

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

In re K.M., M.M.

Court of Appeals No. L-12-1345

Trial Court No. JC 10210514

DECISION AND JUDGMENT

Decided: April 12, 2013

* * * * *

James J. Popil, for appellant.

Angela Y. Russell, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating the parental rights of K.M. (“mother”), K.M. (“father”), and the legal custodian, B.H., and awarding permanent custody of the minor children K.M. and M.M. to appellee, Lucas County Children Services (“LCCS”). For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} The minor children K.M. and M.M. were born to mother and father in 2000 and 2001, respectively. In 2005, LCCS received a police report that K.M. was left home alone. Apparently, K.M. was being watched by mother's then boyfriend, when the boyfriend left the home. The police subsequently found mother walking down the street looking for the boyfriend, while the five-year-old child was home unattended. In addition, there were other allegations that domestic violence was occurring in the home, and that the home was unkempt. A safety plan was put in place that the boyfriend would be asked to move out because of the domestic violence allegations. However, when a caseworker came to do a home visit, the caseworker learned that mother was still leaving K.M. in the care of the boyfriend.

{¶ 3} K.M. was removed from the home in August 2005, and case plan services were offered to mother, consisting of mental health counseling and parenting classes. In December 2005, mother stated that she was not interested in completing her case plan, and consented to B.H. obtaining legal custody of K.M. At the time, B.H. was already taking care of M.M.

{¶ 4} LCCS again became involved with the family in December 2010, when it received a referral that B.H. had been arrested for a probation violation, and thus was not able to be home when the children returned from school. Further, there were allegations concerning the conditions of the home and B.H.'s drug abuse. B.H. had tested positive for opiates, cocaine, and marijuana, and when officers executed an unrelated search warrant on the home, they found needles and other drug paraphernalia.

{¶ 5} The agency filed a complaint in dependency and neglect on December 9, 2010. The parties stipulated to a finding of dependency, and temporary custody of the children was awarded to LCCS on January 18, 2011, and reaffirmed on February 15, 2011. Case plans were implemented with the goal of reunification with either parent or with B.H.

{¶ 6} Regarding B.H., the case plan called for her to complete a diagnostic assessment to determine counseling needs. B.H. never completed the assessment. In addition, although she expressed initial interest in establishing visitation, B.H. has not seen the children since LCCS has become involved. Robin Powell, the ongoing caseworker, testified that she has not had contact with B.H. as part of the case since January or February 2011. Furthermore, at the time of the termination hearing in October 2012, B.H. was in Marysville prison with an expected release date of August 2014. B.H. did not respond to her attorney's attempts to contact her, and B.H. did not appear at the termination hearing.

{¶ 7} Father also failed to complete a diagnostic assessment as part of his case plan. Throughout the course of this case, father has failed to maintain any visitation or contact with the children. Father did not appear at the termination hearing, but his attorney related that father wished for LCCS to be awarded permanent custody of the children.

{¶ 8} As to mother, the case plan requested a diagnostic assessment to determine mental health counseling needs, a substance abuse assessment, random urine screens, parenting training, and for mother to locate stable and independent housing.

{¶ 9} Mother twice failed to show for her mental health diagnostic assessment, but ultimately completed one on March 17, 2011. The assessment revealed that mother was diagnosed with bipolar disorder with psychosis and post traumatic stress disorder. Mother was referred to the Zepf Center, where she was already in counseling and receiving psychotropic medication. Mother was inconsistent in attending counseling sessions, though, and was terminated from counseling because she attended only twice between February and May 2012. Mother reengaged with weekly counseling services in September 2012, but still cancelled once between then and the termination hearing in October 2012. The current counselor testified that mother has been cooperating in the sessions and that they are beginning to establish goals for the therapy, including alleviating depression, decreasing isolation, decreasing paranoid thinking, improving personal relationships, and maintaining sobriety.

{¶ 10} Regarding substance abuse, no recommendations were made following mother's substance abuse assessment. However, random drug screens were incorporated as part of her case plan. Mother was requested to screen five times between September 2011 and September 2012, but only complied with the requests once. Mother stated that she could not provide the screens because she had problems providing screens in front of other people. An accommodation was made, and mother was requested to go to a doctor's office on October 3, 2012, for a blood test. Mother went to the doctor's office the next day instead. All of mother's drug screenings have come back negative.

{¶ 11} In addition to the mental health services and drug screenings, mother was asked to complete a parenting class because she had not been the primary caregiver for

the children since 2005. The parenting instructor testified that mother successfully completed the course in August 2011, but considered her completion to be “kind of marginal.”

{¶ 12} Finally, mother was asked to locate stable and independent housing. The testimony revealed that mother initially was living with her grandmother, but that housing was inappropriate for permanent placement of the children because it was too small. Additionally, mother’s brother had access to the home and would steal the grandmother’s prescriptions. Mother then moved to a shelter in January 2012, at LCCS’ suggestion. Through the shelter, mother obtained independent housing under the FOCUS program. In March 2012, mother signed a one-year lease, with the first three months paid for by FOCUS. After those three months, though, mother left, claiming that the home was falling apart and that the landlord failed to fix anything. Mother then moved to another home, where she stayed for two months before leaving. Mother again claimed the landlord failed to fix the home, and also complained that there was a problem with mice. At the time of the termination hearing, mother had moved to another location.

{¶ 13} Throughout the proceedings, the parties were moving towards reunification of the children with mother. The children desired reunification, and it is clear that mother loves her children. In March 2012, mother was granted unsupervised visitation. As part of the visitation, no other individuals were permitted to be around the children unless they had first been cleared through LCCS. After the first visitation, though, one of the children indicated that a person named Rob spent the night. The child relayed that Rob brought his dog over, and was there when the child went to bed at night and when she

woke up in the morning. The caseworker confronted mother, who denied it. The caseworker then requested that mother not speak with the children about the allegation. However, the caseworker received a voicemail that night from the child, distraughtly stating that she was wrong, that she misspoke, and that she was sorry. Upon inquiry, the caseworker found out that Rob had an open case with LCCS that included substance abuse issues.

{¶ 14} In addition to Rob, the caseworker expressed concern over mother's judgment because of a relationship mother had with Doug. In late 2011, mother was dating Doug, and was excited that the two were going to get married. However, the relationship ended in December 2011. In April 2012, LCCS received a referral concerning Doug. Doug reportedly had gone to jail for raping mother when she was 11 or 12 years old and he was 22 years old, and had allegedly told the referral source that he was going to take M.M.'s virginity in the same way. Doug was no longer involved with mother when the unsupervised visitations began.

{¶ 15} Finally, the caseworker expressed concern that mother allowed her cousin to temporarily live with her at the housing through the FOCUS program. The cousin had already lost custody of her own three children. When the caseworker confronted mother, mother denied it. However, the cousin's name was on the mailbox, and mother did eventually admit that the cousin lived there.

{¶ 16} On March 26, 2012, as the case progressed, LCCS filed a motion to terminate temporary custody and award permanent custody of K.M. and M.M. to mother. A hearing was set for April 26, 2012, on LCCS' motion. Following the filing of the

motion, though, LCCS learned of the relationship with Rob and the previous relationship with Doug, learned that although mother said she was going to counseling, she was in fact not going, and learned that there were allegations that mother had been around individuals who were abusing drugs, and that mother failed to provide a drug screen. As these issues came to light, LCCS requested a continuance on the hearing. Later, LCCS withdrew its motion, and instead filed its motion for permanent custody.

{¶ 17} On October 15, 2012, the trial court held a termination hearing on LCCS' motion for permanent custody. At the hearing, the caseworker testified that awarding permanent custody to LCCS was in the children's best interest. She spoke to the children's need for stability and permanency, and how the children have been receiving tutoring and have been doing better in school since they were placed in foster care. The caseworker testified that K.M.'s behavior has improved, and that he no longer lashes out as much. The caseworker also testified, though, that M.M.'s behavior has gotten worse, that she is very defiant and disrespectful. However, the caseworker stated those behaviors occurred around the time of the planned reunification with mother, and that since being informed that LCCS was filing for permanent custody, M.M. is doing better, although it is still not perfect. Finally, the caseworker expressed concern that mother would not follow through on the children's counseling services in light of her own inconsistency with counseling.

{¶ 18} The guardian ad litem echoed many of the observations regarding the children. The guardian ad litem also expressed concern that, although mother loves her children very much, she would not be able to provide a stable environment for them

based on her constant moving and her choice of men. The guardian ad litem concluded that it was a difficult decision, but she believed awarding permanent custody of the children to LCCS was in the children's best interest.¹

{¶ 19} After the hearing, the trial court conducted an in-camera interview with the children. The court then entered its judgment on November 7, 2012, awarding permanent custody of the children to LCCS. The trial court found that the children cannot be placed, and should not be placed, with either of the parents within a reasonable period of time. R.C. 2151.414(B)(1)(a).

{¶ 20} The court found, pursuant to R.C. 2151.414(E)(1), that mother failed continuously and repeatedly to substantially remedy the problem that caused the children to be placed outside of the home. Specifically, the court found that mother had lapses in judgment that impacted her ability to keep the children safe, for example, her relationships with Doug and Rob, and her failure to be honest about the incidents that have occurred. Further, the court found that mother failed to maintain stable and independent housing, noting that she has had approximately five different residences since the filing of the case. Additionally, the court found, pursuant to R.C. 2151.414(E)(2), that mother has a chronic mental illness that she has not consistently addressed, and that makes her unable to provide an adequate permanent home for the children. The court elaborated that she has been diagnosed with bipolar disorder with psychosis, post traumatic stress disorder, depression, and anxiety, and has a pattern of

¹ Because the children had expressed their desire to be reunified with mother, separate counsel was appointed for them for the termination hearing.

engaging in mental health services for short periods of time instead of the extensive periods of time that are necessary to address her issues. As to father, the trial court found that he has demonstrated a lack of commitment to the children as described in R.C. 2151.414(E)(4), and has abandoned the children as described in R.C. 2151.414(E)(10).

{¶ 21} The trial court also considered all of the required factors in R.C. 2151.414(B)(1) and (D)(1)(a)-(e), and found by clear and convincing evidence that it is in the best interest of the children to grant permanent custody to LCCS. In particular, the court found that the children have not been in their parents' custody since 2006, and have been in foster care since December 2010. The court found that the children need a stable, permanent home where their issues can be addressed, and that the parents are not able to offer the necessary stable home environment.

{¶ 22} Finally, the trial court found that LCCS has made reasonable efforts to avoid the continual removal of the children from the home, and that it has provided reasonable services to the family to address the family's issues.

B. Assignments of Error

{¶ 23} Mother and B.H. have appealed from the trial court's November 7, 2012 judgment entry. B.H., however, does not raise any independent legal issues, but rather supports the legal arguments raised by mother. Father has not appealed. Mother asserts two assignments of error:

- I. The trial court erred in finding that appellee Lucas County Children Services Board had made a reasonable effort to reunify the minor child with appellant K.M.

II. The trial court erred in granting appellee Lucas County Children Services Board's motion for permanent custody as it was against the manifest weight of the evidence.

II. Analysis

{¶ 24} To terminate parental rights and award permanent custody of a child to a public services agency, the juvenile court must find, by clear and convincing evidence, two things: (1) that one of the enumerated factors in R.C. 2151.414(B)(1)(a)-(d) apply, and (2) that permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is more than a preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 25} “A trial court’s determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence.” *In re A.H.*, 6th Dist. No. L-11-1057, 2011-Ohio-4857, ¶ 11, citing *In re Andy-Jones*, 10th Dist. Nos. 03AP-1167, 03AP-1231, 2004-Ohio-3312, ¶ 28. We recognize that, as the trier of fact, the trial court is in the best position to weigh the evidence and evaluate the testimony. *Id.*, citing *In re Brown*, 98 Ohio App.3d 337, 342, 648 N.E.2d 576 (3d Dist.1994). Thus, “[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 Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 26} Here, under the first prong, the trial court found that R.C. 2151.414(B)(1)(a) applied: “the child cannot be placed with either of the child’s parents within a reasonable time or should not be placed with the child’s parents.” R.C. 2151.414(E) provides a list of circumstances, which, if any single one is found by clear and convincing evidence, requires the trial court to enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. Pertaining to mother, the trial court found that R.C. 2151.414(E)(1) and (2) were proven by clear and convincing evidence.

{¶ 27} R.C. 2151.414(E)(1) provides,

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.

{¶ 28} In her first assignment of error, mother argues that LCCS failed to provide reasonable case planning and to make diligent efforts to assist her to remedy the problems that initially caused the children to be removed from the home. She asserts that LCCS should have offered more services once it identified the problems that were uncovered at the time of the planned reunification. However, “[i]n a reasonable efforts determination, the issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute.” *In re A.B.*, 6th Dist. Nos. L-12-1069, L-12-1081, 2012-Ohio-4632, ¶ 25. A reasonable effort to implement a reunification plan means “an honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage.” *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011 (12th Dist.1992).

{¶ 29} We believe the record supports a finding that LCCS made reasonable efforts. Mother was referred to counseling for her mental health issues. In February 2012, the caseworker contacted mother’s new therapist and explained some of LCCS’ concerns, including mother’s inability to engage in healthy relationships. The therapist responded that they would address those issues in the individual counseling sessions. At the time of the planned reunification and overnight unsupervised visits, it appeared that mother was taking advantage of the counseling services and was addressing her issues. It was not until later that LCCS learned that mother, in fact, was not participating in counseling, despite her representations to the contrary. Furthermore, the record is clear that mother was not forthcoming with the nature of her relationships, and that the threat to the children’s safety posed by mother’s judgment regarding the men in her life was not

fully realized until after the unsupervised visits began. Therefore, we find no merit to mother's argument that LCCS did not make reasonable efforts by failing to offer additional services because mother failed even to take advantage of the services that were offered.

{¶ 30} Accordingly, mother's first assignment of error is not well-taken.

{¶ 31} In her second assignment of error, mother argues that the trial court's findings were not supported by the manifest weight of the evidence. We disagree. First, the court's finding that mother failed to remedy the conditions causing removal, specifically, her lapses of judgment and her inability to provide stable housing, is supported by the testimony regarding her relationships with Rob and Doug, and the fact that she has lived in five different houses during the course of this case. Second, the court's finding that mother has a chronic mental illness that makes her unable to provide an adequate permanent home for the children is supported by the testimony that she has been diagnosed with bipolar disorder with psychosis, post traumatic stress disorder, depression, and anxiety. Furthermore, it is supported by the testimony illustrating that mother is inconsistent in receiving counseling. Finally, the court's finding that awarding permanent custody of the children to LCCS is in the children's best interest is supported by the testimony of the caseworker and guardian ad litem that, although not perfect, the children have improved educationally, behaviorally, and mentally since being placed in the foster home. Therefore, because competent and credible evidence exists in the record to support the trial court's findings, we hold that the findings are not against the manifest weight of the evidence.

{¶ 32} Accordingly, mother's second assignment of error is not well-taken.

III. Conclusion

{¶ 33} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellants, mother and B.H., are liable for the costs of the 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, P.J.

JUDGE

Stephen A. Yarbrough, 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>
