[Cite as *In re T. H.*, 2009-Ohio-4409.]

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

In the Matter of: T.H.

Court of Appeals No. L-09-1096

Trial Court No. JC 07175166

DECISION AND JUDGMENT

Decided: August 28, 2009

* * * * *

Stephen D. Long, for appellant.

David T. Rudebock, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on appeal of the Lucas County Court of Common Pleas Juvenile Division's March 31, 2009 judgment entry terminating the parental rights of appellant, Terri H., and awarding custody of her minor child, T.H. to Lucas County Children's Services ("LCCS"). For the following reasons, we affirm the trial court's judgment.

{¶ 2} Appellant, Terri H., is the natural mother of T.H., born August 2007. On November 1, 2007, LCCS filed a complaint in dependency and neglect and motion for shelter care hearing. The complaint stated that LCCS had been involved with the family since T.H.'s birth due to appellant's mental health status and homelessness. A safety plan had been implemented with appellant and T.H. living with an oversight family member. The complaint alleged that appellant's behavior had become very erratic and unpredictable and that appellant's family could no longer supervise her. The complaint further alleged that appellant had not been taking her medication and that T.H.'s father has no contact with her and provides no support.

{¶ 3} On November 2, 2007, following the shelter care hearing, temporary custody was awarded to LCCS and T.H. was placed in foster care. On November 15, 2007, LCCS filed an amended case plan with a goal of reunification. The plan required appellant to obtain independent housing, to actively participate in parenting classes, therapy and counseling, and to appropriately take any prescribed medications. On November 30, 2007, the plan was amended due to a change in foster care placement.

{¶ 4} On December 18, 2007, an adjudication hearing was held. At the hearing, appellant stipulated to a finding of dependency and temporary custody was awarded to LCCS. The court also approved the November 30, 2007 case plan. On January 22, 2008, the trial court approved the magistrate's findings.

{¶ 5} On September 26, 2008, LCCS filed a motion for permanent custody. At the December 12, 2008 hearing on LCCS's motion for permanent custody, the following evidence was presented. Jean Brandt, R.N., testified that she conducts parenting courses at St. Vincent's Mercy Medical Center. Brandt testified that in January 2008, appellant enrolled in an interactive parenting class. Brandt stated that appellant attended all of the classes, was cooperative, and successfully completed the program.

{¶ 6} During cross-examination, Brandt recounted an incident between appellant and another parent; the two were yelling and "prodding" one another and Brandt had to intervene. During the incident, appellant was holding T.H. Brandt stated that she was concerned that when T.H. got older and challenged appellant, the altercation could escalate. Regarding appellant's mental health, Brandt said that appellant would often get off topic and she would have to steer her back to the original question.

{¶ 7} Harbor Behavioral Healthcare counselor, Linda Pierce-Jasiolek, testified that in June 2007, she was assigned to counsel appellant. Pierce-Jasiolek testified that appellant attended 10 of the 14 scheduled visits and that she was cooperative and had been "making progress" on her housing and child custody goals.

{¶ 8} Pierce-Jasiolek was cross-examined regarding appellant's attendance. Pierce-Jasiolek acknowledged that appellant missed two consecutive monthly appointments and, after attempting to reach her, Pierce-Jasiolek closed her case. Pierce-

Jasiolek testified that appellant had not successfully completed the services because her goals had not been met.

{¶ 9} LCCS caseworker, Tionna Jackson, testified that she was assigned to appellant's case from August 2007, until December 2007. Jackson testified that, at the start of the case, T.H. was in appellant's care and that a case plan had been developed and parenting and mental health services were offered. Jackson explained that mental health services had been offered because appellant had been diagnosed with paranoid schizophrenia and had been off of her medication since August 2006. According to Jackson, appellant was not taking her medication because she did not feel that it was needed.

{¶ 10} Jackson testified that LCCS determined that T.H. should be removed from appellant's care after receiving reports from family members that appellant's mental heath had been deteriorating. Jackson stated that LCCS received reports of physical abuse and aggression and that appellant had been hallucinating in the home.

{¶ 11} Jackson testified that she observed instances of appellant's "delusional behavior" including paranoia that her sisters were "setting her up" so that they could steal T.H., and that someone, other than T.H.'s father, wanted to be her father and would try and alter a paternity test. Jackson stated that in September 2008, she was involved in a 90-day review where appellant was "saying things that weren't words, or sentences that didn't make sense."

{¶ 12} During cross-examination, Jackson acknowledged that appellant had participated in the services provided for in the case plan; she attended counseling and was looking for stable housing. Appellant did not want to take her medication. Jackson agreed that appellant was a devoted mother.

{¶ 13} Jackson was further questioned regarding the fall 2007, decline in appellant's mental health. Jackson stated that she was receiving telephone calls from family members every other day and that the family described appellant's hallucinations and that in the middle of the night she would argue with people that "weren't there." While she was arguing with the nonexistent people, she would let T.H. cry all night. Jackson also received a report that appellant was dancing and arguing by herself out on the street.

{¶ 14} LCCS employee Deborah Proe testified that in December 2007, she was assigned as appellant's caseworker. Proe testified that appellant was referred to various clinics to address her mental health issues through medication management, counseling, and psychiatric treatment. Proe testified that appellant was not following through with her psychiatric treatment. Proe stated that appellant's doctor contacted her to try and get appellant to call her. Proe indicated that appellant was strongly opposed to taking her medication; she stressed that no one could make her take it.

{¶ 15} Proe testified that in November 2008, for a short period of time appellant's behavior improved; Proe believed it was because appellant was taking her medication.

Shortly thereafter, appellant's behavior worsened. Proe testified that appellant reported that she had several conversations with the trial judge. Appellant also stated that she was the Attorney General of the state of Ohio; that she was a corporal, a lieutenant, an attorney, and a corrections officer, among other things.

{¶ 16} Proe testified that she had been called to assist with appellant's visitation because appellant would "dangle" T.H.; she also would talk to herself. On one occasion, Proe was called to visitation because appellant was having a dispute with another parent. Proe testified that appellant's mental health status would make it very difficult to care for T.H.

{¶ 17} During cross-examination, Proe acknowledged that appellant loves T.H. She also agreed that appellant completed the parenting program and sought assistance from agencies such as the Salvation Army. Proe stated that she believes that if appellant accepts something, she will get assistance. Proe believed that appellant had not accepted that she has mental health issues.

{¶ 18} Loretta Kirk, a security officer employed by LCCS, testified that she supervised visits between appellant and T.H. During the visits, Kirk noticed that, at times, appellant would just sit and "stare into space" or talk to herself. Kirk observed that appellant was very fixated on how T.H. was dressed and how her hair had been cared for.

{¶ 19} Kirk acknowledged that, during the visits she observed, appellant properly fed and cared for the child; she also appropriately interacted and played with the child.

Kirk testified that appellant followed visitation rules and was cooperative. Upon further questioning, Kirk stated that appellant would sometimes dress inappropriately for the weather and that occasionally her outfits were too revealing. Kirk also admitted that appellant would speak to T.H. in "another language;" appellant told her that it was Spanish, but Kirk testified that it did not sound like Spanish.

{¶ 20} Judith Orphey testified that she was appointed as T.H.'s guardian ad litem in early November 2007. Orphey testified that she was made aware that appellant had another child, aged 15, who had been removed from her custody when he was six. The child lives in the Chicago, Illinois area and resides with a woman who has legal custody.

{¶ 21} Orphey testified regarding the September 2008 LCCS staffing. Orphey stated that appellant was agitated and the individuals present were not able to understand what she was saying. According to Orphey, appellant acknowledged that they could not understand her because she was speaking "perumbrig;" she understood the language but the others did not.

{¶ 22} Orphey testified that appellant told her that T.H.'s father had been shot and killed in a bar in Toledo. Appellant informed Orphey that the father had a funeral, was cremated, and that she had the death certificate (which she refused to produce.) Appellant also stated that the father left T.H. a large sum of money. Shortly thereafter, it was discovered that the father was alive; appellant denied making up the story.

{¶ 23} Orphey testified extensively about appellant's issues with taking her medication. According to Orphey, appellant stopped taking her medication while pregnant with T.H. In September 2008, appellant stated that she had resumed taking her medication. Orphey stated that on November 10, 2008, she was at appellant's apartment and saw a prescription bottle that had been filled on October 20; the bottle still had 26 pills out of 30. Orphey believed that she was not taking her medication based on appellant's behaviors. Such behaviors included nonsensical language, handling T.H. in an unsafe manner, inappropriate attire, and appellant's belief that she had regained custody of T.H. Orphey testified that appellant would also represent that she had various job titles such as an attorney and a police officer. Orphey stated that based on appellant's refusal to consistently take her medication, despite her schizophrenia diagnosis, she believed that it was in T.H.'s best interests to award LCCS permanent custody.

{¶ 24} During cross-examination, Orphey acknowledged that during visits with T.H., appellant would provide appropriate food and clothing. Orphey also stated that appellant's apartment was very clean though it was sparsely furnished.

{¶ 25} Regarding the case plan, Orphey agreed that appellant completed the parenting classes and that in July 2008, she had secured housing. Orphey agreed that appellant had acquired prescriptions for her medications, but she had no knowledge of whether appellant actually took the medications.

{¶ 26} Orphey was also questioned regarding T.H.'s special needs. Orphey stated that T.H. is involved with Help Me Grow and that she is being evaluated for a speech delay. T.H. also hits or kicks in order to get attention.

{¶ 27} Appellant provided a testimonial narrative. Appellant admitted that she had not seen her psychiatrist for the past two months but stated that, because the doctor had given her sample packs of Ritalin, she did not know that she needed to schedule another appointment. Appellant denied that the doctor prescribed her a "Schizo-Psychosis" medicine since December 2006, when she discovered that she was pregnant with T.H. Regarding T.H.'s father, appellant testified that she thought he was dead because that is what she was told.

{¶ 28} Appellant stated that she is tired of hearing about her mental health issues and that she has had no health problems, no problems with the police, and no difficulties caring for T.H. since being off of her medication.

{¶ 29} On March 31, 2009, the court granted LCCS' motion for permanent custody. The court found that, under R.C. 2151.414(B)(1)(a), T.H. could not be placed with either one of her parents within a reasonable time. The court based its determination on its findings that appellant failed to remedy the conditions that caused T.H. to be placed in foster care, R.C. 2151.414(E)(1); that appellant's chronic mental illness prevents her from providing an adequate permanent home at present and, likely, within one year, R.C. 2151.414(E)(2); that appellant has had her parental rights involuntarily terminated with

respect to T.H.'s sibling, R.C. 2151.414(E)(11); and that T.H.'s alleged father has stipulated that his parental rights should be terminated and that it is in T.H.'s best interests to be adopted. R.C. 2151.414(B)(1)(a) and (E)(16). This appeal followed.

{¶ 30} Appellant now raises the following three assignments of error for our review:

{¶ 31} "1. The trial court failed to adequately inquire as to the voluntariness of appellant's stipulation to findings of fact and a finding of dependency as the initial adjudication on December 18, 2007, pursuant to Juv.R. 29(D), where it was aware of appellant's mental health issues and failed in its voir dire of appellant to ascertain her then present mental state.

{¶ 32} "2. Appellant was denied effective assistance of counsel.

{¶ 33} "3. The decision of the trial court to award the agency permanent custody was against the manifest weight of the evidence and not supported by sufficient evidence."

{¶ 34} In appellant's first assignment of error, she argues that the trial court erred when it accepted her stipulation as to the finding of dependency where her competency was not established. The state contends that this court does not have jurisdiction to address the alleged error. We agree.

{¶ 35} In *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, the Supreme Court of Ohio addressed the issue of the timing of an appeal from a trial court's adjudication of

abuse, dependency, or neglect. The court held that an adjudication order and an award of temporary custody pursuant to R.C. 2151.353(A)(2), is a final order that must be appealed within 30 days of the judgment entry pursuant to App.R. 4(A). Id. at ¶ 18.

{¶ 36} In the present case, it is undisputed that the magistrate's order finding T.H. a dependent child was reviewed and adopted by the trial court on January 22, 2008. Appellant's notice of appeal was not filed until April 15, 2009, clearly beyond the 30-day period set forth in App.R. 4(A). Accordingly, appellant's first assignment of error is not well-taken.

{¶ 37} In appellant's second assignment of error, she contends that she was denied the effective assistance of counsel by her original trial counsel's acquiescence to the findings of fact and adjudication of dependency when her mental health status was at issue. Appellant further argues that her counsel erred by not filing a notice of appeal from the adjudication.

{¶ 38} "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." (Citations omitted.) *In re Heston*, (1998), 129 Ohio App.3d 825, 827. In order to prove ineffective assistance of counsel, appellant must show (1) that his counsel's performance fell below an objective standard of reasonable representation in some particular respect or respects and (2) that he was so

prejudiced by the defect or defects that there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, following *Strickland. Washington* (1984), 466 U.S. 668.

{¶ 39} Juv.R. 29(D) provides that prior to accepting an admission, the trial court must determine both of the following:

{¶ 40} "(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

{¶ 41} "(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing."

{¶ 42} In the present case, at the December 17, 2007 adjudicatory hearing LCCS' counsel read the agreed upon amendments to the complaint into the record. Thereafter, the court addressed appellant as follows:

{¶ 43} "THE COURT: Miss H., if we proceed and take an agreement from you today, you would be giving up your right to have a hearing on any issue contained within that agreement. Do you understand that?

{¶ 44} "Ms. H.: Yes, I do.

{¶ 45} "THE COURT: And for adjudication, you would have the right to present evidence and challenge any evidence provided by any other party. So you would be waiving those rights today also. Do you understand that?

{¶ 46} "Ms. H.: Yes, I do.

{¶ 47} "THE COURT: And in this type of proceeding, you would also be waiving your right to remain silent in that you would be admitting that the facts in the Complaint were true with the changes read into the record by Mr. Rudebock. Do you understand that?

{¶ 48} "Ms. H.: Yes, I do."

{¶ 49} The court then asked appellant if she had any questions. Appellant stated that she was not disputing anything that had been stated but that she desired to have unsupervised visitation with T.H. The court indicated that they could have a separate hearing on the visitation issue; appellant concurred. The court continued:

{¶ 50} "THE COURT: But the Agency would be getting temporary custody with the case plan services, with the goal of reunification.

{¶ 51} "Ms. H.: And I very much understand that, sir, because isn't that what we are going through on the first court date? Isn't she still in temporary foster care?

{¶ 52} "THE COURT: Well, you will need to talk to your attorney, but, yes.

{¶ 53} "Ms. H.: Isn't she still in temporary foster care now?

{¶ 54} "MR. NATHAN: Yes.

{¶ 55} "THE COURT: The situation would continue.

{¶ 56} "Ms. H.: That's what I was trying to find out. Nothing had changed, so I'm still in compliant – I'm still complaint with that.

{¶ 57} "THE COURT: Okay. So other than the visitation issue, you would be in agreement?

{¶ 58} "Ms. H.: Yes.

{¶ 59} "THE COURT: Okay. Mr. Nathan, are you satisfied your client understands what her rights are with the agreement and she is entering into it voluntarily –

{¶ 60} "MR. NATHAN: Yes.

{¶ 61} "THE COURT: With the understanding of the facts in the Complaint?

{¶ 62} "MR. NATHAN: Yes, your Honor.

{¶ 63} "THE COURT: Okay. I'll take the agreement from the mother as to adjudication. * * *."

{¶ 64} Upon review, because we find that the trial court complied with Juv.R. 29(D), and that appellant's stipulation was voluntary, we find that appellant's counsel was not ineffective by agreeing to the court's findings of fact and adjudication of dependency. Likewise, we find that appellant's counsel was not ineffective when it failed to file a notice of appeal of the adjudication. Appellant's second assignment of error is not well-taken.

{¶ 65} In appellant's third and final assignment of error, she argues that the court's judgment awarding permanent custody to LCCS was against the manifest weight of the evidence and not supported by sufficient evidence. We first note that the disposition of a child determined to be dependent, abused or neglected is controlled by R.C. 2151.353 and the court may enter any order of disposition provided for in R.C. 2151.353(A). However, before the court can grant permanent custody of a child to the agency, the court must determine: (1) pursuant to R.C. 2151.414(E) that the child cannot or should not be placed with one of his parents within a reasonable time; and (2) pursuant to R.C. 2151.414(D), that the permanent commitment is in the best interest of the child. R.C. 2151.353(A)(4).

{¶ 66} R.C. 2151.414(E) provides that, in determining whether or not a child can or should be placed with a parent within a reasonable time, the court shall consider all relevant evidence. If, however, the court determines by clear and convincing evidence that any one of sixteen factors listed in the statute exist, the court must find that the child cannot be placed with the parent within a reasonable time. The trial court found that R.C. 2151.414(E)(1), (2), (11), and (16) applied to T.H.. They provide:

{¶ 67} "(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.

{¶ 68} "(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 after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code.

{¶ 69} "* * *

{¶ 70} "(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

{¶ 71} " * * *

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

{¶ 73} In determining the best interest of the child, R.C. 2151.414(D) directs that the court shall consider all relevant factors, including but not limited to:

{¶ 74} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 75} "(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶ 76} "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶ 77} "(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶ 78} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶ 79} As set forth in the above-quoted statutory sections, the trial court's findings must be supported by clear and convincing evidence. Clear and convincing evidence is

that proof which establishes in the mind of the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 80} Appellant first argues that the trial court's finding that appellant's parental rights had been involuntarily terminated in Chicago was not supported by the record. LCCS does not dispute this assertion. Accordingly, we find that the court's finding under R.C. 2151.414(E)(11), was not supported by clear and convincing evidence.

{¶ 81} Appellant next asserts that the trial court's findings under R.C. 2151.414(E)(1) and (2), regarding appellant's mental health status, were not supported by the record. This court has carefully reviewed the hearing testimony and outlined the relevant facts above. While we do acknowledge that appellant had success with her parenting classes and in obtaining housing, at the hearing testimony was presented demonstrating that appellant has still failed to remedy all the issues which caused T.H.'s removal. It is apparent from the record that during 2008, appellant's mental health continued to deteriorate. By the September 2008 LCCS staffing, appellant was agitated and speaking in an unknown language. Appellant's family members witnessed appellant conversing, even arguing, with herself and dancing in the street. At the hearing, appellant denied being prescribed any anti-psychotic medications; this assertion was contradicted by evidence in the record.

{¶ 82} Upon careful review of the record in this case, we conclude that the trial court's decision granting permanent custody of T.H. to LCCS was supported by clear and convincing evidence. Accordingly, the trial court did not err when it found that awarding LCCS permanent custody was in T.H.'s best interest. Appellant's third assignment of error is not well-taken.

{¶ 83} On consideration whereof, we find that substantial justice was done the party complaining, and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

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, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE