[Cite as *In re A.J.*, 2010-Ohio-4206.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: A.J., D.E., D.E., L.E.

Court of Appeals No. L-10-1038

Trial Court No. JC 09196008

**DECISION AND JUDGMENT**

Decided: August 13, 2010

* * * * *

Mary C. Clark, for appellant father.

Charles S. Rowell, Jr., for appellant mother.

Tim A. Dugan, for appellant children.

Dianne L. Keeler, for appellee.

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SINGER, J.

**{¶ 1}** Appellants, mother, father and four children, appeal the judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating the parental rights of the parents and awarding permanent custody of the children to a county children's services agency. For the reasons that follow, we reverse.

**{¶ 2}** Appellant C.E. is the mother of appellant children, 13 year-old A.J., D.E. IV, age 9, D.E., age 7, and L.E., age 2. Appellant, D.E. III, is the father of the three youngest children. A.J.'s father did not participate in the proceedings below and is not part of this appeal. Appellee is the Lucas County Children's Services Board.

**{¶ 3}** The record of the initial involvement between appellee and appellants is vague. From what we can glean in testimony and vestigial information in documents before the trial court, it appears that in late 2006, appellee removed the three oldest appellant children when their home was found to be without heat and unsanitary. While the children were in appellee's temporary custody, appellee referred appellant mother and father to parenting classes and domestic violence training, which both successfully completed. In mid 2008, the children were returned to the parents, with appellee maintaining protective supervision.

**{¶ 4}** On April 22, 2009, the trial court approved appellee's motion to terminate protective supervision. On April 24, 2009, appellant mother filed a domestic violence complaint against appellant father. Appellant mother alleged that appellant father became angry over the cleanliness of the home and stormed out saying that if the place was not clean when he returned he would beat them all, "except the one year-old."

**{¶ 5}** Appellant father was arrested and charged with menacing. The charge was later amended to disorderly conduct, to which appellant father pled guilty. Appellant mother also obtained a civil protection order, prohibiting the mother and father from

having contact. The no contact order became a condition of appellant father's probation following his conviction.

**{¶ 6}** According to appellant mother, once appellant father was out of the home, she obtained his computer password. Appellant mother later testified that when she opened appellant father's computer she found child pornography. She called police.

**{¶ 7}** Police computer forensic experts examined appellant father's computer and found multiple nude pictures of children. They also found some clothed pictures of his stepdaughter, appellant A.J., which appellee characterizes as suggestive, but did not form the basis of any charges. On July 15, 2009, appellant father was named in an indictment, charging five counts of illegal use of a minor in nudity-oriented matter or performance, fifth degree felonies. Although appellant father claimed the pictures were a "set-up," he eventually entered a no contest plea and was found guilty on two of the counts.

**{¶ 8}** According to appellee's caseworker for this family, shortly after appellant father left the home, appellant mother sought the agency's assistance. Appellant mother indicated that the children were not listening to her and were not helping to clean up. In response appellee reintroduced an in-home parent educator who had worked with the family before, counseling for the children, also a continuation, and protective day care. The agency also assisted appellant mother with rent and a utility bill during a time appellant mother was on temporary layoff.

**{¶ 9}** The caseworker later testified that the cleanliness of the home was an issue from the outset of appellee's re-involvement with the family. The caseworker described

clutter everywhere; clothing, debris and garbage throughout. The worker reported incidents of finding a full cat's litter box, cigarette butts, pop cans and garbage on the floor. She also noted that on one occasion a piece of broken glass was propped near a stair rail leading into the mobile home, creating, in the worker's opinion, a safety hazard. Efforts by the caseworker to get appellant mother to clean up the mess met with limited success, according to her testimony.

**{¶ 10}** The caseworker reported that, during the two and one-half months prior to appellee's complaint for permanent custody, she was also concerned about appellant mother's ability to supervise the children. Appellant mother was working third shift at McDonalds and would sleep during the day, leaving supervision of the children to 12-year-old A.J. When she was awake, the caseworker reported, appellant mother spent much of her time on the computer communicating with friends and writing stories. Moreover, appellant mother permitted the children to play outside unsupervised and when she did place the children with a babysitter, the babysitter allowed appellant father to have contact with them.

**{¶ 11}** The caseworker's supervisor later testified that in early July 2009, she accompanied the caseworker to appellant mother's home and found conditions "deplorable." The supervisor advised appellant mother that she would be back in a week and expected improvement. In a week, the supervisor testified, appellant mother was proud of her efforts, while the supervisor could see little improvement.

**{¶ 12}** On July 16, 2009, appellee filed a complaint alleging that appellant children were dependent, neglected and abused. Appellee sought an adjudication to that effect. It also requested a finding that reasonable efforts were made to reunify the family or, alternatively, that no reasonable efforts were necessary, and a disposition terminating the parental rights of appellant mother and father. Appellee asked for an award of permanent custody, pursuant to R.C. 2151.353(A)(4).

**{¶ 13}** The matter proceeded to a lengthy trial, following which the court found appellant children neglected and dependent. After a dispositional hearing, the court found that, despite appellee's reasonable efforts, the children can neither now, nor in a reasonable time, be reunited with their parents. The court found that the evidence appellee presented established that R.C. 2151.414(E)(1), (4), (14) and (16) applied with respect to appellant mother and R.C. 2151.414(E)(1),(2),(14), and (16) applied to appellant father. The court concluded that it was in appellant children's best interests that appellant mother and appellant father's parental rights be terminated and that permanent custody be granted to appellee.

**{¶ 14}** From this judgment, appellants now bring this appeal. Appellant mother sets forth a single assignment of error:

**{¶ 15}** "The judgment of the trial court was against the manifest weight of the evidence."

**{¶ 16}** Appellant father assigns as error:

**{¶ 17}** "The trial court's finding that permanent custody should be awarded to Lucas County Children Services is against the manifest weight of the evidence."

**{¶ 18}** In their assignment of error, appellant children state:

**{¶ 19}** "The Trial Court erred in finding that LCCS had used reasonable efforts to reunify Appellants with their family."

**{¶ 20}** "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson* (1983), 463 U.S. 248, 256.

**{¶ 21}** "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233; *Stanley v. Illinois* [(1972), 405 U.S. 645, 651], supra; *Meyer v. Nebraska* (1923), 262 U.S. 390, 399-401. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts* (1944), 321 U.S. 158, 166, 64. And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' *Cleveland Board of Education v. LaFleur* (1974), 414 U.S. 632, 639-640.

**{¶ 22}** "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the

parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families* (1977), 431 U.S. 816, 862-863 (Stewart, J., concurring in judgment)." *Quillion v. Walcott* (1978) 434 U.S. 246, 254-255. Accord, *Troxell v. Granville* (2000), 530 U.S. 57, 65-66.

**{¶ 23}** The Ohio equivalent of parental unfitness for a child who is not orphaned or abandoned is a determination that the child cannot be placed with either parent within a reasonable time or should not be placed with the parents. R.C. 2151.414(E).[1] In reaching such a determination the court, following a hearing, must find that there is clear and convincing evidence that one of the predicate conditions enumerated in R.C. 2151.414(E)(1)-(16) exists. *In re Sean B.*, 170 Ohio App.3d 557, 2007-Ohio-1189, ¶ 31, citing *In re William S.* (1996), 75 Ohio St.3d 95, syllabus. The court also, in most circumstances, must find that a public children's services agency seeking permanent custody has made reasonable efforts to make it possible for the child to return to the home. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 43.

**{¶ 24}** After the predicate condition is properly established, the court must then decide whether terminating a parent's parental rights is in the child's best interests. R.C. 2151.414(D). This decision too must be based on clear and convincing evidence. R.C. 2151.414(B)(1)(2). Clear and convincing evidence is that evidence sufficient for the trier of fact to form a firm conviction or belief that the essential statutory elements for a

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[1]R.C. 2151.414(B)(2)(d), the "12 of 22" provision, is not implicated in this case.

termination of parental rights have been established. *In re Sean B.*, supra; *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

I. Reasonable Efforts

**{¶ 25}** We shall discuss appellant children's assignment of error first. Appellant children assert that appellee failed to employ reasonable efforts to reunify them with their mother before seeking permanent custody.

**{¶ 26}** "When the state intervenes to protect a child's health or safety, '[t]he state's efforts to resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed are called "reasonable efforts."'" *In re C.F.*, 2007-Ohio-1104, ¶ 28, quoting Will L. Crossley, Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation (2003), 12 B.U.Pub.Int.L.J. 259, 260.

**{¶ 27}** While no single section of Ohio's child-welfare code addresses "reasonable efforts," numerous provisions require that children, wherever possible, be cared for and protected in a family environment. Separation of a child from his or her parents should only be accomplished when necessary for the child's welfare or the public safety. Id. at ¶ 29, quoting R.C. 2151.01(A). To this end, various statutes require a children's services agency to make "reasonable efforts" to prevent a child's removal from the home or, alternatively, speedy reunification with his or her parents if removal is necessary. Id. at ¶ 29-30; Ohio Adm.Code 5101:2-39-05; Juv.R. 27(B)(1). In many states "reasonable

efforts" are described as the children's services agency acting diligently and providing services appropriate to the need. *Crossley*, supra, at 295-296.

**{¶ 28}** Appellant children argue that when appellant father vacated the home in April 2009, there existed a situation that was not only legally distinct from that which had gone before, but circumstantially different. The evidence presented at trial revealed that appellant father was a child of parents who both served in the military. Perhaps because of this, appellant father was the family disciplinarian, demanding obedience from the children and strictly enforcing their good behavior, frequently with a belt.

**{¶ 29}** As appellant father was a student, studying information technology, and appellant mother worked third shift, appellant father assumed the role of house parent. It was appellant father who assigned chores and made certain that rules were followed. When, as the result of appellant mother's domestic violence allegation and protective order, appellant father was taken and kept from the home, the role of single parent fell to appellant mother.

**{¶ 30}** Appellant children argue that appellant father's dictatorial demeanor undermined appellant mother's authority with the children and left her unprepared to be both principal provider and disciplinarian. When she asked appellee for help, all appellee provided was a diluted continuation of prior services, criticism of the speed with which she adapted and, in less than 90 days, an agency determination that she was unfit to parent. Notwithstanding appellee's lackadaisical efforts to aid, appellant children point out, appellant mother remedied the only goal identified in the case plan, the condition of

the home, as evidenced by the introduction at trial of numerous photographs showing an orderly home.

**{¶ 31}** Appellee views the events following the termination of protective supervision as merely a continuation of what had already been a two year involvement with this family. Despite appellee's efforts over this period, there was a reoccurrence of "violence in the home." Appellee is particularly displeased that this incident, which occurred before the hearing for termination of protective supervision, was not reported to law enforcement until after the hearing. Had appellee been timely informed of this incident, appellee asserts, it is likely protective supervision would have been continued. Moreover, appellee insists, even after appellant father was arrested for domestic violence and then charged in connection with the pictures on his computer, appellant mother still permitted him access to the children at a babysitter's and indeed, on one occasion, even attempted her own reconciliation with him. Additionally, appellee notes, after appellant father left the home, its condition relapsed to the uncleanliness and disorder observed prior to the termination of protective supervision.

**{¶ 32}** Appellee characterizes the acts of appellant father in April 2009, as an incident of violence. The trial court adopted this characterization. The evidence, however, does not support this characterization. There was, at worst, a threat of violence. But what is important is not what the incident was called, but how appellant mother reacted. According to a domestic violence expert's testimony at trial, appellant mother responded appropriately and in conformity with the domestic violence training appellant

mother had received. Moreover, the domestic violence expert testified, it is not unusual for a woman to delay reporting an incident for a few days, either to summon courage or, as appellant mother did, to arrange for the children to be out of the home when police arrived. The expert also testified that it is common for couples separated by domestic violence to attempt reconciliation. This testimony was unrefuted.

**{¶ 33}** It is also undisputed that appellant mother believed that, because the children were not named in the protective order as persons with whom appellant father was to have no contact, she had no authority to deny him visitation. Even so, the record reveals no evidence that appellant mother, or anyone else, deliberately or inadvertently ever permitted appellant father to have unsupervised contact with the children after he left the home.

**{¶ 34}** This leaves the condition of the home. Each of appellee's witnesses testified that, at the time of the hearing on termination of protective supervision, the home was sufficiently clean and orderly so that it posed no risk to the children. Yet, when appellant mother sought aid in controlling her children, the caseworker found the home cluttered and dirty.[2]

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[2]This description was challenged by an employee of the Prosecuting Attorney's Crisis Response Team, a neighbor of the family, who testified that, on the day after appellant father's arrest, the house was "cluttered." Around July 4, 2009, two weeks before the children were removed, the neighbor testified the home was, "[s]lightly less cluttered. Not much. A little bit. I mean, it's a small trailer with a lot of people. It wasn't filthy. It wasn't dirty. * * * It's not unsafe."

**{¶ 35}** Both the caseworker and her supervisor pointed out in their testimony that, even though the order terminating protective supervision ended the "legal case," appellee maintained an open file on the family. Indeed, the only case plans filed in this case show that, other than protective child care, all of the planned services were continuations of services begun in 2008, during the prior case. There was nothing in the case plans that would suggest anyone at the agency believed that now was any different than then.[3]

**{¶ 36}** All of this has to be factored into a determination as to whether appellee met its duty to make reasonable efforts to prevent the children from being removed from the home and its burden, pursuant to R.C. 2151.419(A)(1), to present clear and convincing evidence of that effort. It is patently clear the challenges appellant mother faced in April 2009, were markedly different than those prior to that date. Appellee appears to have failed to recognize that difference. Instead of providing aid to a newly minted single working mother, coping for the first time in nearly a decade without a husband to provide discipline and order, appellee viewed appellant mother as a slovenly housekeeper who just was not trying hard enough.

**{¶ 37}** We believe that the definition of "reasonable efforts" adopted in some states makes sense: reasonable efforts means that a children's services agency must act

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[3]In fairness, we note that a community based child therapist on contract with appellee seems to have appreciated the different dynamic in the home, but she testified she was "just beginning" to provide therapeutic services when the children were taken from the home. According to the therapist, she was in the home on June 29, July 7 and July 14. When she returned the following week, appellee had already removed the children.

diligently and provide services appropriate to the family's need to prevent the child's removal or as a predicate to reunification.

**{¶ 38}** It was less than 90 days between appellee's re-involvement with this family and its decision to seek permanent custody. During this time appellee reinstituted some of the services previously offered. It appears that appellee institutionally failed to perceive the change in this family's needs. As a result, there is not even a mention in any case plan filed in the record concerning services to address appellant mother's status as a single mother or the children's reaction when discovering that they were suddenly unfettered by the dominant authority figure in their lives. The therapist who may have recognized these conditions had only been working with the family three weeks when the children were removed. Absent an institutional recognition of these new concerns, we cannot conclude that appellee met its burden of demonstrating clearly and convincingly either that it acted diligently for family preservation or that it provided appropriate services to prevent these children from being removed from the home.

**{¶ 39}** Accordingly, appellant children's assignment of error is found well-taken.

## II. Manifest Weight

**{¶ 40}** Appellant father and appellant mother's assignments of error each assert that the trial court's findings supporting termination of parental rights was against the manifest weight of the evidence. Because we have concluded that appellee failed to prove reasonable efforts to prevent removal of the children from the family, the judgment

of termination must be reversed and the case remanded. Accordingly, appellant father's and appellant mother's assignments of error are moot.

**{¶ 41}** On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

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| Mark L. Pietrykowski, J. | _______________________ JUDGE |
| Arlene Singer, J. | |
| Thomas J. Osowik, P.J. CONCUR. | _______________________ JUDGE |
| | _______________________ JUDGE |

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