

[Cite as *In re T.C.*, 2016-Ohio-5331.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104065

**IN RE: T.C. AND M.C.
Minor Children**

[Appeal By A.C., Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 13910702 and AD 13910703

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 11, 2016

ATTORNEYS FOR APPELLANT

David V. Patton
33595 Bainbridge Road, Suite 200A
Solon, Ohio 44139

Eric J. Cherry
P.O. Box 23181
Euclid, Ohio 44123

ATTORNEYS FOR APPELLEES

For C.C.D.C.F.S.

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Adrienne M. Watson
Yvonne C. Billingsley
Assistant Prosecuting Attorneys
3955 Euclid Avenue
Cleveland, Ohio 44115

For T.C.

Carla L. Golubovic
P.O. Box 29127
Parma, Ohio 44129

Guardian Ad Litem

Mark Witt
6209 Barton Road
North Olmsted, Ohio 44070

MARY J. BOYLE, J.:

{¶1} Appellant, A.C. (“father”), appeals the juvenile court’s judgment granting permanent custody of his two children, M.C. (d.o.b. January 30, 2004) and T.C. (d.o.b. August 26, 2005), to the Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”). He raises four assignments of error for our review:

1. The trial court committed reversible error as a matter of law when it determined the outcome of the proceedings prior to the close of evidence.
2. The trial court abused its discretion in demanding the withdrawal of attorney Michael Wolpert, counsel for [father].
3. The trial court committed reversible error as a matter of law when it denied [father] his right to counsel at the adjudicative hearing.
4. The trial court committed reversible error as a matter of law when it denied [father] the effective assistance of counsel.

{¶2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶3} CCDCFS originally became involved with the family in this case in March 2013 when mother’s boyfriend at that time physically abused T.C. The children had also been in the temporary custody of CCDCFS from 2006 to 2008 because of mother’s substance abuse and mental health issues, unstable housing, and “ongoing domestic violence with [father].”

{¶4} On July 25, 2013, CCDCFS moved for predispositional temporary custody and simultaneously filed a complaint alleging that M.C. and T.C. were neglected and

dependent children, requesting temporary custody of them. The complaint alleged that mother had a substance abuse problem with heroin and cocaine and an untreated mental illness that prevented her from adequately caring for the children. According to the complaint, father had established paternity, but failed to support, visit or communicate with the children on a regular basis. Father also allegedly minimized mother's substance abuse and mental health issues, as well as the "impact on her ability to provide adequate care for the children."

{¶5} After a predispositional hearing was held on August 21, 2013, the juvenile court granted CCDCFS's motion, placing the children in the emergency temporary custody of CCDCFS. Father was present at this hearing. A case plan was filed, with the goal being reunification with the parents.

{¶6} The juvenile court held an adjudicatory hearing on October 16, 2013. Father did not appear. Father's counsel indicated that she had not heard from father. At this hearing, mother told the court that father said that he "will not be attending no more court dates or visitation for the children." The court inquired as to why father said that. Mother stated that father "didn't want to be monitored" at the supervised visits.

{¶7} According to the social worker assigned to the case, father never had custody of the children. When the social worker asked father why he allowed the children to be around mother even though she was "using," father said that he would never keep the children away from their mother. The social worker further stated at the hearing that father refused "any type of services or involvement with" the agency. Father

also did not support the children, or visit with them regularly. Mother stipulated to the complaint, and the juvenile court found the children to be dependent and neglected.

{¶8} On October 23, 2013, the juvenile court held a dispositional hearing, where father again failed to appear. The juvenile court granted CCDCFS temporary custody of the children.

{¶9} At a review hearing in January 2014, where father did not appear, the social worker assigned to the case informed the court that father had started supervised visitation with the children for “the last two or three weeks,” but “there had been no progress on the case plan whatsoever.”

{¶10} At a review hearing in June 2014, where father again did not appear, the social worker informed the court that since April 2013, when he was first assigned to the case, the parents had not completed any case plan services. CCDCFS informed the court that it would be moving for permanent custody. The children’s guardian ad litem (“GAL”) was present at the hearing and also recommended CCDCFS moving for permanent custody.

{¶11} In July 2014, CCDCFS filed a motion to modify temporary custody to permanent custody, alleging that father failed to verify housing, refused to participate in services offered by CCDCFS, and that his supervised visitation with the children was “discontinued due to the negative impact the visits were having on the child T.C.’s mental health.”

{¶12} CCDCFS's motion for permanent custody was set for November 25, 2014. At that hearing, father appeared for the first time since CCDCFS obtained emergency temporary custody in August 2013. The court appointed new counsel for father, who appeared at the hearing with father that day.¹ Father's counsel requested that the case be continued so that he had adequate time to obtain discovery and prepare for trial. Father's counsel further requested that father be given visitation with his children. CCDCFS objected to father receiving visits, as did the GAL. Thus, the court continued the hearing on CCDCFS's permanent custody motion and set the visitation matter for a hearing on January 8, 2015.

{¶13} On January 8, 2015, father did not appear at the visitation hearing. Father's counsel stated at the hearing that he had not spoken to father since the November 25, 2014 hearing, despite trying to contact him. The trial court dismissed father's motion. Father's counsel subsequently filed a notice of mandatory withdrawal as counsel.

{¶14} The juvenile court was scheduled to hear CCDCFS's motion to modify temporary custody to permanent custody on June 30, 2015. On that day, however, the court continued the hearing because mother was in the county jail and had not been properly served with notice of the hearing. Father had been served, but did not appear at the hearing either. The trial court indicated that it would not continue the matter again and that if father obtained counsel, counsel must be prepared for the next hearing date.

¹It is not clear what happened to father's first appointed counsel because she did not file a withdrawal notice with the court.

{¶15} On July 17, 2015, father's newly retained counsel filed a notice of appearance and moved for a continuance. CCDCFS objected, stating that the motion for permanent custody was filed approximately one year before and that father had ample time to obtain counsel. CCDCFS maintained that the children were in need of "permanency as soon as possible." The trial court denied father's request for a continuance because it was scheduled far enough in advance (November 2, 2015).

{¶16} At a later hearing that same day, July 17, the court informed father:

There's at least two opportunities for you to have counsel. You are not going to get a third chance. If you decide not to go forward with [retained counsel] representing you, you're going to represent yourself. So I strongly urge you to make sure that you remain in contact with [retained counsel]. If there are any questions or concerns, that you make sure that you relay those through him to this court. Do you understand that?

Father indicated that he understood.

{¶17} CCDCFS's motion for permanent custody finally went to trial on November 2, 2015. But during the hearing, it was discovered that father's retained counsel represented mother in a criminal matter that same year. The trial court ordered a mistrial and disqualified father's counsel from representing father. Father's retained counsel withdrew from the case. The court informed father that it would appoint new counsel. Father stated that he did not want appointed counsel. Father told the court that he would hire another attorney. The court advised father to retain counsel by the end of the week because new counsel would have to "get up to speed with respect to this case."

{¶18} The trial court held a final hearing on CCDCFS's motion for permanent custody on December 21, 2015. Neither father nor mother appeared at the hearing. The

children had been in the temporary custody of CCDCFS since August 21, 2013. Neither parent had seen the children since February 2014.

{¶19} The GAL for the children, Mark Witt, informed the court that after the last hearing, father told him that he did not want the GAL to conduct a home visit and that the GAL “should not put forth any further effort because [father] would not be returning.” The GAL further informed the court that father’s previous attorney had recommended another attorney to father. The GAL called the recommended attorney who told the GAL that father “was not responsive to his calls.”

{¶20} The social worker testified as to what had occurred since the children had been in the temporary custody of CCDCFS. The GAL recommended that the children be placed in CCDCFS’s permanent custody.

{¶21} At the close of the hearing, the juvenile court granted CCDCFS’s motion for permanent custody. It found that CCDCFS had presented clear and convincing evidence that the children should not or cannot be returned to either parent within a reasonable time, and that it was in the children’s best interest to be placed in permanent custody. The court noted that the children had been in the temporary custody of CCDCFS for over two years; that neither parent had complied with his or her case plan; that the parents continued to engage in behaviors that were harmful to the children; and the parents had not visited with the children in over a year.

{¶22} Regarding father’s visitation, the court stated that the children were removed from mother’s custody in July 2013. Father did not attempt to visit them until January

2014. He then visited them a handful of times in January and February 2014, when the court ordered that his visitations be stopped. Although father requested to have visitation restored in November 2014, he did not show up at the hearing on his motion in January 2015.

{¶23} Father appealed the juvenile court's decision granting permanent custody to CCDCFS, raising his four assignments of error.

II. Due Process

{¶24} In his first assignment of error, father argues that the trial court committed reversible error by determining the outcome of CCDCFS's permanent custody motion before the close of evidence. In this assignment of error, father does not cite to any authority in support of his argument as required by App.R. 16(A)(7). Thus, this court could, in our discretion, summarily overrule this assignment of error. App.R. 12(A)(2); *State v. Djuric*, 8th Dist. Cuyahoga No. 87745, 2007-Ohio-413, ¶ 53. In the interest of justice, however, we will address it.

{¶25} Father contends that the trial court decided the CCDCFS's motion on June 30, 2015, before hearing all of the evidence. We disagree.

{¶26} The children came into CCDCFS's custody in August 2013. Father did not even attempt to see the children until January 2014. He then visited them four times, until February 19, 2014, when his supervised visitations were stopped due to T.C. having severe emotional issues related to father's visits (according to the children's therapists, the GAL, and the social worker assigned to the case). CCDCFS moved for permanent

custody in July 2014. The trial court set the matter for an evidentiary hearing on November 25, 2014. On that day, father appeared in court for the first time since the children were removed from mother's home. At that hearing, father requested visitation through his newly appointed counsel. The trial court continued the evidentiary hearing on CCDCFS's permanent custody motion and set a date for a hearing on father's motion for visitation. Father failed to appear at the hearing on his motion.

{¶27} The juvenile court set the date for CCDCFS's permanent custody motion for June 30, 2015 — almost a year after CCDCFS filed its motion. At this point, the children had been in CCDCFS's temporary custody since October 2013. Father did not appear at this June 30 hearing.

{¶28} At the June 30, 2015 hearing, the parties were prepared for trial on CCDCFS's permanent custody hearing. But they discovered that mother was in the county jail at the time and, thus, had not been served with notice of the hearing. The court was constrained to continue the matter. Father points to the following language by the judge to support his argument in this assignment of error that the trial court decided the matter before hearing evidence: “[B]ased on the information that I’ve been provided, both that I’ve read and that I’ve heard, that [CCDCFS] could [meet] their burden of proof, and permanent custody could be granted regarding both of the children to [CCDCFS].”

{¶29} After review, we disagree with father that this language means that the juvenile court decided the matter that day. The court continued the case because mother

had not been served. Indeed, the court did not end up holding a final evidentiary hearing on the state's motion until over six months later.

{¶30} But if mother had been served, we have no doubt (just as the juvenile court did) that CCDCFS would have presented sufficient evidence to meet its evidentiary burden on the permanent custody motion that day. In the social worker's affidavit attached to the motion, he stated that neither mother nor father had complied with his or her case plans. Regarding father, the social worker stated that he had refused to work with CCDCFS at all. At the hearing, the trial court asked the social worker how the children were doing. The social worker told the court that they were doing well; they were still in counseling, had just completed fourth and fifth grade, and were in summer camp. The social worker further stated that neither parent had seen the children since February 2014, and had little contact with the agency. Father "showed up for a meeting" with the social worker in October 2014, and mother called in December 2014. The parents had no other contact with the agency.

{¶31} The trial court also had access to several case plans and the semiannual administrative review reports, and already knew that the parents had not been complying. In addition, the GAL had provided much information to the trial court over the ensuing months. At the hearing, the GAL stated that his opinion had not changed, that is, that he believed permanent custody was in the best interests of the children. The trial court was well aware of what was occurring with father and mother throughout the case.

{¶32} Accordingly, we find no merit to father’s first assignment of error. **III.**

Attorney Conflict of Interest

{¶33} In his second assignment of error, father argues that the trial court erred in disqualifying his counsel, finding that there was a conflict of interest, because his counsel had represented mother in a criminal matter. Father maintains that his interests and mother’s interests aligned such that there was no conflict. We disagree.

{¶34} The standard of review of a trial court decision disqualifying an attorney is that the decision will be reversed only upon a showing of an abuse of discretion. *Sarbey v. Natl. City Bank*, 66 Ohio App.3d 18, 23, 583 N.E.2d 392 (9th Dist.1990). Abuse of discretion is defined as “an attitude that is unreasonable, arbitrary or unconscionable. * *

* A decision is unreasonable if there is no sound reasoning process that would support that decision.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶35} Disqualification of an attorney is a drastic measure that should not be imposed unless it is absolutely necessary. *Spivey v. Bender*, 77 Ohio App.3d 17, 22, 601 N.E.2d 56 (9th Dist.1991). Ohio has adopted the three-part test for disqualification of counsel because of a conflict of interest set forth in *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882 (6th Cir.1990). *Morgan v. N. Coast Cable Co.*, 63 Ohio St.3d 156, 162, 586 N.E.2d 88 (1992). The test is as follows: (1) a past attorney-client relationship must have existed between the party seeking disqualification and the attorney he or she wishes to disqualify; (2) the subject matter of the past

relationship must have been substantially related to the present case; and (3) the attorney must have acquired confidential information from the party seeking disqualification. *Dana* at 889; *Morgan* at 162, fn.1.

{¶36} In this case, mother was not present at the hearing, but her counsel was. When CCDCFS was questioning the social worker on the case about a journal entry in mother's recent drug possession charge, the parties apparently discovered at that time that father's counsel represented mother in that case. Mother's counsel requested a sidebar, which was held off the record. When the hearing was back on the record, the court declared a mistrial, and disqualified father's counsel, who later withdrew from the case. Although mother was not present at the hearing, mother's counsel was present and representing mother's interests. The subject matter of mother's criminal case was certainly "substantially related" to the present case; mother's drug use was one of the reasons CCDCFS sought temporary custody and then permanent custody of the children. And father's counsel definitely acquired confidential information from mother regarding her criminal case.

{¶37} Although father maintains that his interests were aligned with mother's, that is not the case. The trial court could have terminated mother's parental rights, but not fathers — if father had complied with his case plan and worked with CCDCFS throughout the time it had temporary custody of the children.

{¶38} Accordingly, the trial court did not abuse its discretion when it disqualified father's counsel. Father's second assignment of error is overruled.

IV. Right to Counsel

{¶39} In his third assignment of error, father maintains that his right to counsel under R.C. 2151.352 was violated.

{¶40} Pursuant to R.C. 2151.352, parents are guaranteed the right to counsel at all stages of a permanent custody proceeding. Specifically, R.C. 2151.352 provides in pertinent part:

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person * * *. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code.

{¶41} Similarly, Juv.R. 4(A) provides:

Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

{¶42} Father contends that the trial court denied his right to counsel because it decided the underlying matter without counsel for father present. He maintains that to "avoid prejudice," the court "should have sought to work with [him] to assure he had counsel present * * * rather than demand he retain his own in time to be prepared."

{¶43} While parents involved in permanent custody proceedings are entitled to the effective assistance of counsel, as provided in R.C. 2151.352 and Juv.R. 4(A), such right is not absolute.

Where a parent “fails to maintain contact with counsel, fails to appear for scheduled hearings despite receiving notice of such, and fails to cooperate with counsel and the court, the court may infer that the parent has waived his or her right to counsel and may grant counsel’s request to withdraw.”

In re B.M., 10th Dist. Franklin No. 09AP-60, 2009-Ohio-4846, ¶ 26, quoting *In re Garcia*, 10th Dist. Franklin No. 03AP-874, 2004 Ohio App. LEXIS 1069 (Mar. 16, 2004). In order to ascertain whether a waiver may be inferred, “the court must take into account the total circumstances of the individual case, including the background, experience and conduct of the parent.” *B.M.* at ¶ 26.

{¶44} After review, we find that father’s right to counsel was not violated. Father left the August 2013 hearing stating that he would not return. He did not appear at the adjudicatory or dispositional hearings. His court-appointed counsel did appear at those hearings, and informed the court that she had not heard from father (at least at the adjudicatory hearing; we do not have a transcript from the dispositional hearing). Indeed, father did not appear at another court hearing until November 2014. After he requested visitation at that hearing, he failed to appear for the following hearing on his visitation motion.

{¶45} Further, the trial court continued the matter for nearly a year after father appeared in November 2014; CCDCFS’s permanent custody motion was not decided until December 2015. When the juvenile court disqualified father’s retained counsel, the

court stated that it was going to appoint new counsel for father. Father replied that he did not want an appointed attorney and that he would hire another one. At the final hearing, approximately six weeks later, father failed to appear.

{¶46} Considering all of the circumstances in this case, father's voluntary waiver of counsel can be inferred. His third assignment of error is overruled.

V. Effective Assistance of Counsel

{¶47} In his fourth and final assignment of error, father argues that his trial counsel provided ineffective assistance of counsel.

{¶48} The right to counsel, guaranteed in permanent custody proceedings by R.C. 2151.352 and Juv.R. 4, includes the right to the effective assistance of counsel. *In re Wingo*, 143 Ohio App.3d 652, 666, 758 N.E.2d 780 (4th Dist.2001), citing *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998). “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.” *Id.*, quoting *Heston*.

{¶49} To reverse a trial court's judgment based upon a claim of ineffective assistance, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Noling*, 98 Ohio St.3d 44, 65, 2002-Ohio-7044, 781

N.E.2d 88; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Both prongs of this test need not be analyzed, however, if a claim can be resolved under one prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52; *State v. Loza*, 71 Ohio St.3d 61, 83, 641 N.E.2d 1082 (1994).

A. T.C.’s Counsel

{¶50} Father first argues that T.C. was denied ineffective assistance of counsel because T.C.’s counsel did not inform the court that T.C. wished to remain in his father’s custody. He claims that it is unclear whether T.C.’s counsel ever met with T.C. We disagree. T.C.’s counsel told the court at the permanent custody hearing that he met with T.C. T.C.’s counsel explained to the court that there was a time when T.C. wanted to be reunited with his father. But T.C.’s counsel stated that was just T.C. “looking at life through rose-colored glasses, the idea of a father.” T.C.’s counsel stated that he agreed with the GAL “that at this point in time the child is resigned to life as he has it currently.”

{¶51} Moreover, even if we were to assume that T.C. received ineffective assistance of counsel, T.C.’s wishes would not change the outcome of the proceeding as the child’s wishes in a permanent custody proceeding are only one factor under R.C. 2151.414(D) that a trial court must consider when determining what is in the best interest of the child. The best interest factors include, but are not limited to, the following:

- (1) 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;
- (2) 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;

(3) 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 ending on or after March 18, 1999;

(4) 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;

(5) 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).

{¶52} T.C. was nine years old at the time of the permanent custody hearing. Even if he wished to remain in his father's custody, his father did not comply with his case plan — at all — to establish that he could provide a stable and safe home for T.C. Father's first ineffective assistance of counsel argument is meritless.

B. Father's Counsel

{¶53} Father argues that his two appointed counsel provided him ineffective assistance of counsel because they failed to object to hearsay evidence throughout the proceedings. Father cites to the transcripts from many of the hearings to show where his appointed counsel failed to object to hearsay statements.

{¶54} At the October 16, 2013 adjudicatory hearing, however, mother stipulated to the findings as to why the children were removed from her custody. Thus, the hearsay statements had nothing to do with the trial court's judgment that the children were dependent and neglected.

{¶55} Father's other cited examples of where his two appointed counsel failed to object to hearsay evidence were not determinative of adjudication, disposition (where hearsay is permitted under Juv.R. 34), or permanent custody and, thus, were not prejudicial to father.

{¶56} Father further argues that he was denied ineffective assistance of counsel regarding the permanent custody hearing as well because the court did not ensure that he had counsel at the hearing. But as we discussed in the previous assignment of error, father waived his right to counsel at this hearing.

{¶57} We have also reviewed father's remaining arguments regarding his two appointed counsel (that his first appointed counsel failed to withdraw from the case and that his second appointed counsel failed to properly impeach the social worker at the November 25, 2014 hearing as to how many times father contacted him up to that point) do not materially prejudice father because they would not change the outcome of the trial court's determination that CCDFCS met its evidentiary burden on its motion for permanent custody.

{¶58} Accordingly, father's arguments regarding his appointed counsel being ineffective are also meritless and, as such, his fourth assignment of error is overruled.

{¶59} Judgment affirmed.

It is ordered that appellees 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.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR