

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

In the Matter of: T.H., C.H.

Court of Appeals Nos. S-10-009
S-10-013

Trial Court Nos. 20830044
20830045

DECISION AND JUDGMENT

Decided: September 1, 2010

* * * * *

Nancy L. Jennings, for appellant father.

Andrew R. Bucher, for appellant mother.

Cindy A. Bilby, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is a consolidated appeal from a judgment of the Sandusky County Court of Common Pleas, Juvenile Division, that terminated the parental rights of appellant mother and appellant father and granted permanent custody of their children T.H. ("T.") and C.H. ("C.") to appellee Sandusky County Department of Job and Family

Services ("agency"). For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant mother sets forth the following assignments of error:

{¶ 3} "I. The trial court erred in finding that the Sandusky County Children's Services Board had made reasonable efforts to reunify the minor children with appellant.

{¶ 4} "II. The trial court erred in granting state's motion for permanent custody as it was against the manifest weight of the evidence to grant it.

{¶ 5} "III. Court appointed trial counsel for appellant provided ineffective assistance which unduly prejudiced appellant and warrants reversal of the trial court's decision."

{¶ 6} Appellant father sets forth the following assignment of error:

{¶ 7} "The Sandusky County Department of Jobs and Family Services failed to prove by clear and convincing evidence that permanent custody was in the children's best interest and that the children cannot be reunified with appellant father."

{¶ 8} Appellants have been involved with the agency since 1999, when five-month-old T. was left alone in an apartment from which her parents were about to be evicted. Various referrals and investigations ensued throughout 1999, 2000, 2001 and 2003, following allegations of substance abuse, repeated criminal activities and incarcerations, housing and employment issues, failure to comply with case plan requirements, lack of treatment success and other ongoing problems regarding appellants'

parenting decisions. The agency first received temporary custody of T. in May 2003, when the child was four years old; mother briefly regained custody of T. in late July.

{¶ 9} Father briefly attended parenting classes in 2003 but was unsuccessfully terminated and tested positive for cocaine during that period. Father was convicted of theft and forgery in April 2005 and sentenced to five years probation. In November 2005, father was again arrested for theft; his probation was revoked in February 2006 and he was sentenced to 20 months incarceration.

{¶ 10} Mother attended parenting classes and individual counseling before another investigation was opened in May 2004. At that time, mother had just given birth to C. Referrals that mother was drinking and using drugs in T.'s presence were made in 2004, 2005 and 2006, resulting in several investigations. In early 2006, the agency received numerous referrals alleging on one occasion that the family was homeless and on several other occasions that mother was using cocaine and crack cocaine in the presence of the children. On March 31, 2006, both children were removed from the home. The children were adjudicated dependent on May 15, 2006, and at the dispositional hearing on June 19, 2006, the agency was granted protective supervision.

{¶ 11} During the summer of 2006, mother failed to attend individual counseling sessions and missed appointments for drug tests. On August 9, 2006, mother tested positive for cocaine. In September 2006, she was arrested for driving under the influence of alcohol. Mother began participating in a family drug court program but tested positive for cocaine on October 4 and 5, 2006. On October 5, the agency filed a motion to modify

the disposition of protective supervision and received interim temporary custody. On October 18, 2006, mother began inpatient substance abuse treatment. However, she was unable to successfully complete inpatient treatment and was terminated from the program after she left against staff advice. The agency was granted temporary custody of the children again on January 9, 2007. In December 2007, mother regained custody of the children.

{¶ 12} On June 30, 2008, the agency received a referral alleging a domestic violence incident in a home where mother had placed the children during her incarceration for a probation violation. As a result, the agency requested and received temporary custody of the children. At that time, father was serving a two-year prison sentence for breaking and entering and theft convictions with a release date of March 2010, and mother was unable to provide the names of any friends or relatives for possible placement.

{¶ 13} In July 2008, the agency filed a complaint alleging that T. and C. were neglected and dependent children. The children again were placed in the temporary custody of the agency. Throughout 2008, the agency continued to work with mother on her case plan with the goal of obtaining a job and suitable housing as well as remaining sober. In December 2008, mother was referred for evaluation and possible further counseling. Mother then was referred to intensive outpatient treatment for chemical dependency, which she began in March 2009. Mother admitted in March 2009 to having a relationship with a man who was a registered sex offender despite knowing that she

would not be reunited with her children if the relationship continued. In April 2009, mother was unsuccessfully discharged from intensive outpatient treatment for non-compliance. Both children continued with individual counseling.

{¶ 14} On May 29, 2009, the agency filed a motion requesting modification of temporary custody to permanent custody of both children. As to mother, the agency alleged that she: had failed to show that she could provide for the children and keep them safe; continued to make decisions that did not make her children a priority in her life; violated the terms of her probation numerous times; continued to have contact with a registered sex offender; continued to frequent businesses that serve alcohol and continued to have contact with father, despite being told not to, due to their negative history together. The agency further alleged that on numerous occasions mother requested that her visits with the children be shortened because she did not want to be in a room with them for two hours; that mother cancelled numerous visitations and also refused on several occasions to visit for two hours with her children. Finally, the agency alleged that both parents had consistently failed to make their children a priority in their lives and had consistently failed to remedy the concerns and conditions that initially warranted the agency's involvement.

{¶ 15} The matter came before the trial court for a permanency hearing on November 30, 2009. The agency and mother each presented several witnesses during four days of testimony. On February 10, 2010, the trial court filed a detailed decision in which it ordered that the parental rights of both parents as to T. and C. be terminated and

that permanent custody of both children be granted to the Sandusky County Department of Job and Family Services. It is from that judgment that mother and father appeal.

{¶ 16} The record reflects that at the outset of the permanent custody hearing counsel for father stated father's desire that custody be given to mother. Father was present at the hearing but did not call any witnesses. Father now appeals the trial court's judgment, asserting in his sole assignment of error that the agency failed to prove by clear and convincing evidence that permanent custody was in the children's best interest and that the children cannot be reunified with father. Father's assignment of error will be considered together with mother's second assignment of error in which she asserts that the trial court's decision was against the manifest weight of the evidence.

{¶ 17} In granting a motion for permanent custody, the trial court must find that one or more of the conditions listed in R.C. 2151.414(E) exist as to each of the child's parents. If, after considering all relevant evidence, the court determines by clear and convincing evidence that one or more of the conditions exists, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1). Further, pursuant to R.C. 2151.414(D), a juvenile court must consider the best interest of the child by examining factors relevant to the case including, but not limited to, those set forth in paragraphs 1-5 of subsection (D). Only if these findings are supported by clear and convincing evidence can a juvenile court terminate the rights of a natural parent and award permanent custody of a child to a children services agency. *In re William S.* (1996), 75 Ohio St.3d 95. Clear

and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 18} The trial court in this case heard extensive testimony from caseworkers, case supervisors, investigators, the children's counselors, the parents' substance abuse and mental health counselors, T.'s third grade teacher, a parent's aide who worked with mother on such issues as locating suitable housing, the children's guardian ad litem, and the children's mother.

{¶ 19} Testimony reflects that father was in and out of prison repeatedly since the agency became involved with this family. Father struggles with substance abuse issues and was incarcerated at the time of the permanent custody hearing. Father indicated that he wished the children to be placed in mother's custody and did not argue at the hearing that they should be placed in his care.

{¶ 20} As indicated above, extensive case plan services were provided to mother for several years. Mother was in and out of drug treatment facilities between 2006, when both children were removed from the home, and 2008. In June 2008, mother again relapsed and was incarcerated on a probation violation after testing positive for cocaine while the children were in her custody. Mother completed drug treatment in late 2008, but did not follow through with aftercare and counseling. Visitation was sporadic, as were phone calls to her children, and in 2009 she requested that her two-hour visitations be reduced to one hour. On multiple occasions, mother refused to visit with her children

for the full two hours. Mother did not become employed until the summer of 2009. At that time, she was still relying on the agency for transportation and did not appear to understand that, as the parent of two small children, there was a problem with frequenting bars and socializing with a registered sex offender.

{¶ 21} The children's guardian ad litem submitted an updated report, filed on November 30, 2009, in which she recommended that the agency be granted permanent custody of the children. She noted that the children have responded very well to the stable environment in their foster home and that T., then 10 years old, had expressed a desire to be adopted.

{¶ 22} As to the matter of the children's best interest, the trial court found that: the children had benefited from the safety and stability that their foster placement provided them; neither parent was viewed as a traditional parental figure by the children; the children appeared to be readily adoptable; the children had been in the temporary custody of appellee since June 30, 2008, and both parents had consistently failed to make their children a priority in their lives. Further, the court found that, over a period of years, the agency had worked to return the children by offering many services including case management, information and referral services, individual counseling, drug and alcohol services including inpatient treatment, protective daycare, parenting classes, transportation assistance and in-home services.

{¶ 23} Upon consideration of the adjudicative facts, exhibits, testimony, guardian ad litem's recommendation and other matters of record, the trial court found by clear and

convincing evidence that the children had been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period; the children could not be placed with either parent within a reasonable time or should not be placed with either parent; an award of permanent custody is in the children's best interest, and that the agency had made reasonable efforts to return the children to the home.

{¶ 24} This court has thoroughly reviewed the record of proceedings in this case, beginning with both parents' initial involvement with the agency in 1999, through the hearing on the motion for permanent custody and the trial court's decision. We find that the judgment in this case thoroughly addresses all of the relevant statutory factors as set forth in R.C. 2151.414(B) and (D) as well as R.C. 2151.414(E). Based on our review of the record as summarized above, we further find that the trial court's decision was supported by clear and convincing evidence and was not against the manifest weight of the evidence. We further find that an award of permanent custody to appellee was in the best interest of both children. Accordingly, mother's second assignment of error and father's sole assignment of error are not well-taken.

{¶ 25} We will next consider mother's first assignment of error in which she asserts that the trial court erred by finding that the agency made a reasonable effort to reunite the children with her during the pendency of this case. Mother claims that she was not given sufficient time to demonstrate her ability to care for her children.

{¶ 26} This argument is refuted by the evidence set forth above as to the agency's extensive efforts over several years to assist both parents in reuniting with the children.

The sheer number of professionals involved with this case and the variety of services offered clearly show that the agency put consistent effort into keeping the children safe and assisting the parents in remedying the problems that led to the removal of the children from the home. The agency arranged for mother to receive multiple drug assessments and inpatient and intensive outpatient drug treatment before removing the children in October 2006. Subsequently, the agency provided further assistance to mother with substance abuse treatment and developed a detailed case plan. At one point in 2006, the agency returned the children to mother under protective supervision. After mother was incarcerated in 2008, a new case plan was developed. Again, the agency provided referrals for drug and alcohol treatment and counseling, protective daycare, transportation, in-home services and parenting classes, along with other assistance. Visitation was facilitated and frequently rescheduled when mother failed to show up or cancelled sessions. Eventually, mother had to be informed that she was not permitted to shorten her two-hour visits with the children. Accordingly, mother's first assignment of error is not well-taken.

{¶ 27} In her third assignment of error, mother asserts that she was denied effective assistance of counsel. Mother argues that trial counsel repeatedly failed to object to hearsay testimony and also permitted the agency to lead its witnesses on numerous instances. Further, mother asserts that trial counsel failed to sufficiently challenge the guardian ad litem as to the scope of her investigation, which mother asserts was "scant."

{¶ 28} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 29} "The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." *State v. Fears* (1999), 86 Ohio St.3d 329, 347, quoting *State v. Holloway* (1988), 38 Ohio St.3d 239, 244.

{¶ 30} In support of her claimed error, mother simply lists dozens of transcript pages which she asserts contain examples of hearsay or leading a witness to which trial counsel did not object. However, mother does not discuss how any of the cited testimony constituted hearsay or explain how she was prejudiced thereby. This argument is without merit.

{¶ 31} As to mother's claim that trial counsel should have objected to the guardian ad litem's report, we find that such an objection would not have benefited her case. We note first that mother does not argue that any of the statements in the report were erroneous or flawed. Further, the guardian evaluated the case and made her

recommendation. The trial court was then free to give the report the weight which it believed appropriate, just as the court did with the other witnesses' testimony. This argument is also without merit.

{¶ 32} Based on the foregoing, we cannot find that the result of the hearing in this matter was unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 33} Upon consideration whereof, this court finds that the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.