

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the matter of: M.T.

Court of Appeals No. L-09-1197

Trial Court No. 07176676

DECISION AND JUDGMENT

Decided: December 15, 2009

* * * * *

Dan M. Weiss, for appellant.

Jeremy G. Young, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, that terminated the parental rights of A.W.¹ ("father") and appellant C.T. ("mother"), the natural parents of M.T., and granted permanent custody of

¹A.W. was developmentally disabled, having suffered a stroke and brain cancer as a child, and voluntarily relinquished his parental rights to M.T.

M.T. to appellee Lucas County Children Services ("LCCS") for adoptive placement and planning. Mother of M.T. now challenges that judgment through the following assignments of error:

{¶ 2} "[1]. The trial court committed plain error by failing to appoint a guardian ad litem for the mother-appellant.

{¶ 3} "[2]. The trial court erred when it found by clear and convincing evidence that permanent custody of M.T. should be awarded to Lucas County Children Services Board [sic]."

{¶ 4} M.T. was born in June 2000. Shortly after her birth, LCCS filed a complaint in dependency, citing appellant's involvement with the Mental Retardation and Developmental Disabilities ("MRDD") program, her schizoaffective disorder and her seizure disorder as reasons for her inability to care for M.T. At that time, appellant and M.T.'s father agreed that it would be in the child's best interest for legal custody of her to be awarded to appellant's foster mother, who agreed to accept custody of the child. In June 2007, the foster mother passed away without naming a guardian for M.T. Initially, the foster mother's adult son cared for the child. Subsequently, however, appellee received a referral alleging that the child had been sexually molested by her stepfather. Upon investigation, appellee discovered that no one had custody of M.T. to sign for her medical care and school matters. In addition, M.T. is autistic and has very limited verbal skills and so she could not adequately articulate the matters regarding the molestation allegations.

{¶ 5} On December 11, 2007, appellee filed a complaint in dependency and a motion for a shelter care hearing. The case proceeded to the shelter care hearing that same day. Neither appellant-mother nor father attended the hearing as their whereabouts at that time were unknown. At the conclusion of the hearing, shelter care custody of M.T. was awarded to appellee. Subsequently, the case proceeded to an adjudication and disposition hearing. Again M.T.'s parents did not attend. At the conclusion of that hearing, the court determined that M.T. was dependent and determined that it was in her best interest to award temporary custody of her to appellee. In addition, the court approved the case plan that had been filed with the court. The goal of that case plan was M.T.'s reunification with her parents.

{¶ 6} In February 2008, appellant was located and case plan services were initiated. In addition, the lower court appointed counsel to represent appellant in the proceedings below. As part of her case plan, appellant was referred to substance abuse counseling, was asked to submit to a diagnostic assessment for mental health issues, and was referred to domestic violence services. Appellant made little to no progress on her case plan, and on March 20, 2009, appellee filed a motion for permanent custody of M.T. The case proceeded to trial on June 15, 2009, at which the following evidence was presented.

{¶ 7} Appellant had been referred to substance abuse counseling after her urine screens tested positive for marijuana and alcohol. She participated in substance abuse services at the Unison Joint Venture Program but was unable to successfully complete the program. She restarted the program several times, but never could successfully complete

it. She failed to attend the individual and group sessions and did not show up for the drug screens ordered by Unison. At the time of the trial below, Barbara Cummins, the LCCS caseworker assigned to the case, testified that although appellant was still in substance abuse treatment, she had last attended those services in April 2009. In addition, she last tested positive for marijuana in February 2009.

{¶ 8} Appellant's mental health and physical health issues dominated the case below. In compliance with the case plan, appellant submitted to a diagnostic assessment for mental health services. She was diagnosed with schizoaffective disorder, bipolar disorder and depression, and has struggled with mental health issues for years. She was then referred to the Zeph Center for mental health services where she regularly met with Judy Janicki, her counselor. She also worked with Lynn Browning, a service and support specialist ("SASS") with the Lucas County Board of Mental Retardation. Browning testified that she had worked with appellant since November 2007. Browning developed and oversaw an individual service plan for appellant through which appellant obtained providers to assist her in the everyday aspects of her life. In her SASS role, Browning conducts home visits. Browning testified that approximately three weeks before the trial below, she visited appellant at her new home. Appellant was excited to show Browning her home and Browning was anxious to see the environment in which appellant was living. Browning testified that when she arrived at about 3:00 p.m., appellant smelled fairly strongly of alcohol. She also stated that appellant was drinking out of a sippy bottle that she said was diet coke. Later that day, appellant cancelled a scheduled visit with M.T.

{¶ 9} In addition to her mental health issues, appellant has a number of physical health problems that were of concern to her caseworkers. She has been diagnosed with hepatitis C, has borderline diabetes, and fluid on her brain that causes seizures. Occasionally, appellant has to have surgery to relieve the fluid. To her credit, appellant is extremely independent in attending and following through with her medical appointments. In addition, she keeps her numerous medications very organized and appears to take them properly. Nevertheless, Browning was very concerned about her use of alcohol along with these medications.

{¶ 10} In addition to the above, parenting was a case plan service identified for appellant, but it was stipulated that she complete all of her substance abuse counseling before she start parenting class. Because she never completed her substance abuse counseling, appellant was never able to begin that class. With regard to visitation, appellant's attendance was sporadic, visiting consistently from October 2008 until March 2009. Thereafter, appellant missed a number of visits. In addition, she regularly gave excuses, often complaining of physical health problems, including menstrual cramps, for missing the visits. While at the visits, appellant appeared unable to deal with M.T.'s mood swings and became very frustrated. Although appellant and M.T. appeared very bonded, appellant had not demonstrated an ability to care for M.T.'s special needs.

{¶ 11} M.T.'s many special needs were discussed at the trial below as follows. At the time of the trial, M.T. was nine years old. M.T. has autism and physical disabilities that cause her to have trouble using her hands for dressing and toilet training. Since the fall of 2007, when she was placed with a therapeutic foster parent, she has made

tremendous progress in her development, including the use of her hands, toilet training and personal behaviors. The child's guardian ad litem testified that when M.T. was first placed in foster care, it was very difficult to conduct a physical exam of her because she would scream before the nurse even entered the room. She had many problems with her diet and was not on a regular schedule. In the 18 months since she has been in foster care, she has attended a special school for children with autism and has attended occupational physical therapy sessions which have helped to improve the use of her hands. The guardian ad litem explained that prior to the placement, M.T. was not toilet trained and could not get in and out of a car on her own. She has made great progress with both of these skills since the placement. The guardian ad litem further testified that since being assigned to the case, she has spent a great deal of time with M.T. and appellant. She described appellant as being very concerned about M.T. but more focused on the material aspects of parenting. Moreover, she believed that appellant did not fully grasp the extent of M.T.'s special needs or M.T.'s need for structure and patience on the part of her caregiver. The guardian ad litem was very concerned that M.T. would regress if appellant were to be given custody of her. Finally, the guardian ad litem stated that in her opinion, it was in the child's best interest for permanent custody of her to be awarded to appellee. Although there was at that time no prospective adoptive parent available for M.T., her current foster parent has a history of caring for autistic children and was interested in providing long-term care for the child.

{¶ 12} On July 6, 2009, the lower court issued its judgment entry terminating the parental rights of appellant and father and granting permanent custody of M.T. to

appellee. On the issue of whether M.T. could be placed with either parent within a reasonable time or should be placed with either parent, the court expressly found that appellant and father had failed continuously and repeatedly to substantially remedy the conditions causing M.T. to be placed outside the parents' care in that appellant failed to substantially comply with her case plan services of mental health, substance abuse, domestic violence and parenting services and father did not complete any services. The court further found that appellant's chronic mental illness, mental retardation and chemical dependency was so severe that she was unable to provide an adequate home for M.T. at the present time and within one year after the trial. The court then determined that appellant had demonstrated a lack of commitment to M.T. by failing to regularly visit and communicate with her from March 2009 to the trial date of June 15, 2009, and by providing excuses for missing visits that the court found to be invalid. Finally, the court found that the evidence demonstrated that appellant was not capable of caring for M.T. alone, in part due to her own mental limitations, and that appellant had no one to assist her in caring for M.T.

{¶ 13} On the issue of M.T.'s best interest, the court found that M.T. had been in the temporary custody of appellee for 12 or more months of a consecutive 22 month period, that she is in need of a permanent placement that can only be achieved through an award of permanent custody, that she is doing well in her current foster placement, and that due to her autism and mental retardation is unable to competently state her desires regarding where to live. The court therefore found that awarding permanent custody of

M.T. to appellee would be in her best interest. It is from that judgment that appellant now appeals.

{¶ 14} In her first assignment of error, appellant asserts that because of her clearly limited intellectual functioning, the lower court committed plain error in failing to appoint a guardian ad litem to protect her interests. Appellant's trial counsel did not request the appointment of a guardian ad litem in the proceedings below. "The failure to appoint a guardian ad litem does not constitute reversible error where no request for a guardian ad litem is made or the party cannot show prejudice." *In re King-Bolen* (Oct. 10, 2001), 9th Dist. Nos. 3196-M, 3231-M, 3200-M, 3201-M. Nevertheless, we will review this issue under the plain error standard.

{¶ 15} The plain error doctrine is embodied in Crim.R. 52(B), which reads: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The doctrine has also been applied in civil cases. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. In the civil context, however, "reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Id.*

{¶ 16} R.C. 2151.281(C) and Juv.R. 4(B)(3) require that the court appoint a guardian ad litem to protect the interests of a parent in a juvenile court proceeding where the parent appears to be mentally incompetent. *In re Baby Girl Baxter* (1985), 17 Ohio

St.3d 229, 232. It is simply the appearance of mental incompetence and not an actual finding of such that triggers the requirement of the appointment of a guardian ad litem under R.C. 2151.281(C) and Juv.R. 4(B)(3). *In re: Amber G.*, 6th Dist.No. L-04-1091, 2004-Ohio-5665, ¶ 19, citing *In re Holmes* (Feb. 15, 2001), 8th Dist. No. 77785.

Nevertheless, the fact that a person may have some mental impairment or may be mildly mentally retarded does not necessarily mean that the person is mentally incompetent. *Id.* citing *In re King-Bolen*, *supra*, and *In re Luzader* (Dec. 3, 1997), 9th Dist. No. 18282.

{¶ 17} Pursuant to Juv.R. 4(C), "appointed counsel may also serve as guardian ad litem as long as the roles do not conflict." *In re Amber G.*, *supra* at ¶ 36. "The role of the guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law." *In re Baby Girl Baxter*, *supra* at 232. Even where a parent's attorney was appointed solely as counsel and not specifically for the dual purpose of serving as guardian ad litem, the parent does not suffer prejudice if counsel safeguards the parent's rights and advocates for reunification in accordance with the parent's wishes. *In the Matter of A.S.*, 6th Dist. No. L-09-1080, 2009-Ohio-5504, ¶ 28, citing *In re A.M.*, 4th Dist. No. 08CA862, 2008-Ohio-4835, ¶ 24; *In re Amber G.*, *supra* ¶ 36.

{¶ 18} Assuming arguendo that appellant presented the appearance of mental incompetence, the record reflects that her court appointed counsel safeguarded her rights and interests by actively participating in the court proceedings, drawing the court's attention to the positive aspects of appellant's life as they relate to the statutory factors,

and arguing against the termination of appellant's parental rights. Appellant has failed to demonstrate how a guardian ad litem would have acted differently or produced a different result. Accordingly, we cannot say that the trial court committed plain error in failing to appoint a guardian ad litem for appellant and the first assignment of error is not well-taken.

{¶ 19} In her second assignment of error, appellant asserts that the trial court erred in finding by clear and convincing evidence that permanent custody of M.T. should be awarded to appellee.

{¶ 20} The disposition of a child determined to be dependent, neglected or abused is controlled by R.C. 2151.353 and the court may enter any order of disposition provided for in R.C. 2151.353(A). Before the court can grant permanent custody of a child to a public services agency, however, the court must determine: (1) pursuant to R.C. 2141.414(E) that the child cannot be placed with one of his parents within a reasonable time or should not be placed with a parent; and (2) pursuant to R.C. 2151.414(D), that the permanent commitment is in the best interest of the child. R.C. 2151.353(A)(4). R.C. 2151.414(E) provides that, in determining whether a child cannot be placed with a parent within a reasonable time or should not be placed with a parent, the court shall consider all relevant evidence. If, however, the court determines by clear and convincing evidence that any one of the 16 factors listed in the statute exist, the court must find that the child cannot be placed with a parent within a reasonable time or should not be placed with a parent. Those factors include:

{¶ 21} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 22} "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A) (4) of section 2151.353 * * * of the Revised Code;

{¶ 23} " * * *

{¶ 24} "(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶ 25} " * * *

{¶ 26} "(16) Any other factor the court considers relevant." R.C. 2151.414(E).

{¶ 27} Clear and convincing evidence is that proof which establishes in the mind of the trier of fact a firm conviction as to the allegations sought to be proven. *Cross v. Ledford* (1954), 161 Ohio St. 469. In determining the best interest of the child, R.C. 2151.414(D) directs that the court shall consider all relevant factors, including, but not limited to:

{¶ 28} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 29} "(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;

{¶ 30} "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶ 31} "(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 to the agency;

{¶ 32} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶ 33} Upon a thorough review of the record in this case, we conclude that the trial court's findings that M.T. could not be placed with appellant within a reasonable time and

should not be placed with appellant were supported by clear and convincing evidence. The trial court's express findings under R.C. 2151.414(E)(1), (2), (4) and (16) with regard to appellant mandated a finding that M.T. could not and should not be placed with appellant. The court then evaluated the applicable best interest factors set forth in R.C. 2151.414(D) and concluded that permanent custody was in M.T.'s best interest. We find no error in this finding. Accordingly, the second assignment of error is not well-taken.

{¶ 34} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
