

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

IN THE MATTER OF:	:	
	:	CASE NOS. CA2015-01-006
G.K.	:	CA2015-02-007
	:	
	:	<u>OPINION</u>
	:	6/29/2015
	:	
	:	

APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 17244

Jill Hittle, 112 North Barron Street, P.O. Box 58, Eaton, Ohio 45320, guardian ad litem

Jane E. Schreyer, 100 West Main Street, Eaton, Ohio 45320, for appellant, M.S.

Brian A. Muenchenbach, 200 West Main Street, Eaton, Ohio 45320, for appellant, J.K.

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HENDRICKSON, J.

{¶ 1} Appellants, the mother and father of G.K., appeal a decision of the Preble County Court of Common Pleas, Juvenile Division, granting permanent custody of G.K. to a children services agency.

{¶ 2} On July 17, 2013, the Preble County Department of Job and Family Services,

Children Services Division (agency), filed a complaint alleging G.K. was a dependent child. A few days prior, the agency was granted protective supervision and temporary custody of G.K. The agency had been involved with mother, father, and mother's three sons, G.K., Al.B., and Aa.B., since February 2013. At the time of the filing of the complaint, G.K. was three years old. The dependency complaint alleged mother and father struggle with drug addiction and mother has recently failed compliance with court-ordered drug treatment. The complaint also asserted G.K. is not adequately supervised, possibly developmentally delayed, and mother has not engaged resources for G.K.

{¶ 3} G.K. was adjudicated a dependent child and continued in the temporary custody of the agency. On August 26, 2014, the agency filed for permanent custody of G.K. and a hearing was held on December 3, 2014.

{¶ 4} At the permanent custody hearing, mother testified she has a long substance abuse history, which includes taking methadone for the past 12 years and opioids prior to the methadone treatment. Mother's methadone habit costs approximately \$100 each week. Father also struggles with drug addiction, is not employed, and has a criminal record. Mother acknowledged that she has been best friends with father since she was a teenager and the couple has been in a romantic relationship and lived together for many years. Additionally, mother recognized that her oldest son, Aa.B., abuses drugs and she has trouble separating from him.

{¶ 5} Mother testified she is the primary breadwinner in the family and has a history of employment. However, from August 2012 until late 2014, mother was unemployed and the family relied on mother's unemployment check of \$198 a week as the sole source of income. During this time, the family lived in five different residences, including a period of homelessness, stayed with friends, and had rooms in various hotels.

{¶ 6} Mother testified that after the agency became involved with the family in

February 2013, she began drug treatment at Marie Dwyer Recovery Center. Mother complied with the drug treatment until June 2013, when she missed appointments and allegedly tampered with the results of a drug screen. When mother failed compliance, G.K. was placed in the temporary custody of the agency. After G.K.'s placement into temporary custody, mother attempted suicide and was hospitalized in the psychiatric unit at Ft. Hamilton Hospital. Mother explained she attempted suicide because she was very upset about the removal of G.K., was withdrawing from methadone, and began hallucinating. Once mother was released from the hospital, she began counseling and started weaning herself off methadone.

{¶ 7} When G.K. was placed into foster care in July 2013, mother was prohibited from visiting the child pending the provision of three clean drug screens. Mother was weaning herself off methadone and was unable to satisfy this requirement until December 2013. Therefore, mother did not visit G.K. from July 2013 until December 2013. Mother continued with her drug treatment at Marie Dwyer but relapsed in October 2013 and February 2014 when she took benzodiazepines and clonopine.

{¶ 8} After two years of unstable housing, mother obtained a subsidized apartment in May 2014. Father and mother's oldest son, Aa.B., resided with mother in the apartment at this time. However, a few months later, in July 2014, mother was incarcerated for a felony shoplifting offense and was not released until September 2014. Due to her incarceration, mother was discharged from Marie Dwyer and did not see G.K. during this time. After mother was released from jail, she began drug treatment at Marie Dwyer again. However, in November 2014 Marie Dwyer discharged mother a second time for failure to attend a drug treatment session. Mother explained she was unable to attend the session because she was visiting G.K.

{¶ 9} At the time of the hearing, mother had maintained full-time employment since

September 2014. She also has purchased and insured a vehicle. While Mother no longer attends Marie Dwyer for drug treatment, she attends AA meetings conducted by a church group. Mother also stated that she has ended her romantic relationship with father. She explained that the relationship "officially" ended after she was released from jail when she discovered that father had stolen her car, caused the car to be impounded, and then lost the vehicle. While the relationship has ended, she and father continue to visit G.K. together every week. Father also occasionally comes to her house for a meal.

{¶ 10} Mother also testified G.K. has been diagnosed as having a mild form of autism. Mother acknowledged G.K. was not diagnosed as autistic until he was placed in foster care but stated she noticed speech delays in G.K. when he was a baby and took him to a doctor at 18 months. The doctor did not diagnose G.K. at that time and recommended waiting to see if G.K. was developmentally delayed. Mother stated she was in the process of obtaining a diagnosis for G.K. when he was in her custody and he was given an Individualized Education Program (IEP) by the school system. Mother also stated G.K. was progressing more in her care because he spoke, used cue cards to indicate his wishes, and ate fruits and vegetables.

{¶ 11} Jackie Rust, a psychotherapist with Samaritan Behavior Health, began counseling services with mother in August 2013. She stated mother is diagnosed with depressive disorder and polysubstance abuse and was previously diagnosed with post-traumatic stress disorder. Rust testified mother's goals in counseling are to reunify with her children, maintain sobriety, individuate herself from Aa.B., and not seek approval from others. Mother's relationship with father is a continuing issue in counseling and was not always compatible with mother's goals. Rust acknowledged mother was incarcerated from July to September 2014 but serving jail time was a "turning point," and mother now wants to end her relationship with father. She also stated mother has been attending AA meetings for the past

year and mother's "triggers" for depression and drug use include stress related to finances, being a single mother, lack of a support network, and lack of individuation from her oldest son.

{¶ 12} Father testified he has a history of addiction with methadone and soboxone. Father has not been employed for a number of years, does not receive social security disability income, and does not have a driver's license. Father has also not paid any child support during the case. He stated he has been with mother since 2003 and resided with mother in several residences during most of the custody case, including mother's present apartment. At the time of the hearing, father was incarcerated for a felony. Father also had a separate felony theft offense pending. Father stated he was aware G.K. was diagnosed with autism but that he has not done any research on how to care for an autistic child. Father also believes he is in a relationship with mother and they have recently discussed marriage.

{¶ 13} Clara Miller, G.K.'s foster mother, testified G.K. came to live with her in the summer of 2013 when he was three years old. At that time G.K. had not been diagnosed but Miller suspected he was autistic because she also has a sibling who is autistic. Miller stated when G.K. came to her home, he was "uncontrollable," would not use utensils or drink out of a cup, and did not respond to commands. However, since being placed in her care, G.K. has made progress and is able to use a spoon, follow instructions, and repeat a few words. She also stated G.K. has nutritional challenges and does not eat a variety of foods. Miller recognized that G.K. knew how to do some things before he came to her house, but like many autistic children, lost those abilities when he moved.

{¶ 14} Miller stated she is a licensed foster parent and was trained for two days on autism by a nurse. G.K. is enrolled in a preschool for special needs students, has an IEP, and will be attending a normal kindergarten next year. G.K. also has a speech therapist through the preschool. Miller stated that G.K. must have consistency, is a "child of routine,"

and throws a tantrum if he does not follow a routine. Miller has five biological children in her home, ages six to 15 and one other foster child and G.K. loves all the other children in the home. Miller is also legally separated from her husband and is unable to adopt G.K. because she is a single mother.

{¶ 15} Heather Sullivan testified she was the agency caseworker assigned to G.K. for a period of time. She stated father's case plan required parenting classes, stable housing, income, and drug and alcohol assessment. In March 2014, father had not completed any of the items on the case plan. The case plan for mother required she complete a psychological evaluation and drug and alcohol assessment through Marie Dwyer. Mother was recommended for ongoing drug treatment and was compliant for a period of time until she relapsed. Sullivan stated that, since being placed in foster care, G.K. has made several improvements, such as using different words and attending school. Sullivan also remarked mother and father interact well with G.K. during their visits.

{¶ 16} Nathan McDermitt, the current agency caseworker for G.K., testified father has not completed any portion of his case plan. In regards to mother, she has been attending counseling, was undergoing drug treatment with Marie Dwyer until discharged, has obtained housing, employment, and a vehicle. He stated that G.K. is affectionate with Miller but because Miller is not in a position to adopt G.K., the agency will have to find an adoptive family for him. However, McDermitt stated Miller would be willing to keep G.K. until the agency found a permanent placement for him. McDermitt also testified mother and father's visits with G.K. are good and the parents are "very engaged" with him.

{¶ 17} McDermitt has been to mother's apartment twice. During the first visit in July 2014, the apartment was not appropriately furnished, but during the second visit in October 2014, the apartment was furnished, clean, and organized. He stated mother gave a clean drug screen when she was released from jail in September 2014. However, mother was

discharged from Marie Dwyer with a poor prognosis in November 2014.

{¶ 18} A report of the guardian ad litem (GAL) was also admitted into evidence. The GAL stated father has made no progress on his case plan and expressed concern that mother did not start working on her case plan until the permanent custody motion was filed in August 2014. The GAL reported mother has obtained employment, transportation, housing, and sobriety. The GAL commended mother for making substantial progress in her recovery and stabilizing her life but stated she is vulnerable in her recovery and has a strong bond with father who is a negative influence. The GAL also reported G.K. is doing well in foster care, had made progress, and stressed that G.K. is extremely routine driven and needs consistency. The GAL stated the bond between G.K. and mother is difficult to measure as G.K. is not verbally expressive and wild in his behavior. The GAL recommended granting mother additional time to prove she is able to meet G.K.'s needs, however, if the court is unwilling to grant mother additional time, permanent custody should be granted to the agency.

{¶ 19} In an entry dated January 14, 2015, the juvenile court found, by clear and convincing evidence, it is in the best interest of G.K. to grant permanent custody to the agency. In its decision, the juvenile court took judicial notice of its ruling denying permanent custody of mother's middle son, Al.B. In Al.B.'s case, the juvenile court found that based on the progress mother has made, Al.B. could be placed with mother within a reasonable period of time.

{¶ 20} Mother and father have each separately appealed the decision of the juvenile court.

Permanent Custody and Appellate Review Standards

{¶ 21} 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*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982).

{¶ 22} 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 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)-(d).

{¶ 23} The juvenile court found, by clear and convincing evidence, that granting permanent custody to the agency was in G.K.'s best interest and G.K. cannot be placed with either of the parents within a reasonable time.

{¶ 24} 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 S.H.*, 12th Dist. Butler Nos. CA2014-12-259 and CA2015-01-008, 2015-Ohio-1763, ¶ 11. As an appellate court reviewing a decision granting permanent custody, we neither weigh the evidence nor assess the credibility of the witnesses, but instead determine whether there is sufficient clear and convincing evidence to support the juvenile court's decision. *In re S.F.T.*, 12th Dist. Butler Nos. CA2010-02-043 thru CA2010-02-046, 2010-Ohio-3706, ¶ 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 S.H.* at ¶ 11.

Mother's Appeal

{¶ 25} Mother argues the juvenile court's decision granting permanent custody to the agency was against the manifest weight of the evidence. Mother argues several of the juvenile court's factual findings were not supported by the record. Additionally, mother asserts granting permanent custody of G.K. was against the manifest weight of the evidence when the juvenile court denied permanent custody for mother's other son, Al.B.

{¶ 26} Notwithstanding our standard of review of a juvenile court's decision granting permanent custody, when a party raises a manifest weight challenge to a permanent custody decision, an appellate court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20. The presumption in weighing the evidence is in favor of the finder of fact, which we are especially mindful of in custody cases. *In re C.Y.*, 12th Dist. Butler Nos. CA2014-11-231 and CA2014-11-236 thru CA2014-11-238, 2015-Ohio-1343, ¶ 25. "If the evidence is susceptible to more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Eastley* at ¶ 21.

{¶ 27} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing:

[T]he court shall 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.

{¶ 28} With respect to R.C. 2151.414(D)(1)(a), the juvenile court found G.K.'s autism does not allow for substantial bonding and he is not bonded significantly with his parents. The juvenile court noted the GAL questions mother's and father's claim that they are bonded with G.K. because G.K. is nonverbal and his interaction at visits with mother and father are unstructured. The court stated G.K. is doing well in foster care and receives "one on one" care from his foster mother who is a "trained and experienced parent." Due to his autism, G.K. requires significant extra attention and stability in routine, housing, parenting and the progress he has made since being placed in foster care is due to the fact that his needs are being met.

{¶ 29} With respect to R.C. 2151.414(D)(1)(b), the juvenile court recognized the GAL recommended granting permanent custody to the agency only if the court was unwilling to grant mother additional time to meet G.K.'s needs. The court refused to grant mother additional time reasoning further time will not change mother's history with addiction, mental health problems, and the needs of G.K.

{¶ 30} With respect to R.C. 2151.414(D)(1)(c), the juvenile court found G.K. has been in the temporary custody of the agency for the past 13 out of 13 months. Prior to the grant of temporary custody, G.K. was in the custody of mother and father.

{¶ 31} With respect to R.C. 2151.414(D)(1)(d), the juvenile court found G.K. needs a

legally secure placement and that cannot be achieved without granting permanent custody to the agency. The court noted father is unemployed, has no likelihood of employment, has a criminal history, a drug problem, and besides a few months of involvement, has not assisted mother in parenting G.K. Father also caused mother to lose her car through his criminal actions while mother was incarcerated. The court found father's reluctance to accept G.K.'s autism diagnosis as "foolish and dangerous." The court concluded that father's record "speaks volumes about his character and qualifications to be a partner or a father."

{¶ 32} The court found mother has made progress in her life since the removal of G.K. but struggles with addiction. Mother is now sober and attends a drug treatment program but has had two relapses since G.K.'s removal. The court stated mother has obtained steady employment, housing, and transportation but noted mother's lengthy history with addiction and significant periods in her life of unemployment, homelessness, and irresponsibility. The court also found mother has a continuing relationship with father despite her understanding that he is a negative influence in her life and mother has "potentially lied" about the continued involvement with father. The court also noted that notwithstanding mother's counseling, mother attempted suicide after the children were removed from her custody.

{¶ 33} The court expressed its concern that mother will have the stability and time to provide the attention and structure G.K. requires given that mother will be working full-time, attending her drug treatment program, and working the case plan for her middle son, Al.B. Al.B. has a serious bowel condition that requires significant attention as he has been hospitalized numerous times. The court also stated its apprehension that taking care of G.K., a special needs child, might push mother to another drug relapse or suicide attempt.

{¶ 34} Based on consideration of the statutory factors, the juvenile court determined by clear and convincing evidence it was in the best interest of G.K. to grant permanent custody to the agency. The juvenile court also found by clear and convincing evidence G.K.

cannot be placed with mother or father within a reasonable time and should not be placed with either parent.

{¶ 35} After carefully reviewing the record in this case, the juvenile court's findings are supported by sufficient, credible evidence and are otherwise not against the manifest weight of the evidence. Nevertheless, mother argues several of the juvenile court's factual findings are not supported by the evidence. We are unpersuaded by any of mother's arguments.

{¶ 36} Mother challenges the juvenile's court statement that G.K. receives one-on-one attention and has made progress in foster care. G.K.'s foster mother, Miller, testified she is a single mother raising five biological children and two foster children. However, Miller is a licensed foster parent, had a sibling that was autistic, and has received autism training from a nurse. Miller stated she provides G.K. routine and consistency and since being in her home, G.K. is able to use utensils, responds to commands, repeats words, and understands the meaning of some words. Further, while in foster care, G.K. was diagnosed as autistic, enrolled in a special needs preschool, obtained an IEP, has a speech therapist, and is scheduled to attend a normal kindergarten. While mother testified G.K. was talking more and eating better with her, Miller stated G.K. was "uncontrollable" when she first received him, he would not respond to his name, would not drink out of a cup or feed himself with a spoon, and would not make eye contact or demonstrate affection.

{¶ 37} Mother also challenges the juvenile court's conclusion that G.K.'s autism does not allow for significant bonding and he is not significantly bonded with mother. The GAL reported there was a bond between mother and G.K. but it is difficult to measure as G.K. is not verbally expressive and wild in his behavior. G.K.'s caseworker stated that while mother appears to be bonded with G.K., during mother's visits G.K. sometimes gets upset and throws tantrums. Further, mother has had substantial periods of time where she did not see G.K. at all, including between July to December 2013 when she could not provide three

clean drug screens and between July to September 2014 when she was incarcerated.

{¶ 38} Mother maintains the juvenile court erred in concluding she continues to have a relationship with father despite his negative influence in her life and she has "potentially lied" about her involvement with father. However, there were several pieces of evidence at the hearing indicating mother has not ended her relationship with father. The GAL reported there is a "strong bond" between mother and father, mother would not affirmatively state she would stay away from father, and mother's continued relationship with father is unhealthy. Father also testified he believes he and mother are still together, he has spent time with mother before he was recently jailed, he still has things at mother's home, and he and mother had recently spoken about marriage. While mother and mother's therapist stated the relationship has ended, mother acknowledged she and father have been together for many years and didn't end the relationship until several months after the permanent custody motion was filed.

{¶ 39} Lastly, mother challenges the court's conclusion that mother's life is too full to provide the stability and attention G.K. requires. Mother admitted she has struggled with drug addiction for years and during the agency's involvement, has relapsed, and was discharged from Marie Dwyer twice. Mother has finally achieved sobriety but must attend drug treatment meetings multiple times a week. Mother also has a full-time job and is seeking to regain custody of her other son, A.B., who has a serious bowel condition resulting in hospitalization and medical treatment. While mother has obtained housing, she has had periods of unstable housing or homelessness and testified at trial that the cost of her housing is scheduled to increase. Additionally, mother has struggled with her mental health, attempted suicide, and was hospitalized when G.K. was placed in the temporary custody of the agency. Lastly, mother acknowledged childcare will be needed for G.K. if she were to obtain custody, but stated she had not arranged care at the time of the hearing.

{¶ 40} Finally, Mother argues granting permanent custody of G.K. was against the manifest weight of the evidence when the juvenile court denied permanent custody for mother's middle son, Al.B. In Al.B.'s case, the juvenile court determined he could be placed with mother within a reasonable time but came to the opposite conclusion in regards to G.K. However, we do not find the juvenile court's differing decisions were erroneous in light of the particular needs of each child. G.K. is ten years younger than Al.B., has a different father, was placed in a different foster home, and is autistic. While Al.B. has medical problems, the evidence demonstrated that G.K.'s autism requires extra attention and stability in routine, housing, and parenting. Further, unlike Al.B. where the court found that Al.B. interacts with his parental grandparents, is bonded with his mother, and wishes to be placed with his mother, G.K.'s bond with his parents is hard to measure due to his autism and his grandparents are not involved.

{¶ 41} R.C. 2151.414 directs juvenile courts to decide the outcome of the case based on the best interest of *each* child and whether *each* child may be able to be placed with the parent within a reasonable time. See R.C. 2151.414(B)(1) and (E). Therefore, based on the facts and circumstances of this case, we do not find the juvenile court's decision concluding G.K. could not be placed with mother within a reasonable time while also finding Al.B. could be placed with mother within a reasonable time was against the manifest weight of the evidence. See *In re D.R.*, 12th Dist. Butler No. CA2009-01-018, 2009-Ohio-2805, ¶ 18; *In re D.G.*, 10th Dist. Franklin No. 09AP-1122, 2010-Ohio-2370, ¶ 26.

{¶ 42} In light of the forgoing and after a thorough review of the record, we find the juvenile court did not err by declining to grant mother additional time to prove she is able to meet G.K.'s daily needs. During the 16 months G.K. has been in the temporary custody of the agency, mother has relapsed several times, attempted suicide, and has not cut off all ties with father. The juvenile also did not lose its way in granting permanent custody of

G.K. to the agency. The juvenile court properly considered the appropriate factors under R.C. 2151.414(D) and acted in G.K.'s best interest by granting permanent custody to the agency. After weighing the evidence and all reasonable inferences and considering the credibility of the witnesses, we find the juvenile court did not create such a manifest miscarriage of justice that its judgment must be reversed and a new trial ordered. While mother should be applauded for the significant progress she has made in overcoming her addiction, obtaining employment, transportation, and housing, in light of mother's vulnerable recovery and the significant attention and stability G.K. requires, it is in the best interest of G.K. to grant permanent custody to the agency. Further, the evidence establishes that G.K. cannot or should not be placed with either parent within a reasonable period of time.

{¶ 43} Accordingly, the juvenile court's finding placing G.K. in the permanent custody of the agency was not against the manifest weight of the evidence and was supported by sufficient credible evidence. Mother's assignment of error is overruled.

Father's Appeal

{¶ 44} Counsel for father has filed a brief with this court pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), which: (1) indicates that a careful review of the record from the proceedings below fails to disclose any errors by the trial court prejudicial to the rights of father upon which an assignment of error may be predicated; (2) lists one potential error "that might arguably support the appeal," *Anders* at 744; (3) requests that this court review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of father's constitutional rights; (4) requests permission to withdraw as counsel for father on the basis that the appeal is wholly frivolous; and (5) certifies that a copy of both the brief and motion to withdraw have been served upon father.

{¶ 45} Having allowed father sufficient time to respond, and no response having been

received, we have accordingly examined the record and find no error prejudicial to father's rights in the proceedings in the trial court. Therefore, the motion of counsel for father requesting to withdraw as counsel is granted, and father's appeal is hereby dismissed for the reason that it is wholly frivolous.

Conclusion

{¶ 46} Mother's assignment of error is overruled and the trial court's decision granting permanent custody to the agency is affirmed. Father's appeal is dismissed and his counsel's request to withdraw is granted.

M. POWELL, P.J., and S. POWELL, J., concur.