

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY**

IN RE:

CASE NO. 10-14-13

T.S.,

ALLEGED DEPENDENT CHILD.

O P I N I O N

[ANGELA SCHMITT - APPELLANT].

IN RE:

CASE NO. 10-14-14

N.S.,

ALLEGED DEPENDENT CHILD.

O P I N I O N

[ANGELA SCHMITT - APPELLANT].

IN RE:

CASE NO. 10-14-15

M.S.,

ALLEGED DEPENDENT CHILD.

O P I N I O N

[ANGELA SCHMITT - APPELLANT].

**Appeals from Mercer County Common Pleas Court
Juvenile Division
Trial Court Nos. 32012019, 32012020 and 32012018**

Judgments Affirmed

Date of Decision: March 30, 2015

APPEARANCES:

***Richard M. Delzeith* for Appellant**

***Andrew J. Hinders* for Appellee**

SHAW, J.

{¶1} Mother-appellant, Angela R. Schmitt (“Angela”), appeals the October 2, 2014 judgment of the Mercer County Juvenile Court granting the request for permanent custody of her three children filed by appellee, the Mercer County Department of Job and Family Services (the “Agency”), and terminating her parental rights.

{¶2} On April 19, 2012, the Agency filed a complaint alleging M.S. (born August 2000), T.S. (born May 2004), and N.S. (born December 2009) to be dependent children. The complaint was based on information given to the Agency by Celina City Schools that seven-year-old T.S. threatened suicide on April 16, 2012. The school staff member also noted that T.S. had unattended dental problems. The school district contacted Angela who indicated that she would make arrangements with T.S.’s mental health counselor. On April 18, 2012, the school district notified the Agency when Angela had failed to make any contact with T.S.’s counselor. The children were subsequently removed from Angela’s

custody by law enforcement and placed in the Agency's temporary custody after a shelter care hearing.¹

{¶3} On April 25, 2012, the Guardian Ad Litem ("GAL") assigned to the case filed a report assessing alternative placements to the Agency's temporary custody and the availability of a safe and adequate home of a relative or family friend for the children to be placed. The GAL noted that she was only able to gain access to two of the five addresses given to her and that neither home was suitable for the children. The GAL had also obtained a number of police reports regarding the children while in Angela's custody, which exhibited that there was no supervision occurring in Angela's home. The reports indicated that the children had been caught stealing, beating up other children and antagonizing neighbors, which eventually led to the eviction of Angela from the apartment.

{¶4} There were also reports that the electricity had been disconnected at Angela's apartment due to non-payment. Several authority figures, including local police, expressed grave concern for the children's well-being. The children indicated that there was often no food in the house. T.S. reportedly broke down at

¹ Steven Schmitt, the father of M.S. and T.S., was incarcerated at the time of the children's removal from Angela's custody. He was appointed an attorney and initially showed interest in the case while still in prison. However, upon his release from prison in July 2012, Steven failed to make any contact with his children or his attorney. He subsequently moved out of state and discontinued his personal involvement in this case. Steven's counsel remained active in the case despite his client not being present throughout the proceedings. It was also confirmed during the course of the proceedings that Steven Schmitt was not the biological father of N.S. The record indicates that N.S.'s father was believed to be "a deceased man from Texas." (GAL Report Apr. 11, 2014).

school worried that he would have nothing to eat when he learned that the backpack food program would not be sending any food home with him over Easter weekend. The GAL described all of the children as having severe dental problems, such as abscessed and rotting teeth.

{¶5} The GAL also learned that T.S. had been examined by a doctor in November 2011 and was given a 30-day prescription to address his severe behavioral and emotional issues. However, Angela failed to return T.S. to the doctor until March 23, 2012, leaving T.S. without medication for several months. The GAL also received reports from school staff members that the children lacked good hygiene while in Angela's care. Specifically, they often attended school unbathed and wearing either dirty clothes or the same ones worn the previous day. One particular incident was recalled where T.S. was sent to school with no underwear and jeans with holes allowing some body parts to be exposed. In light of these circumstances, the GAL recommended that the children remain in the temporary custody of the Agency.

{¶6} Shortly thereafter, the trial court granted the request of Leigha Schmitt, the children's half-sister, to have T.S. be placed in her care. However, within a matter of days, T.S. was returned to the temporary custody of the Agency after Leigha contacted the Agency requesting that T.S. be removed from her care immediately.

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{¶7} On May 17, 2012, the trial court approved the Agency's case plan which included the children's placement in foster care and supervised visitation with Angela and her boyfriend, Ricky Ebright. The case plan also set forth certain objectives for Angela to meet.

{¶8} On June 13, 2012, the children were adjudicated dependent children by the trial court.

{¶9} On June 25, 2012, the trial court held a dispositional hearing. The trial court adopted the Agency's case plan and continued the children's placement in the Agency's temporary custody.

{¶10} On October 17, 2013, the trial court conducted a case review. The parties' counsel presented statements establishing that Angela had remained employed and had complied with some of the case plan objectives. Angela had also regained custody of the oldest child, G.S. (born March 1998). The record indicates that G.S. was returned to Angela's care based on her age and the fact that she could request assistance if needed. Angela's residence was still not large enough to accommodate all the children. The trial court also found that the Agency had made reasonable efforts to complete the case plan and that continuing the case plan was in the children's best interest.

{¶11} On January 14, 2014, the trial court held a review of the case. Angela failed to appear without explanation. The trial court approved the

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Agency's request to modify the case plan to include orders that Angela sign a release of information to allow the Agency to confirm her employment and hours, that Angela submit to drug testing a minimum of two times per week, and that Angela participate in and complete a psychological and parenting assessment.

{¶12} On April 11, 2014, the GAL filed a detailed report recommending that it is in the children's best interest to remain in the custody of the Agency and to not be returned to Angela's care.

{¶13} On April 16, 2014, the Agency filed a motion for permanent custody of the children and to terminate parental rights.² The motion specified that the children had been in the Agency's custody for twelve or more months of a consecutive twenty-two month period. The Agency also asserted that Angela had continuously and repeatedly failed to substantially remedy the conditions causing the children to be placed outside the home despite the reasonable case planning and diligent efforts by the Agency to assist Angela in meeting that objective. Specifically, the Agency maintained that Angela demonstrated "a lack of commitment toward the child[ren] by failing to regularly support, visit, or communicate with the child[ren] when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[ren]." (Mot. Apr. 16, 2014 at 2).

² Notice of the Agency's motion for permanent custody was served by publication on Steven Schmitt and N.S.'s unknown father.

{¶14} On August 12, 2014, the trial court conducted an evidentiary hearing on the Agency's motion for permanent custody and termination of parental rights. The Agency presented the testimony of ten witnesses. No witnesses were presented in Angela's defense.

{¶15} Testimony at the hearing from mental health professionals working with the children revealed that both T.S. and M.S. had experienced a significant amount of trauma consisting of both physical and verbal abuse while living with Angela, and T.S. and M.S. were both diagnosed with suffering from Post-Traumatic Stress Disorder ("PTSD"). M.S. shared some of the details of the abuse with his mental health counselor and specified that the abuse occurred when M.S. was between the ages of 6 and 10. The counselor testified that M.S. described being repeatedly hit in the face and "curb stomped" by Angela. M.S.'s foster mother recounted M.S.'s description of a specific "curb stomping" episode during which M.S. called Angela a bad name in front of her friends. Angela then proceeded to throw M.S. to the floor and kick him repeatedly in the head. M.S. also recalled Angela calling him a "dick sucker" on a daily basis. M.S. indicated to his foster mother that he suffered physical abuse at least every other day when Angela was drinking and that Angela abused all the children daily. M.S. also explained that he would often bear the brunt of her abuse so that T.S. would not have to endure as much.

{¶16} According to his mental health counselor, T.S. was more reluctant to discuss the trauma he experienced which is common for a child suffering from PTSD. In addition, T.S. suffered from episodes of suicidal ideation, which led to the initiation of this case when he assaulted a teacher at school and threatened suicide. T.S. also had nightmares that people were killing him. Although T.S.'s behavioral and emotional problems were severe, they were significantly mitigated with medication. However, Angela was not diligent in acquiring T.S.'s medication, leaving him without medication for months at a time. One of T.S.'s behavioral counselors, who began seeing T.S. in January 2011 upon a referral from T.S.'s school, described T.S. as being in "survival mode" while under Angela's care and recalled that T.S. was unable to be attentive long enough to hold a three minute conversation. T.S. also relayed to his mental health counselor that when he was seven-years-old he engaged in sexual intercourse with another child during a time when he was left unsupervised by Angela. The evidence establishes that T.S. was also briefly removed from Angela's home shortly after N.S. was born, but was later returned to her care.

{¶17} There was little testimony regarding N.S. in Angela's care due to the fact that he was two years old at the time of his removal. However, testimony at the hearing also confirmed that there was little to no food in the home while the children lived with Angela and that the other children were sent to school

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unbathed and wearing ill-fitting or dirty clothes. One of T.S.'s counselors recalled that when she first met T.S. at school, he was wearing unfastened pants because they were too small, a shirt that hung down to his knees, and wet shoes and socks. It was also revealed that there was no structure in Angela's home and the children were often left unsupervised, which allowed them to run the streets as they pleased.

{¶18} The record demonstrates that after the children were removed from Angela's home, the Agency set forth certain objectives for Angela to meet in order to facilitate her reunification with the children. However, Angela failed to significantly meet the requirements of the case plan. For example, Angela consistently refused to submit to random drug tests at the Agency's request and was only willing to test on her own terms. Notably, a "refusal" was considered the same as a "positive" under the case plan. The GAL in her report recalled one instance in which Angela attempted to have N.S. urinate in a testing cup at one of the supervised visits. Another witness testified that Angela once submitted cold urine for a drug screen which did not register a reading.

{¶19} In May of 2013, Angela completed a drug and alcohol assessment and at the time admitted to her addiction counselor that her alcohol abuse was spiraling out of control. Angela's counselor developed a treatment plan but Angela failed to follow through with any of the treatment recommendations and

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did not return to the treatment center. In the fall of 2013, the Agency received several reports that Angela was using heroin. Angela also failed to complete the parenting classes required by the case plan.

{¶20} There was also testimony regarding Angela's supervised visitations with the children. The three witnesses who supervised the visitations each described a similar scenario occurring during the visits. M.S. and T.S.' interaction often escalated into a volatile situation with wrestling, pushing, and derogatory curse words being yelled. Other family members including G.S., the oldest child in Angela's custody, joined in the yelling and cursing which typically caused N.S., the toddler, to become agitated and run around the facilities. One of the witnesses described a particular incident involving M.S. and T.S. getting out of hand at a visitation when one boy accused the other of choking him and G.S. smashed a cupcake in T.S.'s eye. It was apparent to the observers that Angela had no control over M.S. and T.S.

{¶21} One of the visitation supervisors characterized Angela's parenting as passive and explained that when Angela attempted to discipline the children by yelling at them and they did not respond, she ignored them by retreating to another part of the room to watch the television or to play with N.S. Another witness recalled Angela becoming rude and threatening when the supervisor decided to end the visit early after it deteriorated beyond the point of being productive. At

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times, M.S. and T.S. also asked to leave the visits early and to be returned to their foster parents. Eventually, the family's supervised visitations were terminated at the private facility because of how disruptive the visitations were to the other people at the location. As a result, the supervised visitations were moved to the Agency's building.

{¶22} Due to the severity of T.S.'s emotional and behavioral issues, he was placed with a different foster family than M.S. and N.S. The evidence presented by the Agency at the hearing demonstrated M.S.'s and T.S.'s well-being improved since being removed from Angela's custody. M.S. and T.S. made considerable progress through their therapy sessions. However, their mental health counselor explained that because of the trauma they experienced both M.S. and T.S. would need to continue counseling long term and that it is imperative for M.S.'s and T.S.'s caregivers to be committed to the process for the treatment to be successful. M.S.'s and T.S.'s foster parents attended their therapy sessions and T.S.'s foster mother testified that she was diligent in making sure that T.S. took his medication as directed. Both boys occasionally reverted to periods of poor behavior and acting out which often coincided with their supervised visitations with Angela or when they had other contact with her. Overall, the record established that the children showed a substantial amount of growth in their foster placements.

{¶23} After the hearing, the parties submitted written closing statements and on October 2, 2014, the trial court issued a judgment entry finding that the children had been in the Agency's custody for twelve months of a consecutive twenty-two month period and that it was in the children's best interest to grant the Agency's motion for permanent custody and termination of parental rights.

{¶24} Angela filed this appeal, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED BY NOT MAKING A DETERMINATION THAT THE MERCER COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES MADE REASONABLE EFFORTS TO PREVENT THE CONTINUED REMOVAL OF THE MINOR CHILDREN FROM APPELLANT'S HOME AT THE DISPOSITIONAL HEARING UNDER OHIO REVISED CODE § 2151.419(A)(1).

ASSIGNMENT OF ERROR NO. II

THE MERCER COUNTY JOB AND FAMILY SERVICES DID NOT MAKE A GOOD FAITH EFFORT TO REUNIFY THE APPELLANT WITH HER CHILDREN.

{¶25} For ease of discussion, we elect to address the assignments of error together.

{¶26} On appeal, Angela argues that the Agency did not make a good faith effort to reunify her with her children. The Ohio Revised Code imposes a duty on the part of children services agencies to make reasonable efforts to reunite parents with their children where the agency has removed the children from the home.

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R.C. 2151.419; see, also, *In re Brown*, 98 Ohio App.3d 337, 344 (3d Dist.1994). Further, the agency bears the burden of showing that it made reasonable efforts. R.C. 2151.419(A)(1). “Case plans are the tools that child protective service agencies use to facilitate the reunification of families who * * * have been temporarily separated.” *In re Evans*, 3d Dist. Allen No. 1–01–75, 2001–Ohio–2302, * 3.

{¶27} To that end, case plans establish individualized concerns and goals, along with the steps that the parties and the agency can take to achieve reunification. *In re Evans* at * 3. Agencies have an affirmative duty to diligently pursue efforts to achieve the goals in the case plan. *Id.* “Nevertheless, the issue is not whether there was anything more that [the agency] could have done, but whether the [agency’s] case planning and efforts were reasonable and diligent under the circumstances of this case.” *In re Leveck*, 3d Dist. Hancock Nos. 5–02–52, 5–02–53, 5–02–54, 2003–Ohio–1269, ¶ 10. We also note that the statute provides that in determining whether reasonable efforts were made, the child’s health and safety is paramount. *See* R.C. 2151.419(A)(1).

{¶28} At the outset, we note that the Agency’s primary caseworker assigned to the case testified that the children’s reunification with the family was always the goal. In the beginning of the case proceedings, the Agency explored relative placements for the children only to discover that potential custodians had

either a prior history with children services or had participated in illegal activities in the past. The Agency also assisted the children's half-sister in obtaining temporary custody of T.S. shortly after his removal, but the placement was not manageable for the sibling.

{¶29} In order to facilitate Angela's reunification with her children, the Agency put specific case plan objectives into effect. However, as previously discussed, Angela failed to substantially meet those objectives. On appeal, Angela focuses on the Agency's withdrawal of a parenting assessment requirement as proof that it failed to use reasonable efforts to achieve reunification. In making this argument, Angela overlooks the fact that she had a sufficient amount of time to complete this assessment but neglected to do so and that the Agency only withdrew the requirement once it became apparent that filing a motion for permanent custody would be in the children's best interest.

{¶30} Despite Angela's lack of compliance with the case plan objectives, the Agency arranged for Angela to have unsupervised visitation with M.S. However, the visits were suspended due to Angela's lack of reliability in being able to pick up and drop off M.S. at the appointed times. Angela also points to the fact that during the proceedings she regained custody of G.S. as evidence of her ability to parent M.S., T.S., and N.S. However, the record reveals that G.S. had a history of cutting herself and it was not clear that Angela was providing G.S. with

the proper support to assist her with obtaining treatment to address the situation. The GAL noted in her report that Angela had not taken steps to discourage G.S.'s rebellious behaviors or to provide more supervision. The GAL also observed that sixteen-year-old G.S. is effectively raising her mother. The simple fact that no major reported incident has occurred since G.S. returned to Angela's custody is not indicative of Angela's ability to be able to properly parent the three boys, two of which have significant emotional and psychological needs resulting from the trauma they experienced while previously in Angela's custody.

{¶31} The record also demonstrates that prior to filing its motion for permanent custody the Agency discussed looking into a Planned Permanent Living Arrangement, which is a placement that gives legal custody to an agency without terminating parental rights and that allows the agency to make an appropriate placement, including foster care or other placement. *See* R.C. 2151.011(A)(39). The GAL expressed concern with the placement due to the fact that Angela had continually avoided contact with the GAL preventing the GAL from doing a home assessment of Angela's residence. After the hearing, the GAL attempted again to complete a visit of Angela's home and detailed the following in a supplemental report:

Following the continuance of the Final Hearing on April 15, 2014, the GAL made arrangements with Angela Schmitt ("Mother") and boyfriend Ricky Ebright in the courthouse to meet at Mother and Ricky's residence immediately after

receiving the new hearing date. GAL made such arrangements since Mother had anticipated being at the Hearing for the remainder of the day, [sic] Mother had no prior scheduled engagements. Mother walks to the courthouse; therefore, GAL indicated that she would wait about 15 minutes to allow Mother and Ricky to walk home; Mother agreed to these arrangements. GAL left the courthouse approximately 15-20 minutes after Mother and went directly to Mother's home on Lake Street (approximately a 3 minute drive from the courthouse). GAL arrived at approximately 2:55 p.m. An unknown woman answered the door. GAL asked for Mother or Ricky. It was indicated by the unknown woman that Mother and Ricky were at court. I requested her to have Mother contact me. I received no contact from Mother until April 30, 2014. At that point over a voicemail, Mother requested an unsupervised visit with [T.S.] for his birthday and mentioned nothing about the missed home visit or scheduling another home visit. In the voicemail, Mother indicated Heidi, JFS caseworker, did not have a problem with her request for an unsupervised visit with [T.S.]. Upon follow up with Heidi, this was deemed incorrect. I returned Mother's call and received no contact in return.

(GAL Report May 22, 2014 at 1). The Agency filed its motion for permanent custody after it determined that a PPLA was not an appropriate placement.

{¶32} As demonstrated above, the record is replete with examples of the Agency's good faith and reasonable efforts to assist Angela in reunifying with her children. Furthermore, it is notable that none of the requirements in the case plan were unduly burdensome for Angela to achieve. Rather, it is apparent from the record that Angela simply chose not to avail herself of the resources and assistance at her disposal to regain custody of her children and as a result we cannot find that

the trial court erred in granting the Agency's motion for permanent custody and termination of parental rights on this basis.

{¶33} Angela also complains that the Agency failed to make a finding at the July 25, 2012 dispositional hearing regarding the reasonable efforts made by the Agency to prevent the continued removal of the children from her home. The reasonable efforts requirement in R.C. 2151.419(A)(1) does not apply in a hearing on a motion for permanent custody filed pursuant to R.C. 2151.413. *In re C.F.*, 113 Ohio St. 3d 73, 2007-Ohio-1104, ¶ 43. "However, except for some narrowly defined statutory exceptions, the state must still make reasonable efforts to reunify the family during the child-custody proceedings prior to the termination of parental rights."³ *Id.* While the specific reasonable efforts finding does not appear in the trial court's judgment entry of disposition, the record establishes that the trial court repeatedly made this finding at the shelter care hearing, at the time of adjudication, and in subsequent judgment entries documenting its periodic review of the case.

{¶34} Moreover, we note that "if the agency has not established that reasonable efforts have been made prior to the hearing on a motion for permanent custody, then it must demonstrate such efforts at that time." *In re C.F.* at ¶ 43.

³ It is notable that one of the statutory exceptions exists when "[t]he parent from whom the child was removed has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food." R.C. 2151.419(A)(2)(b). However, the exception does not apply in this case because the statute requires the court to make a determination that the agency is not required to make reasonable efforts and the trial court failed to make this finding. R.C. 2151.419(A)(2).

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The record in this case shows that the Agency used reasonable efforts and the trial court's factual findings in its judgment entry granting the Agency's motion for permanent custody clearly demonstrates the reasonableness of the Agency's efforts. Thus, Angela has failed to establish that the lack of such a finding in the trial court's judgment entry of disposition warrants reversal of its permanent custody determination in this case. Accordingly, the assignments of error are overruled and the judgments are affirmed.

Judgments Affirmed

PRESTON J., concurs.

WILLAMOWSKI, J., concurs in Judgment Only.

/jlr