

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE S.S., ET AL.

Minor Children

[Appeal by Mother]

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No. 109356

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: May 21, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD-17913904 and AD-17913905

Appearances:

Mark A. Stanton, Cuyahoga County Public Defender, and
Britta M. Barthol, Assistant Public Defender, *for*
appellant.

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Ben Eilers, Assistant Prosecuting Attorney,
for appellee.

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant-mother (“Appellant”) appeals from the juvenile court’s decision that awarded permanent custody of her children to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). Appellant argues that the trial court erred when it determined that a grant of permanent custody to CCDCFS

was in the best interest of the children. For the following reasons, we affirm the decision of the trial court.

Facts of the case

{¶ 2} On September 13, 2017, CCDCFS filed a complaint alleging that S.S. and her sibling, H.S., — Appellant’s two daughters, ages 14 and 12 respectively — were neglected and dependent children. The complaint included a dispositional prayer for temporary custody. CCDCFS had been made aware that neither S.S. nor H.S. had attended school since it began in early August 2017. CCDCFS was also concerned with regards to Appellant’s substance abuse. The court committed S.S. and H.S. to emergency predispositional custody of CCDCFS on October 26, 2017, pending the outcome of the dispositional hearing.

{¶ 3} On November 14, 2017, the court held an adjudicatory hearing. Appellant stipulated to her needing assistance with her parenting decisions, that she had failed to complete a recommended outpatient substance abuse program, and that her youngest child had been previously removed from her home because of substance abuse, as well as her inability to care for his medical issues. In addition, Appellant stipulated to the finding of neglect and dependency. According to our record, the court and all parties involved attempted to schedule a dispositional hearing before the end of 2017. However, the dispositional hearing was eventually set for April 2018.

{¶ 4} On April 3, 2018, the court held a dispositional hearing. At that time, Appellant agreed to temporary custody to CCDCFS. The court granted temporary custody and approved a case plan with a goal of reunification.

{¶ 5} As detailed by the case plan, the children were initially removed for educational neglect and Appellant's substance abuse. As a result, the case plan included parenting classes aimed at increasing empathy and accountability. The plan included requirements for sobriety screens, and mental health care was added as a result of Appellant's behavior during visits with her children. Finally, Appellant was to show that she could maintain safe and stable housing.

{¶ 6} On January 4, 2019, CCDCFS filed a motion to modify to permanent custody. The court heard the motions and conducted a trial over three separate days: October 15, 2019, November 4, 2019, and November 13, 2019.

The trial

{¶ 7} CCDCFS called only one witness, the assigned social worker Ms. Ebony Wright ("Wright").

{¶ 8} On October 15, 2019, the court heard testimony from the assigned Wright. Wright testified that Appellant had only begun actively participating with her case plan as of August 2019, and that she had been noncompliant for the majority of the case.

{¶ 9} Wright began her testimony with a discussion of Appellant's progress as to her substance abuse. Wright testified that Appellant had provided a drug screen in October 2019, right before the trial began, but that it had been "over almost

a year of not being able to obtain a urine screen for [Appellant].” Tr. 95. Since 2017, Appellant had only complied with three random drug screens.

{¶ 10} At this point the court interjected to ask Wright a few questions:

THE COURT: Just so I’m clear, did you say she did one last week?

THE WITNESS: Last week, yes.

THE COURT: Okay. And then the one before that was in the spring or summer of 2018?

THE WITNESS: Yes, over a year ago.

Tr. 95.

{¶ 11} Wright then testified that Appellant had not been consistent with the mental care aspects of the case plan either. CCDCFS had made a mental health care recommendation to Appellant in the spring of 2018, and added mental health care to her plan after observing “erratic behavior” during visits. However, Appellant did not engage with consistent care until August 2019.

{¶ 12} Wright also testified that Appellant and her daughters were “well-bonded” and that both girls wanted to live with Appellant.

{¶ 13} Finally, Wright testified as to the lack of stability she believed Appellant provided. Appellant was inconsistent with her weekly scheduled visits with her daughters. Appellant would sometimes no-show without informing her daughters or CCDCFS. Wright also testified that she did not believe Appellant had provided a stable environment for her children, because she had moved four times during the life of the case.

{¶ 14} Appellant also lacks ties with family members that could help raise the children or have custody. The girls' father is not involved in their lives and CCDCFS was unable to contact him. Appellant suggested to CCDCFS that her mother could care for the children, but CCDCFS did not consider her a viable placement option; the mother did not have her own home and lived with Appellant.

{¶ 15} Following Wright's testimony, Appellant supplied three witnesses over the course of the trial. First, Appellant's therapist testified. She confirmed that Appellant had begun counseling with her for a single appointment in May 2019, but had not returned consistently until August 2019.

{¶ 16} On November 4, 2019, the children's guardian ad litem ("GAL") testified. The GAL made clear that Appellant loved her children very much, and that the children wanted to be returned to her care. Despite that, she still recommended that permanent custody be granted to CCDCFS. She further testified as to the lack of stability provided by Appellant as well as her inconsistent commitment to the case plan.

{¶ 17} Appellant called her "nurturing parenting coach" to testify as well. The coach stated that Appellant had been referred to her program in 2017 but had not completed the program. She had returned to the program around 16 weeks before the trial, completing the 12-week program in September 2019, but only showed minimal improvement from her preprogrammed evaluation.

{¶ 18} The final day of trial on November 13, 2019, consisted of closing arguments.

{¶ 19} On December 6, 2019, the court, finding a lack of commitment to the children, granted permanent custody to CCDCFS. This appeal follows. Appellant presents a single assignment of error.

Assignment of Error

The trial court abused its discretion when it awarded permanent custody to CCDCFS as the decision is against the weight of the evidence and is not supported by clear and convincing evidence.

Law and Analysis

{¶ 20} We recognize that a parent has a “fundamental liberty interest in the care, custody and management” of his or her child. *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990), quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). We also recognize that the right to raise one’s own child is “an essential and basic civil right.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67, quoting *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). However, this right is not absolute. It is “always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.” *In re L.D.*, 2017-Ohio-1037, 86 N.E.3d 1012, ¶ 29 (8th Dist.), quoting *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979).

{¶ 21} Because termination of parental rights is “the family law equivalent of the death penalty in a criminal case,” it is “an alternative [of] last resort.” *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14; *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21. It is, however, “sanctioned when

necessary for the welfare of a child.” *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 7, citing *In re Wise*, 96 Ohio App.3d 619, 624, 645 N.E.2d 812 (9th Dist.1994). Where parental rights are terminated, the goal is to create “a more stable life” for dependent children and to “facilitate adoption to foster permanency for children.” *In re N.B.* at ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, *5 (Aug. 1, 1986).

Permanent Custody

{¶ 22} CCDCFS may obtain permanent custody by first obtaining temporary custody of the child and then filing a motion for permanent custody under R.C. 2151.413. *See In re M.E.*, 8th Dist. Cuyahoga No. 86274, 2006-Ohio-1837. That process occurred here.

{¶ 23} When CCDCFS files a permanent custody motion under R.C. 2151.413 after obtaining temporary custody, the guidelines and procedures set forth under R.C. 2151.414 apply.

{¶ 24} Division (B) of R.C. 2151.414 sets forth a two-prong analysis to be applied by a juvenile court. Pursuant to this division, before a trial court can terminate parental rights and grant permanent custody to CCDCFS, the court must find 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 (e), and 2) that granting permanent custody to CCDCFS is in the best interest of the child.

{¶ 25} Clear and convincing evidence is defined as:

that measure or degree of proof which is more than a mere “preponderance of the evidence” but not to the extent of such certainty required “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

In re Awkal, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987).

{¶ 26} Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24, citing *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). Judgments supported by 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. *Id.* citing *id.* With these standards in mind we turn to the two-pronged analysis required by R.C. 2151.414(B).

The first prong

{¶ 27} First, the court, after a hearing, must determine whether, by clear and convincing evidence, any of the following factors apply:

(a) the child is not abandoned or orphaned, but the child cannot be placed with either parent within a reasonable time or should not be placed with the child’s parents; (b) the child is abandoned; (c) the child is orphaned, and there are no relatives of the child who are able to take permanent custody; (d) the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for 12 or more months of a consecutive 22-month period; or (e) the child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated

an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

R.C. 2151.414(B)(1)(a)-(e). *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, ¶ 41.

{¶ 28} Only one of the factors must be present for the first prong of the permanent custody analysis to be satisfied. *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 28. In this instance, the court determined that R.C. 2151.414(B)(1)(a) was satisfied.

{¶ 29} When determining whether the child cannot be placed with either parent within a reasonable time or should not be placed with the parents, courts look to the 16 factors listed in R.C. 2151.414(E). *In re M.B.*, 8th Dist. Cuyahoga No. 109187, 2020-Ohio-1391. If both parents meet one or more of the listed factors, then the court is obligated to find that R.C. 2151.414(B)(1)(a) applies. *Id.* at ¶ 22. Parents do not need to both meet the same factors; as long as each parent meets a factor individually then R.C. 2151.414(B)(1)(a) is satisfied.

{¶ 30} Here, the court found that three factors applied:

There is evidence that one or more of the factors in Division E of this section exist 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.

(1) 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 parent remedy the problems that initially caused the child to be removed from the parents, the parents have failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the home.

(4) 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.

(10) The father has abandoned the children. He has failed to visit or communicate with the children for the two years they have been in CCDCFS custody.

{¶ 31} In this instance, per the first factor, the court found by clear and convincing evidence that Appellant had failed to substantially remedy the conditions requiring the removal of her children. The court found that Appellant had failed to demonstrate her continued sobriety and that her completion and performance at her parenting classes did not convince the court that she would ensure the children would attend school.

{¶ 32} As to the fourth factor, the court found that her housing situation was not stable and that “the mother’s inconsistency in visitation over the two year course of this case shows a lack of commitment to the children.”

{¶ 33} Appellant argues that she cannot prove that she would ensure the children attend school until she has been given custody. However, the court found by clear and convincing evidence that Appellant had not addressed her substance abuse issues, her parenting plan objectives, or her mental health issues. As a result, there was evidence that Appellant would not change her behavior.

{¶ 34} For these reasons, we find that the first prong of R.C. 2151.414(B) has been satisfied by clear and convincing evidence. We now turn to the trial court’s conclusion that permanent custody for the agency was in the children’s best interests.

The second prong: Best Interests Determination

{¶ 35} Appellant argues that the court's best interests determination is not supported by clear and convincing evidence, and the court abused its discretion in making a finding against the manifest weight of the evidence. Cognizant of the heavy burden Appellant must overcome, we affirm the trial court's decision for the following reasons.

{¶ 36} We review a trial court's determination of a child's best interests under R.C. 2151.414(D) for abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 37} In determining the best interests of a child at a hearing held pursuant to R.C. 2151.414(A)(1) or for the purposes of 2151.353(A)(4), the juvenile court must 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.

R.C. 2151.414(D)(1).

{¶ 38} Although a trial court is required to consider each relevant factor under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, “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. We have previously stated that only one of these enumerated factors needs to be resolved in favor of the award of permanent custody. *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000), citing *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (3d Dist.1993).

{¶ 39} In this case, the court clearly considered all relevant factors, as well as additional factors listed in R.C. 2151.414(E):

In considering the best interests of the child, the Court considered the following relevant factors pursuant to 2151.414(D)(1): the interaction and interrelationship of the child with her parents, siblings, relatives and foster parents; the wishes of the child; the custodial history of the child, including whether she has been in temporary custody of a public child services agency or private child placing agency under one or more spate orders of disposition for twelve or more months of a consecutive twenty-two month period; her need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of Permanent Custody; and whether any of the factors in Division (E) of Section 2151.414 apply in relation to the parents and child.

{¶ 40} A child’s best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). The court did not

specifically tie its analysis to the enumerated factors, instead providing more general, yet still comprehensive, analysis. It is clear that the court focused on stability in particular; it is equally clear from the court's findings that the court did not find that Appellant could provide permanent stability.

{¶ 41} The court provided its analysis as to Appellant and the children's best interests as follows:

[t]he evidence shows that the mother has not completed her case plan. There has been no established sobriety date. From the spring or summer of 2018 through October of 2019, the mother never provided a random urine screen as requested by [CCDCFS]. The mother did not comply with any mental health services until August of 2019, almost two years after the children had been in custody. And based on the testimony provided by the mother's witness, the Court cannot say that this portion of the case plan has been completed.

* * *

The mother completed a parenting class in September of 2019, several months after this matter was first set for trial. The witness who testified regarding the parenting class stated that she had never seen the mother interact with the children over eight visits. She further testified that the mother got some information out of it. The Court cannot say the completion of knowledge-based parenting class shows that the mother can or will insure that the children will attend school every day or that mother will meet the children's needs at all times. This is of particular concern given the children's issues at school and issues with their own mental health.

Finally, the Court finds that the mother's inconsistency in visitation over the two year course of this case shows a lack of commitment to the children. The GAL for the children references these issues in her report, and the social worker testified to this concern which was an issue as recently as this summer. When the mother would miss visits without calling to cancel the visits, there was testimony that this was very upsetting to the children and the mother knew that this was upsetting to the children. The father has never visited.

Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child. There are no Motions for Legal Custody of the child to an extended family member pending before this Court.

The guardian Ad Litem recommends that Permanent Custody is in the best interest of the child.

A sibling of the children was in the Legal Custody of his father.

* * *

The Court finds that the continued residence in the home or return to the home of mother will be contrary to [S.S. and H.S.'s] best interest.

{¶ 42} In this instance, the trial court, in illustrating its findings, focused on the need to provide a legally secure permanent placement for the children and whether that stability was possible with Appellant's custody, consistent with R.C. 2151.414(D)(1)(d). The court's conclusions that Appellant is unable to provide permanent stability are supported by clear and convincing evidence.

{¶ 43} Based on the testimony provided, Appellant has not met her requirements under the case plan and has not proven that she can provide a permanently stable environment for her children. Appellant has not been able to consistently prove sobriety; provide consistent housing; consistently visit her children; demonstrate that she has a significant familial support system; or demonstrate that she will consistently seek the help she needs in order to ensure both children's needs are met.

{¶ 44} Based on this record, we do not find that the trial court abused its discretion in determining that permanent custody was in the children's best interests.

{¶ 45} Accordingly, we affirm the decision of the court to grant permanent custody to CCDCFS.

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.

MARY EILEEN KILBANE, JUDGE

ANITA LASTER MAYS, P.J., and
LARRY A. JONES, SR., J., CONCUR