dependency and neglect case. The *Perales* standard does not apply to a legal custody determination following an adjudication that the children are abused, neglected, or dependent. See *In re C.R.*, 108 Ohio St. 3d. 369, 2006-Ohio-1191, at ¶19-23.

{¶10} Moreover, this Court need not distinguish case law that is arguably relevant to this issue because the trial court's authority to modify or terminate its prior legal custody order is explicitly set forth by statute. The juvenile court's authority in abuse, dependency, and neglect cases is governed by a fairly comprehensive statutory scheme. See *In re D.R.*, 153 Ohio App. 3d 156, 2003-Ohio-2852, at ¶13. All dispositional and adjudicatory hearings and orders must comply with the procedures set forth in Chapter 2151 of the Ohio Revised Code.

{¶11} Under Section 2151.35.3(A) of the Ohio Revised Code, a trial court has six dispositional options to protect the best interests of a child that it has adjudicated as abused, neglected, or dependent: (1) protective supervision; (2) temporary custody to a children services agency or a person; (3) legal custody to either parent or another person; (4) permanent custody to a children services agency; (5) a planned, permanent living arrangement, if the children services agency requested such a placement and certain criteria are met; or (6) removal of a parent or another person from the child's home.

{¶12} Following adjudication of I.S. and A.S. as dependent and abused children, the trial court placed them in the temporary custody of Children Services and later extended that order. After T.S. was born, the trial court adjudicated her a dependent child and also placed her in the temporary custody of Children Services.

{¶13} As the two-year sunset date was approaching, the trial court lacked authority under Section 2151.41.5(D)(4) of the Ohio Revised Code to extend temporary custody beyond July 21, 2006. Consequently, the trial court and the parties focused on a permanent disposition for the children. On April 20, 2006, after a hearing on the mother's motion for legal custody and agreement of all the parties, the trial court placed I.S., A.S., and T.S. in the legal custody of the mother, under an order of protective supervision. K.S., who was born in April 2006, was also adjudicated a dependent child, but the trial court allowed him to remain in the mother's legal custody under an order of protective supervision. The trial court later terminated protective supervision of all four children. On November 13, 2006, the trial court closed the cases.

{¶14} Although the trial court had closed the cases, Section 2151.35.3(E)(1) of the Ohio Revised Code provides, in relevant part, that "[t]he court shall retain jurisdiction over any child for whom the court issues an order of disposition pursuant to division (A) of this section . . . until

the child attains the age of eighteen years” Consequently, on January 3, 2008, when the Tuckers sought to change the trial court’s order of legal custody to the mother, they filed a motion for a change of legal custody in each child’s dependency case.

{¶15} The Tuckers attached evidence to their motions that the mother had agreed to place the children in their custody temporarily, but the juvenile court had issued no further orders to affect the children’s custody. Since November 13, 2006, the children’s dependency cases had been closed. There is also nothing in the record to suggest that Children Services had taken any action to remove the children from the mother’s legal custody. The matter pending before the trial court was solely a request by the Tuckers for modification of the 2006 order that placed the children in the legal custody of the mother.

{¶16} The trial court’s authority to modify its prior legal custody order is also delineated by statute. Section 2151.42 (B) of the Ohio Revised Code provides that an order granting legal custody of a child to a person “is intended to be permanent in nature.” That section prohibits a trial court from modifying or terminating an order of legal custody “unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child.” See, also, *In re Brayden James*, 113 Ohio St. 3d 420, 2007-Ohio-2335, at ¶26.

{¶17} Rather than evaluating the Tuckers’ motions for change of legal custody under the legal standard of Section 2151.42, however, the trial court applied the *Perales* standard and found that the mother was unfit and that legal custody to the Tuckers was in the best interests of the children. Without making the requisite findings of a change of circumstances of the mother

or the children and that a change of legal custody was necessary to serve the children's best interests, the trial court lacked authority to modify or terminate the prior legal custody order.

{¶18} Although the Tuckers suggested at oral argument that the trial court's finding that the mother was unfit under *Perales* encompassed an implicit finding of a change in her circumstances, the trial court was required to make that finding explicitly, which it failed to do. Moreover, the hearing on the Tuckers' motion rehashed many of the same facts that had brought the children into Children Services' custody in 2004 and were known to the trial court in 2006 when it issued the legal custody order. To modify or terminate the 2006 legal custody order, the trial court was required to focus solely on facts that had arisen since the prior order or that were unknown to it at that time. Because the trial court failed to apply the correct legal standard to the Tuckers' motion for a change of legal custody, the mother's assignment of error is sustained.

CONCLUSION

{¶19} The mother's assignment of error is sustained because the trial court failed to apply the correct legal standard to make the requisite statutory findings before it terminated or modified its prior legal custody order. The judgment of the Summit County Common Pleas Court, Juvenile Division, is reversed and remanded for a new hearing on the Tuckers' motion.

Judgment reversed,
and cause remanded.

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 Appellee.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶20} I understand why the trial court used the *Perales* standard as it makes sense that it should be applied to all legal custody motions by non-parents who seek to remove children from their parent's custody, but I am bound to follow the specific standard set forth by the legislature in R.C. 2151.42. Although I agree with the majority's analysis of the statutes relevant to this case, I write separately to voice my concern that the legislative scheme fails to protect the fundamental rights of parents in this context. The juvenile court's decision to reunify a family and return children to the full legal custody of their parent should not be treated the same as an award of legal custody to a non-parent.

APPEARANCES:

RONALD T. GATTS, attorney at law, for appellant.

ALEXANDRA HULL, attorney at law, for appellee.

RUTH A. GIBSON, attorney at law, for appellees.

HOLLY FARRAH, attorney at law, for Guardian ad Litem.