

[Cite as *In re C.W.*, 2020-Ohio-3189.]

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE C.W. :
A Minor Child : No. 109219
[Appeal by Ch.W., Mother] :
:

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 4, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-17917627

Appearances:

Milton A. Kramer Law Clinic Center, Andrew S. Pollis, Supervising Attorney, and Vito R. Giannola and Emily M. Peterson, Certified Legal Interns, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Robin Christine Kunikis, Assistant Prosecuting Attorney, *for appellee.*

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant, Ch.W. (referred to herein as “Appellant”), the mother of C.W., appeals from the order of the juvenile court that awarded permanent custody

of C.W. to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). Appellant assigns the following error for our review:

The trial court deprived [Appellant] of due process when it denied her motion to continue and proceed with the hearing before either investigating the reasons for her absence or considering whether its right to control its docket outweighed the prejudice to [Appellant].

{¶ 2} Having reviewed the record and the controlling case law, we affirm.

{¶ 3} On November 21, 2017, CCDCFS filed a complaint for predispositional emergency custody of C.W. who was then five years old. CCDCFS alleged that C.W. is neglected and dependent because Appellant is bipolar and schizophrenic, has left C.W. at home alone, and does not ensure that he attends school on a regular basis. CCDCFS further alleged that in 2014, C.W. was adjudicated dependent due, in part, to Appellant’s mental health issues, and that two of Appellant’s other children have been adjudicated neglected. C.W.’s father has not established paternity and does not support, visit, or communicate with him.

{¶ 4} The Cuyahoga County Public Defender was appointed to represent Appellant and represented her throughout the course of the proceedings. In November 2017, CCDCFS was granted predispositional emergency custody of C.W., and guardians ad litem (“GAL”) were appointed for him and for Appellant. CCDCFS implemented a case plan requiring, inter alia, Appellant to complete parenting classes and take all required medications. Following a hearing in February 2018, the trial court learned that Appellant had been seeing her psychiatrist monthly and started parenting classes. She also informed the court that she was considering

online school for C.W. due to issues with bullying. The court determined that Appellant had made a meaningful start on her case plan objectives, but the return of C.W. to her home would be contrary to C.W.'s best interests. The court terminated the order of emergency custody and committed C.W. to the temporary custody of CCDCFS. In a semiannual review, CCDCFS noted that Appellant completed parenting classes but "does not demonstrate learned techniques and appropriate parenting practices during visits" with C.W., and she was not complying with the mental health component of the case plan. Additionally, C.W. has developmental delays and behavioral issues that are exacerbated while he is in Appellant's care, but he is doing well in foster care.

{¶ 5} On September 18, 2018, CCDCFS moved for permanent custody of C.W. CCDCFS alleged that Appellant refuses to complete the psychological evaluation required under the case plan, has not benefitted from parenting classes, often cancels visits with C.W., and father has not made himself available for case plan services. In addition, C.W. continued to have behavioral issues, including physical abuse toward adults at school. After C.W. speaks with Appellant on the telephone, he engages in negative and disruptive behavior.

{¶ 6} At a subsequent hearing on October 30, 2018, Appellant did not appear. The court issued an order noting that her attorney made "reasonably diligent efforts to contact [her], secure [her] attendance, and ascertain [her] wishes. Efforts have been futile and the parties' wishes remain unknown." Several months later, on February 14, 2019, Appellant again failed to appear for hearing on the issue

of CCDCFS's reasonable efforts at reunification. The court determined that Appellant did receive "notice of the hearing [but] not service on the motion for permanent custody." The court ruled that CCDCFS had used reasonable efforts at reunification.

{¶ 7} Appellant attended a pretrial on March 22, 2019, and was advised that final pretrial would be held on April 19, 2019. Appellant failed to appear at the final pretrial. The court informed the parties that trial would be held on May 28, 2019. Several weeks later, however, counsel for the parties were notified that trial was rescheduled to July 22, 2019. Several weeks prior to the rescheduled trial date, counsel for CCDCFS advised the court that she was unavailable on July 22, 2019. The permanent custody hearing was then rescheduled, without objection, to August 26, 2019. Notice of the trial date was provided to Appellant.

{¶ 8} Appellant failed to appear for trial on August 26, 2019. The GAL for C.W. issued a supplemental report on that date in which he opined that the award of permanent custody of C.W. to CCDCFS is in the best interests of the child. The GAL explained that Appellant's mental health issues and refusal or inability to comply with case plan services "make reunification extremely difficult," and that C.W. "is an active child [with] his own disabilities, and he would be a difficult child for any skilled parent to raise." Because this supplemental report was not filed prior to the scheduled trial date as required by Loc.R. 18 of the Cuyahoga County Court of Common Pleas, Juvenile Division, and untimeliness could not be waived due to Appellant's absence, the court continued trial again until October 21, 2019.

{¶ 9} Appellant failed to appear for trial on October 21, 2019, and her counsel, a different assistant public defender who was newly assigned to the case, orally moved to continue the hearing. Appellant's counsel explained to the court that he spoke to Appellant ten days earlier, on October 11, 2019. He attempted to meet with her on October 15, 2019, but she did not appear for the meeting, and he has "been unable to reach her since then." The GAL for C.W. advised the court that he had not had recent contact with Appellant, and the GAL for C.W. advised that she had not had contact with Appellant in over a year. The trial court denied the motion to continue.

{¶ 10} Counsel for CCDCFS advised the court that because Appellant had already lost permanent custody of two of her other children, she now carried the statutory burden of showing that she has alleviated the conditions causing removal. In addition, counsel for CCDCFS stated that C.W. had been in custody for 22 months.

{¶ 11} According to the social worker, C.W. was adjudicated a neglected child in 2014 due to Appellant's mental health issues. In addition, two other children were removed from her care and a third child is in the legal custody of his father. The social worker advised the court that Appellant did not visit C.W. in July 2018. She stopped visiting again in January 2019, but she explained to the social worker that she had been in a car accident. By September 2019, Appellant resumed her visits with C.W. According to the social worker, Appellant "seemed fine like she did before the accident. Like she was walking normal." Appellant stated that she

had been going to physical therapy but did not say where the therapy was taking place. The social worker also testified that C.W. has been in the same foster home since 2017, and the placement is a home for adoption. The social worker opined that an award of permanent custody of C.W. to CCDCFS is in C.W.'s best interests.

{¶ 12} The GAL also opined that permanent custody of C.W. to CCDCFS is in C.W.'s best interests. The GAL testified that he had not had contact with Appellant for almost a year. He stated that “[e]ven several months prior to this auto accident where she got hit by a car, [Appellant] has fallen off the radar screen in the past for significant periods of time.” However, because Appellant refused to provide a release for her medical records, he could not say whether this absence of contact was due to her mental health issues.

{¶ 13} The trial court awarded permanent custody of C.W. to CCDCFS, concluding:

Upon considering the interaction and interrelationships of the child with the child's parents, siblings, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; the child's need for a legally secure permanent placement and whether the type of placement can be achieved without a grant of permanent custody; and the report of the Guardian Ad Litem, the Court finds by clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

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.

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.

The parent has had parental rights involuntarily terminated with respect to a sibling of the child * * *, 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.

The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

Continuance of Hearing

{¶ 14} In the assigned error, Appellant argues that the trial court erred in denying her motion for a continuance and proceeding with the trial on the merits.

{¶ 15} The decision to grant or deny a motion for a continuance rests in the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981); *In re S.B.*, 8th Dist. Cuyahoga Nos. 101159 and 101160, 2014-Ohio-4839, ¶ 43. An abuse of discretion connotes more than an error of law or judgment; it occurs where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} Not every failure to grant a continuance violates due process “even if the party fails to offer evidence or is compelled to defend without counsel.” *In re*

C.G., 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 9, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). *See also In re T.R.*, 8th Dist. Cuyahoga No. 102071, 2015-Ohio-4177, ¶ 34. In *Unger*, the Ohio Supreme Court noted that “[t]here 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.” *Id.* at 67.

{¶ 17} The following factors are to be considered: the length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *Id.* at 67-68.

{¶ 18} Under Juv.R. 23, “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.” Loc.R. 35(C) further provides:

No case will be continued on the day of trial or hearing except for good cause shown, which cause was not known to the party or counsel prior to the date of trial or hearing, and provided that the party and/or counsel have used diligence to be ready for trial and have notified or made diligent efforts to notify the opposing party or counsel as soon as he/she became aware of the necessity to request a postponement. This rule may not be waived by consent of counsel.

{¶ 19} Moreover, courts have recognized “the critical importance of communication by the parent to either counsel or the court in the event of a problem

in attending a hearing.” *In re C.G.* at ¶ 20; *In re B.M.*, 10th Dist. Franklin Nos. 09AP60-09AP64, 2009-Ohio-4846, ¶ 13. Even “a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding.” *In re S.V.K.*, 8th Dist. Cuyahoga No. 108038, 2019-Ohio-3287, ¶ 12, quoting *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.). *See also In re D.T.*, 8th Dist. Cuyahoga No. 108407, 2019-Ohio-4895, ¶ 18.

{¶ 20} Considering the unique facts of this case, we find no abuse of discretion in connection with the court’s denial of Appellant’s motion for a continuance. The motion did not comply with the rules of court because it was filed on the day of trial. Appellant does not challenge the trial court’s notice or service of notice of the hearing.

{¶ 21} Moreover, beginning with the issue of any delay, we note that pursuant to R.C. 2151.414(A)(2), the trial court is to hold the permanent custody hearing no later than 120 days after the agency files its motion except “good cause shown” for a reasonable continuance, and the court is to dispose of the motion for permanent custody no later than 200 days after the agency files its motion. *See also In re D.T.*, 8th Dist. Cuyahoga No. 108407, 2019-Ohio-4895, ¶ 16; *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 21, citing *In re A.C.*, 6th Dist. Lucas No. L-10-1025, 2010-Ohio-4933, ¶ 128. Here, by the time of the dispositional hearing, well over 200 days had lapsed since the filing of the motion for permanent

custody and C.W. was in CCDCFS custody for 22 months. *Accord In re Z.J.*, 8th Dist. Cuyahoga No. 108834, 2020-Ohio-383, ¶ 16-18. The matter had also been continued in August 2019 due to the untimely GAL report that could not be waived due to Appellant's failure to appear. Further, apart from Appellant's failure to appear and failure to communicate, no reason was offered, because no reason had previously been offered for her other absences, including absences preceding the accident. As this court stated in *In re S.V.K.*,

Trial counsel made no indication that Mother's failure to appear was the result of an emergency. Furthermore, counsel indicated that the late nature of the request for a continuance was predicated on Mother's failure to communicate with counsel prior to the permanent custody hearing. For instance, trial counsel conceded that Mother failed to appear for two scheduled appointments and did not reply to an email correspondence. Under these circumstances, we find Mother failed to exhibit the necessary level of cooperation and communication to reasonably argue her due process rights were violated by the trial court's decision to proceed with the hearing in her absence.

Id., 2019-Ohio-3287 at ¶ 27. *Accord In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 10.

{¶ 22} Further, the record reflects that a continuance would have caused great inconvenience to the agency witness, opposing counsel, the guardian ad litem, and court personnel, who were present and ready to proceed with the hearing. *See In re J.C.*, 8th Dist. Cuyahoga No. 106272, 2018-Ohio-2234, ¶ 15; *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 17.

{¶ 23} As to additional issues, we note that although this particular assistant public defender was recently assigned to the case, he was familiar with the

procedural history of the case and the controlling statutes, and he thoroughly cross-examined the social worker and advocated for Appellant. *Accord Cleveland v. Carson*, 8th Dist. Cuyahoga No. 100060, 2014-Ohio-608, ¶ 24 (denial of continuance was affirmed where, inter alia, despite the rotation of the assistant public defenders, defense counsel was prepared for trial).

{¶ 24} Appellant asserts, however, that Loc.R. 35(C) is in conflict with *Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078. This claim lacks merit. Again, pursuant to *Unger*, “[t]here 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.” *Id.* at 67. The “imperative to secure fair treatment of the parties” set forth in Juv.R. 23, and the requirement of “good cause shown” set forth in Loc.R. 35(C) have been consistently applied in relation to *Unger’s* due process considerations. *In re J.B.*, 8th Dist. Cuyahoga No. 106045, 2018-Ohio-1201, ¶ 30-34; *In re D.G.B.*, 8th Dist. Cuyahoga No. 107921, 2019-Ohio-3571.

{¶ 25} In accordance with all of the foregoing, the trial court did not abuse its discretion and did not violate Appellant’s right to due process in denying the motion for a continuance and proceeding with the trial. The assigned error lacks merit.

{¶ 26} Judgment is 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.

PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

