

[Cite as *In re B.A.*, 2016-Ohio-7786.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104496

IN RE: B.A., ET AL.
A Minor Child

[Appeal By A.A., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD14909537

BEFORE: Celebrezze, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 17, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, A.A. (“Mother”), appeals the grant of permanent custody of her daughter, B.A., to the Cuyahoga County Department of Child and Family Services (“CCDCFS”). Mother claims that she is being unfairly discriminated against based on a disability in violation of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. 12101 et seq. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Mother, a widow, has three children. The oldest, D.A. was assisting mother with caring for the younger children. When D.A. was going to leave the household to go to college, she was concerned for the well-being of her siblings. D.A. called CCDCFS for assistance. D.A. called because Mother was having some issues with her mental health and caring for her children, and D.A. suspected that Mother may have Huntington’s disease. The hereditary disease ran in her family, and D.A. thought that may be the cause of Mother’s behavior. CCDCFS sent a social worker to interview the family and provide services. On July 25, 2014, CCDCFS filed a complaint alleging the two minor children were dependent. A hearing on the motion was conducted on August 15, 2014. The court granted the agency’s motion. B.A. was placed with a foster family and her older brother, Br.A. was placed with the parents of his best friend. Br.A. has since been emancipated, so this appeal only deals with B.A.

{¶3} On September 18, 2014, an adjudicatory hearing was held. The trial court found that temporary custody was in the best interests of the child on February 25, 2015.

{¶4} On April 10, 2015, CCDCFS filed for permanent custody, and a hearing was held on May 15, 2015. Further hearings were conducted over several months including an in camera interview of the minor children. On November 20, 2015, the court heard testimony from the guardian ad litem for the children and the social worker involved in the case. B.A. and the guardian ad litem preferred permanent custody. The court determined that was in B.A.'s best interests and awarded permanent custody to the agency on April 20, 2016.

{¶5} Mother then filed this appeal assigning two errors for review:¹

I. The trial court erred in proceeding on [the motion] for permanent custody * * * when the only allegations was Mother's disability and the wishes of the children as expressed in the in camera interview by virtue of the Americans with Disabilities Act.

II. The trial court erred in colluding with [CCDCFS] in terminating services to Mother for reunification and/or maintenance of the parent/child relationship within a Dependency case when the only allegation was Mother's disability. This conduct is prohibited by the federal law titled as the Americans with Disabilities Act.

II. Law and Analysis

{¶6} Mother asserts that the grant of permanent custody to CCDCFS violates the ADA because Mother's disability, Huntington's disease, is the only reason given for seeking permanent custody. Mother points to the Supremacy Clause of the United States Constitution and argues that Ohio is bound by federal law, specifically, the ADA. Mother asserts that the removal of her child violates the ADA and the trial court erred in

¹ Mother does not argue that the trial court erred in applying the facts of the case to the best interest factors found in R.C. 2151.414.

failing to recognize that the ADA applied to the case.

{¶7} The Supremacy Clause of the United States Constitution provides that “the Laws of the United States * * * shall be the supreme Law of the Land; * * * any thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Constitution, Article VI, cl. 2. However, Ohio courts of appeals are generally in agreement that an alleged violation of the ADA does not provide a defense in an action brought to terminate parental rights. *See, e.g., In re J.C.*, 2d Dist. Montgomery No. 25608, 2013-Ohio-3937; *In re C.W., J.W., & H.W.*, 1st Dist. Hamilton No. C-110342, 2011-Ohio-4756. Mother claims these courts have wrongly ignored the Supremacy Clause and erred when they did not apply the ADA to permanent custody actions.

{¶8} The ADA provides that no person, on the basis of disability shall be subject to discrimination by a public agency on account of a disability. “Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132.

{¶9} Mother argues the ADA’s prohibition against discrimination by a public agency should preclude the trial court from granting permanent custody to CCDCFS based solely on her disability. She argues that the Supremacy Clause is superior to any state statute concerning the award of permanent custody. Other states that have addressed the issue have come to the same conclusion as our sister courts in Ohio. *Stone*

v. Daviess Cty. Div. of Children & Family Servs., 656 N.E.2d 824 (Ind.App.1995); *People ex rel. C.Z.*, 2015 COA 87, 360 P.3d 228 (2015); *J.T. v. Arkansas Dept. of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997); *In re C.M.S.*, 184 N.C.App. 488, 646 S.E.2d 592 (2007); *In re B.S.*, 166 Vt. 345, 693 A.2d 716 (1997); *S.G. v. Barbour Cty. Dept. of Human Resources*, 148 So.3d 439 (Ala.Civ.App.2013); *In re Terry*, 240 Mich.App. 14, 610 N.W.2d 563 (2000); *In re Kayla N.*, 900 A.2d 1202 (R.I.2006); *Adoption of Gregory*, 434 Mass. 117, 747 N.E.2d 120 (2001); *In re Doe*, 100 Haw. 335, 60 P.3d 285 (2002), *In re Chance Jahmel B.*, 187 Misc.2d 626, 723 N.Y.S.2d 634 (2001); *In re Diamond H.*, 82 Cal.App.4th 1127, 98 Cal.Rptr.2d 715 (2000). *But see State ex rel. K.C. v. State*, 2015 UT 92, 362 P.3d 1248 (2015) (ADA applies to the provision of services in a reunification plan and discrimination in the provision of those services may be raised as a defense in a termination hearing. However, the court recognized that raising the claim as a defense in a termination hearing was imprudent.). At least one federal court has also agreed with the interpretation adopted by Ohio courts. *Bartell v. Lohiser*, 12 F.Supp.2d 640 (E.D.Mich.1998).

{¶10} Therefore, based on numerous holdings across the country, this court takes the position that a violation of the ADA is not a valid defense to a permanent custody action. We take this position because

the ADA does not restrict the trial court's authority to terminate parental rights when the parent, even on the basis of a disability, is unable to meet his or her child's needs. *People in Interest of T.B.*, 12 P.3d 1221, 1223 (Colo.App.2000). Indeed, a child is entitled to a minimum level of care regardless of the special needs or restricted capabilities of his or her parents. *Id.* at 1223-24. In this sense, the ADA cannot be raised as a defense to

termination of parental rights. *Id.* at 1223.

People ex rel. C.Z. at ¶ 17. Further, where the matter was not raised in the proceedings below, it is waived. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 185-186; *In re the Matter of A.M.*, 304 Mont. 379, 2001 MT 60, 22 P.3d 185, ¶ 71.

{¶11} Mother did not raise a violation of the ADA below as a defense. Therefore, she has waived the argument on appeal absent a showing of plain error, which does not exist here.

{¶12} The only avenue the ADA may aid Mother is the manner in which CCDCFS provided services to her. *See State ex rel. K.C.*, 2015 UT 92, 362 P.3d 1248. However, there is no dispute here that CCDCFS attempted to provide Mother with services with the goal of reunification. For instance, social workers met with Mother on several occasions and provided her with off-site and in-home mental health and medical services. Mother initially refused the services offered. She refused to get tested for Huntington's disease, refused mental health services, and refused to cooperate with social workers.

{¶13} CCDCFS did not give up in the provision of services to the family. Despite Mother's refusals, social workers with CCDCFS provided significant services to all three of Mother's children. CCDCFS attempted to maintain regular visitation between the children and Mother, and arranged various visits and events to maintain the parent-child relationship. Mother's refusal to accept help, her diagnosis, and her worsening mental and physical condition posed a danger to herself and her children that would, in all

likelihood, never get better. The trial court is guided by R.C. Chapter 2151 et seq. when making a permanent custody determination. The ultimate driving factor is the best interests of the child. Here, this court cannot say that the trial court abused its discretion in awarding permanent custody of B.A. to CCDCFS.

{¶14} In Mother's second assignment of error, she alleges that the trial court colluded with CCDCFS to terminate services being provided to her. There is no evidence in the record of such collusion. All the evidence in the record demonstrates that services were offered to Mother and that she refused. While she later accepted some help and was eventually diagnosed with Huntington's disease, that fact does not indicate any collusion, discrimination, or disparate treatment. CCDCFS attempted to accommodate Mother's condition with tailored services designed to reunite her with her children. Her refusal to accept that help ultimately led to the removal of her children. The record does not reveal any discrimination.

III. Conclusion

{¶15} This is a sad and tragic case for all involved. However, the best interests of the child are of paramount concern. The record establishes that, through no fault of her own, Mother can no longer provide a safe home for B.A. CCDCFS investigated placement with a family member but none was available. CCDCFS also understood the situation and provided many services to the entire family. The ADA does not offer a defense to a permanent custody action because such an action does not constitute "services, programs, or activities." Even if the ADA applied as a defense regarding the

provision of services by an agency of the state, there is no evidence that Mother was discriminated against based on disability. CCDCFS should and did attempt to provide tailored services for Mother with the goal to reunify the family. Mother's refusal to accept help, her inability to provide a safe home, and her inability to properly care for her children resulted in a grant of permanent custody to CCDCFS. The trial court did not err in so ordering.

{¶16} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, 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

LARRY A. JONES, SR., A.J., CONCURS;

PATRICIA ANN BLACKMON, J., CONCURS IN JUDGMENT ONLY