

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN RE: :
B.K., et al. : CASE NO. CA2010-12-324
: OPINION
: 9/6/2011
:
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. JN2009-0008, JN2009-0009

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Adolfo Olivas, 10 Journal Square, 3rd Floor, Hamilton, Ohio 45011, guardian ad litem

RINGLAND, J.

{¶1} Appellant, Angela K. (Mother), appeals from the decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of her two minor children, B.K. and C.K., to their paternal-grandfather, Greg K., and his wife, Diana K. (Grandparents). For the reasons outlined below, we affirm.

{¶2} On January 12, 2009, Butler County Department of Job and Family Services, Children Services Division (Children Services), filed a complaint alleging the children, who, at that time, were ages four and five, were abused, neglected, and dependent after learning Mother had been involved in a physical altercation with her husband, Daniel K. (Father), the children's primary caregiver and an active heroin user. The next day, after Children Services filed an emergency ex parte order, the trial court granted Grandparents temporary custody of the children. Following an adjudication hearing, the children were found neglected and dependent and ordered to remain in the temporary custody of Grandparents.

{¶3} On March 13, 2009, Children Services filed a motion for temporary custody requesting the trial court to grant Mother temporary custody of the children after finding "there [were] no active safety concerns that would prohibit [the children] from being safely returned to [Mother's] temporary custody." The trial court subsequently granted Children Services' motion on March 16, 2009.

{¶4} On October 2, 2009, Children Services filed a motion requesting the trial court to terminate Mother's temporary custody and return the children to Grandparents after learning Mother had violated the trial court's September 1, 2009 order prohibiting Father from "enter[ing] any residence wherein mother and the children are residing." According to an affidavit submitted by Children Services in support of its motion, Father, who, has since been incarcerated on charges of burglary and theft, "resumed living with [Mother] and the children, against the order of the court" following a "recent relapse." The trial court once again granted Grandparents temporary custody of the children.

{¶5} On December 10, 2009, Children Services filed a motion for legal custody requesting the trial court to grant Grandparents legal custody of the children. Following a three-day dispositional hearing before a magistrate that ultimately concluded on June 16, 2010, during which the magistrate denied Mother's motion to appoint a new guardian ad

litem, Grandparents were granted legal custody of the children. The trial court subsequently overruled Mother's objections to the magistrate's decision and adopted the magistrate's decision in full in an entry filed November 8, 2010.

{¶6} Mother now appeals from the trial court's decision overruling her objections to the magistrate's decision granting legal custody of the children to Grandparents, raising three assignments of error for review.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING LEGAL CUSTODY TO [GRANDPARENTS]."

{¶9} In her first assignment of error, Mother argues that the trial court erred by overruling her objections to the magistrate's decision granting legal custody of the children to Grandparents as such finding "is not supported by the manifest weight of the evidence." We disagree.

{¶10} After a child is adjudicated abused, neglected, or dependent, such as the case here, the trial court may award legal custody to a nonparent upon a demonstration by a preponderance of the evidence that granting legal custody to the nonparent is in the child's best interest. R.C. 2151.353(A)(3); *In re C.K.*, Butler App. No. CA2008-12-303, 2009-Ohio-5638, ¶10, citing *In re Nice* (2001), 141 Ohio App.3d 445. A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶26. In determining whether a decision is against the manifest weight of the evidence, "an appellate court is guided by the presumption that the trial court's findings were correct." *Id.* at ¶28, quoting *In re Peterson* (Aug. 28, 2001), Franklin App. No. 01AP-381, 2001 WL 988013, at *3. Therefore, "[w]here an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the

evidence by a reviewing court." *In re T.M.*, Butler App. No. CA2007-01-019, 2007-Ohio-6034, ¶28, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶11} In order to determine the best interest of a child, R.C. 3109.04(F)(1) requires the trial court to consider all relevant factors. *In re M.M.*, Fayette App. No. CA2010-12-034, 2011-Ohio-3913, ¶9. These factors include, but are not limited to: the wishes of the parents; the child's wishes and concerns, if interviewed; the child's interaction and interrelationship with other family members or others who may significantly affect the child's best interest; the child's adjustment to home, school and community; the mental and physical health of all persons involved; the likelihood that the caregiver would honor and facilitate or had honored and facilitated visitation and parenting time; whether support orders have been followed; and whether household members or parents have been convicted or pled guilty to certain offenses. See R.C. 3109.04(F)(1); *In re A.L.H.*, Preble App. No. CA2010-02-004, 2010-Ohio-5425, ¶9.

{¶12} In general, appellate review of custody cases is limited to whether the trial court abused its discretion. *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, ¶14; *In re Brown* (2001), 142 Ohio App.3d 193, 198. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *In re J.M.*, Warren App. No. CA2008-12-148, 2009-Ohio-4824, ¶17, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶13} In this case, the record indicates that B.K. and C.K., both of whom were interviewed by the trial court, were placed in the temporary custody of Grandparents from January 12, 2009 to March 16, 2009, and again on October 2, 2009. During this time, the

children created a strong bond with Grandparents and have exhibited significant improvement in their previously uncontrollable behavior. In fact, as the caseworker from Children Services testified, "[i]n the grandparents' home, it seems as though the children follow direction, follow rules; they're thriving in the structure." The record also indicates that the children's guardian ad litem supports awarding legal custody to Grandparents, that the children have blossomed both academically and socially while in Grandparents custody, and that the children have had virtually no difficulty adjusting to Grandparents more stable home environment. In addition, while their relationship is somewhat contentious, the record indicates Grandparents would be more than willing to honor and facilitate Mother's visitation time. According to Greg K., the children's paternal grandfather, "[w]e have no problem with their mom seeing them and calling them."

{¶14} On the other hand, the record indicates that although Mother tries to discipline the children appropriately, these attempts, while showcasing some improvement, are generally unavailing and merely lead to the children exhibiting overtly aggressive behavior towards her, as well as towards each other. Furthermore, while the children have certainly bonded to her, the record indicates that Mother's attendance at her scheduled visitation has been, at best, sporadic, and that she has failed to pay any court-ordered child support to Grandparents. In addition, while Mother seems to have little difficulty in securing full-time employment, as the trial court found, and for which we certainly agree, Mother has engaged in "erratic job-hopping patterns" by failing to maintain such employment for any significant period of time. The record also indicates that Mother has not satisfactorily completed her case plan, has experienced a significant period of residential instability, including a period of homelessness, suffers from mental health issues for which she does not take her prescribed medications, and, despite his recent incarceration and prior battles with drug addiction, continues to maintain nearly constant contact with Father.

{¶15} After a thorough review of the record, we find the trial court's decision overruling Mother's objections to the magistrate's decision granting Grandparents legal custody of the children was supported by a substantial amount of credible and competent evidence. As noted above, since being placed in Grandparents' custody, the children have thrived in their now stable home environment and have blossomed both academically and socially. Therefore, while Mother's love for her children is apparent, and although she has made some improvement, we simply cannot say the trial court's decision was against the manifest weight of the evidence or that the court abused its discretion by finding it was in the children's best interest to grant legal custody to Grandparents. Accordingly, Mother's first assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY OVERRULING THE MOTION TO GRANT A NEW GUARDIAN AD LITEM AND BY NOT SEPARATING THE ROLES OF GUARDIAN AD LITEM AND ATTORNEY FOR THE CHILDREN DUE TO A POTENTIAL CONFLICT OF INTERESTS."

{¶18} In her second assignment of error, Mother argues that the trial court erred by overruling her objection to the magistrate's decision denying her motion to appoint the children with a new guardian ad litem "after a potential conflict arose between the wishes of the children and the guardian's recommendation." We disagree.

{¶19} Generally, when an attorney is appointed as guardian ad litem, as is the case here, "that attorney may also act as counsel for the child, absent a conflict of interest." *In re Holt*, Franklin App. No. 03AP-355, 2003-Ohio-5580, ¶20. In other words, because the guardian ad litem is permitted to maintain dual roles in a custody dispute, "a court is not required to appoint separate counsel unless the [guardian ad litem's] recommendations regarding their best interest conflict with the children's wishes." *In re J.M.*, 2009-Ohio-4824

at ¶52, citing *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500; see, also, Juv.R.4(C); R.C. 2151.281(H). In determining whether a conflict exists, "courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child." *In re J.P.-M.*, Summit App. No. 23694, 23714, 2007-Ohio-5412, ¶53, quoting *Williams* at ¶17. Such appointment may be necessary when the child has consistently and repeatedly expressed a strong desire that differs and is otherwise inconsistent with the guardian ad litem's recommendations. See *In re Wylie*, Greene App. No. 2004CA0054, 2004-Ohio-7243, ¶73; *In re Hilyard*, Vinton App. Nos. 05CA600-604, 05CA606-6009, 2006-Ohio-1965, ¶37; *In re J.B.*, Summit App. No. 23436, 2007-Ohio-620, ¶22; *In re K.K. & D.C.*, Licking App. No. 09-CA-93, 2009-Ohio-5887, ¶15.

{¶20} After a thorough review of the record, we find no error in the trial court's decision overruling mother's motion to appoint a new guardian ad litem for the children. Here, while it may be true that the children's court-appointed special advocate indicated the children had expressed some desire to live with their mother, there is no indication that they expressed this desire consistently and repeatedly. Moreover, despite numerous opportunities to do so, it is clear that the children never expressed that same desire to their guardian ad litem. In fact, as the guardian ad litem specifically stated, "[the children] have been consistent in liking where they are, enjoying where they are," that they "have been consistent in being happy with their placement" with Grandparents, and that, although they have told him they "want to see their mother," he "would have been quite concerned had they not wanted to." In turn, based on the facts and circumstances of this case, it simply cannot be said that the children have consistently and repeatedly expressed a strong desire that differed from their guardian ad litem. Therefore, having found no conflict of interest existed that would have necessitated the appointment of a new guardian ad litem, we find the trial

court did not err by denying Mother's motion. Accordingly, Mother's second assignment of error is overruled.

{¶21} Assignment of Error No. 3:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING LEGAL CUSTODY, WITHOUT THE REQUIREMENT THAT THE GUARDIAN AD LITEM FILE A FINAL REPORT."

{¶23} In her third assignment of error, Mother argues that the trial court erred by overruling her objection to the magistrate's decision "by not requiring the guardian ad litem to file a final report with written recommendations" prior to the dispositional hearing pursuant to Ohio Rules of Superintendence 48(F). However, while it may be true that the magistrate did not require the guardian ad litem to file his written report, something Mother never brought to the magistrate's attention during the dispositional hearing, "[b]ecause Sup.R. 48 is a general guideline that does not have the force of statutory law, an appellant does not have any substantive right to enforce it." *Rice v. Rice*, Delaware App. No. 10 CA F 11 0091, 2011-Ohio-3099, ¶40. In other words, the Ohio Rules of Superintendence are "purely internal housekeeping rules which do not create substantive rights in individuals or procedural law." *Elson v. Plokhooy*, Shelby App. No. 17-10-24, 2011-Ohio-3009, ¶40; see *In re K.G.*, Wayne App. No. 10CA0016, 2010-Ohio-4399, ¶12; see, also, *State v. Gettys* (1976), 49 Ohio App.2d 241, 243. In turn, while it may be better practice for the trial court to have the guardian ad litem file his written report in conjunction with his oral recommendations, such violation of the Ohio Rules of Superintendence is simply not grounds for reversal. See, e.g., *Allen v. Allen*, Trumbull App. No. 2009-T-0070, 2010-Ohio-475, ¶31 (finding violation of Sup.R. 48[F][2] not grounds for reversal). Therefore, Mother's third assignment of error is overruled.

{¶24} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.