

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

In the Matter of: A.W.

Court of Appeals No. L-10-1257

Trial Court No. JC09192620

DECISION AND JUDGMENT

Decided: March 18, 2011

* * * * *

Mary C. Clark, for appellant.

Patricia J. Clark, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, in a disposition of an abused, neglected and dependent child case.

{¶ 2} On March 30, 2009, appellee, Lucas County Children Services ("LCCS"), filed a complaint in dependency, neglect and abuse of A.W., born in August 2002. The complaint sought, in the alternative, protective supervision of A.W., temporary custody of A.W. to an appropriate relative, or temporary custody of A.W. to appellee. The complaint alleged that A.W.'s mother, appellant J.W., was subjecting her son to unnecessary evaluations, treatments, and school interventions for behaviors which were not subsequently observed by examining health professionals. As a result, those professionals were concerned for the welfare of A.W. A referral was made to LCCS due to appellant's insistence that A.W. suffered from autism and exhibited aggressive behavior.

{¶ 3} At an emergency hearing held on March 30, 2009, the court appointed separate counsel for appellant and A.R., the natural father of A.W. A guardian ad litem was also appointed for A.W. Appellant was ordered to have no further medical or psychological assessments completed on A.W., to seek medical treatment for A.W. only through one primary physician, and to undergo a psychological evaluation. LCCS was awarded protective supervision of A.W. An adjudicatory hearing was scheduled for May 6, 2009, but was ultimately continued to July 21 and 22, 2009.

{¶ 4} On June 26, 2009, appellant took A.W. to the Rescue Crisis Center claiming that A.W. "*** physically attacked [appellant] to a pretty large level." The Rescue Crisis staff reported that appellant appeared hyperverbal, manic, and was exhibiting paranoid delusions. The staff did not feel safe sending A.W. home with appellant so

A.W. remained at Rescue Crisis until June 30, 2009. Consequently, an ex parte order was issued on July 10, 2009, ordering A.W.'s placement into shelter care custody. A shelter care hearing was held on July 13, 2009, and temporary custody was awarded to LCCS.

{¶ 5} At the July 21, 2009 hearing before the magistrate, A.W. was adjudicated a dependent, neglected, and abused child by clear and convincing evidence, and the court found that it was in the best interest of A.W. to award temporary custody to LCCS. A.W. was placed in foster care and amended case plans were implemented to reunify A.W. with appellant. The father, previously estranged from A.W., was also ordered to be assessed for services because of his willingness to take temporary custody of A.W. After an independent review, the court adopted the magistrate's decision in an entry journalized on August 21, 2009.

{¶ 6} On September 9, 2009, after two months of visitation with A.W., the father filed a motion for legal custody. On October 29, 2009, LCCS also filed a motion to terminate temporary custody of A.W. and recommended awarding legal custody to the father.

{¶ 7} A home study was completed and approved on the father's residence where he lives with A.W.'s paternal grandmother. The home study included criminal record checks, a review of any past history with LCCS and references. A.W. began living with his father on October 30, 2009. On November 9, 2009, an amended case plan was filed

with the goal changed from reunification with appellant to an award of legal custody to the father.

{¶ 8} On February 22, 2010, the matter proceeded to the final dispositional hearing on the motions of the father and LCCS. The magistrate's decision, journalized on March 23, 2010, recommended legal custody of A.W. to his father, with visitation to appellant at the Children's Right's Counsel twice monthly. In an entry journalized on April 9, 2010, and after an independent review, the court adopted the magistrate's decision, finding that an award of legal custody to the father is in the best interest of A.W.

{¶ 9} On May 4, 2009, the court granted leave for appellant to file her untimely objections to the magistrate's decision and obtain transcripts of the proceedings. The court's final decision, journalized on August 16, 2010, denied mother's objections to the magistrate's decision. This appeal followed.

{¶ 10} Appellant raises the following assignment of error:

{¶ 11} "The trial court abused its discretion when it concluded that the award of permanent custody to the Father was in the child's best interest."

{¶ 12} As a preliminary clarification, legal custody was granted to father, not permanent custody, as noted by appellant's sole assignment of error. The standard the trial court must use to determine an award of legal custody is proof by a preponderance of the evidence. *In re Nice* (2001), 141 Ohio App.3d 445, 455.

{¶ 13} An award of legal custody will not be reversed on appeal absent an abuse of discretion. *In re Guedel S.* (June 16, 2000), 6th Dist. No. L-99-1343. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An appellate court affords deference to a judge or magistrate's finding regarding witnesses' credibility. *In re Alexander C.*, 6th Dist. No. L-05-1173, 2005-Ohio-6134, ¶ 6, citing *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 419.

{¶ 14} Legal custody is defined as "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(B)(19).

{¶ 15} An award of legal custody is authorized by statute where a child, as here, has been adjudicated neglected, dependent, or abused. R.C. 2151.353(A)(3). A determination of a child's best interest remains the primary standard to be applied in custody cases. *In re Pryor* (1993), 86 Ohio App.3d 327, 332. Appellant argues that an award of legal custody to the father is not in A.W.'s best interest because: (1) the father did not play a meaningful role in raising A.W. from the age of two, (2) appellant previously alleged the father abused A.W., (3) appellant complied with the LCCS case plan, and (4) appellant claims that the arranging of all medical tests and evaluations was done in good faith demonstrating a deep love and willingness to do what is best for A.W.

{¶ 16} Parents have a constitutionally protected interest in "the care, custody, and management of their child[ren]." *In re M.J.M.*, 8th Dist. No. 94130, 2010-Ohio-1674, ¶ 15 citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. However, those rights are "always subject to the ultimate welfare of the child." *Id.* citing *In re B.L.*, 10th Dist. No. 04AP-1108, 2005-Ohio-1151, ¶ 7.

{¶ 17} Testimony from the foster parent, caseworker and guardian ad litem at the dispositional hearing evinces that it is in A.W.'s best interest for the father to be awarded legal custody.

{¶ 18} Addressing appellant's first issue, we agree that it is troubling that the father ceased contact with A.W. from the time A.W. was two years old. However, the father testified that appellant made several accusations about himself and his family which caused the father to sever his relationship with A.W. The father testified that "[i]t was the hardest thing I had to do * * *." The father also stated that he is "worried because it's just everytime I'm around [appellant] I will be accused of something new, and quite frankly, I can't have that." Furthermore, recent interactions between the father and son demonstrate a positive, healthy and developing relationship.

{¶ 19} In fact, the caseworker investigated several accusations appellant made of the father during supervised visits in appellant's home. As a result, appellant's supervised visitations were required to be held at LCCS. The accusations were later determined to be unfounded. The guardian ad litem also investigated several allegations made by appellant against the father during the pendency of the juvenile court proceedings, and

found them all to be unwarranted. While the father may have been absent from A.W.'s life in the past, the father testified that he is willing to commit to a legal custody arrangement for A.W., despite continued allegations from appellant.

{¶ 20} A.W.'s foster parent testified that A.W. was excited to see his father during scheduled visitations. The guardian ad litem's testimony reflects that A.W. had an "excellent" adjustment to living in his father's home, and that A.W. wished to live with his father. A.W. has also been able to develop a relationship with his paternal grandmother while living in the father's home.

{¶ 21} Addressing appellant's second allegation, that the father was previously accused of harming A.W., testimony from the dispositional hearing reflects that a home study was completed and approved after an investigation of any past history with LCCS. The caseworker testified that she investigated allegations of the father giving A.W. too much cough medicine, and the father spanking A.W., leaving a mark. These allegations occurred before the father ceased contact with A.W. The caseworker testified that "[I]n reviewing those, they were either found not to be substantiated or things that were taking place that didn't interfere with [the father's] home study being accepted."

{¶ 22} In appellant's third claim, she argues that since she has complied with the case plan, A.W. should be returned to her. It is true that appellant completed a psychological evaluation, attended counseling and took medication. As a result of the psychological evaluation, appellant was diagnosed with depressive disorder, generalized anxiety disorder, and personality disorder, not otherwise specified. During the

completion of her case plan, appellant's therapist felt she was "decompensating, * * * that [appellant's] ideas are not based in reality." During the course of the proceedings, appellant made several untrue allegations concerning caseworkers. For example, appellant claimed one of the caseworkers lived across the street from her and that caseworker's husband was doing work in her bathroom. Both allegations were untrue as the caseworker lived elsewhere and had never been married.

{¶ 23} At the dispositional hearing, the caseworker testified that she believes it is in the best interest of A.W. for the father to have legal custody due to appellant's mental health and "fears of [appellant's] ability to properly care for [A.W.]." The guardian ad litem also testified that appellant's "delusional behaviors" could cause her "to not directly or deliberately harm the boy, but not be protective and appropriate because she's elsewhere."

{¶ 24} Appellant's willingness to comply with her case plan and continue in counseling should be commended. As stated in appellant's fourth assertion, it is clear that appellant loves A.W. However, appellant failed to remedy the situation that caused A.W. to be removed from her home. In fact, during the dispositional hearing, appellant continued to insist that A.W. suffered from "atypical autism" despite being confronted with evidence to the contrary. Appellant also admitted that A.W.'s last alleged aggressive behavior occurred in her care, stating that "* * * you have to understand the definition of unpredictable behavior" in explaining why A.W. did not exhibit aggression in the care of his foster parent or father.

{¶ 25} Further evidence admitted in the dispositional hearing shows that while A.W. lived with his mother, he appeared anxious and depressed at school, but once he was placed with his father, his demeanor changed and he appeared happy and smiling. Also, the guardian ad litem testified that when A.W. lived with his mother, he was frequently late. After A.W. began living with his father, the evidence indicates that he arrived at school in a timely manner, and his skills in all subjects "became much closer to grade level if not at grade level."

{¶ 26} Based on all of the foregoing, the juvenile court reached the determination that it was in A.W.'s best interest to be placed in legal custody of his father. That determination is not arbitrary, unconscionable, or unreasonable.

{¶ 27} Accordingly, appellant's assignment of error is found not well-taken.

{¶ 28} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the court 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

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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