

[Cite as *In re O.L.*, 2010-Ohio-878.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: O.L.

C.A. No. 24928

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-1-69

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

WHITMORE, Judge.

{¶1} Gwendolyn H. (“Mother”) has appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that overruled her objections to the decision of the magistrate and placed one of her minor children in the legal custody of the child’s father, Gregory L. (“Father”). This Court affirms.

I

{¶2} Mother and Father are the parents of O.L., born May 23, 2005. The parents had a brief relationship, but were never married. Mother had custody of the child for the first two and one-half years of his life, and Father had visitation, pursuant to an order of the domestic relations court. On January 24, 2008, two-year-old O.L. and his thirteen-year-old half-brother, T.H., were removed from Mother’s home upon the discovery of marks on O.L. that suggested physical abuse. Following an adjudication that O.L. was abused and dependent and that T.H. was dependent, both children were placed in the temporary custody of Summit County Children

Services Board (“CSB”). O.L. was placed with his paternal grandmother (“Grandmother”) and T.H. was placed in a foster home. Mother was charged with failure to protect and child endangering, but those charges were later dismissed. T.H. was eventually returned to Mother’s home, with an order of protective supervision, but the case involving O.L. continued.

{¶3} A case plan was adopted, requiring Mother to address mental health and substance abuse issues. Mother had long been treated for depression and had also been diagnosed with paranoia. Father’s case plan required him to address substance abuse issues. Eventually, Mother and Father each moved for legal custody of O.L., and CSB supported Father’s motion. Following a hearing on the competing motions, the magistrate decided that O.L. should be placed in the legal custody of Father, as that was in the child’s best interest. The trial court adopted the magistrate’s decision and entered independent judgment, pending the filing of objections. Thereafter, Mother filed an objection, maintaining that the magistrate erred in finding that it was in O.L.’s best interest to be placed in the legal custody of Father. The trial court overruled Mother’s objection and ordered O.L. to be placed in the legal custody of Father. Mother has appealed and has assigned two errors for review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING MOTHER’S MOTION FOR LEGAL CUSTODY AND AWARDING LEGAL CUSTODY TO FATHER.”

{¶4} Mother’s first assignment of error is that the trial court erred by granting legal custody of O.L. to Father.

{¶5} Initially, this Court observes that although the decision adjudicating the child abused and dependent and placing him in the legal custody of his Father was made by a

magistrate, Mother has appealed from the trial court's judgment that overruled her objections to the magistrate's decision. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093.

{¶6} The juvenile court's disposition of legal custody is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead "leaves intact 'residual parental rights, privileges, and responsibilities.'" *In re Shepherd* (Mar. 26, 2001), 4th Dist. No. 00CA12 at *7, quoting R.C. 2151.011(B)(17), now designated as R.C. 2151.011(B)(19). Generally, this Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In so doing, we consider the trial court's action with reference to the nature of the underlying matter. *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. Consequently, we must consider, in this case, whether the trial court abused its discretion by overruling Mother's objections to the magistrate's decision and granting legal custody to Father.

{¶7} Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, at ¶17. The trial court's disposition of legal custody is not guided by clear statutory requirements, as the Ohio Revised Code fails to set forth a best interest test that is specifically tailored to the determination of legal custody following an adjudication of abuse, neglect, or

dependency. See *In re B.G.*, 9th Dist. No. 24187, 2008-Ohio-5003, at ¶9. Nevertheless, “courts agree that the trial court must base its decision on the best interest of the child.” *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11. The record in this case reveals that the trial judge did not abuse her discretion in overruling Mother’s objections and deciding that an order granting legal custody to Father was in the best interest of O.L.

{¶8} Because of CSB’s concerns that O.L. had been abused by either Mother or his older brother, after the agency obtained temporary custody, the children were put in separate placements, with O.L. being placed with Grandmother and T.H. in a foster home. Father had previously been living with Grandmother and he was initially ordered to leave the home. After some time, and because that home had been made accessible for his physical disabilities, he was eventually permitted to resume his residence there.

{¶9} While staying with Grandmother, O.L. began attending pre-school in March 2008. Based on concerns with the child’s disruptive behavior in pre-school, O.L. began seeing a counselor in June 2008. The child’s counselor, Angela Lancianese, testified at the hearing. While the initial concern was with the child’s behavior, the counselor’s concern quickly turned to the child’s attachment to his parents. Mother claimed that O.L. never needed counseling when he was in her care and believed that O.L.’s acting-out behaviors were due to his fear of Father and missing her. The counselor very much disagreed. She testified that O.L. was very apprehensive in the sessions conducted jointly with Mother and that he did not attempt to engage her in play. When Mother attempted to secure an affirmation of her relationship with O.L. from the child or get him to suggest that he was sad when he was with Father, O.L. would not agree or assent. In addition, when Mother would attempt to give the child a hug, he would push her

away. When this occurred, according to the counselor, Mother seemed unaware and just kept repeating her actions. On another occasion, O.L. walked out of the room and shut the door on Mother. O.L. was said to leave visitation sessions quickly in order to rejoin Father, Grandmother or Ms. Talley who would be waiting to take him back to their home. Ms. Lancianese believed that Mother lacked insight or awareness and that her level of attachment with O.L. was poor. By way of contrast, she stated that O.L. sought Father out for hugs and for play, and that he was “clingy” with Ms. Talley. According to the counselor, O.L. did not show the same apprehension or fear with Father, Grandmother, or Ms. Talley as he did with Mother. She believed that the child was very attached to Father and Ms. Talley, and that Father handled his son’s behaviors appropriately.

{¶10} The counselor stated that she made little progress with Mother’s relationship with O.L., explaining that Mother was very rigid in her beliefs about child-rearing and would not respond to the counselor’s interventions or follow through with her recommendations, including the recommendation that Mother obtain a parenting evaluation. Mother responded by claiming that she did not need a parenting evaluation and insisted that the only problem was that O.L. was not living with her. The counselor testified that Mother demonstrated no emotional attachment and showed little insight into O.L.’s behaviors and feelings. The counselor indicated that Mother was simply not cooperative, whereas Father always was. She concluded by stating that O.L. needs to feel safe in his environment and needs to believe that his feelings are accepted. He needs his parents to be consistent, nurturing, and open to seeking out professional help.

{¶11} The CSB case aide who supervised most of Mother’s visits with O.L. testified similarly. Victoria Diamond had 23 years of experience as a visitation aide and was the person designated to closely supervise Mother’s visits with her sons. Initially, there was a no-contact

order between the two boys because of a question as to who abused O.L., and, therefore, Mother visited with them separately. After about four months, the boys were permitted to share one hour of visitation per week with Mother.

{¶12} Significantly, Ms. Diamond testified that Mother treated the boys differently during those visits, and she believed Mother's bond with O.L. was not as strong as her bond with T.H. During her visits, Mother was said to have behaved in a rigid manner with O.L., whereas she was more relaxed and loving with T.H. She would just sit and watch O.L., while she tended to engage T.H. in games. On one occasion, Mother sent T.H. back to his placement with a watermelon, but gave none to O.L. And on another occasion, Mother brought a camera and took pictures of T.H., but took none of O.L.

{¶13} According to Ms. Diamond, O.L. did not respond to his older brother at first and would move away from him. This was the single occasion in which O.L. went to Mother for comfort. The case aide stated that O.L. would respond to Mother, but that their bond was not very close. He would not initiate any interaction with her. Ms. Diamond observed Mother and T.H. engaging in rough horseplay, kicking each other, and rolling on the grass, which she believed to be inappropriate. Ms. Diamond also observed Mother refusing to tell T.H. to stop hitting O.L. in the face, despite O.L. calling for him to stop. Ms. Diamond testified that she would be concerned about the physical nature of the visits if they were unsupervised and would worry that O.L. could get hurt.

{¶14} Maria Whalen, the CSB caseworker assigned to this case, believed that legal custody to Father was in the best interest of O.L. and testified to her reasoning. First, Ms. Whalen said that Father had been meeting O.L.'s needs, and she had no concerns with Father's ability to parent his son. Furthermore, Ms. Whalen explained that Father had completed his case

plan requirements and had always been forthcoming and cooperative, whereas Mother had not completed her case plan objectives, and had generally been non-compliant and uncooperative throughout the process. Along those same lines, Ms. Whalen believed that O.L. should continue with counseling and she was confident that Father would keep him in counseling, whereas she doubted that Mother would. She based this conclusion on the fact that Mother had not been agreeable to her requests for follow-up services in the past. For example, when Ms. Whalen acted upon the recommendation of O.L.'s pre-school teacher and told Mother that O.L. needed counseling, Mother insisted that there was nothing wrong with him because he did not act that way at her home. In addition, when Ms. Whalen asked Mother to obtain a parenting evaluation, Mother claimed she did not need it and objected to having it added to her case plan.

{¶15} Ms. Whalen was also cognizant of safety concerns. She noted that T.H. had been diagnosed with intermittent explosive disorder. He had had four incidents at school in the current year and several more last year. His problems included taunting other students, chasing a child out of a classroom and pushing him towards the steps, and grabbing a teacher. T.H. was hospitalized last year with suicidal/homicidal ideations, is in a behavioral program, and is also in counseling. He was on medications to stabilize his mood and calm him. Mother believed that he did not have intermittent explosive disorder because he did not exhibit those problems at home. Ms. Whalen stated that she would be concerned with putting O.L. in Mother's home along with T.H. because of T.H.'s explosiveness. Ms. Whalen noted that although it had never been determined who harmed O.L., O.L. has been resistant to interaction with Mother and T.H., but he has not been reluctant to engage with Father or others in that household.

{¶16} Mother has contended that the return of T.H. to her home, in combination with the failure to return O.L., demonstrates an inequity. If she can parent her older son, Mother argued,

she should also have custody of her younger son. The caseworker addressed this point by explaining that the two boys are different, and agreed with the case aide in the respect that Mother seemed to have a different relationship with each of them. In addition to the differences noted by the case aide, Ms. Whalen noted that Mother spent more time with T.H. and interacted with him more than with O.L. The caseworker also explained that, at 13 years old, T.H. would be better able to communicate any concerns and protect himself than would three-year-old O.L., and that, in addition, there would be service providers in the home because CSB retained protective supervision of T.H.

{¶17} Father and Mother each testified and presented several character witnesses in support of their positions. For his part, Father presented the testimony of a friend, Grandmother, and Catherine Talley. The friend testified that Father interacted lovingly with O.L. She stated that Father shows affection to his son, plays with him, properly disciplines him, and shops for his clothing. Grandmother testified that O.L. is better adjusted since he has been in her home. She explained that she, Father, and Ms. Talley all help with the daily care of O.L. She said that O.L. follows Father all over, and that the child does not seem to like to talk to Mother on the telephone. Ms. Talley testified that she had lived in Grandmother's home since 2005, has her own room, and attends school during the day. Since Father's accident, she has transported him to appointments and, more recently, has taken O.L. to visits and counseling sessions. She explained that she often helps O.L. get dressed in the morning, takes him to daycare, and picks him up at the end of the day. She also takes him to church. She explained that Father often picks out the child's clothes, sometimes dresses him, gives him baths, prepares his meals and does other things with him. She stated that when O.L. first came to their home, he would frequently awaken with nightmares, but that the nightmares have now stopped. Ms. Talley

testified that O.L. did not want to talk to Mother on the telephone, and that his whole attitude changed when she talked to him about going to her home.

{¶18} Father testified that he had an accident in 2005, where he was crushed by ice falling off a building. His mobility is currently limited so that he uses a walker, but he is getting therapy and hopes to eventually return to his mobile barbeque business. He explained that before the present case, he and Mother had disputes about support and visitation, resulting in a domestic relations case where Father was ordered to pay support, Mother was ordered to permit Father to visit, and Mother was held in contempt for failing to do so. Father described O.L. as an energetic, challenging, lovable child, and said that his favorite toys are trucks, a small train, and a bicycle. Father testified that he and O.L. have a great relationship and that he believes he can care for him. He expressed concern for O.L.'s safety if he were placed in Mother's custody.

{¶19} For her part, Mother presented three character witnesses, who attested to Mother's love for and close relationship with her children while they were in her care, her ability to properly provide for them, and the existence of a family support system. The witnesses stated that they never saw T.H. harm O.L.

{¶20} Mother also testified on her own behalf and stated that she had been the sole provider for O.L. during the first two and one-half years of his life. Father provided some child support, but was in arrears. She stated that she supports herself with recently-acquired social security benefits for herself, social security benefits for T.H., occasional child support from T.H.'s father, and an occasional job with a catering company. Mother admitted to using cross words with Ms. Talley, and conceded that Ms. Talley never said anything inappropriate to her.

{¶21} Mother also testified that she loves her children and has a strong bond with them. She believes that O.L.'s behavioral problems and need for counseling have only arisen since he

was removed from her home, and she believes that she can provide a better home for O.L. than can Father. She believes that O.L. is not being properly fed or supervised at Father's home. She has claimed that O.L. says Father does not play with him. She stated that she has a good family support system, and that Father has an anger problem and lacks patience. Mother refused to get a parenting evaluation because she insists that parenting was never the problem in this case. She denied that her parenting skills were ever put into question, despite the fact that O.L.'s counselor and caseworker expressed such concerns.

{¶22} The guardian ad litem also reported to the court. She indicated that both homes are appropriate and that O.L. enjoys contact with both parents. He is very attached to Father, and Mother interacts appropriately at visits. She reported that Father completed his case plan goals, whereas Mother still had some objectives outstanding. She observed that the domestic relations magistrate issued a very negative review of Mother's behavior when Mother denied visitation to Father. She emphasized that both parents clearly love O.L. and, although the parents do not have a good relationship, the child will continue to need both of them. She noted that, despite his disability, Father has come to all the court hearings, and despite Grandmother's age, she is able to help with O.L. as well. Ms. Talley has provided valuable educational assistance to O.L. also. The guardian ad litem expressed concern with the fact that O.L. was harmed by someone in January 2008, but that no one has been found to be responsible. She also expressed concern that T.H. exhibits aggressive behavior in certain settings. The guardian ad litem concluded by recommending that legal custody be awarded to Father.

{¶23} From a review of the evidence presented, the trial court could reasonably have concluded that placement with Father was in O.L.'s best interest. The trial court did not abuse its

discretion by overruling Mother's objection to the magistrate's decision and ordering that O.L. be placed in the legal custody of Father. Mother's first assignment of error is overruled.

Assignment of Error Number Two

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING SUPERVISED VISITATION FOR MOTHER WITH THE MINOR CHILD."

{¶24} Mother's second assignment of error is that the trial court erred in requiring her visitation to be supervised. This Court will not reach the merits of this challenge because Mother failed to preserve it for appellate review. Juv. R. 40(D)(3)(b)(iv) provides that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion *** unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b)." Mother did not object to that portion of the magistrate's decision requiring Mother to have supervised visitation with O.L. Having failed to raise this argument in the court below or to make an appropriate argument for plain error, Mother has forfeited her right to assign error before this Court. See *Ilg v. Ilg*, 9th Dist. No. 23987, 2008-Ohio-6792, at ¶6. Mother's second assignment of error is overruled.

III

{¶25} Mother's two assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

BELFANCE, P. J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶26} I concur in the judgment of the Court. I write separately only to indicate that, even if Mother had properly preserved the issue of supervised visitation, as raised in the second assignment of error, for review, I would find that requiring supervised visitation is warranted in this case. Although the perpetrator of abuse against O.L. was not determined, there was evidence that he had been physically abused by someone. There was, at the least, a failure to protect this child from such harm. In addition, there was evidence that Mother failed to fully

appreciate the risk of harm to O.L during supervised visitation. Accordingly, I would find that the trial court did not err in requiring supervised visitation.

APPEARANCES:

DEREK CEK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

EDWARD SMITH, Attorney at Law, for Appellee.

NANCY FLOWER, Guardian ad Litem.