

[Cite as *In re S.C.*, 2009-Ohio-6448.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:
S.C., D.C., and A.C.

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2009CA00110

OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Juvenile Division Case No.
2006 JCV 00192

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

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Hoffman, J.

{¶1} Appellant Jerry Chadima (“Father”) appeals the April 15, 2009 Findings of Fact, Conclusions of Law and Decision entered by the Stark County Court of Common Pleas, Juvenile Division, finding it was in the best interest of one of Father’s minor children to remain in the custody of appellee Patricia Chandler (“Mother”).¹

STATEMENT OF THE CASE AND FACTS

{¶2} On April 17, 2006, the trial court adjudicated Mother and Father’s three children dependent, and placed them in the temporary custody of the Stark County Department of Job and Family Services (“SCDJFS”). On January 17, 2008, SCDJFS filed a Motion for a Planned Permanent Living Arrangement. SCDJFS asserted, although Father had participated in case plan services, the service providers had voiced concerns about his progress. SCDJFS further alleged the two older children did not wish to be adopted, and Mother needed time to re-establish her relationship with the children. The trial court overruled SCDJFS’s motion via Judgment Entry filed January 22, 2008, which included Findings of Fact. The trial court found Mother had abandoned the children, but after a lengthy absence, had re-surfaced and become enthusiastically involved in visiting the children. The trial court also found Father had completed all the requirements of his case plan, did not present any threat to the children, and had sufficiently addressed his anger management issues.

{¶3} On January 24, 2008, Mother filed a motion for change of custody. Subsequently, on January 29, 2008, SCDJFS filed a motion for dispositional orders,

¹ The Stark County Department of Job and Family Services has also filed a Brief in this matter.

citing *In re: Adams*, 115 Ohio St.3d 86, 873 N.E.2d 886, 2007-Ohio-4840, as authority for the proposition the court's overruling of the motion for PPLA was not a final order unless and until the court made a final disposition of the matter.

{¶14} On February 28, 2008, the trial court overruled Father's motion for immediate placement, but directed the parties to submit to mediation to come to a graduated plan for returning the children to Father's custody. The court found if mediation did not occur, or if the parties could not reach an agreed plan, then each interested party would submit a proposed plan to effectuate the graduated transfer. The trial court filed a Temporary Transition Plan Agreement on March 6, 2008. The trial court scheduled a review hearing for April 1, 2008.

{¶15} Following the review hearing on April 3, 2008, the magistrate filed an Order on April 11, 2008. The magistrate found there was "a depth to the concerns in this case". The magistrate noted, "Worker reported that Father's current counselor, who has previously rendered an opinion, is not aware of significant historic incidents of Father's anger manifestations." Pending evidence as to Mother's motion for change of custody and SCDJFS's motion for dispositional order, the magistrate ordered S.C. be placed with Father for an extended visit, and D.C. and A.C. be placed with Mother on an extended visit. The magistrate stated the guardian ad litem supported temporary custody of D.C. and A.C. with Mother, and temporary custody of S.C. with Father. The magistrate added, "GAL's recommendations as to [S.C.] are more a reflection of [S.C.'s] state of mind than of positive assessment of Father." The magistrate ordered full psychological evaluations for both parents.

{¶6} On April 11, 2008, Father moved to set aside and stay the magistrate's order. SCDJFS moved to terminate its involvement with the family and change legal custody to Mother. On May 5, 2008, Father filed a motion requesting the trial court order the two children with Mother be returned to him, and requesting the trial court terminate SCDJFS's involvement in the case. Via Judgment Entry filed May 7, 2008, the trial court terminated SCDJFS's involvement in the matter, and ordered legal custody of the children returned to Father. The court found Mother's motion for of custody should be dismissed, and deferred all custody issues between the parents to the Summit County Domestic Relations Court, which issued the initial custody determination.

{¶7} Thereafter, Mother filed a Notice of Appeal to this Court. The trial court stayed its May 7, 2008 Judgment Entry, pending appeal. This Court found the judgment was not a final appealable order as the trial court did not make a best interest finding. Accordingly, we dismissed the appeal for lack jurisdiction. *In re: Chadima Children*, Stark App. Nos. 2008-CA-00102, 2008-CA-00104. 2009-Ohio-376.

{¶8} Following the filing of this Court's decision, the trial court conducted a best interest hearing on April 9, 2009.

{¶9} Janice Fein of SCDJFS testified she has been the on-going caseworker for the children since May, 2008. During that time, Fein has visited D.C. and A.C. in West Virginia at least once, sometimes twice, a month. Her last visit with the children was a few days prior to the best interest hearing. Fein has found Mother's home to be appropriate for both children. D.C. and A.C. have their own rooms, and A.C.'s room is safe. Fein noted she has seen significant changes in the children. With respect to D.C., Fein recalled the girl, who is 13 and in the 8th grade, was always angry. Now,

D.C. is “amazingly relaxed”, talks a lot, is happy, and plays pranks. D.C. is doing well in school, except for one or two subjects. Mother is handling the situation appropriately. D.C. has made a number of friends. D.C. has stated her desire to stay with Mother. She feels safe. D.C. was never sure of what would happen with Father and expressed fears over his manner of discipline.

{¶10} A.C., who is 15 and in the 9th grade, is autistic. The boy has gained a substantial amount of weight over the last year, however, he is gentle and affectionate. A.C. clearly loves Mother and understands her. During past visits, A.C. would be agitated, walking around the room, throwing toys. Now, he is very calm. Mother is diligent about advising his doctors of any changes in his behavior. He attends special Individual Education Plan (“IEP”) in place. Fein attended A.C.’s IEP conference in September, 2008. She noted he has had an IEP the entire time he has been in West Virginia. She provided Mother with a copy of his IEP from Southgate School, which was subsequently given to the West Virginia school. Fein commented on the excellent program at Southgate, but noted the West Virginia school is providing for A.C.’s needs, including occupational and physical therapy.

{¶11} With respect to S.C., who is 17 and a senior in high school, Fein testified she “should probably stay with her father.” S.C. has repeatedly talked about getting her own apartment when she turns 18. Fein believes S.C. “severely needs counseling”, and such was a big concern for the caseworker. Fein also expressed concerns regarding S.C.’s poor academic performance and internet activity. Although S.C. has had access to SCDJFS’s independent living program for several years, Father would not allow her to become involved. S.C.’s former counselor would not see her due to S.C.’s

dishonesty in counseling. Although Fein prepared all the intake paperwork for S.C. to see another counselor, and advised Father of the person, place and time of the appointment, S.C. did not present for the appointment.

{¶12} On cross-examination, Fein acknowledged A.C. had been doing well at Southgate. The boy enjoyed school, received occupational and speech therapies, and his foster parents kept him active in the Special Olympics and summer camp. Fein could not say anything negative about Southgate or A.C.'s foster parents, but expressed her opinion it was in the child's best interest to be with Mother.

{¶13} Mother testified she lives in a three bedroom, two bath ranch. Mother stated D.C. is doing very well, and has made several friends. The girl likes school and is looking forward to going to high school. Academically, D.C. is doing well in school, except for a few subjects. D.C. makes excuses for why she has not done well in the subjects, but Mother handles the academic situation by requiring the girl to study each night and taking away privileges. Mother had also inquired into getting a tutor for D.C.

{¶14} With respect to A.C., Mother testified he attends the public high school, but is in special education classes. Mother recalled the Board of Education conducted extensive testing to determine which classes would best benefit A.C. Mother obtained A.C.'s IEP from the foster parents and the case worker. Southgate forwarded all of the school records to West Virginia. A.C. receives physical therapy, occupational therapy and speech therapy. A.C. swims and bowls during the week, and attends a program in the summer. Mother explained A.C. wears a monitoring bracelet for his safety. A.C. is under the care of three doctors, a pediatrician, a neurologist, and a counselor. His

medications have been adjusted and he is doing well. A.C. is on a waiting list for a specialized day care.

{¶15} Myrna Blosser, principal at Southgate School, testified on Father's behalf. Blosser testified the school did not receive written notice A.C. was being removed. She was not contacted by social workers regarding the advisability of moving A.C. out of the school. She had not personally heard from A.C.'s guardian ad litem. A.C. had been doing well in the Southgate program and had accomplished most of the goals on his first IEP. Blosser stated there was no paperwork in the office or A.C.'s main file indicating a release of his school records. Blosser was unaware of any school requesting information regarding A.C.'s IEP or about his development. Blosser noted A.C. would probably be able to return to the school. Blosser stated she could not say it was in A.C.'s best interest to remove him from the Southgate program. However, she recognized the school is not always aware of a family's needs and what is occurring in their lives personally.

{¶16} Father testified he is currently working, but could not provide details as he was subject to a non-disclosure agreement. When asked about S.C., who was just shy of 17 and in the 11th grade, Father replied, "she is a teenager and I think she's acting like any other teenager would. * * *I think she's doing...I mean, I'd always like to see better... but I think she's she's right along with her age bracket." Tr. at 18. Although Father resides in Alliance, Stark County, Ohio, S.C. attends Waterloo High School in Portage County. Father could not explain why S.C. was attending high school in a different county. Father used his sister's Portage County address to register S.C. in the school.

{¶17} With respect to her grades, Father noted S.C.'s grades were not very good, and the girl was failing two classes. However, Father could not recall the other grades S.C. received on her last report card. Father met with two of S.C.'s teachers two weeks before the hearing, but could not remember the names of the teachers or the subject one of them taught. Father commented S.C. is not reaching her potential. When asked what he is doing to help his daughter, Father replied he was encouraging her to do her homework and making himself available to help her. Generally, S.C. tells Father she finished her homework in study hall, but never has the work to show to Father. Despite a court order, S.C. had not been in counseling for at least eight months. S.C. spends a number of nights each week at Father's sister's home in Portage County.

{¶18} Fein recommended S.C. remain with Father, fearing she would disrupt the placement of the other two children with Mother. The guardian ad litem concurred, recommending legal custody of S.C. be granted to Father, and legal custody of A.C. and D.C. be granted to Mother.

{¶19} The trial court issued its Findings of Fact, Conclusions of Law and Decision on April 15, 2009. The trial court determined "in analyzing the case today given the facts before this Court, it is clear that it is in the best interest of [A.C.] and [D.C.] to remain in the care of their Mother". Findings of Fact, Conclusions of Law and Decision at 7. The trial court recognized it was difficult to find without having conducted a best interest hearing in May, 2008, whether custody to Father would have been in their best interest. Thereafter, trial court specifically found Mother had proven her fitness and ability to parent effectively and proactively with A.C. and D.C., and that the children had responded "dramatically" to her parenting style and the environment.

{¶20} It is from this entry Father appeals, raising as his sole assignment of error:

{¶21} “THE JUDGMENT OF THE TRIAL COURT AS TO [A.C.] IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I

{¶22} Herein, Father challenges the trial court’s finding it was in A.C.’s best interest to remain in the custody of Mother.

{¶23} R.C. 3109.04, which governs motions for the allocation of parental rights and responsibilities in divorce, legal separation, annulment, or private custody matters, provides, in relevant part:

{¶24} “(F)(1) In determining the best interest of a child pursuant to this section, * * * the court shall consider all relevant factors, including, but not limited to:

{¶25} “(a) The wishes of the child's parents regarding the child's care;

{¶26} “(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶27} “(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶28} “(d) The child's adjustment to the child's home, school, and community;

{¶29} “(e) The mental and physical health of all persons involved in the situation;

{¶30} “(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶31} “(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶32} “(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child;* * * ;

{¶33} “(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶34} “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶35} In support of his position, Father submits the undisputed testimony of Myrna Blosser, the principal of the Southgate School, revealed A.C.'s best interest was ignored when the magistrate ordered an extended visit with Mother and the immediate removal of A.C. from the specialized school.

{¶36} A review of the record reveals Blosser testified, “we’re always sad to see students go”, but continued the school realizes, “students come and go from our program * * * for different reasons, a variety of reasons. As to which, it’s not our decision, it’s the decision of the Guardian or the parent* * * we understand that. We do make recommendations when we’re asked.” Tr. at 7. Blosser stated A.C. was doing well in the program and meeting the goals of his IEP. Blosser acknowledged a parent could provide a new school with a copy of a child’s IEP, and such would be all the

information the new school would need. Blosser stated it was important for children with special needs, like A.C., to have consistency.

{¶37} The record also reveals A.C. has undergone many dramatic and positive changes since being in Mother's care. He was described as happier, calmer, and more relaxed. Although A.C. is not attending a school dedicated solely to children with special needs, he attends a public high school with a program so dedicated. Mother testified she provided the West Virginia school with a copy of A.C.'s IEP, which she had received from his foster parents and case worker. The new school conducted extensive testing and created its own IEP for A.C. A.C. is receiving the same services at his new school as he received at Southgate. Further, Mother is ensuring A.C.'s medical needs are met. The boy sees three physicians. Mother carefully monitors his behavior and his medications.

{¶38} Father, on the other hand, did not give the trial court a clear sense of how he would be able to meet A.C.'s daily needs other than returning the boy to Southgate School. Father did not appear to have an understanding of what was happening in his oldest child's daily life. Although everyone agreed S.C. needed consistent, on-going counseling, Father had never seen that such occurred.

{¶39} Based upon the foregoing, the evidence set forth in our Statement of the Facts and Case, as well as the evidence in the entire record, we find the trial court's finding it was in A.C.'s best interest to remain with Mother was not against the manifest weight of the evidence.

{¶40} Father's sole assignment of error is overruled.

{¶41} The judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman _____
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer _____
HON. SHEILA G. FARMER

s/ W. Scott Gwin _____
HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:
S.C., D.C., and A.C.

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JUDGMENT ENTRY

Case No. 2009CA00110

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN