[Cite as *In re S.K.*, 2009-Ohio-5533.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

IN THE MATTER OF: S.K.	:	
	:	C.A. CASE NO. 2009 CA 29
	:	T.C. NO. 2007-1930
	:	(Civil appeal from Common Pleas Court, Juvenile Division)
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O P I N I O N

Rendered on the 16th day of October, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of E.T., filed March 13, 2009. E.T. appeals from the judgment of the Clark County Court of Common Pleas, Domestic Relations Division, Juvenile Section, granting permanent custody of her daughter, S.K., to the Clark County Department of Job and Family Services ("Agency"). S.K. was born on September 11, 2007.

{¶ 2} S.K.'s father, H.K., also appealed the juvenile court's decision regarding

the permanent custody of S.K., and we affirmed the juvenile court's decision as to H.K. on August 7, 2009. H.K. is E.T.'s former boyfriend.

{¶ 3} On October 15, 2007, the Agency filed a Complaint for Emergency Shelter Care, seeking guardianship of S.K. According to the Complaint, United States Marshals mistakenly went to S.K.'s home to serve a warrant, and while there they observed deplorable conditions. Inside the home were 17 cats and two dogs. Feces, urine and vomit were all over the floors. The odor within the home was overwhelming, and the authorities observed fleas and gnats everywhere. Springfield Police officers responded, along with Agency workers, and both H.K. and E.T. were arrested on charges of child endangering. S.K. was removed from the home.

{¶ 4} Agency workers observed that S.K. had diarrhea and a diaper rash so severe that she was bleeding in one area, and she was screaming in pain. S.K. was subsequently admitted to the hospital, where she was diagnosed with dehydration, thrush, acid reflux, and a urinary tract infection. She was subsequently diagnosed with hypotoma, which is a lack of muscle tone. According to the Complaint, S.K. was previously admitted to the hospital for acid reflux from October 5 - 9, 2007, and hospital staff at that time advised the Agency of their concerns regarding the hygiene and level of functioning of H.K. and E.T. A social worker met the family at the hospital on October 9, 2007, but when she attempted a follow-up visit after S.K.'s release, H.K. and E.T. denied her access to their home.

{¶ 5} Following a hearing, the juvenile court issued a Temporary Shelter Care Order on October 15, 2007, and on December 5, 2007, the court issued a Judgment Entry and Temporary Custody Order with the agreement of H.K. and E.T. A guardian

ad litem was appointed for S.K.

{¶ 6} The Agency developed a case plan with the aim of reuniting S.K. with her parents. Pursuant to the plan, E.T. was referred to Family Life Education to gain the skills to "provide a safe/clean living environment for her family." E.T. was also required to "have a Parenting Psychological evaluation," and to attend "Cooking/Cleaning 911 via Family Life Education." The case plan also provided for E.T. to attend scheduled visitations with S.K. and to attend all of the child's doctor and physical therapy appointments. The case plan notes, "[E.T.] was neglected as a child and was adopted. [She] also has a history of living in unhealthy conditions. She is a victim of domestic violence by her ex-husband."

{¶ 7} On October 17, 2008, the Agency filed a Complaint and Motion to Modify Temporary Custody to Permanent Custody, after concluding that H.K. and E.T. were unable to meet S.K.'s needs.

{¶ 8} A hearing was scheduled for October 28, 2008. E.T. did not attend the hearing, where the following exchange occurred:

{¶ 9} "THE COURT: And where is [E.T.], do we know?

{¶ 10} "[COUNSEL FOR E.T.] : I have no idea. I have sent letters and have not received any response. I have talked to CSB and there's no indication of where she is at this time.

{¶ 11} "THE COURT: And I can't find her either, so I sent out a notice through the News and Sun to see if she would respond. And she's expected to be here next month, particularly on November the 6th, about eight days from now. We'll see if she shows up."

{¶ 12} E.T. did not appear at the hearing on November 6th. Counsel for H.K. indicated that he sent E.T. a subpoena via certified mail to an address in Saraland, Alabama, an address obtained from the post office, without response. The court rescheduled the hearing to attempt to perfect service upon E.T.

{¶ 13} Another hearing was held on January 13, 2009, and again E.T. did not attend. Counsel for E.T. stated that she had communicated with her client via email approximately six times. Counsel indicated that she received an email from E.T. the night before the current hearing indicating "that she did not have notice of the hearing."

{¶ 14} A trial was held on February 6, 2009, in E.T.'s absence. Dr. Daniel Hrinko, an expert in the field of clinical forensic psychology, testified regarding the psychological evaluation he performed on E.T. pursuant to the case plan. According to Hrinko, E.T. was "very meek, demur, and appeared to be intimidated at times. As soon as [H.K.] left the room she changed. She was much more open, talkative and assertive and spoke her mind about what she thought, what she felt and what she was concerned about much more comfortably and much more freely. That particular response of being intimidated by someone, being worried about future problems that may occur causing her to inhibit what would be a reasonable and appropriate behavior is the behaviors implied by the psychological testing."

{¶ 15} When asked about her ability to regain custody of S.K., Hrinko stated that he was "a bit more optimistic about her since she possesses higher intellectual capabilities and higher academic capabilities [than H.K.]. She does lack assertiveness about being able to be proactive, as in anticipating problems and taking actions to avoid them. And, as a result, she is likely to allow others to do as they please without taking a

stand. That is a significant problem." Hrinko indicated that "intensive mental health counseling could be a way for her to begin to develop these skills." Hrinko was "concerned that if [E.T.] continued to maintain a relationship with [H.K.], that the intimidation involved in that relationship would inhibit her ability to make progress in this area." Hrinko "felt that with that mental health counseling * * * and distance from controlling and domineering relationships, that within a reasonable amount of time, six months to a year, that she would develop the skills to be able to * * * do a reasonable job of taking care of a child."

{¶ 16} Regarding her absence from the trial, Hrinko stated, it "is possible that she may have looked at the situation, determined it, possibly inaccurately, to be hopeless, and that efforts on her part would make no real difference and therefore put no effort into meeting plans and expectations and made a choice to start fresh or clean."

{¶ 17} Hrinko testified that E.T. was referred to him for a follow-up evaluation by the Agency, and that she missed the appointment. Another appointment was scheduled, which E.T. also missed. On cross-examination by counsel for E.T., Hrinko was asked if E.T.'s current separation from H.K. would contribute to his "optimism" regarding her ability to care for S.K., and he responded, "that would be an intelligent decision on her part and a first step towards a series of other steps necessary to make use of her skills and develop strengths necessary to be a safe and effective parent. In and of itself, I don't believe that would be sufficient, but it would be a good first step."

{¶ 18} Kathryn Boyle, a developmental specialist who had been working with S.K. for almost a year and a half at the time of trial, testified about S.K.'s developmental delays. According to Boyle, S.K. was evaluated in the areas of cognitive development,

motor development, language development, self help development and social development, and she was "delayed in all areas."

{¶ 19} Boyle testified that H.K. and E.T. had visitation with S.K. at Gibault Visitation Center, and she met with them several times to teach them how to work with S.K. in order to increase her developmental skills. Boyle testified, "People who have low muscle tone will always have issues to deal with. And you always need to have someone caring for her who will keep medical appointments, who will look for interventions, * * * on a regular basis, work with a child so that they can maintain their skills." Boyle maintained that S.K. would need someone to work with her on a daily basis.

{¶ 20} According to Boyle, E.T. was hostile and resistant initially to the proposed intervention with S.K., insisting that nothing was wrong with her daughter. Boyle described her interactions with E.T. and H.K. as follows; "It was very difficult for them. They were uncomfortable doing the kinds of activities that at that time were necessary * * *, teaching her rolling activities and hands and knees activities. * * * it was always very difficult for them. And I didn't ever feel like they really understood, or weren't able to physically do the things I was asking them to do. And as we went from visit to visit, it never seemed like there was any progress as far as them, their comfort level or their ability to work with [S.K.]." Boyle testified that she visited with E.T. 12 times and did not observe any progress in her parenting skills. Boyle's last contact with E.T. was before she left town, and at that time, Boyle did not believe that E.T. was capable of caring for S.K. In response to a question from the court, Boyle indicated that E.T. never "got to the point where she could say my child has a developmental delay and I

need to focus a lot of time working with her, or that I need intervention." According to Boyle, E.T. "never acknowledged when I was at a home visit that she had worked on anything that I had given her to do."

{¶ 21} Jennifer Rickets, a visitation coordinator at Gibault Visitation, testified that she supervised E.T.'s and H.K.'s visitations with S.K. and prepared summaries of the visits. According to Rickets, E.T. "fed and changed S.K. appropriately. She came down to [S.K.'s] level and spread out toys on the rug for her to play with." Regarding the necessary exercises, Rickets stated, E.T. "was resistant to those at first, but eventually she would do them * * * if we prompted her to. But she was very resistant and did not feel that she * * * needed those exercises." Rickets did not indicate in her summaries that E.T. resisted working with S.K. but rather noted that E.T. did work with S.K. on some aspects of her physical therapy.

{¶ 22} Officer Anna Frendenhall of the Springfield Police Department testified that she photographed the conditions of S.K.'s home at the time of her removal. According to Frendenhall, "there really wasn't any place for the baby to sleep. * * * the crib was full of clothes. * * * there [were] old bottles sitting out." Frendenhall noted there were "a lot of cats," the litter boxes were dirty, and "there were feces all over the floor."

{¶ 23} T.K., S.K.'s foster mother, testified regarding S.K.'s progress, stating that "she is pretty much on target physically and developmentally." She stated that S.K. still had care givers coming to her home to help her with her exercises, and "[they feel that it would be a lifelong [sic] to help make her core stronger." When asked if it was necessary to make various medical appointments for S.K., T.K. responded, "Many,

many." She stated that S.K.'s parents were invited to all of her appointments at every team meeting, but that "[f]or the appointments down at Children's they made approximately half. For the physical therapy, which was done locally, they came less than half."

{¶ 24} Brenna Theiss, a social service worker with the Agency testified that she received S.K.'s case in June, 2008, after a previous social worker left the Agency. Theiss had regular contact with E.T. from June until August of 2008 but has not seen E.T. since the end of August. According to Theiss, she went to E.T.'s last known address looking for her. She sent her emails to an address provided by H.K., as well as letters and certified mail. "We've attempted phone conversation. And I have attempted to locate her through family members as well," Theiss stated.

{¶ 25} Theiss testified that E.T. did not successfully meet her case plan objectives in terms of counseling, and that E.T. was not honest with Theiss about her attendance at her counseling sessions. Theiss stated that E.T. also did not meet her case plan objectives in terms of visitation, having not seen her child since August of 2008. According to Theiss, E.T. has not inquired about her daughter's well-being since leaving the State. Theiss stated that she has no idea what type of housing E.T. had at the time of the hearing.

{¶ 26} Theiss testified that S.K. has made tremendous progress in foster care, and that she has bonded with her foster parents. According to Theiss, S.K. is "active and attempting things that she had not [before]." When asked what was in S.K.'s best interest, Theiss maintained, S.K. "needs to be in a stable and loving home that can meet all of her needs, that will continue regularly with any type of physical therapy or

developmental assessments." Theiss indicated that she did not believe either of S.K's parents were able to meet her needs.

{¶ 27} Theiss stated that E.T. informed her that she is currently in a new relationship in Alabama, but Theiss had no information about the current living situation. When asked if there were a reasonable way to effectuate visitation for S.K. and E.T. between Ohio and Alabama, Theiss replied, "absolutely not," and she added that it would have been "very hard" for E.T. to continue to work on S.K.'s developmental needs from that distance. The following exchange occurred between the court and Theiss:

{¶ 28} "Q. So she responds to your inquiries. She responds with enough information that leads you to believe she's getting your email?

{¶ 29} "A. Yes.

{¶ 30} "Q. And when you implore her to come back and resume her role as a parent, to be involved in the life of the child, her response has been what?

{¶ 31} "A. Not to do so.

{¶ 32} "Q. Has she ever said anything to you about her reasoning for abandoning the child?

{¶ 33} "A. She's never typed [S.K.'s] name in an email, your Honor. She has indicated that she is married now * * * to a police officer; * * * she indicates that she intended to fight for her." According to Theiss, she received no more than six emails from E.T. since August.

{¶ 34} H.K. provided lengthy testimony. Regarding the charges of child endangering brought as a result of S.K.'s removal from the home, H.K. testified that he

and E.T. served three months of pretrial probation and the charges were dismissed.

{¶ 35} In determining that the Agency should have permanent custody of S.K., the juvenile court concluded as follows regarding E.T.: "The mother was appointed legal counsel months before the permanent custody proceedings began. The mother was capably represented by counsel throughout the proceedings. Approximately four or five months before the permanent custody hearing, the mother left the state of Ohio, she has had no contact with the child. The mother did not appear for the permanent custody trial. She was advised of the proceeding by the court and by her counsel. In fact, the permanent custody trial was delayed three weeks so that counsel for the mother could make a second effort to advise mother of the proceedings and to get her to the court room for the hearing.

{¶ 36} "The mother has abandoned the child and has not visited for more than ninety days.

{¶ 37} "A case plan was established for the mother. She failed to complete every component of the case plan. Mother did complete the psychological evaluation but did not follow through and complete any of the recommended counseling. She did complete a portion of the family life classes, but did not complete a full regimen of that program. The mother had reasonable visitation until August 2008. She has had no contact in five months with the child and has expressed no genuine interest in the well being of her daughter. The mother's housing is unknown. She has left the child behind and had failed to communicate with the Guardian Ad Litem, her child or the caseworker. It can be reasonably concluded that mother failed to successfully complete every component of the case plan. She is not indicating an interest or

willingness to be a parent to the child. There is no likelihood that she will change anytime soon. In fact, in spite of continuing the trial so that we could hear from the mother, she again chose not to appear. It can be reasonably and justly concluded that the mother cannot meet the needs of the child now or anytime in the near future."

{¶ 38} The court noted that the guardian ad litem recommended that the motion for permanent custody be granted, and that the Agency made reasonable efforts at reunification.

{¶ 39} The trial court order provides, "The child cannot be placed with either parent within a reasonable period of time or should not be placed with either parent. * * *

{¶ 40} "The child should not be returned to the parents for the following reasons:

{¶ 41} "A. Following removal of the child outside the home of the parents, and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents, they have failed to remedy the problems that caused the child to be placed outside the home.

{¶ 42} "B. The mother and father have abandoned the child.

{¶ 43} "C. The parents have demonstrated a lack of commitment toward the child by failing to regularly support, visit or communicate with the child when able to do so."

{¶ 44} Finally, the court enumerated its reasons for its conclusion that it was in S.K.'s best interest to grant permanent custody of her to the Agency, including the reasonable probability that S.K. can be adopted, that S.K. has no regular and meaningful contact with her biological family, that her parents cannot provide a safe

home for her, that neither parent substantially remedied the conditions resulting in her removal, there are no known relatives on either side of the family that can care for her, the wishes of the child as expressed by the G.A.L. for a loving and secure home, and the lack of a safe, loving, appropriate relationship between S.K. and her parents.

{¶ 45} E.T. asserts one assignment of error as follows:

{¶ 46} 'THE TRIAL COURT'S DECISION TO GRANT PERMANENT CUSTODY OF S.K. TO THE CLARK COUNTY CHILDREN SERVICES BOARD WAS IMPROPER."

{¶ 47} According to E.T., the juvenile court's decision "was against the manifest weight of the evidence and not supported by clear and convincing evidence."

{¶ 48} "The United States Supreme Court has recognized that parents' interest in the care, custody, and control of their children 'is perhaps the oldest of the fundamental liberty interests recognized' by the Court. *Troxell v. Granville* (2000), 520 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49." *In re M.S. & D.S.*, Clark App. No. 2008 CA 70, 2009-Ohio-3123, ¶15.

{¶ 49} "In a proceeding for the termination of parental rights, all of the court's findings must be supported by clear and convincing evidence. R.C. 2151.414(E); *In re J.R.*, Montgomery App. No. 21749, 2007-Ohio-186, at ¶ 9. However, the court's decision to terminate parental rights will not be overturned as against the manifest weight of the evidence if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements for a termination of parental rights have been established. *In re Forrest S.* (1995), 102 Ohio App.2d 338, 345, * * * ; *Cross v. Ledford* (1954), 161 Ohio St. 469, * * * paragraph three of the syllabus." *In re K.S. & K.S.*, Clark App. No. 2008 CA 77,

2009-Ohio-533, ¶ 16. "'An appellate court will not reverse a trial court's determination concerning parental rights and custody unless the determination is not supported by sufficient evidence to meet the clear and convincing standard of proof.' 'Clear and convincing evidence is that level of proof which would cause the trier of fact to develop a firm belief or conviction as to the facts sought to be proven.'" *Miller v. Greene County Children's Services Board* (2005), 162 Ohio App. 3d 416, 2005-Ohio-4035.

{¶ 50} R.C. 2151.414(B) sets forth the circumstances under which a court may grant permanent custody of a child to a children services agency. Pursuant to R.C. 2151.414(B)(1)(a), the court may grant permanent custody of a child to the agency if the court determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the children services agency, and "The child is not abandoned or orphaned, 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, * * * and the child cannot be placed with either of the child's parent's within a reasonable time or should not be placed with the child's parents."

{¶ 51} R.C. 2151.414(B)(1)(b) allows the court to grant permanent custody of the child to the agency if doing so is in the child's best interest and the "child is abandoned."

{¶ 52} In determining whether a child can be placed with either parent within a reasonable time, a trial court must comply with R.C. 2151.414(E), which provides in relevant part:

{¶ 53} "In determining at a hearing * * * whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the

parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing * * * that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶ 54} "(1) Following the placement of the child outside the child's 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 to substantially remedy the conditions causing the child to be placed outside the child's 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.

{¶ 55} * * *

{¶ 56} "(4) The parent had demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶ 57} "* * *

{¶ 58} "(10) The parent has abandoned the child."

{¶ 59} "R.C. 2151.414(D) directs the trial court to consider all relevant factors when determining the best interest of the child, including but not limited to: (1) the

interaction and interrelationship of the child with the child's parents, relatives, foster parents and any other person who may significantly affect the child; (2) the wishes of the child; (3) the custodial history of child; (4) the child's need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; (5) whether any of the factors in R.C. 2151.414(E)(7) through (11) are applicable. The factors in R.C. 2151.414(E)(7) through (11) include conviction of various crimes like homicide, assault and child endangerment, and withholding food or medical treatment from a child." *In re S.K. & S.K.*, ¶ 2

{¶ 60} Upon thorough review of all of the record, we conclude that the Agency presented clear and convincing evidence that granting permanent custody to the Agency was in S.K.'s best interest. The juvenile court correctly determined that E.T. abandoned S.K., a finding that E.T. does not contest in her brief. R.C. 2151.011 provides: "For the purposes of this chapter, a child shall be presumed abandoned 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." At the time of the February 6, 2009 trial, E.T. had not had contact with S.K. since August, 2008, a period of several months. In addition to the lack of contact, E.T.'s lack of commitment to S.K. was further demonstrated by the fact that E.T. failed to even inquire about her daughter's well-being during this period.

{¶ 61} While Hrinko testified that E.T.'s separation from H.K. was "a good first step," he indicated that a series of other necessary steps were required for E.T. to become a safe and effective parent. Consistent with her psychological profile, there was no evidence before the court that in the last several months during her absence

that E.T. had affirmatively sought the "intensive mental health counseling" Hrinko recommended to gain the necessary skills to support and maintain S.K.'s development.

{¶ 62} We note, the testimony was undisputed that S.K. was doing very well in foster care. She remains entitled to a safe and secure home, and there was no evidence before the court at the time of trial that E.T. was maintaining an appropriate home for her daughter. Finally, Hrinko, T.K. and Theiss all testified that E.T. missed numerous appointments for herself and S.K., demonstrating E.T.'s failure to utilize the resources provided to her and belying her ability to assume responsibility for S.K.'s demonstrated needs.

{¶ 63} We find that the trial court considered all relevant factors in determining S.K.'s best interest, and the record contains competent, credible evidence upon which the court concluded that the essential statutory elements for a termination of parental rights had been established. E.T.'s sole assignment of error is overruled.

{¶ 64} The judgment of the trial court is affirmed.

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BROGAN, J. and FAIN, J., concur.

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