

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: D.L.

C.A. No. 24892

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 07-5-528

DECISION AND JOURNAL ENTRY

Dated: February 17, 2010

MOORE, Presiding Judge.

{¶1} Appellant, Mother, appeals from the decision of the Summit County Juvenile Court. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} Mother is the natural mother of D.L., who was born on July 15, 1995. Casey McCary is D.L.’s natural father and Candy McCary is his Step-Mother. On May 29, 2007, Summit County Children Services Board (“CSB”) filed a complaint, alleging D.L. to be an abused, neglected, and dependent child. He was subsequently placed in the emergency custody of CSB.

{¶3} Father filed motions for temporary custody and legal custody. On July 26, 2007, the trial court adjudicated D.L. to be a dependent child pursuant to R.C. 2151.04(C). The trial court held a dispositional hearing and placed D.L. in the temporary custody of CSB. Mother filed a motion to return D.L. to her custody. On December 19, 2007, the trial court held a

hearing on the competing motions of legal custody. The parties agreed to maintain D.L. in the temporary custody of CSB with placement with Father and visitation with Mother.

{¶4} On March 28, 2008, Mother filed a motion for legal custody. On April 4, 2008, CSB filed a motion to modify temporary custody to legal custody to Father. On April 7, 2008, Mother and Father entered into a shared parenting agreement in which they would share legal custody, with D.L. to remain in Father's home during the school year. The trial court adopted this agreement.

{¶5} On April 21, 2008, Mother moved to rescind the agreed shared parenting plan and filed a motion to modify shared parenting. In her motion she noted that Father had a warrant pending for his arrest and consequently, she had concerns about D.L.'s welfare. On July 22, 2008, Mother filed an emergency ex parte motion for temporary change of custody on the basis that Father had been arrested. On July 23, 2008, the trial court denied Mother's motion. On August 8, 2008, Father filed an alternative disposition motion for legal custody to Step-Mother, Father's wife. On August 11, 2008, CSB filed a motion to modify temporary custody to Father to legal custody of Step-Mother. CSB subsequently filed a motion to be removed as a party, which the trial court granted.

{¶6} On September 12, 2008 and December 4, 2008, a magistrate held a trial on Mother and Father's competing motions for legal custody. On December 23, 2008, the magistrate ordered shared legal custody of D.L. to Mother and Step-Mother. Mother filed objections to the magistrate's decision, and on July 28, 2009, the trial court overruled Mother's objections and adopted the decision of the magistrate. It is from this decision Mother appeals. She has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED MOTHER’S OBJECTIONS TO MAGISTRATE’S DECISION AND FOUND THAT IT WAS IN THE BEST INTEREST OF D.L. TO BE PLACED IN THE SHARED LEGAL CUSTODY OF MOTHER AND STEP-MOTHER.”

{¶7} In her first assignment of error, Mother contends that the trial court committed error when it overruled her objections to the magistrate’s decision and found that it was in the best interest of D.L. to be placed in the shared legal custody of Mother and Step-Mother.

{¶8} Initially, we note that this appeal arises from the trial court’s adoption of a magistrate’s decision. The decision to affirm a magistrate’s decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion. *Kalail v. Dave Walter, Inc.*, 9th Dist. No. 22817, 2006-Ohio-157, at ¶5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Abuse of discretion is more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore*, 5 Ohio St.3d at 219. On appeal, however, “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. While we review the trial court’s determination of custody for an abuse of discretion, *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, “‘where a trial court’s order is based on an erroneous standard or a misconstruction of the law, it is not appropriate for a reviewing court to use an abuse of discretion standard. In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court, since an important function of appellate courts is to resolve disputed propositions of law.’” *Zenfa Labs, Inc. v. Big Lots Stores, Inc.*, 10th Dist. No. 05AP-343, 2006-Ohio-2069, at ¶24, quoting *Castlebrook Ltd. v. Dayton*

Properties Ltd. Partnership (1992), 78 Ohio App.3d 340, 346; see, also, *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721, citing *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506 (observing that “[a]n appellate court’s review of the interpretation and application of a statute is de novo”). As we will fully set forth below, we conclude that the trial court incorrectly applied the law when it applied precedent that was inapplicable to this case.

{¶9} We observe that the trial court correctly noted that because D.L. was adjudicated dependant, the court was not required to make a specific finding that Mother was unsuitable before it would consider a motion for legal custody to Step-Mother. See *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, at paragraph three of the syllabus; R.C. 2151.353(A)(3). In reaching its decision regarding custody of D.L., the trial court relied solely upon the Ohio Supreme Court’s decision in *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, for the proposition that the trial court could place a child in “shared custody” of a parent and non-parent if such an order was in the child’s best interest. We conclude that the trial court’s reliance upon *Bonfield* as authority for its disposition in this case is misplaced.

{¶10} In *Bonfield*, the parties, a same-sex couple, sought to establish a shared parenting agreement for their five children. Teri Bonfield adopted two children and gave birth to three children. Shelly Bonfield, Teri’s partner, participated in the decision to adopt and also in the planning and births of the other children by anonymous artificial insemination. The parties agreed that Shelly was the children’s primary caregiver. The Bonfields filed a petition for the allocation of parent rights and responsibilities, seeking shared parenting. The juvenile court found that it did not have jurisdiction to grant the petition because Shelly was not a “parent” pursuant to R.C. 3109.04. *Bonfield*, 97 Ohio St.3d at ¶10. However, it further questioned why the parties had not applied for joint custody because “custody” is a much broader in scope than

shared parenting. *Id.* at ¶36. On appeal, the appellate court determined that, pursuant to R.C. 2151.23(A)(2), the juvenile court had exclusive jurisdiction to determine the custody of the Bonfield children because they were not wards of a court. *Id.* at ¶11. However, the appellate court determined that the juvenile court must exercise its jurisdiction in child custody matters pursuant to R.C. 3109.04. While R.C. 3109.04 did not define “parent,” the appellate court applied the definition of parent found in 3111.01.¹ Because the definition of the parent and child relationship in R.C. 3111.01 did not apply to Shelly, the appellate court concluded that the juvenile court did not have the authority to award Shelly parental rights or shared parenting. Thus, the appellate court affirmed the juvenile court’s dismissal of the Bonfields’ petition. *Id.* at ¶11.

{¶11} The Bonfields appealed the appellate court’s decision to the Ohio Supreme Court. The Court first analyzed R.C. 3109.04(A)(2), which provides the trial court with the authority to allocate parental rights and responsibilities for the care of the children to both “parents.” The Court, referring to the definition contained in R.C. 3111.01, concluded that the term “parent” for purposes of shared parenting was limited to the child’s natural or an adoptive parent, and therefore not available to the Bonfields. *Bonfield*, 97 Ohio St.3d at ¶28.

{¶12} The Court further considered whether the juvenile court nonetheless had jurisdiction to consider the petition for shared custody by examining the claim for shared parenting in the “custody context.” *Id.* at ¶36. In examining the language contained in R.C. 2151.23(A)(2), the Court concluded that the “juvenile court has jurisdiction to determine the

¹ Pursuant to R.C. 3111.01 a “parent and child relationship” can be established by natural parenthood, adoption, or by other legal means in the Revised Code that confer or impose rights, privileges, and duties upon certain individuals.

custody of any child not a ward of another court, even though the court has not first found the child to be delinquent, neglected, or dependent.” Id. at ¶42. It further concluded that “[t]his exclusive responsibility to ‘determine the custody of any child not a ward of another court of this state’ cannot be avoided merely because the petitioner is not a ‘parent’ under R.C. 3109.04.” Id.

{¶13} The Court then considered whether the juvenile court was required to make the custody determination in accordance with R.C. 3109.04. In contrast to the appellate court, the Court determined that the juvenile court had jurisdiction to determine custody pursuant to R.C. 2151.23(A)(2) without reference to R.C. 3109.04. Id. at ¶45. In so doing, it distinguished its prior holding in *In re Poling* (1992), 64 Ohio St.3d 211. In *Poling* the Court had previously determined that where custody has already been determined by a domestic relations court in a divorce decree and the children are later determined to be abused, neglected or dependent, the juvenile court has jurisdiction under R.C. 2151.23(A)(2) to make a custody determination but must do so in accordance with R.C. 3109.04. *Bonfield*, at ¶45. However, the Court noted that *Poling* was limited to cases where the juvenile court had obtained jurisdiction under R.C. 2151.353 and the Court had not considered whether *all* custody cases arising under R.C. 2151.23(A)(2) must be decided under R.C. 3109.04. The Court further explained “nor could such an interpretation of *Poling* be reconciled with Ohio’s long-standing precedent that a juvenile court has jurisdiction to determine custody claims brought by nonparents.” Id.

{¶14} Upon concluding that the juvenile court had jurisdiction to consider the petition for shared custody without reference to R.C. 3109.04, the Court then addressed the standard that the juvenile court should use in disposing of the petition. The Court again distinguished its prior precedent, *In re Perales* (1977), 52 Ohio St.2d 89, to clarify that it was unnecessary for the juvenile court to make a finding of parental unsuitability in order to award custody to the

nonparent. The Court reasoned that in *Perales*, there was an actual dispute in parties competing for custody. *Bonfield*, 97 Ohio St.3d at ¶47. However, in the *Bonfield* case, the biological mother sought to relinquish her right to sole custody in favor of shared custodial rights. *Id.* Thus, in the context of an uncontested petition, the Court implicitly determined that the necessity of a finding parental unsuitability as required in *Perales* is absent.

{¶15} Upon close examination of *Bonfield*, it is apparent that the Court addressed three questions. First, whether the juvenile court had jurisdiction over a joint petition for shared parenting brought by a same-sex couple. Second, whether the juvenile court had to exercise its jurisdiction under R.C. 2151.23(A)(2) by reference to R.C. 3109.04. Finally, the Court determined the standard by which the juvenile court should consider the petition for shared custody. These considerations are absent from this case. Notably, in *Bonfield*, the Court was centrally concerned with the issue of jurisdiction, in particular, whether the juvenile court had the authority to even consider the petition of a nonparent. Jurisdiction is clearly not an issue in this case. R.C. 2151.23(A)(1) provides that a juvenile court has exclusive original jurisdiction over a child once a complaint was filed alleging D.L. to be a dependent child. Thus, it is clear that from the outset of this case, the juvenile court had jurisdiction under a different subsection of the statute than was at issue in *Bonfield*. Unlike *Bonfield*, in this case, we are faced with a custody determination at the dispositional phase of the case *after* the juvenile court gained jurisdiction pursuant to R.C. 2151.23(A)(1) and after an adjudication of dependency.

{¶16} Further, *Bonfield* is distinguishable because its analysis is limited to shared custody pursuant to R.C. 2151.23(A)(2). The Ohio Supreme Court has explained that the “grants of jurisdiction in R.C. 2151.23(A)(1) and (A)(2) are independent of each other[.]” *In re Poling*, 64 Ohio St.3d at 214, citing *In re Torok* (1954), 161 Ohio St. 585.

{¶17} Accordingly, Mother’s first assignment of error is sustained insofar as the trial court erred in its interpretation and application of *Bonfield* to the facts of this case. *Bonfield* does not apply to the instant case. Therefore, the decision of the trial court is reversed and remanded for proceedings consistent with this opinion.

ASSIGNMENT OF ERROR II

“TRIAL COURT’S DECISION TO PLACE D.L. IN THE SHARED LEGAL CUSTODY OF MOTHER AND STEP-MOTHER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶18} In her second assignment of error, Mother contends that the trial court’s decision to place D.L. in the shared legal custody of Mother and Step-Mother was against the manifest weight of the evidence. Our disposition of Mother’s first assignment of error renders her second assignment of error moot. App.R. 12(A)(1)(c).

III.

{¶19} Mother’s first assignment of error is sustained. Her second assignment of error is moot. The judgment of the Summit County Juvenile Court is reversed and remanded for proceedings consistent with this opinion.

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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

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