

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

In re J.B., J.P., Du.B., Dari.B.,
A.B., E.B., Darr.B., T.B.

Court of Appeals No. L-13-1153

Trial Court No. JC 11215777

DECISION AND JUDGMENT

Decided: January 17, 2014

* * * * *

Charles S. Rowell, Jr., for appellants.

Jill E. Wolff, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, minor children Du.B., Dar.B., A.B., E.B., and Darr.B., appeal the June 24, 2013 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which granted appellee, Lucas County Children Services Board's ("LCCS") motion for permanent custody and terminated the parental rights of appellants' natural mother and father. Based on the foregoing, we affirm.

{¶ 2} On June 22, 2011, LCCS commenced this action with the filing of a complaint in dependency and neglect and motion for a shelter care hearing. The complaint alleged that the mother and father of six of the eight children had been arrested on multiple counts of breaking and entering and forgery and were incarcerated. The fathers of two of the children could not be located. The children had been staying with family friends who could no longer keep them; the family residence was alleged to be roach infested and the children were without proper clothing and shoes and appeared unkempt. There were also allegations of drug use by the parents. On June 23, 2011, temporary custody was awarded to LCCS.

{¶ 3} On July 11, 2011, the initial case plan was filed with the court with a goal of reunification. The children were referred for medical care, psychological testing and domestic violence counseling. The parents were required to contact LCCS upon their release from jail for various referrals and classes.

{¶ 4} On August 17, 2011, the children were determined to be dependent and neglected and the magistrate's decision was reviewed and approved on September 7, 2011. Mother and father were released from jail in September 2011, and the case plan was amended to add services for the parents including substance abuse, parenting, domestic violence and mental health services.

{¶ 5} On October 10, 2012, LCCS filed a motion for permanent custody. The motion alleged that mother failed to complete any of the case plan services and had relapsed on opiates. The motion stated that the mother was not taking her medication

which was prescribed for depression and anxiety and that she had been in and out of jail in Ohio, Indiana, and Illinois during the pendency of the case. Regarding the father, he was diagnosed as bipolar and was not taking his medication. LCCS further stated that father was shot three times due to an altercation following his reporting of an alleged rape of an 11-year-old girl and that his life was being threatened due to the incident. The motion stated that most of the children have special needs including hearing, speech, aggression, and various behavior issues. At the request of the guardian ad litem, the children (Nos. three through seven in birth order) were appointed an attorney after expressing their wish to remain with their mother and father.

{¶ 6} A hearing on the motion was held on May 13 and May 17, 2013, and the following evidence was presented. LCCS caseworker Deborah Proe was the family's caseworker from June 2011 until September 2012. She stated that the family was brought to LCCS' attention after the parents were arrested for theft and the eight children were living with family friends. The friends had contacted the agency for assistance.

{¶ 7} Proe explained that the older two children had different fathers. Proe did have some contact with one of them but neither had established paternity nor had any relationship with his child. The younger six children's father was D.B. (referred to as "father") with whom they and their mother lived.

{¶ 8} After his release from jail, father was referred for mental health services and completed substance abuse counseling. Proe stated that father never completed the recommended domestic violence services. Father had been participating in visitations

until he was shot three times in retaliation for an altercation he was involved in while in jail. The altercation was with an individual who allegedly raped a minor girl. Father indicated that he was scared to leave the house.

{¶ 9} Mother was enrolled in intensive outpatient substance abuse treatment. Proe stated that she attended the classes but due to missing AA meetings and being jailed in March 2012, she had not proceeded to the aftercare program as of September 2012, when Proe left the case. Proe stated that the failure to complete the program prevented mother from completing the parenting classes and securing housing. Mother was also involved in a domestic violence women's group and mental health services.

{¶ 10} Proe testified that there were ongoing issues with mother's parenting skills. Proe stated that she had received numerous reports that mother could not handle the children during visitation and that she was part of the "chaos"; in other words, acting more like a child than a parent. The children would engage in very aggressive behaviors.

{¶ 11} Proe further testified regarding a March 2012 incident where mother took the three girls (with permission of their foster mother) and was heading to Chicago when she was arrested on a warrant. At the time, mother was still required to have agency visitation. Proe testified that the mother was arrested at least three times while she was the family's caseworker and was on probation.

{¶ 12} Appellants' attorney cross-examined Proe about their statements that they wanted to live with one or both of their parents. Proe also acknowledged that their wishes have been consistent.

{¶ 13} Renee Lewis, LCCS caseworker, testified that she was the caseworker for the family following Proe. Lewis stated that when she received the case, the mother had recently been arrested on a fugitive warrant. Lewis stated that the mother had been involved in the case plan services but that her compliance was not 100 percent. Mother was incarcerated on the date of the hearing.

{¶ 14} Lewis testified that she spoke with the children and learned that they had lived in eight places, including Toledo, Ohio, Orlando, Florida, Kenosha, Wisconsin, Atlanta, Georgia, and Chicago, Illinois, and that there was a history of children services' involvement in five of the locations.

{¶ 15} Lewis stated that father had been terminated in August 2012, from batterer's intervention for noncompliance. He reengaged in October 2012, and attended a few dates but failed to continue. According to Lewis, the father stated that his prescribed psychotropic medication made him "high" and that he could not take it if he had to go to a meeting. Further, father reported that there were people trying to harm him and he feared for his safety. At the time of the hearing, Lewis did not know where the father was residing and testified that there were warrants for his arrest due to probation violations.

{¶ 16} Regarding visitation, Lewis stated that up until January 2012, both parents had been fairly consistent in appearing for scheduled visitations. After February 2012, their appearances became more erratic. Lewis stated that father missed all the February visitations and only appeared twice in March. In March 2012, mother attended three of

the four visitations and missed all of April. In May 2012, mother attended half of the visits and father attended three of the four. In June, each parent attended only half of the visits. Lewis said that attending half of the visits was how they then proceeded for the next few months.

{¶ 17} Lewis discussed the children's various special needs including adjustment disorder, mood disorders, and ADHD. Lewis then stated her recommendation that LCCS receive permanent custody of the children based upon the unsuccessful completion of the case plan services and the parents' continued criminal involvement.

{¶ 18} Lewis was cross-examined regarding the contact the family had with out-of-state children services agencies. She acknowledged that the parents could have initiated the contact. Lewis also admitted that although mother was not fully compliant with her services, she had not been removed from any program. Lewis further agreed that mother completed the domestic violence training and nonoffender caregiver education.

{¶ 19} Mother testified that when she and father were arrested in June 2011, they arranged for friends to get their children. Mother stated that the agency was contacted because the friends could not obtain son T.B.'s asthma medication. Mother stated that she was released from jail in September 2011.

{¶ 20} Mother stated that after completing substance abuse treatment and beginning parenting classes she had been working with her caseworker to obtain housing. Father would not be living with them.

{¶ 21} Mother stated that she was arrested on a warrant in March 2012, while she had her three girls and was driving to Chicago to see her mother who was ill. Mother was incarcerated until late April. Mother admitted that she was not supposed to have the girls for unsupervised visits. As a result, they were removed from the foster mother's home and visitation was returned to level one, or communal agency visits with a security officer and LCCS staff member. Mother indicated that she eventually asked for split visits, or visits with two groups of four children, so she could spend more time with each child. The visits never returned to level two because LCCS filed its motion for permanent custody.

{¶ 22} Mother testified that she was arrested in September 2012, on a warrant from Chicago following a traffic stop. She was given 30 days to get the warrant removed. Mother said that she had difficulty keeping appointments and visitation and going back and forth to Chicago. On October 3, 2012, the Chicago warrant was resolved. Mother testified that her current incarceration was due to a theft case in Wood County, Ohio. Mother was sentenced to nine months of imprisonment with a release date of December 2013. Mother stated that there was a possibility of early release.

{¶ 23} Mother agreed that she has made some bad choices but that she now has the support of her fiancé's family and an AA sponsor. Mother stated that she is pregnant and that her baby was due in August 2013. She plans to start a small business like a convenience store with money she claimed was awarded from a civil lawsuit. During the

pendency of the case, mother was employed for approximately four months in two different jobs.

{¶ 24} Mother was cross-examined regarding some sexual behaviors the children had been exhibiting and sexual abuse allegations. Mother had stated during a meeting that her children were lying and that she had taught them to lie. She clarified that on one occasion she told her daughter to lie in order to keep the father in jail. As to the boys, she stated that they had not been touching each other, just themselves and that spreading feces on the wall was normal (for a child under five).

{¶ 25} Mother testified that appellants had consistently expressed their wish to reside with with her or father and that, when in her care, the children always had food to eat, clothes to wear, and were enrolled in school.

{¶ 26} Guardian ad litem (“GAL”), Judith Orphey, testified regarding her report and recommendations and supplemental reports which were admitted into evidence. Her opinion was that it was in the children’s best interests that permanent custody be awarded to LCCS. Orphey mentioned that possibility of a planned permanent living arrangement or “PPLA” for the oldest child, J.B. (15 on the hearing dates) but acknowledged that LCCS had not requested a PPLA.

{¶ 27} Orphey testified that mother was making progress from September 2011 through February 2012; she was then arrested on the way to Chicago. Orphey stated that mother had not “reengaged.”

{¶ 28} Orphey testified that she had appellants' attorney appointed based upon their wish to remain with their mother or mother and father. Orphey stated that the children had expressed love for their parents and their wish to be with their siblings.

{¶ 29} There was also testimony presented from counselors and therapists who worked with mother and father on their case plan services. At the conclusion of the testimony and closing arguments, the trial court granted LCCS' motion for permanent custody finding that the children could not or should not be placed with either parent within a reasonable time because the parents failed to remedy the problems that initially caused removal of the children and that, due to their incarceration, the parents demonstrated a lack of commitment. The court further found that the children had been in LCCS custody 12 out of the last 22 months. As to the fathers of the two older children, the court found that they abandoned their children.

{¶ 30} The court's judgment entry was filed and journalized on June 24, 2013, and this appeal followed. Appellants raise the following three assignments of error:

Assignment of Error Number One: The LCCS failed to make reasonable efforts by not offering a case plan goal of PPLA for the appellant minor children.

Assignment of Error Number Two: The appellant minor children were not afforded the effective assistance of counsel.

Assignment of Error Number Three: The trial court abused its discretion in awarding permanent custody when no evidence was presented

by the minor children's counsel in support of their opposition to such an award.

{¶ 31} In appellants' first assignment of error they argue that LCCS, in contravention of R.C. 2151.419(A)(1), failed to offer a case plan goal of a PPLA. R.C. 2151.353(A)(5) provides:

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

* * *

(5) Place the child in a planned permanent living arrangement with a public children services agency or private child placing agency, *if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement* and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child and that one of the following exists:

(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care now and for the foreseeable future beyond the date of the dispositional hearing held pursuant to section 2151.35 of the Revised Code.

(b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child, as determined in accordance with division (D)(1) of section 2151.414 of the Revised Code, and the child retains a significant and positive relationship with a parent or relative.

(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available to the child, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing the child for independent living. (Emphasis added.)

{¶ 32} Appellants argue that “several” of them have special needs and that their mother has “significant problems” but that they retained a “significant and positive” relationship with their parents, especially their mother, which would be precluded with an award of permanent custody. Appellants contend that they could have “potentially” renewed a relationship with their parents and, specifically, their mother who could have “conceivably” participated in sufficient services while she was incarcerated so that she could have visited them.

{¶ 33} Reviewing the factors in R.C. 2151.353(A)(5) we conclude that there was no evidence presented that appellants would have been unable to function in a family-like setting. R.C. 2151.353(A)(5)(a). Further, at the time of the hearing, none of the children were over the age of 16. R.C. 2151.353(A)(5)(c). As to R.C. 2151.353(A)(5)(b), while

both parents have mental health concerns there is no evidence that these issues were the cause of appellants' removal from the home. The reason that permanent custody was sought was due to the parents' ongoing criminal activity and parenting issues.

Accordingly, appellants' first assignment of error is not well-taken.

{¶ 34} Appellants' second assignment error contends that they were denied the effective assistance of counsel. R.C. 2151.352 and Juv.R. 4(A) provide that children and their parents are entitled to an attorney for all proceedings under R.C. Chapter 2151 and have the right to appointed counsel if they are indigent. The right to counsel in these cases naturally includes the right to effective counsel, and the test for ineffective assistance of counsel is the same in these cases as it is in criminal cases. *In re Baby Girl Doe*, 149 Ohio App.3d 717, 2002-Ohio-4470, 778 N.E.2d 1053, ¶ 99 (6th Dist.).

Accordingly, to prevail on a claim of ineffective assistance of counsel, a claimant must demonstrate that counsel's performance was deficient, and that the deficient performance resulted in prejudice. *In re Anisha N.*, 6th Dist. Lucas No. L-02-1370, 2003-Ohio-2356. The court must defer to the strong presumption that counsel's performance falls within the wide range of reasonable professional performance. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 35} Appellants specifically argue that counsel was deficient by failing to provide evidence in support of appellants' position and by failing to propose an acceptable alternative to permanent custody. Decisions regarding the presentation of evidence are tactical in nature, *State v. Sweetser*, 6th Dist. Wood No. WD-02-062, 2003-Ohio-6379, ¶ 22; debatable tactical decisions do not form the basis of an ineffective assistance of counsel claim. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 36} Appellants do not state what evidence or witnesses would have aided their position. Further, appellants' counsel effectively cross-examined LCCS' witnesses. Thus, we cannot find that appellants' counsel's failure to call any witnesses prejudiced appellants.

{¶ 37} As to the argument that appellants' attorney should have requested that the court place them in a PPLA, as the above-quoted statute provides, the request for a PPLA must be made by the agency. *See In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, 852 N.E.2d 1187, syllabus. Accordingly, we find that appellants' counsel was not constitutionally ineffective. Appellants' second assignment of error is not well-taken.

{¶ 38} In appellants' third and final assignment of error, they argue that the trial court abused its discretion when it granted LCCS' motion for permanent custody where no evidence was before the court regarding appellants' opposition to the motion.

{¶ 39} Pursuant to R.C. 2151.414(B), after a child is adjudicated dependent and temporary custody is granted to a public agency, a court may grant the public agency's

motion for permanent custody “if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody” and that any of the listed factors apply. The court specifically found that the children had been in agency custody for more than 12 of the past 22 months and that the children could not or should not be placed with either parent within a reasonable time. R.C. 2151.353(A)(4), R.C. 2151.414(B)(1)(a). The court further found that, under R.C. 2151.414(E)(1), (4), and (13), the parents had failed to remedy the conditions which caused the removal, that the parents demonstrated a lack of commitment to the children, and that the parents had been repeatedly incarcerated. The court then concluded that it was in the children’s best interests to award permanent custody to LCCS.

{¶ 40} Upon review of the record in this case, we conclude that the above findings were supported by clear and convincing evidence. Accordingly, we find that the trial court did not abuse its discretion in awarding permanent custody of appellants to LCCS. Appellants’ third assignment of error is not well-taken.

{¶ 41} On consideration whereof, we find that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

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