

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE L.H.	:	
	:	No. 108566
A Minor Child	:	
	:	
[Appeal by L.H., Mother]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 5, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-17-912703

Appearances:

Prugh Law, L.L.C., and Leigh S. Prugh, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Amanda Wilson Orr and Julie Garswood, Assistant Prosecuting Attorneys, *for appellee.*

LARRY A. JONES, SR., J.:

{¶ 1} Mother, L.H., appeals from the juvenile court's April 10, 2019 judgment granting the motion of the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "Agency") for permanent custody of Mother's child, who has her same initials, L.H. For the reasons that follow, we affirm.

Procedural History

{¶ 2} In August 2017, the Agency filed its complaint, alleging the child, who was born in January 2017, to be a dependent child and seeking temporary custody. The Agency also filed a motion for predispositional custody of the child. According to CCDCFS, Mother failed to provide appropriate parenting to L.H. without prompting, failed to address his developmental needs, and had unsuitable housing. The child was assigned a guardian ad litem (“GAL”). In September 2017, the trial court held a hearing on the motion for predispositional custody; Mother stipulated to the motion, and L.H. was placed in the predispositional custody of CCDCFS.

{¶ 3} In November 2017, a hearing on the complaint was held. CCDCFS made, and was granted, an oral motion to amend the complaint. Mother stipulated to the amended complaint, thereby admitting the following: (1) she has cognitive delays that interfere with her ability to provide appropriate care for L.H.; (2) L.H. has developmental issues that need to be addressed; (3) she needs to apply parenting skills from intensive in-home supportive services when she is alone with L.H.; and (4) she needs to maintain appropriate housing to care for L.H. The trial court adjudicated L.H. dependent.

{¶ 4} In January 2018, the trial court held a hearing, at which Mother agreed to the Agency’s request for temporary custody of L.H.; thus, the trial court terminated predispositional custody and granted CCDCFS temporary custody of L.H.

{¶ 5} In August 2018, CCDCFS filed a motion to modify temporary custody to permanent custody. According to the Agency, Mother had failed to remedy the conditions that led to L.H.'s removal.¹ Mother's case worker, Juanita Holloway ("Holloway"), testified at the hearing. L.H.'s GAL summarized his report, in which he recommended permanent custody to the Agency would be in L.H.'s best interests. In an April 12, 2019 judgment, the trial court granted CCDCFS's motion for permanent custody. Mother now appeals, raising the following two assignments of error for our review:

- I. CCDCFS should not have filed a motion for permanent custody because it did not meet the requirements of R.C. 2151.416(D)(3)(b).
- II. Mother received ineffective assistance of counsel when her counsel neglected to modify her case plan to seek additional services.

Factual History

{¶ 6} The record demonstrates that Mother has cognitive delays. She engaged in services from the Cuyahoga County Board of Developmental Disabilities ("Board of DD"). Holloway, Mother's social worker from the Agency, testified that when L.H. was first born, a worker from the Board of DD moved in with Mother for three months to help her take care of L.H. Mother responded well to the worker and was, with the worker's help, able to take care of L.H. After the worker moved out,

¹In regard to Mother's housing situation, the record demonstrates that the apartment where mother was living was initially infested with bed bugs. By the conclusion of the case, the situation appeared to be remedied, however.

however, things did not go well for Mother in regard to taking care of L.H., which prompted CCDCFS's involvement.

{¶ 7} The record shows that the Agency referred Mother for services, namely (1) the Nurturing Parenting Program, and (2) Help Me Grow. Mother participated in and completed the Nurturing Parenting Program. Holloway testified that she did not believe Mother benefitted from the program, however. Holloway believed Mother had tried, but she was not able to grasp the concepts of "positive bonding or positive interaction" with L.H. Mother declined services from Help Me Grow.

{¶ 8} Holloway testified about Mother's supervised visits with L.H., which initially were visits for two hours once a week, and which she personally observed. According to Holloway, "there wasn't anything going on. Mom would sit on the couch and she would play on her phone and [L.H.] would pretty much entertain himself." Because of Mother's lack of interaction with L.H., CCDCFS reduced the visits to one hour once a week. Holloway testified that the reduction "didn't seem to phase" Mother. And Holloway testified that Mother's behavior did not change during the reduced visitation, and then the child began a pattern of crying through most of the visitation.

{¶ 9} In addition to Mother's developmental delays, the Agency had concerns that L.H. had developmental delays, too. Holloway testified that when he first came into the Agency's custody, he was unable to keep his tongue in his mouth which caused excessive drooling that led to him having a yeast infection on his neck.

Holloway learned from medical professionals that L.H.'s inability to keep his tongue in his mouth was due, in part, to lack of facial muscle tone, which was caused by him not being engaged in interaction and reacting to stimulus. Holloway testified that L.H. has made improvements since being placed with his foster family, and that he is "very bonded" with the family.

{¶ 10} As mentioned, the GAL summarized his report to the court. He was of the opinion that permanent custody to the Agency would be in L.H.'s best interests. He explained his rationale to the trial court as follows:

My take on this is that although mom cares for this child and loves the child, that it's just outside of her ability to provide day-to-day care, and that's evidenced by the question of could she do it with 24-hour services in the home.

I just don't think that's realistic. Ultimately, that makes somebody else caring for the child, in my opinion.

Things were okay when there was somebody for 24-hour care, but that snowballed into something that wasn't productive for this child.

* * *

* * * I was a little bit upset to find that mom had the possibility of Help Me Grow [to get] involved [but] for one reason or another it didn't happen.

I will give kudos to mom. She goes to these visits every week. She is not the one that cancels out. She goes.

But all of my reports are that it doesn't go well, that she needs constant reminders to engage, to interact and to do things.

* * *

So it saddens me to have to say this, because it's not really a fault of mom's, it's just she's unable to do that, and because she's unable to do that, then the reality is that 24-hour care isn't something that has been

implemented, nor do I think it would be in the future, that 24-hour care or oversight for the mother to parent [L.H.]

Law and Analysis

{¶ 11} A trial court may not grant a permanent custody motion unless clear and convincing evidence supports it. “Clear and convincing evidence” requires that the proof produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954).

{¶ 12} While a parent has a fundamental liberty interest in the care, custody, and management of his or her child and an essential and basic civil right to raise his or her children, the parent’s rights are not absolute. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990). Rather, the natural rights of a parent are always subject to the best interests of the child. *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979).

{¶ 13} In her first assignment of error, Mother contends that the Agency failed to meet the statutory requirements prior to filing its motion for permanent custody.² At oral argument, Mother conceded this assignment of error.

²Mother cites R.C. 2151.416(D)(3)(b). R.C. 2151.416 governs administrative reviews of case plans and annual reports. The provision that correlates with Mother’s argument is R.C. 2151.413(D)(3)(b), which governs agency motions for permanent custody.

{¶ 14} CCDCFS filed its motion for permanent custody under R.C. 2151.413(A), which provides that,

A public children services agency * * * that, pursuant to an order of disposition under division (A)(2) of section 2151.353 of the Revised Code or under any version of section 2151.353 of the Revised Code that existed prior to January 1, 1989, is granted temporary custody of a child who is not abandoned or orphaned may file a motion in the court that made the disposition of the child requesting permanent custody of the child.

{¶ 15} In her brief, Mother contends that CCDCFS failed to make reasonable efforts to return L.H. home prior to filing its motion. The reasonable efforts requirement is imposed under R.C. 2151.413(D),³ not R.C. 2151.413(A), however. Under R.C. 2151.413(D)(1) and (2), the Agency can file a motion for permanent custody if the child had been in its temporary custody for 12 or more months of a consecutive 22-month period. L.H. was removed from Mother's care in September 2017, he was adjudicated dependent in November 2017, and CCDCFS filed its motion for permanent custody in August 2018. Thus, L.H. had not been in the Agency's care for 12 or more months of a consecutive 22-month period when the Agency requested permanent custody, and R.C. 2151.413(D) was inapplicable. We therefore agree with the Agency and Mother's concession regarding this first assignment of error.

{¶ 16} In light of the above, the first assignment of error is without merit and overruled.

³See R.C. 2151.413(D)(3)(b).

{¶ 17} For her second assignment of error, Mother contends that her counsel was ineffective for failing to request modification of Mother’s case plan to seek additional services. We disagree.

{¶ 18} A parent who is a party in juvenile court proceedings has a right to effective assistance of counsel. R.C. 2151.352; Juv.R. 4(A); *In re C.P.*, 10th Dist. Franklin No. 08AP-1128, 2009-Ohio-2760, ¶ 56. The applicable test for the effectiveness of counsel for a parent in a juvenile custody case is the same test applied in determining whether a criminal defendant was provided effective assistance of counsel, i.e., the test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). *In re C.P.* at ¶ 58.

{¶ 19} “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.” *In re C.P.* at *id.*, quoting *Strickland* at 686. Moreover, the “burden of showing ineffective assistance of counsel is on the party asserting it.” *In re C.P.* at ¶ 57, quoting *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). “Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance.” *In re C.P.* at *id.*, quoting *State v. Sallie*, 81 Ohio St.3d 673, 675, 693 N.E.2d 267 (1998).

{¶ 20} Under *Strickland*, to succeed on her claim of ineffective assistance of counsel, Mother must first demonstrate that her trial counsel’s performance was deficient. If she can show deficient performance, she must next also demonstrate

that there exists a reasonable probability that, but for her counsel's errors, the result of the trial would have been different.

{¶ 21} In regard to the first prong, it was not deficient for Mother's counsel not to request additional services to her case plan when Mother had not progressed with one of the services completed (the Nurturing Parenting Program) and declined the other service she was referred to (Help Me Grow).

{¶ 22} Further, in regard to the second *Strickland* prong, Mother has not demonstrated that had she been afforded additional services the outcome of the proceeding would have been different. The record demonstrates that Mother struggled with rectifying the situation that led to the removal of L.H. In addition to the lack of progress with the two above-mentioned services, Mother had difficulty with her visitations with L.H., which led to them being reduced.

{¶ 23} In light of the above, the second assignment of error is overruled.

{¶ 24} In conclusion, competent credible evidence supports the trial court's judgment granting CCDCFS permanent custody of L.H. We do recognize that this result came about through no fault of Mother, however, as acknowledged by all involved in the case. But as mentioned, the best interests of L.H. are paramount and the record supports the trial court's judgment that his best interests will be served by granting the Agency permanent custody of him.

{¶ 25} Judgment 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 issue out of this court directing the common pleas court, juvenile division, 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.

LARRY A. JONES, SR., JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR