

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

IN THE INTEREST OF: M.N.J. & N.M.D.A.;

JUVENILE OFFICER

Respondent,

v.

M.G. AND C.G. (MOTHER)

Appellants.

DOCKET NUMBER WD70056 & WD70057

DATE: June 30, 2009

Appeal From:

Circuit Court of Henry County, MO
The Honorable James Kelso Journey, Judge

Appellate Judges:

Division One: Alok Ahuja, P.J., Harold L. Lowenstein, J., and Thomas H. Newton, C.J.

Attorneys:

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Counsel for Appellant,

Attorneys:

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Counsel for Respondent.

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

IN THE INTEREST OF: M.N.J. & N.M.D.A.; JUVENILE OFFICER,
Respondent, v. M.G. AND C.G. (MOTHER), Appellants

WD70056 & WD70057

Henry County

Before Division One Judges: Ahuja, P.J., Lowenstein, J., and Newton, C.J.

The Children's Division investigated a neglect allegation that M.J. had an untreated burn. During the investigation, the investigator suspected child abuse based on behavior of N.A., M.J.'s sister. The children were removed from Mother and Stepfather's home. Subsequently, the children were placed in protective custody. The Juvenile Officer filed a petition for custody, shortly thereafter. The petition alleged that Stepfather beat the children with a belt on several occasions, leaving bruises. After an adjudicatory and dispositional hearing, the juvenile court determined that Stepfather had abused the children by using excessive force during discipline and that Mother abused the children by failing to protect them. Stepfather and Mother appeal.

REVERSED AND REMANDED.

Division One Holds:

The Juvenile Officer did not meet its burden to prove by clear and convincing evidence the allegation that Stepfather physically abused the children. For evidence to be clear and convincing, it must *instantly* tilt the scale in favor of finding abuse when weighed against the contrary evidence and leave the fact finder with an *abiding conviction* that the evidence is true.

First, the children did not testify, and their statements admitted into evidence were that they were disciplined with a belt. There were no bruises on the children. A red mark was found on the oldest child's buttocks that appeared and vanished within a day. Second, although Stepfather reported diagnoses of bipolar disorder and an explosive anger disorder, and admitted he stopped taking his medicine, that evidence does not prove physical abuse while disciplining the children. Significantly, the test that assesses whether a parent is probably a child abuser did not indicate that Stepfather was or had abused the children. His scores were normal, with the exception of viewing children in a negative way. The parenting assessor stated that this perception was common with parents who have problem or disabled children and attributed it to the oldest child's emotional conditions. Third, although Mother lied about using the belt to discipline children, Stepfather did not give misinformation. He was consistent with the police and the parenting assessor. Thus, the judgment cannot stand on the finding that Stepfather physically abused the children by using excessive force when disciplining them.

Next, we consider the juvenile court's additional jurisdictional findings, which is the only reasoning provided for its finding of abuse. Those findings indicate that abuse was found because the court believed that a "potentially dangerous home environment" existed because of the parents' mental conditions. A finding of potential harm due to parents' mental conditions is a proper ground to support a judgment under section 211.031. Cases in which a parent's mental condition supports a finding that a child is in need of care require expert testimony of that mental condition and that the mental condition affects parenting.

In this case, there was no expert testimony or records of the parents' mental conditions. Rather, there were self-reports of mental diagnoses in parenting assessments and the caseworker's testimony about Stepfather's statements of his condition. The parenting assessor recommended psychological evaluations because his tests produced only potential problems that needed further assessment. At best, without the psychological evaluations, the juvenile court made an inappropriate probable cause determination of potential harm attributed to the parents' mental conditions.

Most importantly, we cannot affirm the judgment based on the parents' mental conditions causing potential harm to children because it was not alleged within the petition and, thus, violated the parents' due process rights. Due process requires that a parent be informed of the allegations against her so that they may prepare a proper defense; it is not violated when evidence raising an issue not alleged in the petition is admitted without objection because the petition is deemed to conform to the evidence. Under such circumstances, the parent implicitly consents to trying that issue. However, that rule does not apply when that evidence could also address issues already alleged, which was the case here.

It is clear that the Juvenile Officer introduced the mental conditions of the parents along with the children's fear of spankings to create the inference that Stepfather abused the children during those spankings. The dissent admits this in its decision because it relies on the parents' mental conditions to support a finding of clear and convincing evidence of abuse. Additionally, as the proceeding was a combined adjudicatory and dispositional hearing, their mental conditions were offered to support an out-of-home placement for disposition after an adjudication of abuse. The trial court has authority to order a custodian to submit to mental examination because a custodian's fitness is always at issue when deciding the placement for the child's best interest. Thus, to use the mental conditions as a basis to support an adjudication based on potential harm violated the parents' due process.

Because there was not clear and convincing evidence to substantiate the juvenile court's finding on this basis, the issue was not alleged in the petition, nor did the parents consent to it being tried, we reverse and remand for further proceedings on the issue of the parents' mental conditions.

Opinion by: Thomas H. Newton, Chief Judge

June 30, 2009

Dissenting Opinion by Judge Harold L. Lowenstein:

The author would hold that this court should affirm the decision of the trial court. Given the evidence and the circumstances of this case, this court should defer to the trial court's assessment of the parents and their credibility and uphold the decision of the trial court. Evidence beyond the Juvenile Officer's petition was tried by consent and clear and convincing evidence established that the children have been subjected to abuse and ill treatment. Returning these children to the parental home based on the uncontroverted evidence addressed at trial would put them in imminent danger.

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