

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: : JUDGES:
: Hon. Sheila G. Farmer, P.J.
S.M. : Hon. W. Scott Gwin, J.
: Hon. Patricia A. Delaney, J.
NEGLECTED/DEPENDENT CHILD :
: Case No. 2009AP070036
:
: OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Juvenile Division, Case No. 09JN00295

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 18, 2009

APPEARANCES:

For Appellant

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Guardian ad Litem

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For Father

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Farmer, P.J.

{¶1} On August 4, 2008, Rachel Miller gave birth to S.M. The child's father is Charles Masters. On May 9, 2009, Ms. Miller died. Appellant, Tuscarawas County Job & Family Services, was called as Ms. Miller was the sole custodian of S.M. Appellant gave Ms. Miller's father, Doug Miller, physical custody of the child.

{¶2} A shelter care hearing was held on May 12, 2009 wherein the trial court granted Mr. Miller temporary custody of S.M. pending the adjudication and disposition.

{¶3} A hearing was held on July 8, 2009. By judgment entry filed July 10, 2009, the trial court adjudicated S.M. a neglected and dependent child, and placed S.M. in appellant's temporary custody as opposed to Mr. Miller's.

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

I

{¶5} "THE JUVENILE COURT ABUSED ITS DISCRETION IN REFUSING TO CONTINUE PLACEMENT OF S.M. IN THE TEMPORARY CUSTODY OF HER MATERNAL GRANDFATHER, MR. MILLER, AND INSTEAD PLACING S.M. INTO THE TEMPORARY CUSTODY OF JOB AND FAMILY SERVICES."

I

{¶6} Appellant claims the trial court abused its discretion in refusing to continue placement of S.M. in the temporary custody of S.M.'s maternal grandfather, Doug Miller. We disagree.

{¶7} 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.

{¶8} A trial court's determination on custody is subject to reversal only upon a showing of an abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71. In order to find an abuse of 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.

{¶9} R.C. 2151.412(G)(2) provides if a child cannot be placed in the legal custody of his/her parents, the child should be placed "in the legal custody of a suitable member of the child's extended family." In *In re Cunningham Children*, Stark App. No. 2003CA00054, this court noted the following at ¶22:

{¶10} "The language of R.C. 2151.412(G) is precatory rather than mandatory. See, *In Re: Hiatt* (1983), 86 Ohio App.3d 716, 621 N.E.2d 1222; *In Re: Dixon* (Nov. 29, 1991), Lucas App. No. L-91-021, unreported; *In Re: Cundiff* (Nov. 20, 1995), Stark App. No.1995 CA 00102, unreported. Consequently, this statute does not require the trial court to act in a specific manner, but rather suggests criteria to be considered in making its decision regarding case plan goals. *Dixon, supra*."

{¶11} Appellant argues the trial court disregarded R.C. 2151.412(G)(2) when it did not continue temporary custody of S.M. to Mr. Miller, as he was a suitable member

of S.M.'s extended family. It should be noted that Mr. Miller was the only member of S.M.'s extended family who remotely qualified. T. at 6-7, 16-17.

{¶12} S.M.'s father has a criminal history, including child endangering and a domestic violence against S.M.'s mother. T. at 6, 12-14. The maternal grandmother, Lisa Gesaman, has a history of involvement with children's services. T. at 17.

{¶13} Mr. Miller's home was found to be appropriate for placement. T. at 16. He has been married four times and has five children, and never attempted to aid his two daughters, Vanessa and Rachel, when their mother, Ms. Gesaman, was investigated by children's services. T. at 25-26, 33-34. Mr. Miller does not have a history of positive parental involvement. T. at 32-37.

{¶14} Mr. Miller described how S.M. was functioning in his home as follows:

{¶15} "She's awesome. She's awesome. She's, um, man, she's got a cool little schedule. I can be out mowing clear out two acres at the end of the thing, and she sees me and she's waving and she's just, she's very content, she has a, we have a non-dramatic lifestyle, and the reason that is, is because we've been through the drama and, um, my wife's two daughters, um, grew up in that home and Ruth has always had the opinion that this needs to be a safe haven for kids. They get out into the school, get out into the world, when they come home this needs to be their safe haven, and that's how we operate our home, and it is very awesome for that." T. at 39.

{¶16} Mr. Miller states he has learned from his past history and mistakes. T. at 40-41. He also claims the guardian ad litem was prejudiced against him and had a "lopsided" approach, and he was being set up. T. at 41-43.

{¶17} We note the guardian ad litem's report recommended against placement of S.M. with Mr. Miller:

{¶18} "The undersigned believes this placement will be long term and she has concerns about Mr. Miller's ability to properly parent [S.M.] in the future based on the following:

{¶19} "1. Mr. Miller is currently married to his fourth wife. He has two (2) children from his first marriage, two (2) children from his second marriage (including the deceased mother of [S.M.]), and one (1) child from his third marriage. Mr. Miller has a shared parenting arrangement with his youngest child, but has had almost no relationship with three (3) of his four (4) older children and their children. He does not see his other grandchildren, but did happen to see them when they attended the funeral of Mr. Miller's father. Mr. Miller blames this on his ex-wife Lisa.

{¶20} "2. Mr. Miller is extremely hostile to his ex-wife Lisa and reports that she is and never was an appropriate mother. He reports several inappropriate activities on her part that he believes contributed to his poor relationship with his four (4) older kids and specifically to Rachel's use of drugs. Mr. Miller admits he did not file for visitation or custody, in spite of these inappropriate activities, because he was afraid of what Lisa might do to him.

{¶21} "3. Mr. Miller repeatedly failed to pay child support for his children, resulting in a finding of Contempt in every one of his support cases, including a relatively recent Contempt finding in April, 2008. (see Stark County entries attached)

{¶22} "The undersigned met with Mr. Miller in his home to observe his home and discuss this case. At that time, the undersigned learned Mr. Miller's history as noted

above. Mr. Miller does not hide his animosity and freely spoke of these issues in front of his ten (10) year old son. He advised that his son already knows the history and it was of no concern for him to be present.

{¶23} "Based on Mr. Miller's inability or unwillingness to protect or consistently support his older children, the undersigned has concerns that Mr. Miller has a limited understanding of appropriate parenting. In addition, the undersigned has concerns that Mr. Miller will not protect this child in the future from the drama that continues in his relationship with his ex-wife Lisa. If Mr. Miller is to continue as the custodian of [S.M.], the undersigned believes a psychological evaluation as well as parenting classes would be helpful in assisting Mr. Miller in developing his parenting skills."

{¶24} Appellant argues the trial court's decision is contra to its personal observations of Mr. Miller's ability to care for S.M. However, in reviewing the trial court's entries and statements on the record, we find the trial court did not find placement with Mr. Miller to be in S.M.'s best interest. The trial court explained its decision was based upon the expectancy that this would be a long-term temporary placement:

{¶25} "It's obvious that a relative placement in this particular case would probably be a long term placement, and, uh, certainly would be a good thing if that were available, but the bottom line is I, uh, do not feel that this placement is in the best interest of this child given everything I have heard here today, and given the facts, uh, and other details that I've just indicated. Mr. Miller, the bottom line is this, Sir, I think today as we sit here you and your wife are perfectly capable of caring for this baby. I think you can feed her, and love her, and change her, and, bathe her, and take her to the doctor, and do all those things. I do not think for a minute under those

circumstances with those requirements that any harm would come to this child. I do not find you to be an appropriate custodian as this child grows older and as you meet the challenges of an older child. You have a long history that says otherwise. I heard an awful lot of excuses today, Sir. I heard, uh, an awful lot of things that convinced me that nothing much has changed with you as a father. I give you the opportunity, you know, you wanted to blame Karen, and you wanted to say that she was biased and she didn't ask you the appropriate questions to get the appropriate information to me. I asked you want (sic) you wanted me to know, I wanted to give you that opportunity, Sir, your answer is, I have a cool house. Now I heard the other things you said along with it, um, I'm going to order that this child be placed in the custody of Job and Family Services and, uh, that that move be made immediately. T. at 84-86.

{¶26} Clearly none of the observations noted by the trial court are in dispute. The fact that the trial court's judgment on Mr. Miller's continued ability to properly parent may be different than appellant's is not a reason to find an abuse of discretion. We note even in the black and white printed transcript, Mr. Miller's hostility to the guardian ad litem is evident. This, coupled with Mr. Miller's attempt to palaver the judge and his blasé referencing of a nine month old as "cool," could have impacted the trial court's decision.

{¶27} Upon review, we find the trial court did not abuse its discretion in refusing to continue placement of S.M. in the temporary custody of Mr. Miller.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio, Juvenile Division, is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.

s/ Sheila G. Farmer_____

s/ W. Scott Gwin_____

s/ Patricia A. Delaney_____

JUDGES

SGF/sg 1103

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	JUDGMENT ENTRY
S.M.	:	
	:	
NEGLECTED/DEPENDENT CHILD	:	CASE NO. 2009AP070036

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

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES