

[Cite as *In re J. W.*, 2009-Ohio-6957.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: J. W.

C.A. No. 24924

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-01-0067

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} This case involves the permanent custody of a ten-year-old boy. The main issue presented on appeal is whether the trial court erred when it denied his mother’s motion for a continuance of the permanent custody hearing. The mother was hospitalized at the time and sought a continuance so that she could attend the hearing. This Court concludes that the trial court erred when it denied the motion for a continuance and conducted the permanent custody hearing in the mother’s absence. Accordingly, this Court reverses the judgment of the trial court and remands for further proceedings.

FACTS

{¶2} Tammy B. is the mother of J.W., born July 7, 1999. J.W.’s biological father voluntarily surrendered his parental rights to the child. According to testimony, Summit County

Children Services Board had previously been involved with the mother, but few details and no record documents of those involvements are included in the record of this case.

{¶3} The current case began in January 2008. J.W. and his mother were staying at a battered women's shelter when Children Services learned that they were being evicted due to concerns that the mother had been using illegal drugs and violating medication storage rules. Children Services filed a complaint in juvenile court on January 25, 2008, alleging that J.W. was neglected and dependent, and sought temporary custody of the child. In due course, the trial court found J.W. to be dependent and placed him in the temporary custody of the agency. The reunification case plan focused on concerns that the mother did not have a reliable source of income or stable housing, that she abused alcohol and legal as well as illegal drugs, and that she had a history of mental illness that impacted her ability to meet the needs of her son.

{¶4} During the case planning period, the mother had several hospitalizations due to a knee surgery and related infections. Initial plans to place the child with his maternal grandmother fell apart when she unexpectedly died in September 2008. On January 12, 2009, Children Services moved for permanent custody. For her part, the mother sought an extension of temporary custody.

{¶5} A hearing on the pending motions took place in the absence of the mother on July 20, 2009, after which the trial court granted permanent custody to Children Services. The trial court found that J.W. could not be returned to his mother within a reasonable time or should not be returned to his mother, and also found that permanent custody was in the best interest of J.W. In support of the finding that the child could not or should not be returned to his mother's care, the trial court determined that the mother had failed to remedy the conditions that brought J.W.

into care and that the mother had demonstrated a lack of commitment toward her child. See R.C. 2151.41.4(E)(1), (4). The mother has appealed and has assigned three errors.

DENIAL OF MOTION FOR CONTINUANCE

{¶6} The mother first contends that the trial court erred in violation of her due process right to participate in the permanent custody hearing when it denied her motion for a continuance. Because we determine there is merit in the first assignment of error, we need not address the remaining assignments, one of which challenges the trial court's allowance of testimony by an unlicensed psychologist at the hearing and the other of which is an argument that the trial court's judgment is against the weight of the evidence.

{¶7} Just prior to the scheduled 9:00 a.m. permanent custody hearing on Monday, July 20, 2009, Madeline Lepidi-Carino, the mother's lawyer, filed a written motion for a continuance so that the mother might attend the hearing. It appears from the motion that the mother was seeking a continuance of approximately one month, until August 19, 2009. According to the motion, the mother was hospitalized for a knee infection on July 18, 2009, was on intravenous antibiotics on the 20th, and was also scheduled to have surgery on the 20th. The motion indicated that the lawyer would produce a letter from the mother's doctor, informing the court of the mother's current medical status. Finally, Ms. Lepidi-Carino asserted that the motion was filed out of necessity and not for purposes of undue delay.

{¶8} Court opened with argument on the motion for a continuance. The mother's lawyer stated that her client had been admitted to the hospital with an infection, an apparently recurring problem following her knee surgery. The lawyer further explained that another surgery was planned for later that day and that the mother was supposed to have a letter from her

physician. Ms. Lepidi-Carino verified that she had received documentation from the hospital of the hospitalization and the scheduled surgery.

{¶9} Children Services opposed the continuance, citing the mother's repeated hospitalizations and extensive time spent in nursing homes throughout this case. The agency also claimed this pattern made it difficult for the agency to facilitate progress on the case plan. Children Services indicated that the hearing had previously been continued once and urged the court to proceed with the hearing immediately. The guardian ad litem expressed agreement with the agency's lawyer.

{¶10} The trial court pointed out that it had continued the case once before due to a previous surgery the mother had, and again due to the death of a friend of the mother. The trial court indicated that the mother's health issues "appear to be pretty significant" and expressed sympathy with her hospitalization. The court concluded, however, that, "at some point in time the court has to hear the case and move the case on for the benefit of the minor child" On this basis, the trial court denied the motion and proceeded to hear the case in the absence of the mother.

{¶11} On appeal, the mother maintains that the trial court erred in failing to grant her motion for continuance and that the denial of the motion deprived her of a due process right to be present at the hearing. Both parties have cited *State v. Unger*, 67 Ohio St. 2d 65 (1981), as setting forth the appropriate considerations for a trial court in evaluating a motion for a continuance.

{¶12} The court in *Unger* held that "[t]he grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge." *Unger*, 67 Ohio St. 2d 65,

syllabus. A reviewing court will not reverse the denial of a continuance unless there has been an abuse of discretion. *Id.* at 67.

{¶13} The salient question before this Court is whether the denial of the continuance violates the mother’s right to due process of law. “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *State v. Unger*, 67 Ohio St. 2d 65, 67 (1981) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). In *Sarafite*, the United States Supreme Court recognized that, although “not every denial of a request for more time . . . violates due process[,] . . . a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend . . . an empty formality.” *Sarafite*, 376 U.S. at 589. According to the Ohio Supreme Court, a reviewing court should utilize a balancing test, weighing any potential prejudice to the moving party against such concerns as the “court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice.” *Unger*, 67 Ohio St. 2d at 67.

{¶14} The court in *Unger* also listed factors that the trial court should consider in evaluating a motion for a continuance. Those factors include the length of the requested delay; prior continuances requested and received; the inconvenience to parties, witnesses, counsel, and the court; the presence or absence of legitimate reasons for the requested delay; and the moving party’s participation or contribution to the circumstances giving rise to the request for a continuance. *State v. Unger*, 67 Ohio St. 2d 65, 67-68 (1981).

{¶15} In applying the *Unger* factors to this case, the record demonstrates that they weigh in favor of reversal. First, regarding the length of the requested delay and the reasons for it, Ms.

Lepidi-Carino argued in court for an unspecified delay because of the mother's emergency hospitalization and surgery "[until she] can attend her trial." The written motion, however, appears to request a delay of approximately one month until August 19, 2009. The written motion indicated that a letter from the mother's doctor would be produced, and, during argument, the mother's lawyer indicated that she believed such letter to be with the mother. No letter was ever included in the record. Nevertheless, Ms. Lepidi-Carino indicated to the trial court that she had been informed by the hospital that the mother was hospitalized and was due to have surgery that day. Children Services did not dispute the stated reason for the continuance. Moreover, the trial court appeared to accept the validity of the reasons for the continuance and did not express any doubt in that regard. Instead, the court acknowledged the seriousness of the mother's health issues and expressed sympathy for her.

{¶16} Next, regarding prior continuances requested and received by the mother, the record demonstrates that she had requested and received two prior continuances of the permanent custody hearing. The first continuance was due to a previous medical hospitalization, and the second was due to the death of the mother's roommate on the morning of the scheduled hearing. The request at issue was based on an emergency hospitalization for an infection and remedial surgery scheduled for the day of the hearing. The mother's first request for a continuance of the hearing was initially denied by the trial judge and was later granted upon receipt of a letter from the mother's physician, indicating that it would be medically dangerous for the mother to leave the nursing home. All of the requests for continuances appear to have been based on legitimate reasons, and there is no evidence in the record that they were "dilatatory, purposeful, or contrived." *State v. Ungar*, 67 Ohio St. 2d 65, 68 (1981).

{¶17} Finally, regarding the question of inconvenience to the parties and witnesses, the mother has argued that those individuals would not have been greatly inconvenienced by a continuance of the hearing. The motion was filed and heard in open court on the day set for trial, and all parties were apparently in attendance. There would necessarily have been some amount of inconvenience if they had to return on another day. If the continuance had been sought for a “contrived” reason or for mere delay, this factor might well weigh against the granting of a continuance, but the request was apparently based on a legitimate and emergency situation over which the mother had no control. In fact, Children Services did not dispute the reasons for the request, nor did it claim inconvenience. The agency argued only that the mother had been faced with multiple hospitalizations during the case and that made their efforts and case plan progress difficult.

{¶18} Further, the hearing was scheduled for the morning of July 20, 2009, a Monday. Ms. Lepidi-Carino’s motion stated that the mother was hospitalized on Wednesday, July 18, 2009. Actually, July 18, 2009, was a Saturday. If the mother was hospitalized on Saturday, July 18, then there would not have been any possibility of notifying the court before Monday morning. And if the mother was hospitalized on Wednesday, July 15, 2009, she would have had to assess her medical situation and contact her lawyer from her hospital room, if medically and logistically possible. Then, her lawyer may have had to verify or obtain additional information through her doctors or the hospital before preparing a motion for the court. In either situation, there was little practical opportunity to alert the court and all the parties in order to avoid inconvenience to those who did appear at court on Monday morning. In addition, there is no evidence of potential inconvenience or difficulty for those same individuals in terms of rescheduling the hearing to a time in the future.

{¶19} Finally, then, this Court must balance the potential prejudice to the moving party with the trial court’s right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice. The potential prejudice to the moving party is of great consequence. Parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel v. Granville*, 530 U.S. 57, 66 (2000). It is beyond question that this right to custody resides first in the parent. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). It is subject only to the ultimate welfare of the children. *In re Cunningham*, 59 Ohio St. 2d 100, 106 (1979). If, however, the state intervenes to terminate the relationship between a parent and child, “it must provide the parents with fundamentally fair procedures.” *Santosky*, 455 U.S. at 753-54. Ohio courts have emphasized that, if the right to parent one’s own child is being contested by the state, parents “must be afforded every procedural and substantive protection the law allows.” *In re Hayes*, 79 Ohio St. 3d 46, 48 (1997) (quoting *In re Smith*, 77 Ohio App. 3d 1, 16 (1991)).

{¶20} Parents have a due process right to be present at permanent custody hearings. See e.g. *In re C.M.*, 9th Dist. Nos. 23606, 23608, 23629, 2007-Ohio-3999, at ¶14. That right, however, is not absolute. *Id.* Several courts have upheld the termination of parental rights although the parent was incarcerated and, therefore, not present in court. *Id.* In general, those cases have been determined by a balancing of the interests involved. *Id.* Criminal incarceration, however, cannot be compared to emergency medical hospitalization.

{¶21} Examples of permanent custody cases in which an otherwise participating parent was not present at the hearing for reasons other than incarceration are less frequent. In its appellate brief, Children Services has cited a case in which the termination of parental rights was upheld by this Court following the denial of a request for a third continuance. *In re L.A.*, 9th

Dist. No. 21531, 2003-Ohio-4790, ¶45-46. In that case, the parent sought a continuance due to a headache and watery eyes, relatively minor symptoms. Moreover, the trial judge in that case did not believe the parent was actually sick, but rather believed she was merely stalling for time. In addition, more than two years had expired since the original complaint had been filed in that case. In this case, there is no suggestion that the request for a continuance was anything but legitimate, and the proceedings were six months away from the two-year mark. There may be a point at which even legitimate reasons for a continuance become too much, but that point was not reached in this case.

{¶22} The trial court was persuaded to proceed with the hearing based on the interest of the child in resolving this matter promptly. Certainly, the goal of timely permanence is important in permanent custody cases. But so, too, is the goal of properly measuring whether the parent-child relationship should be maintained. With that comes the question of whether the issues involved in this termination proceeding could be fairly determined in the absence of the child's parent. As observed by the United States Supreme Court, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). There was no urgency to conduct the hearing on July 20, 2009. It was not a lengthy hearing; Children Services called only two witnesses plus the guardian ad litem. Although the mother had faced a series of medical set-backs, there is no evidence that her medical problems were unending or permanent. Upon consideration, we conclude that the trial court erred in denying the mother's request for a continuance of the permanent custody hearing. The mother's first assignment of error is sustained.

CONCLUSION

{¶23} The mother's first assignment of error is sustained. The remaining assignments of error need not be addressed. The judgment of the Summit County Common Pleas Court, Juvenile Division, is reversed, and the cause is remanded for further proceedings.

Judgment reversed,
and 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 appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MADELINE LEPIDI-CARINO, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.