

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

IN THE MATTER OF:

:

W.R. II, et al.

:

CASE NO. CA2011-08-016

:

OPINION
2/3/2012

:

:

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. 10AND0612 and 09AND0624

Jess C. Weade, Fayette County Prosecuting Attorney, James Roach, 110 East Court Street, Washington C.H., Ohio 43160, for appellee, Fayette County Department of Job and Family Services

Susan R. Wollscheid, P.O. Box 176, Washington C.H., Ohio 43160, for appellant, W.R., Sr.

D.R., 4037 Dogtown Road, Clarksburg, Ohio 43155, mother, pro se

Renae Zabloudil, 58 East High Street, Suite B, London, Ohio 43140, guardian ad litem

PIPER, J.

{¶ 1} Appellant, the biological father of W.R. and K.R., appeals a decision of the Fayette County Court of Common Pleas, Juvenile Division, granting permanent custody of his children to the Fayette County Department of Job and Family Services.

{¶ 2} The Fayette County Department of Job and Family Services removed W.R. and

his older half-sister from their home on August 10, 2009. The removal occurred after the half-sister, who has a different father, was taken to the hospital by relatives and medical evidence of physical abuse was discovered. The agency filed a complaint alleging W.R. was neglected and dependent based on the abuse involving his half-sister and requested temporary custody of the child. The agency amended the neglect and dependency complaint on January 26, 2010 to include a request for permanent custody.

{¶ 3} On May 12, 2010, the trial court found W.R. was a dependent child and that his half-sister was an abused and dependent child. In its adjudication entry, the court found that the half-sister was taken to Nationwide Children's Hospital by her maternal aunt and grandmother after the two adults discovered the child could not walk. The court found uncontroverted evidence was presented that medical personnel at the hospital found the child had a number of recently broken bones in different locations, in addition to other bones that had been broken at an earlier point in time. The child was placed in a cast and hospitalized for five days.

{¶ 4} The court further found that a radiologist opined that the three broken bones in the area of the child's left elbow were broken as the result of the elbow being squeezed. In addition to the broken bones, the child was also found to have numerous bruises on her body in several locations. The child also had a lacerated liver and the court found uncontroverted evidence that it takes significant blunt force to cause lacerations to the liver. The court determined that the number and location of injuries, along with the difference in age of the injuries were medically consistent with child abuse.

{¶ 5} The court determined that the mother told the agency that a week prior to the child's hospitalization, the child fell down some stairs and the mother planned on taking her for medical care on the day she was hospitalized. The court also found that in speaking to counselors who are part of the hospital, the child consistently indicated on several occasions

that she was physically abused by appellant and appellant's older daughter. The trial court ordered the parents to undergo psychological evaluations prior to disposition of the children in order to assess their likelihood of committing child abuse in the future.

{¶ 6} On August 4, 2010, K.R. was born to W.R.'s parents. She was born with drugs in her system and was removed from her parents at birth. A complaint alleging abuse and dependency was filed by the agency and permanent custody was requested. K.R. was adjudicated an abused and dependent child on February 15, 2011.

{¶ 7} The mother was convicted of child endangering for the injuries sustained by the children's older half-sibling and was incarcerated from October 2010 until January 2011. The parents continued to live together until February 11, 2011 when they had an argument. The mother obtained a civil protection order against appellant with herself as the protected party.

{¶ 8} A dispositional hearing was held on April 25, 2011 for all three children. In a written opinion, the court granted permanent custody of W.R. and K.R., along with the children's half-sibling, to the agency.

{¶ 9} Appellant now appeals the court's decision to grant permanent custody of his children, W.R. and K.R., to the agency. In his brief, he fails to list assignments of error, but instead raises three "issues for review." We accordingly construe each of these issues as separate assignments of error.

{¶ 10} We additionally note that several hearings were held in this case, but on appeal, appellant has provided this court with only the transcript of the dispositional hearing. It is appellant's duty to provide a record of the proceedings below necessary for review on appeal. *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d 197, 199; *Cox v. Cox*, 12th Dist. No. CA2008-06-077, 2009-Ohio-1446. In the absence of a complete and adequate record for review on appeal, the court will presume the regularity of the proceedings below. *Knapp* at 199.

{¶ 11} While appellant does not specifically dispute any of the trial court's findings prior to the dispositional hearing, the trial court clearly considered the events leading to the dispositional hearing, along with those presented in the dispositional hearing, in its determination to grant permanent custody. As we are unable to review a transcript of events prior to the dispositional hearing, we have taken our factual discussions from the trial court's decisions and entries, and we must presume the regularity of those portions of the proceedings below. Id.

Irrelevant Evidence

{¶ 12} In his first assignment of error, appellant argues that the trial court erred by improperly considering irrelevant evidence. Specifically, he argues that the court erred in admitting the mother's medical records and testimony from the records custodian regarding these records.

{¶ 13} Relevant evidence is "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. The decision of whether evidence is relevant is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *In re Adoption of Linder*, 3rd Dist. No. 11-04-07, 2004-Ohio-6962.

{¶ 14} At the hearing, the record keeper from Fayette County Memorial Hospital verified that an exhibit of medical records were true and accurate copies of the mother's medical records. She listed the dates from May 2008 through August 4, 2008 that the mother visited the hospital's emergency room, obtained outpatient testing, and visited the birth center and specialty clinic. Appellant argues that there was no evidence to show the relevance between the records and the issues before the court and the relevance was never established. The agency responds that the records were relevant to question the mother's

physical ability to take care of the children, to raise an issue regarding the mother's obtaining narcotic pain relievers, and whether the mother took pain medication while pregnant.

{¶ 15} Regardless of whether this evidence was relevant, appellant has failed to argue, much less establish, how the introduction of this evidence prejudiced him in any manner. The evidence involved the mother's visits to the hospital, not the father, and there was no connection between these records and the father. Appellant simply argues that this evidence was irrelevant, but does not give any indication of the prejudicial effect of its admission.

{¶ 16} Moreover, this was a hearing before the trial court, not a jury. As a fact-finder, the trial court is presumed to have considered only relevant, material and competent evidence in arriving at its judgment unless the record shows affirmatively to the contrary. *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683; *In re Adoption of Linder*, 3rd Dist. No. 11-04-07, 2004-Ohio-6962 at ¶6. The trial court's decision does not mention this evidence in any manner, nor does the decision contain any conclusions based on this evidence. Accordingly, we find no prejudicial error in the admission of this testimony.

{¶ 17} Within this first "issue" in his brief, appellant also argues that the trial court erred in admitting the testimony of the record keeper for the Fayette County Clerk of Courts regarding a civil protection order granted to the mother. He argues that the record keeper did not identify the parties in the permanent custody case as the ones involved in the protection order and that the order only covered the mother and was irrelevant to appellant's ability to care for his children.

{¶ 18} The record keeper for the Fayette County Clerk of Courts testified that a civil protection order was issued on February 9, 2011 and stated the names of the parties who were petitioner and respondent in the order. Appellant argues that the state failed to identify he and the mother were the parties involved. He also argues that the evidence is irrelevant

because it does not involve his ability to care for his children, as the children were not covered by the order.

{¶ 19} We find no merit to appellant's argument. Other evidence at the hearing established that the parents were the parties to the protection order. The caseworker and the mother both testified that a civil protection order was issued preventing the father from contacting the mother and both also testified that the father was arrested for violating the protection order. In addition, although the protection order did not involve the children, the fact that the children's father was legally prohibited from contact with the mother was clearly relevant to the ability of the father to parent and to provide a safe environment for his children. Accordingly, this evidence was relevant and properly admitted at the hearing. Appellant's first assignment of error is overruled

Hearsay Evidence

{¶ 20} In his second assignment of error, appellant argues the court erred in admitting inadmissible hearsay evidence at the hearing. He argues that three witnesses were allowed to testify with hearsay evidence.

{¶ 21} Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Unless an exception to the hearsay rule applies, hearsay is inadmissible. Evid.R. 802.

{¶ 22} We note that in its brief, the agency argues that hearsay does not apply in dispositional juvenile proceedings and cites Juv.R. 34(B)(2) for this proposition. However, while providing that hearsay is admissible in juvenile dispositional hearings, this provision states it applies "[e]xcept as provided in division (I) of this rule." Division I, in turn, specifically states that "the Rules of Evidence shall apply in hearings on motions for permanent custody." Juv.R. 34(I). Accordingly, hearsay is inadmissible in hearings on motions for permanent

custody. See e.g. *In re D.S.*, 12th Dist. Nos. CA2010-08-058, 2010-08-064, 2010-08-065, 2011-Ohio-1279, ¶ 34; *In re J.J.*, 12th Dist. No. CA2005-12-525, 2006-Ohio-2999.

{¶ 23} Appellant first argues that the court erred in admitting the testimony of Beth Potts, the current agency caseworker. Potts testified that she recently became the caseworker and testified regarding events in the former caseworker's notes. She testified that the former caseworker's notes were kept in the ordinary course of business of the agency. She testified over objection that the notes state that the mother called the agency and reported she was going to obtain a civil protection order because she "needed to stand up for her children and protect them," even if that meant leaving appellant. According to Potts, the case notes state that the mother told the caseworker that the father threatened to kill her and has physically, emotionally and verbally harmed her.

{¶ 24} Appellant also argues that the court allowed the children's aunt to testify regarding her attempts to report signs of physical and mental abuse in the home and the agency's mishandling of her complaints. Finally, appellant argues that the court erred in allowing the mother to testify regarding what her injured daughter told her about the source of her injuries, statements made by appellant about the injuries and her failure to seek treatment for the child.

{¶ 25} Regardless of the possible hearsay nature of the comments above, appellant has failed to establish any prejudice from this testimony, or that the court relied on this evidence in any manner. The mother testified herself regarding her decision to seek a protective order against appellant. The aunt's testimony was largely ranting, and the trial court directed her testimony to relevant, admissible evidence. The half-sister's statements regarding the source of her injuries was also discussed at the adjudication hearing, as the trial court heard from the testimony of medical personnel.

{¶ 26} Most importantly, inadmissible hearsay is grounds for reversal only if the

juvenile court relied on the evidence to terminate parental rights. *In re J.J.*, 12th Dist. No. CA2005-12-525, 2006-Ohio-2999, ¶ 19; *In re M.H.*, 8th Dist. No. 80620, 2002-Ohio-2968, ¶79. The trial court did not mention this evidence in its decision, nor is there any indication that the court relied on the evidence in any manner. In fact, the trial court specifically stated that it did not clearly and convincingly know who inflicted the abuse on the half-sister. Appellant's second assignment of error is overruled.

Sufficiency and Weight of Evidence

{¶ 27} In his final assignment of error, appellant argues that the agency failed to meet its burden of clear and convincing evidence that appellant was unable to care for his children. Appellant argues that the agency failed to provide any evidence that he was unfit as a parent. Appellant argues that he completed his case plan, displayed appropriate parental skills, anger control and was never charged in connection with the injuries to the children's half-sibling.

{¶ 28} Before a natural parent's constitutionally protected liberty interest in the care and custody of his child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982). An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶ 16 (7th Dist.). A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520 (12th Dist.).

{¶ 29} A public children services agency may seek permanent custody of an abused, neglected or dependent child in one of two ways. *In re E.P.*, 12th Dist. Nos. CA09-11-022,

CA09-11-023, 2010-Ohio-2761, ¶ 22. An agency may seek permanent custody as part of an initial disposition after the child has been adjudicated abused, neglected or dependent, or the agency may seek permanent custody as a post-dispositional hearing by filing a motion. *Id.*; *In re Miller*, 101 Ohio App.3d 199, 202 (2nd Dist.1995).

{¶ 30} In cases where an agency files a request for permanent custody as part of an initial disposition the court is guided by the standards in R.C. 2151.353. This section provides that a court may grant permanent custody of a child to a children services agency if it determines that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, and permanent custody is in the best interest of the child. R.C. 2151.353(A)(4).¹

{¶ 31} In determining whether a child cannot or should not be placed with either parent, the court must consider all relevant evidence, including the factors in R.C. 2151.414(E). In this case, after considering the factors, the court found that there was clear and convincing evidence that the children should not be returned to their parents. The court found the case began after the children's half-sibling was taken to the hospital by her grandmother when the grandmother picked the child up for a visit and discovered the child was unable to walk. The court determined "[a]t the hospital, it was discovered that the child had old fractures in various stages of healing, besides the new fractures, other internal

1. We note that in their briefs to this court, neither party cited the correct legal standard for granting permanent custody under the circumstances of this case. Appellant argues the state "has the burden to show by clear and convincing evidence that the children are dependent and that a grant of permanent custody is in the best interest of the children." The agency cites to the standards for granting permanent custody found in R.C. 2151.414(B)(1), which generally apply when an agency files a motion for permanent custody after an initial disposition. See R.C. 2151.413(A)-(C). The court did not cite a standard in its decision granting permanent custody. However, as discussed above, the court made the necessary determinations for granting permanent custody under R.C. 2151.353(A)(4). We further note that the court incorrectly determined that the children had been in agency custody for 12 of 22 months as the "12 of 22" determination must be established at the time a motion for permanent custody is filed. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411. However, any error is harmless, as this determination was not required in this case.

injuries and bruising on her body." The court determined that "[t]he medical evidence of physical abuse was overwhelming."

{¶ 32} In determining whether the children could be placed back in their home, the court stated that "[t]he precipitating event for these cases is truly shocking and reprehensible" and a "young child was allowed to suffer multiple injuries and broken bones without treatment." The court further found "[n]o treatment was sought by the mother or [appellant] even though the child was unable to walk. Finally, she was taken to the hospital by a third party. The child was two and totally defenseless." The court determined that at the adjudication, neither the mother nor appellant acknowledged any misdoing or suffering on the part of the child.

{¶ 33} The court further determined that during the course of the case, the mother had been incarcerated for child endangering and "[a]fter all this time, at this hearing, she testified that [appellant] had forbidden her to take [the step-sibling] to the doctor or hospital." The court found that it was during the permanent custody hearing that mother first alleged appellant would not let her take the child to the hospital, and that she did not tell the caseworker, law enforcement or GAL until after she and appellant separated.

{¶ 34} The court also determined that it was in the best interest of the children to grant permanent custody to the agency. R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶ 35} "(a) 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;

{¶ 36} "(b) 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;

{¶ 37} "(c) 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 * * *

{¶ 38} "(d) 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;

{¶ 39} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶ 40} The trial court found that W.R. was removed from the home on August 10, 2009 at the age of six weeks and W.R. was removed from her parents at birth on August 4, 2010. Both children have been in the same foster home together since their respective removals. The court found they are very bonded as a family and the foster parents love and provide for the children. The court further found that the children call the foster parents "mommy" and "daddy" and the foster parents would like to adopt both children. The court found that the children's interactions with their parents are satisfactory, but are fully supervised by the agency.

{¶ 41} The court determined that the children are too young to express any wishes, but as both were placed in foster care at an early age, neither child has known any other home than that of the foster parents. The guardian ad litem recommended permanent custody based on the children's need for permanency and their progress in the foster home.

{¶ 42} The court also found that the children need legally secure placements and determined that there is no evidence either of the parents can provide the safety and security that the children need. The court also considered relatives' motions for custody and determined that there were no suitable relatives for placement.

{¶ 43} The court found that the children have been the victims of the parents' abuse and neglect. The court stated that, based on the testimony and history of the case, it "still

does not know who inflicted the horrendous and continuing physical harm on [the half-sister]" but that it "does clearly and convincingly know that [the half-sister and W.R.] were in the home and care of [the mother and appellant] at the time." The court concluded that it was "clearly convinced that to place any of these children with any of their parents would be placing them in very unstable circumstances and may well be placing them in grave danger." Therefore, the court found it was in the best interest of the children to grant permanent custody to the agency.

{¶ 44} We find no error in the trial court's determinations. The children's half-sister was severely and repeatedly injured while in the care of appellant and their mother. According to the court's findings, neither appellant nor the mother took responsibility for the injuries or for the failure to seek medical attention. We find no error in the court's determination that under these circumstances, the children cannot be placed with either parent and that it is in the children's best interest to grant permanent custody to the agency. Appellant's third assignment of error is overruled.

{¶ 45} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.