

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

In Re: D.T.,	:	
	:	No. 108407
A Minor Child	:	
	:	
[Appeal by D.T., Sr., Father]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: November 27, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-17-903025

Appearances:

Judith M. Kowalski, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Rachael Matgouranis, Assistant
Prosecuting Attorney, *for appellee.*

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant, D.T., Sr. (referred to herein as “Appellant”), the father of
D.T., appeals from the order of the juvenile court that awarded permanent custody

of D.T. to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). Appellant assigns the following errors for our review:

I. The trial court erred to the prejudice of the Appellant and against the best interests of the child when it denied a continuance for the [Appellant], depriving him of his right to due process and abusing its discretion.

II. The trial court erred and abused its discretion in finding that permanent custody was in the best interests of the child.

{¶ 2} Having reviewed the record and the controlling case law, we affirm the decision of the trial court.

{¶ 3} On February 21, 2017, CCDCFS filed a complaint for protective supervision of D.T. who was then nine years old. CCDCFS alleged that D.T. is neglected because mother, T.J. (“mother”), does not ensure that D.T. consistently attends school, does not have stable and independent housing, and has substance abuse issues. CCDCFS also alleged that D.T. recently moved in with Appellant, and that Appellant provides care and support for him. A guardian ad litem (“GAL”) was appointed for D.T., and CCDCFS implemented a case plan requiring both parents to ensure that D.T. attends school, and that mother complete drug, alcohol and anger management assessments, and obtain stable housing.

{¶ 4} On June 8, 2017, CCDCFS filed a motion for temporary custody of D.T., alleging that Appellant “is no longer willing to take care of [D.T.] after today,” mother does not have stable and independent housing, and mother denied CCDCFS access to her residence. CCDCFS also alleged that mother was aggressive and failed

to complete five substance abuse referrals. At an emergency hearing later that same day, the magistrate determined:

[T]here are no relatives willing or able to care for the child [and] there is probable cause for removal. The Court finds that the continued residence of the child in or return to the home of either parent will be contrary to the child's best interest and welfare for the reasons indicated in the motion. Mother has been unable to verify her housing.
* * * Father is unwilling to continue providing care for the child. Mother and father are in need of anger management and mental health services.

{¶ 5} CCDCFS was granted temporary custody of the child, but subsequently notified the court that Appellant refused to allow the agency to obtain physical custody of D.T. By August 2017, D.T. was placed with a paternal aunt, and the case plan was amended to require Appellant to complete parent education services, psychological evaluation, and drug and alcohol assessments. Counsel was appointed for Appellant.

{¶ 6} On September 13, 2017, the trial court held an adjudication hearing and determined that D.T. is a neglected child. The court awarded temporary custody of D.T. to CCDCFS. Several months later, CCDCFS filed a motion to award legal custody of D.T. to the paternal aunt. The GAL supported the motion, noting that “[n]either parent has engaged in any case plan services,” D.T. is doing well with the paternal aunt, and the paternal aunt has “a full understanding that [the award of legal custody] may well mean that she will raise him into adulthood.”

{¶ 7} Approximately six months later, CCDCFS moved for permanent custody of D.T. CCDCFS alleged that mother had not completed case plan

requirements and had not visited D.T. since June 2017. CCDCFS further alleged that Appellant failed to complete required substance abuse and mental health evaluations, did not participate in a parenting program referral, and has not demonstrated an ability to provide for the basic needs of D.T.

{¶ 8} In a semiannual review conducted in August 2018, CCDCFS noted that D.T. was now living with a second paternal aunt due to a dispute with mother, and Appellant was required to “ensure that the child attends school on a daily basis.” Appellant completed the required drug and alcohol assessments, but CCDCFS recommended that he take a class to address his occasional marijuana use. Appellant had not yet completed the required parenting class.

{¶ 9} By January 2019, the second paternal aunt no longer wished to be considered as a custodian of D.T., and he was placed in therapeutic foster care. The GAL subsequently advised the court that mother still had not visited with D.T., and that Appellant “half-heartedly became involved in case plan services” and visits only “sporadically.” The GAL recommended that CCDCFS be awarded permanent custody of D.T. because “neither of his parents is willing to step up to the plate and do what they need to do to make reunification possible.”

{¶ 10} The matter proceeded to trial on February 26, 2019. At the start of the hearing, counsel for Appellant orally requested a continuance, stating that Appellant left the courtroom without explaining the reason for his departure. Counsel also asked the court to extend the temporary custody award in order for

Appellant to complete an additional parenting class. The court denied the motion for a continuance, and proceeded with the hearing.

{¶ 11} Social Worker Kera Korzekwa (“Korzekwa”) testified that she made a total of six substance abuse assessment referrals for mother, but mother did not show up for any of them. Mother also failed to complete any of the case plan services required of her, moved to a new address, and failed to provide her current address to CCDCFS.

{¶ 12} Korzekwa also testified that Appellant completed a substance abuse assessment, but failed to take a required two-week alcohol and drug education class to deal with his marijuana use. He has refused to provide urine screens, and completed but did not benefit from a parenting class. Appellant also refused to permit Korzekwa to see his home in order to assess it for safety and reunification purposes. Korzekwa opined that Appellant is not able to provide for D.T.’s daily needs, and that while living with Appellant, D.T. missed almost a month of school. During the time period when the second paternal aunt had custody of D.T., Appellant also moved into her home, but D.T. still continued to miss an “excessive amount of school [and on the days he attends, is] late almost every day.” According to Korzekwa, D.T. had “close to 15 unexcused absences since November 2018.” CCDCFS was not able to place D.T. with any other relatives.

{¶ 13} On March 6, 2019, the trial court awarded permanent custody of D.T. to CCDCFS, concluding:

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; 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; and the report of the [GAL], the Court finds by clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

Continuance of Hearing

{¶ 14} In the first assigned error, Appellant argues that the trial court erred in denying his motion for a continuance and proceeding with the trial on the merits.

{¶ 15} The decision to grant or deny a motion for a continuance rests in the sound discretion of the trial court. *In re S.B.*, 8th Dist. Cuyahoga Nos. 101159 and 101160, 2014-Ohio-4839, ¶ 43; *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} The trial court's decision must comport with due process, however. *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 21, citing *In re A.C.*, 6th Dist. Lucas No. L-10-1025, 2010-Ohio-4933, ¶ 128. In *Unger*, the Ohio Supreme Court noted that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the

trial judge at the time the request is denied.” *Id.* at 67. The following factors are to be considered:

The length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68.

{¶ 17} Under Juv.R. 23, “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.” Loc.R. 35(C) of the Cuyahoga County Court of Common Pleas, Juvenile Division, further provides:

No case will be continued on the day of trial or hearing except for good cause shown, which cause was not known to the party or counsel prior to the date of trial or hearing, and provided that the party and/or counsel have used diligence to be ready for trial and have notified or made diligent efforts to notify the opposing party or counsel as soon as he/she became aware of the necessity to request a postponement. This rule may not be waived by consent of counsel.

{¶ 18} Furthermore, even “a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding.” *In re S.V.K.*, 8th Dist. Cuyahoga No. 108038 2019-Ohio-3287, ¶ 12, quoting *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.).

{¶ 19} In this matter, we find no abuse of discretion in connection with the court’s denial of Appellant’s motion for a continuance. The motion did not comply

with the rules of court because it was filed on the day of trial. Appellant's counsel also failed to demonstrate that the continuance was imperative to secure fair treatment for the client because no explanation was offered in support of the continuance. Likewise, Appellant did not exhibit cooperation and communication with the court because he simply left the hearing without providing a reason to the court or his counsel. Moreover, at that point in the proceedings, D.T. had been in custody of CCDCFS for almost two years. Therefore, we conclude that the court's ruling did not violate Appellant's right to due process, and did not constitute an abuse of discretion.

{¶ 20} Accordingly, the first assigned error lacks merit.

Permanent Custody

{¶ 21} In the second assigned error, Appellant argues that the trial court erred in awarding permanent custody to CCDCFS, rather than extending temporary custody to give him additional time for reunification efforts.

{¶ 22} A juvenile court's termination of parental rights and award of permanent custody to an agency will not be reversed unless the judgment is unsupported by clear and convincing evidence. *In re I.S.*, 8th Dist. Cuyahoga No. 107472, 2019-Ohio-638, ¶ 13, citing *In re Dylan C.*, 121 Ohio App.3d 115, 121, 699 N.E.2d 107 (6th Dist.1997); *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48.

{¶ 23} R.C. 2151.414 sets forth a two-part analysis to be applied by a juvenile court in adjudicating a motion for permanent custody. Under this statute, the

juvenile court is authorized to grant permanent custody of a child to the agency if, after a hearing, the court determines, by clear and convincing evidence, that: (1) any of the five factors under R.C. 2151.414(B)(1)(a) to (e) exists; and (2) permanent custody is in the best interest of the child under the factors enumerated in R.C. 2151.414(D). *In re S.H.*, 8th Dist. Cuyahoga No. 108404, 2019-Ohio-3575, ¶ 26; *In re I.S.* at ¶ 14-15.

{¶ 24} Under the first part of permanent-custody analysis, the juvenile court is to determine if any of the following factors exists: whether the child has been in the temporary custody of public children services agencies or private child placing agencies for 12 or more months of a consecutive 22-month period (R.C. 2151.414(B)(1)(d)); whether the child is abandoned (R.C. 2151.414(B)(1)(b)); whether the child is orphaned and there are no relatives of the child who are able to take permanent custody (R.C. 2151.414(B)(1)(c)); whether another child of the parent has been adjudicated as abused, neglected, or dependent on three occasions (R.C. 2151.414(B)(1)(e)); or, when none of these factors apply, 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.” (R.C. 2151.414(B)(1)(a)). If the court determines at a hearing that one or more of the factors set forth in R.C. 2151.414(E) exist as to each of the child’s parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable period of time or should not be placed with either parent. *In re I.K.*, 8th Dist. Cuyahoga No. 96469, 2011-Ohio-4512, ¶ 8. The existence of any one of these factors is sufficient to determine that a

child cannot be placed with a parent within a reasonable period of time. *In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 10 (8th Dist.), citing *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996).

{¶ 25} In this matter, the trial court found that D.T. cannot be placed with either parent within a reasonable time or should not be placed with his parents for the following reasons:

Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.

The parent has 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.

{¶ 26} We find clear and convincing evidence on the record supporting the trial court's findings. Mother did not visit with D.T. since June 2017, did not complete case plan objectives, and did not provide her new address to CCDCFS after she moved. Appellant did not comply with requests for a urine drug screen and did not permit CCDCFS to view his home. Although Appellant completed a required parenting class, he did not benefit from it, and he had not completed another class by the day of trial. D.T. continued to miss significant amounts of school while in Appellant's care. In short, Appellant failed to remedy the conditions that caused D.T.'s removal. *Accord In re S.H.*, 2019-Ohio-3575, ¶ 32. The first part of the permanent-custody analysis is satisfied.

{¶ 27} Under the second part of the analysis, the best interest of the child, R.C. 2151.414(D)(1) mandates that the juvenile court consider all relevant factors, including, but not limited to, the following:

(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;

(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;

(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 * * *;

(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;

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

{¶ 28} Only one of the enumerated factors needs to be resolved in favor of the award of permanent custody. *In re S.C.*, 8th Dist. Cuyahoga No. 102350, 2015-Ohio-2410, ¶ 30. No element is greater weight than the rest. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

{¶ 29} Here, the court considered D.T.'s interactions and interrelationships, his custodial history, his need for a legally secure placement and whether that objective can be achieved without an award of permanent custody, and the report of the GAL, and determined that the grant of permanent custody to CCDCFS is in D.T.'s best interest. After thoroughly reviewing the record, we conclude that these findings

are supported by clear and convincing evidence. D.T. had an extensive custodial history during which mother failed to communicate with him, and Appellant failed to meet case plan objectives. Significantly, Appellant repeatedly failed to bring D.T. to school, failed to complete substance abuse class, refused to appear for drug screens, and failed to benefit from parenting class.

{¶ 30} Accordingly, the second assigned error lacks merit.

{¶ 31} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR