

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN THE MATTER OF: :

K.W. and J.W. : CASE NOS. CA2003-11-289
CA2003-11-291

: :

: O P I N I O N

: 10/11/2004

: :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2001-0671

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ad litem

YOUNG, P.J.

{¶1} Appellants, Jonathan Whyte and Essabea Hemingway, appeal the decision of the Butler County Court of Common Pleas, Juvenile Division, granting permanent custody of two minor children, K.W. and J.W., to the Butler Children Services Board ("BCCSB"). We affirm the decision of the trial court.

{¶2} K.W. is the biological son of appellant, Essabea Hemingway, and an unknown father. J.W. is the biological son of Hemingway and appellant, Jonathan Whyte. When K.W. was approximately two months old, the trial court adjudicated him an abused, neglected, and dependent child after Hemingway attempted to set her home on fire while the child was asleep inside. As a result, K.W. was placed in the temporary custody of BCCSB from June 2000 until April 2001.

{¶3} On September 25, 2001, K.W. was hospitalized after sustaining several injuries. K.W.'s injuries included bleeding around his brain, severe brain swelling, and bruises on his forehead, cheeks, and temples. According to appellants, the child was injured when he fell down the stairs. However, because the injuries were consistent with child abuse, BCCSB filed complaints on September 27, 2001, alleging K.W. to be an abused and dependent child and J.W. to be a dependent child, and also requesting temporary custody of the children. At that time, the trial court granted temporary custody of both children to BCCSB, and BCCSB implemented a case plan.

{¶4} On October 1, 2001, BCCSB amended its complaints to allege that K.W. was a neglected, abused, and dependent child and that J.W. was a dependent child. At that time, BCCSB also filed a motion seeking to amend the case plan, a motion to extend temporary custody to BCCSB, and a motion requesting permanent custody of the children. On September 6, 2002, a magistrate found that the proposed case plan was in the

children's best interest and also that BCCSB had made reasonable efforts to prevent the need for placement of the children outside the home. Further, the magistrate granted BCCSB's motion for extended temporary custody, holding that it was in the children's best interest.

{¶5} On December 9, 2002, a magistrate found, by clear and convincing evidence, that K.W. was an abused, neglected, and dependent child and that J.W. was a dependent child. The magistrate found that Whyte had been convicted of child endangering which resulted in serious physical harm to K.W. and that Whyte is the perpetrator of the physical abuse upon K.W. Further, the magistrate found that Hemingway was convicted of obstruction of justice which caused physical harm to K.W., and that she was the perpetrator of abuse and neglect upon K.W.

{¶6} The trial court held hearings on BCCSB's motion for permanent custody in February and March 2003, and the magistrate issued a decision granting permanent custody of the children to BCCSB on September 15, 2003. The magistrate found that there was clear and convincing evidence that it was in the best interest of K.W. and J.W. that they be placed in the permanent custody of BCCSB, that the children had been in the temporary custody of BCCSB for more than 12 months, and that neither child could or should be placed with their parents. Appellants timely objected to the magistrate's decision. The trial court overruled appellants' objections and adopted the magistrate's decision as its final findings and order.

{¶7} Appellants appeal the decision of the trial court and are represented by separate counsel on appeal. Whyte raises a single assignment of error, and Hemingway raises three assignments of error. Whyte's single assignment of error and Hemingway's second and third assignments of error are interrelated and will be addressed together.

{¶8} Hemingway's Assignment of Error No. 1:

{¶9} "THE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ADMITTED AND CONSIDERED HEARSAY EVIDENCE IN THE PERMANENT CUSTODY PROCEEDINGS."

{¶10} In her first assignment of error, Hemingway argues that she was prejudiced when the court admitted hearsay evidence.¹ Hemingway maintains that the trial court abused its discretion in admitting into evidence and considering transcripts of Whyte's trial and several videotaped police interrogations of Whyte and Hemingway.

{¶11} It is well-established that the admission or exclusion of evidence rests within the sound discretion of the trial court. In re Brown (2001), 142 Ohio App.3d 193, 197; State v. Robb, 88 Ohio St.3d 59, 68, 2000-Ohio-275. Absent an abuse of discretion, an appellate court will not disturb a ruling by a trial court as to the admissibility of evidence. State v. Martin (1985), 19 Ohio St.3d 122, 129.

1. We note that Hemingway failed to comply with Loc.R. 11(B)(3), which provides "the argument portion of the brief shall include citations to the portion of the record before the court on appeal wherein the lower court committed the error complained of." However, in light of the fact that Hemingway included citations to the record in the statement of the facts

{¶12} Juv.R. 34 provides that the Ohio Rules of Evidence apply in hearings on motions for permanent custody. Under Evid.R. 801(C), "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶13} However, according to Evid.R. 801(D)(2), an admission by a party-opponent is not hearsay if "the statement is offered against a party * * *." Although the term "admission" may appear to imply that the out-of-court statement must be a confession or a statement against interest, any prior statement of a party is admissible so long as the statement is offered by the opposing party at trial. State v. Baker (2000), 137 Ohio App.3d 628, 652.

{¶14} For an admission of a party to be admissible under Evid.R. 801(D)(2), a prior out-of-court statement must be: (1) offered against a party; and (2) the statement of the party against whom the statement is being offered. Mastran v. Urichich (1988), 37 Ohio St.3d 44, 47. Evid.R. 801(A) defines a "statement" as "an oral or written assertion."

{¶15} Hemingway claims that the trial court improperly admitted into evidence transcripts of her testimony at Whyte's criminal trial, because such testimony is hearsay and does not fall within an exception to the hearsay rule. At Whyte's trial, Hemingway testified that on at least one occasion, when

portion of her brief, we hold that such an error did not substantially prejudice the state.

she was angry with K.W., she jerked K.W. to discipline him, causing his head to snap back. Hemingway also testified at the trial that she fabricated a story that K.W.'s injuries resulted from his falling down stairs. Hemingway maintained at trial that she lied because she was afraid of losing custody of her children and also to protect Whyte from responsibility for K.W.'s injuries.

{¶16} We disagree with Hemingway's assertions, and find that her testimony at Whyte's trial is an admission. Under the Ohio Rules of Evidence, an admission by a party-opponent is not hearsay. See Evid.R. 810(D)(2). At the permanent custody hearing, the state used Hemingway's prior out-of-court statements in the form of a transcript against her. Certainly, Hemingway's testimony qualifies as an admission by a party opponent under Evid.R. 801(D)(2). Further, the certified copy of the transcript meets the authentication requirement pursuant to Evid.R. 902. Therefore, we find that the trial court did not err in admitting transcripts of Hemingway's testimony at Whyte's trial.

{¶17} Next, Hemingway argues that the trial court erred in admitting into evidence videotaped interrogations of herself and Whyte. Hemingway maintains that the statements she and Whyte made during the interrogations are inadmissible hearsay. Again, we disagree.

{¶18} At the permanent custody hearing, the state offered the recorded statements appellants made during the

interrogations in the form of videotape. Such recorded statements also constitute admissions of party opponents under Evid.R. 801(D)(2) if they are a party's statement being offered against that party. See Mastran, 37 Ohio St.3d at 47. Because the state offered Hemingway's videotaped statements against her, the statements Hemingway made during the interrogation are admissions, and the trial court properly admitted them as such.

{¶19} Hemingway's claim that she was prejudiced by the admission of Whyte's videotaped statements is unpersuasive. Although Whyte was not present during the permanent custody hearing, he was, and remains a party in this matter. Accordingly, the trial court properly admitted his videotaped statements as his own admissions. A thorough review of the record reveals no evidence that the trial court considered Whyte's admissions in determining that it was in the children's best interest that Hemingway's parental rights be terminated.

{¶20} We find that Hemingway's testimony at Whyte's trial and the statements both made during their interrogations constitute admissions by a party opponent. Because admissions by a party opponent are not hearsay, the trial court did not err in admitting them as evidence. Hemingway's first assignment of error is overruled.

{¶21} Hemingway's Assignment of Error No. 2:

{¶22} "THE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT GRANTED PERMANENT CUSTODY OF BOTH APPELLANT'S CHILDREN TO THE STATE."

{¶23} Hemingway's Assignment of Error No. 3:

{¶24} "THE COURT'S DECISION AND ORDER GRANTING PERMANENT CUSTODY OF BOTH APPELLANT'S CHILDREN TO THE STATE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶25} Whyte's Assignment of Error:

{¶26} "THE TRIAL COURT'S DECISION TO GRANT BCCSB PERMANENT CUSTODY IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE."

{¶27} Appellants argue that the trial court's decision to grant permanent custody to BCCSB is not supported by clear and convincing evidence. Appellants claim that the trial court's decision to grant permanent custody of the children to BCCSB is not in the children's best interest.

{¶28} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. Santosky v. Kramer (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a trial court's decision finding clear and convincing evidence is limited to whether sufficient credible evidence exists to support the trial court's determination. In re Starkey, 150 Ohio App.3d 612, 617, 2002-Ohio-6892. A reviewing court will reverse a finding by the trial court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. In re Rodgers (2000), 138 Ohio App.3d 510, 520.

{¶29} When a state agency seeks permanent custody of a dependent child, the trial court is required to determine, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency. R.C. 2151.414(B)(1). In making such a determination, the trial court must consider all relevant factors, including, but not limited to, the following factors enumerated in R.C. 2151.414(D):

{¶30} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶31} "(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶32} "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶33} "(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶34} "(5) Whether any of the factors in [R.C. 2151.414(E)(7) to (11)] apply in relation to the parents and child."

{¶35} Upon thoroughly reviewing the record, we find that clear and convincing evidence supports the trial court's determination that it is in the best interest of J.W. and K.W. that they be permanently placed in the custody of BCCSB. The trial court made findings related to the applicable statutory factors set forth in R.C. 2151.414(D). Viewing the facts of this case in light of these factors, it is clear that the children's needs are best served by granting permanent custody to BCCSB.

{¶36} In its decision, the court found that that K.W. and J.W. have lived in foster care since September 26, 2001. The court noted that after Hemingway was released from prison following her sentence for obstruction of justice, she has attended visitations with K.W. and J.W. The evidence indicates that although Hemingway feels bonded with J.W., she is not bonded with K.W., and has failed to demonstrate the ability to meet K.W.'s special medical needs.² Whyte, J.W.'s father, has had no contact with either child since his conviction for child endangering in May 2002. K.W.'s father is unknown and has never come forward.

{¶37} The court also noted that J.W. is bonded with the foster family with which he has lived since he was six-months old, and that his foster family is bonded with him. Also, the court found that K.W. is bonded with his foster mother and that

2. As a result of the injuries Whyte inflicted upon K.W., the child must be fed through the use of a "G-tube" and must utilize special breathing treatments. Despite K.W.'s foster mother's willingness to demonstrate how

his foster mother is bonded with him. J.W.'s foster parents and K.W.'s foster mother are friends and provide the children with weekly opportunities to interact with each other.

{¶38} Further, the court found that both children had been in the temporary custody of BCCSB for 12 or more months of a consecutive 22-month period ending on or after March 18, 1999.

The record indicates that K.W. and J.W. were removed from appellants' care on September 26, 2001, and remained in foster care until and through the date of the permanent custody hearing, which began on February 26, 2003.

{¶39} The court also considered the children's need for a legally secure permanent placement, and whether such a placement could be achieved without a grant of permanent custody to BCCSB. The court found that J.W. has been in foster care for 18 months of his 24-month lifetime, that he is very bonded with his foster family, and that his foster family wishes to adopt him if BCCSB is granted permanent custody.

{¶40} Also, the court found that K.W. has been in the custody of his foster mother since being removed from appellant's custody, and that he will require specialized medical care throughout his childhood. The court noted that K.W.'s foster mother, a registered nurse, has demonstrated that she can meet his special medical needs and has indicated that she wishes to adopt K.W. On the other hand, the evidence indicates that Hemingway has never taken the initiative to

to feed K.W. and assist in the breathing treatments, Hemingway has refused to learn these techniques, which are necessary for K.W.'s survival.

learn how to care for K.W.'s special medical needs, despite his foster mother's willingness to demonstrate the necessary techniques.

{¶41} In addition, the court noted that Hemingway failed to complete a requirement under case plan in which she was to undergo a psychological evaluation. The court stated that although Hemingway did complete several parenting instruction courses in compliance with the case plan, Hemingway has failed to demonstrate her ability to protect her children from future harm. Further, the court found that since her release from prison, Hemingway has at times been homeless and has failed to establish a suitable residence.

{¶42} With respect to Whyte, the court relied on R.C. 2151.414(D)(5), which provides that it is in the best interest of the child to grant permanent custody to an agency if any of the factors in R.C. 2151.414(E)(7) to (11) are applicable. According to R.C. 2151.414(E)(10), if a parent abandons his child, it is in the child's best interest to be placed in the permanent custody of the agency. According to R.C. 2151.011(C), "a child is presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after that period of 90 days." The court found that because Whyte is to serve an eight-year prison term, and because he failed to contact J.W. since his incarceration, he has abandoned the children. The court also found that K.W.'s unknown father has abandoned K.W. since he

has failed to come forward.

{¶43} After considering this evidence, the court found that granting permanent custody to BCCSB is in the best interest of M.C. We find that sufficient credible evidence supports the trial court's findings with respect to the best interest determination.

{¶44} Once a trial court does find by clear and convincing evidence that it is in the best interest of the child to grant permanent custody to the agency, R.C. 2151.414(B)(1) provides that the court may grant permanent custody to an agency if it determines that the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period ending on or after March 18, 1999. As stated above, the evidence indicates that as of the date of the hearing, the children had been in the temporary custody of BCCSB for at least 17 months.

{¶45} Also, according to R.C. 2151.414(E), after a court determines that it is in the best interest of the child to grant permanent custody to the agency, a court must grant permanent custody if the court determines by clear and convincing evidence that the children cannot or should not be placed with their parents.

{¶46} According to R.C. 2151.414(E)(1), a child cannot or should not be placed with his parent if:

{¶47} "The parent has failed continuously and repeatedly to substantially remedy the conditions causing the [children] to

be placed outside the [children's] home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties."

{¶48} In its decision, the trial court noted that when Hemingway was released from prison, she was ordered to undergo psychological evaluations to determine the types of available services that could be implemented for reunification. The court found that because Hemingway failed to participate in any type of psychological evaluation, reunification could not be considered, in light of the fact that she neglected K.W.'s medical needs the day he was injured and then subsequently lied about the source of the injuries. Further, the court found that Hemingway failed to take the necessary steps to educate herself with regard to K.W.'s medical treatments. Although BCCSB failed to provide such education directly to Hemingway, the evidence indicates that on several occasions, Hemingway has had the opportunity to learn the techniques from K.W.'s foster mother.

{¶49} Also, according to R.C. 2151.414(E)(5), a child cannot or should not be placed with his parent if: "[t]he parent is incarcerated for an offense committed against the child or a sibling of the child." In its decision, the trial court found that Whyte is serving an eight-year sentence for

child endangering as a result of the physical injuries he inflicted upon K.W., who is J.W.'s sibling.

{¶50} In addition, according to R.C. 2151.414(E)(10), a child cannot or should not be placed with his parent if the parent has abandoned the child. As stated above, the trial court found that both Whyte and K.W.'s father have abandoned their respective children by failing to have contact with the children for 90 days prior to the date of the hearing.

{¶51} Further, according to R.C. 2151.414(E)(12), a child cannot or should not be placed with his parent if: "[t]he parent is incarcerated at the time of the filing of the motion for permanent custody or the disposition hearing of the child and will not be available to care for the child for at least 18 months after the filing of the motion for permanent custody or the disposition hearing." As stated previously, the trial court found that Whyte is currently serving an eight-year prison sentence for child endangering.

{¶52} Finally, according to R.C. 2151.414(E)(15), a child cannot or should not be placed with his parent if the parent has caused or allowed the child to suffer neglect as described in R.C. 2151.03, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the parent a threat to the child's safety. In its decision, the trial court found that because of the seriousness of K.W.'s injuries and the fact that Hemingway neglected K.W. by failing to seek immediate medical

attention, it could not determine the likelihood of a recurrence of neglect without a psychological evaluation of Hemingway's mental state. Further, the court found that it could not determine whether Hemingway could ensure that both children would be safe from future harm if in her custody.

{¶53} Upon a thorough review of the evidence, we find that clear and convincing evidence supports the trial court's determination that it is in the best interest of K.W. and J.W. to be permanently placed in the custody of BCCSB, that both children were in the temporary custody of BCCSB for more than 12 months prior to the hearing, and that neither child can or should be placed with either Hemingway or Whyte. The trial court made findings related to the applicable statutory factors set forth in R.C. 2151.414(D) and (E), which are supported by the evidence. The trial court did not err by granting permanent custody of the children to BCCSB. Hemingway's second and third assignments of error and Whyte's assignment of error are overruled.

{¶54} Judgment affirmed.

POWELL and WALSH, JJ., concur.