[Cite as *In re M. M.*, 2009-Ohio-3400.]

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

In the Matter of: M. M. and H. M.

Court of Appeals No. WD-09-014

Trial Court Nos. 2006 JC1268
2006 JC1269

DECISION AND JUDGMENT

Decided: July 10, 2009

* * * * *

Scott T. Coon, for appellant.

Paul A. Dobson, Wood County Prosecuting Attorney, and Charles S. Bergman, Assistant Prosecuting Attorney, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the judgment of the Wood County Court of Common Pleas, Juvenile Division, terminating her parental rights to two children and granting permanent custody to a children's services agency. For the reasons that follow, we affirm.

{¶ 2} On July 25, 2006, a caseworker for appellee, Wood County Department of Job and Family Services, Children's Services Division, visited the home of appellant, Lisa M.[1] The caseworker was accompanied by a deputy sheriff.

{¶ 3} The deputy would later testify that appellant's home was clean and well kept, but that he also immediately noticed a strong odor of burnt marijuana upon entry. When appellant concluded her interview with the caseworker, the deputy inquired about the smell of marijuana. Appellant admitted that she had been smoking in her bedroom and eventually produced a small quantity of marijuana and a pipe. The deputy cited appellant for drug abuse and paraphernalia possession.

{¶ 4} On August 15, 2006, appellee filed a complaint with the trial court, alleging that appellant's children, a four-year-old H. and a three-year-old M., were dependent due to her present use of drugs. Appellee alleged that such drug use was in conformance with appellant's behavior in Michigan that resulted in the termination of her parental rights for other children.

{¶ 5} On September 13, 2006, appellant stipulated to the facts of the complaint and an adjudication of dependency for the children. The two children were adjudicated dependent. Appellee was directed to provide protective services. Appellant was ordered to submit to random drug screens, complete diagnostic assessment and abide by the recommendations resulting from the assessment.

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[1]Although served by publication, the children's natural father did not participate in the trial, nor is he a party to this appeal.

{¶ 6} In January 2007, appellant tested positive for marijuana. Shortly thereafter, she and the children disappeared. On February 12, 2007, the court awarded temporary custody of the children to appellee and issued an emergency pickup order. The children were believed to have been taken to Louisiana with appellant when she fled.

{¶ 7} At the end of February, appellant was back in Ohio and present at a review hearing, following which the court continued custody of the children with appellee and ordered appellant to drug and alcohol counseling. By the end of March, custody of the children was returned to appellant, who was again ordered to substance abuse treatment.

{¶ 8} Appellee again sought custody of the children and an emergency pickup order in July 2007, after appellant again tested positive for cocaine. The court granted appellee's request. Shortly thereafter, appellee learned that appellant had been arrested in Louisiana. Appellee sent representatives to Louisiana to return the children to Ohio. The children were placed in foster care.

{¶ 9} From the record, it is difficult to glean the exact order and timing of events, but it appears that over the next year appellant was incarcerated for one offense or another in Michigan, Louisiana and Mississippi. On September 12, 2008, appellee moved to terminate appellant's parental rights and requested that it be awarded permanent custody of the children.

{¶ 10} The matter was originally set for hearing on November 14, 2008, but the court granted a continuance due to appellant's incarceration in Mississippi. The hearing

was rescheduled for February 19, 2009, however, appellant remained incarcerated. The trial court denied a motion by appellant's counsel for a further continuance.

{¶ 11} At trial, appellee presented testimony concerning the events which first brought appellant's family to appellee's attention. Appellee also introduced evidence that appellant's parental rights in four children had previously been terminated in Michigan for much the same reasons as alleged here: chronic drug use for which appellant will not or cannot engage in treatment. Appellee also presented an enumeration of the 21 locations of appellant's residences (including three incarcerations) between July 2006, and December 2008.

{¶ 12} Although appellant was not present at the termination hearing, her counsel cross-examined witnesses and in the end argued that, notwithstanding appellant's marijuana use, she was providing her children with a clean and safe environment when appellee intervened. Indeed, counsel argued, there was a lack of evidence showing in any way that her drug abuse negatively impacted the children.

{¶ 13} Upon submission, the court, in a 17 page judgment, found that appellee had proven by clear and convincing evidence that (1) notwithstanding reasonable efforts by appellee, appellant had failed to remedy the condition which caused the children to be removed from her home (R.C. 2151.414(E)(1)), (2) appellant demonstrated a lack of commitment by her unwillingness to deal with her drug abuse (R.C. 2151.414(E)(4)), (3) appellant's chronic chemical dependency is so severe that she cannot now, nor within a year provide an adequate permanent home for the children (R.C. 2151.414(E)(2)),

(4) her repeated incarceration prevents her from providing the children with an adequate home or care (R.C. 2151.414(E)(13), (5) appellant's parental rights to four other children was terminated in Michigan (R.C. 2151.414(E)(16), and (6) the children had been in appellee's custody for than 12 of the previous 22 months (R.C. 2151.414(B)(1)).

{¶ 14} On these findings, the court concluded that the children cannot now, nor within a reasonable time, be reunited with their mother and it was in their best interests that permanent custody be awarded to appellee.

{¶ 15} From this judgment, appellant now brings this appeal, setting forth the following three assignments of error:

{¶ 16} "I. The trial court erred in failing to grant appellant's motion to continue the permanent custody hearing to accommodate her appearance at the hearing.

{¶ 17} "II. Appellant was denied effective assistance of counsel due to the fact that her trial counsel did not attempt to secure her testimony by deposition

{¶ 18} "III. The trial court erred in granting permanent custody of the appellant's children to the state of Ohio."

{¶ 19} Appellant first directs our attention to our own characterization of the permanent termination of a parent's parental rights as the, "* * * family law equivalent to the death penalty in a criminal case," in which "[t]he parties to such an action must be afforded every procedural and substantive protection the law allows." *In re Smith* (1991), 77 Ohio App.3d 1, 16. Indeed, we have observed that "[t]he parent/child relationship possesses a unique sanctity in our culture and in our law." *In re Sean B.*, 170 Ohio

App.3d 557, 563, 2007-Ohio-1189, ¶ 28, citing *In re Stacey S.* (1999), 136 Ohio App.3d 503, 511, 1999-Ohio-989.

{¶ 20} "The right of a family to remain intact obtains constitutional protection. *Stanley v. Illinois*, [(1972) 405 U.S. 645] at 651. Therefore, on review, judicial decisions to terminate parental rights receive careful scrutiny and the permanent removal of a child from his or her family may be condoned, '* * * only where there is demonstrated an incapacity on the part of the parent to provide adequate parental care, not [because] better parental care * * * can be provided by foster parents or adoptive parents * * *.' *In re Lay* (1987), 43 Ohio App.3d 78, 82; see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 97, 1996-Ohio-182; R.C. 2151.01(C).

{¶ 21} "Before any court may consider whether a child's best interests may be served by permanent removal from his or her family, there first must be a demonstration that the parents are 'unfit.' *Quilloin v. Walcott* (1978), 434 U.S. 246, 255; see, also, *In re Schoeppner* (1976), 46 Ohio St.2d 21, 24." *In re Sean B.* at ¶ 29-30.

{¶ 22} The Ohio equivalent of parental unfitness for a child that is not orphaned or abandoned is a determination that the child cannot be placed with either parent within a reasonable time or should not be placed with the parents. R.C. 2151.414(E). The principal vehicle for reaching such a determination is a conclusion, following a hearing, that there is clear and convincing evidence that one of the predicate conditions enumerated in R.C. 2151.414(E)(1)-(16) exists. Id. at ¶ 31, citing *In re William S.*, 75 Ohio St.3d 95, 1996-Ohio-182, syllabus. After the predicate condition is properly

established, the court must then decide whether terminating a parent's parental rights is in the child's best interests. R.C. 2151.414(D). This decision too must be based on clear and convincing evidence. R.C. 2151.414(B)(1)(2). Clear and convincing evidence is that evidence sufficient for the trier of fact to form a firm conviction or belief that the essential statutory elements for a termination of parental rights have been established. *In re Sean B.* at ¶ 31; *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

I. Denial of Continuance.

{¶ 23} In her first assignment of error, appellant argues that the trial court erred when it refused to grant her motion for a continuance for the dispositional hearing. Appellant was incarcerated in Mississippi at that time and asserts that the court's decision prevented her from being present to aid in her own interests at the termination hearing.

{¶ 24} The standard of review for the denial of a motion for continuance is whether the trial court abused its discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. An abuse of discretion is more than an error of law; it implies an attitude by the trial court that is arbitrary, capricious, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 25} In its decision on the motion for a continuance, the trial court noted that it had already granted several continuances and that appellant could not relate with any certainty when she would be released from custody so as to be available to attend the hearing. Moreover, the court noted that another continuance might potentially move the

matter beyond the statutory limits within which such a hearing must be held. See R.C. 2151.414(A)(2). Thus the court provided reasonable rationale for its decision and, consequently, acted within its discretion.

{¶ 26} With respect to appellant's argument that her absence constituted a denial of her right to due process, the trial court noted that an incarcerated parent's right to be present at a permanent custody hearing is not absolute. The court cited *In re C. M.*, 9th Dist. App. Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶ 14.

{¶ 27} According to the *C. M.* court, "* * * in evaluating the due process right of an incarcerated parent to be present at a permanent custody hearing, Ohio courts have looked to the test established by the United States Supreme Court in *Mathews v. Eldridge* (1976), 424 U.S. 319, 335. See, e.g., *In re Gray* (December 22, 1999), 9th Dist. Nos. 99CA0014, 99CA0015; *In re Sprague* (1996), 113 Ohio App. 3d 274, 276. In *Mathews*, the court recognized that '[D]ue process is flexible and calls for such procedural protections as the particular situation demands,' and established a three-part test by which to determine what process may be due in a particular case. *Mathews*, 424 U.S. at 334-35 (quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481. Pursuant to *Mathews*, the [parent's] due process right to be present at a permanent custody hearing is determined by balancing: (1) the private interest affected; (2) the risk of erroneous deprivation and the probable value of additional safeguards; and (3) the governmental burden of additional procedural requirements. *Mathews*, 424 U.S. at 335." Id.

{¶ 28} In this matter, the trial court observed that this hearing had already been delayed several times, it was not clear when appellant would be at liberty to attend, appellant's interests would be represented by counsel who could cross examine witnesses on appellant's behalf, call witnesses in her favor and provide appellant's statement to the court via deposition or some other agreed form. Additionally, the court noted, it was of vital interest to the children's well being "* * * to allow issues of permanency to be decided once and for all."

{¶ 29} Considering the court's analysis in view of the *Mathews* standards, we must concur that appellant was not deprived of any right to due process in this matter. Accordingly, appellant's first assignment of error is not well-taken.

II. Effective Assistance of Counsel

{¶ 30} Appellant maintains in her second assignment of error that she was deprived of effective assistance of counsel because counsel failed to obtain and present at trial her deposition.

{¶ 31} Although a statutory proceeding for a termination of parental rights is essentially a civil matter, because a party to such a proceeding is entitled to counsel, it follows that the party is entitled to effective counsel. *Jones v. Lucas Cty. Children Services Bd.* (1988), 46 Ohio App.3d 85, 86. To show that a party was denied effective assistance of counsel, the party must first show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

Strickland v. Washington (1984), 466 U.S. 668, 687. Second, the party must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were of such seriousness as to deprive him or her of a hearing whose result is reliable. Id.

{¶ 32} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the appellant's. *State v. Smith*, supra. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. Id. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. See id. at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 33} Appellant's principal complaint about the performance of her trial counsel is that he did not make arrangements for her to testify at the permanent custody hearing by deposition or an equivalent method. Appellant insists that during such testimony she would have been afforded an opportunity to explain the circumstances concerning her counseling and to explain the facts underlying the criminal charges against her. In support of this proposition, appellant cites *In re Kessler* (May 12, 1999), 3d Dist. No. 14-98-48, 49; *In re Davis* (Mar. 30, 1995), 10th Dist. No. 94APFO8-1205; and *In re D.P.*, 8th Dist. Nos. 86271, 86272, 2006-Ohio-937.

{¶ 34} In each of the cases appellant relies upon, an incarcerated parent claimed that his or her due process rights were violated because he or she was unable to be present during part or all of a permanent custody hearing. In each case, the appellate court applied the *Mathews v. Eldridge* balancing test discussed supra and determined that the absent parent's rights were not violated. In each of these cases, the court listed as one of the factors belying a violation as that each party either testified by deposition or could have testified by deposition or affidavit. Appellant implies that the import of these cases is that a trial counsel who does not offer such testimony provides deficient representation. We disagree with that conclusion.

{¶ 35} All of the cases appellant cites hold that an incarcerated parent has no absolute right to be present during a permanent custody hearing. Although the cases also permit such an incarcerated parent to present testimony by deposition or affidavit, appellant has directed us to no authority that requires this. Ultimately, whether to offer this kind of testimonial alternative is one of those trial decisions that rests in the discretion of counsel in formulating trial strategy. As such, it is presumed effective. *Strickland* at 687. Accordingly, appellant's second assignment of error is not well-taken.

III. Manifest Weight

{¶ 36} In her last assignment of error, appellant maintains that there was insufficient evidence before the court by which it could have concluded that she was an unfit parent. Indeed, appellant contends the only evidence of her ability to make a home for the children came from the deputy sheriff who arrested her for drug possession.

According to his testimony, appellant's home was clean and well kept. Moreover, appellant maintains, appellee presented no evidence that appellant's drug use negatively impacted her children, no evidence that appellant's frequent moves affected the children, no evidence that her failure to follow through on drug counseling affected her children, no evidence that her frequent incarcerations were justified: there was nothing to show that her "bad conduct" in any way proved deleterious to the children.

{¶ 37} Appellant essentially argues that the trial court's judgment was against the manifest weight of the evidence. Since all findings in a termination of parental rights proceeding must be supported by clear and convincing evidence, a court's decision to terminate a parent's parental rights must be affirmed if the record contains competent, credible evidence by which the court could have formed a firm belief that the essential statutory elements for a termination of parental rights have been established. *In re Alexis Kaye K.*, 160 Ohio App.3d 32, 2005-Ohio-1380, ¶ 26; *Cross v. Ledford*, supra, paragraph three of the syllabus.

{¶ 38} In this matter, the trial court found that the children could not be placed with either of their parents within a reasonable time or should not be placed with either parent. The court supported this conclusion with predicate findings under R.C. 2151.414(E)(1),(2),(4),(13) and (16). The court also found that the children had been in the custody of a children's services agency for 12 of the preceding 22 months, pursuant to R.C. 2151.414(B)(1).

{¶ 39} We have already stated our concern with the 12 of 22 provision. See *In re Daniel D.*, 6th Dist No. L-04-1363, 2005-Ohio-5457, fn. 1, but see *In re S.W.*, 10th Dist. No. 05AP-1368, 2006-Ohio-2958, ¶ 28. Again, however, the issue is superfluous to our decision and need not be discussed. Indeed, in this matter, the trial court must be sustained if any one of its predicate findings is supported by the evidence. Id. at ¶ 15.

{¶ 40} The version of R.C. 2151.414(E) applicable to this matter provides, in material part:

{¶ 41} "(E) * * * If the court determines, by clear and convincing evidence * * * that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶ 42} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 43} "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year * * *;

{¶ 44} "* * *

{¶ 45} "(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶ 46} "* * *

{¶ 47} "(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

{¶ 48} "* * *

{¶ 49} "(16) Any other factor the court considers relevant."

{¶ 50} Interestingly, the trial court chose to include appellant's prior Michigan termination of parental rights under the R.C. 2151.414(E)(16) catch all provision rather than the (E)(11) provision which specifically makes a predicate that a parent has previously had parental rights terminated.[2] This tactic avoids the apparent non-rebuttable presumption in the former R.C. 2151.414(E)(11).

[2]The present version of R.C. 2151.414(E)(11) (eff. 4/7/2009) makes a prior termination a predicate, but permits the parent to demonstrate that, notwithstanding the

{¶ 51} For this finding and others, the trial court relied heavily on the records admitted during the hearing from Michigan relative to appellant's four prior terminations. The court found, and the evidence admitted supports, that appellant's behavior in Michigan was the same noted in Ohio. She would become engaged with a children's services agency, complete assessment for drug and alcohol abuse, then fail to follow up on treatment. If she tested positive for drugs, she would take the children and flee to another state, occasionally becoming involved with law enforcement in the process. This is behavior that resulted in 21 residences and three arrests in 18 months. It was behavior that caused the children to be removed from the home; moreover, the evidence suggested that it was behavior that continued through the day of the dispositional hearing.

{¶ 52} Given this evidence, we cannot say that any of the trial court's findings was unsupported by evidence by which the court could have found that predicate proven by clear and convincing evidence. The children were removed because of appellant's drug use and flight. The evidence clearly shows that this was a condition that appellant had not remedied by the time of the final hearing and it is undisputed that appellee provided diligent efforts to help her accomplish that remedy.

{¶ 53} Appellant's behavior in Michigan and in Ohio certainly suggests that she is chronically drug dependent, unwilling to remedy that dependency and her ability to provide an adequate permanent home for her children is undermined by this condition.

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prior termination, the parent is now capable of a secure home and providing for the child's welfare.

Her failure to engage in treatment similarly demonstrates an unwillingness to provide an adequate home.

{¶ 54} Although appellant may protest her innocence, it is unrefuted that she has been incarcerated on three different occasions in three different states and, at the time of the final hearing, could provide no finite date for her release. Neither could she give any assurance that on her release she would not be taken into custody for offenses elsewhere. During none of these incarcerations has she been capable of caring for her children and future prospects of her being able to do so are not within reasonable optimism.

{¶ 55} Consequently, we conclude that there was sufficient evidence presented at the dispositional hearing by which the trial court could have properly found that appellant cannot now, nor with a reasonable time, be reunited with her children and she should not be reunited with them. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 56} On consideration whereof, the judgment of the Wood County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the court costs of this appeal, pursuant to App.R. 24.

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

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE