

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: A. A.

C. A. No. 25253

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-10-832

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

CARR, Judge.

{¶1} Appellant, Abigail A. (“Mother”), appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that placed one of her minor children in the legal custody of her father, Timothy G. (“Father”). This Court affirms in part and reverses in part and remands.

I.

{¶2} The child at issue in this case, A.A., is the daughter of Mother and Father. She was born December 1, 2001, after the relationship between Mother and Father ended. A.A. resided with Mother and her older half-brother, M.A., for the first several years of her life, but she visited with Father on a regular basis. In May 2007, Father filed an action in domestic relations court, seeking to establish a formal parent-child relationship and to obtain custody of A.A. Around this same time, A.A. allegedly made a disclosure to Father and his wife that M.A. had touched her in a sexual manner. The domestic relations court granted Father temporary

custody of A.A. while the allegations of inappropriate touching were investigated. A.A.'s allegation was not substantiated and she returned to Mother's home after a little over a year in Father's temporary custody. The domestic relations case was resolved by an agreement of the parties that A.A. would live with Mother, but Mother would ensure that A.A. and M.A. were not left alone together.

{¶3} Shortly after A.A. returned to Mother's home, she allegedly disclosed to Father that M.A. had again touched her in a sexual manner. Due to the new allegations, Mother and Father agreed that A.A. would move back to Father's home to be away from M.A. Father's wife had also reported to Summit County Children Services Board ("CSB") that she had discovered A.A. with her hands down the pants of her three-year-old half-brother, L.G. On October 15, 2008, CSB filed a complaint, alleging that A.A., then six years old, was a dependent child because she had been both the victim and perpetrator of inappropriate sexual behavior. The parties later stipulated to an adjudication that A.A. was a dependent child "as set forth in the complaint."

{¶4} On May 11, 2009, Father and Mother each filed a motion for legal custody of A.A. CSB also moved the trial court to place A.A. in Father's legal custody and to terminate the order of protective supervision. Following a hearing on the competing motions, the trial court placed A.A. in the legal custody of Father and granted Mother supervised visitation. Mother appeals and raises four assignments of error, which will be addressed out of order for ease of discussion.

II.

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED IN FAILING TO ALLOW MOTHER’S COUNSEL TO QUESTION THE CASA REGARDING POSSIBLE BIAS ON THE PART OF THE CASA.”

{¶5} Mother’s fourth assignment of error is that the trial court committed reversible error by failing to allow her to cross-examine the guardian ad litem about her possible bias against Mother and members of her family. The guardian ad litem testified at the hearing and also submitted a ten-page report, in which she recommended that A.A. be placed in Father’s legal custody. When Mother started to cross-examine the guardian, CSB raised an objection and the trial court refused to allow Mother to cross-examine the guardian any further.

{¶6} The Ohio Supreme Court has held that, “[i]n a permanent custody proceeding in which the guardian ad litem’s report will be a factor in the trial court’s decision, parties to the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation.” *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, syllabus. Although CSB argued, and the trial court agreed, that the *In re Hoffman* holding does not extend beyond permanent custody cases, this Court disagrees.

{¶7} The focus of *In re Hoffman* was on the fundamental right to due process, which is not confined to proceedings in which the parties face a termination of their parental rights. This Court has often emphasized that legal custody is a less drastic disposition than permanent custody because it does not sever all parental rights. Nevertheless, a disposition of legal custody to another person potentially terminates a parent’s constitutional right to custody of her child, because that placement “is intended to be permanent in nature.” R.C. 2151.42. “While legal and permanent custody are admittedly different things, we find them sufficiently analogous to ***

afford the child's parents the procedural and substantive protections available under the law.” *In re S.J.*, 9th Dist. No. 22554, 2005-Ohio-4945, at ¶15.

{¶8} Although *In re Hoffman* was decided within the context of a permanent custody decision and the Court briefly emphasized the significance of terminating parental rights, the thrust of its analysis focused on the need to ensure the fundamental fairness of custody proceedings when a report of the guardian ad litem or other expert is considered by the trial court in reaching its decision. In fact, the *In re Hoffman* decision relied extensively on the reasoning of other jurisdictions in custody cases that did not involve the termination of parental rights, nor did they involve dependency or neglect. See *In re Hoffman*, at ¶19-20, 22, citing *Collins v. Collins* (1984), 283 S.C. 526, 324 S.E. 2d 82; *Mazur v. Lazarus* (App.D.C.1964), 196 A.2d 477; *Stanford v. Stanford* (1963), 266 Minn. 250, 123 N.W.2d 187.

{¶9} *In re Hoffman* emphasized the parties' due process right to cross-examine the guardian ad litem or anyone else who prepared a report that would be considered by the court in making its custody determination. *Id.*

“Where the sole issue is what will best serve the welfare of the child, such reports are an invaluable aid to the court in determining the question. Their use should be encouraged, but care should be taken to give fair notice of the contents of such reports to the parties involved so as to afford them every opportunity to test the credibility of the reporter through cross-examination or otherwise and to meet or answer every adverse fact or inference included therein.” *In re Hoffman*, at ¶22, quoting *Stanford*, 266 Minn. at 258.

Based on this same type of reasoning, the Eleventh District Court of Appeals explicitly extended the holding of *In re Hoffman* to custody proceedings outside the context of the termination of parental rights and held that a trial court errs by considering the report of the guardian ad litem without providing the parties an opportunity to cross-examine the guardian. See *Allen v. Allen*, 11th Dist. No. 2009-T-0070, 2010-Ohio-475, at ¶35, 40.

{¶10} This Court agrees that the holding of *In re Hoffman* should be extended to this case because the trial court allowed the guardian ad litem to submit a report and testify at the hearing and it explicitly considered her report and recommendation in its determination that legal custody to Father was in the best interest of A.A. Because the guardian's recommendation was a factor in the trial court's decision and Mother was denied the opportunity to cross-examine the guardian, she was denied her right to due process. Mother's fourth assignment of error is sustained.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN GRANTING LEGAL CUSTODY TO FATHER OR, IN THE ALTERNATIVE, DENYING MOTHER A SIX-MONTH EXTENSION AS SAID DETERMINATIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶11} Mother's first assignment of error is that the trial court erred by placing A.A. in Father's legal custody rather than in her legal custody. Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, at ¶17. Because this Court is remanding the matter to allow cross-examination of the guardian ad litem, and the trial court will necessarily need to reevaluate its best interest determination in light of that new evidence, this assignment of error has been rendered moot and will not be addressed. See App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN GRANTING LEGAL CUSTODY TO FATHER WHEN [CSB] DID NOT USE REASONABLE CASE PLANNING AND DILIGENT EFFORTS TO REUNIFY A.A. WITH HER MOTHER.”

{¶12} Mother's second assignment of error is that the trial court erred in granting Father legal custody because CSB failed to use reasonable efforts to reunify A.A. with her. Although

CSB maintains that Mother did not raise this issue at the legal custody hearing, her cross-examination of several witnesses focused on this very issue. If the juvenile court had removed A.A. from the home, CSB would have been required to prove that it had made “reasonable efforts to prevent the removal of the child from the child’s home, to eliminate the continued removal of the child from the child’s home, or to make it possible for the child to return safely home.” R.C. 2151.419(A)(1). At the time this case began, however, A.A. was living with Father and the trial court never removed her from his home. Moreover, the goal of the case plan was to prevent the removal of A.A. from the home and that goal was accomplished. Mother has failed to prove that the agency had the burden of establishing that it made reasonable efforts to reunify A.A. with Mother.

{¶13} Moreover, Mother’s argument that CSB was responsible for the delay in her engaging in joint counseling with A.A. is not supported by the record. Given that Mother’s key parenting problem was her damaged relationship with A.A., one of the primary goals of the case plan was for Mother and A.A. to engage in joint counseling. The joint counseling sessions did not begin, however, until near the time of the hearing. Although Mother correctly notes that the professional who performed the physiological assessment of A.A. obtained background information only from Father, the counselor made several attempts to meet with Mother. Mother kept putting her off and, after she finally scheduled an appointment, Mother cancelled it on the day of the appointment and never contacted the counselor again.

{¶14} The case plan also required all parties to begin counseling on an individual basis, with a goal of progressing to joint family counseling. Mother, Father, and A.A. all engaged in counseling on an individual basis, but Mother did not begin individual counseling until five months into this case. As is the typical protocol in dependency cases, the child’s counselor was

given the discretion to determine when A.A. was ready for joint counseling with each parent. Moreover, each parent would need to have made sufficient progress in individual counseling. Mother would not be ready for joint counseling with A.A. until she developed an understanding of how her reaction to A.A.'s disclosures had negatively impacted their relationship. Mother's counselor explained at the hearing that it had taken Mother some time to develop any insight into how her inappropriate reaction had damaged her relationship with A.A. The delay in beginning joint counseling was due to the circumstances of the case, not any failure on the part of CSB. Mother's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN FAILING TO REMOVE THE CASA DUE TO HER INABILITY TO OBSERVE VISITS BETWEEN A.A. AND HER MOTHER.”

{¶15} Mother's third assignment of error is that the trial court erred in failing to remove the guardian ad litem because her schedule did not allow her to observe the Saturday visits between Mother and A.A. Although the parties dispute whether Mother can raise this issue due to her failure to file a motion to set aside the magistrate's order under Juv.R. 40(D)(2)(b), the record further reveals that Mother failed to raise this issue at the legal custody hearing. The guardian testified and gave her report without any objection from Mother, aside from her inability to cross-examine the guardian. Moreover, by the time of the legal custody hearing, due to adjustments in the visitation schedule, the guardian had been able to attend several visits between Mother and A.A. The guardian testified that, during the eight months that she was the guardian ad litem in this case, she observed four or five visits between Mother and A.A., which is the number of visits that she typically observes in a dependency case. Mother's third assignment of error is overruled.

III.

{¶16} Mother's fourth assignment of error is sustained and the matter is remanded for a hearing on the recommendation of the guardian ad litem to afford Mother an opportunity to cross-examine the guardian. Her first assignment of error was not addressed because it has been rendered moot and her remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and the cause remanded.

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 both parties equally.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

MARY ELLEN LESLIE, and GREGORY A. PRICE, Attorneys at Law, for Appellant.

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LINDA BENNETT, Attorney at Law, for Guardian ad Litem.