

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re: G.S.,	:	No. 10AP-734
(T.E.,	:	(C.P.C. No. 08JU02-01532)
Appellant).	:	(REGULAR CALENDAR)
In Re: F.T.,	:	No. 10AP-736
(T.E.,	:	(C.P.C. No. 08JU02-01529)
Appellant).	:	(REGULAR CALENDAR)
In Re: J.E.,	:	No. 10AP-737
(T.E.,	:	(C.P.C. No. 08JU02-01528)
Appellant).	:	(REGULAR CALENDAR)
In Re: T.P.,	:	No. 10AP-738
(T.E.,	:	(C.P.C. No. 08JU05-06179)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 24, 2011

Robert J. McClaren, for appellee Franklin County Children Services.

Thomas E. Friedman, for Guardian ad Litem.

Edward J. Emsweller, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶1} Appellant, T.E., appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating her parental rights and granting permanent custody of her four children to appellee, Franklin County Children Services ("FCCS"), for purposes of adoption.

{¶2} The record reveals the following factual and procedural history. Appellant is the biological mother of G.S., born December 31, 2003, F.T., born December 4, 1994, J.E., born January 4, 1997, and T.P., born September 20, 1993. Upon a referral from one of the children's teachers, FCCS removed the children from appellant's care on November 8, 2007. According to the complaint filed on February 1, 2008, this family has a history with FCCS dating back to 2006. The complaint alleged that Columbus police officers were dispatched to the children's home on November 8, 2007, at which time the children were found not attended by a parent and living in "deplorable" home conditions. The complaint described the home as roach infested, containing little or no food, and no sleeping accommodations for the children. The complaint further asserted that appellant was alleged to be using drugs and engaging in prostitution. Additionally, it was alleged that appellant would not comply with drug screens and was not in contact with her caseworker. Temporary custody was awarded to FCCS on February 4, 2008, and on May 1, 2008, the children were found to be dependent and neglected children.

{¶3} FCCS's motion for permanent custody was filed on December 18, 2009, and the matter came for dispositional hearing on July 8, 2010. Despite being served with the motion for permanent custody, appellant did not attend the hearing. The trial court heard testimony from Christina Grace, the FCCS caseworker assigned to the case since

March 2010, and the children's guardian ad litem Thomas Friedman, who also submitted a written report. According to Ms. Grace, though a reunification case plan was prepared and implemented, appellant did not complete any of her case plan objectives. Ms. Grace testified that appellant had not seen or visited with the children since March 17, 2008, and that her recommendation for each of the children was for the court to grant permanent custody to FCCS for the purposes of adoption. The guardian ad litem testified that his recommendation was allowing the children to remain in their present placement with their maternal aunt, and that he was supportive of permanent custody being granted to FCCS to accomplish the same.

{¶4} Appellant did not appear at the dispositional hearing, nor any other proceeding before the trial court. On July 15, 2010, the trial court adopted the magistrate's decision granting permanent custody of the children to FCCS. Appellant did not file objections to the magistrate's decision, and did not make an appearance in this case until August 3, 2010, when she filed a notice of appeal and an affidavit of indigency.

{¶5} Appellant filed a pro se motion for the appointment of counsel, which was granted by this court on October 13, 2010. On appeal, appellant asserts the following assignment of error for our review:

Appellant was deprived of her fundamental constitutional right to parent her child when the trial court proceeded in this case without appointing counsel to represent her interests.

{¶6} As previously noted, appellant did not file objections to the magistrate's decision. It is well-settled that a party's failure to file objections to a magistrate's decision waives all but plain error. See Civ.R. 53(D)(3)(b)(iv); *Hoyt v. Heindell*, 11th Dist. No. 2009-L-151, 2010-Ohio-6058, ¶28. Hence, we review this matter accordingly.

{¶7} Appellant does not assert the trial court's granting of permanent custody of her children to FCCS was necessarily in error, but, rather, that it was error to do so without appointing counsel to represent her interests. 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. No. 09AP-60, 2009-Ohio-4846, ¶26, quoting *In re Garcia* (Mar. 16, 2004), 10th Dist. No. 03AP-874, ¶12, quoting *In re Rachel G.*, 6th Dist. No. L-02-1306, 2003-Ohio-1041, ¶14. 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." *Rachel G.* at ¶14; *B.M.* at ¶26.

{¶8} The record reflects appellant was not represented by counsel during any of the proceedings in the trial court. The record also reflects, and it is undisputed by appellant, that despite having been served with the initial complaint and subsequent notices, she did not appear at any of the trial court proceedings or request the appointment of counsel from the trial court.

{¶9} As conceded by appellant, pursuant to *B.M.*, she waived any statutory right to court-appointed counsel that she possessed. Nonetheless, it is appellant's contention that regardless of her failure to make an appearance, she did not waive her constitutional right to counsel, and, therefore, the trial court erred in proceeding without appointing

counsel to represent her interests. According to appellant, a constitutional right to counsel cannot be waived by inaction, and, instead, requires an intentional relinquishment or abandonment of the right.

{¶10} The fallacy in appellant's contention is two-fold. First, with the exception of *Lassiter v. Dept. of Social Servs. of Durham Cty., N. Carolina* (1981), 452 U.S. 18, 101 S.Ct. 2153, the body of authority appellant cites for such proposition is inapplicable and concerns juvenile delinquency proceedings, which the Supreme Court of Ohio has recognized that though they are labeled "civil" proceedings, " '[w]hatever their label, juvenile delinquency laws feature inherently criminal aspects that we cannot ignore.' " *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶76, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶25. We are not presented with a juvenile delinquency proceeding nor a matter that has inherent criminal aspects as the matter before us concerns a termination of parental rights and permanent custody of the children being granted to FCCS for purposes of adoption. Secondly, as will be explained infra, though *Lassiter* considered the factors set forth in *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893,¹ to determine whether due process requires the appointment of counsel for an indigent parent in a permanent custody proceeding, *Lassiter* did not hold counsel was required to be appointed in every parental termination proceeding, or that one had to intentionally relinquish a constitutional right to counsel in such a proceeding. Instead, the *Lassiter* court concluded that based on the facts before it, the mother's due process rights

¹ "[*Mathews*] propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter* at 27.

were not violated when the trial court did not appoint counsel for her in a parental termination proceeding.

{¶11} In *Lassiter*, Lassiter's son was adjudicated a neglected child, and transferred to the custody of the Durham County Department of Social Services ("DCDSS"). A year later, Lassiter was convicted of murder and began serving a sentence of 25 to 40 years imprisonment. While incarcerated, Lassiter was served with notice that DCDSS sought to terminate her parental rights. Lassiter was brought from prison to the hearing and a discussion was held regarding whether Lassiter should have more time to find legal assistance. The trial court concluded that Lassiter had ample opportunity to obtain counsel and did not postpone the proceedings. Lassiter did not aver she was indigent and the trial court did not appoint counsel for her.

{¶12} On appeal, Lassiter argued that because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to assistance of counsel, and, thus, the trial court erred in not requiring the state to provide counsel for her. The North Carolina Court of Appeals disagreed, holding that the appointment of counsel for indigent parents in parental termination proceedings is not constitutionally mandated. The Supreme Court of North Carolina denied the application for discretionary review.

{¶13} The United States Supreme Court granted certiorari and framed the issue as whether the Due Process Clause requires the appointment of counsel when a state seeks to terminate an indigent's parental status. *Id.* at 31. Declining to hold that the constitution requires the appointment of counsel in every parental termination proceeding, the court stated, "[w]e therefore adopt the standard found appropriate in *Gagnon v.*

Scarpelli,² and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 31-32. The court stated:

"[it] is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements," since here, as in that case, "[the] facts and circumstances . . . are susceptible of almost infinite variation . . ." 411 U.S., at 790. Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness, we decide today whether the trial judge denied Ms. Lassiter due process of law when he did not appoint counsel for her.

Id. at 32.

{¶14} In its analysis of whether due process required the appointment of counsel in Lassiter's case, the court noted there was no expert testimony presented, no specially troublesome points of law, either procedural or substantive, and the weight of the evidence demonstrated Lassiter "had few sparks" of an interest in her son, such that counsel's presence could not have made a determinative difference. *Id.* at 32-33. Most significantly, the court went on to state:

Finally, a court deciding whether due process requires the appointment of counsel *need not ignore a parent's plain demonstration that she is not interested in attending a hearing.* Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's

² In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, the court declined to hold that indigent probationers have, per se, a right to counsel at revocation hearings, and instead left the decision whether counsel should be appointed to be made on a case-by-case basis. *Lassiter* at 27.

failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

Id. at 33. (Emphasis added.)

{¶15} As further noted in *Lassiter*, our constitution imposes on the states the standards necessary to ensure that judicial proceedings are fundamentally fair, and that public policy may require the adoption of standards higher than those minimally tolerable under the constitution. Ohio statutorily provides a right to counsel to indigent parents in parental termination proceedings, and the Supreme Court of Ohio has recognized that, " 'Ohio, through R.C. 2151.352, provides a statutory right to appointed counsel that goes beyond constitutional requirements.' " *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶15, quoting *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46 (citing *Lassiter* for the proposition that the United States Constitution does not require the appointment of counsel to indigent parents in all juvenile court proceedings).

{¶16} Thus, *Lassiter* instructs that the appointment of counsel to an indigent parent in a parental termination proceeding is not *always* required under the constitution, but, instead, the determination of whether due process requires the appointment of counsel in such a circumstance is to be decided on a case-by-case basis. In *Lassiter*, the court concluded due process did not require the appointment of counsel to Lassiter, and the reasoning was based largely on Lassiter's inaction with respect to seeking counsel that demonstrated to the court that she was not interested in the proceedings concerning her son. In other words, the *Lassiter* court held that based on Lassiter's *inaction*, due process did not require the appointment of counsel under the facts presented; ergo,

Lassiter did not have a constitutional right to counsel that she had to intentionally abandon by an affirmative action as appellant suggests is required.

{¶17} A similar conclusion was reached by the Fifth District Court of Appeals in *In re Westfall*, 5th Dist. No. 2006 CA 00196, 2006-Ohio-6717. In *Westfall*, the trial court granted the Stark County Department of Job and Family Services' motion for permanent custody of Westfall's two children, and Westfall argued on appeal that her due process rights were violated when the trial court proceeded without appointing counsel for her. Westfall, however, failed to appear at any of the trial court proceedings prior to the permanent custody hearing, and failed to file a written request asking the trial court to appoint counsel on her behalf. The Fifth District Court of Appeals noted that pursuant to statute an indigent parent is entitled to appointed counsel in all stages of juvenile proceedings, and that the Supreme Court of Ohio has found that in actions instituted by the state to force the permanent, involuntary termination of parental rights, the United States and Ohio Constitutions' guarantees of due process and equal protection require that indigent parents be provided with counsel and a transcript at public expense for appeals as of right. *Id.* at ¶8.

{¶18} Because Westfall failed to make an appearance prior to the permanent custody proceeding and failed to file a written request asking the trial court to appoint counsel on her behalf, the court held, "[t]hus, although appellant would have been entitled to the appointment of counsel, her failure to request such did not result in the denial of her due process rights." *Id.* at ¶10. See also *In re Jeffrey D.* (Sept. 30, 1997), 6th Dist. No. L-97-1012 (father was properly served with notice of the proceedings and given the opportunity to assert his right to counsel but failed to do so; therefore, the court of appeals

determined the trial court complied with the requirements of R.C. 2151.353 and did not violate father's due process rights); *In re Frantz* (Apr. 7, 1989), 11th Dist. No. 3985; but see *In re J.S.*, 184 Ohio App.3d 310, 2009-Ohio-5189 (even though the father waived his right to counsel under R.C. 2151.353, due process was not satisfied because the trial court knew the father was unable to secure transportation to attend the hearing and the failure to make an inquiry regarding his need for counsel amounted to plain error).

{¶19} Upon review, we find that *Lassiter* compels a conclusion here that appellant's due process rights were not violated. In this matter, though having been served with notice of the proceedings, appellant did not make an appearance until after the trial court entered judgment granting FCCS's motion for permanent custody of her four children. Appellant was also informed in the notices with which she was served of who to contact to obtain the appointment of counsel if eligible; however, the record reflects no action taken by appellant to demonstrate an interest in either attending or taking part in the proceedings being held to determine whether or not to terminate her parental rights. As stated in *Lassiter*, when deciding whether due process requires the appointment of counsel to an indigent parent in a parental termination proceeding, a court "need not ignore a parent's plain demonstration that she is not interested in attending a hearing." *Id.* at 33.

{¶20} Accordingly, in the matter sub judice, we do not find that proceeding on the motion for permanent custody without appointing counsel to represent appellant's interests constitutes a violation of appellant's due process rights. *Lassiter*. To hold otherwise and conclude that due process requires the appointment of counsel to a parent in a parental termination proceeding where, despite having received adequate notice, the

parent has not made an appearance, averred indigency, or otherwise demonstrated *any* interest in the parental termination proceedings until *after* their conclusion is contrary to both the holding and reasoning set forth by the United States Supreme Court in *Lassiter*.

{¶21} For the foregoing reasons, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
