[Cite as *In re A.S.*, 2010-Ohio-1441.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94098 and 94104

IN RE: A.S. and T.S.
Minor Children

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 07901023 and AD 0701024

BEFORE: Dyke, J., Rocco, P.J., and Cooney, J.

RELEASED: April 1, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Appellant K.S.[1] appeals from the order of the juvenile court that awarded permanent custody of her daughters, A.S. and T.S., to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). For the reasons set forth below, we affirm.

{¶ 2} Appellant had A.S in 2004, and T.S. was born the following year. On September 7, 2007, CCDCFS filed a complaint for temporary custody alleging that appellant had a substance abuse problem that interfered with her ability to care for the children, that she refused to attend inpatient treatment, that she is homeless and cannot provide for their basic needs, and that she has been diagnosed with depression "and fails to take her recommended medication which affects her ability to care for the children."

{¶ 3} In an amended complaint, CCDCFS noted that appellant had recently completed inpatient treatment and crossed out the reference to appellant not taking medication for depression.

{¶ 4} CCDCFS was awarded temporary emergency custody on October 15, 2007. On October 23, 2007, appellant admitted the allegations set forth in the amended complaint, and following a dispositional hearing, CCDCFS was awarded temporary custody on November 13, 2007. A.S. and T.S. were subsequently placed together in foster care.

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[1] The parties are referred to using their initials pursuant to this court's policy regarding the nondisclosure of identities in juvenile cases.

{¶ 5} The case plan for the family indicated that the mother was to obtain stable housing, address her chemical dependency issues, find employment, and address her mental health needs and depression. A progress report dated April 2, 2008, indicated, with regard to the mother's mental health, that the mother had an intake appointment, was to see a counselor once a month, and had been prescribed Zoloft and Seroquel.

{¶ 6} Temporary custody was later extended until April 10, 2009. In a semi-annual review dated January 6, 2009, it was indicated that the children's needs were being met in their foster care placement, and that they had bonded with their foster family. The mother still had not obtained stable housing or income and had not demonstrated "consistent compliance with her mental health services as well as continued sobriety."

{¶ 7} On March 17, 2009, CCDCFS filed a motion for permanent custody. In relevant part, CCDCFS alleged that appellant failed to comply with the recommended drug treatment, had failed to consistently attend the recommended mental health counseling and to take her medication, and failed to obtain stable housing.

{¶ 8} The trial court scheduled a hearing on the motion for September 15, 2009. On September 8, 2009, appellant's counsel filed a motion to withdraw from the case, and stated:

{¶ 9} "Mother failed to remain in contact with our office to share her position in the progression of this case. A letter was sent [to mother] on August 24, 2009

which requested that she contact our office on or before September 4, 2009 to provide the attorney with information regarding her position with the current request for permanent custody." In addition, the mother's attorney noted that she had not appeared for hearings set in the matter on June 3, 2009 and July 21, 2009.

{¶ 10} At the scheduled hearing, the mother's attorney explained:

{¶ 11} "MS. KENNEDY: Your Honor, the last contact that I had with Mom was in April of 2009. I sent a letter to her home shortly thereafter. Unfortunately, that letter was returned to us. Because that letter was returned, I did not file a motion to withdraw from the case at that time. Actually, I sent a letter to her on June 4th, which was the day after a court hearing. That letter was returned to us. We talked with the social worker at one of our last court hearings, and she gave us a suggestion taking off --- there was a letter in front of the apartment number. The apartment number was N103. She said that there had been some changing or restructuring of the property. So I sent another letter on August 25th. That letter has not been returned. And in that letter, I again let Mom know that we needed to hear back from her; and if we didn't hear back from her by the 4th, that we would withdraw on the case. On the 4th, we were required to take a furlough day, and then we were off again on the 7th for the holiday.

{¶ 12} "THE COURT: Did you have a phone number? Were you able to reach her by phone?

{¶ 13} "MS. KENNEDY: The last phone number I had for Mom was not working."

{¶ 14} The trial court then determined that appellant had waived her right to counsel and it permitted counsel to withdraw, concluding that counsel had made "every reasonable effort to contact" appellant.

{¶ 15} Social worker Michelle Wilkins testified that the mother had not addressed the basic needs outlined in the case plan, as she had not gone to counseling since August 2008, and had attempted suicide on May 29, 2009. In addition, the mother did not complete her chemical dependency treatment as she was referred for in-treatment therapy but was discharged for a combative attitude. Further, according to Wilkins, appellant did not maintain stable housing. Although appellant was living with the children's maternal grandmother, this location was not a suitable residence for the children in light of the grandmother's chemical dependency issues, mental health issues, and history with CCDCFS, as well as reports of domestic violence between appellant and the maternal grandmother. The mother also failed to visit the children in May and June 2009, and kept some scheduled visits in July and August 2009, and stopped visiting after August 20, 2009.

{¶ 16} The trial court subsequently awarded permanent custody of A.S. and T.S. to CCDCFS. Appellant challenges that determination and assigns three errors for our review.

{¶ 17} For her first assignment of error, appellant complains that the award of temporary custody to CCDCFS is void because the trial court did not properly advise her of her rights prior to obtaining her admission to the complaint.

{¶ 18} A dependency adjudication followed by a disposition awarding or continuing temporary custody of a child to a public services agency constitutes a final appealable order. *In re H.F.,* 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607. Thus, the trial court's finding of dependency on November 13, 2007, was a final appealable order. Since appellant did not file a notice of appeal from this final order, she is barred from challenging it at this time.

{¶ 19} Accordingly, this assignment of error is without merit.

{¶ 20} For her second assignment of error, appellant asserts that she was denied effective assistance of counsel because her attorney was permitted to withdraw from representation on the date of the permanent custody hearing.

{¶ 21} As an initial matter, we note that the permanent termination of parental rights has been described as "the family law equivalent to the death penalty in a criminal case." *In re Hayes* (1997), 79 Ohio St.3d 46, 679 N.E.2d 680. Thus, a parent "must be afforded every procedural and substantive protection that the law allows." Id.

{¶ 22} Pursuant to R.C. 2151.352:

{¶ 23} "A child, the child's parents or custodian, or other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code * * *." Accord Juv.R. 4(A).

{¶ 24} Juv.R. 4(F) outlines the procedures for the withdrawal of counsel and states:

{¶ 25} "An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown."

{¶ 26} Courts have determined, however, that the right to counsel is not absolute and that a parent can be found to have waived the right to counsel in an action for termination of parental rights, in which case a court may properly grant a request by counsel to withdraw. In *In re C.H.*, 162 Ohio App.3d 602, 2005-Ohio-4183, 834 N.E.2d 401, the Court explained:

{¶ 27} "'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. 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.'" Id., quoting *In re Rachal G.,* Lucas App. No. L-02-1306, 2003-Ohio-1041, _ 13-14.

{¶ 28} 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. *In re Rachal G.,* supra; *In re C.H.,* supra. In addition, courts may consider whether counsel's attempts to communicate with and obtain the cooperation of the client were reasonable; and

second, the court must verify that the failure of this communication resulted in the inability of counsel to ascertain the client's wishes. *In re I.D.,* Columbiana App. No. 09 CO 13, 2009-Ohio-6805; *In re B.M.,* Franklin App. Nos. 09AP-60, 09AP-61, 09AP-62, 09AP-63, 09AP-64, 2009-Ohio-4846.

{¶ 29} Appellant notes, however, that pursuant to Loc.R. 19(C) of the Court of Common Pleas of Cuyahoga County, Juvenile Division, an attorney may not withdraw from a case on the "later than thirty (30) days prior to a trial/adjudicatory hearing, dispositional hearing or bindover hearing except for extraordinary circumstances that require permission of the court."

{¶ 30} In this case, we concur with the trial court's determination that the mother waived her right to counsel and we find that the trial court was therefore authorized to extend its permission for appellant's attorney to withdraw from the matter before the permanent custody hearing. The totality of the circumstances demonstrate to us that appellant's trial counsel acted reasonably, made numerous attempts to contact appellant, but could not, due to the lack of communication, ascertain her wishes. That is, appellant's last contact with counsel was in April 2009. The mother failed to attend hearings set in the matter on June 3, 2009 and July 21, 2009. The mother did not respond to a letter instructing her to contact counsel by September 4, 2009, and counsel could not reach her using her last known phone number. In addition, the mother failed to visit the children in May and June 2009 and kept some scheduled visits in July and August 2009, and stopped visiting after August 20, 2009. These circumstances, taken as a whole,

demonstrate to us that the mother waived her right to counsel both by failing to communicate with counsel and failing to cooperate with counsel and CCDCFS in this matter.

{¶ 31} In accordance with all of the foregoing, we conclude that the trial court properly allowed appellant's trial counsel to withdraw from this matter. The second assignment of error is overruled.

{¶ 32} For her third assignment of error, appellant maintains that the trial court erred by failing to timely appoint a guardian ad litem for her. She maintains that a guardian ad litem should have been appointed well before the permanent custody hearing, in light of the reference in the record to her mental health issues.

{¶ 33} R.C. 2151.281 provides, in pertinent part:

{¶ 34} "(C) In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child in which the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of that parent."

{¶ 35} In addition, Juv.R. 4(B)(3) provides that the court shall appoint a guardian ad litem when the parent is under eighteen years of age or appears to be mentally incompetent. Pursuant to Juv.R. 4(F), a guardian ad litem may withdraw only with the consent of the court upon good cause shown.

{¶ 36} In this matter, the record indicates that the trial court did in fact appoint a guardian ad litem for appellant. Our review of the record indicates that he had been appointed at least six months prior to the hearing on the termination of

parental rights. At the time of the permanent custody hearing, however, the guardian ad litem informed the court that he had not had any contact with appellant since June 2009, either by phone or by letter and that the "phone number [he had] for her is no good."

{¶ 37} In accordance with the foregoing, the record does not demonstrate that the trial court's appointment of a guardian ad litem for the mother was untimely. In any event, she waived her right to a guardian ad litem by not communicating with him.

{¶ 38} This assignment of error is without merit.

{¶ 39} Affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS (SEE ATTACHED SEPARATE CONCURRING OPINION);
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY

KENNETH A. ROCCO, P.J., CONCURRING:

While I agree with the majority decision in this case, I write separately to note some of the difficult questions inherent in the legal representation of persons with diminished mental capacity whose children are the subject of a request for permanent custody. These considerations suggest that counsel should sometimes continue to represent the client to the best of his or her ability during the critical dispositional phase of the proceedings even if the lawyer is unable to locate the client, the client has not communicated with the attorney, and he or she has not cooperated with the court's efforts to reunite the parent and child.

Although the permanent termination of parental rights has been described as "the family law equivalent to the death penalty in a criminal case," *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, the paramount interests at issue in criminal and parental rights proceedings are very different. In a criminal case, if the defendant is incompetent to assist his attorney, all proceedings are stayed until the defendant is restored to competency. See R.C. 2945.38. In a parental rights case, however, the best interests of the child guide the process. *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶11. The parent's incompetency will not halt the process, although a guardian ad litem may be appointed to protect the incompetent parent's interests. See R.C. 2151.281(C); Juv.R. 4(B).

If the defendant fails to appear for trial in a criminal case, the case cannot go forward. Crim.R. 43(A). However, a hearing on a motion for termination of parental rights can go forward even if the parent does not appear, so long as the

parent has been notified of the hearing. The very fact that a hearing to terminate parental rights may go forward without the parent's presence makes it all the more critical that someone should be present to represent his or her interests (to the extent that they can be known) and to test the evidence on his or her behalf.

Rule 1.14(b) of the Ohio Rules of Professional Conduct authorizes an attorney to take reasonably necessary protective action to protect a client with diminished capacity:

> "When the lawyer *reasonably believes* that the client has diminished capacity, is at risk of *substantial* physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take *reasonably* necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian." [Emphasis in original.]

In this case, for example, K.S.'s attorney could have consulted with her guardian ad litem to determine the appropriate course of action.

The client's best interests may not be easily ascertained, but the important rights at stake make it imperative that some effort should be made. In determining whether to allow counsel to resign immediately before the dispositional hearing, the juvenile court should weigh carefully the burden on counsel in going forward with the dispositional hearing against the potential harm to the absent client in being unrepresented at the hearing.