

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

IN THE MATTER OF:

LACEY MAE NOLEN

CASE NO. 3-04-20

ALLEGED NEGLECTED CHILD

[AMY JO KINCAID

OPINION

MOTHER/APPELLANT]

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Juvenile Division**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: June 20, 2005

ATTORNEYS:

**JOHN SPIEGEL
Attorney at Law
Reg. #0024737
222 West Charles Street
P. O. Box 1024
Bucyrus, Ohio 44820-1024
For Appellant**

**MICHAEL J. WIENER
Asst. Prosecuting Attorney
Reg. #0074220
112 East Mansfield Street, Suite 305
Bucyrus, Ohio 45820
For Appellee**

GEOFFREY L. STOLL
Attorney at Law
Reg. #0038520
208 South Walnut Street
Bucyrus, Ohio 44820
Guardian Ad Litem

ROGERS, J.

{¶1} Appellant, Amy Jo Kincaid, appeals from a judgment of the Crawford County Court of Common Pleas, committing her child, Lacey Nolen, to the legal custody of the child's paternal aunt, Anna Rosier. Amy contends that the trial court erroneously considered events outside of the courtroom in ruling that she was unable to adequately supervise her children. She also claims that the trial court's judgment was based solely on her poverty status. Finally, Amy asserts that the trial court erred in ruling that she used improper discipline without expert testimony to that effect. After reviewing the entire record, we find no merit in any of Amy's three assignments of error. Accordingly, the judgment of the trial court is affirmed.

{¶2} On June 25, 2002, at approximately 4:00 p.m., the Galion Police Department responded to a report that a young child was running around outside unattended. Upon arriving at the scene, police discovered Amy's four year old daughter, Sierra, outside of a neighbor's apartment while Amy was in her apartment sleeping. A few hours later, at approximately 7:00 p.m., the police were

again dispatched to Amy's residence in response to a possible domestic situation. This time police found Sierra running around outside unattended with Amy's other daughter, Lacey. At the time, Lacey was two years old. The children were witnessed running in and out of a parking lot and street intersection for approximately one hour.

{¶3} As a result, Lacey was removed from Amy's home. Thereafter, the trial court found Lacey to be a neglected child and placed her in the temporary custody of the Crawford County Children's Services Board ("Children's Services"). The trial court also approved a case plan that addressed the need for Amy to: (1) obtain safe and stable housing; (2) secure full-time employment; (3) improve her parenting skills; (4) curb family violence; and (5) learn to provide adequate supervision.

{¶4} Because Amy failed to adequately pursue these goals and objectives, Children's Services filed a motion to commit Lacey to the legal custody of a relative. The trial court considered the motion on March 2, 2004, but granted an extension of temporary custody in order to allow Amy more time to correct the deficiencies in her life. In its judgment entry, the trial court specifically stated that:

To eliminate any confusion, the mother [Amy] shall assume responsibility to take control of and demonstrate completion of the following: (a) obtaining and maintaining suitable stable housing; (b) obtaining and maintaining stable full-time

employment; (c) learning to deal with and handle this child's assertive personality traits; and (d) resolving the lack of reliable transportation.

(Emphasis in original.)

{¶5} Despite the extension of time, Amy failed to comply with the goals and objectives the trial court explicitly described in its March 2, 2004 judgment entry. Consequently, a second motion to commit Lacey to the legal custody of a relative was filed on June 7, 2004. At the hearing on this motion, the trial court found that Amy did not have stable housing, did not have full-time employment, was unable to adequately supervise Lacey, and did not have reliable transportation. Accordingly, the trial court determined that Amy had not successfully completed any of the previously established objectives and goals and that it was in Lacey's best interest to grant Lacey's paternal aunt, Anna Rosier, legal custody. Amy appeals from this judgment, presenting the following assignments of error for our review.

Assignment of Error I

The trial court erred when it considered events outside the courtroom in an unfairly prejudicial manner against the mother.

Assignment of Error II

The trial court erred when it failed to restore custody of the child to the mother, where the mother's failures were solely rooted in her poverty.

Assignment of Error III

The trial court erred when it failed to restore custody of the child to the mother, where there was no competent expert testimony that the discipline used by the mother was improper or that such discipline constituted sufficient cause for not returning the child.

Assignment of Error I

{¶6} In her first assignment of error, Amy maintains that the trial court wrongfully attributed to her the inability of her mother, Sheryl Kincaid, to adequately supervise children. She claims that she should not have been held responsible for her mother's inadequate supervision.

{¶7} During the hearing, the sound of children playing in the hallways of the courthouse could be heard inside of the courtroom. The noise rose to such a level that the trial court actually commented about it on the record. While on the stand, Sheryl testified that the children in the hallway who had been making the noise had been under her supervision at the time. Sheryl also testified that Amy adequately supervised Lacey.

{¶8} After both attorneys were done examining Sheryl, the trial court began questioning Sheryl about what she considered to be adequate supervision. During this questioning, the following exchange took place between the trial court and Sheryl:

Judge: Miss Kincaid, you been sitting her testifying, you clearly heard the noise in the hallway. (inaudible)...will be excited children. But you can hear, clearly hear that that resonates...

A: ...Yes...

Judge: ...and as I (inaudible)...this machine recorded that all out in (inaudible)... Do you think that is appropriate adult supervision to allow that to continue?

A: We have tried and tried. I've had them sat down, I even, like I said, I held – I had Tierra on my lap holding on to her so she could not get down and she sat out there and screamed about it.

Judge: You missed the question. I didn't ask you what you did. I just asked a question. Is that appropriate supervision?

A: Well, I'm not sure what you mean.

Judge: Should they have been removed from that area where they are gleefully making that kind of noise and appreciating the echo that that noise makes? Would other adults responsible for supervising them would've removed them from that area so that they could not have done that?

A: Okay, to answer you question. I had – I could not take them anywhere else because I had to wait to be called in here. And her sister's out there and she is here for her too.

(Transcript from the September 20, 2004 hearing, page 77-78.)

{¶9} Amy argues that the trial court wrongfully used the above exchange to justify a finding that she could not provide adequate supervision for Lacey. However, it is clear that the trial court did not consider the insufficient supervision of the children in the hallway as evidence that Amy is unable to properly supervise Lacey. Rather, the trial court was inquiring into what Amy's mother, Sheryl,

considered to be adequate supervision. The trial court specifically stated on the record that it was considering Sheryl's credibility in light of her opinion as to what is and is not adequate supervision. Thus, the trial court was using Sheryl's supervision of the children outside of the courtroom to determine her credibility as a witness, not to determine Amy's actual ability to supervise Lacey. On the issue of witness credibility, this Court must not substitute its judgment for that of the trier of fact unless it is patently clear that the fact finder lost its way. *State v. Parks*, 3d Dist. No. 15-03-16, 2004-Ohio-4023, at ¶ 13, citing *State v. Twitty*, 2nd Dist. No. 18749, 2002-Ohio-5595, at ¶ 114.

{¶10} Amy's claim that the trial court considered Sheryl's inadequate supervision as evidence that Amy could not provide adequate supervision is simply without merit. Furthermore, after looking at the entire record, we find that the trial court did not lose its way in finding that Sheryl's testimony was not credible. Therefore, the first assignment of error is overruled.

Assignment of Error II

{¶11} In her second assignment of error, Amy maintains that the trial court erred when it found that granting Rosier legal custody was in Lacey's best interest. She argues that the trial court's findings were based solely on her poverty status.

{¶12} Lacey was found to be a dependent and neglected child in July of 2002. The trial court originally granted Children's Services temporary custody of Lacey, but she was eventually placed in the temporary custody of a relative. In June of 2004, a motion was filed pursuant to R.C. 2151.353(E)(2) to modify the trial court's previous disposition and place Lacey in the legal custody of Rosier. According to R.C. 2151.42(A):

At any hearing in which a court is asked to modify or terminate an order of disposition issued under section 2151.353, 2151.415, or 2151.417 of the Revised Code, the court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child.

The trial court's determination in custody matters regarding the best interest of a child will not be reversed absent an abuse of discretion. *Jackson v. Copeland-Jackson*, 3d Dist. No. 11-04-05, 2004-Ohio-5426, at ¶ 4, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. An abuse of discretion will only be found where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} The trial court's decision that it would be in Lacey's best interest to grant Rosier legal custody was based on its finding that Amy had failed to: (1) obtain suitable stable housing; (2) obtain full time employment; (3) learn how to provide proper supervision of Lacey; (4) obtain reliable transportation. Amy contends that these findings are based solely on her poverty.

{¶14} First, we note that the record is replete with evidence supporting the trial court's findings. The fact that Amy had failed to achieve any of the objectives listed in the case plan is clearly established by the evidence in the record.

{¶15} Second, none of the above findings were based upon Amy's financial situation. The inability of Amy to provide adequate supervision for Lacey is not rooted in her poverty. The trial court did not find that it was Amy's inability to provide material things for her daughter that caused the inadequate supervision, but a lack of appropriate parenting skills. Likewise, the trial court's finding that Amy's housing situation was not stable was also not based on her poverty. The trial court did not question the appropriateness of the house based on its size, location, or physical attributes. Rather, the trial court found that the housing was unstable due to the fact that Amy was sharing it with her sister, who had recently called the police to report that Amy was physically attacking her.

{¶16} Additionally, Amy's lack of full-time employment and reliable transportation are not products of her poverty. The trial court did not question the type of job Amy was performing or the amount of money she was making at the job. The trial court was concerned by the fact that she had not held a full-time position in over five months and was not utilizing the community job placement service to seek full-time employment. On the issue of reliable transportation, the

trial court was not requiring Amy to obtain her own vehicle. The trial court was merely asking Amy to have some sort of reliable transportation available, whether that transportation was a friend or relative's vehicle or public transportation. Her failure to do so was a reflection of her lack of commitment to the case plan, not her status as an indigent.

{¶17} After reviewing the entire record, we find that the trial court did not act unreasonably, arbitrarily, or unconscionably in finding that it would be in Lacey's best interest to grant Rosier legal custody. Therefore, the second assignment of error is overruled.

Assignment of Error III

{¶18} In her third assignment of error, Amy challenges the trial court's finding that her supervision of Lacey was inadequate. Amy claims that such a finding required expert testimony on the issue of child supervision.

{¶19} "The purpose of expert testimony is to aid and assist the trier of fact in understanding the evidence presented and in arriving at a correct determination of the litigated issues." *Waste Mgt. of Ohio v. Cincinnati Bd. of Health of Cincinnati*, 159 Ohio App.3d 806, 2005-Ohio-1153, at ¶ 55, citing *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 81-82. Experts should be used in matters involving scientific, mechanical, professional, or other like nature requiring special study, experience, or observation not within knowledge of

laymen in general. *McKay Machine*, 11 Ohio St.2d at 81. Expert testimony is only necessary where the subject matter is outside of the comprehension of lay people. *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 102, 1992-Ohio-109.

{¶20} The issue of whether a parent can provide adequate supervision of his/her child is a subject matter within the comprehension of a lay person. See, *In re Ross*, 11th Dist. No. 2003-G-2550, 2004-Ohio-3680, at ¶ 79 (finding that an expert was not required in a child custody case to prove that a parent had a chemical dependency). Accordingly, expert testimony was not required for the trial court to determine that Amy could not provide adequate supervision of Lacey, and the third assignment of error is overruled.

{¶21} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

CUPP, P.J. and BRYANT, J., concur.

/jlr