

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

In re J.T.-W., D.H.

Court of Appeals No. L-12-1353

Trial Court No. JC 10206932

DECISION AND JUDGMENT

Decided: September 10, 2013

* * * * *

Diana Bittner, for appellant J.C.

Christopher S. Clark, for appellant D.H.

Shelby J. Cully, for appellee.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, awarding permanent custody of J.T.-W., born May 22, 2004,

and D.H , born February 18, 2010, to Lucas County Childrens Services (“LCCS”) and terminating the parental rights of J.C., Dem.H. and M.W. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant J.C. (“mother”) is the biological mother of J.T.-W. and D.H.

{¶ 3} Appellant Dem.H. (“father”) is the biological father of D.H.

{¶ 4} M.W. is the biological father of J.T.-W. He is not a party to this appeal.

{¶ 5} In July 2010, LCCS filed a complaint alleging abuse, dependence, and neglect of J.T.-W. and D.H. The complaint alleged that then five-month old D.H. had suffered an orbital fracture and subdural hematoma and that the mother and father presented no causation or explanation for the injuries. The complaint further alleged that LCCS was unable to determine the cause of the injuries and that the emergency room physician had determined that the injuries were “non-accidental and likely physical abuse.”

{¶ 6} A shelter care hearing was held. LCCS was granted protective supervision. A safety plan was developed and the children were placed in the home of the children’s maternal great-grandmother. The goal was reunification. Under the plan, father was granted supervised contact with the children. Mother was allowed supervised daytime and overnight visits at the home of the maternal great-grandmother. After a few weeks, the maternal great-grandmother indicated she was no longer able to care for the children.

{¶ 7} An adjudication disposition was held on September 8, 2010. D.H. was adjudicated abused and J.T.-W. was adjudicated neglected. Mother and M.W. stipulated

to these findings. The court awarded temporary custody of both children to D.H.'s paternal great-aunt. Mother was granted supervised daytime visits with the children in the home of the temporary custodian. Mother was denied overnight visits. Father was granted supervised visits at LCCS. The case plan indicated, in part, that mother would need to "avoid relationships that are unhealthy and likely to compromise the safety and well-being of her family."

{¶ 8} On September 23, 2010, father was indicted on one count of endangering children in violation of R.C. 2919.22(B)(1), (E)(1) and (E)(2)(d), a felony of the second degree. Father was taken into custody.

{¶ 9} Contrary to court order, mother spent the night with the children at the paternal great-aunt's home. Before long, the relationship between the paternal great-aunt and mother began to break down. Mother's visits were moved to LCCS.

{¶ 10} In mid-December, father was released from custody on bond with the stipulation that he have no contact with the children. On Christmas weekend, father had unauthorized contact with D.H. Father's bond was revoked.

{¶ 11} The children were removed from the paternal great-aunt's home on December 28, 2010. Upon removal, the children were screened at the LCCS clinic. Five bruises were found on D.H.'s buttocks and lower back. The children were moved to an agency approved foster home.

{¶ 12} LCCS was granted temporary custody of the children on March 23, 2011. In April, the children were placed in a second agency approved foster home.

{¶ 13} On July 20, 2011, mother moved for legal custody of the children.

Mother's motion was denied.

{¶ 14} Father entered a plea of no contest to the child endangering charge and was found guilty. On November 22, 2011, father was ordered to serve a term of three years in prison.

{¶ 15} On December 1, 2011, LCCS moved for permanent custody of the children. The matter came on for hearing on May 25, 29, and 30, 2012, September 18 and 25, 2012. M.W. waived his right to a hearing and consented to LCCS's request for permanent custody of J.T.-W.

{¶ 16} On November 21, 2012, the trial court filed a judgment entry granting permanent custody of the children to LCCS. Mother appealed and advances four assignments of error for our review.

1. The termination of Appellant's parental rights was against the manifest weight of the evidence.
2. The Trial Court failed to interpret the child abuse statute.
3. Children Service Agency failed to diligently provide services to remedy the reason for removal of the children.
4. The Trial Court improperly considered speculation as evidence in terminating the parental rights of appellant.

{¶ 17} Father appealed and advances one assignment of error for our review.

1. The trial court erred in awarding permanent custody of [D.H.] to Lucas County Children Services where the agency failed to make reasonable efforts to prevent removal of the child and to return said child to the child's home as required by R.C. 2151.419(A)(1).

Mother's First Assignment of Error

{¶ 18} In her first assignment of error, mother asserts that the termination of her parental rights was not supported by the evidence. For the following reasons, we disagree.

{¶ 19} “Before a juvenile court may terminate parental rights and award custody to a public children services agency, it must find clear and convincing evidence of both prongs of the permanent custody test that: (1) the children are abandoned, orphaned, have been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interests of the children, based on the factors set forth in R.C. 2151.414(D).” *In re J.H.*, 6th Dist. Lucas No. L-12-1344, 2013-Ohio-2598, ¶ 17.

{¶ 20} In this case, the trial court found that the first prong of the permanent custody test was satisfied because D.H. and J.T.-W. had been in temporary custody of LCCS for more than 12 of the prior 22 months. Upon review of the record we find there is clear and convincing evidence to support the trial court's finding.

{¶ 21} Despite having found the first prong satisfied, the trial court went on to consider the 16 factors enumerated in R.C. 2151.414(E). Appellant mother does not challenge the trial court's findings in regard to father or M.W. She does, however, challenge the trial court's findings relating to her under divisions (E)(1), (4) and (15).

{¶ 22} First, the trial court found that the children could not be placed with mother based on R.C. 2151.414(E)(1). This division of the statute 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[.] R.C. 2151.414(E)(1).

{¶ 23} The case worker and guardian ad litem testified that they were afraid mother was not capable of protecting the children from abuse if she refused to recognize and acknowledge that D.H. had been abused. The trial court noted that despite the fact that mother completed her case plan services, mother "does not and has not admitted that

the injuries received to the minor child [D.H.], were intentionally inflicted” by father. The trial court further noted that mother denies “any involvement in a domestically violent relationship.” Finally, the trial court noted that despite being told that ongoing contact with father would likely jeopardize her ability to have the children returned to her, mother maintains a relationship with father.

{¶ 24} The problems that initially caused the children to be placed outside the home were the severe injuries to D.H., the parents’ lack of a reasonable explanation for the injuries, and the parents’ refusal to acknowledge the injuries were intentionally inflicted. The trial court held that mother failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child’s home. Upon review of the record, we find that the trial court’s decision was supported by clear and convincing evidence.

{¶ 25} Second, the trial court found that the children could not be placed with mother based on R.C. 2151.414(E)(4). This division of the statute provides:

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[.] R.C. 2151.414(E)(4).

{¶ 26} While the trial court noted that mother “has stable housing and visits the children regularly,” it found mother unwilling to provide an adequate permanent home

for the children by refusing to end her relationship with father despite knowledge that the relationship “may well prevent her children from being returned to her care.”

{¶ 27} The trial court held that the mother believes that the injuries to D.H. were an accident and that mother continues to maintain a relationship with father despite being told an ongoing relationship would likely jeopardize her ability to have the children returned to her. Based on our review of the record, we find that the trial court’s decision was supported by clear and convincing evidence.

{¶ 28} Third, the trial court found that the children could not be placed with mother based on R.C. 2151.414(E)(15). This division of the statute provides:

The parent has committed abuse as described in section 2151.031 of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child’s placement with the child’s parent a threat to the child’s safety[.] R.C. 2151.414(E)(15).

{¶ 29} In turn, R.C. 2151.031 provides that an “abused child” includes any child who “[e]xhibits evidence of any physical * * * injury * * * inflicted other than by accidental means * * * which is at variance with the history given of it.” R.C. 2151.031(C).

{¶ 30} The trial court noted that D.H.’s injuries were severe and perpetrated when he was home alone with his father when D.H. was only five months of age. The trial

court further noted “[n]either parent had a reasonable explanation for the injuries and refused to acknowledge the injuries were intentionally inflicted.” Based on our review of the record, we find that the trial court’s decision in regard to the first prong of the permanent custody test was supported by clear and convincing evidence.

{¶ 31} To satisfy the best interest prong of the permanent custody test, LCCS was required to establish, by clear and convincing evidence, that an order of permanent custody to the agency is in the best interest of the children based on an analysis under R.C. 2151.414(D). In so doing, the trial court must consider all relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers; the wishes of the children; the custodial history of the children; and the children’s need for permanence.

{¶ 32} Here, the trial court’s judgment entry reveals that the court considered, in detail, all the enumerated factors in R.C. 2151.414(D). In regard to the children’s interrelationship with each other, the evidence is clear that the children shared a typical sibling relationship. In regard to the children’s interrelationship with their mother, the caseworker testified she did not see a strong bond between the mother and children at visitations. The guardian ad litem testified that the bond between mother and D.H. is not strong. She further testified that the bond between mother and J.T.-W. “has gotten worse.” The evidence indicates that while J.T.-W. loves her mother and wants to stay with her brother, she is fearful of returning home. The guardian ad litem testified that she

believes mother and father will continue to be a couple when father is released from jail and that mother cannot protect the children because she refuses to accept D.H.'s injuries were caused by father. In that regard, the guardian ad litem testified that it was her belief that it is not in the children's best interest to be returned to mother. In regard to custodial history, two relative placements were attempted; however the children were placed in foster care when the relative placements were unwilling to follow the orders of the trial court or were otherwise disrupted. All evidence indicates that D.H. bonded well with the foster care providers and that that J.T.-W. struggled with the changes in custody. The children's need for permanency was uncontroverted.

{¶ 33} Upon review, we conclude that there was clear and convincing evidence underlying the trial court's determination that it was in the best interest of the children to grant permanent custody to LCCS. Appellant mother's first assignment of error is overruled.

Mother's Second Assignment of Error

{¶ 34} In her second assignment of error, appellant mother argues the trial court improperly interpreted R.C. 2151.031(C) to require mother to admit that father intentionally inflicted the injuries to D.H.

{¶ 35} In response, LCCS argues that the trial court did not require mother to acknowledge that father intentionally inflicted the injuries to D.H. Rather, the court accepted the concerns of the LCCS case worker and guardian ad litem that without mother's recognition that the injuries were non-accidental, then the "likelihood of

recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety." R.C. 2151.414(E)(15).

{¶ 36} Our review of the mother's testimony affirms mother's assertion that on one occasion she did admit that D.H.'s injuries occurred while father was supervising D.H. and that the injuries were not a result of an accident. However, testimony from the caseworker and guardian ad litem reveal mother's recurring inability to acknowledge abuse by father. The credibility of witnesses are issues primarily for the trier of fact. *See State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). Here, the trial court indicated on the record that mother's testimony "was not credible."

{¶ 37} The record supports LCCS's interpretation of the concerns identified by the trial court. Appellant mother's second assignment of error is overruled.

Mother's Fourth Assignment of Error

{¶ 38} In her fourth assignment of error, appellant mother argues that the trial court improperly considered "speculation" as evidence in terminating the parental rights of appellant. In support of this argument, appellant asserts the trial court impermissibly used evidence of speculation to terminate the parental rights of the appellant mother when it concluded the parents are still in a relationship and that that their relationship will continue after father is released from prison in August 2014. In response, LCCS contends that the trial court did not speculate as to the status of mother and father's relationship because the clear and convincing evidence establishes a continuing relationship between mother and father.

{¶ 39} At the hearing, mother testified she was no longer involved in a romantic or intimate relationship with father. At the time of the hearing, she was speaking to father twice a week and visiting him once a week in prison. Mother indicated she and father were friends and that she had no intention of resuming the relationship when father is released from prison in 2014. When asked about the telephone calls to the prison, mother admitted she closes most phone calls with father by saying “I love you.” Portions of the recorded conversation were played on the record.

{¶ 40} Father testified that at the time of the hearing his relationship with mother was “just strictly friends,” and that since November 2011 he has been involved with another woman. Father asserts that fear of future harm to D.H. is not an issue because father will be incarcerated until June 2014.

{¶ 41} To the contrary, the guardian ad litem testified that she observed a bond between the parents and listened to hours of taped conversations between mother and father. In her opinion, mother and father intend to continue their relationship after father is released from prison. The guardian ad litem also testified that she read poems that mother wrote to father and posted on Facebook that would support her conclusion.

{¶ 42} As stated above, the credibility of a witness is primarily for the trier of fact and the trial court indicated mother’s testimony simply “was not credible.”

{¶ 43} In its entry of judgment, the trial court set forth numerous reasons for the termination of mother’s parental rights. Notably, the court held that mother’s *refusal to*

end her relationship with father showed an unwillingness to provide an adequate home for the children. Citing our decision in *In re Julia G., Jaclynn M. and Jordon M.*, 6th Dist. Lucas No. L-95-157, 1996 WL 465402 (Aug. 16, 1996), the court held that mother's refusal to believe that D.H.'s injuries were the result of abuse, despite medical evidence to the contrary, demonstrated that mother is "unable to protect these children and assure their safety in the future." For these reasons, appellant mother's fourth assignment of error is overruled.

Mother's Third and Father's Sole Assignment of Error

{¶ 44} Mother's third and father's sole assignments of error are similar and will be addressed together. In her third assignment of error, appellant mother argues that LCCS failed to diligently provide services to remedy the reason for removal of the children. In his sole assignment of error appellant father argues that the trial court erred in finding LCCS made a reasonable effort to reunify the children with their mother.

{¶ 45} In 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 Myers*, 4th Dist. Athens No. 02CA50, 2003-Ohio-2776, ¶ 18. A "reasonable effort" is an "honest, purposeful effort, free of malice and the design to defraud or to seek unconscionable advantage." *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011 (12th Dist.1992).

{¶ 46} In this case, the trial judge found that LCCS made "reasonable efforts to prevent the need to remove the children from the parents' care." In regard to mother, the

“reasonable efforts” noted by the trial judge included a parenting education program, domestic violence education, and diagnostic assessments to determine mental health and/or substance abuse concerns. The trial court opined,

[LCCS] provided services to [mother] for over two years. She fully participated in services. These facts make the Court all the more concerned for these children’s safety. The purpose of services is to educate the parent on the issues of concern and for the parent to demonstrate a measurable change. In this matter, compliance and [sic] with services cannot be confused with remediation of the problems that caused the removal of the children from the home. In the two years of services [mother] participated in, she gained no knowledge or insight from these services as to the reasons for her children’s removal. As such, the Court finds she cannot provide a protective home to her children. The facts and concerns proven at the permanent custody hearing were unchanged from those identified at the time of the adjudication.

{¶ 47} Based on the foregoing, we find the evidence supports the trial court’s determination that reasonable case planning and diligent efforts were made to assist mother to remedy the problems that initially caused the children to be placed outside the home. The subject assignments of error are overruled.

{¶ 48} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellants are 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.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, 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>
