

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

In Re: A.C, E.C., S.C., M.C., G.T.

Court of Appeals No. L-11-1129

Trial Court No. 08189452

DECISION AND JUDGMENT

Decided: March 2, 2012

* * * * *

Richard M. Kerger and Kimberly A. Conklin, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a May 11, 2011 judgment of the Juvenile Division of the Lucas County Court of Common Pleas awarding legal custody of appellant's five minor children to appellees. Appellant is C.C., the mother and natural parent of the children A.C., E.C., S.C., M.C. and G.T. Appellees, J.K. and D.K., are mother's parents and the children's maternal grandparents. At the time of judgment, the children were 15, 13, 11, 8, and 3 years of age.

{¶ 2} The trial court proceedings were maintained under R.C. 2151.23(A)(2) and are governed by the standards applicable to disputes over child custody between a parent and nonparents. *See In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977), syllabus; *In re Christian S.*, 6th Dist. No. E-06-066, 2007-Ohio-5750, ¶ 25-26. The maternal grandparents filed a complaint seeking an award of legal custody of the children on December 12, 2008.

{¶ 3} Mother is divorced from the father of the four older children and never married the father of the youngest. On November 23, 2008, mother and the five children lived together in a townhouse in Toledo. Mother discovered that E.C., a daughter 11 years of age, had lied when she claimed to have completed a book report due at school the next day. Mother disciplined the child by spanking her with a belt.

{¶ 4} There was conflicting evidence as to whether mother also sat on E.C.'s back or on a mattress with E.C. underneath, while punishing the child by repeatedly striking her with a belt. A.C., the oldest child, witnessed the incident, became upset, and ran from the family residence to the nearby residence of an aunt to seek help. Grandmother called the police and both grandmother and police went to the family residence.

{¶ 5} After police and maternal grandmother appeared at the townhouse, mother made a statement that they should just take the children and she would go jump off a cliff. Concerned with mother's emotional state, police transported mother to Rescue Crisis Center. The children were sent home with the maternal grandparents. Mother testified that she was released by the facility within minutes of her arrival.

{¶ 6} Lucas County Children Services (“LCCS”) became involved and established, with mother’s consent, a safety plan for the children. Under the safety plan, the children were to stay with the maternal grandparents and mother’s contact with the children was limited to supervised visitation at the residence of the maternal grandparents. The stated reason for limiting visitation under the plan to supervised visitation was to assure no physical discipline or injuries of the children occurred.

{¶ 7} LCCS also created a case plan that included services for mother. Those services included a required drug screening of mother and a diagnostic assessment by Lloyd Letterman, LISW-S. They included counseling and parenting classes for mother to learn new discipline techniques. The plan also provided for home visits. Mother participated in plan services.

{¶ 8} LCCS returned the children to mother’s legal custody on December 24, 2008. Afterwards, parenting classes and home visits by the LCCS caseworker continued.

{¶ 9} The children remained in the custody of mother until April 7, 2009. On that date the magistrate conducted a hearing on temporary custody in the action brought by the maternal grandparents for legal custody of the children.

{¶ 10} After the hearing, the magistrate awarded interim temporary custody to the maternal grandparents effective on the date of the hearing and established visitation schedules for parenting time of mother and the fathers of the children. Mother’s parenting time was set to be unsupervised and under the established court schedule, the Lucas County Court of Common Pleas, Juvenile Division, Parenting Plan and

Companionship Schedule. In a May 8, 2009 judgment, the trial court approved and adopted the magistrate's decision.

{¶ 11} Trial proceeded on the maternal grandparent's complaint for legal custody on April 30, 2010. By agreement, the testimony and exhibits in evidence in the prior hearing on temporary custody were also treated as evidence at trial. The magistrate announced her decision awarding legal custody to the maternal grandparents at the close of the hearing, effective immediately, and filed a written judgment on June 4, 2010. Mother's parenting time remained under the court's schedule. Mother filed objections to the decision. The trial court overruled the objections and adopted the magistrate's decision in a judgment filed on May 11, 2011.

{¶ 12} Mother appeals the May 11, 2011 judgment to this court and asserts one assignment of error on appeal:

Assignment of Error

The trial court committed error in granting custody to appellees because there was no evidence the custody with the appellant put the children in danger.

Legal Custody

{¶ 13} An award of legal custody does not terminate all parental rights. *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 8, fn. 1. In the decision of *In re Hockstok*, the Ohio Supreme Court explained:

“Legal custody” is defined by R.C. 2151.011(B)(19) [now R.C. 2151.011(B)(21)] as “a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, *all subject to any residual parental rights, privileges, and responsibilities.*” (Emphasis added.) “Permanent custody” is defined in R.C. 2151.011(B)(30) [now R.C. 2151.011(B)(32)] as “a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and *divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations.*” (Emphasis added.) *Id.*

R.C. 2151.23(A)(2) Custody Proceedings Between Parent and Nonparents

{¶ 14} In R.C. 2151.23(A)(2) proceedings between a parent and nonparents over child custody, the “overriding principle * * * is that natural parents have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599; *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169.” *Hockstok* at ¶ 16. In such a proceeding, a court may not award custody to the nonparent without first making a determination of parental unsuitability. *Perales* at syllabus.

{¶ 15} In *Perales*, the Ohio Supreme Court identified the standard to determine parental unsuitability in custody disputes between parents and nonparents:

In an R. C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child. *Id.*

{¶ 16} The magistrate concluded in the June 4, 2010 decision, by a preponderance of the evidence, that continued custody to the parent would be detrimental to the children. In addition, the magistrate found:

Children removed by Children Services Board from mother's home due to physical abuse. Placed with maternal grandparents per a safety plan. Mother diagnosed with Post Traumatic Stress Disorder but denies requiring any services. Mother failed to follow through with family counseling with children. Mother admits she physically disciplined the children for school issues (e.g. missed homework, inattention). Maternal grandparents have the children in counseling at Harbor, 3 of them have diagnosis of Post-Traumatic Stress Disorder. * * * [E.C.] * * * has significant special needs

due to mental and emotional issues. Guardian ad Litem in agreement with legal custody to maternal grandparents. (Original modified by substitution of words for abbreviations used in the original.)

{¶ 17} Mother challenges the judgment on the basis that competent, credible evidence is lacking in the record to support these trial court's findings. First, mother argues that competent, credible evidence in the record is lacking "to suggest that appellant presented a physical threat to her children." Second, mother argues that "[t]he finding that appellant was diagnosed with PTSD but refused treatment is not supported by competent credible evidence." Third, mother argues that "[t]he finding that appellant failed to follow through with family counseling is not supported by competent credible evidence." Fourth, mother argues that the record does not support a finding of parental unsuitability by competent, credible evidence. The maternal grandparents have not entered an appearance in this appeal and have failed to respond to mother's contentions.

{¶ 18} A challenge to a judgment based upon a claim that competent, credible evidence is lacking to support the judgment is a claim that the judgment is against the manifest weight of the evidence. In a civil action, appellate review of such a claim is undertaken under the standard established by the Ohio Supreme Court in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). *See State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Under the standard, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the

manifest weight of the evidence.” *C.E. Morris* at syllabus. We consider the factual contentions in turn.

{¶ 19} We agree with appellant that the record reflects that LCCS did not remove the children from mother’s home and that LCCS did not seek an award of either temporary or legal custody of the children. After the incident involving E.C., mother agreed to the safety plan placing temporary custody of the children with maternal grandparents. LCCS also established a case plan for the family.

{¶ 20} The record also reflects that LCCS concluded that mother complied with all requests made by LCCS to her under both the safety plan and case plan. This included attending parenting classes on child discipline, submitting to drug and alcohol screening, and undergoing an assessment on whether treatment was necessary of mother with respect to any mental or emotional condition. The caseworker assigned by LCCS to the case testified that mother “had done everything that we asked her to do.”

{¶ 21} Drug and alcohol screening reported negative. The emotional and mental health assessment was performed by Lloyd Letterman, LISW-S. The Letterman assessment report is an exhibit in evidence. LCCS interpreted the report as indicating no treatment was required.

{¶ 22} LCCS returned custody of the children to mother on December 24, 2008. The children resided with mother at the family residence until the court awarded temporary custody to the maternal grandparents on April 7, 2009 in the action for child custody brought by the grandparents.

{¶ 23} Appellant argues that the trial court failed to consider a lack of any incidents involving discipline of the children during the period from December 24, 2008 through April 7, 2009. Additionally, after the April 7, 2009 hearing mother was granted unsupervised parenting time, without incident, under the trial court's parenting time schedule.

{¶ 24} The record demonstrates that mother is correct that evidence is lacking to demonstrate any injury or physical discipline to the children during the period from December 24, 2008, until April 7, 2009, when LCCS returned the children to mother's custody. Evidence is also lacking in the record of any physical discipline or injury to the children by mother during the unsupervised parenting time from April 7, 2009, until trial on April 30, 2010. The guardian ad litem testified that the children who were old enough to express an opinion each stated a preference to live with mother.

{¶ 25} It is not disputed that mother caused physical harm to E.C. in the November 2008 incident. Mother has also acknowledged that her actions involved excessive use of force and did not use an appropriate manner to discipline the child.

{¶ 26} To the extent the trial court found that appellant "abused" the child, we agree with appellant that the court made no finding that E.C. was an abused child within the meaning of R.C. 2151.031(C) and 2919.22. Not only did the trial court not make such a finding, this action is not one initiated by LCCS to declare the children dependent, neglected, or abused. Rather this is a private action, brought by a nonparent for a change

of custody. *See In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶ 18-21.

{¶ 27} The next finding addressed by mother is the finding that mother had been diagnosed with PTSD “but denies requiring services.” Appellant argues that the finding suggests that mother had failed to pursue treatment of her own emotional problems and that the failure makes legal custody with the mother a danger to the children. Appellant objected to the finding in the trial court, arguing that the only reference to PTSD at trial was in a report by Social Worker Lloyd Letterman who performed an assessment of mother for LCCS. The social worker concluded in the assessment that mother “meets criteria for PTSD, but [it does] not interfere with her life to warrant treatment unless desired by client.” Mr. Letterman stated “no treatment recommendations” in his report.

{¶ 28} Maternal grandparents did not call Mr. Letterman as a witness and called no expert witness to testify as to any need for treatment of mother for PTSD before returning the children to her custody. In our view, the assessment is clear and unambiguous in providing that Mr. Letterman had no treatment recommendations.

{¶ 29} The evidence demonstrates that LCCS treated the Letterman assessment as not recommending treatment for PTSD. Furthermore, in direct questioning by the magistrate, the LCCS caseworker clarified that it was not Mr. Letterman’s practice to recommend treatment only if the client would agree to pursue treatment. The caseworker testified “[w]e have resistant clients all the time that he makes recommendations for them.”

{¶ 30} The next finding challenged by mother is the finding that “Mother failed to follow through with family counseling.” The trial court concluded that there was conflicting testimony on whether mother had been prevented from continued participation in counseling sessions with the children. Mother testified that grandmother interfered with her participation in counseling. Grandmother denied interference.

{¶ 31} The record also reflects that the guardian ad litem testified that she could not determine at whose insistence mother was denied contact during counseling sessions for the children. The guardian ad litem did testify, however, that she knew mother had been denied access to the sessions. Accordingly, while the evidence is in conflict as to who was responsible for denying mother access, the evidence demonstrates that access was denied.

{¶ 32} In our view competent, credible evidence in the record is lacking to support a claim that legal custody of the children with mother was detrimental to the children based upon any claimed failure of mother to seek emotional or mental treatment or any claimed failure of mother to support counseling of the children. The maternal grandparents failed to present evidence demonstrating a continuing risk of injury to the children by awarding custody to mother due to a risk of physical discipline by mother. From December 24, 2008, to April 7, 2009, mother held legal custody of the children without record of physical discipline or injury of the children by mother. Mother had unsupervised visitation on weekends with the children since that time under the court’s parenting schedule without evidence of physical discipline or injury.

{¶ 33} We conclude that the May 11, 2011 trial court judgment holding that an award of legal custody to mother would be detrimental to the children is against the manifest weight of the evidence. We reverse the trial court’s judgment awarding legal custody of the children to maternal grandparents and remand this matter to the Lucas County Court of Common Pleas, Juvenile Division, for further proceedings including a new trial on the issue of legal custody of the children. Pursuant to App.R. 24, we order appellees to pay the costs of this appeal.

Judgment reversed.

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

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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:
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