[Cite as *In re D.S.*, 2009-Ohio-3167.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE D.S., T.S., E.S., AND N.S.	C. A. No. 24619
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. DN 06-09-920 DN 06-09-921 DN 06-09-922 DN 06-09-923

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Tammara Huffman ("Mother"), appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division that terminated her parental rights to her four minor children and placed them in the permanent custody of Summit County Children Services Board ("CSB"). This Court affirms.

I.

{¶2} Mother is the natural mother of D.S., born June 3, 1995, T.S., born October 5, 1996, E.S., born May 12, 1998, and N.S., born September 24, 1999. The fathers of the children are not parties to this appeal. At the time this dependency and neglect case began, Mother already had a six-year history of involvement with CSB due to her failure to follow through with consistent treatment for her mental illness. Mother had been diagnosed with bipolar disorder with severe psychotic features and had frequently displayed irrational and explosive behavior

around her children. Some of the children had also been diagnosed with serious mental health issues. Mother also had a history of involvement with a children services agency in Bucks County, Pennsylvania before she moved to Ohio. Because she refused to sign a release of the information, however, CSB was unable to obtain any details about her case history in Pennsylvania.

{¶3} Mother moved with her children from Pennsylvania in October 2000 at the request of the children's paternal grandmother. The grandmother was concerned about Mother's unstable mental health, so she provided the family with bus passes to come to Summit County. Shortly after Mother and the children arrived in Summit County, CSB filed its first dependency and neglect case involving this family. On October 6, 2000, the children were removed from Mother's care pursuant to Juv.R. 6 because, while having a mental health crisis, she ransacked her apartment by breaking windows and furniture and throwing furniture out the windows. Mother was charged with vandalism and child endangering but was found not guilty by reason of insanity. She was admitted to a psychiatric unit of a hospital for treatment, and the children lived in CSB custody for the next 20 months. The children were returned to Mother's care and the case was later closed. CBS filed another case in early 2006, but details about that case are unclear from the record.

{¶4} On September 22, 2006, CBS filed this case, again due to Mother's erratic behavior and unstable mental health. Police found Mother wandering the streets with her children. Mother told the police that she was afraid to go home, but she was not speaking rationally and again required psychiatric hospitalization. When she was released from that hospitalization, while her children were still in CSB custody, Mother moved back to Pennsylvania. Because Mother still would not sign releases and refused to cooperate with CSB,

she failed to demonstrate to CSB that she was receiving any mental health treatment or otherwise complying with the requirements of the case plan.

{¶5} On August 15, 2008, CSB moved for permanent custody of all four children. After unsuccessfully attempting to serve Mother by certified mail, CSB submitted a request to the court for service by publication, accompanied by an affidavit that Mother's address was unknown and the agency had been unable to locate her through numerous enumerated means. Mother was later served by publication.

{¶6} The permanent custody hearing commenced on December 11, 2008. The transcript of proceedings fails to indicate whether Mother was or was not present at the hearing. Moreover, there was no discussion of whether Mother had or had not been directly contacted by the court, CSB, or Mother's counsel, nor was there any explanation of the efforts that any of them had made to contact her about the hearing.

{¶7} Following the hearing on the motion for permanent custody, the trial court found that the children had been in the temporary custody of CSB for more than 12 of the prior 22 months and that permanent custody was in their best interests. Consequently, the trial court terminated parental rights and placed the children in the permanent custody of CSB. Mother appeals and raises four assignments of error.

I.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT LACKED JURISDICTION TO HEAR THE PERMANENT CUSTODY MOTION SINCE MOTHER WAS NOT PROPERLY SERVED. MOTHER'S DUE PROCESS RIGHTS WERE VIOLATED."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN ACCEPTING THE APPOINTMENT AND RECOMMENDATIONS OF THE GUARDIAN AD LITEM CONTRARY TO FEDERAL AND STATE CODE. AS A RESULT OF GAL'S EMPLOYMENT BY THE COURT, A CONFLICT OF INTERESTS EXISTED WARRANTING HER REMOVAL."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN NOT PROVIDING PROPER REPRESENTATION TO THE MINOR CHILDREN AT EVERY PROCEEDING."

ASSIGNMENT OF ERROR IV

"THE TRIAL WAS INHERENTLY UNFAIR AND THE OUTCOME WAS UNRELIABLE AS MOTHER WAS DENIED THE RIGHT TO A FAIR TRIAL AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF HER COUNSEL."

{¶8} This Court will consolidate Mother's assignments of error because each of the first three assignments of error overlaps with the fourth. Mother does not challenge the evidence supporting the trial court's permanent custody decision. Instead, through her first three assignments of error, Mother raises procedural challenges that she did not raise in the trial court. Therefore, she maintains that that each of the alleged errors constituted plain error. Then, through her fourth assignment of error, Mother contends that her trial counsel was ineffective for failing to raise these issues in the trial court.

{¶9} To establish a claim of ineffective assistance of counsel, Mother must demonstrate that her trial counsel's performance was deficient and that the deficient performance prejudiced her case. *Strickland v. Washington* (1984), 466 U.S. 668, 687. A "deficient performance" is one that fell below an objective standard of reasonableness. *Id*. at 687-88. To establish prejudice, Mother must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. at 694.

{¶10} The standard of review for plain error is similar to the standard for reviewing a claim of ineffective assistance of counsel, although plain error requires more certain proof of prejudice to the appellant. In a concurring opinion in *State v. Murphy* (2001), 91 Ohio St.3d 516, 559, Justice Cook compared the criminal plain error standard and emphasized that, while ineffectiveness requires proof of a *reasonable probability* that the trial result would have been different but for the error, plain error requires proof that the trial result *clearly* would have been otherwise. The civil plain error standard requires the demonstration of an even greater level of error, as it must be one that rises to the level of challenging the legitimacy of the underlying judicial process itself. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus. This Court has not determined which is the appropriate plain error standard to apply in cases involving the termination of parental rights and it need not do so now.

{¶11} For ease of discussion, rather than conducting separate reviews under each standard, this Court will address Mother's first, second, and third assignments of error within the context of her ineffective assistance of counsel challenge, thus covering all of her assigned errors. If Mother can prevail under the lesser standard of ineffective assistance of counsel, she will have established reversible error.

{¶12} Mother maintains that her trial counsel was ineffective for failing to: (1) challenge the trial court's failure to make reasonable efforts to locate Mother to provide her with notice of the hearing; (2) object to the fact that the guardian ad litem was a court employee and, as such, had an inherent conflict of interest; and (3) contest the trial court's failure to provide counsel for the children at every stage of the proceedings. This Court will address each of the alleged errors in turn.

Notice of Hearing

{¶13} Mother maintains that she was denied due process because she was not properly served with notice of the permanent custody hearing. This Court begins by emphasizing that, because this issue was not raised and discussed in the trial court, most of the facts alleged by Mother are not reflected on the record. For example, Mother faults CSB and her trial counsel for failing to contact her relatives, failing to call her cellular telephone number, and failing to make other specific efforts to provide her with notice of the hearing, but none of these alleged failures is reflected on the record. She even recognizes in her appellate brief that "the record is devoid of these efforts." Mother apparently fails to recognize that she has the burden of demonstrating ineffective assistance of counsel on the appellate record. This Court will not infer ineffectiveness from a silent record. See *Murphy* (2001), 91 Ohio St. at 542.

{¶14} The record does reveal that the trial court initially attempted to serve Mother via certified mail at her last known address in Pennsylvania, but the certified mailing was returned unclaimed. Next, CSB filed with the court a request for service by publication.

{¶15} Juv.R. 16(A) sets forth the procedural requirements for obtaining service by publication. It provides for service by publication when the residence of a party is unknown. Juv.R. 16(A) further provides:

> "Before service by publication can be made, an affidavit of a party or of a party's counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot be ascertained with reasonable diligence and shall set forth the last known address of the party to be served."

{¶16} Attached to its request for service by publication, CSB filed the affidavit of an employee of CSB who stated that the present address of Mother was "unknown to affiant and cannot with reasonable diligence be ascertained." The affidavit further stated the efforts that were made to learn Mother's address including a search of the telephone directory, Child

Support Enforcement Agency records, and other specific sources. Finally, the affidavit gave Mother's last known address and indicated that service could not be made at that address and requested service by publication.

{¶17} Interpreting almost identical language in a prior version of Civ.R. 4.4(A), the Ohio Supreme Court held in *Sizemore v. Smith* (1983), 6 Ohio St.3d 330, that compliance with the affidavit requirement of Civ.R. 4.4(A) "gives rise to a rebuttable presumption that reasonable diligence was exercised." Id. at 331. The court does not delve into an examination of whether reasonable diligence was in fact exercised unless the defendant attempts to challenge the presumption in the trial court. See id.

{¶18} The statements in the affidavit filed by CSB fully complied with the requirements of Civ.R. 4.4(A)(1) and gave rise to a rebuttable presumption that CSB had exercised reasonable diligence in attempting to ascertain Mother's address. See id. Because Mother failed to challenge service in the trial court, she failed to rebut the presumption that CSB had used reasonable diligence to locate Mother at her current address. Service by publication was therefore valid. Mother has failed to demonstrate that she was denied proper notice of the hearing, or that her trial counsel committed any error by failing to raise this issue in the trial court.

Guardian Ad Litem

{¶19} Next, Mother challenges the appointment of the guardian ad litem in this case. Mother maintains that the guardian's appointment was in violation of law and that the guardian ad litem had an inherent conflict of interest because she was an employee of the juvenile court.

{¶20} Again, most of the facts argued by Mother do not appear in the record, such as the caseload of the guardian ad litem, the benefits that she receives, or the identification on the badge

that she wears at the juvenile court. In fact, although this Court has seen affirmative statements on the record in other recent Summit County permanent custody cases, there is nothing in the record of this case to indicate that the guardian ad litem was employed by the juvenile court.

{¶21} As there is nothing in the record to demonstrate the basic factual premise of Mother's argument, this Court need not address the merits of her challenge. Mother has failed to demonstrate ineffective assistance of counsel for failing to raise this challenge below.

Counsel for Children

{¶22} Finally, Mother contends that her children were denied due process because they did not have appointed counsel at every stage of the proceeding. The record reflects that the trial court appointed counsel for the children prior to the hearing on the motion for permanent custody and that counsel appeared at the permanent custody hearing as a representative of the children's interests. Mother maintains that the trial court should have appointed counsel for the children at a much earlier point so the children could have had legal representation throughout this two-year case.

{¶23} As this Court has repeatedly stated, "'where no request was made in the trial court for counsel to be appointed for the children [at an earlier stage of the proceeding], the issue will not be addressed for the first time on appeal.'" *In re T.E.*, 9th Dist. No. 22835, 2006-Ohio-254, ¶7, quoting *In re K.H.*, 9th Dist. No. 22765, 2005-Ohio-6323, at ¶41, citing *In re B.B.*, 9th Dist. No. 21447, 2003-Ohio-3314, at ¶7. Other appellate districts have also held that this issue must be raised in the trial court to preserve it for appellate review. See, e.g., *In re Graham*, 4th Dist. No. 01CA57, 2002-Ohio-4411, at ¶31-34; *In re Brittany T.* (Dec. 21, 2001), 6th Dist. No. L-01-1369, at *6.

{¶24} Mother has not explained why this Court should delve into this issue for the first time on appeal. In *In re T.E.*, supra, at ¶8-9, this Court explained its rationale for not addressing this issue when a parent raised it for the first time on appeal:

> "Although some courts have held that a parent cannot waive the issue of the children's right to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 158 Ohio App.3d 679, 2004-Ohio-4544, at ¶31, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1, 13.
>
> "The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity [in the trial court] to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion." Id.

{¶25} Although Mother raises this challenge as a claim of ineffective assistance of counsel, she fails to argue, much less demonstrate, that the trial court result would have been different if counsel had timely raised this issue below.

{¶26} Although Mother also argues about the failure of the children's counsel to represent the children's rights in this appeal, she fails to allege any error by the trial court or her trial counsel. The trial court had appointed counsel for the children and there is nothing in the trial court record to indicate that the trial court prevented counsel from representing the children on appeal. Moreover, as this alleged error occurred after the trial court's judgment, Mother fails to explain how her trial counsel could have raised the issue prior to the trial court's judgment, how she can raise it on appeal from the trial court's judgment, or how such error affects the trial

court's judgment. Mother has failed to demonstrate any trial court error or ineffective assistance of her trial counsel pertaining to the legal representation of the children.

{¶27} Mother's four assignments of error are overruled.

III.

{¶28} Mother's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

HEATHER R. DYER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.