

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

IN RE: M.W., Jr. :
 :
 : CASE NO. CA2011-07-052
 : OPINION
 : 12/30/2011
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APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2007 JC 03874

Matthew Faris, 40 South Third Street, Batavia, Ohio 45103, Guardian Ad Litem

John Woliver, 204 North Street, Batavia, Ohio 45103, for appellants

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POWELL, P.J.

{¶1} Appellants, the paternal grandmother and step-grandfather of M.W. (grandparents), appeal a decision of the Juvenile Division of the Clermont County Court of Common Pleas denying their motion for legal custody of their grandson.

{¶2} A complaint was filed on August 21, 2007, alleging M.W., who was three years old at the time, his five-year-old half-sister, and newborn half-brother were neglected children. The complaint alleged that the mother had recently given birth to the youngest child and both the mother and child tested positive for marijuana at birth. The complaint also

included allegations of repeated substance abuse and violence in the home. The children were placed in the custody of their mother with protective supervision by the agency.¹ M.W. was adjudicated neglected on October 18, 2007.

{¶3} At some point in 2007, the grandparents requested custody of M.W. and were advised that the child could not be placed with them. The basis of the denial was a 1997 Children Services report that indicated past sexual abuse by the step-grandfather involving his niece.

{¶4} On September 24, 2008, the child's aunt filed a motion for custody of M.W. The motion stated that the mother had nowhere to live and requested placement with the aunt. On November 12, 2008, following an investigation, the agency moved for temporary custody alleging that the mother was unable to provide for the basic needs of the child. The motion stated that at the time, the mother was homeless, unemployed, and was asking others to care for the children due to a pending incarceration. The motion also expressed concerns regarding the father's mental stability, a reported suicide attempt and indicated that there were both criminal and civil charges against both parents. The juvenile court granted temporary custody to the agency and placed M.W. in a foster home.

{¶5} The grandmother again requested consideration as a placement for the child and a home study was performed on March 31, 2009. The home study indicated that the step-grandfather had moved out of the home. The report indicates that the grandmother stated that he was asked to leave due to "some past child protective service history" and that he had moved, but she did not know his phone number. The investigator indicated that there were concerns regarding whether the grandmother was capable of keeping the grandfather away from the residence, as several calls were received while the investigator was in the

1. M.W.'s half-siblings are not involved in this appeal.

home and the grandmother stated, "he's not here right now," indicating the grandfather or some other male was living in the home.

{¶6} The home study also stated that the two individuals the grandmother named to provide care in her absence were inappropriate as one had a significant child protective services history, and the other, the child's aunt, failed a home study that was performed for possible placement of the child in her home. The report indicates that the investigator discussed the substitute caregivers and explained to the grandmother that she would have to name someone else since the two named individuals could not be approved. There was also some concern regarding the financial situation with the step-grandfather out of the home and how expenses would be met. The report also indicates the grandmother's driver's license was suspended in 1999 and had not been renewed. Based on these concerns by the agency, the home study was not approved.

{¶7} Temporary custody to the agency was extended on January 12, 2010 and again on July 8, 2010 to give the parents further opportunity to complete their case plans and reunify with the child. On December 2, 2010, the agency moved for permanent custody. The grandparents filed a motion for legal custody of M.W. on December 6, 2010.

{¶8} The guardian ad litem filed a report on January 20, 2011. The report indicated that the guardian visited with the grandparents and found that in general the home was neat, organized and clean. The grandparents reported having a strong relationship with M.W. and indicated they wanted the parents to continue to have a relationship with the child, but would not allow contact if the parents were using drugs. The guardian also stated that he spoke with the step-grandfather about the 1997 allegations. The step-grandfather indicated the alleged victim was his niece and he denied any type of inappropriate contact. The guardian also reported receiving a call from the niece, who stated that no inappropriate contact ever occurred.

{¶9} The guardian's report concluded that the grandparents appear to be able to provide adequate care and support, and that there appears to be a bond between M.W. and his grandparents. The report also indicated that the guardian had concern that the parents would have contact with the child without addressing the agency's concerns that led to his removal if the child were placed with his grandparents. The guardian also expressed concern with the 1997 allegations, but noted no charges were filed and that the alleged victim denied any wrongdoing. The guardian tentatively recommended placement with the grandparents provided the home study did not turn up any unforeseen troubling issues, but reserved the right to modify his opinion if warranted.

{¶10} A second home study was performed on January 21, 2011. The investigator determined the home and family's income were adequate to care for the child. However, three areas of concern were noted. First, the investigator was concerned by the fact that the grandparents again named the same two persons as substitute caregivers despite being informed at the time of the last home study that these two individuals were inappropriate and could not be approved. The investigator noted that the grandparents could not understand why the persons they named were not appropriate and they were unable to name anyone else as substitute caregivers. The investigator found it troubling that the grandparents were unable to recognize an inappropriate substitute caregiver, causing concern with the type of person the grandparents would trust with the child.

{¶11} The second area of concern involved potential abuse of the step-grandfather's Vicodin prescription, which he takes for arthritis. When the investigator viewed the pills in the bottle, there were several missing. When questioned, the step-grandfather stated that he takes an extra pill if he is really hurting, causing some concern that the medication was not being taken as prescribed.

{¶12} Finally, the investigator indicated that there was concern regarding the sex

abuse allegations involving the step-grandfather's niece. While the step-grandfather denied the allegations, the fact that he had a history with children's services was concerning. Based on the above concerns, the investigator determined that the agency was unable to recommend placement with the grandparents.

{¶13} At the permanent custody hearing, the 1997 children services report regarding the sexual abuse allegations by the step-grandfather was admitted into evidence.² The report states that on November 17, 1997, Clermont County Children Services received a report that the victim, the step-grandfather's niece, was being sexually abused by her cousin. A caseworker interviewed the niece regarding allegations of sex abuse. The report indicates that during a discussion between the caseworker and the niece, the niece disclosed that someone other than her cousin had also sexually abused her. The niece stated that her uncle, who she also indicated had a nickname, had been living with them for six months, had been sexually abusing her and that her parents had "kicked him out" after finding out about the abuse.

{¶14} The report also indicates that the niece's parents and a sister were interviewed regarding the allegations. According to the parents' statements, it appears the cousin was questioned by police and confessed to the sexual abuse. None of the other family members were aware of any sexual interaction between the niece and step-grandfather, but the sister mentioned seeing something that appeared inappropriate between her uncle and another sister. The report states that the caseworker again discussed the allegations with the niece on December 4, 1997. Also attached to the report are referrals regarding the niece's statements to the Clermont County Sheriff's Department and the Clermont County Prosecutor. The report states that an investigator "was not able to locate the perpetrator as

2. Due to the confidential nature of the report, it was admitting under seal. Accordingly, we have omitted any confidential details in our discussion.

of yet." A letter to the family on December 30, 1997 states that the result of the investigation was that abuse was "Indicated/Low-Moderate Risk" and the letter recommended no contact between the step-grandfather/uncle and the children, along with counseling.

{¶15} Prior to the permanent custody hearing, the parties agreed to depose the niece who was the alleged victim in the sex abuse allegations. The niece testified that her uncle's nickname was as stated in the report but he never lived with the family, and that he only stayed with them for one weekend and she was with her grandparents that weekend. She stated she was unaware that she was an alleged victim in an allegation of sex abuse until her uncle showed her a copy of a report the previous year and that he had never touched her inappropriately. She said any allegations are totally untrue. She further stated that she never talked with a caseworker or anyone else about any type of sexual allegations.

{¶16} The niece stated that no one in her family had ever sexually abused her, she was never questioned about her uncle or any other family member and she didn't understand the allegations or the report because none of it ever happened. She did state that her cousin lived with them for a time in 1997 when he didn't have anywhere else to go, but nothing inappropriate ever happened and she was never questioned about any allegations regarding him. When questioned regarding whether it was possible that she made up the allegations in the report to get out of her parents' home, she stated that it was not. She stated that she and her uncle are close, have always been close and she trusts him completely with her children.

{¶17} The guardian ad litem submitted a supplemental report on February 11, 2011. The guardian stated that he reviewed additional information, including the grandparents' income documentation, the 1997 children services report, both home evaluation reports, the deposition transcript of the step-grandfather's niece, and the step-grandfather's medical documentation and information on possible substitute caregivers.

{¶18} The guardian indicated that the concern regarding the grandfather's use of

Vicodin appeared to be alleviated by letters from his physician. He also indicated that the grandparents had now identified possible substitute caregivers but these people had not yet been investigated to determine if they were appropriate. The guardian stated that when he spoke with the niece in December 2010, she indicated she was not aware of any investigation regarding allegations of sex abuse until her uncle showed her the report in 2010. She stated she never had any contact with anyone from children services. After reviewing the 1997 children services report, the guardian concluded that it was clear the caseworker had spoken with the niece in 1997. He found it "incredibly difficult" to believe the niece's current statements as the report indicates in detail that a caseworker spoke with the niece on several occasions in 1997.

{¶19} The guardian ad litem indicated he was concerned with possible contact between the parents and M.W. if the child were to be placed with the grandparents. He was also greatly concerned about the past allegations of sex abuse and that the niece had not been honest and forthcoming in her conversations with him and in her deposition. The guardian also expressed concern regarding the grandparents' initial substitute caregivers and the fact that the agency was unable to approve the home after both home studies. He recommended that the grandparents not receive custody of M.W. and that the motion for permanent custody be granted.

{¶20} At the permanent custody hearing, neither parent was present. An agency caseworker testified regarding the fact that M.W. has been in agency custody since November 2008. The caseworker testified that M.W. has been receiving therapy since his initial placement in foster care due to extreme behavior problems, but the child has progressed a "long way" and is now a good student and well-behaved. She also discussed the parents' initial work on the case plan and how both parents had failed to follow through. The caseworker testified that in addition to the grandparents, an aunt was considered as a

placement early in the case, but was denied. She indicated that both parents lost contact with the agency. She stated that the grandparents were bonded with the child and visited fairly regularly early in the case at the father's scheduled visitation time, but were unable to visit when the father's progress slowed and he no longer had visits. M.W. visits each week with a half-sister, with whom he is bonded, and the grandparents attend these visits. Finally, the caseworker discussed the child's placements, his progress and options for adoption.

{¶21} Both grandparents testified at the hearing. The grandmother testified that she and the step-grandfather married in 1997, but they lived together in the 1990s and there has never been a period of time when he lived anywhere else. She indicated she first found out about the sexual abuse allegations when M.W. was initially removed from his home and they tried to obtain custody.

{¶22} The step-grandfather testified that his nickname is the same as stated in the 1997 report, but he never spent time at his brother's home and first became aware of the allegations a couple of years ago. He stated that he moved out at the time of the first home study so that the grandmother could obtain custody. He stated that no one interviewed him about the allegations in the 1990s and that once he found out about the allegations, he did not ask his niece about them and did not speak with her about it. The step-grandfather also explained that the reason there were less pills in his prescription bottle was because they were placed in a daily pill dispenser.

{¶23} The guardian ad litem testified and was subject to cross-examination on his report. He discussed the specifics in his report and indicated that the 1997 children services report caused concern, along with the inconsistent statements by the people involved, especially the niece. He found her statements in the report totally inconsistent with her statements to him and in her deposition, when it was clear from the facts in the report that she had talked to someone in 1997. The guardian indicated he did not know if the

allegations were true or not, and agreed there were internal inconsistencies in the stories given in the report. He indicated it appears that the allegations were not substantiated, but the niece's statement in 1997, along with the sister's statement regarding her uncle, combined with the niece's current inconsistent statements that no interview or anything ever happened were all very concerning.

{¶24} The guardian further testified that given the testimony regarding the step-grandfather's medication, he did not have any concern now regarding possible abuse of the prescription, but was only concerned why the step-grandfather did not initially tell the investigator about the reason for the missing pills. The guardian also expressed concern regarding the grandparents' decision to name the same substitute caregivers for the second home study when it had previously been explained to them that these people were not appropriate. This caused concern regarding the grandparents' ability to make decisions. The guardian concluded that M.W. wanted permanency and that granting permanent custody to the agency was in his best interest.

{¶25} An adoption supervisor testified that although M.W. is not currently in a foster-to-adopt home, based on her knowledge of the child and her experience in adoptions, she believes an adoptive home could be found in a short period of time, and estimated the length of time as within 180 days. She stated that M.W. needs permanency and that the child had been diagnosed with post-traumatic stress disorder and depressive mood and counseling services were available for these conditions with an adoption.

{¶26} The magistrate found that M.W. had been in agency custody more than 12 of 22 months and that permanent custody was in the child's best interest. The magistrate found that the facts did not indicate that a legally secure placement could be provided by the grandparents. The grandparents' motion for legal custody was denied and the magistrate granted the agency's motion for permanent custody. The grandparents filed objections to the

decision which were overruled by the trial court after a hearing.

{¶27} The grandparents now appeal the trial court's decision denying their motion for legal custody of the child. They raise the following single assignment of error for our review:

{¶28} THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR CUSTODY BY FAILING TO WEIGH THE FACTORS SET FORTH IN R.C. []2151.414(D).

{¶29} Appellants argue in their sole assignment of error that the trial court improperly weighed the best interest factors found in R.C. 2151.414(D) and argue that a finding of custody in their favor is warranted. Their argument largely involves the court's use of the 1997 report alleging sexual abuse by the step-grandfather.

{¶30} 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. First, the court must find that 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). Second, the court must find that 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 and CA2009-11-146, 2010-Ohio-1122, ¶ 22. In this case, the court determined that M.W. had been in the agency's custody for 12 of 22 months and it was in the child's best interest to grant permanent custody to the agency. The court also determined that it was in M.W.'s best interest to deny the grandparents' motion for legal custody.

{¶31} We begin our analysis by emphasizing that the parents have not appealed the trial court's decision regarding the termination of their parental rights. Instead, the issue before this court is whether the trial court erred when it denied the grandparents' motion for

legal custody of the child. It is well-established that relatives seeking custody of a child are not afforded the same presumptive rights that a natural parent receives. *In re A.C.*, Butler App. No. CA2006-12-105, 2007-Ohio-3350. In these circumstances, the inquiry focuses on what is in the best interest of the child. *Id.* *In re Patterson* (1999), 134 Ohio App.3d 119, 130. A juvenile court is not required to find by clear and convincing evidence that a relative is an unsuitable placement option. *Patterson* at 130.

{¶32} A reviewing court will not reverse a juvenile court's custody decision absent an abuse of discretion. *In re A.C.*; *In re Patterson* at 130. The discretion granted to a juvenile court in custody matters "should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *In re A.W.-G.*, Butler App. No. CA2003-04-099, 2004-Ohio-2298. quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, an appellate court affords deference to a judge or magistrate's findings regarding witnesses' credibility. *In re D.R.*, Butler App. Nos. CA2005-06-150 and CA2005-06-151, 2006-Ohio-340, ¶12.

{¶33} R.C. 2151.414(D)(1) provides a list of factors that provide guidance for courts in determining the best interest of a child. *In re C.C. & N.C.*, Licking Co. App. No. 2010 CA 0088, 1011-Ohio-1624. Under this statute, "the court shall consider all relevant factors, including, but not limited to the following:

{¶34} "(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;

{¶35} "(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;

{¶36} "(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 * * *;

{¶37} "(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."

{¶38} With regard to R.C. 2151.414(D)(1)(a), the trial court found that the child was in a foster home that is not a potential adoptive home. The child has a relationship with his sister, aunt, grandmother and step-grandfather.

{¶39} In consideration of R.C. 2151.414(D)(1)(b), the court found that the child enjoys being with his foster family and also liked seeing his biological family. The court also noted the guardian ad litem's reports and recommendation that permanent custody should be granted and the child placed in a foster-to-adopt family as soon as possible.

{¶40} With regard to R.C. 2151.414(D)(1)(c), the court found that M.W. has been in the temporary custody of the agency since November 2008 and has been in several foster homes since that time. The court also found that prior to agency involvement, the child had a great deal of contact with the grandparents, including living with them for periods of time during the first few years of his life.

{¶41} Finally, the court found that with regard to R.C. 2151.414(D)(1)(d), M.W. is in need of a legally secure placement which can be achieved with a grant of permanent custody to the agency. The court found that at least one more move would be required for M.W. once an adoptive home was found and he would be required to live in the home for six months before adoption could be finalized.

{¶42} The court further found that placing M.W. with the grandparents would guarantee continued contact with the child's biological family, but as far as the parents were concerned, this might be problematic. The court noted that the grandparents named two

individuals who had a history with children's services and/or who were not approved for placement as possible substitute caregivers and that the grandparents had been informed at the time of the first home study that these persons were not appropriate. The court found that the fact that the step-grandfather named other individuals at the hearing as substitute caregivers "did not dispel the judgment issues that identifying the same unacceptable persons a second time raises." The court also concluded that the issue with possible abuse of the step-grandfather's medication noted in the home study was adequately explained at the hearing.

{¶43} Finally, the court found that a 1997 Clermont County agency investigative report concluded that sex abuse perpetrated by the step-grandfather was indicated. The court found that the statement given by the niece to the investigator was "quite specific" but at her deposition in this case, the niece testified that she never talked to anyone about "none of this." The court concluded that the niece's "total failure of recall is not only inexplicable [,] but it also raises significant suspicion."

{¶44} In conclusion, the court found that M.W. "needs a legally secure placement" and "the facts do not indicate that such a placement can be provided by [the grandparents]" but "granting the [a]gency's motion can lead to a legally secure placement for this still young child through the adoption process."

{¶45} After a careful and thorough review of the record in this case, we find that the trial court did not err in denying the grandparents' motion for legal custody of the child. The grandparents filed the motion for legal custody and it was their burden to establish that their home was appropriate for the child. The agency used reasonable efforts to determine the appropriateness of the home and in performing a home study, the 1997 report was discovered, causing a level of concern. While the report involving possible sex abuse by the step-grandfather does not conclusively prove that sex abuse occurred, and in fact, the stories

from the family members in the report are somewhat inconsistent, it does raise concern regarding the appropriateness of placing a child with the step-grandfather. The court found that the niece's testimony, instead of alleviating the concern raised by the report, caused "significant suspicion."

{¶46} The court also questioned the judgment of the grandparents given their naming of inappropriate substitute caregivers, particularly the second time, after it was explained to them after the first home study. Finally, the trial court expressed concern that placing M.W. in his grandparents' home would allow continued contact between the child and his parents. The trial court was in the best position to judge the credibility and demeanor of the witnesses before it and determined that the grandparents' home was not appropriate. Finding no abuse of discretion and that the court's decision was in the child's best interests, appellants' assignment of error is overruled.

{¶47} Judgment affirmed.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.