[Cite as *Penna v. Rowe*, 2012-Ohio-5442.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

JUANITA M. PENNA, et al.,	:	**O P I N I O N**
Plaintiff,	:	
		CASE NO. 2012-P-0026
(LYNDA PENNA,	:	
Appellee),	:	
- vs -	:	
ANDY J. ROWE,	:	
Defendant-Appellant.	:	

Appeal from the Portage County Court of Common Pleas, Juvenile Division, Case No. 2011 JCH 00082.

Judgment: Affirmed.

S. Kim Kohli, 8121 Main Street, Garrettsville, OH 44231 (For Appellee).

Warner D. Mendenhall, 190 North Union Street, #201, Akron, OH 44304 (For Defendant-Appellant).

Holly Kehres Farah, P.O. Box 935, Hudson, OH 44236 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Andy Rowe, appeals from the judgment of the Portage County Court of Common Pleas, adopting the magistrate's decision granting custody of his biological daughter, O.R., to her maternal grandmother, appellee, Lynda Penna. For the reasons discussed in this opinion, we affirm.

{¶2} Appellant and Juanita Penna are the biological parents of the minor child, O.R, born March 6, 2008. The couple lived together for a time but was unmarried. They eventually broke up and Juanita, O.R., and Juanita's other daughter, N.K. (from a previous relationship), born April 14, 2005, moved in with Juanita's mother, appellee; her husband, Joseph; and their four children. On February 1, 2011, Juanita filed a "Complaint for Child Support to Adopt Administrative Orders." The matter was assigned Case No. 2011 JCH 82 and, on March 24, 2011, the magistrate filed a decision adopting the pre-existing administrative child support orders. In April 2011, however, Juanita was killed in an automobile accident. At the time of her death, she and the two children were still living with appellee and her family.

{¶3} Following Juanita's death, in May 2011, appellant filed a motion for Custody with the Portage County Court of Common Pleas, Juvenile Division. On June 21, 2011, the court granted the motion and O.R. began living with appellant, who resided with his parents and his 17-year-old son, T.R. Appellee subsequently filed a pleading captioned, "Complaint / Motion for Custody / Allocation of Parental Rights." This case was assigned case number 2011 JCG 345. The trial court appointed a guardian ad litem ("GAL") for O.R. and, after a hearing on appellant's motion, granted custody of the child to appellant. In its order, the court scheduled a date on which appellee's motion for custody in Case No. 2011 JCG 345 would be heard. Despite the absence of a formal journal or docket entry, the pleadings and entries in the underlying matter were eventually captioned exclusively under Case No. 2011JCH 82, indicating the two cases were, at some point, consolidated.

{¶4} Prior to trial, the GAL filed her report providing the court with information regarding the parties' respective backgrounds and summarized her impression of the interactions between all relevant individuals involved in O.R.'s care and custody. The GAL indicated that O.R. had strong bonds with both parties, but provided no specific recommendation regarding custody. Rather, the GAL's "conclusion" read, in relevant part:

> **{¶5}** If the court finds Andy Rowe to be an unsuitable parent, then * * * [O.R.] should be placed in the legal custody of Lynda Penna. Under this scenario, Andy Rowe should be granted companionship time with [O.R.] pursuant to this court's Standard Order of Visitation.
>
> **{¶6}** If the court does not find Andy Rowe to be an unsuitable parent, then [O.R.] should remain in her father's legal custody * * *. Under this scenario, Lynda Penna should be granted companionship time * * * pursuant to this court's Standard Order of Visitation.

{¶7} At the hearing, evidence was presented that appellant worked 40 hours per week, usually first shift, but sometimes second. He had been married twice before and, including O.R., had four children with three separate women. The evidence indicated appellant was close with his two eldest children, his son, T.R., and an 18 year-old-daughter, Serena. He was, however, estranged from his 13 year-old-daughter.

{¶8} The evidence further demonstrated that appellant had been convicted in 2007 of felony assault on his second wife and was sent to prison for one year. The evidence indicates that appellant had met and was in a relationship with Juanita while in

prison. After his release, appellant moved in with Juanita, O.R., and N.K. They were engaged for a time, but eventually broke up.

{¶9} Juanita subsequently moved in with her mother, appellee, and her family. And appellant, T.R. and Serena moved in with appellant's parents. The evidence indicated appellant and Juanita had at least a cordial relationship with one another after the break up and, appellee testified, she and appellant were friendly prior to Juanita's death. After Juanita's death, appellant permitted O.R. to stay with appellee due to her close bond with her half-sister, N.K., who remained in appellee's custody.

{¶10} The parties' relationship became strained, however, when appellant filed his motion for custody. And, once appellant obtained custody of O.R., appellee stated appellant failed to maintain contact with her, did not permit O.R. to visit with N.K., and specifically ignored her multiple inquiries into O.R.'s well-being.

{¶11} The evidence also demonstrated that after Juanita's death, but prior to appellant gaining custody of O.R., appellant intercepted a $694 insurance check made out to Juanita based upon insurance premiums she had paid in advance. Appellant forged Juanita's name, endorsed the check, and cashed it. At the time of the hearing, charges were pending on this incident.

{¶12} Appellee testified that her husband is retired and receives a pension grossing between $2000 and $2500 per month. To supplement the family income, appellee works at a restaurant; appellee also receives an additional $597 per month in social security benefits to care for N.K.

{¶13} The evidence also demonstrated that, in 2004, appellee was charged with assault and convicted of child endangering as a result of an incident involving her eldest

daughter. Appellee testified that, due to the incident, she lost custody of her children for a time; since regaining custody, however, she has had no further problems.

{¶14} The GAL testified that it would be in O.R.'s best interest to remain residing with N.K. and therefore remain in the custody of appellee. The GAL observed the sisters are very close and, prior to appellant gaining custody of O.R., the girls had never been apart from one another. Notwithstanding her recommendation on custody, the GAL noted that she saw nothing problematic in appellant's ability to care for O.R. And when asked whether she believed it would be detrimental for O.R. to remain with appellant, the GAL opined:

> **{¶15}** That's a really difficult question to answer. I've been at the home. I've seen her interact with her father. I've seen her interact with her paternal grandparents. She's very bonded to her father. She's very bonded to her grandparents. I cannot tell the Court that I saw anything to give me reason to believe she's not being well cared for there at this point in time. At the same time, I've heard the testimony today and talked with other people about some perhaps poor parenting choices in the past. I think that, you know, applies to kids that are a little bit older, so and I can't predict what the future would hold. So, I don't know that, I think it would be detrimental from the standpoint that I'm not sure how much of an impact that would, it would have a negative impact on her not to be with her sister. I definitely think that would be detrimental and have a negative impact. I don't think that living at her father's

house, at least from what I've seen right now is having a detrimental impact.

{¶16} After considering the evidence, the magistrate issued a lengthy decision concluding that appellant was not a suitable parent for O.R. because awarding him custody would be detrimental to O.R. The magistrate further concluded that O.R.'s best interests would be served by granting appellee custody. Appellant filed objections to the magistrate's decision. The court overruled appellant's objections and adopted the magistrate's findings and conclusions. This appeal follows.

{¶17} Appellant's sole assignment of error provides:

{¶18} "The court erred as a matter of law in finding that Father is an unfit parent because a preponderance of the evidence did not show that an award of custody to the parent would be detrimental to the child."

{¶19} A parent has a fundamental and essential right to raise his or her child. *See e.g. In re Murray*, 52 Ohio St.3d 155, 157 (1990). "[I]t has been deemed 'cardinal' that the custody, care and nurture of the child reside, first, in the parents." *Id*. Furthermore, the Supreme Court of Ohio has frequently stated that parents who are suitable persons have a paramount right to the custody of their children. *See e.g. In re Perales*, 52 Ohio St.2d 89, 97 (1977). R.C. 2151.23(A)(2) affords a juvenile court exclusive jurisdiction "to determine the custody of any child not a ward of another court of this state." This statute, although broad, empowers a juvenile court to adjudicate child custody proceedings between a parent and a nonparent. *See e.g. Perales*, generally. The courts of Ohio have sought to effectuate a parent's fundamental rights by "severely limiting the circumstances under which the state may deny parents the

custody of their children." *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶17. Accordingly:

> **{¶20}** in a child custody proceeding [pursuant to R.C. 2151.23(A)(2)] 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; 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." *Id.* If a court concludes that any one of these circumstances describes the conduct of a parent, the parent may be adjudged unsuitable, and the state may infringe upon the fundamental parental liberty interest of child custody. *In re Hockstok*, *supra.*

{¶21} A finding of unsuitability is a necessary condition precedent to divesting a parent's right to custody of his or her child. *Id.* at ¶18; *see also Perales*, *supra*, at syllabus. A "preponderance of the evidence" is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." Black's Law Dictionary 1182 (6th Ed.1998). Although a trial court has broad discretion to adjudicate custody matters, it is not within its discretion to order a parent to relinquish his right to custody where the finding of unsuitability is unsupported by the record. *Perales*, *supra*, at 99.

{¶22} Under his sole assignment of error, appellant argues that the trial court's adoption of the magistrate's decision is neither supported by the evidence nor

applicable law. Father underscores that the trial court's emphasis on father's decision to avoid contact and visitations with appellee should have no bearing upon the analysis because, in his view, he, as O.R.'s biological father, was under no obligation to maintain O.R.'s relationship with appellee or N.K. Moreover, appellant argues the GAL's testimony that his custody of O.R. would have no detrimental impact upon the child necessarily implies he was a suitable parent. And, without any indication to the contrary, the trial court's adoption of the magistrate's decision is both unreasonable and contrary to law.

{¶23} We first point out that, although the magistrate's decision was based in part upon appellant's decision to block O.R.'s contact with appellee and N.K., a review of the decision demonstrates the court's conclusion was not solely premised upon this point. To wit, the court essentially determined that the weight of the evidence supported the conclusion that an award of custody to appellant would be detrimental to O.R. In drawing this legal conclusion, the court highlighted evidence of appellant's personal history and arguable parental shortcomings. With respect to the former, the court considered appellant's previous felonious assault conviction and prison term. The court also took notice of appellant's recent interception and ultimate forgery of an insurance check payable to Juanita, and potential crime for which charges were still apparently pending at the time of the hearing. The magistrate also amply detailed appellant's generally unstable relationship history with his wives, girlfriends, and, in some cases, his children.

{¶24} With regard to his parenting, the court considered evidence presented regarding appellant's conduct toward his three other children. The court highlighted

appellant's reaction to T.R. being hospitalized after a suicide attempt in early 2011. With respect to this incident, appellant's first wife, Stephanie Rowe (T.R.'s mother) testified that appellant was not reachable after T.R. was admitted to the hospital. Stephanie further testified that appellant did not visit T.R. until his discharge five days after the suicide attempt. According to Stephanie, when appellant finally arrived to visit and ultimately take the boy home, he advised T.R. "if you want to be a retard and hang yourself, I will hang you for you."

{¶25} Appellant disputed this testimony, claiming he arrived at the hospital within one hour of T.R.'s suicide attempt. And, although appellant seemed to minimize T.R.'s attempt at suicide, stating it was less a "legitimate suicide attempt" and more "an expression of anguish," he testified he sees T.R. regularly and the boy is doing fine.

{¶26} The court further discussed evidence of appellant's relationship with D.C., his 13-year-old daughter. D.C stated appellant had no significant involvement in her upbringing and appellant only facilitated contact with her after she turned five years old. At that point, appellant obtained visitation with D.C. but, according to the girl, he did not supervise her and permitted her to wander the neighborhood with Serena, who was 13 years old at the time, into the early hours of the morning. She further testified that on at least three or four occasions, appellant locked the girls out of his residence.

{¶27} D.C. also testified that, when she was eight years old, she contracted poison ivy while visiting appellant. Appellant was aware D.C. had a severe allergy to poison ivy, but did not call D.C.'s mother or consult a pediatrician. Instead, he gave the girl Tylenol. D.C. testified she eventually called her mother who retrieved her. As a result of her exposure, D.C. was hospitalized for the allergic reaction and dehydration.

Appellant testified that, even though he knew of the girl's allergy, he did not think her exposure had been significant. He stated that, on previous occasions, D.C. developed hives and he saw no trace of this reaction. He therefore concluded, although wrongly, the exposure was not serious. D.C. did not visit appellant after this event. D.C. testified she was not close with appellant and did not particularly like him.

{¶28} The court also found the testimony of Michelle Curry, Juanita's cousin, worth noting. According to Michelle, appellant and T.R. moved in with her and her three children following Juanita's death. Michelle testified she did not have a romantic relationship or interest in appellant. Rather, Michelle stated she was very close with Juanita and was concerned about the ultimate welfare of O.R. and N.K. Michelle testified that appellant depicted O.R.'s and N.K.'s living conditions with appellee and her family as substandard. Given appellant's characterization, Michelle testified she allowed appellant and T.R. to stay with her in an effort to assist appellant in obtaining custody of O.R. and N. K.

{¶29} After living with appellant, however, Michelle testified she observed various things that concerned her about appellant's parenting skills. Preliminarily, Michelle testified that, after Juanita's funeral, she witnessed O.R. crying. Instead of calming or comforting the child, appellant simply told the small child "everything would be alright," placed O.R. on a couch, and walked away.

{¶30} Furthermore, while living with Michelle, Serena was physically assaulted by her boyfriend in Sandusky, Ohio. According to Michelle, appellant had no interest in helping her, and had to be urged to retrieve Serena and her belongings.

{¶31} Finally, Michelle testified appellant was living with her when T.R. attempted suicide. According to Michelle, appellant believed T.R. was lying about the suicide attempt and he had no interest in checking on his son's condition. Michelle ultimately learned that appellant had lied about the nature of appellee's care for O.R. and N.K. and, while she permitted T.R. to remain at her residence, she demanded that appellant leave.

{¶32} Finally, the court noted an episode in which appellant, after obtaining custody of O.R., went to a cookout with a friend, T.R., and O.R. The group left the cookout in the middle of the night and attempted to rent a room at a Sheraton Hotel. At the hotel, appellant verbally abused the hotel clerk because, in his view, the rates were too high. The clerk testified appellant, while holding O.R., used foul language, challenged the clerk's sexual orientation, and then grabbed his own groin.

{¶33} Considering the foregoing evidence, it is clear that the magistrate did not base his decision only upon appellant's decision to keep O.R. from appellee and N.K. The court noted appellant's uncontested criminal history. And, although appellant denied many of the allegations regarding his past, somewhat questionable parenting decisions, the magistrate, as the finder of fact, was free to believe the witnesses, which he found most credible. Appellee put on multiple witnesses that testified appellant was, at various important times in his children's lives, a disinterested or even an absentee father. From this, the magistrate concluded that appellant "evidences a history of an unwillingness or inability to properly supervise and care for his children when they are in his physical or legal custody." The magistrate's findings were premised upon the

evidence and his ultimate conclusion was based upon more than simply appellant's decision to prohibit O.R. from seeing N.K.

{¶34} We acknowledge that the GAL specifically testified that living with appellant was not currently having a detrimental effect on O.R. This does not necessarily imply, however, that granting appellant custody would not be detrimental to O.R in the foreseeable future. The *Perales* factor upon which the court relied embraces a broader timeframe than simply the present. The factor requires a court to consider whether, given all the evidence, custody to a parent *would be* detrimental to the child both now and into perpetuity. Thus, simply because the GAL concluded that, at this point, she did not think living in the father's house was detrimental, the court was still free to consider whether, given the evidence, this stability would continue.

{¶35} The evidence demonstrated that appellant has taken an active position in blocking contact between O.R. and N.K; he has argued such a decision is his prerogative and right as O.R.'s parent, even in the face of abundant testimony from the GAL, among others, that breaking O.R.'s close ties with her sister would be devastating and clearly against O.R.'s best interests. While the inquiry into a child's best interests does not dictate the suitability analysis, it is necessarily implicated in an analysis of whether a parent's custody of that child is or would be detrimental to the child's overall well being. In this case, by unequivocally denying O.R. contact with N.K., appellant has taken a position that would be detrimental to the child. Given these points, the GAL's express testimony that she did not think O.R. living with her father was detrimental, it is reasonable to conclude that this testimony did not reflect the possibility of such custody having a detrimental impact on O.R. in the near future.

{¶36} Finally, we recognize that appellee has a previous child endangering conviction from 2004. The magistrate acknowledged this in his decision but, given the circumstances of the charge leading to the conviction and that appellee has had no other problems since that time, did not find appellee's conviction prohibitive of custody. Because appellee has demonstrated an ability to care for her four children since the conviction without any incident over the seven years preceding the hearing, we find the magistrate did not err in giving appellee's conviction greater weight.

{¶37} The testimony of appellee's witnesses, in conjunction with appellant's decision to preclude O.R. from interacting with N.K., appellant's felony record and his forgery of Juanita's name on an insurance check, was sufficient to demonstrate, by a preponderance of the evidence, that awarding custody of O.R. to appellant would be detrimental to the child. The court's adoption of the magistrate's conclusion is both reasonable and consistent with the evidence before this court.

{¶38} Appellant's assignment of error is without merit.

{¶39} For the reasons discussed in this opinion, the judgment of the Portage County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.