[Cite as *In re S.S.*, 2009-Ohio-4520.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
S.S.	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
ALLEGED DEPENDENT CHILD	:	
	:	Case No. 2009CA0040
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. F2008-0469
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 31, 2009

APPEARANCES:

For Appellant

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Farmer, P.J.

{¶1} On June 20, 2008, appellee, the Licking County Department of Job & Family Services, filed a complaint for the permanent custody of S.S. born June 8, 2008, alleging the child to be dependent. Mother of the child is appellant, Jamie Schafer; father is Jody Gantt. An adjudicatory hearing was held on August 25, 2008 wherein a magistrate found the child to be dependent.

{¶2} Dispositional hearings before a magistrate were held on August 25, and September 5, 2008. By decision filed September 18, 2008, the magistrate recommended that appellee be granted permanent custody of the child. Appellant filed objections. By judgment entry and decision filed March 10, 2008, the trial court overruled the objections and approved and adopted the magistrate's decision.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN AWARDING PERMANENT CUSTODY OF THE CHILD TO THE AGENCY."

II

{¶5} "THE TRIAL COURT ERRED IN DETERMINING THAT THE CHILD IS A DEPENDENT CHILD AS ALLEGED IN THE COMPLAINT."

III

{¶6} "THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY CONCERNING ALLEGED 'REPORTERS' OF COCAINE ABUSE AT HEARING

WITHOUT SUPPORTING DOCUMENTATION OR OPPORTUNITY TO CROSS EXAMINE."

I, II

{¶7} Appellant claims the trial court erred in granting appellee permanent custody of the child and in finding the child was a dependent child. We disagree.

{¶8} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279.

{¶9} R.C. 2151.414(E) sets out the factors relevant to determining permanent custody. Said section states in pertinent part as follows:

{¶10} "(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code 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:

{¶11} "(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.

{¶12} "(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.

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

{¶14} R.C. 2151.414(B) enables the court to grant permanent custody if the court determines by clear and convincing evidence that it is in the best interest of the child. "Clear and convincing evidence" is that which will 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* (1985), 18 Ohio St.3d 361, 368.

{¶15} R.C. 2151.414(D) sets out the factors relevant to determining the best interests of the child. Said section states relevant factors include, but are not limited to, the following:

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

{¶17} "(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;

{¶18} "(3) The custodial history of the child***;

{¶19} "(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;

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

{¶21} Appellant argues there was insufficient evidence to support the granting of permanent custody to appellee, and appellee never planned to reunify her and the child and afforded her no opportunity to comply with the case plan. Appellee argues it was not mandated to provide reasonable efforts and to formulate a case plan for reunification of appellant with her child. Appellee argues R.C. 2151.419(A)(2)(e) is controlling sub judice which states the following:

{¶22} "(A)(2) If any of the following apply, the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the

child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home:

{¶23} "(e) The parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to section 2151.353, 2151.414, 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."

{¶24} Appellee also argues the evidence supports the conclusion that it would be futile for appellant to work on a case plan given her prior track record with the agency.

{¶25} After reviewing appellant's objections to the magistrate's decision, the trial court entered its own evaluation of the evidence as follows:

{¶26} "There was sufficient evidence presented to show that past problems experienced by the mother in former cases continued to exist and posed a threat to this child. As was discussed while addressing objections raised to the adjudication of this matter, the mother's drug abuse concerns continue to exist. The mother continues to refuse to seek appropriate treatment for her substance abuse concerns. When seen for a LAPP assessment during the pendency of this case, the LAPP counselor recommended inpatient residential treatment, but the mother denied this treatment option. (Tr. Day 2, 17:18-24, 19:19:14-18) Further, the mother's LAPP counselor expressed concern that mother had all this positive support from the Morgans and the church (Last Call Outreach Ministries Family Care Center) since January of 2007 (Tr. Day 1, 90: 4-6), BUT still managed to use marijuana. (Tr. Day 2, 28:5-8) The mother

also has a significant history of involvement with the Agency and has lost custody of all five of her previous children, with three being placed in the permanent custody of the Agency in Licking County. (Tr. 19:21-23:20, State's exhibits 3, 4, & 5) Jill Bailey, Social Worker, testified how past concerns are still current concerns with the mother, including the mother's failure to address her mental health issues. (Tr. Day 1, 194:14-195:4)

{¶27} "There was substantial evidence presented to support that the mother struggles to give up drugs. The mother tested positive for drugs following the removal of S. (Tr. Day 1, 192:3-14) Jamie refused to take a requested drug screen on the Wednesday before the second day of the hearing in this matter. (Tr. Day 2, 7:21-22, 13:4-12) Her drug use was still a concern to her social worker. (Tr. Day 1, 214:10-16, 215:16-216:3) As discussed earlier, Jamie denied the treatment option recommended by her LAPP counselor. (Tr. Day 2, 17:18-24, 19:19:14-18, Tr. Day 1, 35:8-20) Again, her LAPP counselor expressed concern that Jamie had received positive support from the Morgans and the church (Tr. Day 1, 90:4-6), but still managed to use marijuana. (Tr. Day 2, 28:5-8) Mother admitted dependence on vicodin and stated that she was going to 'try' to stop using. (Tr. Day 2, 35:1-20) Mother exhibited pill seeking behavior with vicodin as she testified to having multiple refills and two different doctors prescribing this medication. (Tr. Day 2, 57:11-58:13, 59:100-22)

{¶28} "The mother did not have independent housing at the time of the hearing. The mother argues that she was staying with the Morgans because she was ill but had her own home on Elmwood Avenue. However, evidence revealed that Jamie had not returned to the home she had been 'renting' from the Morgans on Elmwood. Marilyn Morgan testified that Jamie was still staying with them at the time of the hearing and

that is where the child would stay if he was returned. (Tr. Day 2, 88:9-17) Jill Bailey testified that Jamie's personal belongings were no longer set out at the house on Elmwood, and it looked different from her previous visits. (Tr. Day 1, 212:14-21) Further, even if Jamie were to return to the house on Elmwood, it would not be an independent living arrangement. Jamie would share the home with other women. At the time of the hearing there was another resident living there, Miss Wilson (Tr. Day 1, 212:22-213:4) Ms. Wilson testified that she had lived at the house since July 16, 2008 (Tr. Day 1, 36:20-21) and that Jamie had not resided there since she had been there. (Tr. Day 1, 37:6-7)." See, Decision filed March 10, 2009.

{¶29} Based upon these facts, the trial court ultimately concluded that allowing appellant "to work on a case plan would equal a futile waste of time and effort." Appellant has a significant history with appellee, has lost custody of all five of her previous children, has not complied with prior case plans, was still using drugs, had no independent housing, was unemployed, and was not seeking help with mental health issues. Appellant relied on the Morgans to provide for her needs, and did nothing on her own to solve her problems.

{¶30} From our review of the evidence, it is first necessary to test the trial court's determination that the child was a dependent child.

{¶31} Pursuant to 2151.04, a "dependent child" means any child:

{¶32} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶33} "(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶34} "(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;

{¶35} "(D) To whom both of the following apply:

{¶36} "(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

{¶37} "(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household."

{¶38} From the testimony of appellant and her own witnesses, the child was not provided for by appellant, but was provided for by the goodness and charity of the Morgans. The Morgans took appellant in when she was too sick to care for herself. Vol. I T. at 152. During appellant's pregnancy, she smoked marijuana to combat "morning sickness," and admitted to using cocaine. Vol. II T. at 60, 61-62. Appellant claimed some of the drugs were prescribed, but she disregarded her unborn child's well-being by taking Vicodin which her own midwife admitted was harmful to a child. Vol. I T. at 136-137.

{¶39} There is no evidence in the record to demonstrate that appellant provides for the health and welfare of her own child. We therefore find the conclusion of dependency to be correct.

{¶40} The record is replete with evidence that the mandates of R.C. 2151.419(A)(2)(e) have been met. Vol. I T. at 46, 185, 195. Appellant's drug abuse, domestic violence complaints, and mental health issues were the major concerns in her prior cases. By her own admission, appellant took drugs during her pregnancy, and attempted to justify it by giving verification that some of the drugs were prescribed by doctors. Within this testimony, it was revealed that she had two different doctors prescribe medication for her, and had the drugs filled or refilled within ten days which gave her a total Vicoden count of 100 pills. Vol. II T. at 57-58. The same issues of drug dependence and mental health issues existed just prior to the second hearing date, September 5, 2008, that existed in the prior three case plans. Vol. II T at 16, 23.

{¶41} Upon review, we find clear and convincing evidence that the best interests of the child would be best served by awarding appellee permanent custody of the child.

{¶42} Assignments of Error I and II are denied.

III

{¶43} Appellant claims the trial court erred in permitting evidence of cocaine use by "reporters." We disagree.

{¶44} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶45} Appellant argues her medical records were hearsay and not properly authenticated. Appellant's own trial counsel marked them as an exhibit and questioned Jennifer Burke, appellee's intake social worker, on the exhibit:

{¶46} "By Mr. Banks:

{¶47} "Q. I'm going to hand you what's been marked as Defendant's Exhibit A and ask if you can identify that.

{¶48} "A. Yes, this is a certification from Licking Memorial Hospital in regards to Jamie Shepard - - Schafer's hospital visit on December 4th, 2007.

{¶49} "***

{¶50} "Q. Are these the documents that you received, and if so, when?

{¶51} "A. We received this referral in February of 2008.

{¶52} "Q. Okay. And it was just automatically sent to your office because that it was mandated; is that correct?

{¶53} "A. Correct.

{¶54} "Q. Okay. And what was the mandate - - or the reason for the mandate, if you understand?

{¶55} "A. Because Miss Schafer was positive for cocaine and opiates while she was pregnant.

{¶56} "Q. Okay. And - - and under those conditions you would receive a mandate on any person; is that correct?

{¶57} "A. If a mandated reporter has that information, yes, they are mandated to give it to us." Vol. I T. at 56-58.

{¶58} Under the doctrine of "invited error," it is well-settled that "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Supreme Court of Ohio has stated:

{¶59} " 'The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted.

{¶60} " 'It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible.' " *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91.

{¶61} We also find no error in that appellant admitted to using cocaine and marijuana during her pregnancy.

{¶62} Assignment of Error III is denied.

{¶63} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

SGF/sg 0805

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	JUDGMENT ENTRY
S. S.	:	
	:	
Alleged Dependent Child	:	CASE NO. 2009CA0040

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES