

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re: Rachel K. and Glorietta K.

Court of Appeals No. L-03-1061

Trial Court No. 99007751

DECISION AND JUDGMENT ENTRY

Decided: September 30, 2004

* * * * *

James D. Valtin, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating the parental rights of appellant, Kyong K.¹, and awarding permanent custody of her two minor daughters, Rachel K., born August 24, 1996, and Glorietta K., born December 11, 1998, to appellee,

¹The court also terminated the parental rights of the minor children's putative father, Min K., who had no contact with his daughters and was served by publication. He never took part in this case and did not appeal the juvenile court's decision.

the Lucas County Children Services Board ("LCCSB"). Appellant appeals this judgment and asserts the following assignments of error:

{¶ 2} "The trial court's decision to permanently deprive appellant of all parental rights is against the manifest weight of the evidence, and therefore contrary to law."

{¶ 3} "The trial court's denial of appellant's motion to dismiss on the grounds that appellee's motion for permanent custody was not timely filed was inconsistent with a prior court order and therefore violated appellant's constitutional right to due process."

{¶ 4} The following facts are taken from the record of this cause and the magistrate's decision, as approved and adopted by the juvenile court. On November 10, 1999, appellant and her two daughters were driving from Chicago, Illinois, to their home in Columbus, Ohio. Because she felt ill, appellant left the interstate near Toledo, Lucas County, Ohio, and sought medical assistance. Eventually, appellant was admitted to St. Luke's Hospital.

{¶ 5} When medical personnel examined appellant, they noticed that she appeared to have paranoid tendencies and that she was hearing voices. Appellant told the hospital staff that she had left Columbus because her neighbors were physically and sexually abusing her and her children. However, an examination of appellant, Rachel, and Glorietta failed to reveal any evidence of either physical or sexual abuse. The children were, nonetheless, crying, dehydrated, and tired.

{¶ 6} On November 12, 1999, the Lucas County Children Services Board ("LCCSB") filed a complaint in dependency, neglect, and abuse in which it sought temporary custody of Rachel and Glorietta. LCCSB also requested temporary shelter

care of the children until the hearing on its complaint. The trial court, after a hearing, immediately granted this last motion.

{¶ 7} Rachel and Glorietta were adjudicated dependent children on February 2, 2000, and were placed in the temporary custody of LCCSB. Throughout the course of the next two years, several case plans were formulated for appellant. The main focus of each of these plans was on appellant's mental health. Even though she was offered several psychological services, appellant's mental condition did not improve.

{¶ 8} Appellant, a registered nurse, worked in 11 different medical facilities when she resided in Columbus. In Toledo, she was able to obtain a job at St. Vincent Mercy Medical Center in November 1999. However, she was later terminated. Appellant was also terminated from her subsequent employment at the Franciscan Care Center. At the time of the hearing on this matter, appellant was unemployed. In addition, due to her behavior, which includes, but is not limited to unfounded complaints that the neighbors were coming into her apartment and hurting her and 911 calls involving unsubstantiated claims of illness, appellant was notified that her lease would not be renewed. Appellant also continued claiming that both she and her children were sexually abused by their neighbors in Columbus.

{¶ 9} On March 19, 2001, LCCSB filed its first motion for permanent custody of Rachel and Glorietta. On August 13, 2001, the trial court, after a hearing, denied the motion for permanent custody, but granted LCCSB the right "to file a new motion for permanent custody after four months from the date of this judgment, if, in their opinion sufficient progress leading to reunification has not been made."

{¶ 10} LCCSB filed its second motion for permanent custody on November 9, 2001. The children services agency explained that the filing occurred less than four months after the trial court's decision on the initial motion for permanent custody because "the children were originally removed from the home November 11, 1999, and the two year sunset date is approaching, suggesting a filing needs to be made nearer the three-month mark to comply with the law." In response to LCCSB's motion, appellant filed a motion to dismiss this cause because the second motion for permanent custody was "premature," that is, it was filed prior to the four month period set forth in the juvenile court's August 13, 2001 judgment. Appellant argued that the trial court specifically stated that the period of four months was set in order to provide her with sufficient time to comply with her case plan. The trial court denied the motion to dismiss.

{¶ 11} Four days of hearings were held before a magistrate on LCCSB's motion for permanent custody. In her August 7, 2002 decision, the magistrate set forth numerous findings of fact related to the requisites of R.C. 2151.414(B), (D), and (E). Based on these factual findings, the magistrate concluded that clear and convincing evidence supported the termination of appellant's parental rights and an award of permanent custody of Rachel and Glorietta to LCCSB.

{¶ 12} On August 21, 2002, appellant filed timely objections to the magistrate's decision. Appellant objected, inter alia, to the finding that LCCSB demonstrated, by clear and convincing evidence, that it should be awarded permanent custody of appellant's minor children. Appellant indicated that, with the court's leave, she would raise more specific objections after the filing of the transcript of the proceedings below.

A praecipe for the transcription of those proceedings was also filed on August 21, 2002; however, neither the transcript nor more specific objections to any of the magistrate's findings of fact and conclusions of law were ever filed for the trial court's consideration.

{¶ 13} On February 3, 2003, the juvenile court filed its judgment terminating appellant's parental rights and granting LCCSB's motion for permanent custody. In that judgment the court below incorporated, by reference, the findings of fact and conclusions of law set forth in the magistrate's decision. The trial court also overruled appellant's objections.

{¶ 14} On February 26, 2003, appellant filed a timely notice of appeal. On March 10, 2003, she filed a praecipe requesting that a complete transcription of the hearing on LCCSB's motion for permanent custody be prepared and filed on appeal. That transcript, consisting of four volumes, was filed on December 10, 2003.

{¶ 15} In her first assignment of error, appellant contends that the trial court's judgment is against the manifest weight of the evidence. Specifically, appellant states that "based upon a review of the transcript," the testimony concerning (1) Rachel's wish to be reunited with her mother; (2) appellant's commitment to regaining custody of her children; and (3) the testimony of the mental health professionals who evaluated appellant was not considered. Appellant therefore asks this court to undertake an analysis which would require a review of the testimony at the dispositional hearing. For the following reasons, we cannot engage in the requested analysis.

{¶ 16} Juv.R. 40(E) controls decisions by a magistrate in juvenile cases. Juv.R. 40(E)(3)(c) provides that objections must be specific "and state with particularity the

grounds of objection." Objections to particular findings of fact must "be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of the evidence if a transcript is not available." Furthermore, a party cannot "assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." Juv.R. 40(E)(3)(d).

{¶ 17} In the present case, appellant failed to file specific objections to the matters raised in her appeal and failed in her duty to provide the trial judge with a transcript of the proceedings below for use in his independent review of the magistrate's decision. Thus, appellant waived her right to the alleged error on appeal. *In re Wright* (Feb. 23, 2001), 11th Dist. No. 2000-T-0108.

{¶ 18} Moreover, due to the fact that it was never filed in the trial court, we cannot review the transcript filed by appellant on appeal. See *In re Jeremy K.* (July 27, 2001), 6th Dist. No. E-00-051, citing *State v. ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730. The underlying principle that prevents this court from considering that transcript is found in *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus, in which the Ohio Supreme Court determined that a reviewing court could not add matter to the record that was not part of the trial court proceedings and then decide the appeal on the new matter. See, also, *Howard v. Howard*, 6th Dist. No. L-02-1371, 2003-Ohio-5683, at ¶15; *In re Wright*, supra; *In re Jeremy K.*, supra.

{¶ 19} Because appellant failed to provide a transcript of the permanent custody hearing, the magistrate's findings of fact are considered established, and this court may review the trial court's judgment in this circumstance only for an abuse of discretion, that is, we must decide whether the trial court's attitude in adopting the magistrate's decision was arbitrary, unreasonable, or unconscionable. *Howard v. Lucas Cty. Child Support Enforcement Agency*, at ¶16 (Citations omitted.); *In re Jeremy T.*, supra. Upon that review of the magistrate's findings of fact we find that they were sufficient for the trial court to make an independent analysis under R.C. 2151.414. Consequently, we find no abuse of discretion on the part of the trial court in adopting the magistrate's findings of fact as its own. Appellant's first assignment of error is found not well-taken.

{¶ 20} In her second assignment of error, appellant urges that the trial court's denial of her motion to dismiss this cause, which was made after LCCSB "prematurely" filed its second motion for permanent custody, violated her constitutional right to due process. Appellant bases this alleged violation on LCCSB's "premature" filing of the second motion for permanent custody thereby depriving appellant of the opportunity to achieve the goals of her case plan. She also argues that LCCSB failed to make reasonable efforts toward reuniting appellant with her children.

{¶ 21} We agree that parents have a fundamental right to care for and have custody of their children, see *Santosky v. Kramer* (1982), 455 U.S. 745, 753, and that due process requires that proceedings resulting in the loss of permanent custody of children must be fundamentally fair, see *Lassiter v. Dept. of Social Serv. of Durham Cty., North Carolina*

(1981), 452 U.S. 18. However, in this case, we find that appellant's due process rights were not violated by the trial court's decision to deny her motion to dismiss.

{¶ 22} Initially, we note that the determination of appellant's assertions in her second assignment of error rest largely on testimony presented in the hearing on LCCSB's second motion for permanent custody. To repeat, we cannot consider that testimony. Thus, our review of this assignment of error is limited to the record and the trial court's judgment. Based upon the information in these documents, we find that appellant had ample time, over two years to complete her case plans. These plans were frequently modified in order to meet appellant's need for psychological counseling and to reunify her with her daughters.

{¶ 23} Furthermore, because the order denying LCCSB's motion for permanent custody was not a final, appealable order, it was subject to change and reconsideration at any time, either upon the court's own motion or that of a party. *Barrett v. Waco Internat'l., Inc.* (1997), 123 Ohio App.3d 1, 11. Here, the court recognized that the two year sunset provision set forth in R.C. 2151.353 (F) was approaching and that, therefore, pursuant to R.C. 2151.415(A), LCCSB was required to file its motion for permanent custody prior to the lapse of the four month period set by the court in its prior order. Thus, the fact that the trial court reconsidered its position and denied appellant's motion to dismiss was not an abuse of discretion. *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 535.

{¶ 24} Accordingly, we can find no lack of fundamental fairness in the proceedings that resulted in appellant's loss of the permanent custody of her children, and appellant's second assignment of error is found not well-taken.

{¶ 25} On consideration whereof, this court finds that substantial justice was done the party complaining, and the judgment of the Lucas Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal. See App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J.

JUDGE

Richard W. Knepper, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE