

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF J.H.,
DEPENDENT CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 14-CA-94

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Juvenile Division, Case
No. F2013-0059

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 23, 2015

APPEARANCES:

For Appellee

For Appellant

KENNETH W. OSWALT
Licking County Prosecutor
By: J. ANDREW STEVENS
Assistant Prosecuting Attorney
20 S. Second Street, Fourth Floor
Newark, Ohio 43055

JOHN D. WEAVER
542 S. Drexel Ave.
Bexley, Ohio 43209

For Father

Guardian ad Litem

USHERALA JOHNSON
98 Hamilton Park
Columbus, Ohio 43203

MICHAEL DAL SANTO
3. S. Park Place, Suite 220
Newark, Ohio 43055

Hoffman, J.

{¶1} Appellant Kimberly Shortridge (“Mother”) appeals the September 24, 2014 Judgment Entry entered by the Licking County Court of Common Pleas, Juvenile Division, which overruled her objections to the magistrate's June 10, 2014 decision, approved and adopted the magistrate's decision, and granted permanent custody of her minor child to Appellee Licking County Department of Job and Family Services (“the Agency”).

STATEMENT OF THE FACTS AND CASE

{¶2} Mother is the biological mother of J.H. (dob 3/26/2006). Lucas Ruddock is J.H.'s biological father.¹ On January 28, 2013, the Agency received a referral relative to the family. The referral indicated Mother and her boyfriend were abusing methamphetamines; there was no gas, electric, or water in the house in which Mother and J.H. were living; J.H. slept on a futon in the living room as the home only had one bedroom; and the landlord had commenced eviction proceedings. The trial court placed J.H. in the emergency custody of the Agency on February 4, 2013.

{¶3} On April 3, 2013, the trial court adjudicated J.H. a dependent child and granted temporary custody to the Agency. The Agency filed a motion for permanent custody on December 31, 2013.

{¶4} The testimony at the hearing revealed Mother has a history of substance abuse, financial instability, domestic violence, and involvement with the criminal justice system. When the matter commenced, Mother was in county jail. She was released in April, 2013, but was arrested again in July, 2013, for Burglary. Between April, and July,

¹ Ruddock is not a party to this Appeal.

2013, Mother failed to make significant progress on her case plan. Mother was unemployed, did not establish a residence of her own, and missed a number of counseling appointments. Mother was convicted of Burglary and sentenced to two years in prison, commencing August 2, 2013. She is currently incarcerated at the Ohio Reformatory for Women, due to be released on April 2, 2015.

{¶15} At the onset of the Agency's involvement, the legal father of J.H. was Frederick Husk. Husk is deceased. The Agency received information in August, 2013, Lucas Ruddock, not Husk, was J.H.'s biological father. Ruddock completed paternity testing, and was determined to be J.H.'s father on January 15, 2014. Ruddock met with the Agency on February 19, 2014, and provided the names of his mother and sister as potential placements for J.H. Upon investigation, the Agency discovered Ruddock's sister had her parental rights terminated with respect to her own child, and Ruddock's mother was involved in that matter. Ruddock is currently incarcerated at Southern Ohio Correctional Facility, and is not scheduled to be released until September, 2022.

{¶16} J.H. was originally placed with his half-brother, Nicholas Murray, and Murray's girlfriend, Leah Starkey. J.H. was placed in his current foster home in May 24, 2013, after Murray was charged with possession of marijuana drug paraphernalia.

{¶17} The magistrate issued his decision on June 10, 2014, granting permanent custody to the Agency. An amended decision was issued on June 26, 2014, to correct typographical errors in the original. Mother filed preliminary objections to the magistrate's decision on July 9, 2014. Via Judgment Entry filed September 10, 2014, the trial court overruled Mother's objections, terminated her parental rights, and granted permanent custody of J.H. to the Agency. Mother filed a motion for reconsideration of

the September 10, 2014 judgment entry, explaining she had not received notification the transcript of the permanent custody hearing had been filed. Mother filed additional objections to the magistrate's decision on September 19, 2014. The trial court again overruled Mother's objections via judgment entry filed September 24, 2014.

{¶8} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.2(C).

{¶9} Mother appeals, raising the following assignments of error:

{¶10} "I. THE TRIAL COURT COMMITTED PLAIN ERROR BY GRANTING PERMANENT CUSTODY WITHOUT INVOLVING FATHER IN THE CASE PLAN AND WHEN NEITHER FATHER NOR ANY MEMBERS OF HIS FAMILY WERE GIVEN CONSIDERED FOR PLACEMENT.

{¶11} "II. APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶12} "III. THE TRIAL COURT'S DECISION THAT IT WAS IN J.H.'S BEST INTERESTS TO GRANT PERMANENT CUSTODY WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE."

I

{¶13} In her first assignment of error, Mother contends the trial court committed plain error in granting permanent custody as the Agency failed to involve Ruddock in the case plan, and failed to consider placement with Ruddock or any members of his family.

{¶14} Assuming, arguendo, the trial court erred in granting permanent custody to the Agency when the Agency failed to involve Ruddock in the case plan, we find any such error to be harmless. The Agency learned Ruddock was possibly J.H.'s father in

August, 2013. Paternity was established on January 15, 2014. At that time, Ruddock was incarcerated and not due to be released for at least 8 years. Accordingly, any case planning services for Ruddock would be futile.²

{¶15} Mother further asserts the trial court erred in granting permanent custody as the Agency failed to consider placement of J.H. with members of Ruddock's family. Ruddock provided the names of his mother and sister as possible placements for J.H. Upon investigation, the Agency learned Ruddock's sister had her parental rights terminated with respect to her own child, and Ruddock's mother was involved in that matter. Any failure by the Agency to consider these family members was harmless as they were not suitable.

{¶16} Mother's first assignment of error is overruled.

II

{¶17} In her second assignment of error, Mother raises an ineffective assistance of counsel claim. Specifically, Mother asserts trial counsel was ineffective for failing to file motions for legal custody to family members.

{¶18} R.C. 2151.352 provides that parents are guaranteed the right to counsel at all stages of a permanent custody proceeding. This right to counsel includes the right to effective assistance of counsel. *In re Brooks*, 10th Dist. Nos. 04AP-164, 04AP-202, 04AP-165, 04AP-201, 2004-Ohio-3887, ¶ 24. In permanent custody proceedings, where parents face losing their children, we apply the same test as the test for ineffective assistance of counsel in criminal cases. *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E .2d 93 (8th Dist.1998).

² We also question whether Mother has standing to raise this issue on Ruddock's behalf.

{¶19} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, the appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, the appellant must demonstrate he or she was prejudiced by counsel's performance. *Id.* To show that he or she has been prejudiced by counsel's deficient performance, the appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶20} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id.*

{¶21} Mother failed to show the outcome of the permanent custody hearing would have been different had trial counsel filed motions for legal custody. The trial court heard testimony relative to several maternal relatives, including J.H.'s half-brother, Nicholas Murray. The testimony revealed these relatives were not suitable placements for J.H. Nicholas Murray had recently been arrested on drug charges.

{¶22} Mother's second assignment of error is overruled.

III

{¶23} In her final assignment of error, Mother contends the trial court's finding it was in J.H.'s best interest to grant permanent custody to the Agency was not supported by clear and convincing evidence.

{¶24} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates the trial court must consider all relevant factors, including, but not limited to, the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (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; (3) the custodial history of the child; and (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.

{¶25} As set forth in our statement of the facts and case, *supra*, we find there was competent, credible evidence Mother failed to remedy the problems which caused the removal of J.H. from the home. Mother failed to make significant progress on her case plan, in large part due to her incarceration. At the time of the hearing, approximately ten months remained on Mother's sentence.

{¶26} J.H. is well adjusted in his current placement. His foster parents have expressed a willingness to adopt the child. The foster parents are willing to continue to facilitate the bond between J.H. and his half-siblings.

{¶27} Based upon the foregoing, we find the trial court's finding an award of permanent custody was in the J.H.'s best interest was supported by clear and convincing evidence.

{¶28} Mother's third assignment of error is overruled.

{¶29} The judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur