

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:	:	
M. K.,	:	
(V. H.,	:	No. 09AP-1141 (C.P.C. No. 07JU-02-2406)
Appellant).	:	(REGULAR CALENDAR)
In the Matter of:	:	
T. R.,	:	
(V. H.,	:	No. 09AP-1142 (C.P.C. No. 07JU-02-2407)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 18, 2010

John T. Ryerson, for appellant

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Services

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appellees M.K. and T.R.

APPEALS from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

CONNOR, J.

{¶1} Appellant-mother, V.H. ("mother"), appeals from two separate decisions of
the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile

Branch, which terminated her parental rights and awarded permanent custody of her two minor children, M.K. and T.R., to appellee, Franklin County Children Services ("FCCS" or "agency"). For the following reasons, we affirm the decisions of the trial court.

{¶2} According to the record, the established father of M.K. is J.K., while the alleged father of T.R. is W.R. This matter arose on February 16, 2007, when FCCS filed complaints alleging the children were abused, neglected, and dependent based upon mother's hospitalization after an alleged overdose on prescription medications. According to the complaints, mother admitted to being dependent on Percocet, Vicodin, and Xanax, in addition to having used cocaine and ecstasy. There were also allegations pertaining to a history of domestic violence and improper living conditions. Mother initially opened cases voluntarily with FCCS but thereafter became uncooperative.

{¶3} On February 20, 2007, the trial court granted a temporary order of custody to FCCS. The children were placed in foster care at the time. On March 2, 2007, M.K.'s paternal grandparents, or J.K.'s parents, came forward and agreed to allow both children to reside with them. On April 23, 2007, however, the children were removed at the request of M.K.'s paternal grandparents. As a result, the children went back into foster care.

{¶4} On May 9, 2007, the trial court conducted adjudicatory hearings on the dependency causes of action. On May 17, 2007, the trial court adjudicated the children as dependent, awarded temporary court commitments ("TCC") to FCCS, and approved and adopted case plans. The case plans had goals of reunification and required mother to complete parenting classes, visit the children for at least one hour per week, and obtain

independent housing and a legal source of income. Further, the case plans also required mother to complete drug treatment and pass random drug screens.

{¶5} On August 17, 2007, W.R. filed a motion for legal custody even though he had never established paternity. A hearing on W.R.'s motion was originally set for September 27, 2007. The hearing was continued twice before it came before the court on January 17, 2008. A magistrate presided over the hearing and issued a decision, which recommended a dismissal of W.R.'s motion based upon his failure to prosecute it. The court adopted the magistrate's decision without any objection being filed by W.R. In this same entry, the trial court granted FCCS's first request for an extension of TCC.

{¶6} The children remained in foster care until January 2008, when M.K.'s paternal grandparents again requested that both children be placed with them. The children resided with M.K.'s paternal grandparents from January until April 30, 2008, when M.K.'s paternal grandparents again requested they be removed. As a result, the children were placed back into foster care where they have remained since. The children have resided with the same foster family since their placement on April 30, 2008.

{¶7} On September 4, 2008, B.R., who is W.R.'s mother and consequently T.R.'s alleged paternal grandmother, filed a motion to intervene and motion for legal custody of T.R. These motions, along with the FCCS's motion for a second extension of TCC, were heard by a magistrate on October 7, 2008. The magistrate issued a decision recommending an extension to TCC, in addition to a dismissal of B.R.'s motions because she failed to appear at the October 7, 2008 hearing. The trial court adopted the magistrate's decision to extend TCC and dismiss B.R.'s motion. B.R. never filed objections to the magistrate's decision.

{¶8} On March 2, 2009, FCCS filed motions for permanent court commitment ("PCC") with regard to T.R. and M.K. The hearing on the motions was scheduled for April 2, 2009. Mother filed a motion for continuance in order for her to obtain counsel. The trial court granted mother's motion and continued the matter to May 5, 2009. Both parties then requested the matter be continued, which the court granted and set the hearing for October 5, 2009.

{¶9} In the meantime, B.R. had filed a second set of motions to intervene and for custody of T.R. On April 3, 2009, the trial court dismissed B.R.'s second set of motions because she was not a party to the action. Nevertheless, B.R. filed a third motion for legal custody on May 5, 2009. The trial court dismissed B.R.'s third set of motions because she was not a party to the action and her motions were merely duplicative of her prior motions, which had previously been denied.

{¶10} On June 2, 2009, mother was incarcerated after being convicted of the offense of receiving stolen property. She anticipated being released on December 20, 2009. However, her release date was actually set for February 12, 2010. The discrepancy amongst the release dates was apparently based upon an issue with jail-time credit. As a result of these circumstances, mother filed a motion to continue the PCC hearing on the morning of trial. She sought a continuance in order to enable her more time to show progress towards her case plan.

{¶11} The hearing on the PCC motions came before the court on October 5, 2009. No appearance was made by J.K. He was incarcerated and had not participated in the case plan with the exception of possibly completing a parenting class. As for W.R.,

no appearance was made at the October 5, 2009 hearing. He was also incarcerated and had not participated in the case plan.

{¶12} The court heard testimony and considered the merits of the PCC motions. On November 9, 2009, the trial court issued decisions granting FCCS's PCC motions. Mother has timely appealed and raises the following assignments of error:

- I. The trial court erred in granting the Motion of Franklin County Childrens [sic] Services for Permanent Custody, as the trial court should have granted the request for a continuance of the trial for a two and one-half month period.
- II. The trial court erred in failing to allow paternal grandmother to pursue her motion for legal custody for [T.R.] and to participate in the trial.
- III. The trial court erred in applying the older version of the permanent custody statute, 2151.414(D), in determining the best interest of the children in this matter.

Notably absent from mother's assignments of error is any argument that the trial court's decision was against the manifest weight of the evidence and therefore not in the children's best interest. Instead, mother's three assignments of error all challenge the procedure through which the trial court issued its decisions.

{¶13} In mother's first assignment of error, she argues the trial court erred when it denied her request for a continuance. In support, she references due process concerns and Ohio Juv.R. 23, which provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties."

{¶14} The decision whether to grant or deny a continuance is within the sound discretion of the trial court and should not be reversed on appeal absent an abuse of that discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. In determining whether the trial court abused its discretion we weigh the potential prejudice to the movant against the trial

court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. *Id.* "There 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." *Unger v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841.

In evaluating a motion for a continuance, a court should note, *inter alia*: 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.

Unger at 67-68.

{¶15} Regarding the circumstances of the instant matter, again, FCCS filed its PCC motions on March 2, 2009. The final hearing was originally scheduled for April 2, 2009. However, the hearing was continued once at the request of mother. The hearing was again continued at the request of all of the parties. As of October 5, 2009, the PCC motions had been pending for seven months. Nevertheless, on the morning of the final hearing, mother sought another continuance for a period of ten weeks, or until her anticipated release from incarceration. Mother's main contention was that her inability to fulfill the case plan requirements was attributable to her incarceration from June 2 through October 5, 2009. She failed to explain why she was unable to meet the requirements during the near two years when she was not incarcerated. She similarly failed to explain how this continuance would have any bearing on many portions of her case plan.

Instead, mother testified that, upon her release from incarceration, she would likely have permission to maintain a residence and hold down employment with a friend in Waverly, Ohio.

{¶16} Additionally, we note that mother's request for a continuance came on the morning of the final hearing, despite Loc.R. 2 of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which provides that "[n]o case will be continued on the day of hearing except for good cause shown." See also *In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622, ¶7. For some unexplained reason, mother waited until the morning of the final hearing to seek a continuance. She did this in spite of the fact that she had been incarcerated since June 2, 2009 and was fully aware that her earliest potential release date was December 20, 2009. Furthermore, FCCS and the guardian ad litem both opposed mother's request in the trial court. They noted that the matter had already been continued in the past. They also indicated that they were prepared to present witnesses and proceed with the prosecution of the case. They argued that mother had failed to complete substantial portions of her case plan during the 31 months from the date temporary custody was first granted. They noted that during most of the time of these proceedings, mother was not incarcerated. They argued that her incarceration was not the cause of her failure to meet the case plan requirements. As a result, they classified it as merely conjecture for mother to argue that she would finally be able to meet the requirements of the case plan upon her release.

{¶17} While mother's intentions to fulfill the case plan requirements upon her release were admirable, we cannot find that the trial court abused its discretion in denying

her request for a continuance in these circumstances. As a result, we overrule mother's first assignment of error.

{¶18} In mother's second assignment of error, she argues that the trial court erred when it refused to permit B.R. to pursue custody. In support, mother cites the current version of R.C. 2151.414 and argues that the statute provides special standing to relatives in PCC determinations.

{¶19} Mother's second assignment of error asserts B.R.'s purported statutory rights to pursue custody as a relative. We have consistently questioned whether a parent has standing to raise arguments on behalf of a non-party. See *In re [A.C.]*, 10th Dist. No. 03AP-348, 2003-Ohio-5344, ¶7; *In re W.A.*, 10th Dist. No. 06AP-485, ¶20, discretionary appeal not allowed, 112 Ohio St.3d 1422, 2006-Ohio-6712 (table); *In re SW*, 10th Dist. No. 05AP-1368, 2006-Ohio-2958, ¶30, writ of certiorari denied in *Z.W. v. Franklin Cty. Children Servs.* (2007), 549 U.S. 1183, 127 S.Ct. 1152. Nevertheless, even if mother did have standing to raise this challenge, we find that the substance of mother's argument lacks merit. Mother argues that R.C. 2151.414(D)(2)(d) "means that if a relative has come forward or has been identified as a possible placement for a child, prior to the 'dispositional' hearing, the granting of permanent custody is not in the best interest of a child or children." (Appellant's brief, at 12.)

{¶20} The same argument was recently rejected by the Second Appellate District. See *In re K.H.*, 2d Dist. No. 2009-CA-80, 2010-Ohio-1609. In that case, the court referenced R.C. 2151.414(D)(2) and noted that permanent custody is in a child's best interest if all of the four factors enumerated therein are found. *Id.* at ¶52. The court then noted that the mother argued that the inverse should also be true. *Id.* at ¶53.

Specifically, the court classified the mother's argument as follows: "If it is the case that not all of the enumerated facts in division (D)(2) exist, i.e., if at least one of those enumerated facts does not exist, then the statute establishes that an award of permanent custody to the public agency is not in the child's best interest." *Id.* at ¶53. In response, the court held that the mother's argument was not a proper construction of the statute. *Id.* at ¶54-55. The court noted that the mother's construction would obviate any use of (D)(1) altogether. *Id.* at ¶53. Under the proposed construction, all that would be required in reaching a best interest determination would be to analyze the factors enumerated in (D)(2). *Id.* If the (D)(2) factors were met, then permanent custody would be in the best interest of the child; if not, then permanent custody could not be in the child's best interest. *Id.* Further, the court noted that a simple motion for custody filed by a relative or interested party would act as a complete bar to any motion for permanent custody, regardless of "how clearly unsuitable the 'relative or other interested party' might be." *Id.* at ¶55.

{¶21} In response to the proposed construction, the court held:

As we understand division (D)(2), if all of the facts enumerated therein apply, then an award of permanent custody is in the child's best interest, and the trial court need not perform the weighing specified in division (D)(1). But if it is not the case that all of the facts enumerated in division (D)(2) exist; that is, if any one of the facts enumerated in division (D)(2) does not exist, then the trial court must proceed to the weighing of factors set forth in division (D)(1) to determine the child's best interest.

* * *

As we construe it, division (D)(2) provides that if: (1) the trial court has determined, by clear and convincing evidence, that the child cannot be placed with either parent within a reasonable time, or should not be placed with either parent; *and* (2) the child has been in the agency's custody for two

years or longer and no longer qualifies for temporary custody; *and* (3) the child does not meet the requirements for a planned permanent living arrangement; *and* (4) no one has come forward to seek legal custody of the child, then, in that case, where there is no practical alternative to a permanent placement by the agency, the General Assembly has made a legislative determination that it is not in the best interest of the child to remain in legal limbo – the agency should be allowed to move forward with a permanent placement for that child. But if any one of those four conditions is not satisfied – e.g., someone has come forward, like the [great] aunt in this case, to seek legal custody of the child – then the trial court should perform the weighing of factors set forth in division (D)(1) and make a judicial determination of the child's best interest.

Id. at ¶54-56.

{¶22} Therefore, the Second Appellate District found division (D)(2) to be an alternative to using (D)(1) as a means of reaching the best interest determination, rather than a means of superseding (D)(1) by statute. We agree with this well reasoned analysis. As a result, we overrule mother's second assignment of error.

{¶23} In her third assignment of error, mother argues that the trial court erred by referencing the best interest factors enumerated in a prior version of R.C. 2151.414. Specifically, mother notes that the trial court cited the best interest factors as R.C. 2151.414(D)(1), (D)(2), (D)(3), (D)(4), and (D)(5). Under the current version of the statute, however, the best interest factors are enumerated as R.C. 2151.414(D)(1)(a), (D)(1)(b), (D)(1)(c), (D)(1)(d), and (D)(1)(e). Mother makes no argument about the substantive impact of this error but instead argues that it is unclear whether the trial court applied the statute correctly.

{¶24} After comparing the two versions of the statute, we note that no substantive changes were made to the best interest factors set forth in the respective statutes. Instead, the Ohio General Assembly merely relabeled the factors as different subsections

in the current version of R.C. 2151.414. Although the trial court clearly cited the prior version of the statute and therefore mislabeled the best interest factors in its decision, this error had no substantive impact on the court's decision. Indeed, mother makes no contention to the contrary. After reviewing the trial court's decisions, we find that the trial court considered the proper substantive issues. Accordingly, under these circumstances, the error in citing the prior version of R.C. 2151.414 was harmless. As a result, we overrule mother's third assignment of error.

{¶25} Having overruled each of mother's three assignments of error, we affirm the decisions of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating mother's parental rights and awarding permanent custody of M.K. and T.R. to Franklin County Children Services.

Judgments affirmed.

BROWN and KLATT, JJ., concur.
