[Cite as *In re C.Y.*, 2014-Ohio-1144.]

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

In re C.Y., M.N.

Court of Appeals No. L-13-1184

Trial Court No. 12225115

DECISION AND JUDGMENT

Decided: March 21, 2014

* * * * *

Dan Nathan, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, L.Y., appeals the judgment of the Lucas County Court of Common Pleas, Juvenile Division, awarding legal custody of her minor children, C.Y. and M.N., to appellee, J.F.

A. Facts and Procedural Background

{¶ 2} Appellant is the mother of three minor children—C.Y., M.N., and A.H. Only C.Y. and M.N. are involved in the present action, as A.H. is currently in the custody of her father, D.H. Prior to the initiation of the underlying custody proceedings, C.Y. and M.N. were in appellant's sole custody since their father, Lar.Y., was serving a prison sentence that began in 2008. Appellee is father's second cousin.

{¶ 3} Appellant has a history of drug and alcohol abuse. Indeed, appellant readily admits that she used to consume alcohol on a daily basis. In 2012, appellant was diagnosed with major depression. She began receiving medication, and was further ordered to abstain from alcohol and recreational drugs.

{¶ 4} Despite appellant's substance abuse issues, she retained custody of C.Y. and M.N. However, in April 2012, Lucas County Children Services (LCCS) received notification that the children were in an unsafe environment with their mother. The children's safety was called into question when it became apparent that they were witnessing instances of domestic violence against appellant at the hands of her former boyfriend. Accordingly, LCCS sought protective supervision for the children, requesting that they be placed with appellee.

{¶ 5} While undergoing treatment for her depression, appellant was convicted of disorderly conduct. Consequently, she is currently serving a three-year probation sentence. As part of her sentence, appellant was instructed to abstain from drugs or alcohol and was also ordered to submit to random screening for those substances. The

record reveals that appellant has complied with the terms of her probation, and has tested negative for drugs or alcohol in every screening.

{¶ 6} Prior to disposition of the LCCS action, LCCS determined that appellant had made a "clean break" from her former boyfriend, and that she was engaged in her case plan services. As a result, LCCS determined that protective supervision was no longer necessary, and dismissed its complaint.

{¶ 7} The next day, June 29, 2012, appellee filed a pro se complaint for custody of C.Y. and M.N., alleging that he was capable of providing the children with a safe environment, and that appellant was not providing such an environment. On that same day, the children's guardian ad litem, Linda Lark, filed her own motion for change of custody, opining that a change in custody was in the children's best interests and was necessary in order to allow appellant to "engage in services to remedy risks in her home." Lark requested that appellee be awarded custody of C.Y. and M.N.

{¶ 8} The court eventually scheduled the case for a hearing before a magistrate. The hearing took place over four days. At the hearing on March 8, 2013, appellee called upon Lark to testify regarding her recommendations concerning custody of the children. In support of her recommendation that custody be awarded to appellee, Lark referred to a prior proceeding in which an in-camera interview was conducted with appellant's oldest child, A.H. Appellant immediately objected to the admission of such testimony, and the magistrate stated: "I am well aware of the in-camera interview, and Ms. Lark was

present during it. But you don't have to testify as to what [A.H.] said because I heard it." No further testimony was offered concerning the in-camera interview.

{¶ 9} At the conclusion of the hearing, the magistrate determined that continuing custody with appellant would be detrimental to the children, and that a transfer of custody to appellee was in their best interests. In support of his conclusion, the magistrate stated, in relevant part: "I had a guardian ad litem [Lark] who was strongly recommending that these children not be returned home to their mother. I had a bright and articulate young lady, [A.H.], come to me and beg me to save her siblings from their mother."

{¶ 10} On April 16, 2013, appellant filed her objections to the magistrate's decision, arguing, inter alia, that the magistrate improperly considered evidence that was outside the record in the form of A.H.'s in-camera interview. The trial court disagreed, concluding that "[t]he Magistrate is obligated to consider the * * * interview to determine the best interest of the subject children. Irrespective of differing case numbers, the parties to this action remained consistent between cases; therefore, the Court finds that the Magistrate had the discretion to consider the record * * *." Consequently, the court overruled appellant's objections and adopted the magistrate's decision awarding custody of C.Y. and M.N. to appellee.

B. Assignment(s) of Error

{¶ 11} Appellant has timely appealed the trial court's decision awarding custody to appellee, assigning the following errors for our review:

Assignment of Error No. 1: The trial court erred in taking judicial notice of an *in camera* interview from another case.

Assignment of Error No. 2: The trial court's determination that [appellant] was unsuitable was against the manifest weight of the evidence.

{¶ 12} Appellee has not filed an appellate brief in this proceeding.

II. Analysis

{¶ 13} In child custody proceedings between a parent and nonparent brought under R.C. 2151.23(A)(2), we have stated that a juvenile court may not award custody to the nonparent without first determining that the parent is unsuitable. *In re A.C.*, 6th Dist. Lucas No. L-11-1129, 2012-Ohio-826, ¶ 14. The Supreme Court of Ohio has outlined the standard for unsuitability as follows:

> [T]he hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability that is, 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. *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977), syllabus.

{¶ 14} A trial court has broad discretion in child custody proceedings. *See, e.g.*, *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Because the trial

court is to be afforded wide latitude in considering all the evidence, its custody decision will not be reversed absent an abuse of discretion. *Id.* An abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} In her first assignment of error, appellant argues that the trial court erred in taking judicial notice of the testimony provided by A.H. during an in-camera interview in a separate proceeding. Appellant contends that the trial court was only permitted to consider evidence contained in the record. Further, appellant challenges the trial court's characterization that the previous proceeding contained the same parties. Appellant asserts that A.H. was not a party to the present action, making the trial court's consideration of the in-camera interview all the more egregious.

{¶ 16} Judicial notice allows a court to accept, "for purpose of convenience and without requiring a [party's] proof, * * * a well-known and indisputable fact." *State v. Blaine*, 4th Dist. Highland No. 03CA9, 2004-Ohio-1241, ¶ 12; Evid.R. 201. Ohio courts have confined the use of judicial notice to matters that arise in the immediate proceeding. *Diversified Mtge. Investors, Inc. v. Athens Cty. Bd. of Revision*, 7 Ohio App.3d 157, 159, 454 N.E.2d 1330 (4th Dist.1982) ("a court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of the proceedings in the immediate case"); *Blausey v. Van Ness*, 6th Dist. Ottawa No. OT-10-041, 2011-Ohio-4680, ¶ 11; *Northpoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 16 (8th Dist.) ("a trial court may not take judicial notice of prior

proceedings in the court even if the same parties and subject matter are involved. * * * [it] may only take judicial notice of prior proceedings in the immediate case." (Citations omitted.)). "The rationale for the rule that a trial court cannot take judicial notice of proceedings in a separate action is that the appellate court cannot review the propriety of the trial court's reliance on such prior proceedings because that record is not before the appellate court." *Campbell v. Ohio Adult Parole Auth.*, 10th Dist. Franklin No. 97APE05-616, 1997 WL 678199, *2 (Oct. 28, 1997), citing *The Deli Table, Inc. v. Great Lakes Mall*, 11th Dist. Lake No. 95-L-012, 1996 WL 761984 (Dec. 31, 1996).

{¶ 17} Here, the magistrate clearly considered the in-camera interview, which was admitted in a prior custody proceeding involving A.H. Moreover, the record reveals that the magistrate's decision was influenced, at least in part, by the information he received during the in-camera interview—namely, that A.H., a "bright and articulate young lady," begged him to "save her siblings from their mother." Therefore, we agree with appellant that the trial court erred in taking judicial notice of the in-camera interview.

{¶ 18} Accordingly, appellant's first assignment of error is well-taken. Our resolution of appellant's first assignment of error renders her second assignment of error moot.

III. Conclusion

{¶ 19} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is reversed, and this matter is remanded to the trial

court for a new hearing. Costs are assessed to appellee pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE