

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

IN THE MATTER OF:	:	O P I N I O N
B. J.,	:	
DEPENDENT CHILD	:	CASE NO. 2010-G-2946
	:	

Civil Appeal from the Geauga County Juvenile Court, Case No. 08 JF 000524.

Judgment: Affirmed.

Dennis J. Niermann, Dennis J. Niermann Co., L.P.A., 8437 Mayfield Road, #103, Chesterland, OH 44026 (For Mikal Johnston-Appellant).

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Geauga County Job and Family Services-Appellee).

DIANE V. GRENDALL, J.

{¶1} Appellant, Mikal Johnston, appeals the Judgment Entry of the Geauga County Juvenile Court, maintaining the existing custody arrangements with respect to his and appellee, Denise Johnston’s, minor child, B.J. For the following reasons, we affirm the decision of the court below.

{¶2} On October 22, 2008, Geauga County Job and Family Services filed a Complaint, alleging B.J. to be dependent, pursuant to R.C. 2151.04(C)¹, and requesting protective supervision and/or temporary custody.

1. R.C. 2151.04(C): “dependent child’ means any child *** [w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child’s guardianship.”

{¶3} On October 29, 2008, the juvenile court issued a Judgment Entry, finding B.J. to be dependent and granting Geauga Job and Family Services protective supervision of him. The following concerns were identified in the case plan filed with the court: “Mikal is involved with a lengthy child custody and divorce conflict and it appears to be effecting his ability to provide the necessary emotional/mental support that [B.J.] requires due to more time and energy going to arguments with Denise rather than to [B.J.]”; “Denise is involved in [a] lengthy child custody and divorce conflict that appears to become a constant source of stress for Denise that has affected her ability to more effectively provide the necessary emotional/mental support for B.J.”; “[t]he concern for B.J. is that he is witnessing the ongoing conflict between his parents and that he consistently feels torn between households and has been observed by his parents to cope with the situation [sic].”

{¶4} Initially, B.J. was in Denise’s custody. In April 2009, the juvenile court designated Mikal the residential parent. During this period, the court concluded “the parents have made no progress improving their ability to jointly parent B.J. without exposing him to harmful conflict.” The result was an observed increase in B.J.’s stress and anxiety.

{¶5} On October 16, 2009, the juvenile court granted Denise legal custody of B.J. and indefinitely suspended Mikal’s parenting time.²

{¶6} On October 23, 2009, the juvenile court appointed Scott Riding as B.J.’s guardian ad litem/CASA (Court Appointed Special Advocate).

{¶7} On December 30, 2009, Riding filed his Report and Recommendations with the juvenile court. Riding reported: “B.J. seems to be making a seamless transition

2. On May 21, 2010, this court affirmed the decision of the juvenile court in *In re B.J.*, 2009-G-2933, 2010-Ohio-2284.

and is obviously very happy with his new life [with Denise]. B.J. is still doing well in school, making new friends and re-kindling old one's [sic], excited about his Cub Scout Troop, and seems to be a happy young boy. When asked, B.J. does not want to talk about or see his Father and this seems to be the only negative issue with him." Riding recommended that Denise retain custody of B.J. and have supervised visitation with Mikal, "[o]nly when B.J. is ready." Denise should continue therapy as needed and B.J. should continue counseling with Leila Vidmar.

{¶8} On December 30, 2009, Mikal filed a Motion to Remove Leila Vidmar from the Case, on the grounds that she is "unable to act in the best interest of Minor B. in any objective impartial and competent manner." Mikal stated that, at Vidmar's suggestion, he provided her discounted tent rental service for a private party at her residence in exchange for credit toward B.J.'s future counseling sessions. Mikal claimed that, as a result of this barter, Vidmar's objectivity and professionalism were compromised. Vidmar became defensive and angry when Mikal had B.J. assessed by an independent psychologist and filed a formal complaint against her with the State of Ohio Counselor, Social Worker, and Marriage and Family Therapist Board.

{¶9} Also on December 30, 2009, Mikal filed a Motion to Appoint Minor B. an Attorney.

{¶10} On January 5, 2010, Mikal filed a Motion for Custody of B.J.

{¶11} On January 6, 2010, a review hearing was held in which the juvenile court considered Mikal's Motions. The court overruled Mikal's Motion to Appoint an Attorney to represent B.J. for the reason that it was not "timely," i.e., there was not sufficient time to secure representation for B.J. at the present hearing. However, the court stated that an attorney would be appointed for B.J. if further hearings were held. The court heard

testimony from Tracy Prohaska, a social worker with the Geauga County Job and Family Services, as well as Mikal, Ruth Ann (Mikal's spouse), and Denise.

{¶12} On January 7, 2010, the juvenile court issued its Judgment Entry. The court made the following findings:

{¶13} After the initial trauma of the custody change at the beginning of the review period, B.J. has made a good adjustment to residing with [h]is mother without exposure to the on-going conflict between the parents. The child's therapist, GAL, school counselor, and social worker all report that B.J. is doing fine in his mother's home and th[at] he is demonstrating less anxiety now that he is no longer put in the middle of his parents' conflict. He has attended counseling regularly and benefits from the counseling he receives. *** Neither parent [h]as been consistent in attending individual counseling during this review period. The individual counselors working with the various family members have not communicated or coordinated efforts to address the conflict between the parents. The child's counselor is not recommending joint sessions with the father at this time. The child is expressing th[at] he does not wish to have contact with his father.

{¶14} The juvenile court ordered that the prior custody and visitation orders should continue.

{¶15} Father shall have no contact with the child other than participation in counseling with the child if recommended by the child's counselor or if mutually agreed to by the parents. Father may have contact/visitation with the child as the two parents may mutually agree with input from the therapist working with both parents and the child. The child shall not be forced to participate in visitation against his will. *** If [the] father wishes to work toward reestablishing parenting time with his son, he shall participate in counseling twice monthly to address parenting and relationship issues with a counselor willing and able to coordinate therapy with the other therapists involved with the case.

{¶16} The juvenile court denied Mikal's Motion for Custody, finding "there has not been a change in circumstances from the last review that would justify a modification of the current custody order and that the harm to the child from another change in custody would outweigh any benefit to the child."

{¶17} The juvenile court denied Mikal's Motion to Remove Leila Vidmar, finding that B.J. "has a therapeutic relationship with his counselor that is beneficial to him" and "[t]erminating that relationship is not in the child's best interest."

{¶18} On February 8, 2010, Mikal filed his Notice of Appeal. On appeal, Mikal raises the following assignments of error:

{¶19} “[1.] The trial court violated father’s fundamental constitutional and paramount right to the custody of and visitation with minor child.”

{¶20} “[2.] The trial court abused its discretion by failing to make a determination that the state had made reasonable efforts to reunify the family prior to extinguishing father’s paternal rights.”

{¶21} “[3.] The trial court abused its discretion by failing to appoint Minor B. an attorney prior to ending Minor B.’s fundamental constitutional right to his relationship with his father.”

{¶22} “[4.] The trial court abused its discretion by disregarding credible evidence and focusing on ethically questionable, flawed and orchestrated evidence offered through counselor Leila Vidmar.”

{¶23} “[5.] The trial court erred by abusing its discretion in denying father’s December 30, 20[09] motion for custody.”

{¶24} A juvenile court’s dispositional order regarding abused, neglected, or dependent children is reviewed under an abuse of discretion standard. *In re Corey*, 11th Dist. No. 2005-G-2649, 2006-Ohio-2013, at ¶31; *In re Goff*, 11th Dist. No. 2002-A-0038, 2003-Ohio-1744, at ¶17 (“[a] juvenile court has broad discretion in the disposition of an abused, neglected, or dependent child case”).

{¶25} In his first assignment of error, Mikal argues that the juvenile court’s dispositional order effectively terminated his parental rights by denying him any visitation unless recommended by B.J.’s counselor or mutually agreed to by the parties.

Mikal argues the evidence reflects that he was a suitable parent whereas Denise was not suitable.

{¶26} Mikal is essentially challenging the juvenile court's suspension of his visitation with B.J., as ordered in the October 16, 2009 Judgment Entry. The court's January 7, 2010 Judgment Entry did not materially alter its prior order regarding visitation. The suspension of Mikal's visitation was affirmed by this court in *B.J.*, 2010-Ohio-2284. Therein, we explained that a parent's right of visitation may be suspended where there has been a showing of parental unfitness or unsuitability and/or visitation would cause harm to the child. *Id.* at ¶52. In the present case, there was evidence of parental unsuitability and harm to B.J. *Id.* at ¶¶54-55. Mikal's arguments are directed toward an order that has been affirmed on appeal and are based on evidence pre-dating that order. The suspension of his visitation privileges, therefore, is *res judicata*.

{¶27} We further note that the juvenile court's suspension of a parent's visitation privileges is expressly sanctioned under the Revised Code. At the time B.J. was adjudicated dependent, he was placed under the protective supervision of Geauga Job and Family Services. When the court issues a protective supervision order it "may place any reasonable restrictions upon the child, the child's parents, guardian, or custodian, or any other person, including, *** Order[ing] a party, a parent of the child, or a physical custodian of the child to prevent any particular person from having contact with the child." R.C. 2151.353(C)(2).

{¶28} Finally, we note that the juvenile court's January 7, 2010 Judgment Entry stated: "If father wishes to work toward reestablishing parenting time with his son, he shall participate in counseling twice monthly to address parenting and relationship issues with a counselor willing and able to coordinate therapy with the other therapists

involved with this case.” This order reflects the court’s prior order suspending Mikal’s visitation. There is no evidence that, during the period between the two orders, Mikal tried to work with B.J.’s therapist to reestablish visitation, either directly or through his own counselor.

{¶29} The first assignment of error is without merit.

{¶30} In his second assignment of error, Mikal argues the juvenile court failed to make a determination, pursuant to R.C. 2151.419(A)(1), that Geauga Job and Family Services “made reasonable efforts to prevent the removal of the child from the child’s home, to eliminate the continued removal of the child from the child’s home, or to make it possible for the child to return safely home.”

{¶31} We hold that R.C. 2151.419(A)(1)’s requirement to use reasonable efforts does not apply where custody is being transferred from one parent to another. The obligation to demonstrate “reasonable efforts” arises “at any hearing held pursuant to *** 2151.353 [2151.35.3] [disposition of abused, neglected or dependent child] of the Revised Code at which the court removes a child from the child’s home or continues the removal of a child from the child’s home.” In the present case, the juvenile court has never ordered the removal of B.J. and/or granted Geauga Job and Family Services custody of B.J. Rather, custody was transferred from one parent’s home to another parent’s home. Contrary to Mikal’s position, the transfer of B.J.’s custody to Denise was not the legal equivalent of permanently terminating his parental rights. Thus, his reliance on *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, is misplaced.

{¶32} The second assignment of error is without merit.

{¶33} In his third assignment of error, Mikal argues the juvenile court erred by failing to appoint an attorney to represent B.J.’s interests.

{¶34} Initially, we agree with the juvenile court that Mikal's Motion to have counsel appointed for B.J., filed seven days before the hearing, was not timely inasmuch as the appointment of counsel at this stage in the proceedings would have caused considerable delay while counsel became familiar with the case. Moreover, the court stated that it would appoint counsel for B.J. if further hearings were held. We will next consider whether the court erred by not appointing counsel for B.J. earlier in the proceedings.

{¶35} "A child *** is entitled to representation by legal counsel at all stages of the proceedings under this chapter [Chapter 2151. of the Revised Code]." R.C. 2151.352. "The appointment of counsel is not an automatic occurrence in every juvenile court proceeding." *In re Yates*, 11th Dist. No. 2008-G-2836, 2008-Ohio-6775, at ¶43. The Ohio Supreme Court has held that "a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding, and, therefore, is entitled to independent counsel in certain circumstances." *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, at syllabus. The "certain circumstances" in which it has been found necessary to appoint independent counsel are cases in which a motion for permanent custody has been filed or in which there have been allegations of abuse. E.g. *In re Allen*, 11th Dist. No. 2008-T-0010, 2008-Ohio-3389, at ¶10; *In re Borntreger*, 11th Dist. No. 2001-G-2379, 2002-Ohio-6468, at ¶77.

{¶36} The present case is not a permanent custody proceeding and there have been no allegations that B.J. is abused, as defined in R.C. 2151.031. This court has held that, "where the proceeding only involved the grant of legal custody, the court was well-apprieved of the children's feelings and no demonstration of prejudice has been

made,” the failure to appoint counsel for the child is not error. *Yates*, 2008-Ohio-6775, at ¶47.

{¶37} The third assignment of error is without merit.

{¶38} In the fourth assignment of error, Mikal argues the juvenile court erred, “[i]n light of the revealed unethical practices and failed duty of care by Ms. Vidmar,” by “accepting her testimony and evidence, by allowing her to give recommendations and stilted testimony based on unethical practices and deeming them credible and reliable.”

{¶39} As with the first assignment of error, Mikal is objecting to testimony presented prior to the October 16, 2009 Judgment Entry, the subject of a prior appeal. As explained above, issues relating to the October 16, 2009 Judgment Entry are res judicata. It is proper for this court to consider the denial of Mikal’s Motion to Remove Vidmar from the Case.

{¶40} Vidmar submitted a Treatment Update to the juvenile court on January 5, 2010. She reported that B.J. “has transitioned well to his mother’s home and states that he is ‘happy.’” B.J. told Vidmar that following the October 15, 2009 hearing, Mikal and/or Ruth Ann accused him of lying about the situation at their house, i.e., that Mikal records and eavesdrops on his conversations and tries to influence what he says to Vidmar and the other social workers, and told him that he would have to live with strangers. B.J. claimed the incident made him feel angry and guilty. Vidmar reported, “[i]t is apparent that [B.J.] was traumatized by the activity that took place after the last court hearing with his father and step-mother,” and, as a result, “he is currently not open to talking or meeting with his father and does not feel safe and lacks trust with the relationship.” Vidmar concluded that “[i]t would always be in the best interest of any

child to have a healthy relationship with each parent,” and a goal for B.J. is “to eventually establish a healthy relationship with both birth parents.”

{¶41} Caseworker Prohaska confirmed that B.J. reported mistreatment following the October 15, 2009 hearing and that he described living with Mikal as “being in a nightmare.”

{¶42} Guardian ad litem/CASA Riding stated in his Report, filed December 30, 2009, that B.J. also told Denise of his mistreatment following the October 15, 2009 hearing. Riding’s impression was that B.J. was “doing extremely well and is very happy,” although, “when you bring up the topic of his father, his mood changes immediately and he does not want to see him at this time.”

{¶43} Mikal claims Vidmar’s report of B.J.’s current condition and hostility toward him is the result of her unethical bartering with him for counseling fees and her partisan reaction to an independent psychologist’s evaluation, which indicated that B.J. was happy and well-adjusted to Mikal’s home.³

{¶44} Mikal has failed to present convincing evidence of bias in Vidmar’s report. Her assessment of B.J.’s current condition is consistent with, and corroborated by the reports of the guardian ad litem/CASA and the caseworker. Prior to the transfer of custody from Mikal to Denise, B.J. gave conflicting indications of his preferences regarding custody. Regardless of B.J.’s preferences, there was abundant evidence that his mental condition was worsening in Mikal’s custody. See 2010-Ohio-2284, at ¶¶35-

3. Mikal accused Vidmar of improperly advocating on Denise’s behalf with respect to B.J.’s custodial arrangements. Mikal, however, without informing the juvenile court, Geauga Job and Family Services, or Vidmar, had B.J. evaluated by Psychologist Lee Horowitz. In a report filed with the court prior to the October 15, 2009 hearing, Horowitz opined, “with a reasonable degree of psychological certainty, I can find nothing to indicate any change in home or school placement is warranted at the current time.” In contrast, Vidmar’s pre-hearing report made no specific recommendation regarding custody, beyond noting that B.J. “needs a safe, secure, empathetic, consistent and nurturing environment in order for him to experience a healthy childhood and to stabilize his depressive and anxious symptoms.”

45. Finally, B.J.'s prior guardian ad litem/CASA, who initially recommended that Mikal have custody of B.J., acknowledged that B.J. "has developed a trusting relationship with *** Vidmar" and "strongly recommended" that he continue therapy with her.

{¶45} The fourth assignment of error is without merit.

{¶46} In the fifth and final assignment of error, Mikal argues the juvenile court erred by denying his Motion for Custody.

{¶47} Mikal has failed to argue that a change of circumstances has occurred since the award of custody to Denise, as required by R.C. 3109.04(E)(1)(a). *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at paragraph two of the syllabus ("[t]he provisions of R.C. 3109.04(E)(1)(a) promote stability in the development of children and are not unconstitutional as applied where a noncustodial parent has not evidenced that a change has occurred in the circumstances of the child").

{¶48} The fifth assignment of error is without merit.

{¶49} For the foregoing reasons, the Judgment of the Geauga County Juvenile Court, denying Mikal's Motions for Custody, to Appoint Minor B. an Attorney, and to Remove Vidmar from the Case, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.