

[Cite as *In re K. M.*, 2004-Ohio-4152.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN RE: K.M. : CASE NO. CA2004-02-052

: O P I N I O N

: 8/9/2004

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APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS,
JUVENILE DIVISION
Case No. JN2001-0178

Dawn S. Garrett, 7865 Paragon Road, Suite 107, Centerville, OH
45459-4027, for appellant

Robin N. Piper, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515, for appellee

Diana Songer, 29 N. "D" Street, Hamilton, OH 45011, guardian ad
litem

POWELL, J.

{¶1} Appellant, Kristina Rhodus, appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, granting permanent custody of her daughter to appellee, Butler County Children Services Board ("BCCSB"). We affirm the decision of the trial court.

{¶2} On March 6, 2001, BCCSB filed a complaint alleging that K.M. was a neglected and dependent child. At the time BCCSB filed this complaint, K.M. was slightly more than a year old. BCCSB requested that the juvenile court grant BCCSB custody of K.M. due to appellant's inability to provide for the infant. Appellant did not have a permanent job or housing. Therefore, appellant often switched residences, at times living out of her car, while K.M. slept and lived at different relatives' homes.

{¶3} On the same day the complaint was filed, an ex parte order was issued granting temporary custody to BCCSB. K.M. was removed from appellant's home on March 6, 2001. At a shelter care hearing held on March 9, 2001, the court upheld the ex parte grant of temporary custody to BCCSB. On June 6, 2001, the trial court adjudicated K.M. a neglected and dependent child.

{¶4} On April 17, 2002, BCCSB filed a motion for permanent custody and termination of parental rights. A series of hearings on this motion have been held for the past two years. Appellant was ordered by the court to take part in a case service plan that has been modified and adjusted during the pendency of the trial.

Appellant was directed to complete a psychological evaluation and follow any recommendations, to attend parenting and anger management classes, to attend individual therapy, and to complete the home based Development of Living Skills ("DLS") program.

{¶5} Appellant failed to complete and participate in some of the programs that were assigned to her. Specifically, appellant

did not participate in individual counseling and failed to complete an anger management course and the DLS program.

{¶6} At trial, Tim Brannigan Sr. ("Brannigan"), a BCCSB social worker, testified that appellant acted inappropriately when visiting with her daughter. On one occasion, appellant spent 15 minutes of a two-hour visit on the telephone and then proceeded to fall asleep. When K.M. cried, appellant responded by saying "go tell your new family about it."

{¶7} During another visit, appellant brought the 16-month-old son of a boyfriend. It was noted that appellant spent more time interacting with this child than with K.M. Moreover, on two separate occasions, appellant smacked K.M.'s hand for hitting the other child. Appellant told K.M. that "she better get used to him because they were going to be brother and sister." Appellant also frequently talked to K.M. as if the toddler was an adult.

{¶8} However, Brannigan observed that over time appellant's visits with her daughter became more appropriate. Yet, appellant still exhibited jealousy towards the foster family in her interactions with K.M. and would take K.M.'s toys, bottles, and other items from the child to gain her attention. Furthermore, appellant was incarcerated for eight months in 2002. During this time, appellant had no contact with her daughter.

{¶9} The trial court also found that appellant had shown very little improvement in her employment and housing situations.

Appellant has switched residences many times and has been homeless on a couple of occasions since her daughter was removed

from her custody. Appellant has also had difficulty holding down steady employment.

{¶10} Several of appellant's relatives came forward during the past several years to attempt to gain custody of K.M. However, none of the relatives passed BCCSB's home study or followed through on requirements requested by the agency. The court also contacted K.M.'s biological father on several occasions to notify him of court hearings and so forth. The biological father demonstrated no interest in the matter. Therefore, all placements with relatives were denied.

{¶11} K.M. has been in foster care since March 6, 2001. However, since July of 2001, K.M. has lived with her current foster family. K.M. and her biological sister live together with the foster family. This foster family consists of a mother, father, and the foster parent's 19-year-old and six-year-old children. The foster mother testified at the hearing that K.M. interacts well with all members of the foster family and is viewed no differently than any of the other family members.

{¶12} On August 29, 2003, the Butler County Common Pleas Court, Juvenile Division, terminated appellant's parental rights and granted permanent custody of K.M. to BCCSB. The court found K.M.'s best interest would be served by this decision. Appellant's objections to the juvenile court's decision were subsequently overruled. Appellant appeals the trial court's decision to grant permanent custody of K.M. to BCCSB, raising the following five assignments of error for our review.

{¶13} Assignment of Error No. 1:

{¶14} "THE COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS THE CASE FOR FAILURE TO SATISFY THE REQUISITE BURDEN OF PROOF."

{¶15} Appellant orally moved to dismiss the case at the close of the state's evidence arguing that the state failed to prove that K.M. is a neglected or dependent child. The court overruled the motion. Appellant argues the denial of her motion to dismiss was an abuse of discretion.

{¶16} However, appellant failed to appeal the June 6, 2001 neglect and dependency adjudication. A neglect or dependency adjudication "followed by an award of temporary custody to a children's services agency is a final appealable order." In re: Michael Lander (June 26, 2000), Butler App. No. CA99-05-096, at 3. Having "failed to timely appeal, [from the dependency adjudication which resulted in a grant of temporary custody,] appellant cannot raise in this appeal the issue of the dependency adjudication." Id. citing In re Fox (Sept. 21, 1994), Henry App. No. 7-94-1. Consequently, the first assignment of error is overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT'S DAUGHTER TO BE NEGLECTED AND DEPENDENT."

{¶19} As stated above, appellant failed to timely appeal the neglect and dependency adjudication. Consequently, for the

reasons stated above, the second assignment of error is overruled.

{¶20} Assignment of Error No. 3:

{¶21} "THE COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN IT FOUND THAT BCCSB HAD MADE REASONABLE EFFORTS TO PREVENT REMOVAL OF THE CHILD AND/OR TO TERMINATE THE PARENTAL RIGHTS."

{¶22} Appellant argues that when a parent is precluded from completing case plan services, it is an abuse of discretion to find BCCSB made reasonable efforts to prevent the removal of the child. Furthermore, appellant argues that there was no real need for the case plan services, therefore, her parental rights should not have been terminated.

{¶23} In determining whether the agency made reasonable efforts to prevent the removal of the child from the home, the issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute. In re Hughley (Oct. 26, 2000), Cuyahoga App. No. 77052, citing In re Tirado (Jan. 22, 1998), Mahoning App. No. 97 CA 26; In re Brewer (Feb. 12, 1996), Belmont App. No. 94-B-28. "Reasonable efforts" does not mean all available efforts. Otherwise, there would always be an argument that one more additional service, no matter how remote, may have made reunification possible. In re Fast (Mar. 25, 1992), Summit App. No. 15282.

{¶24} In support of her proposition that BCCSB did not make reasonable efforts to prevent K.M.'s removal from her home, appellant alleges that BCCSB ordered unsuitable case plans. Appellant argues that her problems were "primarily financial in a down job market," however, "BCCSB ordered drug and alcohol assessments, counseling, redundant anger management classes, and redundant parenting classes" instead of "assistance with housing and employment."

{¶25} Appellant was directed to complete a psychological evaluation and follow any recommendations, to attend parenting and anger management classes, to attend individual therapy, and to complete the home based Development of Living Skills (DLS) program. The case plan included appellant maintaining stable employment and housing.

{¶26} Appellant testified that she failed to complete and participate in individual counseling, and failed to complete an anger management course and the DLS program. Appellant also admitted that she had lived in at least nine places since K.M.'s removal and has been homeless on a couple of occasions. Her current residence is a two-bedroom apartment with four adults residing there. Appellant also testified that she has experienced financial difficulties due to her inability to hold a job.

{¶27} Based upon the foregoing, the trial court could reasonably conclude that BCCSB made sufficient reasonable efforts to prevent K.M.'s removal from appellant's home pursuant to R.C. 2151.419, however, appellant failed to take advantage of the

services offered by BCCSB. Consequently, the third assignment of error is overruled.

{¶28} Assignment of Error No. 4:

{¶29} "THE COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN FOUND [SIC] TERMINATING THE PARENTAL RIGHTS OF APPELLANT TO BE IN THE CHILD'S BEST INTERESTS AND WHEN IT SO TERMINATED THE RIGHTS OF APPELLANT."

{¶30} Pursuant to R.C. 2151.414(B)(1), a trial court may grant permanent custody of a child to a state agency if the court finds, by clear and convincing evidence, that it is in the child's best interest to do so, and that any one of the following circumstances apply:

{¶31} "(a) 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;

{¶32} "***

{¶33} "(d) 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 ending on or after March 18, 1999."

{¶34} In this case, the trial court found that granting permanent custody to BCCSB was in the child's best interest and both that the child had been in the custody of BCCSB for 12 or more months and that she could not be placed with either of her parents within a reasonable time. K.M. was in the temporary

custody of BCCSB for 12 or more months of a consecutive 22-month period ending on or after February 14, 2003.

{¶35} We begin by examining whether there was clear and convincing evidence that granting permanent custody was in the child's best interest. R.C. 2151.414(D) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, included, but not limited to the following:

{¶36} "(1) 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;

{¶37} "(2) 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;

{¶38} "(3) 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 ending on or after March 18, 1999;

{¶39} "(4) 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;

{¶40} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶41} Viewing the facts of this case in light of the factors above, it is clear that, although appellant appears to love her daughter, there are problems with the interaction and interrelationship. Appellant acted inappropriately when visiting with her daughter. On one occasion, appellant spent 15 minutes of a two-hour visit on the telephone and then proceeded to fall asleep. When K.M. cried, appellant responded by saying "go tell your new family about it."

{¶42} During another visit, appellant brought the 16-month-old son of a boyfriend. It was noted that appellant spent more time interacting with this child than with K.M. Moreover, on two separate occasions appellant smacked K.M.'s hand for hitting the other child. Appellant told K.M. that she better get used to him because they were going to be siblings. Appellant continued to take toys away from K.M. to get her attention. K.M has bonded with her foster family.

{¶43} Although the child is too young to give an opinion, the guardian ad litem recommended granting permanent custody to BCCSB. Evidence shows that the child is in need of a stable home environment with a mature, organized caregiver who can provide for her needs. Although given considerable time and instruction, appellant failed to demonstrate that she is able to care for even the child's most basic needs.

{¶44} Appellant does not have a permanent job or housing. Therefore, appellant often switches residences, at times living out of her car. As a result of appellant's homelessness and

incarceration, K.M. has been in the temporary custody of one or more public children services agencies for 12 or more months of a consecutive 22-month period.

{¶45} Furthermore, the statute requires consideration of whether any of the factors in R.C. 2151.414(E)(7) to (11) apply. R.C. 2151.011(C) creates a presumption of parental abandonment "when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days."

{¶46} K.M.'s father has not had any contact with her since she has been placed in BCCSB's custody. Appellant was incarcerated for more than eight months during which time she had no contact with K.M.

{¶47} Considering all of the evidence, we find that the trial court did not err in determining by clear and convincing evidence that it is in the child's best interest to grant permanent custody to BCCSB. The fourth assignment of error is overruled.

{¶48} Assignment of Error No. 5:

{¶49} "THE COURT'S DECISION AND ORDER OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND FAILED TO MEET THE REQUISITE CLEAR AND CONVINCING STANDARD."

{¶50} Before a juvenile court can terminate parental rights and award permanent custody to a public or private children services agency, it must find that clear and convincing evidence supports both portions of the permanent custody test set forth in

R.C. 2151.414(B). Specifically, the juvenile court must find that clear and convincing evidence establishes that one of the following requisites exists: "[t]he child is not abandoned or orphaned or has not been in the temporary custody of one or more public services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999, and that the child cannot be placed with either of his or her parents within a reasonable time or should not be placed with his or her parents[,] " R.C. 2151.414(B)(1)(a); or "[t]he child has been in the temporary custody of one or more public services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999." R.C. 2151.414(B)(1)(d). The court must also find that clear and convincing evidence shows that permanent custody is in the best interest of the child, pursuant to the factors set forth in R.C. 2151.414(D). In re William S., 75 Ohio St.3d 95, 99, 1996-Ohio-182. Clear and convincing evidence is that which will cause the trier of fact to develop a firm belief or conviction as to the facts sought to be established. Cross v. Ledford (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶51} As applied to the present case, the juvenile court found that two of the requisites, R.C. 2151.414(B)(1)(b) and 2151.414(B)(1)(d), were applicable. However, the court only needed to find that one of these requisites was satisfied. Undisputed clear and convincing evidence established that K.M.

was in the temporary custody of the BCCSB for 12 or more months of a consecutive 22-month period ending on or after February 14, 2003. Thus, even though the juvenile court addressed the fact that K.M. could not be placed with appellant within a reasonable time or should not be placed with her, and, in doing so, discussed the question of reasonable case planning and efforts by the agency to remedy the conditions that caused the removal of the children from appellant's home, it was unnecessary to the resolution of this case. See In re Nice, 141 Ohio App.3d 445, 449, 2001-Ohio-3214; In re C.N., Cuyahoga App. No. 81813, 2003-Ohio-2048 at ¶22; In re Sarah S., Erie App. Nos. E-02-052, E-02-053, E-02-054; 2003-Ohio-4730 at ¶13; In re Miqueal M., Lucas App. No. L-02-1020, 2002-Ohio-3417 at ¶17. Accordingly, appellant's fifth assignment of error is overruled.

Judgment affirmed.

YOUNG, P.J., and WALSH, J., concur.