

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

IN RE: :  
B.J. : CASE NO. CA2011-10-192  
: OPINION  
: 7/9/2012  
:  
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. JN2010-0495

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**PIPER, J.**

{¶ 1} Appellant, C.M. (Mother), appeals a decision of the Butler County Common Pleas Court, Juvenile Division, granting legal custody of Mother's teenage daughter, B.J. to S. Morgan, Mother's sister and B.J.'s aunt.

{¶ 2} On October 21, 2010, Morgan initiated a complaint alleging that B.J. was neglected, abused and dependent. Prior to this motion being filed, another of B.J.'s maternal aunts, C. Coombs, had filed a motion for custody. However, once Morgan filed her complaint, Coombs withdrew her custody motion.

{¶ 3} Prior to Morgan's motion, B.J. had been in the temporary custody of Coombs for approximately 18 months, then in her father's custody for a little under a year. B.J. then went to live with Mother, who had moved for and was granted custody by the court. While living in Mother's household, B.J. and Mother became involved in a physical altercation, during which Mother grabbed B.J. around her neck and threw her onto the bed in B.J.'s bedroom. B.J. stated that she was unable to breathe during the incident, and that she was so fearful of Mother that she pushed her dresser against her door to prohibit Mother from re-entering her bedroom. Mother admitted to grabbing B.J. around the neck and throwing her on the bed, but stated it was because B.J. was yelling in her face.

{¶ 4} After the incident, B.J. called her family and friends and told them what happened. Morgan called the police who removed B.J. from Mother's care. B.J. then went to stay with Morgan at her home. B.J. stated that Mother yelled at her frequently, and that Mother kept "barely any food at all" in the house. Morgan's complaint alleged that Mother choked B.J. and that she was not feeding B.J.

{¶ 5} A magistrate held an adjudicatory hearing in May 2011, and later issued an order finding B.J. to be abused and dependent. In reaching its decision, the magistrate also considered testimony admitted at a previously-held shelter care hearing, the transcript of which has not been made a part of the record by either party. In September 2011, the court held a dispositional hearing, after which the magistrate granted Morgan legal custody of B.J. Neither party filed any objections to the magistrate's decision. The trial court issued a dispositional order granting legal custody of B.J. to Morgan. Pursuant to the order, visitation

between B.J. and Mother was to be held at B.J.'s discretion. Mother now appeals the decision of the juvenile court, raising the following assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED BY FINDING THAT THE MINOR CHILD, B.J., WAS DEPENDENT AND/OR ABUSED.

{¶ 8} Mother argues in her first assignment of error that the trial court erred by finding B.J. abused and dependent because the trial court considered irrelevant evidence and believed B.J.'s version of events rather than her own.

{¶ 9} As previously stated, Mother did not object to the magistrate's decision regarding the finding of abuse and dependency. Pursuant to Juv.R. 40(D)(3)(b)(iv), a claimed error is reviewed under the plain error doctrine when the party fails to make objections to the magistrate's opinion. The Ohio Supreme Court defined plain error in the civil context as an error that "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus. The court went on to explain that because the plain error doctrine originated as a criminal law concept,

in applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.

*Id.* at 121.

{¶ 10} According to R.C. 2151.27, "any person" having knowledge that a child is abused, dependent, or neglected, "may file a sworn complaint with respect to that child in the juvenile court \* \* \*." The fact that any person can file a complaint alleging abuse, neglect, or dependency is further codified in Juv.R. 10(A), which reiterates that "any person" having

knowledge of abuse, neglect, or dependency can file a complaint in juvenile court. Therefore, "a public or private party can initiate an action pursuant to R.C. 2151.27 to have a court determine whether a child is neglected." *In re P.T.*, 5th Dist. No. 2011 CA 00200, 2012-Ohio-1287, ¶ 13, citing *In re Shepherd*, 4th Dist. No. 00CA12, 2001-Ohio-2499.

{¶ 11} When a private party files a complaint pursuant to R.C. 2151.27, that party may also move for legal custody of the child. Once the complaint is filed, the juvenile court will hold a bifurcated hearing and first decide if the child is abused, neglected, or dependent, as those terms are defined in R.C. 2151.03, 2151.031 and 2151.04. Only upon an adjudication of abuse, neglect, or dependency will a juvenile court hold a dispositional hearing to determine who will hold legal custody of the child. However, should a juvenile court grant legal custody to a party, a parent may later move to regain custody because a grant of legal custody does not terminate one's parental rights. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, ¶ 23. The case at bar is one in which Morgan, a private party, filed a complaint alleging that B.J. was abused, neglected, and dependent, and was eventually granted legal custody.

{¶ 12} Mother argues that it was plain error for the juvenile court to consider irrelevant evidence when determining whether B.J. was abused or dependent during the adjudication hearing. In support of her argument, Mother relies on *In re S.H.*, 12th Dist. No. CA2005-01-007, 2005-Ohio-5047, in which this court determined that a juvenile court is to determine the issue of dependency as of the date alleged in the complaint. In reaching our decision in *S.H.*, we applied R.C. 2151.23(A)(1), which states,

The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

Concerning any child who *on or about the date specified in the complaint*, indictment, or information is alleged to have violated section 2151.87 of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent,

unruly, abused, neglected, or dependent child and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant[.] (Emphasis added.)

{¶ 13} Mother argues that evidence was introduced at the adjudicatory hearing that was irrelevant because such evidence had nothing to do with B.J.'s condition at the time of Morgan's complaint in October 2010. Mother points to several of the magistrate's specific findings of fact, such as that B.J. was in her father's custody until Mother was granted custody; that Mother had psychological problems dating back to 1983; that Mother had been hospitalized in the psychiatric ward because of Michael Jackson's death; that Mother had smoked marijuana four months *after* the complaint was filed; and that Mother was not taking her medication for mental health issues properly at the time of the hearing. Mother argues that the magistrate improperly considered these facts and that absent such consideration, there was no evidence that B.J. was abused or dependent.

{¶ 14} A trial court's decision finding abuse or dependency must be supported by clear and convincing evidence. *In re T.G.*, 12th Dist. Nos. CA2007-07-158, CA2007-07-171, 2008-Ohio-1795. "Clear and convincing evidence is that which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Id.* at ¶ 29.

{¶ 15} While the magistrate discussed circumstances before or after the date of Morgan's complaint, we do not find that such rises to the level of plain error. Morgan's complaint alleged that B.J. was abused, neglected, and dependent because Mother choked the child "to where she almost passed out," and because Mother "does not feed the child."

{¶ 16} The magistrate heard testimony from B.J. regarding the incident where Mother grabbed her by the throat and threw her on the bed. B.J. testified that she could not breathe once Mother had a hold of her throat and was squeezing. Although Mother did not refer to the physical altercation as choking, she admitted during her own testimony that she grabbed

B.J. by her neck and threw her on the bed. Mother testified that up until that point, she had "ignored" any misbehaving by B.J., but that she grabbed B.J. and threw her on the bed because B.J. "screamed and yelled" in her face. Mother testified that she acted as she had, although she was not in fear for her safety at the time of the incident.

{¶ 17} The magistrate also heard testimony from B.J. that Mother did not keep food in the home, and limited B.J.'s daily food intake to two slices of bread and an apple. B.J. also testified that Mother withheld food as a punishment. Mother admitted to having found a box of cereal that B.J. had hid in her closet, and that a referral had been made to Children Services regarding Mother's refusal to let B.J. eat.

{¶ 18} Mother's choking of B.J. and issues concerning adequate food were therefore alleged to have occurred on or about the time of the complaint, and evidence specific to both instances constituted clear and convincing evidence of abuse and dependency. The magistrate's opinion, while it did mention other reasons to question Mother's parenting ability, did not rise to the level of plain error. Instead, there was clear and convincing evidence that B.J. was abused and dependent even absent the incidences Mother argues are irrelevant.

{¶ 19} We also note that the magistrate was aware of the need to limit the evidence to the time of the complaint. During the adjudicatory hearing, the magistrate sustained several of Mother's objections to testimony of incidents that occurred prior to or after the filing of the complaint. In doing so, the magistrate stated, "this is allegations of abuse, neglect, or dependency that occurred preceding October 20th \* \* \* the date of filing \* \* \*." The magistrate therefore understood that a finding of abuse, neglect, or dependency had to be determined as of the time of the filing of the complaint. The juvenile court's decision was not plain error because there existed clear and convincing evidence establishing B.J.'s abuse and dependency *at the time of the complaint* specific to Mother's choking of B.J. and not providing adequate food.

{¶ 20} Mother also takes issue with the fact that the magistrate believed B.J.'s version of events. Specifically, Mother asserts that she did not choke B.J. and that she always had food in the home. However, and "as is well-established, the juvenile court, rather than this court, had the opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *In re C.B. et al.*, 12th Dist. Nos. CA2008-01-002, CA2008-01-003, 2008-Ohio-5543, ¶ 18, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 21} Regardless of Mother's assertions to the contrary, the juvenile court found B.J.'s testimony credible. As witness credibility and the weight to be given the evidence are matters reserved for the juvenile court's determination, we decline to substitute our judgment for that of the trier of fact in cases involving such matters. *Seasons Coal* at 80. As such, Mother's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED IN GRANTING CUSTODY OF THE CHILD, B.J., TO A NON-PARENT.

{¶ 24} Mother argues in her second assignment of error that the juvenile court erred in granting legal custody of B.J. to Morgan because (1) a court must give preferential treatment to a parent when determining custody issues; (2) the juvenile court must comply with the time limits in R.C. 2151.35; and (3) the juvenile court must be presented with an affidavit prior to granting custody to a nonparent.

{¶ 25} When reviewing custody issues, a juvenile court's decision is granted great deference and will not be disturbed absent an abuse of discretion. *Smith v. Smith*, 12th Dist. No. CA2005-04-091, 2006-Ohio-2136. More than mere error of judgment, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "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." *Miller v. Miller*, 37 Ohio St.3d 71, 74, (1988). We also reiterate that given Mother's lack of objections, we will apply the plain error standard discussed within Mother's first assignment of error when deciding whether the juvenile court abused its direction in granting custody to Morgan.

{¶ 26} Mother first argues that the trial court erred in granting custody to a non-parent without first finding that she is an unsuitable parent. In support of this contention, Mother relies on *In Re Perales*, 52 Ohio St.2d 89 (1977), in which the Ohio Supreme Court set forth the proposition that before custody is given to a nonparent, the evidence must indicate abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is unsuitable to parent the child because awarding custody to the parent would be detrimental to the child. Mother therefore argues that the juvenile court committed plain error because it never made a finding that she was an unsuitable parent.

{¶ 27} However, R.C. 2151.353(A)(3), provides as follows:

If a child is adjudicated an abused, neglected, or dependent child, the court may \* \* \* [a]ward legal custody of the child to either parent *or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.* (Emphasis added.)

{¶ 28} The Ohio Supreme Court has specifically stated that "when a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody to a nonparent." *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, ¶ 24. The Ohio Supreme Court reasoned that unlike permanent custody cases that divest a parent of all parental rights, legal custody proceedings merely vest in the custodian the right to have



physical care and control subject to any residual parental rights, privileges, and responsibilities. *Id.* at ¶ 14-15. The court then recognized that its previous decision in *In re Perales* did not involve an abused, neglected, or dependent child, but instead arose from a private custody dispute in juvenile court pursuant to R.C. 2151.23(A)(2). Therefore, the court concluded,

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. It does not, however, permanently foreclose the right of either parent to regain custody, because it is not a termination of all residual parental rights, privileges, and responsibilities, and therefore a motion for a change of custody could be filed in a proper case in accordance with law.

*Id.* at ¶ 23. See also *In Re M.D.*, 12th Dist. No. CA2006-09-223, 2007-Ohio-4646.

{¶ 29} Mother's unsuitability was inherent in the juvenile court's adjudication of B.J. as an abused and dependent child. As such, the juvenile court was not required to make a separate finding of Mother's unsuitability.

{¶ 30} Mother next argues that the trial court erred by not complying with the time limits prescribed in R.C. 2151.35(B)(1), which states that a "dispositional hearing may not be held more than thirty days after the adjudicatory hearing is held," and that "the dispositional hearing shall not be held more than ninety days after the date on which the complaint in the case was filed." If the dispositional hearing is not held within the prescribed time frame, the court "shall dismiss the complaint without prejudice." *Id.* The same time requirements are set forth in Juv.R. 34(A).

{¶ 31} However, this court, and the majority of appellate districts, have found that the timeframe guidelines set forth in R.C. 2151.35(B)(1) are not jurisdictional in nature, and can be waived by a parent. "A party may implicitly waive this right, however, when the party fails to move for dismissal when it becomes the party's right to do so and, instead, assists in

delaying the hearing before moving for dismissal based upon the time limitation." *In re N.B.*, 12th Dist. Nos. CA95-02-031, CA95-03-056, CA95-06-107, 1996 WL 174546, \*1 (Apr. 15, 1996). See also *In re Kimble Children*, 7th Dist. No. 99 517 CA, 2002-Ohio-2409 (comparing the statutory time limits of R.C. 2151.35(B)(1) to those of speedy trial rights, which may be waived by a defendant by failure to object).

{¶ 32} Mother is correct that the complaint was filed on October 21, 2010, and that the adjudicatory hearing was held on May 31, 2011, while the dispositional hearing was held on September 2, 2011. However, Mother did not object at any time to the scheduling of the hearings, and never moved to dismiss based on the statutory time requirements. Moreover, Mother did not raise any concerns during the hearings, let alone any objections. Before each hearing began, the magistrate provided the parties, including Mother who was represented by counsel at both hearings, the opportunity to raise any preliminary matters. Mother did not reference any timing requirements at either hearing, and expressed no concerns to the timing of either hearing. As such, Mother's conduct has waived the time limits prescribed by statute.

{¶ 33} Mother also argues that the trial court erred in granting custody to Morgan, who did not file a statement of understanding pursuant to R.C. 2151.353 prior to the dispositional hearing. According to section (A)(3) of that statute, the non-parent requesting custody must sign a "statement of understanding" acknowledging (1) the assumption of legal responsibility; (2) the permanent nature of legal custody; (3) that parents have residual rights; and (4) the duty to be present for the dispositional hearing in order to affirm their intention to become the legal custodian.

{¶ 34} Morgan did not sign the legal custody statement of understanding before the dispositional hearing, as is suggested by the statute. However, Mother did not object to the lack of the statement before the dispositional hearing. Nor did Mother object to the magistrate's decision and entry granting custody to Morgan in which the magistrate ordered

Morgan to sign a statement of understanding and submit it to the court. While the statement of understanding was not signed prior to the dispositional hearing, we do not find that such rises to the level of plain error.

{¶ 35} Instead, Morgan moved for custody on October 21, 2010, and B.J. had been living at her home since the day of the choking incident on October 17, 2010. Therefore, Mother was well aware that Morgan requested and intended to have legal custody of B.J., and that Morgan had assumed the responsibilities of parenting since 2010. Moreover, Morgan appeared at the adjudication hearing, as well as the dispositional hearing, and testified that she was requesting custody, that she believed she would be a good parent and that B.J. would thrive in her care, and that her husband was in agreement with her having custody because he loved B.J. Mother, as well as the other parties in attendance at the dispositional hearing such as B.J.'s guardian ad litem, all had the opportunity to question Morgan regarding her willingness and desire to have legal custody of B.J. The parties therefore had the ability to voice any concerns regarding Morgan's understanding of the acknowledgements set forth in R.C. 2151.353(A)(3). However, Mother did not object to Morgan not submitting an affidavit or statement of understanding, and nothing in Morgan's testimony suggested she was not aware of the legal responsibility inherent in custodianship, the permanent nature of legal custody, or that Mother still would have residual rights.

{¶ 36} Given our review for plain error, we cannot say that the lack of the custody statement of understanding before the dispositional hearing seriously affected the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. As such, we find no plain error, and Mother's second assignment of error is overruled.

{¶ 37} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.