[Cite as *In re C.L.T.*, 2012-Ohio-427.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN RE:	:	
C.L.T.	:	CASE NO. CA2011-04-073
	:	O P I N I O N 2/6/2012
	:	
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2009-0300

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for appellee, Butler County Children Services

Dawn S. Garrett, 7865 Paragon Road, Suite 107, Centerville, Ohio 45459-2748, for appellant, J.B.

Jeannine C. Barbeau, 9435 Waterstone Blvd., Suite 140, Cincinnati, Ohio 45249, for L.T.

Steven Sharpe, 10 Journal Square, 3rd Floor, Hamilton, Ohio 45011, guardian ad litem

RINGLAND, J.

{¶ 1} Appellant, J.B. (Father), appeals from the decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of his infant son, C.L.T., to the child's maternal aunt, T.R. (Aunt). Father also appeals from the juvenile court's decision

limiting the length of his unsupervised visitation time and its decision denying his request to change C.L.T.'s name. For the reasons outlined below, we affirm.

{¶ 2} C.L.T. was born on July 22, 2009. At the time of his birth, both C.L.T. and L.T., the child's mother, tested positive for cocaine. Three days after his birth, C.L.T., who suffers from seizures and who has since been diagnosed with fetal alcohol syndrome, was released from the hospital and placed in the care and custody of Aunt.

{¶ 3} On August 18, 2009, the Butler County Department of Job and Family Services, Children Services Division (BCDJFS), filed a complaint with the juvenile court alleging C.L.T. was an abused and dependent child. On September 15, 2009, the juvenile court adjudicated C.L.T. a dependent child and granted temporary custody to Aunt. The man believed to be C.L.T.'s father at that time failed to appear at the adjudication hearing.

{¶ 4} On February 11, 2010, BCDJFS filed a motion with the juvenile court requesting Aunt be granted legal custody of C.L.T. Thereafter, during a review hearing before the juvenile court, DNA test results were presented indicating Father, who appeared at the hearing pro se, was actually C.L.T.'s biological father. As a result of the DNA testing, the juvenile court found Father to be C.L.T.'s "legal and natural father" and granted him supervised visitation time. However, finding it in C.L.T.'s best interest, the juvenile court ordered C.L.T. to remain in the temporary custody of Aunt.

{¶ 5} Once it was determined that Father was, in fact, C.L.T.'s biological father, Father, through appointed counsel, requested C.L.T.'s name be changed and that he be granted legal custody. However, following a hearing on all pending motions, a juvenile court magistrate issued a decision granting legal custody to Aunt and awarding Father with weekly unsupervised visitation time. The magistrate's decision also denied Father's request to change C.L.T.'s name. Father filed objections to the magistrate's decision, which, after holding a hearing on the matter, the juvenile court overruled.

{¶ 6} Father now appeals from the juvenile court's decision, raising four assignments of error for review. For ease of discussion, Father's second assignment of error will be addressed out of order.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE COURT PREJUDICIALLY ERRED AS A MATTER OF LAW IN ITS ANALYSIS OF THE APPLICABLE BEST INTEREST FACTORS, PREJUDICIALLY ERRED IN ITS FACTUAL FINDINGS AS APPLIED TO SAID STATUTORY FACTORS AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO THE MATERNAL AUNT BEFORE REASONABLE EFFORTS WERE MADE TO PERMIT FATHER A REASONABLE OPPORTUNITY TO WORK THE CASE PLAN TO RECEIVE CUSTODY AND WHEN FATHER WAS NOT A PARTY TO THE ADJUDICATION AND HAD NEVER BEEN FOUND UNFIT.

{¶ 9} In his second assignment of error, Father argues that the juvenile court erred by overruling his objection to the magistrate's decision granting legal custody of C.L.T. to Aunt. We disagree.

{¶ 10} Pursuant to R.C. 2151.353(A)(3), after a child has been adjudicated abused, neglected, or dependent, such as the case here, the juvenile 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." *In re C.K.*, 12th Dist. No. CA2008-12-303, 2009-Ohio-5638, ¶ 10, citing *In re Nice*, 141 Ohio App.3d 445, 2001-Ohio-3214 (7th Dist.). A preponderance of the evidence constitutes "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.*, 12th Dist. No. CA2006-09-223, 2007-Ohio-4646, ¶ 26.

{¶ 11} In order to determine the best interest of a child, R.C. 3109.04(F)(1) requires the juvenile court to consider all relevant factors. *See In re M.M.*, 12th Dist. No. CA2010-12-

034, 2011-Ohio-3913, ¶ 9. These factors include, but are not limited to: the wishes of the parents; the child's interaction and interrelationship with his parents, siblings, and other persons 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; and the likelihood that the caregiver would honor and facilitate or had honored and facilitated visitation and parenting time. *See In re A.L.H.*, 12th Dist. No. CA2010-02-004, 2010-Ohio-5425, ¶ 9.

{¶ 12} An appellate court reviews a juvenile court's custody determination for an abuse of discretion. *In re Brown*, 142 Ohio App.3d 193, 198 (12th Dist.2001). An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *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." *In re J.M.*, 12th Dist. No. CA2008-12-148, 2009-Ohio-4824, ¶ 17, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶ 13} Initially, Father argues that the juvenile court erred by granting legal custody of C.L.T. to Aunt when he "had never been found to be unfit." However, as this court has repeatedly stated, "[t]he requirement of finding parent unsuitability does not apply to dispositional hearings following an adjudication that the child is abused, dependent, or neglected." *In re D.R.*, 12th Dist. Nos. CA2005-06-150 and CA2005-06-151, 2006-Ohio-340, ¶ 14; *In re T.G.*, 12th Dist. Nos. CA2005-10-444 and CA2005-12-521, 2006-Ohio-5504, ¶ 16-17; *In re C.S.*, 12th Dist. Nos. CA2005-06-152 and CA2005-06-153, 2006-Ohio-5198, ¶ 8; *see also In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, ¶ 21-22. Therefore, contrary to Father's claims, the juvenile court was not required to find him unfit before it could grant legal

custody to Aunt for the fundamental inquiry here "is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit," but instead, it is "the best interests and welfare of the child [that] are of paramount importance." *In re J.F.*, 11th Dist. No. 2010-T-0029, 2011-Ohio-3295, ¶ 39, quoting *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979).

{¶ 14} That said, a review of the record indicates that the juvenile court engaged in a detailed evaluation of the relevant factors set forth in R.C. 3109.04(F)(1) before awarding custody of C.L.T. to Aunt. In a written decision, the juvenile court magistrate found C.L.T., who tested positive for cocaine at birth, suffers from seizures, and who has since been diagnosed with fetal alcohol syndrome, has been in the temporary custody of Aunt since his release from the hospital. The magistrate also found C.L.T. and Aunt were "very bonded," and that despite his significant cognitive and physical delays that require him to receive extensive physical and occupational therapy, C.L.T. has made considerable progress while under Aunt's care. In addition, the magistrate found Aunt ensures C.L.T. has the opportunity to bond with his siblings by having weekly contact with his two-year-old and seven-year-old half-sisters. The magistrate also found that C.L.T.'s mother wanted Aunt to be granted legal custody of her son and that the child's guardian ad litem recommended the same.

{¶ 15} On the other hand, the magistrate found that although C.L.T. has begun to develop a bond with Father, Father, who is 61 years old, unemployed, and whose primary means of transportation is his bicycle, has made no effort to familiarize himself with his son's physical and emotional needs. The magistrate also found that Father has refused to participate in any parenting program, has been unwilling and unable to develop a visitation schedule with Aunt, and has demonstrated a lack of understanding regarding C.L.T.'s need for regularity and stability. In addition, the magistrate found Father, who lives in a one-bedroom apartment "with no appropriate furniture or furnishings for an infant," has had no experience raising a special needs child. The magistrate also found Father has been

diagnosed with Hepatitis C and Schizophrenia.

{¶ 16} After a thorough review of the record, we find no abuse of discretion in the juvenile court's decision granting legal custody to Aunt. As noted above, although the child has significant cognitive and physical delays that require strenuous physical and occupational therapy, C.L.T. has made considerable strides while being under Aunt's care. In addition, since being placed in Aunt's temporary custody shortly after his birth, C.L.T. has become very bonded with Aunt to the point where the two have become virtually inseparable. In turn, while Father's desire to have custody of his son is apparent, due to C.L.T.'s extensive medical issues that require regularity and stability within his young life, the record clearly indicates that granting legal custody to Aunt was in C.L.T.'s best interest. Therefore, having found no abuse of discretion in the juvenile court's decision granting legal custody to Aunt, Father's second assignment of error is overruled.

{¶ 17} Assignment of Error No. 1:

{¶ 18} APPELLANT WAS DENIED HIS CONSTITUTIONAL DUE PROCESS AND CONFRONTATION RIGHTS, AND THE OUTCOME WAS PREJUDICED WHEN THE COURT ADMITTED AND CONSIDERED IMPROPER EVIDENCE AT TRIAL AND WHEN THE COURT PROCEEDED TO A DISPOSITIONAL LEGAL CUSTODY HEARING WHEN APPELLANT-FATHER HAD NEVER BEEN FOUND TO BE UNFIT AND WAS NOT A PARTICIPANT IN THE PRIOR ADJUDICATION.

{¶ 19} In his first assignment of error, Father argues that the juvenile court erred by overruling his objection to the magistrate's decision to admit his psychological evaluation into evidence. However, contrary to Father's claims, in ruling on his objections to the magistrate's decision, the juvenile court actually found the magistrate erred by admitting his psychological

evaluation, but, "due to the totality of the circumstances," such error was harmless.[1]

{¶ 20} Based on our review of the record, and without making any determination regarding the admissibility of psychological evaluation here, we agree with the juvenile court's finding that any error the magistrate may have made regarding the admissibility of the psychological evaluation was, at best, harmless error. As noted above, even when ignoring the findings made as part of Father's psychological evaluation, something which this court did when discussing the juvenile court's decision granting legal custody to Aunt, the record still provides overwhelming support for the juvenile court's legal custody determination. Therefore, because the magistrate's decision to admit Father's psychological evaluation into evidence was, at best, harmless error, Father's first assignment of error is overruled.

{¶ 21} Assignment of Error No. 3:

{¶ 22} THE COURT'S PARENTING TIME ORDER IS NOT IN THE CHILD'S BEST INTEREST AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 23} In his third assignment of error, Father argues that the juvenile court erred by overruling his objection to the magistrate's decision limiting his unsupervised visitation time to "only a few hours a week and no overnights." In support of this claim, Father argues that because he is "sober," has a "stable residence and income," and has "never been found to be unfit," he was entitled to "at least the standard order of parenting time." We disagree.

{¶ 24} The juvenile court has broad discretion as to visitation issues. *In re S.K.G.*, 12th Dist. No. CA2008-11-105, 2009-Ohio-4673, ¶ 21. The juvenile court's decision, therefore, is subject to reversal only where there is an abuse of discretion. *In re A.M.*, 12th Dist. No. CA2005-11-492, 2006-Ohio-5986, ¶ 8. As noted above, an abuse of discretion

1. Specifically, as juvenile court stated during the hearing on Father's objections to the magistrate's decision: "[w]ell, what I find is, that it was harmless error despite… [w]hen you look at the totality of the circumstances in this cause."

constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore*, 5 Ohio St.3d at 219.

{¶ 25} In this case, the juvenile court awarded Father weekly unsupervised visitation time "as arranged with and at the discretion" of Aunt that shall "not exceed four consecutive hours at a time, and shall not include overnights." The juvenile court, however, did allow for Father's visitation time be "liberalized" at Aunt's discretion with "the advice and consent of [C.L.T.'s] service providers from time to time."

{¶ 26} After a thorough review of the record, we find no abuse in the trial court's decision regarding the length of Father's unsupervised visitation time. As noted above, Father had made no effort to familiarize himself with his son's physical and emotional needs, had no experience raising a special needs child, and did not have the appropriate furnishings necessary for the child. In turn, while he may be sober and have a stable residence and income through his receipt of SSI benefits, the record indicates that Father was simply not properly equipped to exercise any extended unsupervised visitation time.

{¶ 27} However, although not currently ready to exercise any extended unsupervised visitation time, because the juvenile court allowed for his time to be "liberalized" at Aunt's discretion with the advice and consent of C.L.T.'s care providers, Father's visitation time may be increased once he demonstrates that he is cable of properly providing for his son's needs. This is especially true considering Aunt's flexibility and willingness to cooperate with Father in order to provide him with visitation time previously. Therefore, having found no abuse of discretion in the juvenile court's decision limiting Father's weekly unsupervised visitation time as such, Father's third assignment of error is overruled.

{¶ 28} Assignment of Error No. 4:

{¶ 29} THE COURT ERRED IN REFUSING TO CHANGE THE CHILD'S NAME TO FATHER'S REQUESTED NAME AND SUCH DECISION WAS AGAINST THE MANIFEST

WEIGHT OF THE EVIDENCE.

{¶ 30} In his fourth assignment of error, Father argues that the juvenile court erred by overruling his objection to the magistrate's decision denying his request to change C.L.T.'s name.[2] We disagree.

{¶ 31} Pursuant to R.C. 3111.13(C), "a court of common pleas may determine the surname by which the child shall be known after establishment of the existence of the parent and child relationship, and a showing that the name determination is in the best interest of the child." *Bobo v. Jewell*, 38 Ohio St.3d 330, paragraph one of the syllabus (1988). In determining the best interest of the child, the court should consider: the length of time that the child has used a surname; the effect of a name change on the father-child relationship and on the mother-child relationship; the identification of the child as part of a family unit; the embarrassment, discomfort or inconvenience that may result when a child bears a surname different from the custodial parent; the preference of the child if the child is of an age and maturity to express a meaningful preference; and any other factor relevant to the child's best interest. *D.W. v. T.L.*, 12th Dist. No. CA2011-03-004, 2011-Ohio-5228, ¶ 8. The determination of what is in the best interest of the child is within the sound discretion of the juvenile court. *In re Dayton*, 155 Ohio App.3d 407, 2003-Ohio-6397, ¶ 9 (7th Dist.). This court, therefore, is not free to substitute its judgment for that of the juvenile court when reviewing its decision regarding a child's surname. *Jarrells v. Epperson*, 115 Ohio App.3d 69, 71 (3rd Dist.1996); *In re Skeens*, 4th Dist. No. 11CA2, 2011-Ohio-3424, ¶ 8.

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2. It should be noted, BCDJFS argues that the juvenile court lacked jurisdiction to hear Father's request to change C.L.T.'s name. However, after reviewing the record in this matter, and based on the facts and circumstances of this case, we find his request was made within the context of a parentage proceeding, and therefore, was properly before the juvenile court. *See D.W. v. T.L.*, 12th Dist. No. CA2011-03-004, 2011-Ohio-5228, ¶ 8; *see also Eagleson v. Hall*, 5th Dist. No. 2007-CA-28, 2008-Ohio-3647, ¶ 14 (finding trial court erred by finding it lacked jurisdiction over child's name change where case dealt with "original orders in a paternity determination").

{¶ 32} After a thorough review of the record, we find no abuse of discretion in the juvenile court's decision denying Father's motion to change C.L.T.'s name. We agree with the juvenile court's finding that Father's only reasons "for wanting the name change were that this is his only child, and he wanted to carry on the family name." However, while we recognize Father's interest in having his son carry on his family name, because this was the only evidence presented in support of the name change, Father did not meet his burden establishing that a name change was in C.L.T.'s best interest. *See, e.g.*, *Erin C. v. Christopher R.*, 129 Ohio App.3d 290, 293 (6th Dist.1998) (finding it an abuse of discretion for the trial court to order a name change when "the only evidence in support of the name change consisted of [father's] statement at the hearing that he wanted his son to have his surname"); *In re Wolfe*, 2nd Dist. No. 19136, 2002-Ohio-3277 (finding an abuse of discretion for the trial court to order a name change when "only relevant evidence" father produced in support of the name change was that he wanted his child to have his surname); *Patrick L. v. Michelle L.*, 6th Dist. No. WD-00-005, 2000 WL 1752792, * 6 (Nov. 30, 2000) (finding no abuse of discretion for the trial court to deny name change where the only evidence supporting the name change consisted of father's testimony indicating he wanted his son and only male heir to carry on his family name). The juvenile court, therefore, did not abuse its discretion by denying Father's motion to change C.L.T.'s name. Accordingly, Father's fourth assignment of error is overruled.

{¶ 33} Judgment affirmed.

HENDRICKSON, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.