ORIGINAL

IN THE SUPREME COURT OF OHIO

The Matter of R. B.
Alleged Dependant Child

Kermit Bricker, Appellant/Father

and

Belina Bricker, Appellant/Mother

CASE NO. 11-1898

On Appeal from the Mercer County Court of Appeals Third Appellate District

Court of Appeals Case No. 10-11-07

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS KERMIT BRICKER AND BELINA BRICKER

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EXPLANATION WHY THIS CASE IS A MATTER OF PUBLIC OR GREAT GENERAL INTEREST.

This is an action in which the Third District Court of Appeals upheld the decision of the Mercer County Juvenile Court terminating the parental rights of the parents of twin minor children, L.B. and R.B., in separate cases, and awarding permanent custody to the Mercer County, Ohio Department of Job and Family Services.

This case offers this Honorable Court the opportunity to provide guidance to lower Courts as to what constitutes clear and convincing evidence in the context of expert witness reports and testimony and the report and recommendations of a Guardian ad Litem necessary to invoke the "death knell" of permanently separating children from their parents.

Additionally, this case is of great public interest in that the public has a right to know that the Courts' safeguard the rights of the family, of children and their parents, to remain together and not to be separated but for the most extreme circumstances. This Court has previously held that permanently severing the parent/child relationship is "the family equivalent of the death penalty." In Re Hoffman, 97 Ohio St. 3d 92. The law provides for an automatic appeal to the Supreme Court in the case of a death penalty conviction. The Appellants submit that this Court should apply the same level of judicial scrutiny when the question is the death penalty equivalent to the permanent termination of the parent/child relationship.

At the trial in this matter, the Court heard the testimony of five witnesses on behalf of the Department. Of those, the Court relied on the testimony of Dr. Frederick Ferri, a psychologist, in determining that the parents were unable to provide an

adequate, safe and permanent home for the children. However, Dr. Ferri testified at trial that he had no contact with the parents (Appellants herein) for the eight months prior to the December 2010 permanent custody hearing. In fact, his report was prepared in April 2010, only nine months after the children had been removed from their parents in July 2009. Also, the testimony of this witness was that in reaching his opinions, he relied upon certain records and reports that were never introduced into evidence.

Additionally, this case affords the Court an opportunity to clarify and define the role of the Guardian ad Litem in a permanent custody case. In this matter, the Guardian ad Litem did not testify at the trial in this matter. While the Guardian did file a written 3 page report the day of the hearing, the Guardian did not testify at the trial. The report of the Guardian ad Litem contained many hearsay statements. The Guardian ad Litem specifically relied on the report of the psychologist, Dr. Ferri, in reaching his, the Guardian ad Litem's, opinion. The psychologist's report contains opinions based in part on hearsay statements that were not introduced as evidence at trial.

The Guardian ad Litem stated that the Court should rely on the report of Dr. Ferri and his opinions but, as noted previously, that report was prepared some 8 months before the hearing.

STATEMENT OF THE CASE AND FACTS

L.B. and R.B. are the two minor children of Appellants Kermit Bricker and Belina Bricker. L.B. and R.B. were born in April, 2009.

In July, 2009 the Mercer County Department of Job and Family Services (hereafter Department) removed the children from their parents and filed a Motion with the Court alleging that the children were dependant.

By ex parte Entry filed on July 13, 2009 temporary custody of the children was given to the Department, which order remained in effect until it was affirmed after the adjudicatory hearing on September 16, 2009.

On September 6, 2009 after an adjudicatory hearing the Court found the children to be dependant. The Court then "adjourned" the adjudicatory hearing and then proceeded with the dispositional hearing wherein it continued temporary custody with the Department.

On April 30, 2010, the report of Frederick Ferri, a psychologist, was filed with the Court. Per order of the Court, no copies of the report were allowed to be made. The report was not introduced into evidence at the December 2010 permanent custody hearing but was relied on by the Guardian ad Litem in reaching his recommendation that the children should be permanently removed from their parents.

On May 10, 2010 the Department filed its Motion for permanent custody of both L.B. and R.B. alleging that the Appellants have failed to "continuously and repeatedly" substantially remedy conditions which gave rise to the temporary custody orders; the Appellants demonstrated a lack of commitment toward the children by failing to regularly support, visit or communicate with the children and that the parents suffered

from conditions that rendered them incapable of caring for the children.

On December 6, 2010 a three page report of the Guardian ad Litem was filed, recommending that permanent custody be removed from Appellants.

Also on December 6, 2010, a hearing was held on the Department's Motion for permanent custody. The Department presented the testimony of five witnesses, Dr. Ferri (the psychologist) and four social workers/case workers. The Appellant's both testified but presented no other witnesses. The Guardian ad Litem did not testify, nor did the Guardian present any witnesses or evidence. No exhibits or reports were introduced into evidence.

As requested by the Court, both the Department and Appellants submitted written closing arguments.

On February 14, 2011 the Court issued its Judgment Entry granting the Department's Motion for Permanent Custody. After summarizing the testimony presented at trial, the Trial Court stated:

> Based on the testimony of Dr. Ferri, the Guardian ad Litem's report and the parties themselves, the parents are unable to provide an adequate, safe, permanent home for the children nor can they do so in the foreseeable future. While the parents assert that they love their children there are mental and physical issues which prevent them from providing a safe environment. (underline added)

and further stated:

> The Court further finds that the Department had provided reasonable services in an attempt to assist the family to remedy the problems which initially caused the children to be removed from the home. The parents have failed to successfully remedy the conditions causing the children to be placed outside the parent's home. The parents had services provided or made available either through counseling at Foundations, Help-Me-Grow, in-home parenting classes and were also provided transportation for the children.

On March 15, 2011 the Appellants filed their Notice of Appeal to the Third District Court of Appeals. On September 26, 2011 the Third District Court of Appeals issued its Opinion and Entry, affirming the decision of the Trial Court.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW #1

In determining whether the proponent for permanent custody of children has met its burden of clear and convincing evidence, the opinion of an expert witness may not rely on facts not in evidence.

ARGUMENT

The Trial Court, in its Entry depriving Appellants of permanent custody of their children, relied on the testimony of psychologist Frederick Ferri. At trial, Dr. Ferri was the first witness to testify, as an accommodation to his schedule. Dr. Ferri testified that he relied not only on his personal testing and observations but also on reports from the Mercer County Children's Services, community psychiatric support of treatment progress notes and notes from a local mental health center relative to counseling, together with a series of police reports and diagnostic assessments and notes from a group called Help Me Grow, also, a file called "dictation for parent education, supervised visits." The doctor admitted that these records were 4 to 5 inches thick. None of these records were proffered or introduced into evidence.

The doctor admitted that he relied on a number of factors, including the records he reviewed, in reaching his opinion that the Appellants had not made significant progress in their ability to care for the children.

For an expert to be able to render an opinion, his testimony must be supported by facts in the record. In Re CS (2010) 2010 Ohio 4463 paragraphs 40-42. None of

these records that the Doctor relied on in reaching his opinion were introduced into evidence. As such, his opinions would not be admissible in determining the question of whether the Department had met its burden of clear and convincing evidence.

This issue becomes more critical when this Court considers that the Trial Court based its decision that the Appellants were unable to provide an adequate, safe, permanent home for the children on the testimony of this expert, the Guardian ad Litem's report (deficiencies in that are discussed in Proposition #3) and the testimony of the parties.

Since the testimony of Dr. Ferri was taken out of sequence, Trial counsel would not have been able to object at the time of the Doctor's testimony that these records and reports not admitted into evidence. It was incumbent on the Appellee-Department to then properly introduce the exhibits that the Doctor testified he relied on in reaching his opinions.

PROPOSITION OF LAW #2

In determining whether the proponent for permanent custody of children has met its burden of clear and convincing evidence, the Court must consider all relevant conditions at the time of the hearing. Expert testimony dated 8 months before the hearing, and factual witness testimony 6 months before the hearing, without updates, is insufficient to remove children permanently.

ARGUMENT

In this matter, the permanent custody hearing was held on December 6, 2010.

The Department's expert psychologist, Dr. Frederick Ferri, testified that he last saw Appellants or the children on April 10, 2010 and that he could not testify as to any current conditions as of the date of the permanent custody hearing.

The Department presented the testimony of Erin Seitz from Foundations, the County's mental health counseling center. She testified that she closed her case files on Appellants in July, 2010.

As part of its case, the Department presented the testimony of Mary Fortman, from Help Me Grow, a local agency that provides counseling and assistance to parents of young children. She also testified that her involvement, and therefore her testimony, as to Appellant's progress was limited to the time period of before June, 2010.

In a case in which the State is attempting to impose the "death penalty" of permanent custody, it has a duty to prove its case as of the date of the final hearing. The children had lived with their parents only three months before they were removed.

Twelve months elapsed from the children's birth until the report of Dr. Ferri. Eight months elapsed from the last time Dr. Ferri had involvement in the case until the permanent custody hearing. In fact, Dr. Ferri testified that while he hadn't seen the Appellants or children in the eight months before the hearing, he "wasn't in a position to offer any statements on that" (whether between the time of his last involvement and the trial Appellants could have remedied the conditions complained of).

PROPOSITION OF LAW #3

In a permanent custody case, the Trial Court cannot rely on a Guardian ad Litem's report that relies on opinions based on facts not introduced into evidence at trial.

ARGUMENTS

In this case, the three page Guardian ad Litem's report was filed with the Court on the day of the hearing but was not introduced into evidence. In the report, the Guardian reached many conclusionary opinions. Pursuant to local rule of Court, counsel were permitted to read the reports but could not make copies.

In his report, The Guardian advised the Court that it should rely on the report of Dr. Frederick Ferri and his conclusion that the parents would "never be able to raise these children." (underline added) First, the thirty-two (32) page Ferri report was not introduced into evidence. In addition, the report states that, in addition to his own observations and tests, the expert also reviewed and relied on various medical, psychiatric, counseling and police reports, none of which were attached to the experts report, the Guardian ad Litem's report, nor introduced into evidence at trial. In addition, Dr. Ferri testified at the permanent custody hearing. While Dr. Ferri did render an opinion that the probability of Appellants becoming effective parents would be minimal, he never testified as to what the Guardian ad Litem reported his opinion to be that the parents would never be able to raise the children.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was served on Andrew Hinders, Mercer County Prosecuting Attorney, 119 N. Walnut St., Celina, OH 45822 and Attorney Matthew Gilmore, 118 W. Market St., P. O. Box 298, Celina, OH 45822, by regular U.S. Mail, this 7 day of November, 2011

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ATTACHMENT NOT SCANNED