

[Cite as *In re: M.T.*, 2018-Ohio-3023.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

M.T.

JUDGES:

Hon. John W. Wise, P.J.
Hon. William B. Hoffman, J.
Hon. Craig R. Baldwin, J.

Case No. CT2017-0099

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County Court
of Common Pleas Court, Juvenile Division
Case No. 21630038

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 26, 2018

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Appellant Maria Hill (“Mother”) appeals the November 7, 2017 Judgment Entry entered by the Muskingum County Court of Common Pleas, Juvenile Division, which granted legal custody of her child to the child’s paternal grandmother, upon motion of appellee Muskingum County Children’s Services (“MCCS”).

STATEMENT OF THE CASE AND FACTS

{¶2} Mother and Kyle Thomas (“Father”) are the biological parents of the child. On March 17, 2016, MCCS filed a complaint, alleging the child was dependent, neglected, and/or abused. The complaint was filed after Mother presented the child at the hospital with bruising and swelling on his face, a ligature mark around his neck, and bruising and abrasions on his buttocks, which had been received under unknown circumstances. Prior to the filing of the complaint, Mother agreed to a safety plan, placing the child in the home of Jennifer Hill, Mother’s sister (“Maternal Aunt”).

{¶3} The trial court conducted an expedited hearing on March 18, 2016. After the trial court heard testimony relative to the circumstances surrounding the injuries suffered by the child, the trial court ordered the child be placed in the temporary custody of MCCS, and ordered Nevin Anderson, Mother’s boyfriend, have no contact with the child. At an adjudicatory hearing on June 13, 2016, the trial court found the child to be dependent, neglected, and abused. No fault was attributed to Father as the neglect and abuse occurred while the child was in the physical and legal custody of Mother. The trial court also found the child had special needs, and was more physically and medically fragile than a typical child of the same age. The trial court ordered the child remain in the

temporary custody of MCCS. The trial court conducted a dispositional hearing on July 12, 2016, and maintained the status quo. On August 31, 2016, the child was removed from Maternal Aunt's home and placed in the home of Laura Nanna, paternal grandmother ("Nanna").

{¶4} On September 21, 2016, MCCS filed a Motion to Modify Disposition Hearing Order to an Order of Temporary Custody to Laura Nanna with Protective Supervision to MCCS. Father filed a motion for legal custody on October 7, 2016. Father passed away on November 15, 2016. Counsel for Father filed a suggestion of death as well as a motion to withdraw Father's motion for legal custody. On January 17, 2017, MCCS filed a Motion to Modify Expedited Hearing Order to Legal Custody to Laura Nanna with Protective Supervision to MCCS. On March 14, 2017, the trial court ordered Mother "to remove all firearms from the home" and "maintain the home free and clear of any/all firearms and prohibit third party visitors (including but not limited to paramour Nevin Anderson) from bringing firearms onto the property during the pendency of this case."

{¶5} The trial court conducted a hearing on the motion for legal custody to Nanna on June 16, 2017.

{¶6} Assessment caseworker Alley Mitchell testified she proceeded to Nationwide Children's Hospital with Det. Fred Curry on March 11, 2016, after MCCS received concerns regarding the child. Mitchell spoke with Mother, who provided a basic timeline of the child's activities prior to being presented at the hospital. Mother stated she picked up the child from her sister's home at approximately 10:00 a.m. on March 10, 2016. Around 3 p.m., Anderson drove Mother to work. Mother worked until 9:30 p.m., but did not return home until 11 p.m. Mother noted Anderson took the child to his family owned

car repair shop in New Lexington. At approximately 7 p.m., Anderson and the child arrived at Mother's place of employment to pick up the child's medication. Mother advised Mitchell the child did not have any bruising at that time.

{¶7} Mother told Mitchell she received a text message from Anderson at 8:46 pm., in which Anderson explained the child had been playing with a rope necklace, which the boy had around his neck, and because the child was pulling too hard on the necklace, Anderson took it away from him so he would not get hurt. Mother received a second text from Anderson at 9:15 p.m., advising Mother he had fed and bathed the child, and had put the child to bed. Mother returned home at 11 p.m., and checked on the child. Mother did not turn on the bedroom light to avoid waking the child. Mother woke up at 4:30 a.m., after the monitor in the child's room sounded. While she was changing the child's diaper, Mother noticed bruising on his face and buttocks. Mother "freaked out" and confronted Anderson, who denied seeing any bruises and having any knowledge of the cause of the injuries. Mother presented the child to the hospital at 8:00 a.m., on March 11, 2016.

{¶8} During the initial investigation at the hospital, Mitchell informed Mother the child would be removed from her home, until the investigation was completed, if Anderson continued to reside with her. Mother asked Mitchell if the child could be admitted to the hospital because Anderson did not have anywhere else to stay. Mother's response concerned Mitchell as Mother seemed more worried about Anderson than the child and his safety. Mitchell further testified MCCS required Mother to complete parenting classes. Although Mother completed the classes on May 27, 2016, Mother failed to demonstrate appropriate and safe parenting during subsequent visits with the child.

{¶9} Fred Curry, a detective with the Muskingum County Sheriff's Department, testified he responded to the hospital with Mitchell on March 11, 2016. Det. Curry observed extensive bruising on the child's face, head, and buttocks as well as a ligature mark around his neck. Det. Curry opined, based upon his experience in investigation child abuse matters, the child's bruises were consistent with abuse. Det. Curry interviewed Mother, Anderson, and other relatives, however, no one was able to provide a plausible explanation for how the child sustained his injuries.

{¶10} Susan Dorksy, Mother's counselor and the director of the Perry office of Allwell Behavioral Health Services, formerly Six County, testified she began counseling Mother in late October, 2016. Dorksy added she also worked with Mother when Mother was a child. Dorksy stated Mother's primary diagnosis is social phobia/social anxiety disorder. Dorksy noted Mother has additional diagnoses related to childhood trauma and neglect. Although Mother had not completed her counseling, she had never missed an appointment and Dorksy expected to continue to work with Mother as long as necessary. Dorksy explained when Mother was dealing with intense emotions or feeling threatened, she would either become volatile or would shut down and appear disconnected.

{¶11} Dr. Gary Wolfgang conducted a psychological evaluation and a subsequent reevaluation of Mother. Dr. Wolfgang noted Mother did not manifest the kind of reaction one would expect from a mother who discovered her child had been injured as severely as the child had been injured. Mother did not exhibit outrage at whoever had abused the child, but rather, Mother defended herself as not having perpetrated the abuse. Dr. Wolfgang also was concerned with the inconsistencies in Mother's reporting of the events of March 10-11, 2016. Dr. Wolfgang concluded Mother had no diagnosable mental

disorder, but his findings warranted suspicion and raised concerns about the child's safety and well-being. Dr. Wolfgang recommended Mother's visitation with the child remain supervised.

{¶12} Chelsea Large, the ongoing caseworker assigned to the family, testified MCCS had significant concerns regarding the inconsistencies in Mother's reporting to various individuals throughout the case. Mother claimed she left the child in Anderson's care while she worked from 3 p.m., to 9:30 p.m., on March 10, 2016. According to Large, Mother's reporting indicated she may or may not have been aware of some injury to the child prior to finishing her work shift; may or may not have physically seen the child between 7:00 – 7:30 p.m., when Anderson stopped at her place of employment to pick up the child's medication; may or may not have received a text message from Anderson at 8:46 p.m., which included a photo of the ligature marks on the child's neck; may or may not have checked the child's diaper when she returned home at approximately 11:00 p.m.; and may or may not have only "peeked" in the child's room when she returned home as the child was sleeping. Large added, despite observing significant bruising on the child at 4:30 a.m., Mother inexplicably chose to wait until 8:00 a.m., to have the child medically treated.

{¶13} Large developed Mother's case plan, which required Mother to undergo mental health treatment. Mother attended five sessions at River Valley Counseling Center, including her intake. She transferred to Allwell Behavioral Health. She completed an intake on August 20, 2016, and attended one session on August 25, 2016. Mother did not meet with her counselor again until October 28, 2016. Mother attended 11 counseling sessions prior to the final hearing. Large indicated Dr. Wolfgang recommended Mother's

parenting time be closely supervised with ongoing consultation and instruction. Mother completed the required parenting classes. Mother completed a domestic violence assessment, but no further treatment was recommended.

{¶14} Large recalled arriving at Mother's home for an announced visit on June 23, 2016, and found Mother and Anderson shooting guns. Large discussed her concerns about the presence of guns with Mother at the Semi Annual Review meeting at the Agency on September 23, 2016. During an announced visit on September 28, 2016, Anderson was aggressively cleaning his guns despite the fact Large previously advised Mother guns should not be used or displayed during home visits. Large and a police officer made an unannounced visit early one morning. After four knocks, Mother answered the door. Large observed a gun safe in the corner of the living room as well as two large rifle cases. Large asked Mother to open the gun safe, but she was unable to do so. Anderson refused to open the safe. At one point during the pendency of the case, New Lexington Police responded to a call involving a Cassandra Allen who alleged Mother had harassed her. Allen told police Mother stated she was going to get her children back one way or another, even if she had to purchase a throw away gun.

{¶15} Large further testified housing remained a concern as Mother moved three times during the pendency of the case and failed to demonstrate the ability to maintain stable housing. In addition, Mother continued to reside with Anderson, who is court ordered to have no contact with the child.

{¶16} Although the case plan included Anderson, Anderson refused to sign the case plan. Anderson did complete a mental health assessment, a substance abuse assessment, parenting classes, and medical training. However, Anderson did not comply

with the terms of his case plan regarding substance abuse testing. Anderson was required to submit to hair follicle and random drug testing. Anderson failed to appear for two scheduled hair follicle tests, and had not completed a hair follicle test during the pendency of the case. Anderson was placed on the random drug screen list at MCCS. Anderson submitted to only two of 108 requested drug screens, both occasions were in June, 2016.

{¶17} Jamie Groves, a caseworker from Perry County Children's Services, which became involved with Mother after she gave birth to her second child, and another PCCS caseworker made an unannounced visit to investigate allegations Mother was surreptitiously having unsupervised visits with her newborn. When they arrived, a man informed them neither Mother nor the caregiver was at the home. The man also advised them the baby was not at the residence. The caseworkers refused to leave. After a long delay, Mother finally appeared at the door. Mother told the caseworkers she was upstairs cleaning and did not hear the knock. The caseworkers inspected every room in the house with the exception of one room which had a locked door. Mother explained the door could only be opened with a knife. Mother denied having the newborn at the home, claiming the newborn was with the babysitter. The caseworkers went to the babysitter's home. The babysitter informed them the newborn had not been with her that day. When they returned to Mother's home, they found Mother holding the newborn.

{¶18} Theresa Desarro, manager of the Village Green Apartments in Roseville, Ohio, stated Mother submitted an application to live at the apartments on July 21, 2016. On the application, Mother indicated the child would be living with her. Mother received a rental discount based upon the fact the child would be living with her. The child,

however, did not live with Mother at the apartment. Mother did not advise the apartment manager Anderson was living with her. Mother was eventually evicted for failure to pay rent and fifteen apartment complex rule violations.

{¶19} Laura Nanna, the child's paternal grandmother, testified the child has been in her care since August, 2016. The child is attending an MRDD school and is doing well. Nanna is able to attend to all of the child's emotional and physical needs, including his extensive medical demands.

{¶20} Ruthellen Weaver, the guardian ad litem, testified the child had blossomed in Nanna's care. The child expressed his desire to stay with Nanna. Weaver noted the child has come out of his shell and his health seems to have improved. Weaver stated Mother has a short temper which is not helpful in her interactions with people. Mother has learned to deceive people in authority as a means of survival. Weaver believed there was a risk of harm to the child in Mother's care. Weaver recommended the child be placed in the legal custody of Nanna.

{¶21} Via Judgment Entry filed November 7, 2017, the trial court granted legal custody of the child to Nanna. The trial court found Mother "failed continuously and repeatedly to substantially remedy the conditions" which caused the placement of child outside her home. The trial court also found it was in the best interest of the child to grant legal custody to Nanna.

{¶22} It is from this judgment entry Mother appeals, raising the following assignments of error:

I.THE TRIAL COURT'S ORDER BANNING FIREARMS FROM THE APPELLANT'S RESIDENCE WAS IN VIOLATION OF HER RIGHT TO FIREARM OWNERSHIP UNDER ARTICLE I OF THE OHIO CONSTITUTION AND ARTICLE II OF THE U.S. CONSTITUTION.

II.THE TRIAL COURT ERRED IN BASING IT'S [SIC] DECISION ON THE PERCEIVED REFUSAL OF APPELLANT TO PROVIDE TESTIMONY AND/OR AN ADMISSION TO THE ABUSE OR NEGLECT OF THE MINOR CHILD IN VIOLATION OF THE APPELLANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

{¶23} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.2(C).

I

{¶24} In her first assignment of error, Mother submits the trial court's order banning firearms from her residence violated her constitutional right to keep and bear arms.

{¶25} Following a review hearing on March 14, 2017, the trial court ordered "Mother shall cause to remove all firearms from the home, and shall maintain the home free and clear of any/all firearms, and shall prohibit third party visitors (including but not limited to her paramour Nevin Anderson) from bringing firearms onto the property during the pendency of this case." March 14, 2017 Order. The trial court referenced this Order in its Findings of Fact set forth in the November 7, 2017 Judgment Entry. November 7, 2017 Judgment Entry at 10, para. 49.

{¶26} We interpret the trial court’s use of the term “during the pendency of this case” to mean the order was in effect until the trial court determined the pending motion for legal custody and MCCA’s protective supervision was terminated. We find the order did not survive beyond the November 7, 2017 Judgment Entry as said entry does not continue this prohibition.

{¶27} Mother’s first assignment of error is overruled.

II

{¶28} In her second assignment of error, Mother contends the trial court based its decision to grant legal custody of the child to his paternal grandmother upon the perceived refusal of Mother to testify and/or admit to the abuse or neglect of the child, thereby violating her Fifth Amendment Right against self-incrimination.

{¶29} R.C. 2151.353(A)(3) states the following in pertinent part:

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

{¶30} In *In re D.T.*, 8th Dist. Cuyahoga Nos. 100970 and 100971, 2014–Ohio–4818, the Eighth District Court of Appeals explained:

Legal custody is significantly different than the termination of parental rights in that, despite losing legal custody of a child, the parent of the child retains residual parental rights, privileges, and responsibilities. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011–Ohio–4090, ¶ 14, citing R.C. 2151.353(A)(3)(c). In such a case, a parent's right to regain custody is not permanently foreclosed. *In re M.J.M.* [8th Dist. Cuyahoga No. 94130, 2010–Ohio–1674] at ¶ 12. For this reason, the standard the trial court uses in making its determination is the less restrictive “preponderance of the evidence.” *Id.* at ¶ 9, citing *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001). “Preponderance of the evidence” means evidence that is more probable, more persuasive, or of greater probative value. *In re C . V.M.*, 8th Dist. Cuyahoga No. 98340, 2012–Ohio–5514, ¶ 7.

Unlike permanent custody cases in which the trial court is guided by the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court should consider in determining the child's best interest in a motion for legal custody. *In re G.M.* at ¶ 15. We must presume that, in the absence of best interest factors in a legal custody case, “the legislature did not intend to require the consideration of certain factors as a predicate for granting legal custody.” *Id.* at ¶ 16. Such factors, however, are instructive when making a determination as to the child's best interest. *In re E.A.* [8th Dist. Cuyahoga No. 99065, 2013–Ohio–1193] at ¶ 13.

The best interest factors include, for example, the interaction of the child with the child's parents, relatives, and caregivers; the custodial history of the child; the child's need for a legally secure permanent placement; and whether a parent has continuously and repeatedly failed to substantially remedy the conditions causing the child to be placed outside the child's home. R.C. 2151.414(D).

Because custody determinations “ ‘are some of the most difficult and agonizing decisions a trial judge must make,’ “ a trial judge must have broad discretion in considering all of the evidence. *In re E.A.* at ¶ 10, quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). We therefore review a trial court's determination of legal custody for an abuse of discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Id. at 19-22; *Accord, In re L.D.*, 10th Dist. Franklin No. 12AP–985, 2013–Ohio–3214; *Stull v. Richland County Children Services*, 5th Dist. Richland Nos. 11CA47 and 11CA48, 2012–Ohio–738.

{¶31} Mother asserts the state predicated potential reunification upon Mother's admitting she abused the child. Mother adds, the November 7, 2017 Judgment Entry “is replete with the trial court's displeasure with [her] decision not to testify or provide an admission regarding abuse or neglect in this case.” Brief of Appellant at 17. We disagree.

{¶32} Although the trial court found Mother did not testify to refute any of the State's evidence or call any witnesses or submit any evidence to refute the State's case or support her request for custody, the November 7, 2017 Judgment Entry is, despite Mother's assertion, devoid of any indication the trial court based its decision to grant legal custody of the child to Nanna on Mother's failure to testify or admit to the abuse of the child. Rather, the trial court predicated its decision upon the fact the child was abused and Mother was unable to provide a plausible explanation for how the child sustained these injuries while in her and Anderson's physical custody, and its concern a risk of future harm to the child remained if the child was returned to Mother. The trial court also considered the facts establishing Mother engaged in a pattern of lies and deception from housing applications to surreptitiously having unsupervised visits with her newborn, as well as the concerns expressed by the caseworkers and mental health professionals, as set forth in the Statement of the Case and Facts, supra, in determining it was in the child's best interest to place him in the legal custody of Nanna.

{¶33} Based upon the foregoing, we find the trial court did not abuse its discretion in granting legal custody of the child to his paternal grandmother.

{¶34} Mother's second assignment of error is overruled.

{¶35} The judgment of the Muskingum County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Wise, John, P.J. and

Baldwin, J. concur