[Cite as *In re D.E.P.*, 2009-Ohio-3076.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92226

IN RE: D.E.P.

A Minor Child

Appeal by M. P., Mother

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-08932806

BEFORE: Celebrezze, J., Stewart, P.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT M.P.

Kevin H. Cronin
The Brownhoist Building
4403 Saint Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE, C.C.D.C.F.S.

William D. Mason
Cuyahoga County Prosecutor
BY: James M. Price
Assistant Prosecuting Attorney
8111 Quincy Avenue
Room 341
Cleveland, Ohio 44104

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, M.P.[1] ("Mother"), appeals the trial court's decision terminating her parental rights and granting permanent custody of her child to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} On January 16, 2008, Mother gave birth to a son, D.E.P. On January 18, 2008, D.E.P. was removed from Mother's custody,[2] and CCDCFS filed a complaint for dependency and permanent custody. On May 6, 2008, the complaint was refiled because a dispositional hearing had not been held within the statutory 90-day period. On May 15, 2008, the former complaint was withdrawn, and a hearing was held. On the basis of testimony from CCDCFS staff about Mother's mental health[3] and non-compliance with taking her prescription medication, the court determined that the child would be at risk if returned to Mother. The trial court ordered D.E.P. into the predispositional temporary custody of CCDCFS. See Juv. Case No. AD08932806.

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[1]The parties are referred to herein by their initials or title in accordance with this court's established policy regarding non-disclosure of identities in juvenile cases.

[2]At all times relevant to this case, Mother resided at Northcoast Behavioral Institute.

[3]Mother is diagnosed as paranoid schizophrenic and prescribed daily medication and counseling.

{¶ 3} On August 5, 2008, the court held a permanent custody hearing. Participating at the hearing were assistant prosecuting attorney for CCDCFS, Mark Adelstein; CCDCFS social workers, Lisa Collins and Micheline Willis; Mother's counsel, public defender Jeff Gardner; Mother's guardian ad litem, Anjanette Arabian; and guardian ad litem and attorney for D.E.P., Troy Hough. Mother did not participate, and Ms. Arabian and Mr. Gardner represented to the court that Mother had limited comprehension of the proceedings. Mother asked to be returned to Northcoast Behavioral Institute before the hearing got underway.

{¶ 4} CCDCFS social worker Collins testified that she spoke with Mother after D.E.P.'s birth; that Mother had trouble communicating a plan to take the baby home and care for him; and that Mother said she planned to take D.E.P. home where he would sleep in the bathtub. Ms. Collins also testified that on other occasions when she attempted to meet with Mother at Hanna Pavilion immediately after D.E.P.'s birth, Collins was told by staff members there that Mother was heavily medicated and unable to communicate. Collins also testified she had no contact with the possible fathers and that two relatives had come forward as possible placement options for D.E.P.

{¶ 5} CCDCFS social worker Willis testified that she attempted to review the case plan with Mother while Mother was at Northcoast Behavioral Institute; at one point, Mother told her D.E.P.'s father was Jesus; and paternity had not

been established.[4] Willis also testified that Mother told her she had been to "Never Neverland" and seen fairies and that she lived with her husband and "the robot." She testified that Mother became agitated and unresponsive when Willis tried to discuss custody of D.E.P. with her.

{¶ 6} During the hearing, there was testimony about whether Mother had signed a waiver for the release of her medical records. The court was unable to determine who initiated the waiver process with Mother and whether a waiver could be located. Mr. Gardner made a motion in limine to exclude the mental health and medical records from University Hospital and Northcoast Behavioral Institute which CCDCFS sought to introduce. Mr. Gardner argued that the alleged waiver for the release of records signed by Mother was invalid because he and Ms. Arabian had not been informed of the waiver. He argued that Mother's mental incapacity prevents her from executing a valid waiver.

{¶ 7} Although there was no confirmation as to whether Ms. Arabian and Mr. Gardner were given notice of the waiver, the court denied the motion on the basis that the records were released in response to a court-ordered subpoena dated July 29, 2008. The contents of the medical records were never read into the record, nor was there any indication that their contents were considered by the court in reaching its determination.

[4]Mother indicated at least two other possible fathers, and CCDCFS was unsuccessful in its attempts through publication to locate D.E.P.'s father.

{¶ 8} Ms. Arabian testified that in her conversations with Mother, Mother had not demonstrated a full grasp of the court proceedings. She testified that Mother indicated she did not want to participate in the proceedings and that Ms. Arabian should "just give [D.E.P.] her phone number and when he's old enough he can call her." She also testified that there was no projected release date of Mother from Northcoast Behavioral Institute and that Mother could not be restored. Ms. Arabian testified that despite Mother's interest in being part of D.E.P.'s life, Mother showed no signs that she is capable of taking care of him.

{¶ 9} Mr. Hough testified that D.E.P. had been in foster care with the same family since his birth; that D.E.P. was bonding with his foster family; and that the foster family had expressed an interest in adopting D.E.P.

{¶ 10} The court inquired about placement with relatives. Mr. Adelstein indicated that the only relatives who were available for consideration were the maternal grandmother and a maternal aunt. Both relatives suffered from diagnosed mental illnesses, and neither relative agreed to cooperate with a case plan to pursue placement.

{¶ 11} In closing, Mother's counsel argued that there had been no determination that Mother could not be restored or when she might be released from Northcoast Behavioral Institute. Therefore, counsel argued, the possibility that Mother could work her case plan remained open.

{¶ 12} At the close of the hearing, Mother's medical records were admitted into evidence along with other certified records providing for the permanent custody to CCDCFS of two of Mother's other children.[5]

{¶ 13} The court announced its findings from the bench at the conclusion of the hearing. In reliance on the testimony of the witnesses, the court concluded that placement with Mother or relatives is not possible; that Mother is diagnosed with chronic mental illness and was non-compliant with her treatment program; and that Ms. Arabian agreed Mother could not be restored. The court acknowledged that the evidence indicated that D.E.P. was thriving with his foster family. The court thus found D.E.P. to be dependent and that permanent custody was in the child's best interest.

Review and Analysis

{¶ 14} On October 9, 2008, Mother filed a notice of appeal. She asserts three assignments of error[6] for our review, all of which are related to whether the court erred in admitting Mother's mental health and medical records into evidence. Accordingly, we discuss them together.

Introduction of Medical Records

{¶ 15} In her first and second assignments of error, Mother argues that the court erred by allowing her mental and medical health records to be introduced

[5]References in the briefs are made to Mother having had three children permanently removed from her custody. In fact, one child was removed from her custody in California; Mother's two other children were removed from her custody in Cuyahoga County, and that evidence is part of the record before this court.

[6]Appellant's assignments of error are contained in the Appendix to this Opinion.

into evidence and used to determine the dependency and permanent custody of D.E.P. She argues that the restrictions in place under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") were violated when the court admitted her medical records into evidence at the permanent custody hearing. She also argues in her third assignment of error that Juv.R. 17(G) prohibits the court from using its subpoena power to gain access to privileged information. We are not persuaded by these arguments.

{¶ 16} Once it established temporary custody of D.E.P., CCDCFS was required to maintain a case plan for D.E.P. pursuant to R.C. 2151.412, which states in relevant part: "(A) Each public children services agency and private child placing agency shall prepare and maintain *a case plan for any child* to whom the agency is providing services and to whom any of the following applies: (1) The agency filed a complaint pursuant to section 2151.27 of the Revised Code alleging that the child is an abused, neglected, or dependent child; (2) The agency has temporary or permanent custody of the child; ***." (Emphasis added.)

{¶ 17} Communications between Mother and her physicians or the social workers are exempt from protection normally afforded to doctor-patient communications. See R.C. 2317.02(B)(1)(b) and R.C. 2317.02(G)(1)(g).[7] A parent

[7]R.C. 2317.02 states: "The following persons shall not testify in certain respects:
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(B)(1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

who is required to undergo court-ordered treatment as part of a case plan prepared by CCDCFS effectively waives his or her rights to confidentiality of communications with a treating physician or social worker. See R.C. 2317.02.

{¶ 18} Mother's ability to provide and care for D.E.P. was the pivotal issue before the court in determining whether to find the child dependent and to grant permanent custody to CCDCFS. As such, Mother's medical records were critical to the court's determination.[8]

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

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(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 [2151.41.2] of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151 of the Revised Code.

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(G)(1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757 of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist, or independent marriage and family therapist, or registered under Chapter 4757 of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

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(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 [2151.41.2] of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151 of the Revised Code."

[8]It should again be noted that at no time during the hearing did any witness read portions of the medical records into evidence or refer to their contents; Mother's records remain under seal. For Mother's counsel to suggest that the court engaged in "unlimited" use of her records is insincere.

{¶ 19} Mother's mental health and medical records are also not privileged communications afforded protection under Juv.R. 17(G).[9] Mother's motion in limine sought to prevent her medical and mental health records from being admitted into evidence. Only Northcoast Behavioral Institute and University Hospitals have standing to challenge a subpoena for documents within their possession and control. Neither entity appeared at the hearing to challenge the subpoenas. See *Abels v. Ruf*, Summit App. Nos. 22959, 23013, 2006-Ohio-3813, citing *Jones v. Records Deposition Serv. of Ohio*, 6th Dist. No. L-01-1333, 2002-Ohio-2269, and *Ramus v. Ramus* (Aug. 19, 1976), Cuyahoga App. No. 34965 (only the person subpoenaed had standing to file a motion to quash under Civ.R. 45(C)).

{¶ 20} The subpoenaed records are not protected as privileged communications. The communications Mother sought to have withheld from the court's scrutiny are not privileged because they were made when Mother was subject to the case plan created by CCDCFS. Thus, Juv.R. 17(G) does not apply here, and the court properly admitted Mother's records into evidence.

{¶ 21} To the extent the court relied on Mother's medical records, if at all, we find no error. Mother's medical records were obtained by court order and were not subject to protection under R.C. 2151.412 and Juv.R. 17(G).

{¶ 22} Therefore, we overrule Mother's three assignments of error.

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[9]Juv.R. 17(G) states: "Nothing in this rule shall be construed to authorize a party to obtain information protected by any privilege recognized by law or to authorize any person to disclose such information."

Award of Permanent Custody

{¶ 23} Despite the fact that Mother does not specifically challenge the court's determination that permanent custody is in the best interest of the child, we find that, even absent the introduction of Mother's mental and medical health records, the court properly determined dependency and terminated Mother's parental rights.[10]

{¶ 24} A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *In re Murray* (1990), 52 Ohio St.3d 155, 156, 556 N.E.2d 1169. However, a parent's right is not absolute. "The natural rights of a parent *** are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed." *In re Cunningham* (1979), 59 Ohio St.2d 100, 106, 391 N.E.2d 1034, 1038. Consequently, the state may terminate parental rights when the child's best interest demands it.

{¶ 25} "If the record shows some competent, credible evidence supporting the trial court's grant of permanent custody to the county, we must affirm that court's decision, regardless of the weight we might have chosen to put on the evidence." *In re P.R.*, Cuyahoga App. No. 79609, 2002-Ohio-2029, at ¶15.

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[10] Mother's counsel only makes passing reference to whether the court erred in determining what was in the child's best interest, stating there was no determination that Mother would not some day be restored to competency and complete her case plan. Mother does not raise this issue as a separate assignment of error.

{¶ 26} The standard of proof to be used by the trial court when conducting permanent custody proceedings is clear and convincing evidence. R.C. 2151.414(B)(1). "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

{¶ 27} It is well established that when some competent, credible evidence exists to support the judgment rendered by the trial court, an appellate court may not overturn that decision unless it is against the manifest weight of the evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 28} The discretion that a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. *In re Satterwhite*, Cuyahoga App. No. 77071, 2001-Ohio-4137. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding (i.e., observing their demeanor, gestures, and voice inflections, and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. Id., citing *Trickey v.*

Trickey (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. As the Ohio Supreme Court has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

{¶ 29} The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 30} The trial court must satisfy two requirements before ordering that a child be placed in the permanent custody of CCDCFS. First, the court must find that the child cannot be placed with one of his parents within a reasonable amount of time or should not be placed with either parent. R.C. 2151.414(E). Second, the trial court must determine that the placement is in the child's best interest. R.C. 2151.353(A), 2151.414(D).

{¶ 31} If the court determines, by clear and convincing evidence, that one or more of 16 factors under R.C. 2151.414(E) exist as to each of the child's 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. *In re Hauserman* (Feb. 3, 2000), Cuyahoga App. No. 75831.

{¶ 32} Here, the court found that appellant has chronic mental illness issues that render her incapable of providing for D.E.P. This finding was

supported by testimony from Ms. Collins, Ms. Willis, and Mother's guardian ad litem. Mother had never cared for D.E.P. and had, at all times since D.E.P.'s birth, resided at Northcoast Behavioral Institute. The evidence also showed that Mother had her parental rights terminated by CCDCFS as to two of D.E.P.'s siblings. Finally, paternity has not been established, and no suitable relative was available for placement.

{¶ 33} Having found that the trial court properly determined that at least one of the R.C. 2151.414(B)(1) conditions was met, we now must determine whether the trial court appropriately determined, by clear and convincing evidence, that permanent custody is in the best interest of the child by considering all relevant factors, including those listed in R.C. 2151.414(D).

{¶ 34} In determining the best interest of a child, a trial court is to consider all relevant factors including, but not limited to, the five under R.C. 2151.414(D). The factors include "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 child; the custodial history of the child; 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; and whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child." R.C. 2151.414(D). The factors under R.C. 2151.414(E)(7) through R.C. 2151.414(E)(11) do not apply here.

{¶ 35} The evidence at trial showed that D.E.P. has positive interactions with his foster family. Further, the evidence showed that Mother was not able to provide for D.E.P.'s basic needs and stated to the social worker that the child would sleep in the bathtub. The evidence also showed that there were no maternal family members able to take the child, and paternity had not been established. D.E.P. is too young to express his wishes, but Mr. Hough reported that he believed permanent custody was in D.E.P.'s best interest. Mr. Hough testified that D.E.P. was well cared for by his foster family, and the family wanted to pursue adoption. There was also no evidence presented to the court to support Mother's counsel's assertion that there is a "possibility" that Mother would be released and complete her case plan. The court did not find counsel's unfounded statement to be competent, credible evidence to support a finding that placement with Mother would occur within a "reasonable amount of time."

{¶ 36} We find that the trial court appropriately determined that D.E.P. was dependent and permanent custody was in his best interest.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
MARY JANE BOYLE, J., CONCUR

APPENDIX

{¶ 37} Appellant's assignments of error:

{¶ 38} "I. The use of the University Hospital and Northcoast Behavioral Institute medical and psychiatric records to evaluate appellant's capacity in trial and evaluate dependency and neglect of the child violates federal health and privacy requirements as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") permits health facilities to disclose an individual's protected health information pursuant to a court-ordered subpoena, but the information disclosed may be no broader that [sic] the court order, which is not consistent with the prosecution's use of appellant's records on an unlimited basis."

{¶ 39} "II. The use of medical records violates federal health and privacy requirements as HIPAA permits health facilities to disclose an individual's protected health information following a parties' [sic] inquiries or discovery request, provided the health facility receives 'satisfactory assurance' from the Cuyahoga County Department of Children and Family Services (CCDCFS) that reasonable efforts have been made to ensure that the appellant has been given notice of the request, which CCDCFS failed to do."

{¶ 40} "III. The subpoena of mother's private medical records and reports violates the protection accorded by the Rules [sic] of Juvenile Court Procedure 17(G), which is clear that a Juvenile Court subpoena issued under Rule 17 does not authorize disclosure of privileged information."