

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE T.H., JR.

: JUDGES:
:
: Hon. William B. Hoffman, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.
:
: Case No. CT2016-0009
:
:
:
: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County
Court of Common Pleas, Juvenile
Division, Case No. 21330140

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

October 6, 2016

APPEARANCES:

For Mother-Appellant:

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For Father-Appellant

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For GAL-Appellee:

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For MCCS-Appellee:

D. MICHAEL HADDOX
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For Foster Parents-Appellees

SUSAN MCDONALD
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Delaney, J.

{¶1} Mother-Appellant appeals the January 7, 2016 judgment entry of the Muskingum County Court of Common Pleas, Juvenile Division granting legal custody of her child to Foster Parents-Appellees.

FACTS AND PROCEDURAL HISTORY

{¶2} Mother-Appellant and Father-Appellant are the parents of T.H., Jr. Mother and Father are not married.

{¶3} T.H., Jr. was born on July 9, 2013. He had marijuana in his system and addicted to opiates when he was born. The hospital administered methadone for withdrawal. Mother admitted to smoking marijuana during her pregnancy as well as taking Oxycodone during the last three weeks of her pregnancy.

{¶4} The hospital alerted Muskingum County Children Services (“MCCS”) to the addicted status of the child. On July 15, 2013, MCCS filed a complaint alleging the child to be an abused, neglected, and dependent child. MCCS had previous involvement with Mother. Mother’s three older children by a different father were removed from her care because of Mother’s involvement with drugs and her failure to complete her case plan. The three children were placed in the legal custody of a relative.

{¶5} A shelter care hearing was held on July 15, 2013 where T.H., Jr. was placed in the temporary custody of a kinship placement with protective supervision by MCCS. T.H., Jr. was placed with a certified foster family, Foster Parents-Appellees, on July 21, 2013.

{¶6} MCCS developed a case plan for Mother and Father with reunification as the permanency plan. Both Mother and Father had a history of marijuana, cocaine, and

narcotic use. Mother's case plan included outpatient substance abuse counseling, random drug screen, mental health counseling, a psychological evaluation by Dr. Howard Beazel, parenting classes, a demonstrated ability to appropriately parent T.H., Jr., and attend all visits in order to facilitate bonding. Father's case plan included outpatient substance abuse counseling, random drug screens, mental health counseling, a psychological evaluation by Dr. Howard Beazel, parenting classes, and a demonstrated ability to appropriately parent his child.

{¶7} An adjudicatory/dispositional hearing was held on October 7, 2013, wherein T.H., Jr. was found to be an abused, neglected, and dependent child. He was placed into the temporary custody of MCCS. MCCS filed an amended case plan reflecting the placement of T.H., Jr. into a certified foster home on July 19, 2013.

{¶8} An annual review hearing was held on June 16, 2014. The trial court found MCCS had made reasonable efforts to prevent an out of home placement, as well as to reunify T.H., Jr. with Mother and Father. The psychological evaluations of Mother and Father by Dr. Howard Beazel were filed with the trial court on July 17, 2014. Based on his psychological evaluation, Dr. Beazel did not recommend returning the child to Mother or Father. The trial court conducted a review hearing finding reasonable efforts and noting the evaluations by Dr. Beazel. The trial court permitted an independent psychological evaluation of Father and Mother by Dr. Gary Wolfgang.

{¶9} On January 14, 2015, the trial court held an annual review hearing. It found reasonable efforts and found Mother had made progress in her case plan, as reflected by negative drug screens. Mother completed her drug treatment and elected to remain in

treatment until she regained custody of T.H., Jr. The trial court approved MCCS's first request for a six-month extension of its temporary custody.

{¶10} On June 15, 2015, Foster Parents filed a motion to be added as third parties. Father filed a motion for legal custody of T.H., Jr. on June 30, 2015. Foster Parents filed a motion for legal custody of T.H., Jr. on July 8, 2015.

{¶11} On July 10, 2015, following a review hearing and a hearing on the Foster Parents' motion to intervene, the trial court found reasonable efforts, granted the Foster Parents' motion to intervene, and ordered a hearing be set on the motion for legal custody.

{¶12} On September 22, 2015, the trial court held a 90-day review hearing that reiterated reunification as the permanency goal. MCCS began transitioning T.H., Jr. into Mother and Father's home with unsupervised parenting time during the day up to five days a week.

{¶13} The trial court held a hearing on the motions for legal custody on October 8 and 9, 2015. Dr. Wolfgang first testified as to his evaluations of Mother and Father. He stated that based on his evaluations of Mother in 2015 and Father in 2014, it was his opinion that MCCS should move forward with reunification. (T. 112, 155). Mother was clean and sober since July 2013. Dr. Wolfgang's evaluation of Mother did not suggest Mother had a depressive illness or a psychotic disorder. (T. 148). He suggested if MCCS moved forward with reunification, the process should be gradual. Dr. Wolfgang testified there was nothing in Father's evaluation that would make him believe that T.H., Jr. was in danger of abuse or neglect. (T. 112).

{¶14} Dr. Howard Beazel testified after Dr. Wolfgang. Dr. Beazel stated there was nothing in the testimony that changed his opinion as to Father's inability to parent T.H.,

Jr. (T. 216). Father has used marijuana since he was child. Father tested positive for marijuana on July 8, 2014, September 12, 2014, June 9, 2015, and July 14, 2015. (T. 114). Father has spent time in prison and county jail for convictions of aggravated burglary, breaking and entering, grand theft, grand theft auto, possession of marijuana, and traffic offenses. Father was not employed and was receiving SSI benefits based on a bipolar diagnosis. Father was not receiving treatment or taking medication for this psychiatric condition. Father had a degenerative disc disorder for which, at the time of trial, he had obtained a prescription for Vicodin. Mother has not been employed since 2006 and is financially dependent upon Father. (T. 206).

{¶15} Lori Moore, the intervention supervisor with MCCA, testified Mother completed her case plan. (T. 229). Father finished the majority of his case plan except for counseling with Six County Counseling. (T. 230). MCCA was currently transitioning T.H., Jr. with extended visits with Mother and Father at their home. (T. 233). Foster Parents went against the MCCA policy by intervening in the case. (T. 236). The case plan was filed on August 14, 2013 and Moore testified that at the time of the hearing, the case was over 22 months old. (T. 248). MCCA had not filed a motion for permanent custody because Mother and Father were making progress on their case plan and Dr. Wolfgang recommended a gradual transition. (T. 251, 253).

{¶16} Lisa Foley, MCCA Family Stability Worker, testified Mother's and Father's visitations with T.H., Jr. were appropriate. (T. 261). Mother and Father did not have transportation. They lived in an apartment in Zanesville, where T.H., Jr. had his own bedroom.

{¶17} The Guardian Ad Litem report recommended that legal custody be granted to Foster Parents. The GAL was concerned with Father's substance abuse issues. Mother was dependent on Father for financial and physical assistance.

{¶18} Foster Parents testified they filed the motion to intervene in the case because the case was over 22 months old and MCCS was not going to file a motion for permanent custody. (T. 377). Foster Parents felt T.H., Jr. needed permanency. (T. 377). Mother is the director of a day care and Father is employed at a local college. Foster Parents have another adopted child.

{¶19} The trial court issued its decision and order on January 7, 2016. It found it was in the best interests of T.H., Jr. that legal custody be granted to Foster Parents. Mother and Father were granted supervised visitation with T.H., Jr.

{¶20} It is from this decision Mother now appeals.

ASSIGNMENTS OF ERROR

{¶21} Mother raises three Assignments of Error:

{¶22} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO DESCRIBE IN ITS FINDINGS OF FACT WHY THE SERVICES PROVIDED BY THE AGENCY DID NOT ENABLE T.H. TO RETURN HOME AS REQUIRED BY R.C. §2151.419(B)(1).

{¶23} "II. THE TRIAL COURT'S FINDING THAT T.H. COULD NOT BE SAFELY RETURNED TO HIS PARENTS DESPITE THE REASONABLE EFFORTS OF THE AGENCY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶24} "III. APPELLANT WAS DENIED HER LIBERTY INTEREST IN RAISING HER CHILDREN WITHOUT DUE PROCESS OF LAW."

ANALYSIS

I. Specific Findings of Reasonable Efforts

{¶25} Mother argues in her first Assignment of Error that the trial court erred in not entering the specific findings of fact of MCCC's reasonable efforts to prevent removal of T.H., Jr. from his home as required under R.C. 2151.419(B)(1).

{¶26} R.C. 2151.419 governs hearings on efforts of agencies to prevent removal of children from homes. Subsection (A)(1) states the following:

Except as provided in division (A)(2) of this section, at any hearing held pursuant to section 2151.28, division (E) of section 2151.31, or section 2151.314, 2151.33, or 2151.353 of the Revised Code at which the court removes a child from the child's home or continues the removal of a child from the child's home, the court shall determine whether the public children services agency or private child placing agency that filed the complaint in the case, removed the child from home, has custody of the child, or will be given custody of the child has made reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home. The agency shall have the burden of proving that it has made those reasonable efforts. If the agency removed the child from home during an emergency in which the child could not safely remain at home and the agency did not have prior contact with the child, the court is not prohibited, solely because the agency did not make reasonable efforts during the emergency to prevent the removal of the child, from determining

that the agency made those reasonable efforts. In determining whether reasonable efforts were made, the child's health and safety shall be paramount.

{¶27} Subsection (B)(1) states the following:

A court that is required to make a determination as described in division (A)(1) or (2) of this section shall issue written findings of fact setting forth the reasons supporting its determination. If the court makes a written determination under division (A)(1) of this section, it shall briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home.

In re A.H., 5th Dist. Muskingum No. CT2013-0051, 2014-Ohio-1929, ¶¶ 13-14.

{¶28} Mother contends the trial court's statement in paragraph 12 of the January 7, 2016 Decision and Order was insufficient to meet the requirements of R.C. 2151.419(B)(1). The trial court stated in paragraph 12:

Muskingum County Children Services has made reasonable efforts to prevent the removal of the minor child from the home of [Father] and [Mother] and to facilitate the return of the minor child to the home. Specifically, Muskingum County Children Services has provided case planning services, referrals of both parents to mental health evaluations and treatment; referrals of each parent to substance abuse evaluations and treatment; parenting education to both parents; supervision of visitation; home visits; and random drug testing. These efforts, which the Court

considers reasonable, did not prevent the removal of the minor child from the home of the biological parents; did not eliminate the need for continued removal, and did not make it possible for the child to return to the biological parents' home.

{¶29} Reading the Decision and Order as a whole, the trial court reviewed why the services provided by MCCC would not enable the child to return safely home. In paragraph two of the Decision and Order, the trial court outlined the case plan services established on October 16, 2013 for Mother and Father:

The case plan identified substance abuse, mental health, and parenting issues concerning both parents and required each parent to complete a substance abuse assessment as well as a mental health assessment and to complete any recommended treatment as indicated by the assessment(s). In addition, both parents were required to attend parenting skills classes and utilize skills learned through those classes during visits with the minor child.

(Decision and Order, Paragraph 2, Jan. 7, 2016).

{¶30} As to Father, part of his case plan was to complete drug treatment. The trial court found that Father:

[C]ontinued to use marijuana throughout his life, including usage during the pendency of this case, as evidenced by four (4) positive drug test results for the presence of THC. [Father] also admitted that he has "self-medicated" a degenerative disc disorder with hydrocodone for several years. He indicated that he now has a legitimate prescription for Vicodin that he takes

regularly. During the pendency of this case, he tested positive for the presence of opiates in his system on forty-nine (49) occasions.

(Decision and Order, Paragraph 7, Jan. 7, 2016).

{¶31} Father was also to complete a mental health assessment. He did not complete his case plan because he withdrew from mental health counseling. (Decision and Order, Paragraph 7 & 9, Jan. 7, 2016).

{¶32} There was no dispute that Mother completed her case plan objectives, but the trial court found that despite the reasonable efforts, the child could not be returned to Mother. Mother's three older children were removed from her home in 2011 due to Mother's drug abuse, domestic violence, and the presence of a registered sex offender in her home. (Decision and Order, Paragraph 8, Jan. 7, 2016). The trial court found that while Mother completed parenting classes, she failed to demonstrate parenting skills during visits with the child. (Decision and Order, Paragraph 8, Jan. 7, 2016). Mother was unable to work, based on her lack of job skills and her poor health associated with obesity. (Decision and Order, Paragraph 9, Jan. 7, 2016). Mother had no independent means of financial support other than Father's Social Security benefits and food stamps. (Decision and Order, Paragraph 10, Jan. 7, 2016). Mother's poor physical condition also limited her ability to interact with the T.H., Jr. (Decision and Order, Paragraph 8, Jan. 7, 2016).

{¶33} A review of the Decision and Order demonstrates the trial court complied with R.C. 2151.419(B)(1) to briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home.

{¶34} Mother's first Assignment of Error is overruled.

II. Legal Custody

{¶35} Mother argues the trial court's decision to award legal custody of T.H., Jr. to Foster Parents was against the manifest weight of the evidence. R.C. 2151.353(A)(3) regulates the disposition of a child whom has been adjudicated abused, neglected, or dependent. It states in pertinent part as to the award of legal custody

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

* * *

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

{¶36} In *In re K.H.*, 5th Dist. Muskingum No. CT2016-0001, 2016-Ohio-4784, this Court recently specified the analysis relevant to an award of legal custody. We stated:

We agree with the following analysis set forth by our brethren from the Eighth District in *In re D.T.*, 8th Dist. Cuyahoga Nos. 100970 and 100971, 2014-Ohio-4818, ¶ 19-22:

Legal custody is significantly different than the termination of parental rights in that, despite losing legal custody of a child, the parent of the child retains residual parental rights, privileges, and responsibilities. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, ¶ 14, citing R.C. 2151.353(A)(3)(c). In such a case, a parent's right to regain custody is not

permanently foreclosed. *In re M.J.M.* [8th Dist. Cuyahoga No. 94130, 2010–Ohio–1674] at ¶ 12. For this reason, the standard the trial court uses in making its determination is the less restrictive “preponderance of the evidence.” *Id.* at ¶ 9, citing *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001). “Preponderance of the evidence” means evidence that is more probable, more persuasive, or of greater probative value. *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012–Ohio–5514, ¶ 7.

Unlike permanent custody cases in which the trial court is guided by the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court should consider in determining the child's best interest in a motion for legal custody. *In re G.M.* at ¶ 15. We must presume that, in the absence of best interest factors in a legal custody case, “the legislature did not intend to require the consideration of certain factors as a predicate for granting legal custody.” *Id.* at ¶ 16. Such factors, however, are instructive when making a determination as to the child's best interest. *In re E.A.* [8th Dist. Cuyahoga No. 99065, 2013–Ohio–1193] at ¶ 13.

The best interest factors include, for example, the interaction of the child with the child's parents, relatives, and caregivers; the custodial history of the child; the child's need for a legally secure permanent placement; and whether a parent has continuously and repeatedly failed to substantially remedy the conditions causing the child to be placed outside the child's home. R.C. 2151.414(D).

Because custody determinations “ ‘are some of the most difficult and agonizing decisions a trial judge must make,’ “ a trial judge must have broad discretion in considering all of the evidence. *In re E.A.* at ¶ 10, quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). We therefore review a trial court's determination of legal custody for an abuse of discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Accord, In re L.D., 10th Dist. Franklin No. 12AP–985, 2013–Ohio–3214; *Stull v. Richland County Children Services*, 5th Dist. Richland Nos. 11CA47 and 11CA48, 2012–Ohio–738.

In re K.H., 5th Dist. Muskingum No. CT2016-0001, 2016-Ohio-4784, ¶ 9. Under this standard of review, we consider Mother's second Assignment of Error.

{¶37} Mother contends that but for the Foster Parents' motion for legal custody, Mother and MCCS were working towards reunification with T.H., Jr. Mother had completed her case plan objectives and Father had completed the majority of his case plan objectives. The issue presented to the trial court, however, was to determine if it was in the best interests of T.H., Jr. to grant legal custody to Foster Parents. In order to make that determination, the trial court can examine the custodial history of the child and the child's need for a legally secure permanent placement.

{¶38} T.H., Jr. was born on July 9, 2013 and he has been in the temporary custody of MCCS since he was seven-days old. T.H., Jr. was placed with Foster Parents on July

21, 2013. At the time of the hearing on the motion for legal custody, T.H., Jr. had been placed with Foster Parents for two years, two months, and seventeen days. Foster Parents moved for legal custody because they thought it was in the best interests of T.H., Jr. (T. 378). Foster Parents and T.H., Jr. are bonded. Throughout the process, there is no dispute by the parties that Foster Parents have been cooperative and respectful to Mother and Father as to their relationship with T.H., Jr. T.H., Jr. has allergies and eczema which the Foster Parents are treating and are working with Mother and Father to continue the same treatment. (T. 379-380).

{¶39} Mother argues the trial court improperly relied upon the psychological evaluation by Dr. Beazel, completed in 2013, to support its decision to find Mother and Father could not remedy the conditions that led to the placement of the child outside the home. Mother contends the psychological evaluation conducted by Dr. Wolfgang, completed in 2014 and 2015, was more relevant. A review of the psychological evaluations by Dr. Beazel and Dr. Wolfgang do show differing opinions as to the psychological conditions of Mother and Father. Dr. Wolfgang's evaluation showed the improvements Mother and Father had made in their psychological well-being and substance abuse issues as they worked on their case plans for two years. At trial, however, Dr. Wolfgang did not unequivocally state that Mother and Father should be awarded custody of the child. After hearing evidence presented at trial, Dr. Wolfgang acknowledged his evaluation was only as good as the information he was provided by Mother and Father. (T. 115). The trial court asked Dr. Wolfgang whether Father was ready to have a two-year old in his home. Dr. Wolfgang responded:

I understand your – your second question. And I – again, I've labored hard and long here. You know, could this go badly? I can't say that it will not, Your Honor. I really can't. And I do think about it, care about it, the well-being of the children involved. In being a little bit more cautious and careful I am – and in my conclusions of – of this report I'm trying to be fair. I'm trying to be as objective as I can be. Could something go wrong here? Yes. And so subsequent question, even here, within the court hearing, has raised my level of suspicion to some degree.

(T. 134-135).

{¶40} The GAL recommended that Foster Parents be granted legal custody of T.H., Jr. The GAL was concerned about the parenting skills of Mother and Father, based on Mother's history of parenting her three older children. The GAL testified that Mother's three older children were removed from Mother's care because Mother improperly confined the children to a Pack 'n Play, a crib, and chained to a cinder block. (T. 398). The GAL conducted unannounced visits to the parent's home during T.H., Jr.'s visitation. Out of the ten visits, T.H., Jr. was found in Mother's bedroom at least six or seven times at various times during the day. (T. 405). The GAL was concerned that because of Mother's physical condition and her prior history, T.H., Jr. was being confined to his parent's bedroom. (T. 405).

{¶41} The GAL was further concerned that Father obtained a valid prescription for Vicodin even with his documented, and perhaps unresolved, history of substance abuse. (T. 401).

{¶42} We acknowledge the evidence shows Mother completed her case plan and Father has nearly completed his case plan. As the GAL stated at the trial, however, the primary goal is not to simply complete the case plan. (T. 402). The question is what is in the best interests of the child. In making that decision, the trial court must consider the custodial history of the child; the child's need for a legally secure permanent placement; and whether a parent has continuously and repeatedly failed to substantially remedy the conditions causing the child to be placed outside the child's home. In this case, we find the preponderance of the evidence supports the trial court's conclusion that it is in the best interests of T.H., Jr. that legal custody is granted to Foster Parents. We find the trial court did not abuse its discretion in so finding.

{¶43} Mother's second Assignment of Error is overruled.

III. Due Process

{¶44} Mother argues in her third Assignment of Error that her liberty interests in raising her children were denied without due process of law. We disagree.

{¶45} Mother contends Chapter 2151 of the Ohio Revised Code allows the removal of children from their home only when removal is necessary to protect the child. The goal is to remedy the conditions to allow the child to return to the home. Mother contends the trial court impermissibly granted legal custody to Foster Parents because it found Foster Parents were a better alternative than returning T.H., Jr. to his home.

{¶46} In its Decision and Order granting legal custody of the child to Foster Parents, the trial court reviewed the child's custodial history, the child's need for a legally secure permanent placement, and whether the parent has continuously and repeatedly failed to substantially remedy the conditions causing the child to be placed outside the

child's home. The trial court determined that pursuant to R.C. 2151.353(A)(3), it was in the best interests of T.H., Jr. to be placed in the legal custody of Foster Parents. We find the decision was supported by the preponderance of the evidence and not an abuse of discretion.

{¶47} Mother's third Assignment of Error is overruled.

CONCLUSION

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

By: Delaney, J.,

Hoffman, P.J. and

Wise, J., concur.