[Cite as *In re A.G.*, 2014-Ohio-5878.]

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

In re A.G.

Court of Appeals No. L-14-1079

Trial Court No. JC 12222552

DECISION AND JUDGMENT

Decided: November 3, 2014

* * * * *

Tim A. Dugan, for appellant.

Bradley W. King, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, mother, appeals the April 9, 2014 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which terminated her parental rights with respect to A.G. and awarded permanent custody to Lucas County Children Services ("LCCS"). The father has not appealed the trial court judgment. For the reasons set forth herein, we affirm.

{¶ 2} A.G. was born in 2010, and has five older half-siblings. The father of A.G. is T.W., and the father of her half-siblings is C.A. LCCS had been involved with the family for several years. In March 2012, appellant was hospitalized due to severe migraines and mental health concerns. LCCS filed a complaint in dependency and neglect and motion for a shelter care hearing for appellant's five minor children due to its belief that the children were left with an inappropriate caregiver, their maternal great-grandmother. The complaint further chronicled LCCS' prior involvement with the family which included issues with supervision, discipline, and domestic violence. At the time the complaint was filed, fathers C.A. and T.W. were incarcerated.

{¶ 3} Four minor children were placed in foster care (the 17 year old was placed with relatives) and a case plan was filed with the court detailing the various services for the family and listing a goal of reunification. In June 2012, A.G. and her sister were placed in their great-aunt, L.G., and uncle, J.C.'s home.

{¶ 4} In June 2013, the children were removed and A.G.'s sibling went to live with C.A., her father. A.G. was placed in foster care. On July 29, 2013, C.A. filed a motion for legal custody of his three minor children and of A.G. Later, C.A. withdrew his motion as to A.G. A hearing was held on the motion over several days and on January 24, 2014, legal custody of the three minor children was awarded to C.A.

{¶ 5} On January 29, 2014, LCCS filed a motion for permanent custody of A.G. The motion stated that A.G. had been in temporary custody of the agency for 12 or more

of the last 22 months, that reasonable efforts were made to reunify her with appellant, and that it was in her best interest to terminate appellant's parental rights.

{¶ 6} On February 3, 2014, A.G.'s great-aunt and uncle filed a motion to intervene in the action and for legal custody of A.G. The two were represented by appellant's attorney although, at the time of the permanency proceedings, the attorney claimed that he no longer represented the mother. The court granted the motion. On February 26, 2014, prior to the commencement of trial, a discussion was held regarding the attorney's conflict of interest as appellant's former counsel in representing the great-aunt and uncle. Despite claims that the conflict was waived by the parties, the court concluded that because the great-aunt and uncle would have to use information the attorney got from the mother against her, the conflict could not be waived. At that point, the court found that the attorney could not represent the interveners and appointed new counsel for appellant. The court informed the great-aunt and uncle that they either needed to find new counsel or proceed pro se.

{¶ 7} The case proceeded to trial on March 18 and 19, 2014, and March 20 and 24, 2014, and the following evidence was presented. The family's caseworker, Keely Gray, testified. Gray described appellant's case plan as requiring that she participate in parenting classes, domestic violence counseling, and mental health services. There was also counseling services for the children. Gray testified that appellant completed the case plan services but that she had not progressed. Specifically, Gray stated that appellant had completed parenting classes "a few times" but was still making "inappropriate" decisions.

Gray cited examples including appellant's belief that her mother could care for the children despite her own mental health issues and appellant's desire to file for guardianship over her; also, her involvement with a man with a history of domestic violence. When further questioned about services, Gray testified that even though appellant completed the parent-child interactive program ("PCIT"), they requested that she go through it again. Appellant refused.

{¶ 8} Gray then testified about the progression of appellant's visitation with the children following their removal from her custody. Appellant initially had level one, or the most restrictive, supervised visitations which take place at the agency. Level two visitation, also at the agency but in a more intimate, less restrictive setting, began in November 2012. Gray testified that appellant proceeded to level three visits, or visits at her home, and stayed there until June 2013, when one of her children ran away. According to Gray, appellant failed to properly monitor the child and then, once she realized he was missing, failed to properly respond. The child was returned a few hours later by two unknown men in a vehicle appellant recognized; she did not question the men or get the license plate of the vehicle.

{¶ 9} Gray testified that for just under one year, appellant's aunt and uncle had custody of A.G. and a sibling. There were concerns about the couple's ability to get the children to counseling and other appointments due to their work schedules. They gave up temporary custody in June 2013. Appellant had also complained that the children were being physically disciplined in the home. According to Gray, once A.G. was placed in

foster care she was toilet trained within days, began talking more, and her overall behavior and health improved.

{¶ 10} Gray stated that in the fall of 2013, while appellant was on level one visitation, the visits were very chaotic. The children were loud and disruptive and Gray stated that she received several complaints from family visit coaches and supervisors. More concerning was that LCCS employees continued to hear her discussing details of the case with the children. Gray testified that she believes that it is in A.G.'s best interest to award custody to LCCS.

{¶ 11} During cross-examination, Gray was questioned about the fact that appellant had successfully completed all of her case plan services and that she is in ongoing mental health and domestic violence services. Gray was further questioned about appellant's reluctance to attend PCIT; she acknowledged that appellant did, in fact, attend a PCIT class in February 2014. It was discussed that a prior PCIT class involved appellant's older children, not A.G. The February classes were discontinued due to LCCS' pursuit of permanent custody.

{¶ 12} LCCS employee, Michelle Penn, testified that she was the visit coach caseworker for appellant from August 2012 through July 2013. Penn testified that during visits with her five children, appellant would often speak negatively about the older children's father. Appellant would also speak negatively about the foster parent. Penn acknowledged that appellant met the children's needs but that, despite her repeated attempts, appellant was not able to filter her conversations with the children. During

cross-examination, Penn acknowledged that appellant was open to her instruction and that she did improve during the course of their work together.

{¶ 13} Annette Schlegel, an LCCS family visit monitor, testified that she supervised appellant's level one and two visitations. Schlegel stated that she had to redirect appellant when appellant spoke negatively about the children's father. LCCS security officer, Courtney Mowery, testified that she supervised level one visitation. Mowery stated that she has supervised over 20 of appellant's visitations. Mowery testified that on two occasions appellant, against the visitation rules, attempted to tape record a visitation.

{¶ 14} A.G.'s foster mother, B.C., testified next. B.C. stated that when A.G. arrived at her home, at age three, she was not toilet trained and that, after about one week she was using the toilet. After one month she was dry overnight. Regarding her speech, B.C. stated that A.G. was "unintelligible" when she arrived at her home but that after a few weeks her speech improved dramatically. B.C. surmised that the improvement was largely due to being around other children. B.C. testified that she observed appellant involving A.G. in what she believed to be "adult" conversation regarding the LCCS case. During cross-examination, B.C. acknowledged that some children take longer to toilet train than others.

{¶ 15} LCCS supervisor, Holly Mangus, testified that appellant's family was first brought to her attention in 2010 regarding alleged sexual abuse of a younger child perpetrated by an older child. The alleged perpetrator was placed outside the home and

case plan services were offered. The case was reopened in August 2011, and remained an open, noncustody case until March 2012, when the children were removed. Mangus testified that the children were removed because appellant had been admitted to the hospital and the children were left in the care of an older child and maternal grandmother. Mangus stated that the older child had gotten into a physical altercation with a younger child and that the grandmother had "significant" mental health issues. In fact, appellant had been looking into filing for guardianship over her mother.

{¶ 16} Mangus testified that once the children were placed in foster care their health and behavior improved. Mangus stated that she felt that the improvements were due to the removal of the "environmental stressors" in their lives and placement in structured and secure environments. Mangus stated that A.G. was in foster care while the three older siblings had been placed with their father.

{¶ 17} Mangus, too, testified about the PCIT program. Mangus stated that the program was proposed for appellant and A.G. in September 2013, but that appellant refused to participate. Mangus acknowledged that appellant had participated with a different child but stated that the program was focused on one child at a time. As testified to previously, appellant went from level three visitation down to level one due to her son running away while in her care, her inappropriate conversations with her children, and the recording devices found on her during visits.

{¶ 18} Mangus stated that appellant had participated in "several" services through LCCS but that she has failed to make any significant progress. She testified that the

agency had made extensive efforts to reunify the family. Finally, Mangus stated that the agency was recommending permanent custody to LCCS for A.G. in the hopes of her being adopted.

{¶ 19} C.A., father of A.G.'s half-siblings, testified next. C.A. testified that he withdrew his motion for custody of A.G., not his biological child, due to harassment by appellant. C.A. testified that during the summer of 2013, when he had visits with the children in his home, appellant would continually drive by the house and call the police and say that he was abusing the children. C.A. stated that this happened 16 to 20 times. C.A. testified that he was awarded legal custody of the three minor children in January 2014.

{¶ 20} C.A. stated that he had concerns about the past history of the children, the "negativity," manipulation, and lying. He testified that initially when the children came home from visitation with appellant they were upset and acting out. C.A. testified that the children figured out that appellant was not telling the truth and became more relaxed. C.A. stated that he did not feel that appellant should parent A.G.

{¶ 21} C.A. was cross-examined about his criminal history. C.A. admitted that he was in prison for drug trafficking when the LCCS case began. He also admitted that he had been in prison three times. C.A. stated that he and appellant have five children together ranging in age from 20 to 7. C.A. testified that for 10 of the 20 years he had known appellant, he was in prison.

{¶ 22} LCCS called A.G.'s great-uncle, J.C., to testify. He stated that he and his wife, L.G., had custody of A.G. from June 2012 through June 2013. J.C. testified that he and his wife would want to adopt A.G. if appellant's parental rights were terminated. J.C. stated that he saw no reason why A.G. should not be returned to appellant because she completed the required programs. J.C. was then questioned about his affidavit made in connection with his motion to intervene for legal custody of A.G. where it stated that appellant was an unfit parent. J.C. stated that he failed to read the affidavit before signing it and did not remember that statement.

{¶ 23} During cross-examination, J.C. denied that they requested that A.G. and her sister be removed from the home. J.C. stated that he only requested respite care when they were unable to take the girls on a planned vacation. J.C. also clarified that he and L.G. are not legally married, but he believes they are common law spouses and have been together for 29 years.

{¶ 24} The children's guardian ad litem ("GAL"), Joan Crosser, testified that when the case was opened, she had concerns about appellant's mental health. Though never diagnosed, Crosser also felt that the mother had the characteristics of Munchausen by Proxy, the psychological condition where a caregiver fabricates or induces health problems in those in their care. Crosser's concern stemmed from the fact that each child had multiple diagnoses and the conditions that were identified were based, largely, on subjective histories. These concerns were also raised by a treating pediatrician. Once the children were placed in foster care nearly all of the conditions resolved. Crosser also

expressed concern that appellant had Munchausen Syndrome based on her own excess of medications and medical treatment. As to appellant's general mental health, Crosser stated that she had a history of sexual abuse and physical traumas.

{¶ 25} Crosser testified regarding the steps taken by LCCS to reunify appellant with her children. Crosser stated that appellant advanced in her services, but that she had trouble setting and remaining in the proper mother and child roles. Specifically, appellant had a "significant" inability to converse in an age-appropriate manner with her children. Crosser then chronicled the progression and regression of appellant's visitation. Crosser stated that she does not feel that appellant is able to protect A.G. and that it is in her best interests that LCCS be awarded permanent custody.

{¶ 26} On April 9, 2014, the trial court granted LCCS' motion for permanent custody finding that appellant failed to remedy the conditions which caused the removal of the children, has chronic mental illness, lost custody of three of her children, and that A.G. had been in custody of LCCS for 12 or more months of a consecutive 22-month period. The trial court also terminated the father's parental rights and denied the great-aunt and uncle's motion for legal custody. This appeal followed.

{¶ 27} Appellant now raises five assignments of error for our review:

1) Appellant received ineffective assistance of counsel.

2) Appellant was forced to go to trial without her privately retained counsel who was never withdrawn by the trial court.

3) The cumulative effect of the errors committed at trial prevent[ed] appellant from having a fair trial.

4) The decision to terminate appellant's parental rights fell against the manifest weight of the evidence.

5) LCCS failed to demonstrate reasonable efforts to prevent the continued removal of A.G.

{¶ 28} In her first assignment of error, appellant argues that her prior counsel's ineffectiveness created a conflict of interest and prevented her from having proper representation at trial. Specifically, her prior counsel's act of representing the intervening great-aunt and uncle caused the appointment of new counsel too close to trial. Appellant also contends that counsel was ineffective by failing to request a continuance.

{¶ 29} The right to counsel guaranteed in juvenile proceedings by R.C. 2151.352 and Juv.R. 4, includes the right to the effective assistance of counsel. *In re. Heston,* 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *Jones v. Lucas Cty. Children Servs. Bd.*, 46 Ohio App.3d 85, 546 N.E.2d 471 (6th Dist.1988). "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." *Heston* at 827. Thus, to prevail on a claim of ineffective assistance of counsel the appellant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice arose from such performance. *State v. Reynolds,* 80

Ohio St.3d 670, 674, 687 N.E.2d 1358 (1998), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 30} Carefully reviewing the court proceedings, we agree with the trial court's action to remove prior counsel from the proceedings due to the nonwaivable conflict of interest. We cannot say, however, that appellant was prejudiced by the appointment of new counsel or her ability to prepare for trial. Counsel vigorously cross-examined witnesses, made several objections, requested discovery and subpoenaed multiple witnesses. After conferring with appellant, counsel ultimately decided not to call the witnesses.

{¶ 31} Regarding counsel's failure to request a continuance, at the February 26, 2014 pretrial, the court did state that it could not extend the trial date because the case had been pending since March 2012, and it would lose jurisdiction. Appellant's prior attorney indicated that he would make certain that new counsel was prepped as to the case specifics in order to be prepared for trial. Appellant's new trial counsel was not at this pretrial.

{¶ 32} At the March 7, 2014 pretrial, counsel indicated to the court that she had been appointed one week ago. She did not request a continuance. She also set forth her witnesses list which included appellant's therapist and her doctor, various clinicians who had worked with appellant, and three family friends. At that time counsel also raised an issue regarding appellant's visitation with the three children in C.A.'s custody. Counsel

also questioned the LCCS attorney in order to identify employees who had been assigned to appellant's case.

{¶ 33} Juv.R. 23 provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties." Further, "[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. Counsel did not request a continuance at that time thus, we cannot be certain whether the court would have granted it or not. Even assuming that counsel should have made the request, there is no indication of how counsel would have been better prepared for trial. As stated above, counsel thoroughly cross-examined the parties and subpoenaed witnesses which, after consulting with appellant, she decided not to call.

{¶ 34} Accordingly, we cannot say that counsel was ineffective by failing to request a continuance. Appellant's first assignment of error is not well-taken.

{¶ 35} In appellant's second assignment of error, she argues that she was prejudiced by proceeding to trial without her privately retained counsel. As noted by both parties, counsel created a conflict of interest by representing intervenors, J.C. and L.G., in support of their motion for custody of A.G. Appellant claims no prejudice caused by the removal of former counsel, only that the fact was not journalized. Appellant's second assignment of error is not well-taken.

{¶ 36} In her third assignment of error, appellant contends that the cumulative errors set forth in her first and second assignments of error prevented her from receiving

a fair trial. The only conceivable error set forth above was prior counsel's attempt to represent A.G.'s great-aunt and uncle at the permanent custody hearing. Thus, because there were no multiple errors, there can be no cumulative error. *See State v. Hemsley*, 6th Dist. Williams No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. Appellant's third assignment of error is not well-taken.

{¶ 37} In appellant's fourth assignment of error, she argues that the trial court's decision to terminate her parental rights was not supported by clear and convincing evidence. In order to award permanent custody to a public children's services agency, a court must find under R.C. 2151.414(B)(1)(a), where the child is not orphaned or abandoned, that 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." Alternatively, under R.C. 2151.414(B)(1)(d), the court must find that the child has been in the temporary custody of a public children services agency for "twelve or more months of a consecutive twenty-two-month period * * *." The trial court must also determine that an award of permanent custody to the agency is in the child's best interests. R.C. 2151.414(B)(1).

{¶ 38} R.C. 2151.414(E)(1)-(16) lists factors setting forth specific parameters under which a trial court may terminate parental rights. *In re William S.*, 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996). Under R.C. 2151.414(E), if the court determines by clear and convincing evidence that 1 of the 16 factors exists as to both parents, the court "shall enter a finding that the child cannot be placed with either parent within a reasonable time

or should not be placed with either parent." R.C. 2151.414(D) lists relevant factors to be considered by the court in determining whether an award of permanent custody to a public children's services agency is in the best interests of the child.

{¶ 39} As to appellant, the trial court based its decision to terminate parental rights on findings, by clear and convincing evidence, of the existence of three factors under R.C. 2151.414(E). The court found the existence of factors R.C. 2151.414(E)(1), (2), and (16). The court also found that an award of permanent custody to LCCS was in the best interest of the child under R.C. 2151.414(D).

{¶ 40} Appellant argues that the evidence does not support the trial court's finding that A.G. could not be placed with her in a reasonable time. Appellant states that she had been progressing with mental health counseling, was compliant with her case plan services, and was meeting the needs of her children. Appellant argues that mere "inappropriate conversations" with her children about her ex-spouse was insufficient to terminate her parental rights.

{¶ 41} In its judgment, the court found that A.G. could not be placed with appellant because despite years of therapy and medication management, appellant had made no real progress in improving her mental health or the behaviors which caused the removal of the children. R.C. 2151.414(E)(1). Specifically, the court found that appellant continued to have inappropriate conversations and interrogations with her children despite intervention by the caseworker, the supervisor, the GAL, and two visit coaches. The court further found that the chaotic interactions between appellant and her

child were detrimental. The court noted that appellant refused to participate in the PCIT program with A.G. until after LCCS filed its motion for permanent custody. Finally, the court found that appellant violated the visitation rules on two occasions.

{¶ 42} Under R.C. 2151.414(E)(2), the court found that appellant's mental illness was so severe that she was not able to provide a home for A.G. at the time of the hearing or within one year of the hearing. The court noted appellant's diagnoses of post-traumatic stress disorder and major depressive disorder. The court stated that the children had multiple health conditions while in appellant's care and improved significantly when removed from the home.

{¶ 43} Under R.C. 2151.414(E)(16), the court found that appellant lost legal custody of three of A.G.'s siblings approximately one month prior to the permanent custody motion being filed.

{¶ 44} Finally, under R.C. 2151.414(D)(1)(c)(d), the court found that A.G. had been in temporary custody of LCCS for 12 of a consecutive 22-month period and that she needs legally secure placement. The court noted that both the caseworker and the GAL testified that A.G. should be allowed to grow up in a house free of chaos, manipulation and negativity. The GAL recommended that a permanent custody award to LCCS was in A.G.'s best interest.

{¶ 45} The court then noted that LCCS exercised reasonable efforts to avoid the removal and continued removal of A.G. from appellant's home and that it exhausted the

case plan services available to appellant. Despite this, appellant failed to show significant progress.

{¶ 46} Upon our independent review of the record, we agree that clear and convincing evidence exists supporting the court's finding of the above factors. Appellant's fourth assignment of error is not well-taken.

{¶ 47} Appellant's fifth and final assignment of error argues that LCCS failed to make reasonable efforts to prevent the continued removal of A.G. from the home. 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 Savannah J.*, 6th Dist. Lucas No. L-08-1123, 2008-Ohio-5217, ¶ 40, citing *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 an unconscionable advantage." *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011 (12th Dist.1992).

{¶ 48} Reviewing the trial testimony, multiple LCCS employees testified to the services provided to appellant and the case plans filed with the court provide further evidence. LCCS supervisor, Holly Mangus, testified as to the extensive services provided to appellant and that there were no other referrals that they could have made. Thus, we find that the record supports a finding that the agency made reasonable efforts. Appellant's fifth assignment of error is not well-taken.

{¶ 49} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE