

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: K.K. & D.C.,
DEPENDENT CHILDREN

JUDGES:
Hon: W. Scott Gwin, P.J.
Hon: William B. Hoffman, J.
Hon: John W. Wise, J.

Case No. 09-CA-93

OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. F2008-0390& F2008-0391

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 4, 2009

APPEARANCES:

For DJFS

KENNETH W. OSWALT
KIMBERLY MCCARTY
20 S. Second Street, 4th Fl.
Newark, OH 43055

Guardian Ad Litem
ELENA TUHY-WALTERS
Box 4152
Newark, OH 43058-4152

For Misty Cantor

THOMAS GORDON
Box 314
Pickerington, OH 43147

Gwin, P.J.

{¶1} Misty Cantor, the natural mother of K.K. and D.C., appeals a judgment of the Court of Common Pleas, Juvenile Division, of Licking County, Ohio, which terminated her parental rights in the two children and granted permanent custody to appellee the Licking County Department of Job and Family Services. Appellant assigns three errors to the trial court:

{¶2} “I. THE GUARDIAN AD LITEM COMMITTED ERROR WHEN SHE DID NOT SUBMIT HER WRITTEN REPORT WITHIN THE TIME LIMITS IMPOSED BY THE SUPREME COURT AMENDMENTS TO THE OHIO RULES OF SUPERINTENDENCE.

{¶3} “II. THE GUARDIAN AD LITEM COMMITTED ERROR WHEN SHE FAILED TO NOTIFY THE MAGISTRATE OF THE CONFLICT BETWEEN HER RECOMMENDATION AND THE WISHES OF HER WARD.

{¶4} “III. THE TRIAL COURT COMMITTED ERROR WHEN IT FAILED TO OVERTURN THE MAGISTRATE’S DECISION ON APPEAL.”

{¶5} The record indicates the younger child, K.K., was born on May 3, 2008. At the time she was born, both K.K. and appellant tested positive for cocaine, benzodiazepine, and barbiturates. On May 7, 2008, appellant tested positive for cocaine and oxycodone. On May 8, 2008, appellee filed two complaints alleging K.K. and D.C., age 11, were dependent.

{¶6} Paternity of the children had not been established, but the putative father of D.C. did not make an appearance in the case, and a John Doe publication was done for both children.

{¶17} The case plan appellee established to reunite the family required appellant to honestly participate in an evaluation with Licking County Alcoholism Prevention Program and follow any and all recommendations including in-patient treatment and AA/NA meetings. Appellant was to complete random drug screens, and not allow drugs or individuals who use drugs into her home. Appellant was not to use illegal drugs prior to attending visits with her children. Appellant was to obtain and maintain employment and use her paychecks on necessities only. Appellant was to obtain independent housing, with all utilities turned on and paid. Appellant was to develop a budgeting plan, and attend a parenting program. Appellant was to complete a psychological evaluation and follow any and all recommendations including individual counseling. Appellant was to meet with a local psychiatrist to complete a medication evaluation and follow recommendations. Appellant was to learn new coping techniques with dealing with stress other than illegal or prescription drugs. Appellant does not assign error to the factual findings regarding her non-compliance with the requirements of the case plan.

{¶18} After the magistrate to whom the matter was referred sustained the motion for permanent custody, appellant filed objections. The trial court overruled the objections, stating it had reviewed the magistrate's decision, the transcript of the hearing, all exhibits, the objections, and the written report of the children's guardian ad litem.

I , II & III

{¶19} In her first and second assignments of error, appellant argues the guardian ad litem committed error in not submitting her written report within the time limits imposed by the Supreme Court's Rules of Superintendence, and did not notify the

magistrate of an alleged conflict between her recommendation and the wishes of the older child, D.C. In her third assignment of error, appellant argues the court should have appointed a separate guardian for the child.

{¶10} At the outset, we note a guardian ad litem does not commit prejudicial error as appellant states in her assignments of error I and II. Only a trial court can commit prejudicial error, as when it improperly accepts and considers information from the guardian ad litem.

{¶11} The guardian ad litem filed her report on the day of the final hearing. Her report indicated D.C. had expressed a desire to return to his mother's home, but also indicated the child was happy and doing well in the foster home. The guardian ad litem opined the child really wished to remain with the foster parents, but did not want to hurt his mother. The child told the guardian ad litem that the reason he wanted to live with his mother was so that he could play with his cousins. The child had told the guardian ad litem if he could not go home he wished to remain with the foster family, and consider them as his own family. Both children were in the same foster home. K.K. was too young to express any desires.

{¶12} Appellant's objections to the magistrate's decision raised two challenges. The first objection was the magistrate's overruling of her motion for an extension of temporary custody and the subsequent granting of permanent custody of the children to appellee. Her second challenge was that the guardian ad litem should have disclosed a conflict between her role as guardian ad litem and as an attorney advocate, and should have asked the magistrate to appoint separate counsel.

{¶13} A juvenile court should investigate when a child consistently expresses a desire to be with a parent, and determine whether an attorney should be appointed to represent the child's wishes. *In re Williams*, 101 Ohio St. 3d 398, 2004-Ohio-1500, 805 N.E. 2d 1110. Courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child. *Id.*

{¶14} The guardian ad litem specifically disclosed the child's statements, explaining in her report why there was no conflict. She asserted she could represent him both as his guardian ad litem and as his attorney advocate.

{¶15} Here the child did not consistently express a desire to return to appellant. The guardian ad litem disclosed what the child had said, and explained what she believed to be his reasons. The trial court found there was no conflict of interest. The record indicates appellant did not raise the issue of a conflict of interest before the magistrate. Appellant also did not challenge the guardian ad litem's filing of her report on the day of the trial. She did not ask for a continuance or a recess to review the report. She did not cross examine the guardian about the contents of the report.

{¶16} Each of the assignments of error is overruled.

{¶17} For the foregoing reasons, the judgment of the Common Pleas, Juvenile Division, of Licking County, Ohio, is affirmed.

By Gwin P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 1021

