

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: W.T.

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C.A. CASE NO. 23427

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T.C. NO. JC 06 4325

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(Civil appeal from Common
Pleas Court, Juvenile

Division)

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OPINION

Rendered on the 9th day of October, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of L.T., filed
April 28, 2009. L.T. appeals from the judgment of the Montgomery County Court
of Common Pleas, Juvenile Division, overruling her objections to the magistrate's
decision and granting permanent custody of her daughter, W.T., to the Montgomery
County Department of Job and Family Services - Children Services Division

("Agency"). W.T. was born on February 6, 2005.

{¶ 2} On May 5, 2006, the Agency filed a Dependency and Neglect Complaint which provided in part, "[t]he Agency believes that [W.T.] is Dependent and Neglected because Mother has allowed illegal drug activity to occur in the home. The Dayton Police were called out to Mother's home and found drug activity in the presence of this child. There was very little food in the home. The home was in an unsanitary condition, and there was drug residue in the kitchen. Mother was in the home while the drug activity was occurring. When the police arrived, Mother was arrested on an outstanding warrant for a traffic violation and child endangering. On May 4, 2006, there was an officer acceptance of this child. At this time, Mother is incarcerated at Montgomery County Jail. * * * ." W.T.'s two older siblings were also removed from the home and placed with relatives. W.T. was placed in a foster home.

{¶ 3} On May 11, 2006, following a hearing, the juvenile court issued an Order of Interim Temporary Custody, and a Guardian ad Litem ("GAL") was appointed for W.T. On August 23, 2006, following an adjudication and dispositional hearing, the juvenile court terminated the interim order and granted the Agency temporary custody of W.T.

{¶ 4} The Agency developed a case plan with the aim of reuniting W.T. with L.T. Pursuant to the plan, L.T. was to maintain a clean and appropriate home; not allow drugs in her home; complete a drug and alcohol assessment and sign all releases and complete all recommendations; obtain counseling for depression, and sign all releases and complete all recommendations. The case plan provided that

L.T. could visit W.T. twice a week at the Haines Center.

{¶ 5} The initial semi-annual administrative review of L.T.'s progress on her case plan was conducted on October 20, 2006, and W.T.'s placement in foster care was continued because L.T. "has not addressed case plan concerns. She has lost her housing and is non-compliant with probation and this agency."

{¶ 6} On March 12, 2007, the Agency filed a motion and memorandum for permanent custody, or in the alternative, an extension of temporary custody. Attached to the motion is the affidavit of an Agency caseworker which provides in part: "Permanent custody is in the child's best interest because: Mother has made little progress on her case plan objectives and the Agency does not anticipate Mother will be able to adequately provide for the child's basic needs in the future. Mother was unemployed for approximately one year; however, Mother reports she is scheduled to start employment on March 9, 2007. Mother's history has demonstrated she has been unable to maintain steady employment. Mother also has been unable to maintain stable housing. Until recently, the Agency was unable to visit Mother's home because she was reluctant to disclose her address. Mother reported her previous home had structural problems that required repairs. Mother relocated this month and disclosed a current address to the Agency. The Agency referred Mother to CAM to complete substance abuse and mental health assessments. After numerous missed appointments, Mother completed a substance abuse and mental health assessment at crisis care. Mother was then referred to Daymont for treatment to address substance abuse and mental health issues. Mother is currently in group counseling to address these issues. Mother

has started to make progress on her case plan objectives within the past month. The Agency does not believe Mother will consistently address her case plan objectives. The Agency also does not believe Mother will be able to properly and adequately provide for the child in the near future.”

{¶ 7} On March 30, 2007, the GAL filed a report recommending that the Agency be granted permanent custody of W.T. The report provides that W.T. is doing well in foster care and that her foster parents are considering adopting her. The report further provides that L.T. wanted W.T. “to stay in a familiar environment. She told CASA that she does not want [W.T.] to grow up without any family. She said that she takes full responsibility for not following through on her case plan.”

{¶ 8} On April 27, 2007, a second semi-annual review was conducted by the Agency. The review form notes that L.T. “failed to make significant progress in addressing case plan concerns.” The Agency also noted that L.T. has a new residence that has not been viewed by the Agency. At the time of a scheduled visit on April 27, 2007, L.T. did not allow her caseworker “to visit her when she was residing with friends after being evicted from DMHA housing.” The review further indicates that L.T. was diagnosed with depression, and after being referred to Daymont’s “dual diagnosis program for substance abuse and mental health,” L.T. “has not been consistently involved with Daymont and her case was recently closed after she failed to attend for 90 days.” The review further provides that L.T. missed as many as three or more visits with W.T.

{¶ 9} On May 31, 2007, the Magistrate granted a first extension of temporary custody, and on September 18, 2007, the Agency filed a motion and

memorandum for a second extension of temporary custody. The caseworker's affidavit provides in part, "Mother is currently homeless. Mother is unemployed * *
* Mother has not visited child since July 2007. It is suspected that Mother is currently incarcerated."

{¶ 10} On September 18, 2007, a third semi-annual review was conducted. The review form notes that L.T. is incarcerated in Indiana and has been uninvolved with the Agency during the majority of the reporting period.

{¶ 11} On January 8, 2008, the Agency filed a motion for permanent custody. The attached caseworker's affidavit provides in part that L.T. has been incarcerated "since July 2007. Even prior to that, her visitation was inconsistent. It was reduced from twice a week to once a week at mother's request. Then, even when reduced, she was sporadic in her visits. Alleged father is deceased."

{¶ 12} On February 27, 2008, a second extension of temporary custody was granted.

{¶ 13} On March 26, 2008, a fourth semi-annual review was conducted by the Agency, and the summary notes, L.T. "[r]emains incarcerated in Indiana and has never addressed plan concerns even prior to being jailed." On July 10, 2008, the GAL filed a report that provides that the GAL "attempted to contact mother recently at Theodora House in Indianapolis and requested a return call but none has been received." The GAL filed a report recommending that permanent custody of W.T. be granted to the Agency for the purpose of adoption.

{¶ 14} Following a hearing before the magistrate on July 14, 2008, at which Sherrie Spence, L.T.'s caseworker, and L.T. testified, permanent custody of W.T.

was granted to the Agency on August 6, 2008. Spence stated that she became involved in the case while L.T. was incarcerated in Indiana, and that she maintained telephone contact with her during that time. Spence testified that W.T. is very bonded to her foster family, and that they are interested in adopting her. Spence maintained that adoption by the foster family is in W.T.'s best interest. Spence also noted that W.T. does not have a bond with her siblings. Finally, no other relatives expressed an interest in adopting W.T.

{¶ 15} According to Spence, L.T. understood her case plan objectives, but she failed to meet them. L.T. arrived in Dayton the night before the hearing, and she did not have stable housing or income at the time. Spence indicated that L.T. would have to be reevaluated for mental health and substance abuse problems, because there was no documentation that W.T. completed any programs to address those issues. Spence concluded that reunification was not possible in the foreseeable future. Spence summarized by noting that the Agency provided the following services to L.T.: information and referral, case management, and foster care.

{¶ 16} The record reflects that L.T. pled guilty to a shoplifting charge, and she received a two year sentence, with one year suspended. L.T. admitted her record contains prior arrests and convictions for shoplifting.

{¶ 17} L.T. testified that she planned to move into the Highland Apartments on the upcoming weekend, and that she was staying with her mother until then. She stated that she worked for five months in a work release program in Indiana, and that she has leads for available jobs in the Dayton area. L.T. maintained she

received counseling while incarcerated but failed to produce any documentation.

{¶ 18} When questioned about W.T.'s best interests, L.T. stated, “* * * I am mature enough to know that if I can't handle W.T. or handle the responsibilities of being a mother to my kids, I will give her up for adoption. I will give her - - gladly give her back.” L.T. acknowledged that she does not have custody of her other children.

{¶ 19} The magistrate determined in part that L.T.'s case plan objectives were not met in that L.T. lacked stable income and housing and also failed to provide verification of treatment for mental health and substance abuse issues. The magistrate's conclusions of law provide in part, “[m]uch was made of the mother's ‘inability’ to work on case plan objectives for the past 12 months, and how likely it would be that she would become a suitable custodian in the coming 3 to 6 months. The Court observes that the mother had a year to work on case plan objectives before she became incarcerated, but she failed to even maintain regular contact with the child during that time. She also had the ability during the past 12 months to maintain very regular contact with Montgomery County Children Services, as evidenced by her very regular contact with her attorney during the pendency of this motion, but she failed to do so. She also failed to arrange for her endeavors while incarcerated to be confirmed or to be communicated to Montgomery County Children Services by her treatment providers.”

{¶ 20} On August 20, 2008, L.T. filed objections to the Magistrate's decision. On September 8, 2008, a fifth semi-annual review was conducted by the Agency resulting in findings consistent with previous reviews.

{¶ 21} On December 16, 2008, L.T. filed supplemental objections.

{¶ 22} On February 23, 2009, the Agency conducted a semi-annual case review, noting in part that L.T. is again incarcerated and without income and stable housing.

{¶ 23} On April 3, 2009, the juvenile court overruled L.T.'s objections, granting custody of W.T. to the Agency. The juvenile court's decision provides in part: " * * * the Court may grant permanent custody to the agency that filed the motion if it is in the best interest of the child to grant permanent custody to the agency, and one of four conditions listed in the statute also apply. ORC § 2151.414(B)(1). In order to grant permanent custody to the agency, the condition stated in ORC § 2151.414(B)(1)(a) requires the court to find that [the] child cannot be place[d] with either of the child's parents within a reasonable time or should not be placed with the parents, if the child was not abandoned, orphaned, or has not been in the temporary custody of one or more public or private children services for a period of 12 months or more of a consecutive 22 month period. Also, R.C. §2151.414(B)(1)(d) requires the child to have been in the temporary custody of the agency for 12 months or more months of a consecutive twenty-two month period.

{¶ 24} "In the present case, the evidence shows said child has been in the custody [of the Agency] since May 5, 2006, and the Agency did not file for permanent custody until January 8, 2008. Accordingly, the Court finds that the child was in the custody of the Agency for a period longer than twelve months of a consecutive twenty-two month period prior to the Agency's filing of the motion for permanent custody. Therefore, the condition set forth in ORC §2151.414(B)(1)(d)

has been met.”

{¶ 25} The juvenile court then analyzed, pursuant to R.C. 2151.414(E), whether W.T. could be placed with L.T. within a reasonable period of time or should not be placed with L.T., determining that W.T. “cannot be placed with [L.T.] within a reasonable time,” due to L.T.’s failure to remedy the conditions causing W.T.’s removal and L.T.’s demonstrated lack of commitment to W.T, pursuant to R.C. 2151.414(E)(1) and (4).

{¶ 26} The juvenile court next considered W.T.’s best interest. It was important to the trial court that L.T.’s contact with W.T. before her incarceration was “sporadic,” and that L.T. had not seen W.T. in the last year due to her incarceration. The trial court further noted that W.T. has no bond with her siblings, but yet is “very bonded with the foster family, and the foster family has the intent to adopt said child.” The court noted that W.T. was too young to express her opinion.

{¶ 27} The court also considered Agency custody to be in W.T.’s best interest, weighing the fact that W.T. had been in Agency custody for a period longer than 12 of 22 months. Additionally, the court considered W.T.’s need for permanent placement, noting, “the evidence shows said child would not be able to be placed with [L.T.] in a reasonable time, and therefore, permanency can only be accomplished by granting permanent custody of said child to the Agency.”

{¶ 28} Finally, the trial court concluded that L.T. abandoned W.T. pursuant to R.C. 2151.414(E)(10), noting “[f]ailure to contact a child for ninety days creates a presumption of abandonment. ORC 2151.011(C). [L.T.] has not had contact with said child * * * over a year due to her incarceration.”

{¶ 29} L.T. asserts two assignments of error. Her first assignment of error is as follows:

{¶ 30} “THE TERMINATION OF LEGAL CUSTODY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.”

{¶ 31} “The United States Supreme Court has recognized that parents’ interest in the care, custody, and control of their children ‘is perhaps the oldest of the fundamental liberty interests recognized’ by the Court. *Troxell v. Granville* (2000), 520 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49.” *In re M.S. & D.S.*, Clark App. No. 2008 CA 70, 2009-Ohio-3123, ¶15.

{¶ 32} “In a proceeding for the termination of parental rights, all of the court’s findings must be supported by clear and convincing evidence. R.C. 2151.414(E); *In re J.R.*, Montgomery App. No. 21749, 2007-Ohio-186, at ¶ 9. However, the court’s decision to terminate parental rights will not be overturned as against the manifest weight of the evidence if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements for a termination of parental rights have been established. *In re Forrest S.* (1995), 102 Ohio App.2d 338, 345, * * * ; *Cross v. Ledford* (1954), 161 Ohio St. 469, * * * paragraph three of the syllabus.” *In re K.S. & K.S.*, Clark App. No. 2008 CA 77, 2009-Ohio-533, ¶ 16. “An appellate court will not reverse a trial court’s determination concerning parental rights and custody unless the determination is not supported by sufficient evidence to meet the clear and convincing standard of proof.’ ‘Clear and convincing evidence is that level of proof

which would cause the trier of fact to develop a firm belief or conviction as to the facts sought to be proven.” *Miller v. Greene County Children’s Services Board*, (2005), 162 Ohio App. 3d 416, 2005-Ohio-4035.

{¶ 33} R.C. 2151.414(B) sets forth the circumstances under which a court may grant permanent custody of a child to a children services agency. The statute provides in relevant part:

{¶ 34} “(B)(1) * * * the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, 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 that filed the motion for permanent custody and that any of the following apply:

{¶ 35} “(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public services agencies * * * for twelve or more months of a consecutive twenty-two-month period * * * , and the child cannot be placed with either of the child’s parents within a reasonable time or should not be placed with the child’s parents.

{¶ 36} * *

{¶ 37} “(d) The child has been in the temporary custody of one or more public children services agencies * * * for twelve or more months of a consecutive twenty-two-month period * * * .”

{¶ 38} In determining whether a child can be placed with either parent within a reasonable time, a trial court must comply with R.C. 2151.414(E), which provides in relevant part: “In determining at a hearing * * * whether a child cannot be placed

with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing * * * that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶ 39} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child'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.

{¶ 40} "* * *

{¶ 41} "(4) The parent had demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.

{¶ 42} "* * *

{¶ 43} "(10) The parent has abandoned the child."

{¶ 44} “R.C. 2151.414(D) directs the trial court to consider all relevant factors when determining the best interest of the child, including but not limited to: (1) the interaction and interrelationship of the child with the child’s parents, relatives, foster parents and any other person who may significantly affect the child; (2) the wishes of the child; (3) the custodial history of child; (4) the child’s need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; (5) whether any of the factors in R.C. 2151.414(E)(7) through (11) are applicable. The factors in R.C. 2151.414(E)(7) through (11) include conviction of various crimes like homicide, assault and child endangerment, and withholding food or medical treatment from a child.” *In re S.K. & S.K.*, ¶ 21.

{¶ 45} Upon thorough review of all of the record, we conclude that the Agency presented clear and convincing evidence that granting custody to the Agency was in W.T.’s best interest. Since W.T. had been in the temporary custody of the Agency for more than 12 months of a consecutive twenty-two month period, R.C. 2151.414(B)(1)(a) does not apply¹, and analysis pursuant to R.C. 2151.414(E), regarding whether W.T. could be placed with L.T. within a reasonable time or should not be placed with L.T., was not required by the statute. We agree, however, with the juvenile court’s determination that L.T. failed to remedy the conditions resulting in W.T.’s removal from the home. Spence testified that the Agency had no documentation that L.T. completed any mental health or substance abuse counseling as required by her case plan. See R.C. 2151.414(E)(1). Further,

L.T. demonstrated a lack of commitment to W.T. by her sporadic visitation prior to her incarceration, and at the time of the hearing, L.T. did not have housing or a job, and there was no evidence before the court suggesting that L.T. could provide an adequate home for W.T. See R.C. 2151.414(E)(4).

{¶ 46} Regarding W.T.'s best interest, pursuant to R.C. 2151.414(D), Spence testified that L.T.'s contact with W.T. before she was incarcerated was sporadic, and W.T. did not see her mother for over a year while L.T. was in jail. W.T. does not have a bond with her siblings, and there is no other relative prepared to adopt W.T. L.T. has lived in numerous homes, which further suggests a transient lifestyle pattern as opposed to the legally secure placement that W.T. needs. In contrast, W.T.'s bond with her foster family, with whom she has lived since shortly after her removal from L.T.'s home, is very strong. L.T.'s own testimony makes clear that she does not comprehend the commitment and responsibilities involved in providing a stable environment for W.T. According to L.T., she will "gladly give [W.T.] back" if she is unable to handle the responsibilities of raising her daughter.

{¶ 47} We find that the juvenile court considered all relevant factors in determining W.T.'s best interest, and the record contains competent, credible evidence upon which the court concluded that the essential statutory elements for a termination of parental rights had been established. Since the juvenile court's decision is supported by sufficient evidence and is not against the manifest weight of the evidence, L.T.'s first assignment of error is overruled.

¹As the court also noted, R.C.2151.414(B)(1)(d) does apply.

{¶ 48} L.T.'s second assignment of error is as follows:

{¶ 49} "[L.T.]'S ATTORNEY WAS INEFFECTIVE BY NOT REQUESTING A CONTINUANCE OF THE PERMANENT CUSTODY HEARING."

{¶ 50} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 51} L.T. argues, if her attorney had requested a continuance on her behalf, "perhaps she could have established a job, a residence, and been able to provide the Court with documentation regarding her counseling and treatment she had received." (Emphasis added). L.T. has not identified what evidence she would have offered had counsel moved for and obtained a continuance, and her

unsupported speculation is not sufficient to overcome the strong presumption that she received effective assistance without prejudice. By way of observation, we note that L.T. was arrested again and incarcerated once more between the evidentiary hearing and the judgment rendered. L.T.'s second assignment of error is overruled, and the judgment of the juvenile court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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