

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: D.S., D.T.,
D.T., D.T., and D.T.

Court of Appeals No. L-09-1038

Trial Court No. JC05-142079

DECISION AND JUDGMENT

Decided: February 5, 2010

* * * * *

Dan M. Weiss, for appellant.

Julie C. Taylor, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas, Juvenile Division, which, on February 4, 2009, overruled father's objections to the magistrate's decision, signed on August 26, 2008, and affirmed the magistrate's decision that it is in the best interest of father's four children to

remain in the home of a maternal relative and that said relative be awarded legal custody of the children. The children's mother was in agreement with the maternal relative receiving legal custody; however, appellant desired to have custody of the children. Appellant timely appealed the decision of the juvenile court and raises the following sole assignment of error:

{¶ 2} "The trial court decision that legal custody of the minor children should be granted to a maternal relative was against the manifest weight of the evidence, as appellant had substantially completed his case plan."

{¶ 3} In this case, by stipulation of the parties, the children were adjudicated neglected and temporary custody was granted to Lucas County Children Services ("LCCS") on June 20, 2005. Case plan services were offered to the parents and both successfully completed their parenting education, but were unable to demonstrate a change in behavior with their lifestyles. Appellant was recommended for substance abuse treatment and sought treatment, but did not successfully complete the aftercare portion of the treatment program. Nevertheless, having substantially complied with case plan services, the children were to be reunified with their parents.¹ A motion to change placement and terminate temporary custody was filed on August 10, 2006. However, appellant was charged with felony drug charges in November 2006, before the motion could be determined, and was charged again in February 2007. In one instance,

¹Appellant was to have custody of the triplets and the mother was to have the remaining children.

appellant's home was raided and crack cocaine and four pit bulls were discovered. As such, the motion to change placement was dismissed on November 7, 2006.

{¶ 4} On April 19, 2007, LCCS filed a motion for permanent custody and new case plans were initiated. During the pendency of the case, the children were placed with a relative, placed in a foster care setting, placed with another relative, and then placed in a foster care setting with the children's caregiver. On January 3, 2008, the juvenile court found that LCCS failed to meet its burden, by clear and convincing evidence, that it should be granted permanent custody. The juvenile court ordered that the award of temporary custody to LCCS be continued and that additional case plans be prepared, with the goal toward reunification with the parents. Immediately following the juvenile court's decision, appellant was convicted and sentenced to 12 months in prison for his felony drug convictions. Appellant was incarcerated in February 2008.

{¶ 5} Although LCCS's permanent custody motion was denied, it still had temporary custody of the children and, therefore, was required to file a motion with the juvenile court requesting one of the following orders of disposition: "(1) An order that the child be returned home and [placed in] the custody of the child's parents, guardian, or custodian without any restrictions; (2) An order for protective supervision; (3) An order that the child be placed in the legal custody of a relative or other interested individual; (4) An order permanently terminating the parental rights of the child's parents; (5) An order that the child be placed in a planned permanent living arrangement; (6) In

accordance with division (D) of this section, an order for the extension of temporary custody." R.C. 2151.415(A).

{¶ 6} On March 28, 2008, the children were placed with a maternal cousin, while appellant was incarcerated. On April 18, 2008, with the agreement of the children's mother, LCCS filed a motion requesting that legal custody be granted to the maternal cousin. Appellant was released from prison on June 16, 2008, and objected to the motion for legal custody. On August 26, 2008, a hearing was held before the magistrate.

{¶ 7} During the hearing, Lauri Wolfe, case worker with LCCS, testified that during the two months since appellant was released from prison, he had sporadic visits with the children at the maternal cousin's house, and went at least 11 days without seeing the children. Appellant's visits would only be a few minutes in duration and the children associated his visits with getting McDonald's chicken nuggets, doughnuts and juice.

Wolfe testified that appellant indicated to her that he was working since his release, but failed to bring in any work records and missed two recent office visits.

{¶ 8} Wolfe testified that appellant has a lengthy history of arrests and that his most recent convictions were for drug possession and drug trafficking of crack cocaine, and possession of drug paraphernalia. When his home was raided and the crack cocaine was found, there were also four pit bulls in the home, one of which had its ear detached from its head, and there were allegations that he was fighting them. Wolfe testified that, previously, appellant also had been charged in 2007 with possession of Percocet, which was found in his pocket. The Percocet was allegedly being used by appellant, without a

prescription, to treat his scalp condition, which was the basis for his being on disability and receiving Social Security Insurance.

{¶ 9} Although no criminal charges had been brought since the date of his release in June 2008, Wolfe testified that there were a number of reports from relatives that appellant was hanging out with known criminal offenders, drug dealers, and people who engage in pit bull fighting. Appellant, however, tested negative during a urine drug screen the week prior to the hearing. While incarcerated, appellant completed a substance abuse treatment, a course regarding "behavior community services," and completed his GED.

{¶ 10} With respect to the children's adjustment to the maternal cousin's home, Wolfe testified that the children appear to be well bonded and comfortable with the cousin, her husband (who is actually a paternal cousin), and their five children.² With the children, there are a total of 12 people in the cousin's six bedroom home.³ The children know where they sleep each night, which was a concern during prior placements, and, in general, Wolfe found no concerns with the placement.

{¶ 11} The maternal cousin testified that the children had been with her for four months, at the time of the hearing, and that she was having no difficulty meeting the needs of all the children. She described the family activities that the children were

²One of the daughters also has a small child of her's living there.

³Maternal cousin actually testified that there was a total of eight bedrooms, five upstairs and three in the basement.

involved with to include, church, flag football, soccer, "Read for Need," basketball, and a dance team called "Total Youth Dance and Performance." Her husband was not currently working and, therefore, was responsible for transportation of the children to the various schools and activities. The triplets were involved with Head Start. She also testified that she does not restrict parental visitation with the children. She testified that, although she imposed no restrictions on visitation, appellant's visits were infrequent and typically lasted 20 to 25 minutes in duration, except for one Friday when he stayed approximately two hours. She also testified that all the children suffer from asthma, but that appellant smokes around them, causing her to have to give the children extra breathing treatments.

{¶ 12} Appellant testified that he rents a home with his nephew and has lived there for the three years preceding the hearing, except when incarcerated. He testified that the house has four bedrooms and, although the children's beds are not yet in place, he has bunk beds for them to use. During incarceration, appellant completed a drug program, did a relationship and a building a better life program, did a community service program, did community service, got his GED, completed a one-on-one college board construction program, and did a resume class program. Appellant testified that he no longer had any dogs, that the pit bulls he previously had never came into contact with the children, and that whatever caused the dog's ear to tear did not occur in his presence. Appellant also testified that he never smoked in near proximity to the children. According to appellant, 15 people live in the maternal cousin's home. He also testified that he never stayed less

than an hour with his children during visits, but stated that the situation was hostile toward him, so he did not like going there.

{¶ 13} In a September 16, 2008 decision, the magistrate found that it was in the best interest of the children that the maternal cousin receive legal custody. The magistrate also found that continuation in the family home was contrary to the best interest of the children, and that removal of the children was unavoidable under the circumstances despite reasonable efforts, including counseling, parenting class, and substance abuse services, to prevent the need for removal; and that it is in the best interest of the children to be in the legal custody of the maternal cousin as opposed to any other placement. Appellant filed objections to the magistrate's decision on September 23, 2008. On January 7, 2009, the juvenile court held a hearing on appellant's objections. The juvenile court adopted the magistrate's findings, overruled appellant's objections, and found that LCCS had demonstrated by a preponderance of the evidence that granting legal custody to a nonparent was in the children's best interest.

{¶ 14} Upon review, we note that "after a child is adjudicated abused, neglected or dependent, the court may award legal custody of the child to a nonparent upon a demonstration, by a preponderance of the evidence, that legal custody is in the child's best interest." *In re Christopher M.*, 6th Dist. No. L-06-1063, 2007-Ohio-1040, ¶ 12. The standard of proof is by a preponderance of the evidence, rather than clear and convincing evidence, because the parent retains residual parental rights, such as visitation, and has the opportunity to seek the return of the children. *In re: Alexander C.*,

164 Ohio App.3d 540, 2005-Ohio-6134, ¶ 6. An appellate court reviews legal custody determinations for an abuse of discretion, i.e., whether the trial court's decision connotes more than an error of law or judgment, and implies that the court's attitude is unreasonable, arbitrary or unconscionable. *In re Christopher M.*, 2007-Ohio-1040, ¶ 13, citing *In re D.P.*, 10th Dist. Nos. 05AP-117, 05AP-118, 2005-Ohio-5097, ¶ 52, and *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} Based upon the facts presented at the August 26, 2008 hearing, we find that the trial court did not abuse its discretion in granting legal custody to the maternal cousin. The children had multiple placements while LCCS had temporary custody. The maternal cousin's home was suitable to accommodate the children, provided stability for the children, and it was clearly established that the maternal cousin was capable of providing a home and caring for the children on an extended, continuous basis. Conversely, although appellant made great strides toward improving his lifestyle and situation, the record at the time of the hearing demonstrated that prior to his incarceration in 2008, appellant had not maintained a stable home because he owned pit bulls, was thought to engage in dog fighting, and had his home raided by the police, during which crack cocaine was recovered. In addition, appellant had numerous arrests and convictions and had been released from prison only two months prior to the custody hearing. Appellant has a loving relationship with his children, but his visitations with them during the time since he was released from prison was sporadic, despite the fact that he testified he had only begun working three days before the hearing. We find that LCCS established by a

preponderance of the evidence that legal custody in favor of the maternal cousin was in the children's best interest.

{¶ 16} Accordingly, we find that appellant's sole assignment of error is found not well-taken. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant, D.T., is ordered to pay the costs of this appeal

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

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