

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

IN THE MATTER OF: : Case No. 16CA28
: :
K.M.M. : DECISION AND JUDGMENT
: ENTRY
: **Released: 12/27/16**

APPEARANCES:

Robert Henry, Law Office of Robert Henry, LLC, Marietta, Ohio, for Appellant B.D.

Kevin A. Rings, Washington County Prosecuting Attorney, and Amy Graham, Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal filed by B.D., mother of K.M.M., from a Washington County Common Pleas Court, Juvenile Division, judgment that awarded Appellee, Washington County Children Services Board (WCCSB), permanent custody of K.M.M. On appeal, Appellant contends that she was deprived of her constitutional right to due process under the Fourteenth Amendment to the United States Constitution and the Ohio Constitution when the juvenile court overruled her motion to postpone the permanent custody hearing. However, because we find no abuse of discretion on the part of the trial court in denying the motion for continuance, which was actually made on other grounds than Appellant's absence from the hearing,

we find no merit to Appellant's sole assignment of error and it is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶2} On July 30, 2014, K.M.M. was removed from the care of his mother, B.D., Appellant herein, pursuant to a complaint filed by WCCSB alleging that he was a neglected and dependent child, and he was placed in the temporary custody of WCCSB.¹ Appellant was subsequently appointed counsel and thereafter admitted at an adjudicatory hearing that K.M.M. was dependent, which the trial court so found and dismissed the neglect charge. Temporary custody was continued with WCCSB, and K.M.M. went on to be placed in a series of foster homes and therapeutic foster homes, until he was ultimately transferred to a group home. A case plan for the family was implemented by WCCSB with a goal of reunification.

{¶3} WCCSB filed a motion for permanent custody on December 21, 2015. As a result, the trial court appointed a guardian ad litem for K.M.M. A permanent custody hearing was held on June 7, 2016, at which time K.M.M. was fourteen years old. At the start of the hearing, Appellant's counsel represented to the trial court that Appellant was on her way to court, and that he was ready to proceed without her. The trial court noted that the

¹ The record indicates that K.M.M.'s father had his parental rights terminated by a court in West Virginia in 2005.

hearing was scheduled for 9:00 a.m., that it was then 9:26 a.m., that it was of the understanding that Appellant was on her way and that they would begin without her. Appellant's counsel then orally moved for a continuance of the hearing, based upon what he considered a "woefully" poor guardian ad litem report, and requested that a new guardian ad litem be appointed. The trial court denied the motion and the hearing proceeded.

{¶4} Appellant failed to appear at the hearing and the matter was submitted for decision without presentation of testimony or evidence by Appellant. The record indicates that Appellant's counsel was present and participated throughout the hearing. The trial court issued its decision granting WCCSB's motion for permanent custody on August 10, 2016.² It is from this decision that Appellant now brings her timely appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE APPELLANT WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION WHEN THE JUVENILE COURT OVERRULED APPELLANT'S MOTION TO POSTPONE THE PERMANENT CUSTODY HEARING."

LEGAL ANALYSIS

² The trial court's August 10, 2016 decision was, in actuality, its "Second Amended Decision and Judgment Entry On Permanent Custody."

{¶5} In her sole assignment of error, Appellant contends that she was deprived of her constitutional right of due process under the Fourteenth Amendment to the United States Constitution and the Ohio Constitution when the juvenile court overruled her motion to postpone the permanent custody hearing. Specifically, she argues that she had a right to be present at the permanent custody hearing, and that the trial court's failure to grant a motion for a continuance made at the start of trial erroneously deprived her of her fundamental liberty interest in the care, custody, and management of her child. Appellee responds by pointing out that the record does not reflect a request for a continuance of the hearing on the basis of Appellant's absence and that as Appellant was aware of the date and time of the hearing, was offered transportation to the hearing but simply failed to appear, she waived her right to be present at the hearing. Based upon the following, we agree with Appellee.

{¶6} Initially, we agree with Appellant that a parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982); *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990); *accord In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829. A parent's

rights, however, are not absolute. *D.A.* at ¶ 11. Rather, “ ‘it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the pole star or controlling principle to be observed.’ ” *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979); quoting *In re R.J.C.*, 300 So.2d 54, 58 (Fla.App.1974). Thus, the state may terminate parental rights when a child's best interest demands such termination. *D.A.* at ¶ 11.

{¶7} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child's best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. R.C. 2151.414(A)(1). We further agree with Appellant that a child's parent has the right to be present at such a hearing. *In re I.B.L.*, 4th Dist. Washington No. 14CA19, 2014-Ohio-4666, ¶ 13 (stating that such right is not absolute in the case of an incarcerated parent). However, there is nothing in the record presently before us to indicate that this situation involves anything other than a failure to appear on the part of Appellant, rather than a deprivation of Appellant's right to attend the hearing by the trial court. As such, we conclude that the proper analysis simply involves

whether the trial court abused its discretion in denying Appellant's motion for a continuance of the trial.

{¶8} “An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981); citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841 (1964) and *State v. Bayless*, 48 Ohio St.2d 73, 101, 357 N.E.2d 1035 (1976). “ ‘[A]buse of discretion’ [means] an ‘unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.’ ” *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67; quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶9} “ ‘There 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.’ ” *Unger* at 67; quoting *Ungar* at 589. “Weighed against any potential prejudice to a defendant are concerns such as a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice.” *Id.* In evaluating a motion for a continuance, a court should consider (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique facts of each case. *Id.* at 67-68.

{¶10} Here, a review of the record reveals that on the morning of trial, Appellant’s counsel was present and represented to the trial court that Appellant was on her way to court. Appellant’s counsel further stated that he was “prepared to go ahead and start without her.” At that point, the trial court noted on the record that “the matter was set at nine, and it’s now 9:26. The Court’s understanding is the Mother is on her way but we’ll start without her.” After that, Appellant’s counsel made an oral motion to

continue the permanent custody hearing based upon the fact that the guardian ad litem's report had just been filed four days prior, with no recent home visit or contact with the child referenced in the report. Appellant's counsel argued that such a report was "woefully" poor, that he would have expected more care, attention and detail to have been put into the report as "[t]his is the death penalty of custody cases[.]" He further requested, in addition to continuing the hearing, that the court appoint a new guardian ad litem. Appellee opposed the motion and the trial court thereafter denied the motion.

{¶11} There was no motion to continue the hearing made on the basis that Appellant was absent from the hearing. Civ. R. 7(B)(1) provides:

"An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. A written motion, and any supporting affidavits, shall be served in accordance with Civ.R. 5 unless the motion may be heard ex parte."

Thus, we cannot say, based upon these circumstances, the trial court's denial of a motion for a continuance based upon grounds related to the guardian ad litem's report deprived Appellant of her right to be present at the permanent custody hearing. There is no connection between the two.

{¶12} Further, because Appellant did not request a continuance on the basis of her absence below, she cannot now claim error by the trial court on appeal. *See generally State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15 (2014) (It is a well-established rule that “ ‘an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.’ ”); *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986) (failure to raise an issue at the trial court level, which issue is apparent at the time of the proceeding, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal).

{¶13} In the case at bar, we find nothing unreasonable, arbitrary, or capricious about the trial court's decision to deny Appellant's motion to continue, considering that it was not made on the basis of Appellant's failure to be present at the hearing. Further, even if the argument is not waived, we find no abuse of discretion on the part of the trial court in proceeding with the hearing, as scheduled, in the absence of a motion for a continuance made by a party or counsel based upon the specific grounds of Appellant's absence, and where there is no evidence in the record that Appellant had

failed to be served with notice of the hearing, was incarcerated, or was otherwise prevented from attending. Rather, the only evidence in the record is that Appellant was aware of the scheduled hearing and was offered transportation to the hearing by WCCSB, but apparently simply failed to appear.

{¶14} Moreover, we have previously concluded that “ ‘[a] trial court possesses discretion to proceed with a permanent custody hearing in a parent's absence.’ ” *In re I.B.L., supra*, at ¶ 18; quoting *In re A.C.H.*, 4th Dist. Gallia No. 11CA2, 2011-Ohio-5595, ¶ 46; citing *In re S. G.*, 2nd Dist. Greene No. 2009-CA-46, 2010-Ohio-2641, ¶ 22. In *A.C.H.*, we determined that the trial court did not deprive the parent of his due process rights by holding the permanent custody hearing in his absence when “[c]ounsel meaningfully represented appellant at the hearing, a complete record was made, and appellant * * * failed to show what testimony or evidence he would have offered that would have changed the outcome of the case.” *Id.* at ¶ 46.

{¶15} Accordingly, based upon the foregoing reasons, we hereby overrule Appellant’s sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.