

[Cite as *In re S.G.*, 2010-Ohio-5722.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of: :
S.G., : No. 10AP-442
(E.G., : (C.P.C. No. 07JU12-17313)
Appellant). : (REGULAR CALENDAR)

D E C I S I O N

Rendered on November 23, 2010

Robert J. McClaren, for appellee Franklin County Children Services.

Robert E. Shea, for appellant.

Alita Rucker, Guardian ad Litem.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

KLATT, J.

{¶1} Appellant, E.G., the natural mother of S.G., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, granting Franklin County Children Services ("FCCS") permanent custody of her son. For the following reasons, we affirm that judgment.

{¶2} Appellant gave birth to S.G. on October 27, 2007. In December 2007, FCCS received a referral regarding S.G. FCCS workers went to appellant's house and found her drunk and slurring her speech. Appellant was not able to tell the workers where

S.G. was. The FCCS workers found S.G. in an upstairs bedroom under some blankets, very sick and malnourished. S.G. was admitted to a hospital and spent four days there. He was thereafter placed in a foster home and has not lived with appellant since the day he was removed from appellant's care.

{¶3} FCCS subsequently filed a complaint in the trial court in which it alleged that S.G. was a neglected and dependent child. The complaint specifically alleged that S.G. was diagnosed at the hospital as chronically malnourished. The complaint also alleged that appellant had severe drug abuse problems. The trial court found S.G. to be a neglected child and awarded FCCS temporary custody of S.G.

{¶4} The trial court also adopted a case plan for the reunification of appellant and S.G. The chief concern in the case plan was for appellant, an admitted alcoholic, to address her drinking problem so that she could meet S.G.'s basic needs. Therefore, the plan required appellant to successfully complete a drug and alcohol program. She also needed to maintain proper employment, income, housing, and to undergo a mental health assessment.

{¶5} Subsequently, FCCS moved for permanent custody of S.G. pursuant to R.C. 2151.413 and 2151.414. FCCS alleged in its motion that appellant had failed to meet many requirements of her case plan, including her failure to complete alcohol treatment and to provide S.G. with an adequate permanent home. Following a hearing, the trial court granted FCCS permanent custody of S.G., thereby terminating appellant's parental rights.

{¶6} Appellant appeals and assigns the following errors:

1. THE TRIAL COURT DID ERR BY GRANTING PERMANENT CUSTODY OF APPELLANT'S CHILD TO FRANKLIN COUNTY CHILDREN'S SERVICES.

2. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

{¶7} At the outset, we recognize that parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388; *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054. The Supreme Court of Ohio has recognized the essential and basic rights of a parent to raise his or her child. *In re Murray* (1990), 52 Ohio St.3d 155, 157. These rights, however, are not absolute. *In re Awkal* (1994), 95 Ohio App.3d 309, 315; *In re Sims*, 7th Dist. No. 02-JE-2, 2002-Ohio-3458, ¶23. A parent's natural rights are always subject to the ultimate welfare of the child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 106. Thus, in certain circumstances, the state may terminate the parental rights of natural parents when it is in the best interest of the child. *In re Harmon* (Sept. 25, 2000), 4th Dist. No. 00CA-2694; *In re Wise* (1994), 96 Ohio App.3d 619, 624. The permanent termination of parental rights has been described as " 'the family law equivalent of the death penalty in a criminal case.' " *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.*

{¶8} A decision to award permanent custody requires the trial court to take a two-step approach. First, a trial court must find whether any of the following apply:

(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children

services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

R.C. 2151.414(B)(1).

{¶9} Once the trial court finds that one of these circumstances apply, the trial court then must determine whether a grant of permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). FCCS must prove by clear and convincing evidence that an award of permanent custody is in the child's best interest. *Id.* In determining the best interest of a child, a trial court is required to consider all relevant factors including, but not limited to, the following:

(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D).

{¶10} A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶28. "Judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *In re Decker*, 4th Dist. No. 00CA039, 2001-Ohio-2380; *Young v. Univ. of Akron*, 10th Dist. 04AP-318, 2004-Ohio-6720, ¶25 (citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, paragraph one of the syllabus).

{¶11} Appellant does not contest the trial court's findings regarding the first step of this analysis. Instead, appellant contends in her first assignment of error that the trial court's decision that an award of permanent custody was in S.G.'s best interest was

against the manifest weight of the evidence. We disagree, because there is competent, credible evidence in the record supporting the trial court's best interest finding. *In re G.B.*, 10th Dist. No. 04AP-1024, 2005-Ohio-3141, ¶19.

{¶12} To determine whether an award of permanent custody is in the child's best interest, the trial court must consider the factors set forth in R.C. 2151.414(D). The trial court addressed each of those factors.

{¶13} In regards to R.C. 2151.414(D)(1), the trial court noted that S.G. has no relationships with family members other than appellant. His siblings live with appellant's ex-husband, who is not involved with appellant or S.G. Additionally, S.G. has been in foster care since he was removed from appellant's care in December 2007. His FCCS case worker testified that S.G. has a strong attachment to his foster parents and the other children in the foster home. (Oct. 1, 2009 Tr., 107.) This factor weighs in favor of the trial court's decision.

{¶14} In regards to R.C. 2151.414(D)(2), S.G. was not yet three-years old at the time of the hearing. Therefore, he was not old enough to express an opinion regarding his placement. However, the child's guardian ad litem recommended that granting permanent custody of S.G. to FCCS would be in S.G.'s best interest. This factor weighs in favor of the trial court's decision.

{¶15} In regards to R.C. 2151.414(D)(3), S.G. has been in foster care since he was only weeks old. This factor also weighs in favor of the trial court's decision.

{¶16} In regards to R.C. 2151.414(D)(4), appellant's alcoholism and failure to maintain sobriety were, rightly, the focus of FCCS and the trial court. Her failure to adequately address her drinking problem places her son's safety at risk. Although

appellant has participated in many treatments and programs, it appears that her alcoholism is an ongoing problem that she cannot control. In fact, she admitted to relapsing even after S.G. was removed from her custody. More importantly, appellant testified that she still needs help to address her alcoholism and that she has not adequately addressed her alcoholism so that she can provide care to S.G. (Sept. 30, 2009 Tr., 101.) While every child needs a legally secure permanent placement, in light of appellant's admitted failure to address her drinking problem, that goal cannot be achieved without a grant of permanent custody to the agency. Thus, this factor weighs heavily in favor of the trial court's decision.

{¶17} In sum, appellant's failure to address and remedy her alcoholism continually places her son at risk. In light of this failure, competent and credible evidence supports the trial court's decision that an award of permanent custody to FCCS was in the child's best interest. Accordingly, appellant's first assignment of error is overruled.

{¶18} In her second assignment of error, appellant contends that she received ineffective assistance of counsel. This court has noted that the two-part test for ineffective assistance of counsel used in criminal cases, announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, is equally applicable in actions by the state to force the permanent, involuntary termination of parental rights. *In re S.B.*, 183 Ohio App.3d 300, 2009-Ohio-3619, ¶25 (citing *Jones v. Lucas Cty. Children Servs. Bd.* (1988), 46 Ohio App.3d 85, 86).

{¶19} To prevail on a claim of ineffective assistance of counsel under the *Strickland* test, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was

not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690. Appellant's failure to satisfy one prong of the Strickland test negates a court's need to consider the other. *Id.* at 697.

{¶20} In analyzing the first prong under *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶21} If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. *Id.* at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive her of a fair trial, "a trial whose result is reliable." *Id.* at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶22} Here, appellant claims that trial counsel was ineffective for failing to object to certain evidence presented at the evidentiary hearing on FCCS' motion for permanent custody.¹ We disagree.

{¶23} Even if this court were to assume that trial counsel acted deficiently in failing to object to the evidence, appellant has not made any showing that trial counsel's failure prejudiced her. The focus of the hearing, as well as the trial court's decision, concerned appellant's failure to adequately address her drinking problem and how that failure could harm her child. Because appellant admitted to this failure, there is not a reasonable probability that the result of this proceeding would have been different had this evidence been excluded. Accordingly, appellant has failed to show ineffective assistance of counsel. Appellant's second assignment of error is overruled.

{¶24} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

¹ Specifically, appellant complains of trial counsel's failure to object to testimony regarding S.G.'s medical diagnoses, as well as public records of a prior domestic violence conviction and a child endangering complaint.