

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN THE MATTER OF	:	CASE NO. 09CA45
	:	
A.K., S.K. AND M.K.	:	Released: March 19, 2010
	:	
Adjudicated Dependent Children.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>

APPEARANCES:

Thomas L. Cornn, Athens, Ohio, for Defendant-Appellant, Angel Kasler.

C. David Warren, Athens County Prosecutor, and George Reitmeier, Athens County Assistant Prosecutor, Athens, Ohio, for Plaintiff-Appellee.

McFarland, P. J.:

{¶1} Defendant-Appellant Angel Kasler, mother of A.K, S.K. and M.K., appeals the decision of the Athens County Court of Common Pleas, Juvenile Division, granting permanent custody of all three of her children to Plaintiff-Appellee, Athens County Children Services. Appellant assigns only one error on appeal, contending that Athens County Children Services failed to prove by clear and convincing evidence that permanent custody was in the children's best interest and that the children cannot be reunified with their mother. Because there is clear and convincing evidence that it was in the children's best interest, and because it was established that they could

not or should not be placed with Appellant in a reasonable amount of time, the trial court properly awarded permanent custody to Athens County Children Services. Accordingly, we overrule Appellant's sole assignment of error and affirm the decision of the trial court.

I. Facts

{¶2} Appellant is the mother of three children, A.K., S.K. and M.K., currently ages nine, five and three, respectively. A.K.'s father, James Dyal, participated in the permanent custody proceedings below but has not participated in this appeal. S.K. and M.K. share the same father, Mark McGrath, who did not participate below or in the appeal of this matter

{¶3} Appellant and her children initially became involved with Athens County Children Services ("ACCS") on December 21, 2006, when ACCS filed a complaint alleging the children to be neglected and dependent children. A complaint by ACCS was filed after McGrath was arrested, and convicted of domestic violence after he assaulted Appellant and M.K. A related investigation by ACCS revealed that McGrath had been previously convicted of domestic violence and served time in prison as a result of his assault of S.K., which caused S.K. to be diagnosed as a shaken baby and to sustain axial hemorrhages. After being released from prison after his first conviction, Appellant permitted McGrath to return home, which led to the

subsequent assault of Appellant and M.K. As such, ACCS filed a complaint and was granted protective supervision, as set forth above. As part of the order, Mark McGrath was ordered to have no contact with Appellant or the children and a case plan was put into place.

{¶4} On October 15, 2007, ACCS obtained emergency custody of the children after Appellant was evicted from the Highland Hotel. At that time, Appellant was homeless, unemployed and suffering from depression. However, Appellant quickly obtained housing at a local women's shelter and the trial court returned the children to her custody. On January 2, 2008, Appellant was again homeless. As such, and because Mark McGrath was scheduled to be released from prison again, Appellant entered into a 30 day voluntary care agreement with ACCS for her three children. On January 12, 2008, after briefly reuniting with McGrath, Appellant was again assaulted by McGrath. At this point, ACCS filed a motion for temporary custody of the children, which was granted on February 11, 2008.

{¶5} A case plan was into place and was amended several times. During the history of the case, Appellant was required to attend counseling, attend parenting classes, submit to drug screens, and to secure housing. Although Appellant was able to eventually secure housing, and was very

consistent in her visits with her children, she was not compliant with the other requirements of her case plan.

{¶6} Further, while the children were in the temporary custody of ACCS, Appellant became involved with a man named Mark McClelland and became pregnant. The record reveals that Mark McClelland was on parole and was a drug user. During the time that Appellant resided with him, while her children were in foster care, there were several reports of domestic violence at the couple's residence, none of which, however, resulted in charges of domestic violence being filed. The record further indicates that in the fall of 2008, Appellant's child was still born, causing Appellant to spiral further into noncompliance with her caseplan for her other children. Then, on December 19, 2008, ACCS filed a motion for permanent custody of the children.

{¶7} After the motion for permanent custody was filed, Appellant began using and became addicted to heroin. On January 31, 2009, a search warrant was executed in Appellant's home after a male was hospitalized after a drug overdose which occurred at Appellant and McClelland's residence. During the search, police found drugs and drug paraphernalia and obtained a written statement from Appellant which admitted she had an addiction to heroin. Despite her admission to the police that she had a drug

addiction, she denied her addiction to her counselor and refused to submit to drug testing, as required by her caseplan.

{¶8} The hearing on the motion for permanent custody was held over the course of two days, on July 24, 2009, and September 1, 2009. On the first day of the hearing the following witnesses testified: 1) Christopher Hock of the Nelsonville police department, who was present during the search of Appellant's residence and who obtained a statement from Appellant regarding her heroin addiction; 2) Carla Colbert from Tri-County Mental Health, A.K.'s counselor, who testified that A.K. has been diagnosed with Post Traumatic Stress Syndrome, Attention Deficit Hyperactivity Disorder, and Adjustment Disorder; 3) Kira Schumm, ACCS family services caseworker, who testified regarding Appellant's overall noncompliance with the case plan requirements; and 4) Tara Huffman, ACCS family services caseworker, who testified regarding the services and assistance provided to Appellant in an effort to reunify her with her children.

{¶9} The record before us reveals that between the two hearings on permanent custody, on August 13, 2009, an incident occurred at Appellant's residence. Specifically, on that date, two parole officers made an unannounced visit to Appellant and McClelland's residence. Upon arriving at the home, the officers found drug paraphernalia and needle marks on

Appellant and McClelland's arms. McClelland tested positive for opiates and was arrested that day.

{¶10} On September 1, 2009, the second day of the permanent custody hearing, the following witnesses testified on behalf of the State: 1) Marianna Carson, McClelland's parole officer; 2) Duane Covert, Nelsonville police officer; 3) Jane Baer, Appellant's counselor from Tri-County Mental Health; and 4) Sarah Cox, guardian ad litem for the children. Marianna Carson testified that when she arrived at Appellant's residence on August 13, 2009, for the unannounced visit, the house was filthy, filled with bags of trash, dog feces, and that cockroaches were all over the place, even in the microwave. Duane Covert testified that he assisted in the search of Appellant's residence on January 31, 2009, when drugs and drug paraphernalia were found. Additionally, during the testimony of Covert, the State introduced its Exhibit B, which was a certified copy of a indictment, file stamped on August 24, 2009, charging Appellant with possession of heroin and possession of cocaine.

{¶11} Baer testified that Appellant had been diagnosed with Major Depressive Disorder (recurrent), Post Traumatic Stress Syndrome, and Opiate Abuse. Baer explained during her testimony that while Appellant had originally been diagnosed with Dependent Personality Disorder, the

diagnosis was recently changed to “deferred,” meaning there was some diagnostic uncertainty related to the diagnosis. Cox testified that while there was no question of the love that existed between Appellant and her children, because Appellant had been minimally compliant with the case plan and because safety risks were still present in the home, as well the new legal matters that have arisen, she recommended permanent custody.

{¶12} Appellant’s mother and Appellant also testified. Appellant’s mother testified that Appellant now had a clean home for the children and was a good mother. Appellant testified that she had been consistent in her visits with the children, has a strong relationship with the children and does not want to lose them. She also testified that she was pregnant again and was undergoing Subutex therapy to overcome her addiction to heroin.

{¶13} After a full hearing, the trial court granted permanent custody of A.K, S.K. and M.K. to Athens County Children Services. Following that decision, Appellant timely filed the current appeal.

II. Assignment of Error

“I. ATHENS COUNTY CHILDREN SERVICES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PERMANENT CUSTODY WAS IN THE CHILDREN’S BEST INTEREST AND THAT THE CHILDREN CANNOT BE REUNIFIED WITH THEIR MOTHER.”

III. Legal Analysis

{¶14} In her sole assignment of error, Appellant contends that Athens County Children Services failed to prove by clear and convincing evidence that permanent custody was in the children's best interest and that the children cannot be reunified with their mother. Appellant raises several arguments under this assignment of error, questioning whether 1) she should have lost "custody of her children due to being assaulted by the children's father;" 2) the court should "consider the permanent custody recommendations of two caseworkers when the recommendations were based on an incorrect mental health diagnosis of Appellant;" and 3) the court should make factual findings to support its decision that children cannot be reunified with their mother."

{¶15} We must first address the proper standard of review regarding an award of permanent custody. An appellate court will not overrule a trial court's decision regarding permanent custody if there is competent and credible evidence to support the judgment. *In re McCain*, Vinton App. No. 06CA654, 2007-Ohio-1429, at ¶8. "If the trial court's judgment is supported by some competent, credible evidence going to all the essential elements of the case, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court." *In re Buck*, Scioto App. No.

06CA3123, 2007-Ohio-1491, at ¶7. Therefore, an appellate court's review of a decision to award permanent custody is deferential. *McCain* at ¶8.

{¶16} “An agency seeking permanent custody bears the burden of proving its case by clear and convincing evidence.” *In re Perry*, Vinton App. Nos. 06CA648, 06CA649, 2006-Ohio-6128, at ¶13. Clear and convincing evidence has been defined as “[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *McCain* at ¶9, citing *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23.

{¶17} Under R.C. 2151.414(B)(1), an agency seeking permanent custody must meet a two-part test before terminating parental rights and awarding permanent custody. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, at ¶31. First, one of the conditions listed in R.C. 2151.414(B)(1) must apply:

{¶18} “(a) The child is not abandoned or orphaned, has not 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, * * * and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

{¶19} (b) The child is abandoned.

{¶20} (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶21} (d) 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 * * * .”

{¶22} Further, to determine under R.C. 2151.414(B)(1)(a) whether a child cannot or should not be placed with either parent within a reasonable period of time, a court must look to the guidelines provided by R.C.

2151.414(E). *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829 at ¶17. If the court finds, by clear and convincing evidence, that one or more of the factors listed in R.C. 2151.414(E) applies, it must enter a finding that the child cannot or should not be placed with the parent. *Id.*

{¶23} An agency seeking permanent custody must also demonstrate by clear and convincing evidence that such action is in the best interest of the child. R.C. 2151.414(D) sets forth the factors a court must consider in the best interest analysis:

{¶24} “(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;

{¶25} (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;

{¶26} (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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶27} (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;

{¶28} (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.”

{¶29} Applying the two-part permanent custody test to the case sub judice, the trial court determined that, under 2151.414(B)(1)(a), A.K., S.K. and M.K. could not be placed with Appellant within a reasonable time. In making that determination, the court found that at least two of the factors listed in R.C. 2151.414(E) applied with respect to Appellant, and one additional factor applied with respect to the fathers of the children. The court found that (E)(1) and (2) applied because Appellant had

“failed repeatedly to successfully address her multiple serious issues of mental health, substance abuse, domestic relationships, homelessness and prioritization. Mother has Major Depressive Disorder, Recurrent; Post Traumatic Stress Disorder; and Opiate abuse as mental health diagnoses. The oldest child in this case has Adjustment Disorder, ADHD, and PTSD. As his counselor testified, his ability to trust adults has been undermined by what he has been through. Mother continues to abuse opiates, disengage from counseling, and refuse or avoid drug testing. By her own admission, she has been using heroin even since the filing of the motion for permanent custody.

{¶30} She reengaged in attempts to continue a relationship with a man who was abusive to her and at least one of these children. Domestic violence calls involving mother and men have been frequent in recent years, and she acknowledges the fact that she has allowed drug dealers to stay overnight in exchange for drugs.”¹

¹ Although Appellant suggests that the trial court terminated her parental rights because she was assaulted by the children’s father, this excerpt from the court’s decision demonstrates that the trial court instead relied, in part, on Appellant’s attempts to continue in the relationship with the children’s father, despite the history of domestic violence, in terminating her rights. Further, with regard to Appellant’s question as to whether the trial court should have considered the recommendations of two case workers, which were based on an incorrect mental health diagnosis of Appellant, this excerpt indicates that the trial court did not rely on the misdiagnosis in rendering its decision. The transcript from the hearing indicates that the children services employees who testified both based their recommendations, in part, on Appellant’s having been diagnosed with Dependant Personality Disorder. However, when Jane Baer, Appellant’s counselor testified, she clarified that Appellant’s diagnosis had been changed to “deferred,” meaning there was diagnostic uncertainty. As set forth above, the trial court did not rely on that diagnosis in rendering its decision, and instead based its decision, in part, on Appellant’s confirmed diagnoses of Major Depressive Disorder, Post Traumatic Stress Disorder, and Opiate abuse.

The trial court further found that “[a]s to R.C. 2151.414(E)(10) both fathers have adandoned [sic] their children.”

{¶31} We agree with the trial court’s determination that there was clear and convincing evidence that the children could not or should not be placed with Appellant in a reasonable amount of time. At least two of the factors listed in R.C. 2151.414(E) applied to Appellant, any one of which would require such finding. As such, we turn to the second part of the permanent custody test, the best interest of the child analysis.

{¶32} With respect to the first best interest factor, the testimony during the hearing clearly indicated and the trial court found that Appellant has a close relationship with all three of her children and that she was very regular in her visits. The trial court also found that the children were bonded with their foster parents, “where their basic needs are met and they can be kids.” As to the second best interest factor, the trial court found that “[a]ll three children express a desire to live with their mother. This was confirmed multiple times in testimony.” With respect to the third best interest factor, the trial court found as follows:

“The children have been in the legal custody of their mother most of their lives leading up to this Court’s involvement which started in December of 2006. During the history of this case there have been voluntary agreements of care, emergency custody orders, protective supervision orders, respite care, shelter care and temporary custody, all involving ACCS.

Homelessness, drug abuse, domestic violence and mental illness have been pervasive. Finally, by early 2008, the children were in the temporary custody of ACCS and have remained so placed.”²

{¶33} Regarding the fourth best interest factor, the trial court found that

“The children need and deserve a legally secure placement that can be achieved through a grant of permanent custody. The children are currently nine, five and three years old. They are bonded to their mother by virtue of their natural love. Since their removal, their visits have been at clean, safe appropriate settings and all have benefitted from this. Their expressed desire to live with mother is unrealistic given the history of this case.”

Finally, with respect to the fifth best interest factor, the trial court found that both fathers have abandoned their children. Thus, and in light of the foregoing findings, we conclude that Children Services presented clear and convincing evidence that a secure placement for the children could not be achieved without a grant of permanent custody.

{¶34} Although it is evident from the record that the children love their mother and wish to remain with her, and that Appellant clearly loves her children, it is also clear from the record that Appellant failed to remedy the problems which initially caused the removal of her children. Although

² In her brief, Appellant contends that the trial court did not make factual findings to support its decision that the children could not be reunified with her, alleging that “[t]he trial court made no factual findings as to the issues of homelessness, drug abuse, domestic violence and mental illness as it affects the children.” However, contrary to Appellant’s argument and as set forth above, the trial court did in fact, relate Appellant’s history of homelessness, drug abuse, domestic violence and mental illness, to the children, noting that during the history of the case, there had been voluntary care agreements, emergency custody orders, protective supervision orders, respite care, shelter care and temporary custody, all of which impacted the children.

we certainly sympathize with Appellant's loss of her newborn while her other children were in the temporary custody of ACCS, and have no doubt that she suffered from depression as a result, the trial court was not required to overlook her failures with respect to her other children. Additionally, even after ACCS filed for permanent custody of the children, Appellant, though regular in her visits with her children, went on to begin using heroin and developed an addiction, was inconsistent with counseling, was not forthright with her counselor regarding her drug addiction, and was indicted on two felony drug offenses in between the two different hearing dates regarding the permanent custody motion.

{¶35} Further, although Appellant and Appellant's mother testified that Appellant now had a suitable home with enough bedrooms for the children; the hearing transcript was replete with testimony to the contrary. For example, the children services case worker as well as the guardian ad litem did not deem Appellant's home safe enough to conduct home visits. Further, Mark McClelland's parole officer, Marianna Carson, who participated in a search of Appellant's home on August 13, 2009, testified that Appellant's house was filthy, was filled with bags of trash and had cockroaches running all over the place, including inside the microwave.

{¶36} In light of the foregoing, we conclude that there was clear and convincing evidence for the trial court to determine that it was in the children's best interest to be placed in the permanent custody of Athens County Children Services. Here, because it was in the children's best interest, and because they could not be placed with Appellant in a reasonable amount of time, the two-part permanency test required by R.C.

2151.414(B)(1) was satisfied. As such, Appellant's sole assignment of error is overruled.

Accordingly, the trial court's decision is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.