

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: M.S. : APPEAL NO. C-110169
: TRIAL NO. F-0902616x
:
: *JUDGMENT ENTRY.*

We consider this expedited appeal on the accelerated calendar.¹ This judgment entry is not an opinion of the court.²

Appellant Petrina Lee challenges the Hamilton County Juvenile Court’s adoption of a magistrate’s decision committing her one-year-old son, M.S., to the permanent custody of the appellee, Hamilton County Department of Jobs and Family Services (“HCJFS”).³

Following hearings at which Lee and M.S.’s caseworkers testified, the magistrate found that HCJFS would not be able to reunite M.S. with Lee or the child’s father, Michael Smith, within a reasonable period of time due to the parents’ substantial parenting difficulties, including Lee’s failure to remedy the conditions that had caused the loss of custody, particularly her inability to protect M.S.

After making factual findings in accordance with R.C. Chapter 2151, the magistrate determined by clear and convincing evidence that permanent custody with HCJFS was in

¹ See App.R. 11.1(E) and 11.2(C)(1), and Loc.R. 11.1.1.

² See S.Ct.R.Rep.Op. 3(A).

³ M.S.’s guardian ad litem has filed an appellate brief and argues in support of the juvenile court’s order. See App.R. 3(C)(2) and 16(B).

the best interest of M.S.⁴ The juvenile court considered and overruled Lee's untimely objections and adopted the magistrate's decision.⁵

Lee's first assignment of error, in which she contends that the trial court erred in granting permanent custody, essentially challenges the weight of the evidence adduced before the magistrate. A reviewing court must examine the record and determine if the juvenile court had sufficient evidence before it to satisfy the statutory clear-and-convincing standard.⁶ "Clear and convincing evidence" is evidence sufficient to "produce in the mind of the trier of fact[] a firm belief or conviction as to the facts sought to be established."⁷

Lee is the mother of seven children. In 2004, she pleaded guilty in Illinois to the involuntary manslaughter of her two-month-old son Maximilian. Lee admitted that she had lain on top of the child to stop his crying. She served a four-year prison term for that offense. During the investigation of Maximilian's death, Lee also admitted that, in 2000, she had suffocated her three-month-old daughter Kristina under similar circumstances. But because she had withheld information about her role in the girl's death, Kristina's passing had been attributed to sudden infant death syndrome. Because Lee had failed to complete the case-plan objectives for reunification, the Illinois authorities ultimately terminated Lee's parental rights as to her then four surviving children. Lee's mother adopted the children.

In 2008, Lee was released from prison. In late 2009, Lee, Smith, and the then three-month-old M.S. were evicted from a local hotel. During their attempts to assist Lee

⁴ See R.C. 2151.353 and 2151.414.

⁵ See Juv.R. 40(D)(4)(b).

⁶ See *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, 481 N.E.2d 613; see, also, *In re Heston* (1998), 129 Ohio App.3d 825, 828, 719 N.E.2d 93, and *In re Walling*, 1st Dist. No. C-050646, 2006-Ohio-810, ¶15.

⁷ See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

and M.S., HCJFS personnel learned of Lee's extensive history with Illinois's child-protection services. On December 3, after learning that HCJFS was seeking temporary custody of M.S., Smith had a violent outburst with HCJFS staff. He and Lee fled from the meeting. They were apprehended at the local Greyhound bus station.

Smith did not cooperate with the HCJFS investigation. He refused to be fingerprinted. He became angry and stormed out of a family conference. He was verbally aggressive and abusive during a supervised visitation with M.S. And HCJFS learned that Smith was a registered sex offender.

In July 2010, during this custody proceeding, Lee married Smith despite her knowledge of his troubled past and explosive personality. Despite Lee's admissions in Illinois, and to treating psychiatrists in 2004 and 2009, that she had impulsively killed two of her children, at the 2010 dispositional hearing she denied responsibility for their deaths. Lee minimized the import of her criminal history and refused to understand why it could call into question her present fitness to be a parent. HCJFS caseworkers recounted her limited progress in parenting classes. M.S. was thriving in foster care. Both the caseworkers and M.S.'s guardian ad litem recommended an award of permanent custody to HCJFS.

The juvenile court's entry adopting the magistrate's decision was amply supported by the evidence. Because of Lee's history of harming her children, her decision to marry Smith, and her lack of insight into what steps would be required to adequately protect and care for M.S., the record contains sufficient evidence to establish that M.S. could not have "be[en] placed with [Lee] within a reasonable time" and "should not [have] be[en] placed with either parent."⁸ Therefore, permanent custody with HCJFS was in M.S.'s best interest. The assignment of error is overruled.

⁸ R.C. 2152.414(E).

In her second assignment of error, Lee claims that her trial counsel was ineffective for failing to request an independent psychiatric evaluation of her mental capacity. Judicial scrutiny of trial counsel's performance must be highly deferential; this court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.⁹ And we will not ordinarily second-guess strategic decisions made by trial counsel to pursue one course of defense over another.¹⁰

The appointment of a psychiatrist to assist an indigent parent in permanent-custody proceedings may be appropriate where "the parent's mental condition is at issue."¹¹ Lee's counsel had introduced two psychiatric assessments from 2004 and 2009 that indicated that Lee had been clinically depressed, that she had sought treatment on her own, and that she had complied with drug treatment. In her September 2010 testimony, Lee confirmed that medication relieved her depression. But the earlier psychiatric reports and her own testimony at the time of disposition revealed that Lee had denied responsibility for killing her two children and that she continued to do so. We cannot find fault with trial counsel's choice to forego another evaluation that was likely to bolster the impression that Lee would not fulfill her responsibility to protect M.S. Since there were no acts or omissions by trial counsel that deprived Lee of a substantive or procedural right, or that rendered the proceeding fundamentally unfair, the second assignment of error is overruled.¹²

Therefore, the judgment of the juvenile court is affirmed.

⁹ See *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052; see, also, *In re Graham*, 167 Ohio App.3d 284, 2006-Ohio-3170, 854 N.E.2d 1126, ¶41.

¹⁰ See *In re Graham* at ¶41; see, also, *State v. Mason*, 82 Ohio St.3d 144, 157-158, 1998-Ohio-370, 694 N.E.2d 932, certiorari denied (1998), 525 U.S. 1057, 119 S.Ct. 624.

¹¹ *In re Brown* (Nov. 26, 1986), 1st Dist. No. C-850878; see Juv.R. 32(A).

¹² See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; see, also, *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052.

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Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 8, 2011

per order of the Court _____.
Presiding Judge