[Cite as *In re A.S.*, 2009-Ohio-5504.]

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

In the Matter of: A.S.

Court of Appeals No. L-09-1080

Trial Court No. JC 07-170874

DECISION AND JUDGMENT

Decided: October 16, 2009

* * * * *

Dan M. Weiss, for appellant.

David Rudebock, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, terminating the parental rights of the biological parents of the minor child, A.S., and granting permanent custody to Lucas County Children Services ("LCCS"). Because we conclude that the trial court did not err in denying grandmother's request for custody or in granting permanent custody to the agency, we affirm.

{¶ 2} In July 2007, LCCS was given emergency custody of A.S., born in January 2007. With the mother's consent, LCCS placed A.S. with the maternal grandmother, under an order of temporary interim custody. On August 13, 2007, however, at grandmother's request, temporary custody was transferred to LCCS, pending the outcome of the proceedings. In September 2007, grandmother again sought to have interim custody of A.S., and LCCS requested that she complete a diagnostic assessment.

{¶ 3} In October 2007, after the parties stipulated to amended facts in the complaint, A.S. was adjudicated to be neglected and dependent. On disposition, the court then awarded temporary custody of A.S to LCCS. A reunification plan was filed, in which appellant mother and appellant grandmother were each required to attend/complete certain services.

{¶ 4} In June 2008, LCCS filed a motion for permanent custody. In November 2008, grandmother filed a motion requesting that custody be granted to her. The court conducted a hearing on January 5-6, 2009, and evidence was presented regarding mother's and grandmother's attendance at counseling services during the last two months of 2008. To facilitate the possible placement of A.S. with the grandmother, the guardian ad litem recommended that she be given more time to complete services.

{¶ 5} Pursuant to R.C. 2151.353(A) and 2151.414(B)(1)(A) and (E)(1), (4), and (16), the trial court found by clear and convincing evidence that A.S. "cannot and should not, be placed with either parent within a reasonable period of time" and that permanent custody to LCCS was in the child's best interest. The court further found that custody to

grandmother was not in the child's best interest, due to a number of factors, and denied her motion for custody.

{¶ 6} Appellants, mother and grandmother, now appeal from that judgment, arguing the following three assignments of error:

{¶ 7} "A. The Trial Court erred in denying Appellant, [grandmother's] request for custody and in denying [grandmother's] request applied the incorrect standard in its decision and acted against the manifest weight of the evidence.

{¶ 8} "B. The Trial Court erred when it found that the Guardian ad Litem's recommendation of custody to Appellant, [grandmother] was not supported by any credible evidence.

{¶ 9} "C. The Trial Court committed plain error by failing to appoint a guardian ad litem for Appellant, [mother]."

I.

{¶ 10} In her first assignment of error, appellant grandmother contends that in denying her motion for custody, the trial court applied the wrong standard and its decision was against the manifest weight of the evidence.

{¶ 11} R.C. 2151.353 provides that, after a child has been adjudicated to be dependent and/or neglected, a court may enter an order committing the child to the permanent custody of a public child services agency. Before the court can grant permanent custody of a child to a public services agency, however, the court must determine, by clear and convincing evidence, that: (1) the child cannot be placed with one

of her parents within a reasonable time or should not be placed with a parent, pursuant to R.C. 2151.414(E); and (2) an order of permanent custody to the child services agency is in the best interest of the child, pursuant to R.C. 2151.414(D). R.C. 2151.353(A)(4); see, also, *In re: Carlos R.*, 6th Dist. No. L-07-1194, 2007-Ohio-6358, ¶ 21.

{¶ 12} Relatives seeking custody of a child are not afforded the same presumptive rights that a natural parent receives. *In re A. C.*, 12th Dist. No. CA2006-12-105, 2007-Ohio-3350, ¶ 17. Although "a 'children services agency should strive to place a child with a willing and suitable relative[,]' there is no requirement or duty *on the agency* to do so under a best interest analysis." (Emphasis added.) *In re Jones-Dentigance*, 11th Dist. No. 2005-P-058, 2005-Ohio-5960, ¶ 26. Rather, a juvenile court is vested "with discretion to determine what placement option is in the child's best interest. The child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security." *In re McCain*, 4th Dist. No. 06CA654, 2007-Ohio- 1429, ¶ 20. Consequently, a juvenile court is not required to favor a relative if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody. *In re A.C.*, ¶ 17.

{¶ 13} In this case, mother conceded at the motion hearing that, pursuant to R.C. 2151.414(E), A.S. could not be returned to her within a reasonable period of time. The trial court specifically noted that grandmother then had the burden of proving by a preponderance of the evidence that custody to grandmother was in A.S.'s best interest. The court stated that A.S. was in the grandmother's household during the five months

prior to the first shelter care hearing. The court reasoned that had grandmother been able to take over and care for A.S., LCCS intervention would not have been necessary. Moreover, within a month of the initial placement with her, grandmother asked LCCS to remove A.S. from her custody because she could not deal with the stress.

{¶ 14} The court also found that, despite knowing that mother was unable to parent A.S., grandmother did not actively pursue custody. Rather, the court found that, once it was clear that mother was refusing to attend rehabilitation or counseling services, grandmother's priority should have changed to becoming the primary parent, rather than just wanting to help mother. The court also found that grandmother herself stopped going to therapy after two sessions because it was too "stressful" and "counterproductive." Grandmother also missed almost one-third of the visits with A.S., with four skipped visits occurring after grandmother re-engaged in services and one right before Christmas 2008.

{¶ 15} Additionally, the court found that grandmother did not begin going to Family Services of Northwest Ohio on her own, but only after mother had belatedly begun family counseling there. The court questioned the effectiveness of the current Family Services counselor, who acknowledged that she did not know about and had not addressed the domestic violence between mother and grandmother. The court was also baffled by mother's and grandmother's failure to disclose to anyone, including their attorneys, the guardian ad litem, or anyone at LCCS that she and mother had recently engaged in counseling. The court stated that engaging in counseling for only the

previous two months, when it had been recommended more than a year earlier, merely appeared to be a "last-minute effort to stop" the permanent custody proceedings by LCCS.

{¶ 16} The court then pointed out that grandmother's 19 year old son, who had recently been released from the Department of Youth Services, had been living in the household. The court noted that grandmother had not persuaded her son to sign a release of his criminal history to assist in completing LCCS's background checks and home study. Despite his recent move to a girlfriend's home, there was no assurance that the son would not move back into the home. The court also found that, while mother and grandmother had delayed participation in services for more than a year, A.S. had bonded with the foster parents who did, in fact, want to adopt her.

{¶ 17} After considering many factors, the court found that there was a preponderance of evidence against custody to grandmother, and that there was clear and convincing evidence and it was in the best interest of A.S. that permanent custody should be granted to LCCS. Therefore, we conclude that the trial court applied the correct standard and that its decision to deny custody to grandmother was not against the manifest weight of the evidence.

{¶ 18} Accordingly, appellant grandmother's first assignment of error is not well-taken.

II.

{¶ 19} In the second assignment of error, grandmother claims that the trial court erred in not following the guardian ad litem's recommendation. In essence, appellant grandmother is arguing that the trial court's judgment was against the manifest weight of the evidence.

{¶ 20} A trial court is not bound to follow the recommendations of a guardian ad litem. *In re Andrew B.*, 6th Dist. No. L01-1440, 2002-Ohio-3977, ¶ 64. See also, *In re J.P.-M.*, 9th Dist. No. 23694, 2007-Ohio-5412, ¶ 63; *Smith v. Quigg*, 5th Dist. No.2005-CA-002, 2006-Ohio-1495, ¶ 66. "The function of a guardian ad litem or for a representative for the child is to secure for such child a proper defense or an adequate protection of its rights. The ultimate decision in any proceeding is for the judge and not for the representative of the parties" and a trial court does not err "in making an order contrary to the recommendation of the child's representative * * *." *In re Height* (1976), 47 Ohio App.2d 203, 206.

{¶ 21} The trial court should review the report of a guardian ad litem "in connection with all other evidence presented to it." *In re E.M.W.*, 2d Dist. No. 08-CA-25, 2009-Ohio-3016, ¶ 18, citing to *Smith v. Quigg*, supra. The trial court, as the trier of fact, determines the credibility of and weight to be given to the report. *Baker v. Baker*, 6th Dist. No. L-03-1018, 2004-Ohio-469, ¶ 30; see, also, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed on appeal as

against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 22} In the present case, the guardian ad litem's recommendation was actually not that grandmother be given custody of A.S. Rather, she recommended that the court extend the time for services to continue for grandmother so that she could complete a case plan with the goal of custody. Several other conditions also needed to be in effect, i.e, that mother move out of the home to live with her father, that grandmother's 19 year old son remain out of the home, and that the household become financially stable. She also based her recommendation on her belief that mother's belated counseling and engaging in some services constituted "significant progress," and that, in her opinion, children are always better off with their biological family.

{¶ 23} The guardian ad litem then acknowledged that she had not seen mother or grandmother with A.S. or in the home setting to observe how grandmother was handling stress. The guardian ad litem also conceded that mother had domestic violence issues with grandmother, had not specifically addressed those issues, and continued to reside with grandmother. Although some suggestion had been made that mother could move in with her father, mother had taken no actual steps to move out of the grandmother's residence to permit placement of A.S. with grandmother.

{¶ 24} Upon review of the record, we conclude that the trial court considered the guardian ad litem's recommendation when weighing all the evidence presented. We further conclude that clear and convincing evidence was offered on the best interest

factors relevant to the juvenile court's determination that permanent custody of A.S. should be awarded to LCCS. Therefore, we cannot say that the trial court's judgment to deny custody to grandmother was against the manifest weight of the evidence.

{¶ 25} Accordingly, appellant grandmother's second assignment of error is not well-taken.

III

{¶ 26} In the third assignment of error, appellant mother argues that the trial court erred in failing to appoint a guardian ad litem to represent her, since she was a minor.

{¶ 27} Pursuant to Juv.R. 4(C), "appointed counsel may also serve as guardian ad litem as long as the roles do not conflict." *In re A.M.*, 4th Dist. No. 08CA862, 2008-Ohio-4835, ¶ 24, citing to *In re Amber G.*, 6th Dist. No. L-04-1091, 2004-Ohio-5665, ¶ 36. "The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law. [Citations omitted.] " *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232.

{¶ 28} It is not the duty of a guardian ad litem "to constantly prompt his or her client to take advantage of available services." *In re A. M.*, 4th Dist. No. 08CA862, 2008-Ohio-4835, ¶ 26; see, also, *In re Amber G.*, supra, ¶ 35. Even where a parent's attorney was appointed solely as counsel and not specifically for the dual purpose of serving as guardian ad litem, the parent does not suffer prejudice if counsel safeguards the parent's rights and advocates for reunification in accordance with the parent's wishes. *In re A. M.*, supra, ¶ 24, citing to *In re Amber G.*, supra, ¶ 36.

{¶ 29} In this case, although mother had recently begun attending counseling, mother conceded that A.S. could not be returned to her within a reasonable time. Nevertheless, mother's counsel continued to attend and actively participate in the proceedings, representing mother's best interest and wishes. Thus, counsel safeguarded mother's rights as required under Juv.R. 4.

{¶ 30} Moreover, mother has failed to demonstrate how a guardian ad litem would have acted differently or produced different results than her counsel. Since mother's rights were adequately protected, we cannot say that the trial court's failure to appoint a guardian ad litem caused prejudice to appellant mother.

{¶ 31} Accordingly, the third assignment of error is not well-taken.

{¶ 32} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellants are ordered to pay the 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE