

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of of JUSTIN MICHAEL
GUNTHER and JONATHAN JOEL GUNTHER,
Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JENNIFER GUNTHER,

Respondent-Appellant,

and

JOEL GUNTHER,

Respondent.

UNPUBLISHED
September 1, 2009

No. 290260
Saginaw Circuit Court
Family Division
LC Nos. 08-031479-DL
08-031480-DL

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Respondent Jennifer Gunther appeals as of right the trial court's order denying her motion to regain custody of her children, Justin Michael Gunther (DOB 4/13/1992) and Jonathan Joel Gunther (DOB 5/25/1994) during the pendency of juvenile proceedings. We affirm.

Respondent and Joel Gunther divorced in February 2000. They shared legal custody of the children, and respondent gained physical custody. Justin and Jonathan later came to petitioner's attention due to their school truancy. The petitions alleged that Jonathan was absent 63 days between September 5, 2006, and February 29, 2008, with 48 of the absences being unexcused, and Justin was absent for 111 days in the same period, with 80 of the absences being unexcused. After a hearing on whether to authorize the petition and obtain jurisdiction over the children at which respondent, a truancy officer and School Truancy Intern Coordinator Judy Lichnovsky testified, the referee found the boys guilty as charged. Lichnovsky recommended placement with the boys' father, Joel Gunther, maintaining that, in her experience, he had more luck getting the children to comply when respondent could not get them to cooperate. Another caseworker agreed with Lichnovsky's assessment, and opined that respondent made excuses for

the poor behavior instead of providing consequences for it. The referee made the children wards of the court and placed them with Joel Gunther. He restricted respondent from visiting or having phone contact with the children for 60 days, with supervised visitation to commence thereafter.

Subsequently, respondent moved for immediate return of the children. She contended that the referee erred in ordering the children placed into Joel Gunther's custody without allowing her to respond and present evidence, and without taking into consideration the children's background, medical conditions, or other interests. She maintained that Joel Gunther was providing an inappropriate home for the children, and that he was improperly preventing her from having visitation with the children. Citing the Child Custody Act (CCA), MCL 722.23, she maintained that, as the primary caregiver, she was best suited to care for the children. After a hearing, the trial court denied her motion, continuing placement with Joel Gunther, and continuing supervised visitation.

Respondent argues that the trial court abused its discretion in placing the children with their father, rather than attempting to keep them in their established custodial environment with their mother. We review the disposition in a juvenile case for an abuse of discretion. See *In re Ricks*, 167 Mich App 285, 295; 421 NW2d 667 (1988); *In re Scruggs*, 134 Mich App 617, 621-622; 350 NW2d 916 (1984).

Respondent appears to contend that this case should be treated like a general change of custody under the CCA, MCL 722.21 *et seq.* We disagree. Recently, in *In re A.P. and B.J.*, ___ Mich App ___, ___ NW2d ___ (2009), this Court discussed the interrelationship between proceedings under the juvenile code and the CCA and the ability for the juvenile court to temporarily change previous custody orders:

The state, however, may become involved in a child's upbringing under certain limited circumstances where a child's welfare is impacted. [*Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004).] Under domestic relations law, for example, certain actions implicate the state's interest in the child's welfare. These include actions for child support, *LME v ARS*, 261 Mich App 273, 680 NW2d 902; 261 Mich App 273, 680 NW2d 902 (2004), paternity actions, *Sinicropi v Mazurek*, 273 Mich App 149, 729 NW2d 256 (2006), and dissolution of marriage, *Harvey v Harvey*, 470 Mich 186, 80 NW2d 835 (2004). If any of these actions directly or incidentally involve the legal or physical custody of a child, the courts are bound by the CCA in determining who should have physical and legal custody of a child. See *Sirovey v Campbell*, 223 Mich App 59, 68, 565 NW2d 857 (1997). In making this determination, the child's best interests are of paramount importance and the goal is to resolve a custody dispute in a way that promotes the child's best interests and welfare. *Harvey, supra* at 192-193. Once a court enters a custody order, it cannot change the award of custody absent overcoming certain procedural safeguards. See e.g., MCL 722.25(1); MCL 722.27. These safeguards are in place for the stability of the child and are meant to protect against unwarranted and disruptive changes of custody. *Corporan v Henton*, ___ Mich App ___, ___ NW2d ___, (2009); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509, 675 NW2d 847 (2003).

Similarly, the state may become involved in the parent-child relationship when a child's safety is threatened, for example, if the parent has abused or neglected the child or has abandoned the child. The state's involvement under these types of circumstances is governed by the juvenile code. MCL 712A.1, et seq. A court presiding in juvenile proceedings obtains jurisdiction over the matter once a petition is filed and the court has authorized the petition after conducting a preliminary inquiry. MCL 712A.2; MCL 712A.11(1); see *In re Jagers*, 224 Mich App 359, 361-362, 568 NW2d 837 (1997). Although the court has jurisdiction over the matter, the child will not come under the court's jurisdiction and become a ward of the court until the court holds an adjudication on the merits of the allegations in the petition and finds by a preponderance of evidence that there is factual support for permitting judicial intervention. *In re AMB*, 248 Mich App 144, 176-177, 640 NW2d 262 (2001). Subsequently, the court can hold dispositional review hearings and permanency planning hearings, and enter orders governing the child's care and custody. *Id.* at 177; MCL 712A.18f(4). The goal of these proceedings is always reunification of the family unit. *In re B and J*, 279 Mich App 12, 18, 756 NW2d 234 (2008).

However, a conflict may arise as to the care and custody of a child, as in this case, where domestic relations law and juvenile law intersect. See *In re Brown*, 171 Mich App 674, 430 NW2d 746 (1988). Obviously, upon entry of a child custody order under the CCA, a child's parents, or other custodians, must abide by the terms of the custody order. However, once a juvenile court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, the juvenile court's orders supersede all other previous orders, including custody orders made by another court, even if inconsistent or contradictory. MCR 3.205(C); see *Krajewski v Krajewski*, 420 Mich 729, 734-735, 362 N.W.2d 230 (1984). In other words, the previous custody orders affecting the minor become dormant, in a metaphoric sense, during the pendency of the juvenile proceedings, but when the juvenile court dismisses its jurisdiction over the child, all of those previous custody orders continue to remain in full force and effect. This is necessarily the result because the prior domestic relations court neither relinquished its jurisdiction over the custody dispute as the CCA vests a court with continuing jurisdiction over the matter, *Harvey, supra* at 192, nor was the prior court required to relinquish or waive its jurisdiction in order for the juvenile court to exercise its jurisdiction. *Krajewski, supra* at 734-735; MCR 3.205(A). In addition, the juvenile court's orders function to supercede, rather than modify or terminate, the custody orders while the juvenile matter is pending, because the juvenile orders are entered pursuant to a distinct statutory scheme that takes precedence over the CCA. See *Krajewski, supra* at 734-735. We note that during the duration of the juvenile proceedings, while the parties subject to the custody order can move to modify the custody order, any modification would remain superceded by the juvenile court's orders.

If at the time the juvenile court dismisses its jurisdiction over the child it concurrently orders a change of custody, the juvenile court must abide by the procedural and substantive requirements

of the CCA, including a more formal determination of the child's best interests. *In re A.P. and B.J., supra.*

However, the proceedings in the instant case have not yet reached that point, and the trial court continues to exercise jurisdiction over the children through the juvenile proceedings. Thus, respondent's claim that the children were in an "established custodial environment" and her apparent contention that the trial court should have engaged in a best interest analysis pursuant to MCL 777.23 is without merit, at least at this time.¹

Once the juvenile court found during the adjudicative phase of the proceedings that the children came into the jurisdiction of the court, a finding not challenged by respondent, the trial court was charged with a duty to take measures with respect to children and adults properly within its jurisdiction. MCL 712A.2. One method of disposition provided for by statute is to place the child in the home of a related adult. MCL 712A.18(1)(b). The trial court properly exercised its power to place the children with their father. Although this effectively altered the custody arrangement provided for in the earlier circuit court divorce judgment, such a change was proper.

The evidence presented during the hearings below generally supports the trial court's decision. Jonathan continued to experience some behavioral problems while in his father's custody. However, the children's truancy caused them to come into the juvenile court's jurisdiction. Curing that problem was the court's main task here. The testimony supported a conclusion that this ceased to be a problem while the children were in their father's custody, and that they began attending school regularly. While respondent claims that the children suffer severe mental issues, she has not presented any evidence to support her assertion. Further, the children apparently did not exhibit these symptoms while in Joel Gunther's care. Nor has respondent provided support of her other allegations concerning Gunther's alleged neglect or improper behavior.

Moreover, while any lack of financial resources may play a role in determining whether the children's permanent custody arrangements should be changed, Joel Gunther testified that he would be able to continue to support and house Jonathan and Justin during the hearing on respondent's motion. Based on the facts presented, we thus find that the trial court did not abuse its discretion in continuing the children in Joel Gunther's temporary custody during the pendency of the juvenile proceedings.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

¹ While *In re A.P. and B.J.* dealt with the interplay of custody decisions in a case involving alleged neglect rather than juvenile delinquency, we find its analysis equally applicable here.