

[Cite as *In re D.P.*, 2019-Ohio-712.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107649

IN RE: D.P.

A Minor Child

[Appeal By Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 16915466

BEFORE: Jones, J., Blackmon, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: February 28, 2019

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Mother, appeals the trial court’s decision to grant permanent custody to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). For the reasons that follow, we affirm.

{¶2} In 2016, CCDCFS filed a complaint alleging D.P., d.o.b. September 12, 2012, and two siblings were dependent children, and that one of the siblings was also an abused child. Mother stipulated to an amended complaint, D.P. was found to be a dependent child, and was placed in the temporary custody of the agency. D.P.’s siblings were placed in the legal custody of relatives; they are not subjects of this appeal.

{¶3} In January 2018, CCDCFS moved to modify temporary custody to permanent custody. Mother’s cousin, T.G., moved for legal custody just prior to the hearing on permanent custody.

{¶4} In its initial complaint against Mother, the agency alleged that D.P. and his siblings were dependent children and D.P.’s older sister was also an abused child. The allegations against Mother stemmed from excessive discipline against all three of her children and physical violence against D.P.’s sister. CCDCFS also alleged that Mother was overwhelmed by her parental responsibilities.

{¶5} The agency caseworker, Shakeyah McKether (“McKether”), testified that when D.P. first came into agency custody, the agency developed a case plan with a permanency goal of reunification. Mother’s case plan included housing, mental health, anger management, and parenting. Father had minimal involvement with the agency and did not visit with D.P. while he was in agency custody. Father completed a parenting class but was not consistent with responding to agency requests. He did not contest permanent custody and is not a party to this appeal.

{¶6} According to McKether, Mother failed to demonstrate that she had learned the necessary skills to parent D.P. and failed to acknowledge or address D.P.'s severe behavioral issues, which included sexualized behaviors. Mother also did not follow through with recommended mental health services.

{¶7} Jacquella Lattimore ("Lattimore") from Catholic Charities testified that she monitors family visitation at the Hough Community Collaborative center ("the Center"). Lattimore monitored numerous visits between Mother, D.P., and, on occasion, D.P.'s siblings, and while some of the visits went well, many of the visits did not go well. Lattimore described two incidents where D.P. ran out of the Center and into the facility's busy parking lot. According to Lattimore, Mother failed to respond appropriately both times and had to be told by staff to chase after D.P.

{¶8} Lattimore described situations between Mother and D.P. where D.P. would have a tantrum or display other negative behaviors and Mother would get frustrated and yell. Lattimore testified that during the mother and son visits, "it escalates. So when she gets frustrated, he gets frustrated and the situation just escalates." According to Lattimore, Mother "just yells and screams. She don't know how to just be calm and talk calm to [D.P.]. She gets irate with him." Lattimore stated that the family was eventually told they could not return to the Hough center because Mother was unable to manage D.P.'s behavior and that presented a safety risk.

{¶9} The child's foster mother, G.B., testified that she had been D.P.'s foster parent since he entered agency custody. G.B. testified that life with D.P. was chaotic, he would use profanity "24/7," call her names, refuse to follow directions, and would constantly express sexualized thoughts. Prior to trial, G.B. informed the agency that she could no longer care for

D.P. According to G.B., she has a specialized foster home. In her 28 years as a foster parent, G.B. had asked on only one other occasion that a child be removed from her home for behavior issues.

{¶10} G.B. described one incident when she went to pick D.P. up from a visit with his mother. D.P. was in a tree, unable to get down, and was crying for his mother to assist him. Mother was present but failed to respond to D.P., so G.B. helped D.P. down from the tree.

{¶11} G.B. testified that five-year-old D.P. would constantly and “out of the blue” attempt to engage in age-inappropriate conversations with her about such topics as menstruation, pubic hair, and a woman’s private parts. G.B. described one situation where D.P. pulled his pants down in public and told his foster mother to “suck it,” referring to his penis. He also told his foster mother about dreams where he would hump different things. During his 18 months living with G.B., D.P. was suspended from two summer camps for inappropriate sexualized and violent behaviors.

{¶12} Jesse Ryder (“Ryder”) with The Village Network testified that she visited D.P.’s foster home twice a month as his clinical case manager to address his mental health needs. Ryder also observed sexualized behaviors and was working with D.P. to address his behavior. Ryder testified that D.P. would often behave inappropriately during their sessions. For example, D.P. asked Ryder if she had a boyfriend and if they had sex, commented on Ryder’s private parts, tried to kiss Ryder, and tried to look up her dress. During one session, D.P. went upstairs and came back down naked. Another time D.P. was caught “humping” a younger child. Ryder further testified that D.P. could be very verbally and physically aggressive, so she worked on problems with him by teaching him appropriate social and communication skills.

{¶13} The agency social worker, McKether, testified that Mother was unwilling to acknowledge or address D.P.'s inappropriate behavior. During one visit, D.P. was "humping" a toy. McKether brought this behavior to Mother's attention, but Mother did not respond to McKether or take any action. The social worker told Mother that the agency had performed an investigation due to D.P.'s sexualized behaviors and concluded that there were indications of sex abuse in D.P.'s history. When the social worker brought this to Mother's attention, Mother would not discuss the finding. According to the social worker, any time she broached the subject of D.P.'s concerning behavior, Mother became upset and refused to discuss her son's behavior. Mother also refused counseling services.

{¶14} From December 2017 through March 2018, D.P. had no visits with Mother and Ryder received no reports of sexualized behavior. The foster mother also noticed a decrease in D.P.'s inappropriate behavior during this time. Once visitation resumed, the behaviors returned. In March 2018, D.P. set a fire at a respite home.

{¶15} Mother completed a mental health assessment but did not follow through on recommendations for counseling. She told McKether three days before the hearing on permanent custody that she was starting mental health counseling.

{¶16} Mother's cousin, T.G., moved for legal custody of D.P. the week before the permanent custody hearing. Ana Faoniya, a CCDCFS kinship caregiver assessor, investigated T.G. for placement and recommended that T.G. not be approved. T.G.'s house lacked working utilities, had multiple safety hazards including an unsafe second story balcony, a broken window with shards of glass on the ground, hazardous chemicals in plain sight, and nonfunctioning smoke detectors.

{¶17} Guardian Ad Litem (“GAL”) James Schulz recommended that the court award permanent custody to the agency, opining that Mother could not be reunified with D.P. within a reasonable amount of time and that a grant of permanent custody was in D.P.’s best interest.

{¶18} At one point during the hearing, Mother’s attorney asked the trial court to appoint D.P. counsel. The trial court denied the request, finding that D.P. was not of the age and level of maturity to be able to properly express his wishes and, thus, he did not need an attorney to represent him separate from the GAL.

{¶19} The trial court awarded permanent custody to the agency and Mother timely appealed, raising the following assignments of error for our review:

I. The juvenile court erred to the prejudice of appellant and did not act in furtherance of the best interests of the child by failing to appoint an attorney to represent the child’s legal interest.

II. The decision by the juvenile court to award permanent custody to the Cuyahoga County Department of Children and Family Services was against the manifest weight of the evidence.

III. The trial court abused its discretion in finding an award of permanent custody was in the best interests of the child.

{¶20} In the first assignment of error, Mother contends that the trial court erred when it denied Mother’s request to appoint counsel to represent D.P.

{¶21} R.C. 2151.281 provides that when an attorney is appointed as GAL for a child, that attorney may also act as counsel for the child, absent a conflict of interest. *In re J.M.*, 8th Dist. Cuyahoga No. 104028, 2016-Ohio-7306, ¶ 24, citing *In re Janie M.*, 131 Ohio App.3d 637, 639, 723 N.E.2d 191 (6th Dist.1999).

{¶22} Pursuant to Sup.R. 48(D):

(7) When a court appoints an attorney to serve as both the [GAL] and attorney for a child, the attorney shall advocate for the child's best interest and the child's

wishes in accord with the Rules of Professional Conduct. Attorneys who are to serve as both [GAL] and attorney should be aware of Rule 3.7 of the Rules of Professional Conduct and act accordingly.

(8) When a [GAL] determines that a conflict exists between the child's best interest and the child's wishes, the [GAL] shall, at the earliest practical time, request in writing that the court promptly resolve the conflict by entering appropriate orders.

{¶23} Further guidance is found in Ohio Rules of Juvenile Procedure 4(C)(2), which provides:

If a person is serving as [GAL] and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of [GAL], the court shall appoint another person as [GAL] for the ward.

{¶24} In *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, ¶ 17, the Ohio Supreme Court held that trial courts should determine, 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 [GAL] being appointed to represent the child." Ohio courts have concluded that "the appointment of independent counsel is warranted when a child has 'repeatedly expressed a desire' to remain or be reunited with a parent but the child's [GAL] believes it is in the child's best interest that permanent custody of the child be granted to the state." *In re J.M.* at ¶ 27, citing *In re Hilyard*, 4th Dist. Vinton Nos. 05CA600 through 05CA609, 2006-Ohio-1965, ¶ 36. However, where the child lacks the maturity to make a decision of this importance, the court has the discretion to refrain from appointing independent counsel. *In re J.M.* at *id.*, citing *In re M.W.*, 8th Dist. Cuyahoga No. 83390, 2005-Ohio-1302, ¶ 15.

{¶25} After Mother’s counsel moved for independent counsel to represent D.P., the GAL stated, “I don’t believe this five-year-old has the level of maturity to be able to express properly his wishes * * * I think that the child’s history, his behaviors, and his level of maturity, I don’t think that he’s able to properly make that choice.” The trial court agreed and denied the motion.

{¶26} D.P. was only five years old at the time of the permanent custody hearing and had severe behavior issues. Although D.P. told his foster mother he would like to live with Mother, Ryder testified that he only mentioned Mother “occasionally.” The record does not reflect that D.P. “consistently and repeatedly” expressed a strong desire or had interests that were inconsistent with the GAL’s recommendations.

{¶27} In light of the above, the court acted within its discretion and properly determined that D.P. did not need independent counsel.

{¶28} The first assignment of error is overruled.

{¶29} In the second and third assignments of error, Mother contends that permanent custody was against the manifest weight of the evidence and was not in D.P.’s best interest.

{¶30} “An appellate court will not reverse a juvenile court’s termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48. “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.” *In re J.M.*, 8th Dist. Cuyahoga No. 104028, 2016-Ohio-7306, at 43, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). A reviewing court is required to examine the record to determine whether the trier of fact had sufficient evidence to satisfy the

clear and convincing standard. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24. “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence.” *In re S.D.*, 8th Dist. Cuyahoga Nos. 99410, 99411, and 99412, 2013-Ohio-3535, ¶ 13, citing *In re B.M.*, 8th Dist. Cuyahoga No. 96214, 2011-Ohio-5176.

{¶31} R.C. 2151.414(B) authorizes a court to grant permanent custody of a child to an agency if the court determines after a hearing and by clear and convincing evidence that: (1) the existence of any one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d); and (2) granting permanent custody to the agency is in the best interest of the child.

{¶32} As to the first factor, CCDCFS asserts that the award of permanent custody was authorized under R.C. 2151.414(B)(1)(d), which states:

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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

{¶33} As to the second factor, R.C. 2151.414(D)(1) directs that the trial court “shall 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 [GAL], 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(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.

{¶34} In conducting a best interest analysis under R.C. 2151.414(D), "[t]he court must consider all of the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others pursuant to the statute." *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

{¶35} Here, D.P. had been in the custody of the agency for 12 or more months of a consecutive 22-month period. The evidence shows that reasonable efforts were made to reunify D.P. with Mother through various programs and specific goals as set forth in the case plan. Mother had a mental health assessment but did not follow the assessment's recommendation to receive mental health counseling until the eve of the permanent custody hearing. Mother also completed anger management and parenting classes. The record shows, however, that Mother did not benefit from these classes and remained unable to appropriately parent D.P. or respond to his behaviors.

{¶36} Lattimore from the Center testified that when D.P. displayed negative behaviors or had a tantrum, Mother was unable to redirect him. Instead, Mother would become frustrated and yell at D.P., which would escalate the situation. In addition, D.P. ran out of the Center on two separate occasions and Mother failed to go after him. Center staff had to intervene and go after D.P. The foster mother testified to an incident where D.P. was stuck in a tree and crying for Mother, but Mother did not help him and the foster mother had to intervene to help D.P.

{¶37} Mother also refused to acknowledge or address D.P.'s serious behavior problems. The foster mother and D.P.'s therapist, Ryder, testified that D.P. would make inappropriate comments about female private parts, inappropriately exposed himself to his foster mother and therapist, and, on one occasion, asked his foster mother to "suck" his penis. D.P. was suspended from two summer camps for inappropriate behavior, was observed "humping" various objects and toys, and was caught engaging in inappropriate behavior with a younger child. Mother refused to acknowledge D.P.'s behavior when the case worker brought it to her attention and ignored the behavior in her (Mother's) presence. Mother was also unwilling to discuss the results of a sex abuse investigation the agency completed on D.P. that found indications of sexual abuse in D.P.'s past.

{¶38} Mother claims that she could provide for her child's basic needs and is committed to bringing him home but, as set forth above, Mother was unable to address D.P.'s behavioral issues during visits without exacerbating the problem and flatly refused to acknowledge his sexualized behaviors. While Mother may be able to meet D.P.'s basic needs such as food, clothing, and shelter, the evidence showed that Mother was unable to deal with D.P.'s specialized needs.

{¶39} We are aware that Mother’s cousin filed a motion for legal custody. In considering a permanent custody motion, the trial court has discretion to award legal custody to either parent or to any other person who files a motion requesting legal custody pursuant to R.C. 2151.353(A)(3). However, R.C. 2151.414(D) does not make the availability of a placement that would not require a termination of parenting rights — an all-controlling factor, and does not even require the court to weigh that factor more heavily than other factors. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, at ¶ 63. Further, a juvenile court need not determine by clear and convincing evidence that “termination of appellant’s parental rights was not only a necessary option, but also the only option.” *Id.* at ¶ 64. Rather, the statute “requires the court to find the best option for the [child].” *Id.*

{¶40} In considering a disposition of legal custody, there is no specific test or set of criteria that must be followed in determining what is in a child’s best interest. *In re D.T.*, 8th Dist. Cuyahoga Nos. 100970 and 100971, 2014-Ohio-4818, ¶ 20. But the R.C. 2151.414(D) best interest factors are instructive. *Id.* The trial court’s decision to grant or deny a motion for legal custody is within the broad discretion of the trial court. *In re D.T.* at ¶ 22.

{¶41} The record establishes that the cousin’s (T.G.) house failed its safety inspection. The issues with the house included a lack of working utilities, broken glass left out in the open, a lack of working smoke alarms, general uncleanliness and clutter, a broken window, improperly stored hazardous materials, and an unsafe second story balcony. Moreover, T.G. had only seen D.P. five times in his life and had no training to address his behavioral issues.

{¶42} A relative’s willingness to provide care for a child does not alter what a trial court considers in determining whether to grant permanent custody. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 11. A trial court need not favor a relative if, after

considering the required factors, it determines that permanent custody is in a child's best interest.

Id.

{¶43} Upon careful consideration of the record, we conclude that there is competent, credible, clear and convincing evidence to support the trial court's termination of parental rights and award of permanent custody to CCDCFS. The trial court made the appropriate considerations in this case and found by clear and convincing evidence that, although reasonable efforts were made toward reunification, D.P. cannot and should not be placed with either of his parents, reunification is not in the child's best interest, and that it is in the child's best interest to be placed in the permanent custody of CCDCFS. Moreover, in light of the clear and convincing evidence that established that D.P. had been in the continuous custody of CCDCFS since December 2016, and that termination of parental rights and the award of permanent custody to CCDCFS is in his best interest, the trial court's decision is not against the manifest weight of the evidence.

{¶44} The second and third assignments of error are overruled.

{¶45} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR