

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                        |   |                              |
|------------------------|---|------------------------------|
| CANDACE WATSON, ET AL. | : | JUDGES:                      |
|                        | : | Hon. Julie A. Edwards, P.J.  |
| Plaintiffs-Appellants  | : | Hon. Sheila G. Farmer, J.    |
|                        | : | Hon. Patricia A. Delaney, J. |
| -vs-                   | : |                              |
|                        | : |                              |
| RICHLAND COUNTY        | : | Case No. 2010CA21            |
| CHILDREN SERVICES      | : |                              |
|                        | : |                              |
| Defendant-Appellee     | : | <u>OPINION</u>               |

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Juvenile Division, Case No.  
2009DEP00162

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 16, 2010

APPEARANCES:

For Plaintiffs-Appellants

JEFFEREY R. STIFFLER  
21 North Walnut Street  
Mansfield, OH 44902

For Defendant-Appellee

EDITH A. GILLILAND  
731 Scholl Road  
Mansfield, OH 44907

*Farmer, J.*

{¶1} On June 19, 2009, Mary Watson was granted an ex parte order of custody of her minor grandchild, H.D., born October 11, 2004. This order was issued by the Domestic Relations Division of the Court of Common Pleas of Richland County, Ohio. Mother and father of the child are appellants, Candace Watson and James Donathan.

{¶2} On July 1, and September 4, 2009, appellee, the Richland County Children Services, filed a complaint and a second amended complaint in the Juvenile Division, claiming the child was dependent, neglected, and/or abused.

{¶3} On September 10, 2009, appellants admitted that the child was dependent. A hearing was held on January 4, 2010. By judgment entry filed January 13, 2010, the trial court terminated appellants' parental rights and granted appellee permanent custody of the child.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE JUVENILE COURT'S ORDER THAT PERMANENT CUSTODY OF H.D. BE GRANTED TO RICHLAND COUNTY CHILDREN SERVICES BOARD AND THAT APPELLANTS PARENTAL RIGHTS ARE TERMINATED IS VOID, AS THE COURT WAS WITHOUT JURISDICTION TO ENTER SUCH AN ORDER."

II

{¶6} "THE JUVENILE COURT ERRED AS A MATTER OF LAW FINDING THAT H.D. WAS ABANDONED AS TO APPELLANT JAMES DONATHAN, AS THERE WAS CONTRARY EVIDENCE ON THE RECORD."

I

{¶7} Appellants claims the trial court did not have jurisdiction to determine the issue of permanent custody. We disagree.

{¶8} The second amended complaint filed September 4, 2009 in the Juvenile Division stated the following:

{¶9} "The undersigned, being first duly sworn, says that upon information and belief, she has knowledge of a certain child, to wit: H.D., age 4, date of birth 10/11/2004, who resides with grandmother, M.W., at 271 South Main Street, Mansfield, Ohio 44902, who appears to be a dependent, neglected and/or abused child in accordance with Sections 2151.04, 2151.03 and 2151.031 of the Ohio Revised Code, for the following reasons:\*\*\*."

{¶10} R.C. 2151.23(A)(1) states the following:

{¶11} "(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

{¶12} "(1) Concerning any child who on or about the date specified in the complaint, indictment, or information is alleged to have violated section 2151.87 of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant."

{¶13} Pursuant to this statute, it is clear that the trial court had subject matter jurisdiction on the issue of H.D.'s custody.

{¶14} As for personal jurisdiction, appellants appeared and stipulated to the dependency of H.D., and did not contest the trial court's personal jurisdiction. Appellants consented to the trial court's jurisdiction, appeared, and were represented by counsel. Failure to timely present the defense of lack of personal jurisdiction results in a waiver. *Detroit, Toledo & Ironton Railway Company v. Maxine's Potato Service, Inc.* (1983), 13 Ohio App.3d 157; Civ.R. 12(H).

{¶15} Pursuant to an ex parte court order of the Domestic Relations Division, Mary Watson was granted temporary custody of H.D. on June 19, 2009. That assumption of jurisdiction on H.D. was never challenged. The trial court in this case was clearly aware of the ex parte order from the Domestic Relations Division, and that it was still pending but had been stayed by said court.

{¶16} Appellants argue at the time of the ex parte order, H.D. was not in the territorial jurisdiction of the trial court, but was in California. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA"), the Richland County Juvenile Court and the San Diego County Court worked together wherein Richland County assumed jurisdiction as the home state of H.D.

{¶17} R.C. 3127.15 governs jurisdiction to make initial determination and states the following:

{¶18} "(A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies:

{¶19} "(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months

before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

{¶20} "(2) A court of another state does not have jurisdiction under division (A)(1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case:

{¶21} "(a) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

{¶22} "(b) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

{¶23} "(3) All courts having jurisdiction under division (A)(1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.

{¶24} "(4) No court of any other state would have jurisdiction under the criteria specified in division (A)(1), (2), or (3) of this section."

{¶25} Appellants do not contest that Ohio was H.D.'s home state prior to the assumption of jurisdiction by Richland County. Appellant mother resided with H.D. in Crawford County, then arrived with H.D. in Richland County wherein she helped a convicted sex offender escape from a halfway house which led to an interstate hunt for her, H.D., and the escaped felon. See, Appellants' Brief at Statement of Facts.

{¶26} We find pursuant to R.C. 3127.15 and the actions of the Domestic Relations Division in issuing the ex parte order of custody to Mary Watson, a resident of Richland County, that jurisdiction was proper.

{¶27} Assignment of Error I is denied.

II

{¶28} Appellants claim the trial court erred in finding appellant father had abandoned H.D. as the evidence was sufficient to establish that he had "more frequent and substantial interaction and visitation," thereby disproving the issue of abandonment. We disagree.

{¶29} R.C. 2151.011(C) states, "For the purposes of this chapter, a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days."

{¶30} Clear and convincing evidence is evidence which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. See, *Cross v. Ledford* (1954), 161 Ohio St. 469.

{¶31} In its amended memorandum opinion and judgment entry filed January 13, 2010, the trial court made the following findings relative to appellant father:

{¶32} "The child, H.D., was born on October 11, 2004 and is currently five years of age. Because of multiple incarcerations and other factors, the child's father, James Donathan, has been absent from the child for most of the child's life; accordingly, there has been very little interaction with the child throughout the child's life and no father-child relationship exists between the two of them.

{¶33} \*\*\*\*

{¶34} "The child's biological father, James Donathan, by voluntarily choosing to engage in criminal activity which then resulted in multiple incarcerations, has been imprisoned for most of the child's life. Because Mr. Donathan could not thereafter financially support or regularly contact the child, his actions constitute voluntary abandonment of the child\*\*\*. Mr. Donathan has also demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child\*\*\*. Mr. Donathan is repeatedly incarcerated, and the repeated incarcerations prevent him from providing care for the child\*\*\*."

{¶35} Appellants argue that appellant father had sought to reconnect with H.D. after his prior incarceration up until May when appellant mother left with the child over the incident with the escaped convict. T. at 57. The establishment of contact was characterized as "very recently." Id. Appellant father was unable to indicate how many years he had been involved in H.D.'s life given the fact that the child was almost five years old. T. at 59. He admitted he didn't know the child and did not have a real relationship with the child. T. at 62. These were self-serving statements were made to a caseworker while in jail.

{¶36} Admittedly, at the time of the hearing, appellant father was incarcerated, serving a prison term of three years. See, Court Exhibit 14, Sentencing Entry filed September 23, 2009 in Case No. 2009CR0470D. It is appellant father's position that while he is in prison, he can substantially complete the case plan. T. at 21.

{¶37} Appellant father maintains that the issue should not have been abandonment, but whether "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" under R.C. 2151.414(B)(1)(a).

{¶38} We find regardless of the statute employed, appellant father's long history of imprisonment kept him from being with H.D. Appellant now faces another long incarceration where interaction with the child cannot be facilitated. The hearing sub judice was held in January of 2010, and appellant father's term is to be completed sometime in 2012. There remains approximately two years left on his sentence with no interaction with H.D.

{¶39} Upon review, we concur with the trial court's analysis that appellant father's criminal tendencies have created a de facto abandonment of H.D.

{¶40} Assignment of Error II is denied.

{¶41} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

SGF/sg 614

