

[Cite as *In re M.H.*, 2009-Ohio-6911.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF WAYNE        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: M.H.

C.A. No.        09CA0028

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF WAYNE, OHIO  
CASE No.        08-0201-AND

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

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CARR, Judge.

{¶1} Appellant, J.K. (“Mother”), appeals the judgment of the Wayne County Court of Common Pleas, Juvenile Division, which adjudicated her minor child, M.H., dependent. This Court reverses.

I.

{¶2} On February 27, 2008, the Wayne County Children Services Board (“CSB”) filed a complaint in which it alleged that M.H. (d.o.b. 3/27/00) was a dependent child pursuant to R.C. 2151.04(C) and (D). The agency requested an interim emergency order of temporary custody, and dispositional orders of temporary custody or, in the alternative, protective supervision. CSB premised its complaint on allegations that a female child (“B.P.”) living in the same home had disclosed that M.H. and an adult male had made sexual contact with her. The agency further alleged that M.H. might have also been victimized sexually by the same adult male in the home.

CSB also filed complaints in regard to the child who disclosed the sexual contact, as well as in regard to two other related children, including M.H.'s younger sister.

{¶3} The matter came before the juvenile court for shelter care hearing on February 28, 2008. Because the parties required additional time to present evidence, the trial court continued the shelter care hearing until February 29, 2008, and maintained M.H. in the emergency temporary custody of CSB. At the conclusion of the shelter care hearing, the juvenile court found that there was no reason to continue the child in shelter care and ordered that M.H. be returned home. The matter was scheduled for adjudication. Mother filed a motion for funds for an expert witness (licensed psychologist) to testify at adjudication, and at disposition, if necessary. Mother asserted that her two children had been traumatized by their recent separation from her due to CSB's removal of them. The magistrate denied the motion upon finding that Mother had not made any particularized showing of a reasonable probability that the expert would aid in the defense.

{¶4} Prior to adjudication, CSB moved to consolidate M.H.'s case with the cases involving his sister, C.K.; the above-referenced B.P.; and C.H., a 15-year old female in the home. In support, CSB asserted that, because the allegations regarding all four children arise out of the allegations regarding B.P., the agency would be calling the same witnesses at the adjudications of all the children. The juvenile court granted the motion to consolidate the four cases; however, at the beginning of the adjudicatory hearing, the magistrate continued the cases regarding C.H. and B.P.

{¶5} Prior to adjudication, Mother filed a motion in limine to exclude pursuant to Evid.R. 807(A) all out-of-court statements made by the alleged three-year old victim, B.P., describing any sexual acts performed by, with, or on that child. Mother also moved to exclude

all double hearsay evidence from B.P.'s mother or grandmother regarding the alleged molestation. CSB filed a motion in limine to exclude pursuant to Evid.R. 402 and 403 the testimony of the former guardian ad litem for the child B.P. for the reason that "[t]he current allegations in these cases involve certain conduct of a sexual nature while the allegations in the former complaints dealt primarily with neglect by [B.P.'s] mother."

{¶6} The matter proceeded to adjudication regarding M.H. and C.K. on April 21, 2008. At the conclusion of hearing, the magistrate informed the parties that he would render his decision the following day at 8:30 a.m. At 8:04 a.m. on April 22, 2008, CSB filed a case plan regarding M.H. and C.K. The agency listed two concerns, specifically, that M.H. is in need of counseling "to address and determine any emotional trauma he has suffered[,]" and that both children's basic (emotional, physical, educational, supervision and medical) needs be met by their caregivers.

{¶7} The magistrate issued his decision in which he adjudicated M.H. a dependent child pursuant to R.C. 2151.04(C). Although the decision regarding C.K. is not in the record, the magistrate stated on the record that the State failed to prove by clear and convincing evidence that she was dependent and that the complaint regarding her would be dismissed. In his decision regarding M.H., the magistrate ordered that the case plan be amended to delete C.K. At disposition, the magistrate granted protective supervision of M.H. to CSB for a period of one year, until February 27, 2009. Mother filed timely objections to the magistrate's decision. CSB responded in opposition. On July 30, 2008, the trial court overruled Mother's objections, adjudicated M.H. a dependent child pursuant to R.C. 2151.04(C), and placed him under the protective supervision of CSB until February 27, 2009, or upon his release from counseling by a licensed counselor.

{¶8} Mother filed a timely appeal in which she raises two assignments of error for review.

## II.

### ASSIGNMENT OF ERROR I

“THE WAYNE COUNTY JUVENILE COURT ERRED BY FINDING M.H. TO BE A DEPENDENT CHILD PURSUANT TO R.C. 2151.04(C).”

{¶9} Mother argues that the trial court judgment adjudicating M.H. a dependent child pursuant to R.C. 2151.04(C) is against the manifest weight of the evidence. This Court agrees.

{¶10} In reality, Mother is arguing that the trial court erred by adopting the magistrate’s decision, which adjudicated the child dependent. When reviewing an appeal from the trial court’s ruling on objections to a magistrate’s decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. “In so doing, we consider the trial court’s action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. “Any claim of trial court error must be based on the actions of the trial court, not on the magistrate’s findings or proposed decision.” *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. 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. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶11} The nature of the underlying matter is a challenge to the child’s adjudication as being against the manifest weight of the evidence. For some time, this Court has broadly stated

that in determining whether a judgment of a juvenile court is against the manifest weight of the evidence, this Court applies the same standard of review as that in the criminal context. See, e.g., *In re R.S.*, 9th Dist. No. 21177, 2003-Ohio-1594, at ¶10. Two-and-a-half years ago, the Ohio Supreme Court discussed and contrasted the manifest weight of the evidence standards of review applicable in criminal and civil cases. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202. Since then, this Court has been applying the civil manifest weight of the evidence standard of review in juvenile cases in certain contexts. See, e.g., *In re J.S.*, 9th Dist. No.23842, 2008-Ohio-179 (applying the civil manifest weight standard of review in a challenge to a planned permanent living arrangement disposition); *In re J.H.*, 9th Dist. No. 23605, 2007-Ohio-4653 (applying the civil manifest weight standard of review in a challenge to a dependency/neglect adjudication).

{¶12} A year ago, this Court took a hard look at *Wilson* and its holding that appeals from sexual offender classifications require application of the civil manifest weight of the evidence standard of review. In *In re R.D.U.*, 9th Dist. No. 24225, 2008-Ohio-6131, while recognizing the civil nature of juvenile delinquency proceedings, we further acknowledged that they “‘also have inherently criminal aspects.’” *Id.* at ¶5, quoting *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, at ¶26. We concluded that:

“The ‘inherently criminal aspects’ of delinquency proceedings and the constitutional safeguards that apply to children who are alleged to be delinquent lead this Court to conclude that the criminal standard for reviewing the manifest weight of the evidence should be applied when reviewing delinquency adjudications.” *In re R.D.U.* at ¶6.

{¶13} More recently, this Court extended that reasoning to permanent custody cases in recognition of “the very unique significance of the ‘familial bonds’ of parents and children[.]” *In re M.C.*, 9th Dist. No. 24797, 2009-Ohio-5544, at ¶13, citing *Little v. Streater* (1981), 452 U.S.

1, 13, as well as the safeguards accorded to parties in permanent custody proceedings but not generally in other civil proceedings. *In re M.C.* at ¶14. We concluded that “[t]he unique importance of the parent-child relationship and the risk of error in such decisions suggest merit in utilizing the [criminal] standard of review in permanent custody cases.” *Id.* at ¶17. This reasoning is no less relevant to the adjudication stage of a dependency/neglect/abuse proceeding.

{¶14} The adjudication of a child as dependent, neglected, or abused is the jurisdictional “hook” which allows for the on-going intervention by the State in the lives of children and their parents. It necessitates the juvenile court’s consideration of the appropriate custodial disposition of the adjudicated child and permits the continued removal of children from their parents’ homes. While not every parent’s rights are terminated in these proceedings initiated by the local child welfare agency, some are. Other parents’ rights are significantly curtailed by dispositional orders ranging from legal custody to a third party to planned permanent living arrangements. Given that it is the child’s adjudication as dependent, neglected, or abused that opens the door to the possibility of the curtailing or termination of parental rights, we believe that the risk of error in these decisions too merits utilization of the criminal manifest weight standard of review. Therefore, in determining whether a juvenile adjudication is against the manifest weight of the evidence:

“The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the [adjudication] must be reversed[.]” *Id.*, quoting *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶15} An adjudication of dependency must be supported by clear and convincing evidence. Juv.R. 29(E)(4). Clear and convincing evidence is such evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the conclusion to be drawn. *In re*

*Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368. This Court will review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the adjudication must be reversed. *Thompkins*, 78 Ohio St.3d at 387.

{¶16} R.C. 2151.04(C) defines “dependent child” as one “[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child’s guardianship[.]”

{¶17} CSB premised its claim of dependency solely on concerns regarding inappropriate sexual behavior in the home. Specifically, CSB alleged that Mother’s husband Jerrod (M.H.’s stepfather) may have had sexual contact with M.H., and that the three-year old B.P. had alleged that both Jerrod and seven-year old M.H. had sexual contact with her. CSB had the burden of proving these allegations to establish dependency. *In re N.C.*, 9th Dist. No. 24590, 2009-Ohio-4514, at ¶10.

{¶18} The magistrate found the following:

“Due to the psychological needs of [M.H.]; the need for [M.H.] to have a separate bedroom not occupied by other female children; and the need for appropriate supervision of [M.H.], [M.H.] is found to be a dependent child by clear and convincing evidence pursuant to R.C. 2151.04(C).”

In addressing Mother’s objections to the magistrate’s decision, the trial court found that it was “never proven \*\*\* that [B.P.] was abused.” Nevertheless, the trial court adopted the magistrate’s decision finding the child dependent because “there is an issue with the environment in the household of [M.H.] that warrants the state’s intervention to determine how [M.H.] may be assisted by a course of therapy to alleviate any psychological issues for him.”

{¶19} The State's theory of the case was premised solely on the situation in M.H.'s home based on B.P.'s allegations of sexual contact between her and Jerrod, her and M.H., and Jerrod and M.H. At the adjudicatory hearing, CSB presented evidence in the form of only two witnesses. Jennifer Garman, the agency intake worker assigned to this case, testified only regarding the allegations of sexual contact made by B.P. Ms. Garman did not offer any testimony regarding M.H.'s psychological state, or any other matter relevant to his condition or environment.

{¶20} Dr. Shellie Russell, a pediatrician at Akron Children's Hospital, also testified on behalf of CSB. Dr. Russell testified that she observed Ms. Garman's interview with B.P. and conducted the alleged victim's exam at the Children's Advocacy Center. She testified that she found no physical evidence of abuse. She, too, testified solely regarding the alleged sexual abuse of B.P., and offered no testimony regarding M.H.'s home environment and conditions or his psychological state. CSB then rested its case.

{¶21} Sergeant Gary Lee of the Wayne County Sheriff's Office testified on behalf of Mother. He testified that he performed a welfare check of M.H.'s home at the request of CSB as part of the agency's on-going investigation. Sgt. Lee testified that he spoke with Mother, her husband Jerrod, and Mother's parents who also resided in the home, and that all the adults were cooperative and forthcoming in their responses to his questions. Sgt. Lee testified that the home "looked [to be] in normal condition." He testified that he observed the children laughing and playing. He concluded, "I didn't see anything that would lead me to believe that anyone was in distress or anything like that."

{¶22} Holly Alexander, a children's therapist at Every Woman's House, testified that she conducted an assessment regarding Mother and met with M.H. for an hour-long session for



the first time approximately two-and-a-half weeks before the hearing. She testified that she met with him for one additional hour-long session. She testified that, while she is just beginning her evaluation of M.H., she offered a preliminary diagnosis of adjustment disorder, although she would rule out posttraumatic stress. Upon redirect examination, Ms. Alexander clarified that M.H.'s issues related to separation from his family caused by CSB's removal of him from the home.

{¶23} Ms. Alexander testified that she identified the problems and stressors in M.H.'s life as stemming from his removal and placement in foster care. She testified that M.H. is confused, anxious, and becomes angry, although he cannot explain why. She testified that the child has expressed worry that "something bad is going to happen."

{¶24} Ms. Alexander testified that M.H. has emphatically denied that his stepfather ever touched him inappropriately or that he (M.H.) ever touched B.P. inappropriately. The therapist testified that M.H. admitted that he has been angry with B.P. at times because she has been mean to him, hit and punched him, and choked his little sister C.K. She testified that he has expressed confusion about this situation. Ms. Alexander testified that she has not seen any indicators of child sexual acting out in M.H. She opined that M.H. needs continued counseling to address the stressors in his life.

{¶25} Mother testified that she lives in a three-bedroom home. She testified that her mother and stepfather share one bedroom, that she and her husband share a second bedroom, that her 15-year old sister and her 2-year old daughter C.K. share the third, and that M.H. sleeps in the living room. She testified that her living situation is designed to be temporary, that she has applied for public housing, and that ultimately she plans to buy a duplex with her parents. She

testified that neither she nor Jerrod have any prior convictions. She testified that she does not use drugs or drink and drive.

{¶26} Mother testified that M.H. has liberal visitation with his biological father. She testified that there are no unsafe or unsanitary conditions in her home, and that her children have clothing, and are regularly fed, bathed, and taken for routine medical appointments. Mother testified that M.H. has “outstanding” grades, although his grades have slipped somewhat in the past six weeks since CSB’s removal of him and his sister C.K.

{¶27} Mother testified that no one from CSB expressed any concerns to her regarding her parenting or any conditions in her home other than the allegations of sexual abuse to B.P. She testified that no one from the agency met with her prior to the removal of her children from her home. She asserted that both she and Jerrod are interested in the safety and well-being of M.H. and C.K.

{¶28} Mother’s counsel questioned the attorney guardian ad litem (“GAL”) appointed to represent the best interests of M.H. regarding whether he had interviewed M.H., met with M.H., or met with Mother or anyone else. The GAL responded, “No, no, no.”

{¶29} The attorney GAL appointed to represent the best interests of C.K. informed the court that she had visited the children’s home and observed both M.H. and C.K. to be very secure with Mother and in the home. She stated her impression that there is “responsible parenting going on.” She stated that Mother had voluntarily enrolled M.H. in counseling because of “the disruption in the home through the CSB intervention.” The GAL stated that no one else had instigated counseling for M.H.

{¶30} The trial court found that B.P.’s allegations of sexual abuse were not proven. CSB has not raised any cross-assignment of error in regard to this issue and it is now res

judicata. CSB's allegations of dependency were premised solely on B.P.'s allegations of sexual abuse. In the absence of evidence substantiating those allegations, CSB has failed to prove its case by clear and convincing evidence.

{¶31} Moreover, even if the trial court could consider evidence of matters beyond those alleged in the complaint, the finding that M.H. is dependent pursuant to R.C. 2151.04(C) is against the weight of the evidence. The juvenile court premised its finding of M.H.'s dependency solely on its belief that State intervention is necessary "to determine how [M.H.] *may* be assisted by a course of therapy to alleviate *any* psychological issues for him." (Emphasis added.) The trial court does not identify what those issues are or how they are impacting the child's life. In addition, the only evidence presented regarding the child's psychological issues demonstrates that those issues arose as a result of CSB's initial intervention and removal of M.H. to foster care. Furthermore, there is no evidence that anyone other than Mother initiated counseling for M.H. in recognition of issues caused by CSB's intervention into the lives of this family. This Court takes well Mother's argument that CSB cannot create a detrimental condition or environment for a child and then premise allegations of dependency on that condition or environment. Based on our thorough review, this Court is compelled to conclude that the trial court's finding of dependency is against the manifest weight of the evidence. Mother's first assignment of error is sustained.

### **ASSIGNMENT OF ERROR II**

"THE WAYNE COUNTY JUVENILE COURT ERRED BY REFUSING TO PERMIT THE TESTIMONY OF BEVERLY THEIL, TO THE PREJUDICE OF [MOTHER], AND IN VIOLATION OF BASIC CONSTITUTIONAL FAIRNESS."

{¶32} Mother argues that the trial court erred by refusing to permit the testimony of the former GAL for some of these children in prior cases filed in Holmes County. Due to this

Court's disposition of Mother's first assignment of error, we need not reach the merits of the second assignment of error, as it is now rendered moot. See App.R. 12(A)(1)(c).

### III.

{¶33} Mother's first assignment of error is sustained. We decline to address the second assignment of error. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,  
and cause remanded.

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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 Wayne, 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.

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DONNA J. CARR  
FOR THE COURT

MOORE, P. J.  
CONCURS

WHITMORE, J.  
CONCURS IN JUDGMENT ONLY, SAYING:

{¶34} I concur in judgment only because I believe that there is no competent, credible evidence to support the trial court's finding of dependency pursuant to R.C. 2151.04(C).

{¶35} Since the Ohio Supreme Court released *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, in which it distinguished the criminal and civil manifest weight of the evidence standards of review, this Court has struggled to determine the appropriate application of the high court's guidance within the juvenile context. Early on, we reviewed manifest weight of the evidence challenges in permanent custody cases by employing the civil standard. See, e.g., *In re A.C.*, 9th Dist. Nos. 23700, 23703, 2007-Ohio-4654; *In re J.P.-M.*, 9th Dist. Nos. 23694, 23714, 2007-Ohio-5412; *In re J.H.*, 9th Dist. No. 07CA009168, 2007-Ohio-5765. In 2008, this Court retreated from enunciating the applicable manifest weight of the evidence standard in permanent custody appeals. Instead, we analyzed the issue within the context of the statutory considerations regarding an award of permanent custody. See, e.g., *In re M.W.*, 9th Dist. No. 23912, 2008-Ohio-1049; *In re S.P.*, 9th Dist. Nos. 24040, 24043, 2008-Ohio-2672; *In re S.H.*, 9th Dist. No. 24055, 2008-Ohio-3111.

{¶36} I have recognized the propriety of employing the criminal manifest weight of the evidence standard in delinquency appeals. See, e.g., *In re G.E.S.*, 9th Dist. No. 23963, 2008-

Ohio-2671. I further do not disagree with this Court's express adoption of that standard in *In re R.D.U.*, 9th Dist. No. 24225, 2008-Ohio-6131, in regard to delinquency appeals. I am reluctant, however, to extend that reasoning beyond the delinquency context into juvenile matters involving the adjudication and disposition of children in dependency/neglect/abuse cases. In light of *Wilson's* discussion of manifest weight standards of review solely within the broad context of criminal and civil matters, without any reference to juvenile matters, I would caution against expanding the Supreme Court's limited guidance to matters beyond the immediate scope of that case. In the absence of additional guidance, I would apply the civil manifest weight of the evidence standard to all juvenile appeals which do not involve the adjudication and disposition of a delinquent child.

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

CONRAD OLSON, Guardian ad Litem.