[Cite as *In re A.K.*, 2012-Ohio-221.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF: A.K., DEPENDENT CHILD.	**:**	**O P I N I O N**
	:	**CASE NO. 2011-L-060**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2010NG00006.

Judgment: Affirmed.

Christopher J. Boeman, 3537 North Ridge Road, Perry, OH 44081 (For Appellant, Jerry Bradshaw).

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee, Lake County Department of Job & Family Services).

James R. Flaiz, Carrabine & Reardon Co., L.P.A., 7445 Center Street, Mentor, OH 44060 (Guardian ad litem).

Todd D. Cipollo, 33977 Chardon Rd., Suite 100, Willoughby Hills, OH 44094 (For Minor Child, A.K.).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Jerry Bradshaw, appeals the judgment of the Lake County Court of Common Pleas, Juvenile Division, finding him guilty of contempt and sentencing him to 30 days in jail and a fine of $250. The trial court also awarded temporary custody of his minor son, A.K., to the Lake County Department of Job and Family Services ("LCDJFS"). For the following reasons, we affirm.

{¶2} A complaint was filed in the trial court alleging that A.K. was neglected and/or abused. The complaint stated that A.K. had not been enrolled in any scholastic program for the 2009-2010 school year.

{¶3} An adjudicatory hearing was held, and by agreement of the parties, A.K. was found to be dependent. The neglect and/or abuse case was dismissed and protective supervision was granted to LCDJFS.

{¶4} The trial court, in a judgment dated March 25, 2010, stated:

{¶5} "By agreement of the parties, the Lake County Department of Job and Family Services shall provide protective supervision regarding said child.

{¶6} "By agreement of the parties, a case plan shall be adopted as an order of this Court. The case plan shall contain the following goals: a basic needs requirement contained in the case plan previously filed with this Court, as well as a mental health requirement for the juvenile to receive a mental health assessment and follow all recommendations."

{¶7} On May 6, 2010, LCDJFS filed a motion to show cause alleging that A.K. was withdrawn from Ohio Virtual Academy and that appellant had refused to comply with the trial court's order.

{¶8} After a hearing, the magistrate found appellant in contempt of court. In an August 6, 2010 magistrate's decision, appellant was sentenced to 30 days in jail and a fine of $250. Appellant was able to purge his sentence upon compliance with the following:

{¶9} "Father shall sign all releases of information required by the Case Plan as required by the Lake County Department of Job and Family Services * * *.

{¶10} "Father shall cooperate with all home visits with the assigned social worker.

{¶11} "Father shall enroll the minor child in a traditional (structured classroom setting with a school building), accredited public or private school for the 2010-2011 school year, and the enrollment process shall be initiated no later than 14 days from today. The child shall be enrolled in time to begin school on the first scheduled school day.

{¶12} "The minor child shall punctually attend school, and every scheduled class, on a daily basis, unless excused by a school nurse or a medical doctor via a written excuse, in compliance with regularly scheduled school hours and fully cooperate with school officials.

{¶13} "Father shall sign the necessary release for school to conduct a Multi-Factored Examination and agree to allow his son to receive all services recommended by the school as a result of this testing.

{¶14} "The minor child shall have one pediatrician, one dentist and one psychiatrist (if needed). If Father wishes to change any of his son's treatment providers, he must first obtain leave of Court."

{¶15} The trial court adopted the magistrate's decision on August 11, 2010; however, on August 19, 2010, appellant filed objections to the magistrate's decision, staying the decision.

{¶16} Thereafter, the guardian ad litem requested an ex parte emergency interim order, requesting that appellant be required to enroll his son into a traditional classroom setting, to begin on the first scheduled school day. Said request was

granted. Appellant failed to comply with this order, and the guardian ad litem filed a motion to show cause stating that appellant had not enrolled A.K. in school.

{¶17} On January 14, 2011, LCDJFS filed a motion for temporary custody.

{¶18} On January 19, 2011, the trial court overruled the objections to the magistrate's decision and upheld the magistrate's decision filed August 6, 2010. LCDJFS filed a motion to impose sentence on January 28, 2011. Attached to the motion was an affidavit from Lindsay Leppla, a social worker with LCDJFS, averring that appellant had not enrolled A.K. into a traditional school nor had he signed a release for A.K. to complete a multi-factored evaluation. Further, Ms. Leppla averred that appellant admitted that he refused to enroll A.K. in Painesville City School and that he had failed to enroll A.K. in another school district. Appellant also failed to comply with a scheduled home visit.

{¶19} There are two separate contempt issues to be addressed in this appeal—one initiated by LCDJFS and one by the guardian ad litem. A hearing was held on April 15, 2011, pursuant to, inter alia, LCDJFS' motion for temporary custody, the guardian ad litem's motion to show cause, and LCDJFS' motion to impose sentence.

{¶20} In a judgment entry dated April 15, 2010, the trial court stated:

{¶21} "To date, [appellant] has failed to purge himself of Contempt. The social worker has received no documentation from [appellant] that the child has been enrolled in a traditional school or that he has signed a release for the child to complete a multi-factored evaluation. [Appellant] has refused to enroll the child in Painesville City Schools and has failed to enroll the child in another school district. Additionally,

[appellant] failed to cooperate with a scheduled home visit on January 24, 2011, and has not responded to the social worker's attempts to conduct other home visits."

{¶22} As it pertained to the motion to impose sentence, the trial court sentenced appellant to 30 days in jail and a $250 fine. As it pertained to the motion to show cause, the trial court sentenced appellant to a 60-day jail term. The trial court noted that appellant can purge the contempt by complying with the conditions as enumerated above.

{¶23} Temporary custody of A.K. was awarded to LCDJFS.

{¶24} Appellant filed a timely notice of appeal and asserts three assignments of error for our review. Appellant's first assignment of error states:

{¶25} "The trial court abused its discretion and erred, to the prejudice of appellant-father, by granting the LCDJFS's motion to impose sentence and the decision was against the manifest weight of the evidence."

{¶26} This court has previously discussed the issue of contempt, stating:

{¶27} "The primary purpose of a contempt proceeding is to vindicate the authority and proper functioning of the court. Great reliance should be placed upon the trial court's discretion in holding a party in contempt.

{¶28} "Contempt is generally understood as a disregard for judicial authority. Contempt may be either direct or indirect. Direct contempt involves actions occurring in the presence of the court, while indirect contempt occurs outside its immediate presence. Furthermore, contempt proceedings may be either criminal or civil in nature. Criminal and civil contempt serve different purposes in the judicial system and are governed by different rules. Civil contempt is pursued for the benefit of a complainant

and is therefore remedial in nature. Alternatively, criminal contempt is usually characterized by unconditional fines or prison sentences. One charged and found guilty of civil contempt must be allowed to purge him/herself of the contempt by showing compliance with the court's order he/she is charged with violating. However, in the case of criminal contempt, there is no requirement that the individual charged be given the opportunity to purge the contempt." (Citations omitted.) *In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002, ¶ 22-23.

{¶29} In a civil contempt proceeding, the standard of proof is clear and convincing evidence of guilt. *Klodt v. Portage Cty. Agricultural Soc.*, 11th Dist. No. 2000-P-0109, 2001 Ohio App. LEXIS 3527, *4 (Aug. 10, 2001), citing *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253 (1980).

{¶30} Here, since the jail sentence and fine were conditional, the contempt proceeding was civil in nature and the applicable standard of proof was clear and convincing evidence.

{¶31} Under his first assignment of error, appellant presents two issues for our review. First, appellant maintains that the trial court erred in granting the motion to impose, as the purge conditions were "either substantially complied with or [appellant] still had time to comply with it."

{¶32} At the outset, appellant argues that LCDJFS filed its motion to impose before the end of the 14-day period allowed to appellant to comply with the purge conditions. Although LCDJFS filed its motion to impose prior to the 14-day deadline, the record indicates that the hearing was not set until April 15, 2011. Theoretically, if appellant had complied with the purge conditions within the 14-day time frame, the

hearing could have been cancelled. Nonetheless, the record of the April 15, 2011 hearing indicates that appellant still had not complied with the purge conditions and, therefore, he was sentenced to a 30-day jail term.

{¶33} Ms. Leppla, the social worker with LCDJFS, testified that since January 6, 2011, appellant had not allowed her to conduct a home visit. Ms. Leppla testified that she had made three attempts each month. Further, appellant had not provided any documentation that A.K. was enrolled in a traditional public or private school nor was she aware of the completion of a multi-factored evaluation. Ms. Leppla stated that appellant indicated he was not enrolling A.K. in Painesville City School and that he attempted to enroll A.K. into Fairport School, but he was denied admission. Additionally, Ms. Leppla stated that home schooling, in this case, was not in compliance with the case plan, as it did not meet A.K.'s educational needs. Additionally, Ms. Leppla noted that since August 1, 2010, until the date of the hearing, she had not seen any substantial evidence that A.K. had been involved in any type of schooling.

{¶34} Christine Young, of the Painesville City School, also testified at the hearing. Ms. Young stated that A.K. was not enrolled in Painesville City School nor had she received any notice from any other school district in the county regarding A.K.'s enrollment. Ms. Young testified that she had not received any notification that A.K. completed a multi-factored evaluation.

{¶35} The evidence presented at the April 15, 2011 hearing indicates that appellant failed to comply with the purge conditions as imposed by the trial court. We find the trial court did not err in granting the motion to impose filed by LCDJFS.

{¶36} Also under his first assignment of error, appellant maintains that his objection to the magistrate's decision should have been granted. Appellant asserts that A.K.'s educational needs were being met through home schooling.

{¶37} The record indicates that a case plan was adopted which contained two goals. First, the case plan required appellant to meet the educational, medical, and safety needs of A.K. Second, the case plan required appellant to schedule and complete a mental health assessment for A.K.

{¶38} A hearing was held before the magistrate on LCDJFS' motion to show cause. At the hearing, the evidence revealed that A.K. was withdrawn from the Ohio Virtual Academy due to truancy less than one month after the case plan was adopted. Further, Connie Perry, a records and attendance employee with the Ohio Virtual Academy, testified that A.K.'s enrollment date started on approximately February 10, 2010, and terminated on approximately April 14, 2010. Ms. Perry indicated that there was a lack of response from appellant and incomplete log-ins.

{¶39} Further, Ms. Leppla testified that A.K. was not enrolled in school between April 14, 2010, and May 24, 2010. Ms. Leppla also stated that appellant did not sign any releases for medical providers nor did he comply with home visits.

{¶40} Dr. Steve Young, the coordinator of special projects at the Lake County Educational Services Center, also testified at the hearing. Dr. Young asserted that although appellant started the application process to have A.K. home schooled, at the time of the hearing, appellant had not complied with the second phase.

{¶41} The magistrate also heard from appellant. Appellant stated that the withdrawal from Ohio Virtual Academy was due to the lack of internet access as well as

the lack of antivirus software and a power cord for the computer. Appellant noted that A.K. had previously been enrolled in two online schools. Moreover, appellant stated that from April 2010 until May 2010, A.K. was not involved in any type of educational program.

{¶42} We find the evidence presented demonstrates that appellant was not in compliance with the adopted case plan, and, as such, the trial court did not err in finding appellant in contempt.

{¶43} Appellant's first assignment of error is without merit.

{¶44} Appellant's second assignment of error states:

{¶45} "The trial court abused its discretion and erred, to the prejudice of appellant-father, by granting the [guardian ad litem's] motion to show cause and this decision is against the manifest weight of the evidence."

{¶46} Under this assigned error, appellant argues that the interim order, issued on August 24, 2010, expired after 28 days as set forth in Juv.R. 40. Therefore, the trial court erred in granting the guardian ad litem's motion to impose, filed on January 14, 2011.

{¶47} "Contempt of court consists of two elements. The first is a finding of contempt of court and the second is the imposition of a penalty or sanction, such as a jail sentence or fine. Until both a finding of contempt is made and a penalty imposed by the court, there is not a final order. The mere adjudication of contempt is not final until a sanction is imposed." *Chain Bike Corp. v. Spoke 'N Wheel, Inc.*, 64 Ohio App.2d 62, 64 (1979).

{¶48} The trial court, in its April 15, 2011 judgment entry, stated:

{¶49} "As it pertains to the Motion to Show Cause, the Defendant is sentenced to the Lake County Jail for 60 days.

{¶50} "The Defendant may purge himself from contempt by complying with the following purge order: Once the child returns to the Father's custody, or at any and all times that the child is in Father's custody, Father shall sign all releases of information required by the Case Plan as requested by the Department, cooperate with all home visits with the assigned social worker, ensure the enrollment of A.K. in a traditional (structured classroom setting within a school building), accredited public or private school, sign the necessary release for the school to conduct a Multi-Factored Examination and agree to allow his son to receive all services recommended by the school as a result of this testing, ensure that the child punctually attends school, and every scheduled class, on a daily basis, unless excused by a school nurse or a medical doctor via written excuse, in compliance with regularly scheduled school hours, and fully cooperate with school officials."

{¶51} With respect to the above, although the trial court found appellant in contempt, it then gave him an opportunity to purge. Under the case law of this state, when a trial court makes a finding of contempt and imposes a penalty or sanction, but allows an opportunity to purge, the order is not final and appealable. *Estate of Sheehan*, 11th Dist. No. 2007-G-2774, 2007-Ohio-2571, ¶ 4, citing *Chain Bike Corp.*, 64 Ohio App.2d at 62; *see also Nelson v. Nelson*, 11th Dist. No. 2006-G-2696, 2006-Ohio-4944. With respect to the contempt issue related to the guardian ad litem's motion, until a second order is entered by the trial court imposing sentence without an opportunity to

purge, the issue of contempt is not ripe for review. *Welch v. Welch*, 11th Dist. No. 2004-L-178, 2005-Ohio-560, ¶ 5. *See Sheehan*, *supra*, at ¶ 6.

{¶52} Appellant's third assignment of error alleges:

{¶53} "The trial court abused its discretion and erred, to the prejudice of appellant-father, by granting the [guardian ad litem's] motion to grant temporary custody to [LCDJFS] and this decision is against the manifest weight of the evidence."

{¶54} Appellant argues that the granting of LCDJFS' motion for temporary custody, filed January 14, 2011, was an abuse of discretion. In its motion for temporary custody, LCDJFS stated that the educational needs of appellant's minor son were not being met, as he was not in school. In its April 15, 2011 judgment entry, the trial court found that it was in the best interest of the child to grant LCDJFS temporary custody. The trial court further stated:

{¶55} "On March 22, 2010 this Court found the child, [A.K.], to be a dependent child. On that date the Court ordered protective supervision of the child to the Department and adopted a modified version of the case plan including goals for the child to have all of his needs met including his educational needs, and follow any and all recommendations for these needs, and for the child to complete a mental health assessment and follow any and all recommendations from this assessment.

{¶56} "The Court finds that reasonable efforts were made to avoid the removal of the child from the home, but to remain in the home would be contrary to the best interests of the child due to: Father's continued negligence or refusal to enroll the child in a traditional, structured school setting to ensure that the child be educated."

{¶57} The Ohio Supreme Court has held that "an adjudication that a child is neglected or dependent, followed by a disposition awarding temporary custody to a public children services agency pursuant to R.C. 2151.353(A)(2) constitutes a 'final order' for purposes of R.C. 2505.02 and is appealable to the court of appeals pursuant to R.C. 2501.02." *In re Murray*, 52 Ohio St.3d 155, 161 (1990).

{¶58} In his brief, appellant argues only that the trial court's granting of temporary custody to LCDJFS should be reversed since the motion to show cause and the motion to impose are without merit. *See* App.R. 16(A)(7). However, as we found under appellant's first assignment of error, the trial court properly found appellant in the initial contempt of court and properly imposed the sentence, as appellant failed to comply with his purge conditions. Additionally, the second finding of contempt with respect to the guardian ad litem's motion to impose is not a final, appealable order, as appellant has not had the opportunity to comply with the purge conditions and the sentence has not yet been imposed unconditionally.

{¶59} "When choosing among the dispositional alternatives, the court's 'primary, if not only, consideration' is the child's best interest. Furthermore, when making its dispositional order, a court must consider which situation will best promote the 'care, protection, and mental and physical development' of the child. A court should separate a child from his family environment 'only when necessary for the child's welfare or in the interests of public safety.' If a court chooses to award temporary custody to a children services agency, the preponderance of the evidence must support that award" (Citations omitted.) *In the Matter of R.E.C.*, 4th Dist. No. 11CA2, 2011-Ohio-3437, ¶ 14.

{¶60} Based on the record before us, the trial court did not abuse its discretion by placing A.K. in the custody of LCDJFS. Again, the evidence indicates that as of the April 15, 2011 hearing, appellant had not enrolled A.K. in a traditional, structured school setting, as required by the trial court. Nor was A.K. enrolled in an accredited public or private school on the first day of the 2010-2011 school year. While A.K. should be in the seventh grade, he did not complete the fourth grade until 2010. Further, appellant had failed to cooperate with a scheduled home visit and did not respond to any of the social worker's attempts to conduct other home visits. There being no abuse of discretion by the trial court, appellant's third assignment of error is without merit.

{¶61} For the reasons stated in the opinion of this court, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is hereby affirmed as to the first and third assignment of error. With respect to the second assignment of error, we determine that due to the lack of a final, appealable order, it is not ripe for review.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.