

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

IN THE MATTER OF:

A.B., et al.

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CASE NOS. CA2010-04-097
CA2010-04-098

OPINION
11/19/2010

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2003-0834

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Andrew Temin, 301 High Street, Suite 300, Hamilton, Ohio 45011, guardian ad litem for A.B.

RINGLAND, J.

{¶1} Appellant, the biological mother of A.B. and M.B., appeals a decision of the Butler County Juvenile Court, granting permanent custody of the children to the Butler County Department of Job and Family Services (BCDJFS). We affirm the decision of the trial court.

{¶2} BCDJFS has been involved with the family of A.B. and M.B. since the spring of 2001 when BCDJFS received information involving physical abuse. It was reported that the child's father hit A.B. around the crotch and thigh area with a crock-pot cord. The agency caseworker testified that an abuse and dependency complaint was filed and the father was charged with domestic violence and child endangering. A no-contact order was issued as to the child and her father, but in July 2001 the agency discovered the mother, father and child moved to Florida without permission of the juvenile court. At that time, temporary custody was granted to the agency.

{¶3} In August 2001, Florida police called the agency in regard to a missing person report the agency had filed on A.B. According to the caseworker, Florida police became aware of the family when they were called to the home because the father allegedly held a 12-gauge shotgun to the mother's head and cut her arm with a butter knife.

{¶4} Agency workers went to Florida to pick up A.B. and returned the child to Ohio where she was placed with a foster family. The juvenile court found A.B. was an abused and dependent child, with the father as the perpetrator of the abuse. In July 2002, a no-contact order was issued by the court between the mother and father and between the father and child. In April 2003, A.B. was returned to the custody of her mother with the no-contact order still in place.

{¶5} On October 13, 2003, BCDJFS filed a complaint alleging neglect and dependency of A.B. and her three-month-old sister, M.B. The complaint alleged that

although the father was to have no contact with the family, he and the mother were residing together and M.B. was born during that time. The agency became aware of the violation of the no-contact order as a result of a referral received by the agency that the family was residing at a motel in Springdale, Ohio where police had been called for an incident of domestic violence involving the mother and father. Temporary custody of the children was granted to the agency.

{¶6} A case plan was prepared and because the father did not participate in case plan services and was incarcerated on and off over the next several years, reunification with the mother was the goal. On October 13, 2004, the agency filed a motion for permanent custody of the children. The motion was continued at various points to determine if reunification was possible. Guardian ad litem reports from May 2005 and September 2005 indicated that the guardian was reluctant to recommend permanent custody as the mother was still showing signs of progress and was benefiting from counseling.

{¶7} Visitations began as two-hour supervised visits and progressed to unsupervised weekend visitations. On February 6, 2006, the children were granted an unsupervised weekend visit with their mother. During this time, the mother had phone contact with the father and allowed M.B. to speak with her father, and tried to get A.B. to talk to him. When the violation of the no-contact order was discovered, the court again ordered supervised visitation. A guardian ad litem report in March 2006 indicated concern because A.B. felt guilty for the removal and return of supervised visitation and that the child needed to be able to go to someone for help without feeling guilty. The report also indicated that there were numerous examples of the mother not making good decisions and although the mother was verbalizing the right things, she was not demonstrating that she could do them.

{¶8} On April 27, 2007, the court denied the agency's permanent custody motion. At that time, the children were almost 13 and four years old and had both bonded with the foster

family. The court noted that it had been over two years since the motion was filed and there had been several continuances because the mother appeared to be progressing and was successfully working on the case plan. A.B. had consistently taken the position that she wanted to be reunited with her mother and the court found that it appeared that a bond may be developing between M.B. and the mother, although the child's bond with the foster family was strong.

{¶9} The court found the mother had been in substantial compliance with the case plan and court orders for services such as counseling and had stable housing and full-time employment. The court was troubled by the violation of the no-contact order, which occurred within days of the father's release from a Florida jail. The court further found that the father had been convicted of burglary as a result of an alleged break-in at the mother's residence and was currently incarcerated and due for release in September 2007. After considering the evidence, the juvenile court stated that although the mother had violated the no-contact order in the past, it was not convinced that these actions would continue in the future, and determined that there was not clear and convincing evidence that permanent custody was in the children's best interest.

{¶10} At the time the court denied the motion for permanent custody, it granted unsupervised weekend visitations with the mother. Two unsupervised visitations occurred on the weekends of May 4 and May 11. The agency filed a motion for a change of visitation on May 17, 2007 following these two visitations. The motion indicated that the agency received a referral that the mother had been evicted and had moved to Indiana. The children were interviewed and reported that on the first weekend visit, the mother's boyfriend had to climb a balcony in order to get into the apartment because the mother did not have a key. The mother, children and boyfriend spent the night at the apartment and the next night with the maternal grandmother.

{¶11} On the following weekend visit, A.B. reported that they initially went to their grandmother's house where the mother's boyfriend had rubbed her back, asking her if it was "ok" and if she felt comfortable. A.B. reported that they spent the visit at a motel. The mother pushed the two beds together and the mother, boyfriend and two children all slept in what was essentially one large bed. A.B. reported that her mother would drop the boyfriend off somewhere before picking the children up for a visit from the foster family, then would pick him back up after getting the children from the foster home. It was also determined that during this time period the mother's driver's license was suspended and she had been driving without a valid license, including on visitations with the children.

{¶12} In August 2007, A.B. was placed in a different foster home due to an allegation of sexual abuse between her and M.B. The mother was granted unsupervised visitation with A.B., but this visitation was suspended in November 2008 when it was discovered that the mother had given A.B. a cell phone. The foster mother testified that when she asked where the phone came from, A.B. immediately broke down crying and said she knew it was wrong and wanted to tell her foster mother, but she did not want to get her mother in trouble. A caseworker testified that she read the text messages and mother appeared to be pressuring A.B. and causing a great deal of anxiety, despite orders not to discuss the case. Visitations were again returned to supervised visits by the agency. Shortly after, A.B. decided she no longer wanted to attend visits with her mother.

{¶13} On January 2, 2009, the agency filed a second motion for permanent custody of the children. Hearings were held on the motion on June 1, 2 and 8, 2009 before a magistrate. The father failed to appear and was found in default. Agency caseworkers testified regarding the facts and history of the case. A counselor and psychotherapist testified regarding evaluations and counseling sessions. Both foster families testified that they wanted to adopt the children. The court conducted in camera interviews of both

children. The guardian ad litem for each child submitted a written report and both were subject to cross-examination on their reports. The magistrate granted the motion for permanent custody on December 7, 2009. Appellant filed objections to the magistrate's decision and the trial court held a hearing on the objections. On April 12, 2010, the trial court overruled the objections and adopted the magistrate's report.

{¶14} Appellant now appeals the trial court's decision to grant permanent custody of her children to the agency. She raises one assignment of error for our review, arguing the juvenile court's decision finding permanent custody is in the children's best interest is against the manifest weight of the evidence.

{¶15} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520.

{¶16} Pursuant to R.C. 2151.414 (B)(1), a court may terminate parental rights and award permanent custody to a children services agency if it makes findings pursuant to a two-part test. Specifically, the court must find that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and, (2) any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed

with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414 (B)(1)(a), (b), (c) and (d); *In re E.B.*, Warren App. Nos. CA2009-10-139; CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶17} Although the juvenile court analyzed the best interest factors pursuant to R.C. 2151.414(D) and determined pursuant to R.C. 2151.414 (B)(1)(a) that the children could not be placed with either of their parents within a reasonable time or should not be placed with either parent, the court erroneously applied the mandatory "shall grant" language of R.C. 2151.414(B)(2) to those findings and determined that under that statute, it was required to grant permanent custody of the children to the agency. See *In re E.M.D.R.E.*, Butler App. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925. However, as the court also determined that granting permanent custody was required under another section of the statute, we find this error was not prejudicial to appellant.

{¶18} R.C. 2151.414(D)(2) provides an alternate framework in which a court is required to grant permanent custody when a child has been in the temporary custody of an agency for over two years and other conditions are met. Under this section, if a court finds each of four factors exist, "permanent custody is in the best interest of the child and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency." By enacting this section, the General Assembly made a legislative determination that under the enumerated circumstances, it is not in the best interest of a child to remain in legal limbo. See *In Re K.H. Clark* App. No. 2009-CA-80, 2010-Ohio-1609, ¶56.

{¶19} Specifically, under R.C. 2151.414(D)(2) permanent custody must be granted if the following four factors are met:

{¶20} "(1) The court determines by clear and convincing 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.

{¶21} "(2) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.

{¶22} "(3) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.

{¶23} "(4) 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."

{¶24} The juvenile court found by clear and convincing evidence that the children could not be placed with either parent within a reasonable time or should not be placed with either parent pursuant to R.C. 2151.414(E)(1), which provides:

{¶25} "Following the placement of the child outside his 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 for a period of six months or more to substantially remedy the conditions causing the child to be placed outside his home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties."

{¶26} The trial court determined that the complaint was filed in October 2003 as a result of the mother's history with the agency which resulted in an adjudication of A.B. as an abused child with the father as the perpetrator. The court found the allegations included the mother's violation of the no-contact order in the first case by living with the children and father and an allegation of domestic violence between the parents during this time. The court

further found that the previous case had been closed only six months before the present case was filed. The court determined that the mother substantially completed case plan services, but nonetheless continued to show a lack of judgment and understanding of her obligation to protect the children. At the time of the first permanent custody motion the court found that by her own admission, the mother allowed the father to reside with her and the children off and on while the case was pending, and acknowledged maintaining contact with him through November 2004. The father was in jail for a period of time, and within days of his release, she allowed telephone contact. In 2006, the father was charged and convicted of burglary as a result of an alleged break-in at the mother's apartment, and the court noted that at the time of the break-in, the father's clothes were found in the apartment.

{¶27} The court found the mother's recent lack of judgment regarding her obligation to protect the children was demonstrated by her current relationship. The mother's boyfriend continued to refuse to cooperate with the agency so that a complete criminal background check could be performed. Despite knowing that the boyfriend was not allowed on visitations, on her first weekend visits, the mother allowed him to spend the weekend with the children, first by breaking into her old apartment and then spending the weekend together at a motel. In addition, the court found that the mother provided A.B. a cell phone which the child felt compelled to lie about at the mother's urging, and that the mother discussed the case with A.B. to the point where the child felt pressured.

{¶28} With regard to the other factors in R.C. 2151.414(E), the court found that the father had demonstrated a lack of commitment pursuant to (E)(4), and was the perpetrator of abuse pursuant to (E)(15). The court also found that (E)(7)(c) applied, as the father was convicted of domestic violence and child endangering, and that he had abandoned the children pursuant to (E)(10).

{¶29} In regard to the second requirement under R.C. 2151.414(D)(2), the trial court

also determined that the children had been in agency custody beginning in October 2003, for a total of six years and no further extensions were permitted. M.B. was placed in agency custody at the age of three months and was just over six years old at the time of the hearing. A.B. was removed from her parents' care in the previous case, and was just over nine years old at the time of the current removal. At the time of the hearing, A.B. was just over 15 years old.

{¶30} Finally, the court also determined that the third and fourth requirements for granting permanent custody under R.C. 2151.414(D) were established. Under (D)(3), the requirements for a permanent planned living arrangement were not met, and under (D)(4), no other relative or interested person filed a motion for legal custody of the children.

{¶31} After careful review of the record, we find the trial court's findings are supported by the evidence and are not against the manifest weight of the evidence. Although the mother completed case plan services, when she was given opportunities to properly parent, in each instance she was not able to demonstrate an understanding of her obligation to protect the children. Accordingly, appellant's assignment of error is overruled.

{¶32} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

[Cite as *In re A.B.*, 2010-Ohio-5651.]