

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

IN THE MATTER OF:	:	OPINION
L. M. AND A. M., JR.	:	CASE NO. 2010-A-0058
	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Juvenile Division, Case No. 09 JC 47.

Judgment: Affirmed.

Hobart M. Shiflet, 1610 East Prospect Road, P.O. Box 1442, Ashtabula, OH 44005 (For Appellant-Heather Shellenberger).

Laura M. DiGiacomo, 3914 C Court, P.O. Box 1175, Ashtabula, OH 44005 (For Appellee-Ashtabula County Children Services Board).

Eileen Noon Miller, Law Office of Carolyn J. Paschke Co., L.P.A., 10808 Kinsman Road, P.O. Box 141, Newbury, OH 44065 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellant, Heather Shellenberger, appeals the Judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, granting permanent custody of her minor children to appellee, Ashtabula County Children Services Board. For the following reasons, we affirm the decision of the court below.

{¶2} Heather Shellenberger and Alejandro Martinez are the biological parents of L.M., born April 22, 2008, and A.M., born September 8, 2009.

{¶3} On July 8, 2009, Ashtabula Children Services obtained temporary custody of L.M. by Ex Parte Emergency Order. The Order was issued based on the following affidavit, submitted by Children Services Caseworker, Kami English:

{¶4} [O]n the 8th day of July, 2009, while in the Township of Saybrook, County of Ashtabula, *** L.M. was in the care of Alejandro Martinez and has been residing in the home for several days along with Mother, Heather Shellenberger. Ms. Shellenberger has left the home of Mr. Martinez on at least two separate occasions due to domestic violence, including Mr. Martinez holding a loaded gun to Ms. Shellenberger's head, breaking her finger, and bruising her by kicking and hitting. This has been documented by the Ashtabula County Sheriff's Department.

{¶5} Ms. Shellenberger has admitted to using illegal drugs and has recently sought help for her addiction. Ms. Shellenberger has reported in the past that the primary reason for her usage is when involved with Mr. Martinez as he is able to finance drug use. They are currently back together; therefore, use is again an issue. The agency has received several reports that Mr. Martinez himself uses and sells drugs, including heroin.

{¶6} On September 8, 2009, Heather gave birth to A.M.

{¶7} On October 1, 2009, the juvenile court found L.M. to be a "dependent child," i.e., a child "[w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship" R.C. 2151.04(C), and awarded Ashtabula Children Services temporary custody.

{¶8} On October 28, 2009, Ashtabula Children Services obtained temporary custody of A.M. by Ex Parte Emergency Order. The Order was issued based on the following affidavit submitted by Children Services Caseworker, Cailin McMahon:

{¶9} ACCSB has temporary custody of the biological sister of A.M. Jr. The reason for her initial removal was drug use and domestic violence between the parents. Although there have been no recent reports of domestic violence between the parents, mother has continued to use drugs throughout her pregnancy. A.M. Jr. was not tested for drugs at the time of his birth, however, he went through severe withdrawals and was unable to be released from Rainbow Babies and Children Hospital until approximately 7 weeks after his birth.

{¶10} Mother has been attending a methadone clinic (Community Action Against Addiction) in Cleveland, Ohio throughout her pregnancy, this clinic was recommended

by Lake Area Recovery Center. Although mother attended the methadone clinic on a daily basis, information was received from the methadone clinic counselor that mother does not attend any individual or group counseling, she only comes for the methadone and then leaves, and she has continued to test positive for drugs while attending the clinic.

{¶11} Also, according to hospital staff at Rainbow Babies and Children, mother testified positive for benzodiazepines and opiates, approximately two weeks prior to delivery of A.M. Jr. Mother admitted to ACCSB caseworker that she used oxycontin and valium without a prescription because the pregnancy, and being on methadone, was making her sick. On September 22, 2009, both mother and father tested positive for marijuana in a urine screen. On October 1, 2009, father was positive for marijuana in a urine screen. With this information, ACCSB decided to take custody of A.M. Jr., once discharged from Rainbow Babies and Children Hospital.

{¶12} On November 30, 2009, the juvenile court found A.M. to be a “dependent child,” and awarded Ashtabula Children Services temporary custody.

{¶13} On December 7, 2009, the juvenile court consolidated L.M.’s and A.M.’s cases.

{¶14} According to the case plan filed with the juvenile court, Heather was required to complete the treatment plan at Community Action Against Addiction and follow its recommendations, attend individual and family counseling with Alejandro, complete an anger management class, and undergo a psychological assessment.

{¶15} On January 5, 2010, a Magistrate Decision was issued following a Disposition Review Hearing. The magistrate found that there had been “no progress on the case plan” and ordered that “the parents *** have no contact with the children outside of supervised visitation through ACCSB.” The magistrate also found that there were problems placing the children with relatives and ordered them placed in foster care.

{¶16} On May 3, 2010, Ashtabula Children Services filed a Motion to Modify Temporary Custody to Permanent Custody.

{¶17} On August 10, 2010, the guardian ad litem filed her Guardian ad Litem Report. The guardian recognized the “apparent bond” between Heather and the children. During supervised visitation, the guardian observed Heather behaving appropriately with the children and dedicated to giving them care and attention. “Since this case began in July 2009,” the guardian noted, however, “neither parent has successfully completed their case plan and they have failed to show any dedication or any kind of substantial compliance.”

{¶18} The guardian noted that L.M. was initially placed with a paternal aunt, who, however, sought respite for the child’s care by September 2009. Following A.M.’s release from the hospital, both children were placed with their paternal grandparents. The grandparents indicated that they could not care for the children indefinitely. Since January 2010, the children have been in foster care with a family that is willing to adopt them both. The guardian believed that removing the children from their “current home” would be harmful to their best interests.

{¶19} For these reasons, the guardian recommended committing the children to the permanent custody of Ashtabula Children Services.

{¶20} On August 18, 2010, a hearing was held on the permanent custody motion before a magistrate of the juvenile court. The following persons testified at the hearing:

{¶21} Joleen Sundquist, a mental health therapist at the Community Counseling Center of Ashtabula, testified that she met with Heather and Alejandro in September 2009 for court-ordered couple counseling. At the initial meeting, they described their relationship as volatile but reported no domestic violence. After the initial session, Sundquist met with them twice in October and once in December. During this time, Sundquist reported that they were not always together as a couple. Sundquist did not

see them again after the December 2009 session and closed their case, noting the program had not been completed.

{¶22} Warren Forster, a therapist at Signature Health in Ashtabula, testified that he conducted a drug and alcohol assessment of Heather on March 23, 2010. Heather reported to him that she smoked marijuana, was visiting a methadone clinic, and had taken Percocet in July 2009. Forster assessed Heather with cannabis dependency and recommended that she see him on an individual basis and also, as she had reported feelings of anxiety and depression, that she see a psychiatrist. Heather did not return for the individual sessions. Forster reported that Heather saw a psychiatrist in April 2010, but did not seek follow-up treatment.

{¶23} Cailin McMahon, a caseworker with Ashtabula Children Services, testified that she began working with Heather and Alejandro in July 2009. She testified that Heather's compliance with the case plan was minimal. She noted that Heather did not complete the anger management class when first offered due to an argument with Alejandro, and observed that the relationship with Alejandro remained unstable. McMahon testified that, during the course of this case, Heather had separated and reconciled with Alejandro between five and ten times. When separated, Heather resided with her father, whose home (a mobile home) was adequate as a residence for the children. Alejandro's residence was being remodeled and was not suitable for the children.

{¶24} Heather's compliance with the drug screens was sporadic. When tested, Heather consistently tested positive for marijuana. Heather had also tested positive for and/or admitted to using methadone, opiates, and benzodiazepines. Heather had undergone a drug and alcohol assessment, but had failed to follow through with

treatment. Heather also failed to complete the methadone program and eventually quit the program “cold-turkey.”

{¶25} McMahon testified that Heather had not completed a psychological evaluation. Such an evaluation had been scheduled with the Bair Foundation in Ashtabula. After Heather failed to appear for an initial appointment, McMahon canceled a subsequent appointment after she was unable to confirm the appointment with Heather.

{¶26} Heather testified and retracted the allegations of domestic violence and drug dealing against Alejandro. She testified that she has lived with her father in Geneva, Ohio, since June 2010. Prior to this, she had reconciled and separated from Alejandro “more times than I can count.” Heather testified that she did complete an anger management class.

{¶27} Heather admitted that she regularly smokes marijuana and takes Klonopin (a benzodiazepine) for anxiety. Heather testified that she has not taken Oxycodone or Oxycontin since A.M. was born. She ceased taking methadone in June 2010. She also testified that there is a residential treatment facility that is willing to accept her.

{¶28} Heather explained her failure to undergo a psychological assessment and follow through with drug rehabilitation was due to unreliable transportation, lack of insurance, and miscommunication. Heather claimed that the methadone clouded her judgment and ability to think clearly.

{¶29} Heather, whose last employment was with Quiznos in 2006, testified that, about a week before the hearing, she had been hired to do housekeeping at The Lodge in Geneva.

{¶30} The foster father testified that L.M. and A.M. were doing well in his home and that he and the foster mother were willing to adopt them.

{¶31} Katherine Balog, a supervisor at Rooms to Grow, testified that Heather regularly attended the visits with the children and that her demeanor had improved throughout 2010.

{¶32} The guardian ad litem testified that she continued to recommend granting permanent custody to Ashtabula Children Services, citing the instability of Heather's relationship with Alejandro, their continuing marijuana use, and the unsuitability of Alejandro's home.

{¶33} On August 30, 2010, a Magistrate Decision was issued, finding that L.M. and A.M. could not or should not be placed in either parent's custody at this time or in the foreseeable future and that the parents have failed continuously and repeatedly to substantially remedy the conditions causing the children to be placed outside of the home. Accordingly, Ashtabula Children Services' Motion Requesting Modification of Temporary Custody to Permanent Custody should be granted.

{¶34} On September 13, 2010, Heather filed Objections to Magistrate's Decision, wherein she requested a transcript be prepared at the State's expense, and an oral hearing on the objections.

{¶35} On October 20, 2010, the juvenile court issued a Judgment Entry, adopting the August 30, 2010 Magistrate Decision and granting permanent custody of L.M. and A.M. to the Ashtabula Children Services.

{¶36} On October 29, 2010, Heather filed her Notice of Appeal. On appeal, she raises the following assignments of error:

{¶37} “[1.] The trial court erred in granting the motion for permanent custody as such decision was against the manifest weight of the evidence and resulted in a manifest miscarriage of justice.”

{¶38} “[2.] The trial court erred in considering testimony obtained in violation of Appellant Mother’s Fifth Amendment rights against self-incrimination.”

{¶39} “[3.] Appellant was unduly deprived of the effective assistance of trial counsel, and there is a reasonable probability that the outcome of the proceeding absolutely could have been different in the absence of the deficient representation.”

{¶40} “[P]arents who are suitable persons have a ‘paramount’ right to the custody of their minor children.” *In re Murray* (1990), 52 Ohio St.3d 155, 157 (citations omitted). “The fundamental interest of parents is not absolute, however.” *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, at ¶11. The “extreme disposition” of permanently terminating a parent’s rights with respect to a child “is nevertheless expressly sanctioned *** when it is necessary for the ‘welfare’ of the child.” *In re Cunningham* (1979), 59 Ohio St.2d 100, 105. “[T]he *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings is not whether the parents of a previously adjudicated ‘dependent’ child are either fit or unfit,” rather, it is “the best interests and welfare of that child [that] are of paramount importance.” *Id.* at 106 (emphasis sic). “Parental interests must be subordinated to the child’s interest in determining an appropriate disposition of any petition to terminate parental rights.” *Id.*; *D.A.*, 2007-Ohio-1105, at ¶11 (“[o]nce the case reaches the disposition phase, the best interest of the child controls”).

{¶41} “If a child is adjudicated an abused, neglected, or dependent child, the court may *** [c]ommit the child to the permanent custody of a public children services

agency or private child placing agency, if the court determines in accordance with division (E) of section 2151.414 [2151.41.4] of the Revised Code that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D)(1) of section 2151.414 [2151.41.4] of the Revised Code that the permanent commitment is in the best interest of the child." R.C. 2151.353(A)(4).

{¶42} A "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" if, by clear and convincing evidence, the court determines that "the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home." R.C. 2151.414(E)(1).

{¶43} "In determining the best interest of a child ***, the court shall consider all relevant factors, including, but not limited to, *** [t]he 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; *** [t]he custodial history of the child ***; [and] [t]he 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." R.C. 2151.414(D)(1), (3), and (4).

{¶44} When reviewing the juvenile court's findings, this court applies the civil manifest-weight-of-the-evidence standard. *In re Lay* (1986), 25 Ohio St.3d 41, 42 (citation omitted). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54

Ohio St.2d 279, at syllabus. “A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.” *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶45} In her first assignment of error, Heather contends that the juvenile court’s findings that the children could not or should not be placed with either parent within a reasonable time and that it was in their best interests to grant Ashtabula Children Services permanent custody were against the manifest weight of the evidence. Heather claims the conditions causing their removal were remedied. She no longer lived with Alejandro and all domestic violence charges against him were dropped. Her relationship with him is currently civil. She has adequate housing and employment. She demonstrated appropriate behavior with the children and care for their well-being. Her drug use is not “so severe” that it hindered her from parenting her children. Given that the termination of parental rights is the family law equivalent of the “death penalty,” it was prematurely imposed in the present case.

{¶46} We disagree. While acknowledging the severity of terminating a parent’s rights to the custody and care of their children, this fact entitles a parent to “every procedural and substantive protection the law allows.” *In re Hayes* (1997), 79 Ohio St.3d 46, 48 (citation omitted). It does not entitle a parent to have the evidence construed in her favor or otherwise heighten the evidentiary standards to be applied.

{¶47} In the present case, the conditions causing the removal of L.M. and A.M. were not remedied. At the time of the hearing, Heather had only been at her father’s house for a period of about two months. The pattern established and repeated during the course of this case was of recurrent separation and reunification with Alejandro. There was no evidence that this pattern had ceased. There was evidence that Heather

continues to have some sort of relationship with Alejandro and relies on him for matters such as transportation. Heather did not complete relationship counseling with Alejandro and presented no evidence that the issues between them had been resolved. While Heather recanted the allegations of domestic violence against Alejandro, the juvenile court was not bound to accept her recantation.¹

{¶48} Drug use was a factor in A.M.'s removal. During the pregnancy, Heather tested positive for methadone, opiates, benzodiazepines, and marijuana, and A.M. had symptoms of withdrawal after his birth. At the time of the hearing, Heather admitted to regular use of marijuana and a benzodiazepine, "because I get the shakes and stuff real bad." This condition has not been remedied.

{¶49} While Heather may technically have been employed at the time of the hearing, she had not actually worked or had any demonstrable income for about four years. This evidence does not demonstrate an ability to meet the children's material needs.

{¶50} Finally, the guardian ad litem noted in her report that A.M. had never resided with Heather and Alejandro and L.M. had been removed from their custody for half of her life. Given Heather's minimal compliance with the case plan, this evidence demonstrates the children's need for a legally secure placement. Heather is afforded a reasonable, not an indefinite, period of time to remedy the conditions causing the children's removal. She has failed to do so in the present case.

{¶51} The first assignment of error is without merit.

1. Heather acknowledged there had been photographs of domestic violence, but claimed they were not all "from him": "I mean, you couldn't get that many bruises in two hours."

{¶52} In her second assignment of error, Heather claims the juvenile court erred by allowing Ashtabula Children Services to call her to testify as upon cross-examination during the presentation of its case and instructing her to answer questions. Heather relies on *In re Billman* (1993), 92 Ohio App.3d 279, which stands for the proposition that “the [Fifth Amendment] right to refrain from testifying against oneself attaches to a dependency action in juvenile court.” *Id.* at 280.

{¶53} We find no error. “While the umbrella of Fifth Amendment guarantees is broad, the prohibition against compulsory testimony does not relieve a party from appearing or answering questions in a civil action.” *Tedeschi v. Grover* (1988), 39 Ohio App.3d 109, 111; *In re Zahler*, 11th Dist. No. 94-L-091, 1995 Ohio App. LEXIS 2637, at *8 (“[a] witness’s privilege against self-incrimination is clearly not co-extensive with a defendant’s right not to take the stand”). Accordingly, Ashtabula Children Services was entitled to call Heather as a witness. *In re M.E.G.*, 10th Dist. Nos. 06AP-1256, et al., 2007-Ohio-4308, at ¶48 (the “assertion of his Fifth Amendment protection against self-incrimination did not permit [the witness] to completely refuse to testify”).

{¶54} Moreover, Heather never asserted the privilege or indicated an unwillingness to testify. It was unnecessary for the juvenile court to compel her testimony and there is no indication that the court, in fact, did so.

{¶55} The second assignment of error is without merit.

{¶56} In the third assignment of error, Heather asserts that she received ineffective assistance of counsel.

{¶57} An indigent parent in a termination of parental rights proceeding is entitled to effective assistance of counsel as guaranteed by the United States and Ohio Constitutions. *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, paragraph two of the

syllabus. The test applied to evaluate a claim of ineffective assistance of counsel in a proceeding to terminate parental rights is the two-step test of *Strickland v. Washington* (1984), 466 U.S. 668. *In re Ridenour*, 11th Dist. Nos. 2004-L-168, et al., 2005-Ohio-349, at ¶9. Accordingly, Heather must demonstrate “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.” *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland*, 466 U.S. at 687-688.

{¶58} Specifically, Heather claims trial counsel was deficient by failing to object when she was called to testify as upon cross, and by failing to file a request for a transcript at state expense in a separate motion and to explicitly ask for additional time to file supplemental objections.

{¶59} With respect to Heather being called as a witness by Ashtabula Children Services, counsel’s performance was not deficient for the reasons stated in the second assignment of error. We note, moreover, that Heather’s admission to continuing marijuana use was cumulative inasmuch as there was abundant evidence of her drug use through the testimony of McMahon, Forster, and the results of the drug screens.

{¶60} With respect to the failure to file a separate motion requesting a transcript, we find no deficiency. Heather’s counsel duly requested a transcript and hearing in the Objections filed on her behalf. Heather cites to no authority, nor are we aware of any, that requires a separate written motion to request transcripts from a hearing before a magistrate. Cf. Juv.R. 40(D)(3)(b)(iii) (“[t]he objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause”). Nor is Heather

able to demonstrate prejudice. Our review of the complete record of the present case, including the transcript of the dispositional hearing, confirms the juvenile court's conclusions that the children were unable to be placed with either parent in a reasonable time and that granting Ashtabula Children Services permanent custody was in their best interests.

{¶61} The third assignment of error is without merit.

{¶62} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, granting permanent custody of L.M. and A.M. to Ashtabula Children Services, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.