

[Cite as *In re M.B.*, 2018-Ohio-3778.]

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

IN THE MATTER OF: :

M.B., :

Case No. 18CA888

Adjudicated Abused, :

Neglected and Dependent Child. :

DECISION AND JUDGMENT ENTRY

:

:

APPEARANCES:

Alexander F. Hoffman, Waverly, Ohio, for Appellant.¹

Robert Junk, Pike County Prosecuting Attorney, and Elisabeth M. Howard, Pike County Assistant Prosecuting Attorney, Waverly, Ohio, for Appellee.

CIVIL CASE FROM
COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 9-10-18
ABELE, J.

{¶ 1} This is an appeal from a Pike County Common Pleas Court, Juvenile Division, judgment that granted Pike County Children Services Board (PCCS), appellee herein, permanent custody of one and one-half-year-old M.B. T.B., the child’s biological mother and appellant herein, raises the following assignment of error for review:

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MOTHER’S MOTION FOR A CONTINUANCE OF THE HEARING ON PERMANENT CUSTODY.”

{¶ 2} In January 2017, less than three weeks after the child’s birth, appellee sought and received emergency temporary custody of the child. Appellee additionally filed a complaint that

¹ Different counsel represented appellant during the trial court proceedings.

sought temporary custody and alleged that the child is an abused, neglected, and dependent child.

The complaint alleged: (1) the newborn child was born with Subutex in her urine and in her cord blood; (2) appellant tested positive for Subutex, valium, and morphine; (3) the newborn child displayed withdrawal symptoms; (4) the child was placed on a drug protocol; and (5) appellant did not return to the hospital after appellant's discharge. The complaint additionally asserted that appellant and the child's father² have had other involvement with appellee because on November 3, 2016, another child was placed in the paternal grandmother's legal custody.

{¶ 3} On February 15, 2017, the trial court adjudicated the child abused, neglected, and dependent and set the matter for a dispositional hearing. The court subsequently continued the child in appellee's temporary custody.

{¶ 4} On March 6, 2018, appellee requested the trial court to grant it permanent custody of the child. Appellee asserted that the child has been in its temporary custody for twelve or more months of a consecutive twenty-two month period and that placing the child in appellee's permanent custody is in the child's best interest.

{¶ 5} On April 5, 2018, the trial court held a hearing to consider appellee's permanent custody motion. At the start, the court noted that appellant's absence but that counsel could explain her absence. Appellant's counsel informed the court that on March 30, 2018, appellant contacted counsel's office and stated that appellant intended to report to an inpatient drug treatment program on April 4. Counsel contacted the facility the morning of the hearing and confirmed that appellant had, in fact, reported to the facility. Counsel stated that she had contacted the facility to inquire about transportation, but had not yet been able to arrange

² The child's father is not involved in this appeal.

transportation. Appellant's counsel thus requested the court to continue the hearing until appellant could attend.

{¶ 6} At this juncture, both appellee and the guardian ad litem objected to the request for a continuance. Appellee noted that appellant had attempted other inpatient treatment programs without success, and that appellant, although aware of the scheduled hearing, decided to check herself in for treatment the day before the hearing. Appellee further asserted that the child needs permanency without delay. The GAL also argued that the child needs permanency.

{¶ 7} The trial court denied appellant's motion to continue and pointed out that appellant knew when the permanent custody hearing would occur, yet decided to seek treatment the day before the hearing. The court thus proceeded with the hearing in appellant's absence.

{¶ 8} At the hearing, PCCS caseworker Ashley Leasure testified that, in February 2017, appellee developed a case plan that required appellant to find appropriate housing, attend an inpatient drug treatment program, attend and complete parenting classes, comply with random drug screening, and attend visits with the child. Leasure stated that appellant did not comply with all aspects of the case plan. Leasure observed that appellant made several attempts to complete a drug treatment program, but did not successfully complete one. Leasure stated that in May 2017, appellant attended a program for one week, but later reported that she intended to go to another treatment facility. Leasure explained that appellant did not, however, enter any other programs until the day before the permanent custody hearing.

{¶ 9} Leasure also stated that appellant attended thirty-eight of fifty-eight visits that appellee offered, and that appellant's conduct during the visits raised concerns. Leasure related that on August 25, 2017, appellant appeared impaired. Leasure explained that during the visit,

appellant dropped her glasses as she tried to submit a drug screen, the child fell off the couch while appellant attempted to change her diaper, and appellant stumbled. Leasure further stated that appellant would not follow the child's feeding recommendations. Leasure indicated that the child has some food-texture issues that required the child's food to be a certain consistency, but appellant refused to feed the child the recommended food. Leasure stated that rather than following the recommendations, appellant made the food much thicker than the child could tolerate and appellant forced the child to eat to the point of crying. Leasure explained that on at least four occasions, caseworkers had to intervene and inform appellant that appellant needed to feed the child the recommended food. She further related that during the most recent four-hour visit, appellant did not feed the child at all.

{¶ 10} Leasure also stated that she has concerns if the child returns to appellant's care because appellant will not apply new skills and will continue to abuse drugs. In fact, appellant refused the last two drug screens and gave birth to another child, also born addicted to drugs, during the pendency of the case.

{¶ 11} Leasure also testified that the foster family provides for all of the child's needs and considers the child part of their family. Leasure stated that the child is bonded to the family and is "very bonded" to the foster brother.

{¶ 12} On May 2, 2018, the trial court granted appellee permanent custody of the child. The court found that the child has been in appellee's temporary custody for more than twelve out of the past twenty-two months and that placing the child in appellee's permanent custody is in the child's best interest.

{¶ 13} With respect to the child's interactions and interrelationships, the court found that

appellant's interaction with the child is not consistent and the two share a limited bond. The child's father does not have any bond with the child and has not visited the child since June 20, 2017. The court determined that the father has abandoned the child. The court additionally noted that the child has lived with the same foster family since birth and shares a very strong bond with the foster family. The court also observed that the foster family will seek to adopt the child.

{¶ 14} The court considered the child's wishes and noted that the guardian ad litem recommended that the court place the child in appellee's permanent custody.

{¶ 15} Regarding the child's custodial history, the court determined that the child has been in appellee's temporary custody for more than twelve of the past twenty-two months. The court additionally found "that it is impossible to gain a legally secure placement for [the child] without an award of permanent custody to [appellee]."

{¶ 16} Consequently, the trial court granted appellee permanent custody of the child. This appeal followed.

{¶ 17} In her sole assignment of error, appellant asserts that the trial court's denial of her request to continue the permanent custody hearing constitutes an abuse of discretion. Appellant asserts that "she was involuntarily absent from the hearing" and that the trial court acted "unconscionably" by denying her "a reasonable opportunity to be present and participate in the hearing." She claims that on the date of the permanent custody hearing, she was in an inpatient drug treatment facility and had no means of transportation to attend the hearing. Appellant states that she "had just checked into the facility the day prior to the hearing and arrangements to transport her to the hearing were not made amid the tumult of entering such a facility."

Appellant maintains that she “tried to do the right thing by checking herself into inpatient drug treatment.” Appellant contends that the trial court’s denial of her motion to continue deprived her of her ability to present a defense and “all of appellee’s evidence at trial went unchecked and unrebutted.”

{¶ 18} “The determination whether to grant a continuance is entrusted to the broad discretion of the trial court.” *State v. Conway*, 108 Ohio St.3d 214, 2006–Ohio–791, 842 N.E.2d 996, ¶ 147, citing *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus; accord *State v. Myers*, — Ohio St.3d —, 2018-Ohio-1903, — N.E.2d. —, ¶ 92 . Consequently, “[a]n appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *State v. Jones*, 91 Ohio St.3d 335, 342, 744 N.E.2d 1163 (2001), quoting *Unger*, 67 Ohio St.2d at 67; e.g., *In re C.M.*, 4th Dist. Athens No. 17CA16, 2017-Ohio-9037, 2017 WL 6402915, ¶ 40; *In re A.S.*, 4th Dist. Pike No. 16CA878, 2017-Ohio-1166, 2017 WL 1181073, ¶ 43.

{¶ 19} “[A]buse of discretion’ [means] an ‘unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.” *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014–Ohio–1966, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶ 23. “An abuse of discretion includes a situation in which a trial court did not engage in a “sound reasoning process.”” *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The abuse-of-discretion standard is deferential and does not

permit an appellate court to simply substitute its judgment for that of the trial court. *Darmond* at ¶ 34.

{¶ 20} A trial court that is considering a motion to continue should “[w]eigh[] against any potential prejudice to a defendant * * * concerns such as a court’s right to control its own docket against the public’s interest in the prompt and efficient dispatch of justice.” *Unger*, 67 Ohio St.2d at 67. A court should also consider:

the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67–68; accord *State v. Conway*, 108 Ohio St.3d 214, 2006–Ohio–791, 842 N.E.2d 996, ¶ 147; *State v. Jordan*, 101 Ohio St.3d 216, 2004–Ohio–783, 804 N.E.2d 1, ¶ 45. Additionally, with respect to the continuance of juvenile court hearings, Juv.R. 23 provides that “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.”

{¶ 21} An appellate court that is reviewing whether a trial court abused its discretion by denying a motion to continue applies “a balancing test” that recognizes “all [of] the competing considerations.” *Unger*, 67 Ohio St.2d at 67. Moreover, we observe that “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Id.*, quoting *Ungar v.*

Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Broom*, 40 Ohio St.3d 277, 288, 533 N.E.2d 682 (1988) (“Obviously, not every denial of a continuance constitutes a denial of due process.”). Furthermore, the complaining party “must show how he was prejudiced by the denial of the continuance before there can be a finding of prejudicial error.” *Broom*, 40 Ohio St.3d at 288.

{¶ 22} After our review of the case sub judice, we do not believe that the trial court abused its discretion by denying appellant’s motion to continue the permanent custody hearing. We first observe that appellant did not specify the length of delay requested. We note, however, that appellant’s counsel requested the court to continue the matter until appellant’s presence could be secured by arranging transportation through the drug-treatment facility. Thus, we presume that any period of delay would arguably be relatively short.

{¶ 23} With respect to the remaining factors, the record does not suggest that the court previously continued the permanent custody hearing. Thus, any inconvenience to the parties, witnesses, opposing counsel, and the court is, once again, arguably negligible. However, the trial court could have rationally determined that delaying the proceedings would hinder, not promote, the child’s best interest. *See In re N.A.P.*, 4th Dist. Washington No. 12CA30, 2013-Ohio-689, 2013 WL 772815, ¶ 22 (stating that “trial court could have reasonably determined that any further delay contributing to the children’s instability and lack of permanency would not further their best interest”); *see generally In re J.M.*, 10th Dist. No. 15AP-234, 2015-Ohio-3988, 2015 WL 5703586, ¶ 26 (stating that trial court may consider child’s length of time in foster care and potential for adoptive placement when determining whether to grant or deny continuance). Indeed, “[i]t is important to have finality in custody

determinations to protect the best interest of the child.” *In re A.L.A.*, 11th Dist. Trumbull No. 2016–T–0022, 2016–Ohio–5887, ¶ 20. “[C]hildren need to know whom they may rely upon for their care and nurture * * * [and ordinarily] the only way to achieve this is by a stable, permanent, and healthy, home environment.” *In re E.W.*, 12th Dist. Warren No. CA2017-01-001, 2017-Ohio-7215, 2017 WL 3482653, ¶ 40. Considering appellant’s repeated failures to engage in a drug treatment program, the trial court could have quite reasonably concluded that continuing the permanent custody hearing would only frustrate the child’s ability to obtain a stable, permanent, and healthy home environment.

{¶ 24} Although appellant ostensibly offered a legitimate reason for the requested delay, we observe that she chose to check herself into a drug treatment program the day before the scheduled hearing. Appellant, however, could have taken this action at any time during the preceding twelve-plus months. The trial court could have rationally concluded, therefore, that appellant’s requested delay was merely dilatory, purposeful, or contrived and that appellant contributed to the circumstances giving rise to the request for a continuance. *See generally In re B.G.W.*, 10th Dist. Franklin No. 08AP-181, 2008-Ohio-3693, 2008 WL 2854532, ¶ 26 (concluding that trial court may construe parent’s last-minute attempt at case plan compliance as dilatory).

{¶ 25} Furthermore, we point out that appellant failed to attend four other hearings scheduled throughout the proceedings. As appellee documents in its brief, appellant did not attend (1) the March 2017 dispositional hearing, (2) a July 2017 review hearing, (3) a November 2017 review hearing, and (4) a January 2018 annual review hearing.

{¶ 26} We further note that appellant does not argue that she would have presented

different evidence, that she would have questioned witnesses in a different manner, or that the outcome of the proceedings would have been different, if the trial court had granted her motion for a continuance. For example, appellant does not suggest that if the court had continued the matter, appellant would have been able to refute appellee's evidence that during the twelve-plus months preceding the permanent custody hearing, appellant failed to complete any drug treatment program, failed to obtain suitable housing, and failed to complete parenting classes. Moreover, appellant's counsel had the opportunity to fully cross-examine appellee's witness. Appellant cannot, therefore, demonstrate that the court's denial of her motion prejudiced her. *See In re R.M.*, 5th Dist. Muskingum No. CT2017-0057, 2018-Ohio-395, 2018 WL 660223, ¶ 32 (stating that "if the trial court had granted a continuance of one day or 60 days, appellant still could not demonstrate substantial or meaningful compliance with her case plan in order to persuade the trial court that it is within the child's best interest to return custody to appellant").

{¶ 27} After considering all of the foregoing circumstances, we conclude that the trial court's denial of appellant's motion for a continuance does not constitute an abuse of discretion. Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the appeal be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.