

[Cite as *In re T.J.*, 2010-Ohio-4191.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: :
T.J., : No. 10AP-201
(C.B., : (C.P.C. No. 06JU07-11670)
(C.B., : (ACCELERATED CALENDAR)
Appellant). :

In the Matter of: : No. 10AP-202
R.B., : (C.P.C. No. 03JU04-6169)
(C.B., : (ACCELERATED CALENDAR)
Appellant). :

D E C I S I O N

Rendered on September 7, 2010

Andrew Russ, for C.B.

Jason Russ, for father.

Jo Kaiser, guardian ad litem.

Robert J. McClaren and *Susan Engle*, for Franklin County
Children Services.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

KLATT, J.

{¶1} Appellant, C.B., the mother of R.B. and T.J., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that terminated her legal custody over R.B. and T.J. and awarded legal custody

of the children to their maternal grandfather and step-grandmother. For the following reasons, we affirm.

{¶2} Appellant gave birth to R.B. on February 25, 2001. When R.B. was two-years old, Franklin County Children Services ("FCCS") filed a complaint alleging that R.B. was an abused, neglected, and dependent child. The complaint stated that R.B. had sustained numerous bruises, including belt and handprint marks, while his father was caring for him. The trial court adjudicated R.B. an abused, neglected, and dependent child, and it awarded temporary custody of R.B. to Mary Milner, R.B.'s maternal great-grandmother. The trial court also placed R.B. in the protective supervision of FCCS. Approximately a year and a half later, the trial court awarded Milner legal custody of R.B. and terminated the protective supervision. R.B. remained in Milner's custody until she died in April 2007. FCCS then moved for and received temporary custody of R.B.

{¶3} Appellant gave birth to T.J. on December 10, 2003. When T.J. was two-years old, FCCS filed a complaint alleging that T.J. was an abused, neglected, and dependent child. The complaint stated that T.J. had a black eye and a bruise in the shape of a handprint on the right side of her face. The trial court adjudicated T.J. a dependent child, and it awarded temporary custody of T.J. to FCCS.

{¶4} In November 2007, appellant moved for legal custody of both R.B. and T.J. Appellant had moved to Texas to live with her father and step-mother, and they had agreed to support appellant and her children while appellant secured employment and independent housing. Texas Child Protective Services conducted an assessment of the grandparents' home, and it approved the placement of R.B. and T.J. in the home.

{¶5} In early 2008, the trial court awarded appellant legal custody of R.B. and T.J., and it ordered FCCS to provide protective supervision of the children. Appellant

then took both children to Texas and settled them into the grandparents' home. According to the grandfather, after appellant and her children arrived, appellant abdicated her parenting responsibilities to him and his wife. Appellant stayed in bed, slept all day, and refused to help with the grandparents' day-care business. Appellant also cried constantly and mimicked the behaviors of the step-grandmother's autistic son. The grandfather took appellant to a mental health facility, but appellant rejected the recommended counseling. Frustrated with appellant, the grandfather forced her to leave his home. In April 2008, appellant moved back to Columbus, leaving her children with the grandparents in Texas.

{¶6} FCCS helped the grandparents obtain temporary custody of the children, and it moved for a modification of the custody arrangement. FCCS requested that the trial court transfer legal custody of the children from appellant to the grandparents.

{¶7} After a three-day hearing, the magistrate found that awarding legal custody to the grandparents was in the children's best interests, and she recommended that the trial court grant FCCS' motion. Appellant objected to the magistrate's decision, but the trial court overruled her objections. On February 10, 2010, the trial court issued a decision and entry approving and adopting the magistrate's decision. Appellant now appeals from that final order, and she assigns the following errors:

[1.] Appellant was denied her procedural and substantive due process rights when the trial court affirmed the Magistrate's Decision that approved the interstate compact with Texas, and when it terminated Appellant's underlying legal custody.

[2.] The Magistrate's Decision was based upon insufficient evidence and was otherwise against the manifest weight of the evidence, as Appellant completed all requirements of her case plan.

{¶8} By her first assignment of error, appellant argues that the trial court violated her right to procedural and substantive due process. We disagree.

{¶9} Both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution protect individuals' fundamental rights and liberty interests. The United States Supreme Court has recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, 2060. Likewise, the Supreme Court of Ohio has held that parents have a fundamental liberty interest in the care, custody, and management of their children. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶40. See also *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, ¶10 ("The right of a parent to the custody of his or her child is one of the oldest fundamental liberty interests recognized by American courts."); *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶16 (holding that "the Constitutions of both the United States and the state of Ohio afford parents a fundamental right to custody of their children"). Thus, when the state seeks to impinge upon this fundamental parental right, due process both guarantees the parent fair process (procedural due process) and provides the parent with heightened protection against the governmental interference with her right (substantive due process). *Troxel*, 530 U.S. at 65, 120 S.Ct. at 2059-60. See also *Washington v. Glucksberg* (1997), 521 U.S. 702, 719-20, 117 S.Ct. 2258, 2267 (similarly distinguishing between procedural and substantive due process).

{¶10} Procedural due process requires that the government provide constitutionally adequate procedures before depriving individuals of a protected liberty interest. *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 541, 105 S.Ct. 1487,

1493. Prior to curtailing a parent's constitutional custodial right, a court must provide the parent with "a hearing upon adequate notice, assistance of counsel, and, under most circumstances, the right to be present at the hearing." *In re S.B.*, 183 Ohio App.3d 300, 2009-Ohio-3619, ¶29. Here, appellant does not assert that she was denied any of these procedures. Indeed, any such assertion would fail because the record establishes that the trial court provided appellant each of these due process protections. Appellant received notice of and attended the three-day hearing in the company of her court-appointed counsel. Appellant testified during the hearing, thus seizing her opportunity to be heard. Accordingly, we find no violation of appellant's procedural due process rights.

{¶11} Substantive due process forbids the government from infringing upon fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores* (1993), 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1447. Here, the trial court infringed on appellant's fundamental parental rights pursuant to the authority granted by and the procedures mandated in R.C. 2151.353(A)(3), 2151.353(E)(2), and 2151.42(B). Appellant, however, does not challenge the constitutionality of these statutes. Rather, appellant argues that the trial court erred when weighing the evidence and concluding that a transfer in legal custody was in the children's best interests. This argument asserts error, but it does not assert a violation of due process. Consequently, while we will consider this argument in conjunction with appellant's second assignment of error, we reject it as a basis for finding that the transfer of legal custody constituted an unconstitutional infringement on appellant's parental rights. Accordingly, we overrule appellant's first assignment of error.

{¶12} By appellant's second assignment of error, she argues that the evidence does not support the trial court's decision that modification of legal custody was in the best interests of R.B. and T.J. We disagree.

{¶13} Pursuant to R.C. 2151.353(A):

If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

* * *

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

After issuing an order of disposition under R.C. 2151.353(A), the trial court retains jurisdiction over the child until the child turns 18 years old. R.C. 2151.353(E)(1). Prior to that time, any public children services agency may file a motion requesting that the trial court modify or terminate any order of disposition. R.C. 2151.353(E)(2). If the motion requests modification or termination of an order of disposition issued under R.C. 2151.353(A)(3), then the trial court must comply with R.C. 2151.42(B). *Id.* That provision states:

An order of disposition issued under division (A)(3) of section 2151.353 * * * of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child.

{¶14} Appellate courts review a dispositional order that awards, modifies, or terminates legal custody under the abuse of discretion standard. *In re N.F.*, 10th Dist. No.

08AP-1038, 2009-Ohio-2986, ¶9 " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157).

{¶15} In the case at bar, the trial court determined that termination of appellant's legal custody of R.B. and T.J. served the children's best interests. In doing so, the trial court acknowledged that the record contained conflicting evidence regarding whether appellant suffered from a mental illness. Consequently, the trial court disregarded the questionable state of appellant's mental health when considering the children's best interest. The trial court found that, even without that factor, the continuation of appellant's legal custody was not in the children's best interests. First, appellant lacked stable, independent housing. Erin Sines, the FCCS child welfare caseworker assigned to R.B. and T.J., testified that appellant never had long-term housing of her own during the five and a half years that Sines worked with appellant. According to Sines, appellant "moved around a lot," and Sines often lacked a current address for appellant. (Tr. at Vol. II, 10-11.) Appellant claimed that she previously had independent housing, but only for two periods—August to December 2004 and then again for the month of August 2006. At the time of the hearing, appellant was staying at her mother's house, but she did not pay rent or contribute to household expenses.

{¶16} Second, appellant lacked stable employment. Appellant testified that she last worked in July 2007, when McDonald's employed her for a week or two before firing her because she missed two days of work. At the time of the hearing, appellant had no income, and she relied upon her brother, his fiancé, and her mother for support.

{¶17} Finally, appellant failed to consistently care for her children. The grandfather testified that appellant did not parent her children, but instead, treated them like toys. Sines also expressed concern over appellant's ability to parent. Appellant has rarely acted as the sole, primary caregiver for either R.B. or T.J., and she has not exhibited strong parenting skills during the periods in which she has assumed primary responsibility for them. Given these three reasons and the evidence supporting these reasons, we conclude that the trial court did not abuse its discretion in finding that termination of appellant's legal custody was in the children's best interests.

{¶18} Next, the trial court found that an award of legal custody to the grandparents served the children's best interests. In large part, the trial court based this finding on the grandfather and Sines' testimony that the children are flourishing under the grandparents' care. R.B. is doing well in school, and neither child exhibits behavioral problems. Also, the grandfather testified that R.B. and T.J. asked if they could call him and his wife "mom and dad," and the grandparents consented.

{¶19} The trial court expressed reservations about granting legal custody to the grandparents. The grandfather has been arrested previously for domestic violence, although never convicted. Additionally, the grandfather admitted to abusing drugs, albeit ten to fifteen years ago. The grandfather also acknowledged that he was absent from his own children's lives while they were minors. Finally, the grandparents cannot afford health insurance for the family.

{¶20} After considering these negative factors, the trial court found that they did not outweigh the children's interest in a permanent, secure placement where they are happy and successful. Granting legal custody to the grandparents, therefore, was in the children's best interests. However, in light of the concerns raised by the grandfather's

history and the grandparents' scarce economic resources, the trial court determined that continued oversight of the situation was necessary. Thus, the trial court ordered FCCS to remain involved in R.B. and T.J.'s lives through protective supervision. The trial court also ordered FCCS to develop a case plan that required the grandparents: (1) to refrain from physical abuse of each other and physical discipline of the children, (2) to provide economically for the needs of the children, and (3) to refrain from using drugs and comply with at least one random drug screen as required by FCCS.

{¶21} The ultimate question before the trial court was whether granting the grandparents legal custody served the children's best interests. Because the children are doing well in the grandparents' custody, the trial court answered that question in the affirmative. We conclude that the trial court did not abuse its discretion in so finding, particularly when the trial court required the institution of a case plan with safeguards to protect the children. Accordingly, we overrule appellant's second assignment of error.

{¶22} For the foregoing reasons, we overrule appellant's first and second assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
