[Cite as *In re Sorgen*, 2006-Ohio-4180.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF:	**:**	**O P I N I O N**
SKYLER SORGEN, ABUSED CHILD	**:**	**CASE NO. 2005-L-121**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2002 AB 2590.

Judgment: Affirmed.

Carl L. DiFranco, Talidyne Building, #100, 2603 Riverside Drive, Painesville, OH 44077-5173 (For Appellant, Sara Sorgen, Natural Mother).

Laura A. DePledge, 8451 Mentor Avenue, Mentor, OH 44060 (For Appellees, Todd Sorgen and Cindy Sorgen, Maternal Grandparents).

Karen D. Lawson, Karen D. Lawson Co., L.P.A., 240 East Main Street, Painesville, OH 44077 (Guardian ad Litem).

DONALD R. FORD, P.J.

{¶1} Appellant, Sara Sorgen, the mother, appeals from the July 12, 2005 judgment entry of the Lake County Court of Common Pleas, Juvenile Division, adopting the magistrate's decision granting custody of Skyler H. Sorgen ("child") to appellees, Todd and Cindy Sorgen, the child's maternal grandparents.

{¶2} The child was born on September 25, 2002. Appellant and the father, Zachary Shook ("father"), lived together when the child was born, but were not married. On December 16, 2002, the Fairport Harbor Police Department removed the child from

his daycare and the juvenile court awarded emergency custody of the child to the Lake County Department of Jobs and Family Services ("LCDJFS").

{¶3} On December 18, 2002, LCDJFS filed a complaint seeking temporary custody of the child, alleging the child was abused pursuant to R.C. 2151.031. The complaint alleged, inter alia, that the child had bruises on his forehead, a deep tissue bruise on his chin with an accompanying abrasion, a bruise on his left nipple, and two separate abrasions on his scalp. Further, the complaint noted concerns that the child had been spitting up blood.

{¶4} The complaint also indicated that "[m]other first indicated she did not know how the scalp abrasions occurred and then said they were the result of a medical procedure in November. Mother indicated said child received the bruise to his forehead by hitting her head with his head. Mother reports that the bruise to said child's chin occurred when said child's head hit his father's mouth. Mother did not know where the nipple bruise came from but said it might have occurred from being held." In addition, the father could not explain the child's injuries.

{¶5} On December 19, 2002, by agreement of the parties, the juvenile court ordered that temporary custody remain with LCDJFS and appointed a guardian ad litem ("GAL") for the child. The court further ordered that the child be placed with appellees and ordered that appellant and the father have supervised visitation, to be supervised by appellees.

{¶6} At the adjudication hearing on March 3, 2003, LCDJFS amended the complaint to reflect a finding of neglect, and after appellant and the father agreed, the

trial court found the child to be a neglected child pursuant to R.C. 2151.03(A)(6). The juvenile court continued temporary custody of the child to LCDJFS.

{¶7} On July 8, 2003, appellees filed a motion with the juvenile court to be added as new party defendants, which the court granted. On July 25, 2003, appellees moved for temporary custody and legal custody of the child.

{¶8} On August 12, 2003, by agreement of the parties, the juvenile court granted temporary custody of the child to appellees and protective supervision to LCDJFS.

{¶9} On November 3, 2004, the magistrate ordered that legal custody be returned to appellant after determining that pursuant to *In re Perales* (1977), 52 Ohio St.2d 89, that he could not find appellant unsuitable since she had complied with her case plan. He further ordered LCDJFS to retain protective supervision of the child.

{¶10} In addition, the magistrate ordered the father, although still living with the mother at the time of the hearing, to have only supervised contact with the child, finding that he remained a potential threat to him. The magistrate returned custody to appellant, even though he found that she continued to minimize the circumstances that led to the child being adjudicated a neglected child.

{¶11} On December 20, 2004, by leave of court, appellees filed their objections to the magistrate's decision, claiming that because there had been a prior adjudication of neglect, the court should have based its decision on what was in the child's best interests and not whether the mother was unsuitable. On March 4, 2005, the judge sustained appellee's objections, determining that *In re Perales* did not apply since the child had previously been adjudicated a neglected child, and thus a finding of

unsuitability was not required. The judge then referred the matter back to the magistrate to determine what would be in the child's best interests.

{¶12} On March 11, 2005, the magistrate concluded that it would be in the child's best interest to remain in the custody of appellees. On March 24, 2005, appellant filed her objections to the magistrate's decision. On July 12, 2005, the court overruled the objections and adopted the magistrate's decision granting custody of the child to appellees. It is from that judgment appellant appeals, raising the following sole assignment of error:

{¶13} "The trial court erred and abused its discretion by denying [appellant] her federal constitutional rights and fundamental liberty interest in the care, custody and management of her child as protected by the due process clause of the Fourteenth Amendment of the United States Constitution and by Section 16, Article 1 of the Ohio Constitution."

{¶14} In her assignment, appellant presents one issue for our review. She argues that before awarding custody to a nonparent, and after the child has been adjudicated an abused, neglected, or dependant child, *and* the parent has remedied the circumstances that led to the adjudication, a trial court must still find the parent to be unsuitable before awarding custody to a nonparent. For this proposition, the mother relies on *In re C.R.*, 8th Dist. No. 82891, 2004-Ohio-4465. In the Eighth District decision, which we agree with appellant is "factually similar" to the instant appeal, the appellate court held that in a custody dispute between a parent and a nonparent, a court must first find that the parent is unsuitable before it can award custody to the nonparent.

{¶15} We first note that "[a]bsent an abuse of discretion, an appellate court will not reverse a trial court's determination in a child custody matter." *Walther v. Newsome*, 11th Dist. No. 2002-P-0019, 2003-Ohio-4723, at ¶15, citing *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 416-417. "An abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." Id., citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} Since the mother filed her timely notice of appeal, and after both briefs were filed, on March 29, 2006, the Supreme Court of Ohio released a decision that is dispositive of the case sub judice. The Supreme Court reversed the Eighth District's decision in *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, holding that "[w]hen 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." Id., at paragraph three of the syllabus.

{¶17} In *In* re *C.R.*, the Supreme Court first reviewed the history of child custody law which we will summarize. R.C. 2151.23(A)(1) gives juvenile courts exclusive jurisdiction concerning children alleged to be abused, neglected, or dependent. Id. at ¶12. Furthermore, R.C. 2151.23(A)(2) grants jurisdiction to the juvenile court "'to determine the custody of any child not a ward of another court of this state.'" Id. However, "this statute does not articulate a standard for the juvenile court to apply when making such custody determinations." Id.

{¶18} The Supreme Court noted that in *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, syllabus, it held that, "'(A) trial court must make a parental unsuitability determination on the record before awarding legal custody of the child to the nonparent.'" *In re C.R.*, 108 Ohio St.3d at ¶18. However, it pointed out that *Hockstok* did not involve an abused, neglected, or dependent child, and instead, arose from a private custody dispute originating in the domestic relations court pursuant to R.C. 3109.04. Id.

{¶19} The Supreme Court further explained that in *Hockstok*, it had relied on *In re Perales*, supra, "which also did not involve an abused, neglected, or dependent child, but arose from a private custody dispute in juvenile court pursuant to R.C. 2151.23(A)(2)." *In re C.R.*, 108 Ohio St.3d at ¶19. It stated that, "[i]n *Perales*, we held that in a child-custody proceeding between a parent and nonparent, a court may not award custody to the nonparent 'without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.' [*Perales*] at syllabus." Id.

{¶20} The Supreme Court continued by explaining that its decision in "*In re Cunningham* (1979), 59 Ohio St.2d 100, 106 *** did involve a *dependent* child, and we stated that after a dependency adjudication, a finding of parental unfitness is not a mandatory prerequisite to an award of *permanent* custody. *** Unlike *In re Cunningham*, the instant case does not involve an award of permanent custody and concerns a grant of only legal custody, which does not divest parents of residual

parental rights, privileges, and responsibilities. However, as in *In re Cunningham*, no statute requires a finding of parental unfitness as a prerequisite to an award of legal custody in cases where a child is adjudged abused, neglected, or dependent." *In re C.R.*, 108 Ohio St.3d at ¶20-21. [1]

{¶21} After reviewing the history of child custody proceedings, the Supreme Court concluded that it agreed with "the appellate courts that have concluded that abuse, neglect, or dependency adjudications implicitly involve a determination of the unsuitability of the child's parents." Id. at ¶22.

{¶22} Thus, based on the Supreme Court's holding in *In re C.R.*, we conclude that the trial court did not err when it granted custody to appellees after determining that it would be in the child's best interests to remain with them.

{¶23} The mother argues further that even if this court decides that the standard to be applied should be the "best interest" test, her case is factually distinguishable since the magistrate found that she had complied with her case plan and resolved the circumstances that led to the original neglect adjudication. We disagree.

{¶24} Despite finding that the mother had complied with her case plan, the magistrate also found that "[t]he major factor preventing [mother] from re-obtaining custody has been her refusal to separate completely from [father], whose actions and mental health issues were the basis for the finding of neglect." Further, the magistrate noted that "[t]he risk that [father] poses to the child due to his mental health condition and [mother's] position that he poses little or no risk, has caused reluctance to return

1. The Supreme Court stated that in *In re Cunningham*, "we noted that, at that time, no statutory requirement necessitated a finding of parental unfitness as a prerequisite to an award of permanent custody in cases where a child is adjudged abused, neglected, or dependent." *In re C.R.*, 108 Ohio St.3d at ¶20. It then noted that after *In re Cunningham*, "the General Assembly revised the statutory framework

the child to the home. [Mother] minimizes to this date that which occurred as the basis of the neglect."

{¶25} While we agree with the trial court that some issues remain unresolved, such as "how long the implication" of unsuitability should remain, and "whether there is any event that will reinstate the presumption in parents' favor[,]" we conclude that in the case sub judice, the implication of unsuitability still existed at the time of the custody hearing. The record before us reveals that at the time of the hearing, the Lake County Juvenile Court still had jurisdiction of the child, and had never relinquished that jurisdiction since it had originally adjudicated the child to be neglected.

{¶26} Thus, we conclude that the trial court did not err or abuse its discretion when it applied the best interest standard in determining that custody of the child should remain with appellees.

{¶27} We note that during oral argument, appellant argued that this court denied her motion to supplement the record with the guardian ad litem's report. However, appellant did not file a motion to supplement the record. On November 8, 2005, she filed a "Motion to Expend Funds from the State for the Expense of the Transcript of Trial held on August 11, 2004." Appellant moved to have this court pay for a copy of the transcript since she was indigent. She maintained that transcripts from that hearing, regarding closing arguments and the guardian ad litem's recommendation, were necessary for her reply brief.

{¶28} On November 17, 2005, we denied appellant's motion because appellant did not submit to this court a Court Form OPD-206R Financial Disclosure/Affidavit of

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for a juvenile court in making *permanent* custody determinations. See R.C. 2151.353(A)(4) and 2151.414(B) through (E)." *In re C.R.*, 108 Ohio St.3d at fn. 2.

Indigency required by the Ohio Public Defender Commission's Standards and Guidelines for Appointed Counsel Reimbursement. Further, we noted that a reply brief was not permitted since the case was on the court's accelerated calendar, and even if it was not, such reply brief would have been due on October 6, 2005, more than a month prior to the filing of appellant's motion.

{¶29} As such, appellant's assignment of error is without merit. The judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶30} Cases terminating parental rights present an extremely difficult balancing of parents' fundamental liberty interest to raise their child and the state's important interest in ensuring the safety and well-being of all children. Clearly, the child in this matter had been in an unsafe situation, but that is not the question before us. The question is whether a mother may lose custody of her child where there is a finding of neglect, but there is no finding that she is an unsuitable mother.

{¶31} While it is true this matter deals only with custody, and not the termination of parental rights, this constitutes only a temporal difference. If you lose custody of your child for a day, a month, or a year, you have been deprived of your constitutionally protected right to raise your child as you see fit.

{¶32} The Supreme Court of Ohio has recognized the importance of parents' rights to raise their children. "'Permanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." *** Therefore, parents "must be afforded every procedural and substantive protection the law allows[.]"'"[2]

{¶33} Moreover, both the Supreme Court of Ohio and the United States Supreme Court have recognized parental rights as fundamental liberty interests.

{¶34} "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[3]

{¶35} The Supreme Court of Ohio has ruled that a finding of parental unsuitability is necessary in a custody dispute between a natural parent and a nonparent.[4] While the *Hockstok* case involved a dispute between a parent and a grandparent and was decided pursuant to R.C. 3109.04, there is no reason why this requirement should not apply to custody disputes adjudicated under R.C. 2151.23(A)(2). Specifically, the Supreme Court of Ohio held that "'(t)he general rule in Ohio regarding original custody awards in disputes between a parent and a non-parent is that "parents who are 'suitable' persons have a 'paramount' right to the custody of their minor children unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children."'"[5]

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2. *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, at ¶14, quoting *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16.
3. *Santosky v. Kramer* (1982), 455 U.S. 745, 753.
4. *Hockstok v. Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, syllabus.
5. Id. at ¶21, quoting *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 65, quoting *In re Perales* (1977), 52 Ohio St.2d 89, 97.

{¶36} I cannot agree with the logic that the Supreme Court of Ohio and the majority follows in cases adjudicated under R.C. 2151.23(A)(2), that a finding of neglect or dependency is synonymous with unsuitability of a parent.[6] The concepts of "unsuitability" and "neglect," while related, are not the same. For example, a parent who fails to secure a child in a seat belt in his or her motor vehicle is "neglecting" the well-being of that child. In the event of injury, that absence of care could well result in a finding that the child is "neglected" in a juvenile court. Would the grandparents then be permitted to file for custody and urge the court to go immediately to the "best interest" test for that child, since the PRESUMPTION OF UNSUITABILITY had already been established, as a matter of law, with regard to the parents? The obvious answer is "No."

{¶37} The creation of a judicial shortcut to deprive a parent of custody under R.C. 2151.23(A)(2), when the same parent would be accorded greater rights if the court were proceeding under R.C. 3109.04, makes no sense.

{¶38} As a fundamental constitutional right, there can be no deprivation of parental rights, however limited, prior to a specific finding of unsuitability. It is that simple. There has been no finding in this matter that this mother is unsuitable. Therefore, the termination of her custody of her child is contrary to law.

6. See *In re C.R.*, 108 Ohio St.3d 369, paragraph three of the syllabus.