

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

IN THE MATTER OF:	:	<b>O P I N I O N</b>
B. J.,	:	
DEPENDENT CHILD	:	<b>CASE NO. 2009-G-2933</b>
	:	

Civil Appeal from the Geauga County Court of Common Pleas, Juvenile Division, Case No. 08 JF 000524.

Judgment: Affirmed

*Dennis J. Niermann*, Dennis J. Niermann Co., L.P.A., 8437 Mayfield Road, #103, Chesterland, OH 44026 (For Mikal Johnston-Appellant).

*David P. Joyce*, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Geauga County Job and Family Services-Appellee).

DIANE V. GRENDELL, J.

{¶1} Appellant, Mikal Johnston, appeals the Judgment Entry of the Geauga County Court of Common Pleas, Juvenile Division, transferring custody of his and appellee, Denise Johnston's, minor child, B.J., to Denise and indefinitely suspending his parenting time with the child. For the following reasons, we affirm the decision of the court below.

{¶2} Mikal and Denise are the parents of B.J., dob August 9, 2002.

{¶3} On October 22, 2008, Geauga County Job and Family Services filed a Complaint, alleging B.J. to be dependent, pursuant to R.C. 2151.04(C)<sup>1</sup>, and requesting protective supervision and/or temporary custody. The amended<sup>2</sup> basis for the Complaint was as follows:

{¶4} [B.J.'s] parents, Mikal Johnston and Denise Johnston, recently went through a difficult divorce. This divorce has had a significant emotional impact on [B.J.] due to the conflicts that have arisen between his parents. Currently, Mr. Johnston has visitation every other weekend and on Wednesday evenings. While with his father [B.J.] informed a social worker that Ms. Johnston's boyfriend, Mark [Bogadi], hit him in the face. However, in a recent conversation with the same social worker [B.J.] indicated that he was never hit by Mark and that they were just wrestling.

{¶5} On October 29, 2008, the juvenile court issued a Judgment Entry, finding B.J. to be dependent and granting Geauga Job and Family Services protective supervision of him. The court further ordered the adoption of a case plan filed with the court. According to the plan, Mikal, Denise, and B.J. were to undergo mental health assessments and follow all recommendations. Mikal and Denise were to attend parenting classes and to participate in B.J.'s counseling as recommended.

{¶6} On November 19, 2008, Michelle Grida of Geauga CASA was appointed B.J.'s Guardian ad Litem.

{¶7} On December 30, 2008, the juvenile court issued a Judgment Entry following a dispositional hearing. The court expressed its concern that the ongoing conflict between Mikal and Denise placed B.J. "at risk of severe emotional harm." The court ordered Geauga Job and Family Services to continue exercising protective supervision of B.J. The court also modified the case plan. Mikal and Denise were to

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1. R.C. 2151.04(C): "'dependent child' means any child \*\*\* [w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship."

2. The descriptive language of the original Complaint was modified on the motion of Geauga Job and Family Services by the juvenile court's October 29, 2008 Judgment Entry.

address their relationship and parenting issues by participating in mediation through Job and Family Services, participating in counseling at least twice monthly, and completing parenting classes. The goal for B.J. was to “improve his ability to cope with the stress of the conflict between his parents and between his mother and her boyfriend [Mark Bogadi],” by participating in counseling at least twice monthly.

{¶8} On April 27, 2009, the juvenile court issued a Judgment Entry following a review hearing. The court noted:

{¶9} There is still great animosity between mother and father. The child is still being exposed to conflict between the parents that is detrimental to his mental health. Father does not appear invested in counseling and does not appear to be making progress being able to interact appropriately with the child’s mother. Mother’s counselor reports progress, but progress has not been observed by the other professionals involved in the case. The Middlefield PD asked that exchanges of the child be moved to a different location due to the amount of time need[ed] to supervise exchanges and respond to public information requests generated by father. The child continues to be exposed to harmful conflicts between the parents despite the considerable resources that have been made available to assist the parents in addressing the conflict between them. Mother appears unwilling or unable to encourage an appropriate relationship between [B.J.] and his father. Professionals who have observed [B.J.] in his parents’ homes have observed [B.J.] to be guarded and reserved in his mother and his mother’s fiancé’s home. Professionals involved observe [B.J.] to be open and more comfortable when exercising visitation with father and father’s fiancée.

{¶10} On the recommendation of the Guardian ad Litem and Geauga Job and Family Services, the juvenile court designated Mikal the residential parent with Job and Family Services continuing to exercise protective supervision. Denise would enjoy visitation accordingly to the previously ordered visitation schedule.

{¶11} Finally, the juvenile court admonished the parties not to discuss custody issues with B.J. outside of counseling, not to engage in verbal or physical confrontations with each other in B.J.’s presence, and not to make derogatory comments about each other in his presence. “If the level of conflict between the parents continues, the court

shall consider terminating parenting time with one or both parents and placing the child in the custody of a third party that is willing and able to facilitate parenting time with both parents.”

{¶12} In June 2009, Mikal married Ruth Ann Fraedrich nka Johnston.

{¶13} On July 22, 2009, the juvenile court issued a Judgment Entry following a review hearing. The court identified the following concerns:

{¶14} Mother and Father’s relationship continues to be immature, conflicted, and harmful to the child’s emotional well being. Their interaction is poor. They can not agree on simple things like who will accompany the child on school field trips without intervention from third parties. Another example is father’s insensitivity in allowing the child to have a ‘mohawk’ haircut without consulting the child’s mother. There is reason to believe the parents continue to put the child in the middle of their on-going domestic warfare. Neither parent is making much progress in individual or family counseling. The court questions the effectiveness of both individual counselors. The various individual and family counselors have not been in communication with each other and have not attempted to coordinate their efforts in any way. Father has changed individual counselors. Mother’s counseling appears focused on mother’s grief stemming from losing her status as the child’s residential parent. She appears to be doing little work on parenting and relationship issues. The family counselor with whom the parents had been making some limited progress is removing himself from the case because of his inability to establish a trusting, therapeutic relationship with the child’s father. The Court attributes this to father’s paranoia and general difficulty dealing with the various professionals involved attempting to assist the parents to address their extremely dysfunctional relationship. The Court perceives one of the barriers to progress in this case is the parents’ continued focus on the ongoing unresolved custody dispute.

{¶15} The juvenile court designated Mikal the custodial parent, ordered him to use his best efforts to encourage a loving, positive relationship between B.J. and Denise, and extended Geauga County Job and Family Services protective custody over B.J.

{¶16} In August 2009, Mikal and his new wife moved to Peninsula, Ohio, in Summit County, with B.J.

{¶17} On October 16, 2009, the juvenile court issued a Judgment Entry following a review hearing. The court noted the following concerns:

{¶18} Despite court ordered counseling, case supervision by social workers, and monitoring of the case by the GAL, there continue[s] to be extraordinary conflict between the parents and a general inability to implement the custody and visitation schedule ordered by the Court without exposing the child to continued conflict. In part because of mother's inability to facilitate visitation between the father and B.J. and because of perceived progress made by the father during the first 90 day review period, the Court reversed the roles of the parents and designated father as the legal custodian and ordered a schedule of parenting time with the mother.

{¶19} Since the April 2009 review hearing, the parents have made no progress improving their ability to jointly parent B.J. without exposing him to harmful conflict. His counselor [Leila A. Vidmar, PCC-S<sup>3</sup>] reports B.J. is showing signs of increased anxiety as a result of the continued hostilities. Father has proven equally inept at facilitating parenting time between the mother and child and shielding the child from parental conflict. The various counselors working with the parents have had little communication with each other. The individual counselors working with the parents appear to have taken sides as advocates for their clients and have done little to assist the parents to address their inability to interact appropriately as parents. Father has undermined a previous relationship with a counselor that was attempting to provide joint family counseling to the parties. [The father] has now, without good cause, decide[d] that he is unhappy with the child's current counselor [Vidmar] and appears intent on undermining that relationship. An attempt at mediation was also made and failed.

{¶20} The child has been observed at different times to be bonded and content with both parents, but is consistently exposed to the on-going conflict between the parents. Despite extraordinary efforts to address the on-going dysfunction in the family, the child is consistently put in the middle of what has been a perpetual, unabated custody dispute. Due to the lack of progress, there is no reason to believe the ability of the parents to jointly parent their child will improve.

{¶21} The juvenile court acknowledged the present case to be "extraordinarily difficult" and that there were three options before it, all to some degree emotionally traumatic for B.J.

{¶22} One option would be to grant the oral motion of [Geauga Job and Family Services] requesting that it receive temporary custody of the child for a short period of time while a "comprehensive parenting evaluation" was completed on both parents. The Court is of the opinion that this would expose the child to the trauma of a short term out of home placement with no long term benefit to the child. It is clear from the Court's

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3. Professional Clinical Counselor with Supervisor Designation.

experience with these parents that they are not capable of co-parenting their child and their ability to co-parent their child is unlikely to improve in the foreseeable future.

{¶23} A second alternative would be to leave the child in the custody of one parent and continue to provide the other parent with parenting time with the child. This option has been tried for the better part of one year now with both parents having had been designated as custodial parents. These efforts have failed despite considerable resources being made available to assist the parents to improve their ability to co-parent their child. The child has been exposed to considerable emotional trauma and would continue to be exposed to emotional trauma into the foreseeable future if these efforts were to continue.

{¶24} The third option is the option the Court finds to be in the child's best interest. That is the discontinuation of the co-parenting of the child until it can be demonstrated to the Court that the parents have a mature and healthy enough relationship that they can co-parent the child without exposing the child to harmful conflict.

{¶25} Accordingly, the juvenile court determined it to be in B.J.'s best interests that Denise be granted legal custody of B.J. and that Mikal's parenting time be suspended indefinitely. Moreover, Mikal was not to come within a 1/4 mile of B.J. except to participate in counseling with him to the extent it may be recommended by his counselor. Geauga Job and Family Services would continue to exercise protective supervision over B.J.

{¶26} The juvenile court made the following findings in support of its decision:

{¶27} The Court finds specifically that there has been a change in the child's circumstances that warrants a modification of the current custody order and that the benefit to the child from the modification of custody outweighs the harm. The Court finds specifically that the child's father has demonstrated that he is not capable of facilitating a relationship between the child and the child's mother and that he is not supportive of the child's on-going therapeutic relationship with the child's counselor [Vidmar]. The Court finds that the mother is also not capable of facilitating a positive relationship between the child and the child's father. Further, the Court finds that of the two parents, mother is most likely to follow through with and be supportive of the child receiving continued therapeutic services. Choosing between the two parents, mother is most likely to be successful providing the child with a stable nurturing, home if interaction with the other parent is terminated.

{¶28} On November 13, 2009, Mikal filed a Notice of Appeal. On appeal, he raises the following assignments of error:

{¶29} “[1.] The trial court abused its discretion in its October 16, 2009 ruling in transferring legal custody of Minor B. from father to mother. This decision was unreasonable, arbitrary and unconscionable, was an abuse of discretion and was against the manifest weight of the evidence.”

{¶30} “[2.] The trial court failed to consider the factors listed in R.C. 3109.04(F)(1) as a whole rather than an all-or-nothing ten-part test was an abuse of discretion.”

{¶31} “[3.] The trial court erred and abused its discretion by ordering father not to intentionally come within ¼ mile of Minor B. and denying father parenting time and in not following ORC 3109.04(F)(2).”

{¶32} In his first assignment of error, Mikal argues that the juvenile court’s decision to modify B.J.’s custody constitutes an abuse of discretion, i.e. was unreasonable, arbitrary, and unconscionable, inasmuch as there was no competent or credible evidence of a change in circumstances. Mikal relies upon the reports of B.J.’s Guardian ad Litem, Michelle Grida, and Job and Family Services Assessment Worker, Tracy Prohaska, that B.J. thrived while in his legal custody but regressed under Denise’s care. Mikal further argues the court ignored Denise’s violation of court orders with respect to counseling and visitation.

{¶33} “The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree,

that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and \*\*\* [t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child." R.C. 3109.04(E)(1)(a)(iii); *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at paragraph one of the syllabus (applying R.C. 3109.04(E)(1)(a) in the context of a dependency proceeding).

{¶34} "In determining whether a change in circumstances has occurred so as to warrant a change in custody, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change." *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260, at paragraph two of the syllabus. The determination that a change in circumstances has occurred for the purposes of R.C. 3109.04 "should not be disturbed absent an abuse of discretion." *Id.* at paragraph one of the syllabus.

{¶35} In the present case, the juvenile court found that, since transferring custody of B.J. to his father, Mikal has demonstrated an inability to facilitate a relationship between B.J. and his mother and to support B.J.'s therapeutic counseling. Inasmuch as the court awarded custody to Mikal based on its belief that he could and/or would do these things, his failure to do so constitutes a change of circumstances. Moreover, the court noted B.J. has exhibited symptoms of increased anxiety while in his father's custody. The intensification of B.J.'s mental distress as a result of the continuing conflict between the parents and while under Mikal's care also constitutes a



change in circumstances. These findings are supported by competent, credible evidence in the record before us.

{¶36} Grida, the Guardian ad Litem, wrote the following in her report after observing B.J. in August 2009 at a football practice with both parents present: “My observation was that B.J. was extremely anxious, continued to look over to see whether or not Denise was approaching. I would equate what I observed to be similar to a child in fear. Furthermore, I have not experienced this level of anxiety from B.J. for several months and I am quite concerned that he has regressed and has an additional level of stress and anxiety as compared to that when I last observed him in early July. \*\*\* This is not the same boy I played with on the slide and trampoline earlier this summer.”

{¶37} Vidmar, B.J.’s counselor, reported that B.J.’s anxiety continues to escalate. She expressed particular concern with B.J.’s feelings of anger, confusion, and being “sliced in the middle.” She noted that B.J. believes that Mikal can hear everything he says and records his conversations with Denise. Vidmar also reported that B.J. informed her that Mikal and his new wife try to influence what he says to the counselors and doctors. Vidmar stated that she was told by one of B.J.’s siblings that he regularly cries at night in bed.

{¶38} Vidmar testified that B.J. had an extended visitation period of about three weeks with Denise at the beginning of August 2009. During this visitation, Mikal and/or Ruth Ann sent B.J. postcards and greeting cards on a daily basis. After the visitation, they presented B.J. with copies of these cards and had him review them to confirm whether he had received them. B.J. admitted to Vidmar that doing this had made him feel “anxious.”

{¶39} Prohaska, a Job and Family Services Assessment Worker, also testified that B.J. told her that he is being recorded when at Mikal's house.

{¶40} In October 2009, Mikal had B.J. evaluated by Psychologist Lee J. Horowitz, who administered the How Do I Feel Inventory. Dr. Horowitz concluded that B.J. does not exhibit any emotionally deviant behaviors and is "quite comfortable" in his current home and school placement. Mikal did not advise Vidmar or Job and Family Services of this evaluation and did not provide Vidmar with a release to allow her to consult with Dr. Horowitz.

{¶41} Vidmar administered the How Do I Feel Inventory to B.J. and obtained results contrary to those obtained by Dr. Horowitz.

{¶42} Grida, Vidmar, and Prohaska all testified that B.J. tells adults what he thinks they want to hear. Thus, B.J. has made contrary statements about his wishes and/or feelings depending on his immediate circumstances.

{¶43} There was also evidence before the juvenile court that Mikal hindered Denise's visitation with B.J. by not allowing her to pick him up from school, and blamed Denise for B.J. quitting football after he urinated on himself.

{¶44} Grida, Vidmar, and Geauga Job and Family services all recommended that it was in B.J.'s best interest to be removed from his current surroundings and be placed in a neutral environment.<sup>4</sup>

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4. Grida: "It is recommended that measures be taken to eliminate current surroundings that have heightened B.J.'s anxiety and hyper vigilance \*\*\* [and] that B.J. be placed in a stress free environment that would prove neutral, safe and nurturing." Vidmar: "[B.J.] needs a safe, secure, empathetic, consistent and nurturing environment in order for him to experience a healthy childhood and to stabilize his depressive and anxious symptoms." Craig Swenson, Assistant Prosecutor on behalf of Job and Family Services: "Our recommendation is that [B.J.] be placed in the temporary custody of Job and Family Services. \*\*\* [I]f this Court is not inclined to do that, Job and Family Services really does not know what other services we can really provide, and so we \*\*\* would ask to terminate our involvement as we really don't know where to go and what services we could do to help the situation, your Honor."

{¶45} This evidence substantiates the juvenile court’s findings with respect to a change in circumstances, i.e., that B.J.’s mental health continues to worsen, Mikal is not supportive of the therapeutic efforts on B.J.’s behalf, and Mikal is unable or unwilling to facilitate a relationship with B.J.’s mother.

{¶46} The first assignment of error is without merit.

{¶47} In his second assignment of error, Mikal argues the juvenile court abused its discretion by failing to consider the factors listed in R.C. 3109.04(F)(1) as a whole rather than an all-or-nothing ten-part test. *Puls v. Puls*, 2nd Dist. No. 20487, 2005-Ohio-1373, at ¶23 (“[t]he R.C. 3109.04(F)(1) factors must be considered as a whole rather than an all-or-nothing ten-part test”). Specifically, Mikal claims the court failed to balance the evidence of Denise’s questionable mental health and B.J.’s fear of her boyfriend, Mark Bogadi, who lives at her residence.

{¶48} Revised Code 3109.04(F) sets forth a non-exclusive list of ten factors that a court “shall consider” in determining the best interest of a child. These factors include the “mental and physical health of all persons involved in the situation” and “[t]he child’s interaction and interrelationship with \*\*\* any \*\*\* person who may significantly affect the child’s best interest.” R.C. 3109.04(F)(1)(e) and (c). “[T]here is no requirement that a trial court expressly and separately address each best-interest factor.” *Wise v. Wise*, 2nd Dist. No. 23424, 2010-Ohio-1116, at ¶5 (citation omitted). “[I]n the absence of any indication to the contrary, [this court] will assume that the trial court considered all the relevant factors’ that must be reviewed in determining the best interest of the child.” *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, at ¶40 (citations omitted).

{¶49} We find no abuse of discretion in the juvenile court's balancing of the relevant factors. The court heard testimony at the review hearing regarding Denise and Mark's participation in counseling. While Denise's compliance with the court's order to attend counseling has not been perfect, there were no serious concerns expressed about her mental health. Likewise, with respect to Mark, Prohaska testified that B.J.'s relationship with him "appears to be positive," inasmuch as B.J. "laughs and jokes with him, and doesn't seem to be uncomfortable around him."

{¶50} The second assignment of error is without merit.

{¶51} In the third assignment of error, Mikal argues the juvenile court abused its discretion by denying him parenting time and ordering him not to come within a 1/4 mile of B.J., except for counseling.

{¶52} "A noncustodial parent's right of visitation with his children is a natural right and should be denied only under extraordinary circumstances, such as unfitness of the noncustodial parent or a showing that visitation with the noncustodial parent would cause harm to the children. The burden of proof in this regard is on the party contesting visitation privileges." *Petry v. Petry* (1984), 20 Ohio App.3d 350, at paragraph one of the syllabus; accord *Durso v. Durso*, 11th Dist. No. 3832, 1987 Ohio App. LEXIS 9917, at \*3.

{¶53} Mikal argues that B.J. was thriving while in his custody and that the juvenile court either ignored or failed to consider evidence that Denise had falsely misrepresented his mental health history to Job and Family Services, she and Mark Bogadi were hostile to Guardian ad Litem Grida, and she failed to facilitate a relationship between he and B.J.

{¶54} As demonstrated under the first assignment of error, Mikal's assertion that B.J. was thriving while under his custody is not supported by the evidence and/or recommendations before the juvenile court. With respect to Denise's shortcomings as a parent, we note that this evidence has no relevance to the propriety of the court denying Mikal visitation. In other words, demonstrating that Denise is an unsuitable parent does not, ipso facto, make Mikal a more suitable parent.

{¶55} In the present case, both parties' parenting abilities are deficient. As the Ohio Supreme Court has noted, "[a] juvenile court adjudication of abuse, neglect, or dependency is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents." *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1991, at paragraph two of the syllabus. Moreover, the parties have demonstrated a complete inability to co-parent the child to such an extent that the effort to do so has proven psychologically damaging to B.J. Thus, there is evidence of parental unsuitability and the risk of visitation causing B.J. further harm. These are extraordinary circumstances justifying the termination of Mikal's visitation with B.J. outside of a therapeutic setting.<sup>5</sup>

{¶56} Finally, Mikal's reliance on R.C. 3109.04(F)(2) is misplaced inasmuch as that section applies to "shared parenting" as defined in R.C. 3109.04(K).

{¶57} The third assignment of error is without merit.

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5. Legally, we are applying the law as recently stated in *Moline v. Moline*, 11th Dist. No. 2009-A-0013, 2010-Ohio-1799. Factually, however, these two cases are distinguishable. *Moline* is essentially a divorce action. The child in *Moline* was never determined to have been abused or dependent and there has never been a finding that either of the parents were unfit. In *Moline*, the child's therapists recommended "visitation" with the father in a therapeutic setting and the juvenile court found this to be in the child's best interest. As explained in the body of this opinion, the opposite holds in the present case. B.J.'s therapist, as of this appeal, was not recommending visitation with Mikal and the juvenile court found it to be in B.J.'s best interest that there be no visitation for the present.

{¶58} For the foregoing reasons, the Judgment of the Geauga County Court of Common Pleas, Juvenile Division, transferring custody of B.J. to Denise and suspending Mikal's parenting time, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.