

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN RE : Case No. 17CA35
: :
R.P. : :
L.P., : :
S.P. : DECISION AND JUDGMENT
D.P. : ENTRY
M.P. : :
: :
ADJUDICATED DEPENDENT :
CHILDREN : **Released: 06/28/18**

APPEARANCES:

Krista Gieske, Cincinnati, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Assistant Athens County Prosecuting Attorney, Athens, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal by E.M. of the trial court’s judgment that placed her five biological children in Appellee’s permanent custody. Although Appellant raises two assignments of error, we find her first dispositive. In her first assignment of error, Appellant argues that the trial court failed to record the first day of the permanent custody hearing and that this failure mandates a reversal for a rehearing. We agree. According to the Ohio Supreme Court, a trial court’s failure to correctly record a permanent

custody hearing mandates a reversal for a rehearing when an appellant attempts, but is unable, to construct a record of the hearing in accordance with App.R. 9. Consequently, we sustain Appellant's first assignment of error, reverse the trial court's judgment, and remand for a new hearing.

I. FACTS

{¶2} In late 2015, Appellee filed neglect and dependency complaints concerning the five children. The complaints alleged that the children had been diagnosed with scabies and lice and had not been receiving proper medical or dental care. Appellee further alleged that Appellant suffered from mental health issues. Appellee requested the court to grant it permanent custody of the children. The trial court later adjudicated the children dependent, dismissed the neglect allegations, and granted Appellee temporary custody.

{¶3} In April 2017, Appellee filed a motion to modify the disposition to permanent custody. The trial court subsequently granted Appellee permanent custody of the children. The trial court found that the children have been in Appellee's temporary custody for more than twelve out of the past twenty-two consecutive months and that placing the children in Appellee's permanent custody is in their best interest.

II. ASSIGNMENTS OF ERROR

{¶4} Appellant timely appealed and raises two assignments of error.

First Assignment of Error:

“Where permanent custody proceedings fail to record on a day the state presents its entire case, appellate review of an award of permanent custody is effectively foreclosed and the resultant violation of the parents’ due process rights constitutes error warranting reversal.”

Second Assignment of Error:

“The juvenile court’s decision awarding permanent custody of R.P., L.P., S.P., D.P., and M.P. to Athens County Children Services was against the manifest weight of the evidence.”

III. LEGAL ANALYSIS

{¶5} In her first assignment of error, Appellant asserts that the trial court’s failure to properly record the first day of the permanent custody hearing constitutes reversible error. Appellant contends that Appellee presented its entire case on the first day of the hearing and that without a transcript of the testimony Appellee presented, this court cannot possibly meaningfully review the trial court’s decision to grant Appellee permanent custody of the children.

{¶6} Juv.R. 37(A) requires juvenile courts to “make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates” and specifies that “[t]he record shall be taken in

shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device.” The Ohio Supreme Court has “admonish[ed] juvenile courts to take seriously their obligation to ensure that these types of proceedings are recorded properly.” *In re B.E.*, 102 Ohio St.3d 388, 2004–Ohio–3361, 811 N.E.2d 76, ¶17. The court explained:

“Far too often, we see incomplete records, frequently caused by malfunctioning audio-recording devices. Obviously, it is in the court’s best interest to properly record its proceedings the first time around, preferably through the use of a court stenographer. As we cautioned the court and bar in the context of Crim.R. 22: “The minimal effort needed to comply with Crim.R. 22 is far outweighed by the expense, in time and taxpayer money, of retrying a complex criminal case.” *State v. Brewer*, 48 Ohio St.3d at 61, 549 N.E.2d 491. The same holds true in juvenile court proceedings.” *Id.*

{¶7} However, a juvenile court's failure to ensure that its proceedings are properly recorded does not necessarily mandate a reversal for a rehearing. Instead, App.R. 9(C)(1) contemplates situations when a transcript of proceedings may be unavailable and provides a means to reconstruct the record. The rule states: “If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection.” Thus, if an appellant is able to prepare a statement of evidence, a rehearing ordinarily is not required. Instead, a rehearing

ordinarily is necessary when “an appellant attempts but is unable to submit an App.R. 9(C) statement to correct or supplement the record.” *B.E.* at ¶ 16.

{¶8} For example, in *B.E.*, the party attempted to comply with App.R. 9(C) but “could not do so because neither trial counsel recollected the missing testimony.” The Supreme Court remanded the matter for a rehearing and explained:

“Under the facts of this case, we are unwilling to presume the validity of the juvenile court’s proceedings in the absence of an App.R. 9(C) statement, as appellant urges us to do. In this situation, where it is alleged that the missing testimony cannot be recreated, we believe that justice dictates that the matter be remanded for a rehearing. Otherwise, we would be penalizing an appellant for the court’s inability to comply with an established court rule in the first place.” *Id.* at ¶16.

{¶9} In *In re Sidney B.*, 6th Dist. Lucas No. L-06-1371, 2008-Ohio-1961, the court remanded for a rehearing when the App.R. 9(C) statement was “essentially inadequate for use by this court in reviewing the trial court's proceedings.” *Id.* at ¶12. Likewise, in *In re A.R.R.*, 11th Dist. Lake No.2013-L-054, 2014-Ohio-3367, the court remanded for a rehearing when “no one could recall what happened at the hearing with sufficient particularity to provide an adequate record for meaningful appellate review.” *Id.* at ¶8.

{¶10} We agree with Appellant that *B.E.* controls our disposition of her first assignment of error. On December 11, 2017, Appellant filed a

motion to correct or supplement the record in order to procure an App.R. 9(C) statement of the proceedings. Appellant asserted that the trial court failed to record the first day of the permanent custody hearing. On February 6, 2018, Appellant stated that she was unsuccessful in obtaining an App.R. 9(C) statement. Thus, like the mother's counsel in *B.E.*, Appellant's counsel attempted to comply with App.R. 9, but asserted that she was unable to reconstruct the testimony from the first day of the hearing. We therefore apply the *B.E.* court's holding that "justice dictates that the matter be remanded for a rehearing." *Id.* at ¶ 16.

{¶11} Appellee nevertheless asserts that *B.E.* is distinguishable. Appellee claims that unlike the situation in *B.E.* where a transcript was not available, here "there is a transcript made available for this Court's review. ACCS filed a Motion to Modify Disposition to Permanent Custody and outlined the reasons that warranted the modification. The testimony received on the first day would reiterate the reasons as set forth in the motion." We do not agree with Appellee that the allegations contained in its motion constitute a statement of the evidence or proceedings. Instead, App.R. 9(C)(1) details the procedure for obtaining a statement of the evidence. The rule provides:

"If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer

available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App. R. 10 and the appellee may serve on the appellant objections or propose amendments to the statement within ten days after service of the appellant's statement; these time periods may be extended by the court of appeals for good cause. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.”

Nothing in this rule states that a party’s pleading or motion, by itself, suffices as a statement of the evidence or proceedings. Moreover, the rule places the duty upon the appellant to prepare a statement of the evidence or proceedings. Appellant obviously was well-aware of the allegations contained in Appellee’s permanent custody motion. Had she believed that those allegations adequately reflected the testimony presented during the first day of testimony, she could have included those allegations in a statement of the evidence, with the trial court ultimately settling the matter. However, because this procedure was not followed, we do not agree with Appellee that its motion contains a statement of the evidence or proceedings as contemplated in App.R. 9(C). Therefore, we find Appellee’s attempt to distinguish *B.E.* unavailing.

IV. CONCLUSION

{¶12} Our disposition of Appellant's first assignment of error renders her remaining assignment of error moot. Therefore, we need not address it. App.R. 12(A)(1)(c).

{¶13} Accordingly, we reverse the trial court's decision granting Appellee permanent custody of the children and remand this matter to the trial court for a rehearing.

**JUDGMENT REVERSED
AND REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED. Costs are assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.