[Cite as *In re C.J.*, 2013-Ohio-3056.]

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

In re C.J. aka C.H., T.J. aka T.A.-J., T.A., Cayr.J. aka C.J.

Court of Appeals No. L-13-1037

Trial Court No. 11212008
12222958

DECISION AND JUDGMENT

Decided: July 12, 2013

* * * * *

James A. Popil, for appellant.

Jeremy G. Young, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, C.J. ("Mother"), appeals a February 21, 2013 judgment of the Juvenile Division of the Lucas County Court of Common Pleas. The judgment terminated parental rights with respect to four of Mother's children and awarded permanent custody of the four to Lucas County Children Services ("LCCS"). The

children are Cr.J., Cl.J., Ty.J., and Te.A. K.B. is the father of Cr.J. T.A. is the father of Ty.J. and Te.A. L.H. is the father of Cl.J. The fathers have not appealed the trial court judgment.

History with LCCS

{¶ 2} In its judgment, the trial court recognized that LCCS has a long history with this family. In 2006, Cr.J., the oldest child, was removed from the home at age one. LCCS caseworkers had come to the home and found him alone in the apartment in a bathtub of water.

{¶ 3} In the February 21, 2013 judgment, the trial court summarized the circumstances of the removal:

> The issues causing * * * [Cr.J's] * * * first removal included concerns for anger management; the mother was being evicted; mother became hostile with LCCS staff and had to be restrained by security; and she was later found to have a 10-inch knife after she was booked in the county jail. Also, mother complained about * * * [Cr.J.'s] behavior, stating that he cries all the time and 'fights' her.

{¶ 4} In 2007, after mother completed plan services, Cr.J. was returned to Mother's custody. Cr.J, however, was removed from the home again in 2008, with his sister, Cl.J. (Cl.J. was born in January 2007.) After mother completed services, the children were returned to mother.

{¶ 5} On February 11, 2011, LCCS filed a complaint in dependency and neglect in the trial court with respect to three of the children, Cl.J, Ty.J., and Te.A. At the time Cl.J. was 4 years of age, Ty.J was 1 1/2, and Te.A. was one month. The trial court described the circumstances of the filing in its judgment: "LCCS received a referral that * * * [Ty.J] was not being supervised and fell off a porch, resulting in a gash and black eye. The LCCS also received a referral that * * * [Ty.J.] had burned his hands on the oven door four or five weeks earlier."

{¶ 6} The trial court found Cl.J, Ty.J. and Te.A to be dependent children and awarded temporary custody of them to LCCS. Cr.J. was not involved in the neglect and dependency proceedings. He resided outside the home. Mother had voluntarily placed him in the care of a woman who had acted as her foster mother in Mother's youth. The former foster mother applied for custody of the boy, but failed to appear at the hearing on the request and the matter was dismissed.

{¶ 7} The record reflects attempts by LCCS to conduct a home study of the former foster mother to support placement of Cr.J. with her. Those efforts were unsuccessful first, because of delays in securing the home study and second, due to receipt by LCCS of a referral concerning the former foster mother. Cr.J. was placed in the temporary custody of LCCS in April 2012.

{¶ 8} Mother's fifth child was born on September 7, 2012, and in separate proceedings was placed in the legal custody of a cousin.

{¶ 9} LCCS filed a motion for permanent custody of Cl.J, Ty.J., and Te.A. on September 4, 2012. LCCS filed a motion for permanent custody of Cr.J. on October 3, 2012. Both motions proceeded to trial together on January 11, 2013. The court issued its judgment awarding permanent custody of the children to LCCS on February 21, 2013.

{¶ 10} Mother asserts four assignment of error on appeal:

> I. The trial court erred in finding that appellee Lucas County Children Services Board had made a reasonable effort to reunify the minor children with appellant C.J.
>
> II. The trial court erred in granting appellee Lucas County Children Services Board's motion for permanent custody as the decision was against the manifest weight of the evidence.
>
> III. The trial court erred in awarding permanent custody to appellee Lucas County Children Services Board as there were suitable relatives available to take legal custody.
>
> IV. Appellant C.J. was denied the effective assistance of counsel.

{¶ 11} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶ 28. The interest in the care, custody, and control of one's children is "one of the oldest of the fundamental liberty interests recognized in American law." *In re K.H.,* 119 Ohio St.3d 538, 2008–Ohio–4825, 895 N.E.2d 809, ¶ 39, citing *Troxel,* 530 U.S. at 65. As a termination of parental rights to

raise one's children strikes at the core of the parent-child relationship, parents "must be afforded every procedural and substantive protection the law allows." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 12} A juvenile court may award permanent custody of a child to a public children services agency where the court finds, by clear and convincing evidence, the existence of one of the four factors listed in R.C. 2151.414(B)(1) (a) through (d) and that it is in the best interest of the child to grant permanent custody to the agency. *In re M.B.*, 10th Dist. No. 04AP755, 2005-Ohio-986, ¶ 6; R.C. 2151.414(B)(1).

{¶ 13} A finding under R.C. 2151.414 (B)(1)(a) requires a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with the child's parents. R.C. 2151.414(B)(1)(a). R.C. 2151.414(E) directs a 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" where it finds by clear and convincing evidence that "one or more" of the factors listed under R.C. 2151.414(E) exist.

{¶ 14} In this case, trial court found by clear and convincing evidence, pursuant to R.C. 2151.414(B)(1)(a), that the children could not be placed with either parent within a reasonable time or should not be placed with either parent. The court relied on factors R.C. 2151.414(E)(1) and (2) in making the finding. The court also found by clear and convincing evidence that it is in the best interest of the children to grant permanent custody to LCCS.

{¶ 15} We consider Assignment of Error No. II first.

{¶ 16} Mother was incarcerated at the time of trial. She was serving a sentence on a conviction in the Sylvania Municipal Court on an attempted theft offense. The court ordered Mother to serve 28 days in jail but permitted mother to serve the jail time in three separate periods of 10, 10, and 8 days in November and December, 2012. Mother failed to appear at any of the court ordered times to serve her sentence. This ultimately resulted in mother being incarcerated in the Lucas County Jail at the time of trial. The court ordered mother conveyed from the Lucas County Jail to permit attendance at trial.

{¶ 17} The evidence at trial was that housing remained unstable. Testimony at trial established that Mother had moved at least nine times since the start of the case. At the time of trial, she was incarcerated and had last resided in a homeless shelter.

Chronic Mental Illness Factor under R.C. 2151.414(E)(2)

{¶ 18} Under Assignment of Error No. II, appellant argues that the trial court's judgment granting permanent custody to LCCS is against the manifest weight of the evidence. The court based its decision on findings under R.C. 2151.414(E)(1) and (2). We consider the trial court's finding of the existence of the chronic mental illness factor under R.C. 2151.414(E)(2) first. The factor reads:

> (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.

{¶ 19} Appellant contends that the evidence with respect to appellant's mental condition was very limited and no medical care professional testified as a witness at trial. Where a trial court judgment is supported by competent, credible evidence going to all the essential elements of the case, the judgment will not be reversed on appeal on the ground that it is against the weight of the evidence. *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus; *In re S*, 102 Ohio App.3d 338, 344-345, 657 N.E.2d 307 (6th Dist.1995) (termination of parental rights).

{¶ 20} Proof of the existence of a factor enumerated in R.C. 2151.414(B)(1) and proof that an award of permanent custody is in the child's best interest must be made by clear and convincing evidence. R.C. 2151.414(B)(1) and (E). The standard of clear and convincing evidence requires proof that "will produce in the mind of the trier of facts 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.

{¶ 21} In its judgment, the trial court listed case plan services provided by LCCS to the family over the years the custody of mother's children has been in issue:

> The court finds that LCCS has identified and provided numerous case plan services in this and prior cases to the family, including: casework management; diagnostic assessments for the parents; domestic violence

services for the parents; mental health services; housing referrals; parenting; counseling services for the children; and visitation services.

{¶ 22} Mental health diagnostic and treatment records of mother were admitted in evidence as State Exhibit 4 at trial. The records include a November 1, 2010 adult diagnostic assessment report prepared by Lloyd Letterman, LISW-S, and a July 19, 2011 Unison Behavioral Healthcare Initial Psychiatric Evaluation prepared by Irfan Ahmed, M.D. Both identified a primary diagnosis of Bipolar Disorder, Not Otherwise Specified. Mr. Letterman made recommendations for referral for treatment including outpatient services, "symptom management of depression, anxiety, traumatic stress, anger, unruly/defiant/oppositional behavior, inattention, lack of impulse control, mood swings, hyperactivity, substance abuse, disturbed sleep, and psychosocial stressors," and crisis management. Mr. Letterman recommended the referral for treatment at Unison Behavioral.

{¶ 23} Dr. Ahmed examined and treated appellant at Unison Behavioral. He noted in the psychiatric evaluation he prepared that appellant "has been having mood swings and anger issues most of her life." He prescribed medications for help with focus, depression and mood symptoms. Dawn Kluck, MSW, LICDC, provided therapy at Unison. The trial court made specific findings concerning mental health care services, counseling, and medication management:

> Regarding mother's mental health services, mother was diagnosed with bipolar disorder and started services in August, 2011. However,

mother's follow-through with her mental health services, counseling, and medication management has not been consistent as established by caseworker's testimony and Exhibit 5. Mother would attend her services and do well for one or two months. However, she would then stop attending or attend sporadically. The caseworker and the guardian ad litem testified that mother's pattern of inconsistent follow-through continues presently.

{¶ 24} With respect to chronic mental illness, the trial court concluded:

> [U]nder RC 2151.414(E)(2), the Court finds that the mother suffers from a chronic mental illness that is so severe that it makes her unable to provide an adequate permanent home for the children at the present time and, as anticipated, within one year after the Court holds the permanent custody trial. The record is replete with evidence that the LCCS has been working with this mother for many years regarding * * * [Cr.J]. [Cr.J] * * * has been removed twice before and * * * [Cl.J] once before. The mental health records and testimony of the caseworker and guardian ad litem establish that the mother has been inconsistent following through with her case plan services – especially her mental health services. * * * The inconsistency with medication, therapy and treatment, caused by the bipolar disorder, evidence the need for treatment and therapy which the mother has failed to address.

{¶ 25} The Guardian ad Litem ("GAL") testified that he had served as GAL for the children beginning in 2006 with removal of Cr.J. for the first time from the home and in each case since. He has been appointed GAL five times and prepared 12 GAL reports. He testified:

> [T]he situation, if I am being honest, just continues to be a cyclical issue. You know, the services get done, things get stabilized. It's just like spinning plates. The plates spin and everything holds in a pattern, and then it crashes. And that's what's happened time and time again.
>
> * * * It's just been this pattern of – of compliance that takes place, and then when the services and the support disappear and we have issues such as financial pressures, unstable relationships that she might have, you know, with boyfriends and such, it causes the behavior that we've seen – what happens is it causes her ability to parent the children to buckle.

{¶ 26} We conclude that there is competent, credible evidence in the record supporting a firm conviction or belief that mother suffers from chronic mental illness that is so severe that it makes her unable to provide an adequate permanent home for the children at the time of judgment and as anticipated within one year after the hearing on the motion for permanent custody.

{¶ 27} With respect to fathers, it has been undisputed that the fathers abandoned the children by failing to visit or maintain contact with the children, a factor under R.C. 2151.414(E)(10).

{¶ 28} Proof of the existence of an R.C. 2151.414(E) factor establishes a finding under R.C. 2151.414(B)(1)(a) that the children cannot be placed with their parents within a reasonable time or should not be placed with their parents. We do not address in this decision whether such a finding is equally available under R.C. 2151.414(E)(1) grounds as the issue is moot. *See* App.R. 12(A)(1)(c). Under R.C. 2151.414(E), the existence of "any one" of the factors listed in the statute is sufficient to support a finding that children cannot be placed with their parents within a reasonable time or should not be placed with their parents.

{¶ 29} We next turn to the second prong, proof that an award of permanent custody is in the best interest of the children. R.C. 2151.414(D)(1) provides:

> (D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:
>
> (a) 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;
>
> (b) 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;

(c) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(d) 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;

(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶ 30} The trial court made extensive findings of fact in its consideration of R.C. 2151.414(D)(1) factors. Cr.J, the oldest child, had not bonded with mother and was more bonded to his prior placement than to his mother. The second oldest, Cl.J., was confused by discussions with mother over returning home. Cl.J. started acting out after being told that she would be coming home. The LCCS caseworker and the GAL both testified that all four children have bonded to the foster mother. The foster mother has acted to assure

that the children's educational and medical needs have been met, including counseling needs of Cr.J. and Cl.J. The court found that the children have a positive relationship with the foster mother and are bonded to each other.

{¶ 31} The foster mother and two relatives have expressed an interest in adoption. The court found that the prospects for adoption of the children is excellent. The court also found that all the children's medical, education, and other needs are being met.

{¶ 32} The court concluded that the custodial history of Cr.J and Cl.J requires an award of permanent custody of the two children to LCCS after considering their prior removals from the home. The court found that the three youngest children (Cl.J., Ty.J., and Te.A.) had been in the temporary custody of a public children services agency for twelve or more months of a consecutive twenty-two month period. The court found that Ty.J had spent two-thirds of his life with his current foster mother and that Te.A. had lived in the foster mother's home since she was six weeks old.

{¶ 33} The court found that "that the children need a legally secure permanent placement and that placement cannot be achieved without a grant of permanent custody to the agency."

{¶ 34} We have reviewed the trial record and find competent, credible evidence exists in the record to support the trial court findings under R.C. 2151.414(D)(1) and of the type to establish a firm belief or conviction that an award of permanent custody to LCCS is in the best interest of the children.

{¶ 35} Accordingly we conclude that the trial court's determination to award permanent custody of Tr.J, Tl.J., Ty.J. and Te.A. to LCCS is not against the manifest weight of the evidence. We conclude that Assignment of Error No. II is not well-taken.

Reasonable Effort to Reunify

{¶ 36} Under Assignment of Error No. I, Mother argues that the trial court erred in finding that LCCS made a reasonable effort to reunify the children with her. The two motions for permanent custody filed by LCCS were filed pursuant to R.C. 2151.413. In the decision of *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 852 N.E.2d 816, the Ohio Supreme Court considered whether, pursuant to R.C. 2151.419, the state must demonstrate reasonable efforts to reunify the family in proceedings under a motion for permanent custody brought under R.C. 2151.413:

> [W]e hold that R.C. 2151.419(A)(1) does not apply in a hearing on a motion for permanent custody filed pursuant to R.C. 2151.413. However, except for some narrowly defined statutory exceptions, the state must still make reasonable efforts to reunify the family during the child-custody proceedings prior to the termination of parental rights. If the agency has not established that reasonable efforts have been made prior to the hearing on a motion for permanent custody, then it must demonstrate such efforts at that time. *Id.* at ¶ 43.

{¶ 37} Where a court relies on factor R.C. 2151.414(E)(1) to establish that a child cannot be placed with either parent within a reasonable time or should not be placed with

either parent, the factor requires a showing that the agency seeking placement of the child outside the home had undertaken "reasonable case planning and diligent efforts * * * to assist the parents to remedy the problems that initially caused the child to be placed outside the home."

{¶ 38} The record reflects that the LCCS worked with appellant repeatedly over years in an effort to return her children to the home. Prior to these proceedings, the oldest child had been removed twice and returned to the home twice. The second oldest had been removed once and returned. Over the years, LCCS provided diagnostic assessments for parents, domestic violence services for the parents, mental health services, housing referrals, parenting counseling services for the children and visitation services. The record reflects repeated efforts by LCCS caseworkers and Unison Behavior treatment professionals to assure Mother secured treatment for her mental health issues.

{¶ 39} We find Assignment of Error No. I not well-taken.

Claimed Error in Not Awarding Legal Custody to Relatives

{¶ 40} Appellant contends under Assignment of Error III that the trial court erred in awarding permanent custody to LCCS when there were suitable relatives available to take legal custody of the children. This objection was raised at trial. It was undisputed at trial, however, that there were no pending applications by anyone seeking custody of the children other than LCCS.

{¶ 41} LCCS argues first, that parents lack standing to raise this argument, citing this court's decisions in *In re A.B.*, 6th Dist. Lucas Nos. L-12-1069, L-12-1081, 2012-

Ohio-4632, ¶ 27-29 and *In re R.V.*, 6th Dist. Lucas Nos. L-10-1278, L-10-1301, 2011-Ohio-1837, ¶ 15. Second, LCCS argues that even if Mother had standing to raise this issue, in view of the agreed absence of any application from a relative to take custody of the children at the time of trial, the contention lacks merit.

{¶ 42} We agree. Both *In re A.B.* and *In re R.V.* concerned proceedings on motions of a public children services agency for an award of permanent custody. We held in both cases that parents lack standing in such actions to claim the trial court erred in failing to award custody of their children to third parties – in those cases to grandparents. *In re A.B.* at ¶ 27-28; *In re R.V. at* ¶ 14-16. Accordingly, we conclude that Assignment of Error No. III is without merit due to lack of standing.

{¶ 43} Furthermore, even were standing to exist, there is no factual basis for the claimed error. The court did not overrule any application by a relative to be awarded custody of the children in this case. No one applied for custody. We find appellant's Assignment of Error No. III not well-taken.

Ineffective Assistance of Counsel

{¶ 44} Appellant argues under Assignment of Error No. IV that she was denied effective assistance of counsel. "In actions instituted by the state to force the permanent, involuntary termination of parental rights, the United States and Ohio Constitution's guarantees of due process and equal protection require that indigent parents be provided with counsel." *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980), paragraph two of the syllabus. The right to counsel includes the right to effective

assistance of counsel. *Jones v. Lucas Cty. Children Servs. Bd.*, 46 Ohio App.3d 85, 86, 546 N.E.2d 471 (6th Dist.1988). The two part test for ineffective assistance of counsel announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) applies to state actions brought to terminate parental rights. *Jones* at 86.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687.

{¶ 45} Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 46} Mother argues that counsel was deficient in failing to attend court hearings without justification. Counsel failed to appear at a reasonable efforts hearing on August 15, 2011, and at the annual review/motion to extend temporary custody hearing on February 15, 2012. At the time of these hearings, there was no pending motion for an award of permanent custody to LCCS. The motions for permanent custody were not filed until September and October 2012.

{¶ 47} The record reflects that at both hearings Mother spoke with her attorney over the telephone immediately before the hearings and agreed to proceed in his absence.

Transcripts of the hearings are in the record. The hearings were brief and devoid of controversy. Under Assignment of Error No. I, Mother admits that at the annual review hearing on February 15, 2012, the guardian ad litem "testified that Appellant was progressing well and on-track with her services." Counsel has made no specific argument on how the outcome of either hearing prejudiced Mother in this case.

{¶ 48} Counsel called one witness at trial – Mother. Appellate counsel argues that trial counsel was deficient in failing to offer testimony of a medical professional at trial to testify on mental health issues. He argues that Unison counselor Dawn Kluck could have been called as a witness and would have been in the position to testify on how Mother mental health condition has affected her ability to parent, on Mother's progress in her mental health treatment, and the anticipated time frame for her mental health services or other anticipated services. Appellate counsel also argues that counsel could have called the parenting instructor to testify at trial.

{¶ 49} LCCS argues that appellate counsel has failed to identify what favorable information Ms. Kluck would have provided if called to testify. LCCS contends that the argument that Kluck's testimony would be favorable is speculative. LCCS contends that Kluck's testimony would only reinforce evidence in the record of Mother's inconsistent attendance at counseling and failure to responsibly secure mental health treatment.

{¶ 50} On this record, we can only conclude that claims that additional witnesses, if called to testify, would have been favorable to Mother on the outcome of this case is entirely speculative. Mother has failed to establish that the outcome of this case would

have been different had additional witnesses been called to testify on her behalf. Furthermore, the decision of whether to call an expert witness at trial generally is considered a matter of trial strategy and does not support a claim of ineffective assistance of counsel. *State v. Kamer*, 6th Dist. Lucas Nos. L-10-1103, L-10-1189, 2012-Ohio-722, ¶ 32; *State v. Lugli*, 6th Dist. Erie No. E-01-032, 2003-Ohio-479, ¶ 23.

{¶ 51} We find Assignment of Error No. IV not well-taken.

{¶ 52} This court finds that substantial justice was done the party complaining and affirms the judgment of the Lucas County Court of Common Pleas, Juvenile Division. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____
CONCUR.
JUDGE