

[Cite as *In re M.O. and E.O.*, 2015-Ohio-2430.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

IN RE:

M.O. and E.O.

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: Appellate Case No. 26457
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: Trial Court Case Nos. 2009-4636
: 2009-4637
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: (Civil Appeal from
: Montgomery County Juvenile Court)
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OPINION

Rendered on the 19th day of June, 2015.

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FAIN, J.

{¶ 1} Appellant M.B. appeals from a judgment of the Montgomery County Court of Common Pleas, Juvenile Division, granting legal custody of her children, E.O and M.O. to the children's paternal grandparents. M.B. contends that the evidence does not support the juvenile court's decision. She further contends that the juvenile court denied her right to counsel by proceeding with a portion of the hearing while her counsel was not present.

{¶ 2} Because there is competent, credible evidence in the record upon which the juvenile court could rely in determining that granting legal custody to the paternal grandparents is in the best interest of the children, we conclude that the court did not abuse its discretion. We further conclude that the issue M.B. raises concerning the absence of her trial counsel during a portion of the proceedings was not preserved for appellate review, when she failed to object or otherwise take exception once her trial counsel had returned to court. Accordingly, the judgment of the juvenile court is Affirmed.

I. The Course of Proceedings

{¶ 3} M.O. and E.O. were adjudicated dependent in July 2009. In September 2009 the children were returned to their mother with protective supervision by Montgomery County Children Services (MCCS). In August 2010, M.B. was arrested and charged with child endangering. She was convicted, and placed on community control. The children were placed with their maternal grandmother under a safety plan that stated that M.B. was not to have unsupervised contact with the children. In February 2011, M.B. gave birth to another child, the custody of whom is not before this court. It was determined that the maternal grandmother had permitted unsupervised visitation between the

children and M.B. MCCS filed for, and was granted, temporary custody of M.O. and E.O. On July 21, 2011, temporary custody of the children was granted to the paternal grandparents. First and second extensions of custody were granted in June 2012 and August 2012, respectively.

{¶ 4} In January 2014, MCCS moved for an award of legal custody to the paternal grandparents or, alternatively, for legal custody to M.B. with protective supervision. The father of the children moved for an award of legal custody to the paternal grandparents. Following a hearing, the juvenile court granted a third extension of custody to the paternal grandparents. MCCS appealed, contending that the juvenile court did not have authority to grant a third extension. We reversed the extension of temporary custody, and remanded the matter for consideration of the motion that legal custody be granted to the paternal grandparents or, in the alternative, to M.B. with protective supervision by MCCS. See *In re M.O. and E.O., III*, 2d Dist. Montgomery No. 25695, 2014-Ohio-3060.

{¶ 5} Following the hearing on remand, the juvenile court awarded legal custody to the paternal grandparents. M.B. appeals.

II. Based Upon the Evidence in the Record, the Trial Court Was within its Discretion when it Awarded Legal Custody to the Paternal Grandparents

{¶ 6} M.B.'s First Assignment of Error states:

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LEGAL CUSTODY TO THE PATERNAL GRANDPARENTS.

{¶ 7} R.C. 2151.353(A)(3) provides that once a child has been adjudicated

abused, neglected, or dependent, the juvenile court may make an order of disposition awarding legal custody to any person who has filed a motion therefor. A court may award legal custody of the child to an individual if the court finds, by a preponderance of the evidence, that legal custody is in the best interest of the child. *In re Starks*, 2d Dist. Darke No. 1646, 2005-Ohio-1912, ¶ 15. On appeal, we will not reverse an award of legal custody absent an abuse of discretion. *Id.*, ¶ 17. The term “abuse of discretion” implies that the juvenile court’s decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} The evidence demonstrates that M.B. is bonded with the children, and that the children love her. However, the children are also well-bonded with their paternal grandparents, with whom they have resided for more than three years. The grandparents have appropriate housing and income. While with the grandparents, the children have been doing well in school. Both children have needs for which the grandparents take them to therapy. The grandparents are engaged in the therapy. The behavior of each child has “significantly improved” while residing with the grandparents.

{¶ 9} M.O., who was in fifth grade at the time of the hearing, has expressed the desire to be with both M.B. and her paternal grandparents. E.O. has not expressed his wishes. At the time of the hearing, he was in third grade. The Guardian Ad Litem appointed to represent the children recommended that legal custody be awarded to the paternal grandparents. The GAL also recommended that M.B. continue to have ample visitation.

{¶ 10} The evidence also demonstrates that M.B. has failed to comply with her

case plan objectives. The case plan required M.B. to work on gaining income and housing. She was also to complete a parenting and psychological assessment, and follow up with any recommendations. She was required to execute release forms to enable MCCS to obtain information. The plan also required M.B. to attend the children's therapy sessions.

{¶ 11} With regard to income, M.B. has not held a job since 2013, despite referrals by MCCS. M.B. informed MCCS that she was re-applying for unemployment benefits, but she failed to provide any verification that she had done so. M.B. claimed that her husband has a construction job. However, the last verification that he had income was produced in March 2014. MCCS had no verification that the husband was employed at the time of the hearing. Despite numerous requests for verification as to income, M.B. has failed to provide the agency with any documentation of income.

{¶ 12} At the time of the hearing, M.B. had been in the same housing for approximately two years. Despite requests for verification, she failed to produce a lease agreement for MCCS. When the house was visited by MCCS in March 2014, there were some ceiling tiles that had been damaged by water. The caseworker attempted to arrange for follow-up visits, but M.B. did not respond to requests for follow-up visits. When the caseworker attempted an unannounced visit to the home in July 2014, M.B. denied access to the home. During the visit, M.B. was argumentative, and said that she did not want to meet with the caseworker again. The caseworker was able to observe a mattress on the floor of the living room. The children informed the caseworker that the floor housing the bedrooms was too hot, and that M.B. would sleep on the mattress while the children would sleep on the couch. M.B. was provided a notice to vacate the premises in April

2014. Although M.B. informed MCCS that this issue had been resolved, she failed to provide any verification. The GAL visited the home almost two weeks prior to the hearing, and found it to be clean and safe.

{¶ 13} Following a parenting and psychological assessment, M.B. received a recommendation that she attend individual and group therapy for a year to address her mental health issues. Despite requests for verification, MCCS received no documentation that M.B. complied with this requirement. M.B. refused to sign a release to permit MCCS to obtain her records. M.B. began individual therapy with South Community in February 2014. M.B. missed eight of her individual sessions since then. She also began group therapy in April 2014, but was no longer a part of that group due to poor attendance. She began a new group therapy in September 2014, just before the hearing.

{¶ 14} M.B. is also required to attend the children's therapy appointments. The children have been in continuous treatment since June 2013. M.B. has missed fifteen of the 45 sessions. There is evidence that M.B. has failed to maintain contact with the Agency, and that she has missed seven out of fifteen scheduled meetings. In the past, when the juvenile court ordered protective supervision, M.B. was not cooperative with MCCS.

{¶ 15} The juvenile court found that M.B. has not shown any consistency in complying with the provisions of the case plan regarding her therapy or that of the children. The court further found that she had failed to cooperate with MCCS with regard to providing verification that she was meeting the terms of her case plan. The court also noted that the needs of the children are being met by the paternal grandparents. Thus, the court awarded legal custody to the grandparents.

{¶ 16} From our review of the record, we conclude that there is competent, credible evidence in the record upon which the court could rely in finding that the award of legal custody to the paternal grandparents is in the best interest of the children.

{¶ 17} The First Assignment of Error is overruled.

II. Although Limited Proceedings Were Had in the Absence of M.B.'s Counsel, Once M.B.'s Trial Counsel Returned, this Issue Was Not Preserved for Appellate Review

{¶ 18} M.B.'s Second Assignment of Error is as follows:

THE TRIAL COURT VIOLATED MOTHER'S DUE PROCESS RIGHTS WHEN IT PROCEEDED WITHOUT THE PRESENCE, OR ASSISTANCE, OF HER COUNSEL.

{¶ 19} M.B. contends that the juvenile court violated her right to due process by conducting a portion of the hearing, and admitting evidence, while her attorney was absent. The State concedes that M.B. was entitled to representation at all stages of the proceedings, including the hearing.

{¶ 20} We have reviewed the transcript as it concerns this issue, and note the following relevant facts. At the time in question, the paternal grandmother was on the witness stand. M.B.'s attorney conducted a thorough cross-examination of the grand-mother, at the conclusion of which the juvenile court stated that it would recess until 1:30 p.m. At that time, M.B.'s attorney indicated that he had only scheduled a half-day for the hearing. The juvenile court noted that it had the hearing set for a full day, and told M.B.'s attorney to try to arrange for another attorney to handle a motion that he had

pending elsewhere. M.B.'s attorney stated that he understood.

{¶ 21} The transcript resumes with the court noting that the time is 1:45 p.m., and that M.B., the father, and M.B.'s attorney had failed to appear. The court then permitted the father's counsel to conduct cross-examination of the paternal grandmother, C.O. Counsel asked the witness whether she had received a tax exemption for the children, to which she replied affirmatively. Counsel then asked the witness whether she had ever taken any food to M.B.'s house when she dropped the children off for visitation following school on Wednesdays. C.O. replied that she had taken some snacks a few times, and that she once took milk to M.B.'s house. C.O. was also questioned regarding whether she agreed to the current visitation with M.B. and whether she was willing to comply with that visitation. She responded that the children want to spend time with M.B., and that she had no issues with continuing or facilitating visitation. At that point, the witness was released. MCCS indicated that its case was concluded, and sought admission of two exhibits. The court noted that M.B.'s attorney had previously objected to those exhibits, and then admitted them over the objections. At that point the court took a fifteen-minute recess to permit M.B.'s attorney time to return to the hearing. When he returned, the attorney raised no objections, and proceeded to call M.B. to the stand.

{¶ 22} We note that the attorneys for MCCS and the father's attorney were present at the afternoon hearing, and there is no indication that they had believed that the hearing was scheduled for only a portion of the day. In other words, there is no evidence that the juvenile court arbitrarily extended the scheduled hearing on that date, it appearing from the record that M.B.'s attorney had been mistaken about the hearing schedule. In any event, counsel was aware that the hearing would not be re-set, and did

not appear for the above-cited portion of the hearing. Thus, we conclude that the court did not abuse its discretion in conducting the hearing, especially given that it waited an extra fifteen minutes for M.B.'s attorney to appear. We also note that the transcript does not reveal, nor does M.B. cite to, any resulting prejudice stemming from the questions asked of C.O. during the time counsel was absent.

{¶ 23} With regard to the exhibits, the transcript indicates that M.B.'s attorney had already made an objection to their introduction, and been heard on the objections. One exhibit consists of a letter from a therapist indicating that M.B. had missed eight of her own therapy sessions, and that she had dropped out of the therapy. However, the letter also indicated that M.B. had re-enrolled, and had attended a session approximately two weeks prior to the hearing. The other exhibit consists of a letter from E.O.'s therapist indicating that the child was consistently attending therapy, but that M.B. had attended fifteen of the 45 sessions. These exhibits were duplicative of testimony provided by the MCCS ongoing caseworker. M.B. does not state how she was prejudiced by the admission of these exhibits. There is nothing in the record to indicate that the court erred in admitting the exhibits.

{¶ 24} Because M.B., through her trial counsel, did not object, when her trial counsel had returned, to the fact that the trial court had conducted limited proceedings in her trial counsel's absence, any error in that regard was not preserved for appellate review. If M.B. was aggrieved by that procedure, she could have registered an objection through her trial counsel upon his return, in which event the trial court may have been able to provide a remedy by taking further proceedings concerning the witness and the admission of evidence, in the presence of M.B.'s counsel. The Second Assignment of

Error is overruled.

IV. Conclusion

{¶ 25} Both of M.B.'s Assignments of Error being overruled, the judgment of the juvenile court is Affirmed.

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FROELICH, P.J., concurs.

DONOVAN, J., concurring:

{¶ 26} In my view, the trial court operated perilously by proceeding without Mother's counsel being present in the afternoon session. Mother was not at fault in creating her counsel's appearance conflict. The preferred practice would be to wait for Mother's counsel to reappear late (subject to sanction if warranted) or continue the balance of the hearing. However, on this record Mother cannot prevail, as no error is established.

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