

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: J.M.
 S.M.
 A.M.

C.A. No. 27586

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 12 06 0425
 DN 12 06 0426
 DN 12 06 0427

DECISION AND JOURNAL ENTRY

Dated: June 17, 2015

HENSAL, Presiding Judge.

{¶1} Melisa McClain appeals a judgment of the Summit County Court of Common Pleas, Juvenile Division, awarding legal custody of J.M., S.M., & A.M. to Matthew Murphy. For the following reasons, this Court affirms.

I.

{¶2} Ms. McClain and Mr. Murphy have three children together: J.M., S.M., and A.M. In June 2012, they were all living together along with two of Mother’s children from a prior relationship. One day, Father left the children alone while he went to the store. While at the store, he became ill and had to go to the hospital. When the Summit County Children Services Board could not locate Mother and found unsafe conditions in the house, it removed the children. The juvenile court subsequently adjudicated the children abused and dependent.

{¶3} A few months after the children were removed, Mother and Father separated. Children Services developed a different case plan for both of them. In January 2014, Mother moved for custody of the children. Father also moved for legal custody of the children. Children Services initially moved for permanent custody but later withdrew its motion and moved for Father to have legal custody. Following a hearing, the juvenile court placed J.M., S.M., and A.M. in the legal custody of Father. It granted Mother visitation rights in accordance with its standard order and ordered her to pay \$50 a month in child support. Mother has appealed, assigning as error that the juvenile court's judgment is against the manifest weight of the evidence.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT'S FINDING THAT LEGAL CUSTODY TO FATHER WAS IN THE BEST INTEREST OF THE CHILDREN IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

{¶4} Mother argues that the juvenile court incorrectly determined that it is in the best interest of J.M., S.M., and A.M. to be in the legal custody of Father. If a child has been adjudicated neglected and dependent, the trial court has several dispositional alternatives available to it, including legal custody to either parent. *See* R.C. 2151.353(A). The decision to grant or deny a motion for legal custody is within the juvenile court's sound discretion. *In re M.S.*, 9th Dist. Summit No. 22158, 2005-Ohio-10, ¶ 11. This Court will not reverse that decision absent an abuse of discretion. *Id.* An abuse of discretion implies that a trial court was unreasonable, arbitrary, or unconscionable in its judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶5} The statutory scheme regarding an award of legal custody does not include a specific test or set of criteria, but Ohio courts have determined that the trial court must base its decision on the best interest of the child. *See, e.g., In re N.P.*, 9th Dist. Summit No. 21707, 2004-Ohio-110, ¶ 23. We have previously indicated that the factors listed in Revised Code Section 2151.414(D) may provide some guidance in determining whether legal custody is in the best interest of a child. *In re B.C.*, 9th Dist. Summit Nos. 26976, 26977, 2014-Ohio-2748, ¶ 16, citing *In re T.A.*, 9th Dist. Summit No. 22954, 2006-Ohio-4468, ¶ 17. Those factors include: the interaction and interrelationships of the child, the wishes of the child, the custodial history of the child, and the child’s need for permanence in his life. *Id.*; R.C. 2151.414(D)(1). We have also explained that the factors listed in Section 3109.04(F)(1) “may be relevant to addressing how to best allocate custody and visitation rights between the parents, given a prior adjudication of dependency and abuse.” *In re B.G.*, 9th Dist. Summit No. 24187, 2008-Ohio-5003, ¶ 11. Those factors include: the children’s adjustment to their home, school, and community, the mental and physical health of all the persons involved in the situation, the parents’ likelihood to honor and facilitate court-approved parenting time or visitation rights, and whether a parent or a member of their household has been involved in a criminal offense that resulted in a child being adjudicated an abused or neglected child. *Id.* at ¶ 12, citing R.C. 3109.04(F)(1)(d, e, f, & h).

{¶6} The Children Services caseworker assigned to the parents’ case testified that Father had met all of his case objectives, including moving out of his girlfriend’s home when he learned that it would not be a suitable home for the children. She testified that, although Father was currently living with his godparents, he had a firm offer for an apartment that would be sufficient for the children if he obtained custody. Children Services also planned to help him obtain bedding and other necessities for the children. The caseworker further testified that

Father was employed and had been developing a plan to make the children's transition go smoothly.

{¶7} Regarding Mother, the caseworker testified that Mother had made progress on her case objectives, but had not met all of her goals. In particular, Mother had completed only 17 out of the 70 the drug tests the agency had requested, and two of those came back positive for marijuana. The caseworker testified that, although Mother had been reunited with two of her older children, Mother had since taken her daughter off of a prescription medication without consulting a doctor. She also had not always ensured that the children attended their treatment programs. Noting that some of the parties' children had developmental delays, the caseworker expressed concern that Mother might not follow through on obtaining the services they need.

{¶8} The children's guardian ad litem also recommended that Father obtain legal custody. He corroborated the caseworker's testimony that, whereas Father had complied with all of the agency's requests without hesitation, Mother consistently questioned the necessity of the requests and was slow to comply with them, if at all. He also corroborated that Father had a plan for the children regarding their educational, housing, and medical needs.

{¶9} Mother testified that she has stable housing and employment. She explained that, although she does not use drugs, she agreed to drug testing as part of her case plan because her caseworker could not find anything else to include in the plan. She did not realize, however, that the testing would be so frequent. Mother explained that she was unable to comply with many of the testing requests because she did not have transportation to the test center. She could not explain, however, why two of her tests were positive for marijuana because she had not used it for many years. Mother said that, although she had stopped some of her daughter's medications because of their side-effects, she subsequently took her daughter to a doctor who prescribed

different treatments for the conditions. Mother further testified that the children who have been returned to her custody have improved their attendance and performance at school since the reunification.

{¶10} According to Mother, she and Father were equally situated with respect to the children except on one issue, which was housing. She contends that, whereas she had obtained independent housing for her and the children, Father was still living with his godparents. She notes that the juvenile court incorrectly wrote in its decision that she was still living with her boyfriend at the time of the hearing. She, therefore, argues that the court incorrectly determined that it was in the best interest of the children to award Father legal custody.

{¶11} Upon review of the record, we note that, although Father did not have independent housing at the time of the hearing, the caseworker explained that there was an apartment available to him that would be adequate for him and the children if he received custody. She said that she had worked closely with the Akron Metropolitan Housing Administration to finalize an apartment for him. She also verified that her agency would assist Father in obtaining bedding and other necessities for the children.

{¶12} When asked about Father, Mother testified that he is “a great father.” She testified that she had a good relationship with him, that she trusted him with their children, and that she did not have any concerns about their well-being when they are with him. She also said that the children love Father and feel safe around him.

{¶13} Although the juvenile court overlooked the fact that mother had recently secured independent housing, her housing situation was only part of its reason for determining that she had not “demonstrated an ability to independently care for her children.” In light of the fact that Father met all of his case plan objectives, had stable employment, and had been approved for

housing, we cannot say that the juvenile court abused its discretion when it found it was in the best interest of J.M., A.M., and S.M. to place them in the legal custody of Father. Mother's assignment of error is overruled.

III.

{¶14} Mother's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶15} In consideration of whether it was in the children’s best interest to be placed in the legal custody of Mother or Father, the juvenile court made the erroneous finding that Mother lacked independent housing. Ordinarily, where it appears that the trial court relied on an erroneous finding of fact in rendering its determination, I would remand the matter for reconsideration based on the facts as supported by the evidence. *See, e.g., State v. Johnson*, 9th Dist. Medina No. 12CA0050-M, 2013-Ohio-3306, ¶ 11, 13.

{¶16} In this case, however, the juvenile court premised its award of legal custody to Father solely on Father’s case plan compliance. Specifically, the trial court wrote, “Father’s follow through with that plan is resulting in the return of the custody of his children to him.” Because the juvenile court did not rely on its erroneous finding of fact about Mother’s housing situation, but instead awarded legal custody to Father on the basis of his case plan compliance, I agree that the court did not abuse its discretion in its determination of custody.

APPEARANCES:

ANGELA M. KILLE, Attorney at Law, for Appellant.

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