

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: :
A.M., M.M., J.M. & N.M. :
: Hon. W. Scott Gwin, P.J.
: Hon. William B. Hoffman, J.
: Hon. John W. Wise, J.
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: :
: Case No. 2010-CA-56
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: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Licking County
Common Pleas Court, Juvenile Division,
Case Nos. F2009-0036, C2009-0037,
F2009-0038, & F2009-0039

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 12, 2010

APPEARANCES:

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Gwin, P.J.

{¶1} Appellant A.M.¹ (“appellant”) appeals the decision of the Licking County Court of Common Pleas, Juvenile Division that denied her motion to continue the permanent custody hearing. The following facts give rise to this appeal.

{¶2} This matter came before the Magistrate on March 1, 2010 for a hearing on a motion filed by the State of Ohio on behalf of the Licking Department of Job and Family Services, Children's Services Division, asking the permanent custody of A.J. and N.M. be granted to Children's Services, and legal custody of M.M. be granted to their father, D.F. The mother A.M. was not present for the hearing; however she was represented by counsel. Before the start of the hearing, appellant's counsel requested a continuance of the hearing. Counsel told the court that he had recent contact with appellant, and that she indicated her desire to be present and participate in the hearing. Counsel discovered that he had a voice mail message on his office phone, from appellant that she would not be able to attend the hearing because she had car trouble over the weekend and could not get a ride to court. She lives in Roseville, which is in Muskingum County, the neighboring county, and that public transportation is not available. Counsel indicated that appellant asked to be informed of the outcome of that day's hearing. The court determined that the voicemail did not ask for a delay to attend the hearing, but rather asked that appellant be informed of the outcome. Because her counsel was present, the Court denied the request for a continuance.

¹ For purposes of anonymity, initials designate appellant's name only. See, e.g., *In re C.C.*, Franklin App. No. 07-AP-993, 2008-Ohio-2803 at ¶ 1, n.1.

{¶13} The state presented evidence. The Court then ordered that the parental rights to A.M., J.M. and N.M. were to permanently terminate. The Court further ordered that the legal care and custody of M.M. was to be placed with father, D.F.

{¶14} Appellant filed objections to the Decision of the Magistrate. By entry of May 26, 2010, the objections were overruled and the decision of the magistrate was upheld.

{¶15} Appellant timely appealed raising as her sole assignment of error,

{¶16} “I. THE MOTHER, [A.M.], WAS DENIED HER OPPORTUNITY TO PRESENT EVIDENCE AND CONTEST THE PERMANENT CUSTODY MOTION BECAUSE THE COURT ABUSED ITS DISCRETION BY DENYING HER A CONTINUANCE BECAUSE SHE WAS UNABLE TO GET TRANSPORTATION TO ATTEND THE TRIAL.

I.

{¶17} In her sole assignment of error, appellant maintains the trial court erred when it denied her request for a continuance because she was unable to find transportation to the permanent custody hearing. We disagree.

{¶18} Juv.R. 23 provides that “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.”

{¶19} Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841. If, however, the denial of a continuance is directly linked to the deprivation of a specific constitutional right, some courts analyze the denial in terms of whether there has been a denial of due process. *Bennett v. Scroggy* (6th Cir.1986), 793

F.2d 772; *State v. Wheat*, Licking App. No. 2003-CA-00057, 2004-Ohio-2088 at ¶ 16. “[T]he right to raise a child is an ‘essential’ and ‘basic’ civil right.” *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. A parent's interest in the care, custody and management of his or her child is “fundamental.” *Id.*; *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388. The permanent termination of a parent's rights has been described as, “* * * the family law equivalent to the death penalty in a criminal case.” *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45. Therefore, parents “must be afforded every procedural and substantive protection the law allows.” *Id.*

{¶10} A party has a right to a reasonable opportunity to be present at trial and a right to a continuance for that purpose. *Hartt v. Munobe* (1993)], 67 Ohio St.3d at 9, 615 N.E.2d 617. A party does not however, have a right to delay trial for no reason. *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 24 O.O. 552, 45 N.E.2d 763, paragraph two of the syllabus. A continuance based on a party's absence must be based on unavoidable, not voluntary, absence. *Id.* *In re Gibby*, Fairfield App. No. 2003-CA-93, 2004-Ohio-2708 at ¶30.

{¶11} Among the factors to be considered by the court in determining whether the continuance was properly denied are: (1) the length of the requested delay, (2) whether other continuances had been requested and granted, (3) the convenience or inconvenience to the parties, witnesses, counsel and court, (4) whether the delay was for legitimate reasons or whether it was “dilatatory, purposeful or contrived”, (5) whether the defendant contributed to the circumstances giving rise to the request, (6) whether denying the continuance will result in an identifiable prejudice to the defendant's case,

and (7) the complexity of the case. *Powell v. Collins* (6th Cir. 2003), 332 F.3d 376, 396; *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078, 1080. See, *State v. Wheat*, supra at ¶ 17.

{¶12} Generally, a trial court does not abuse its discretion in denying a motion for a continuance when a party fails to appear at trial without explanation and when there is no indication that the party would attend a later trial if the continuance was granted. *Heard v. Sharp* (1988), 50 Ohio App.3d 34, 50 Ohio App.3d 34, 552 N.E.2d 665, syllabus. *In re Gibby*, supra at ¶ 31.

{¶13} In the case at bar, appellant left a message on her attorney's voicemail stating that she had car trouble over the weekend and was unable to get the vehicle fixed, nor was she able to obtain a ride to the hearing. When asked of appellant's position, appellant's attorney stated that appellant was "more concerned about more current information and contact that the child was having with respect to the father and the father's family, and the lack of supervision and control on the basis of the foster family, so that was her primary concern on [his] most recent contact." (T. at 6-7). These issues are not relevant to the question of whether permanent custody should be granted. As a result, a continuance was not imperative to secure fair treatment for appellant because she would not have presented evidence that would have affected the decision to grant permanent custody. In this case, the record additionally shows, that appellant failed to attend a hearing regarding termination of visits on November 30, 2009. (T. at 22).

{¶14} Under the facts of this case, the trial court did not abuse its discretion when denying appellant's motion for a continuance at the permanent custody hearing.

Appellant was represented by her attorney at the hearing, who was able to cross-examine and question witnesses on her behalf. Appellant did not indicate to her attorney that she wished to present any evidence relevant to whether permanent custody should be granted.

{¶15} For the foregoing reasons, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J., concurs

separately

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

Hoffman, J., concurring

{¶23} I generally concur in the majority's analysis and disposition of Appellant's assignments of error. My only disagreement is the majority's conclusion we are bound to accept the trial court's determination Appellant was not under arrest as a factual determination. (Majority Opinion at ¶20). I believe the status of being under arrest is a legal conclusion based upon the various facts in evidence. As such, I believe this Court reviews that legal conclusion under a de novo standard.

{¶24} However, because I agree with the trial court's conclusion Appellant was not under arrest, based upon the facts of this case, I concur in the majority's decision to reverse Appellant's conviction.

HON. WILLIAM B. HOFFMAN

[Cite as *In re A.M.*, 2010-Ohio-3762.]

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

IN THE MATTER OF:
A.M., M.M., J.M. & N.M.

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JUDGMENT ENTRY

CASE NO. 2010-CA-56

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

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE