

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: A.K. AND J.D.,	:	JUDGES:
DEPENDENT CHILDREN	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
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	:	Case No. 2009 AP 05 0025
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	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Juvenile Division, Case No. 07JN00382
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	October 6, 2009
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APPEARANCES:

For-Appellant	For-Appellee
SHAROL BUCKLEY-MIRHAIDARI 152 N. Broadway Ave., Suite 101 New Philadelphia, OH 44663	DAVID HAVERFIELD Job & Family Services 389 16th St. S.W. New Philadelphia, OH 44663
GUARDIAN AD LITEM KAREN DUMMERMUTH Box 494 New Philadelphia, OH 44663	FATHER OF AUSTIN MIKE KYLE, PRO SE 595 George St. West Lafayette, OH 43845
FATHER OF JASMINE SCOTT DANIELS PRO SE 218 W. St. Peters Street New Iberia, LA 70560	

Gwin, P.J.

{¶1} Appellant/mother Shannon Kyle appeals a judgment of the Court of Common Pleas, Juvenile Division, of Tuscarawas County, Ohio, which granted legal custody of her natural children, A.K. and J.D. to relatives, and ordered her to have no contact with the children until further order of the court. Mother assigns three errors to the trial court:

{¶2} “I. THE TRIAL COURT ERRED IN AWARDING LEGAL CUSTODY OF THE CHILDREN TO RELATIVES WHEN JOB AND FAMILY SERVICES FAILED TO EXPEND REASONABLE EFFORTS TO REUNITE THE CHILDREN WITH APPELLANT/MOTHER.

{¶3} “II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT AN AWARD OF LEGAL CUSTODY TO RELATIVES WAS IN THE BEST INTERESTS OF THE CHILDREN AFTER MOTHER WAS PERMITTED ONLY 2 MONTHS TO COMPLETE CASE PLAN SERVICES. THE TRIAL COURT’S DECISION WAS NOT SUPPORTED BY COMPETENT AND CREDIBLE EVIDENCE.

{¶4} “III. THE TRIAL COURT DENIED MOTHER DUE PROCESS OF LAW IN TERMINATING THE CASE AND ISSUING A NO CONTACT AND NO VISITATION ORDER BETWEEN MOTHER AND HER CHILDREN AFTER ONLY 2 MONTHS OF THE COURT ORDERED ADOPTION OF THE CASE PLAN.”

{¶5} The record indicates appellee Job and Family Services became involved with the family on or about July 17, 2007. At the time, A.K. was twelve years old and J.D. was eight. Appellee alleged the children were neglected and dependent, and mother admitted to dependency. J.D. was placed in the temporary custody of her father

and step-mother, and A.K. was placed in the temporary custody of his maternal uncle and his wife. The court adopted a case plan for reunification of the children with mother, but after approximately two months, appellee filed a motion to modify the disposition from temporary custody to legal custody of the children with the relatives with whom they were residing. The trial court conducted a hearing on the motion and awarded legal custody to the respective relatives.

{¶6} When the case came before us, we remanded the matter to the trial court for written findings of fact and conclusions of law. After the trial court made findings of fact and conclusions of law, this appeal ensued.

{¶7} The court found certain facts to be true by clear and convincing evidence: the case plan services for mother consisted of requirements for stable housing, psychological testing, compliance with alcohol and drug treatment, and completion of a parenting class. The court found mother failed to complete or attend the parenting class arranged for her, and at the time of the final hearing, she was just beginning the classes again. She had not completed her psychological testing, because she failed to attend the necessary appointments at the community mental health center. Mother had not established stable housing, and as of the time of the hearing, had moved at least five times in the last few months.

{¶8} The court found mother has a long history of alcohol abuse that she has not adequately addressed. The court found she sporadically attended a treatment program at the alcohol and addiction center, but continues to abuse alcohol. The court found her alcohol abuse has brought her to the attention of law enforcement on several occasions. Mother has no employment issues that would keep her from immediately

complying with the case plan services. The court found mother has not attempted to secure transportation and did not make any timely effort to take advantage of appellee's transportation assistance. The court found visits between mother and her children had been terminated because she failed to attend the visits on a regular basis.

{¶9} The court found J.D. has been placed with her father and step-mother, and her grandmother also lives in the home and helps care for her. The court found J.D. does very well in the placement and wishes to remain there. The court found even at ten years of age, she expresses great concern over her mother's alcohol abuse.

{¶10} A.K. has done well in his placement with his aunt and uncle, but has expressed a desire to be placed with his grandparents so he can take care of them. He indicated his job would be to make sure they eat and take their medication. Appellee investigated the home, and did not find it to be a suitable placement. A.K.'s father visits regularly with him. A.K.'s father admits he cannot care for his son adequately, and did not oppose the motion for legal custody.

{¶11} The court found appellee had provided mother with a referral for alcohol abuse treatment, and gave her the opportunity to participate in parenting classes. The court found appellee provided the means for mother to receive the benefit of a psychological evaluation and follow-up care. Mother was given directives concerning the appropriate type of housing for her children. Appellee arranged visitation with the children and offered mother transportation assistance.

{¶12} The court concluded appellee had expended reasonable efforts to assist mother in addressing each of the issues that had caused the removal of the children. The court found appellee's reasonable efforts have provided mother with an adequate

opportunity to complete her case plan and gain custody of her children, but mother has not complied. The court found mother gave no indication that giving her more time to complete the case plan would be in the best interest of the children or would bring about her compliance.

{¶13} The court concluded it was in the best interest of the children to be placed in the legal custody of their respective relatives, and ordered no contact or visitation between mother and the minor children until further order of the court.

{¶14} Mother contests the court's findings. She argues the day before the adjudicatory hearing, appellee received a letter from Community Mental Health Center informing it she had completed her drug and alcohol assessment. The result of the assessment was consistent with those who display a low probability of having a substance dependency disorder, and the agency recommended mother attend eight substance educational sessions. Mother had begun attending the sessions at the time of the final hearing, and had signed up for parent education classes. Mother argued appellee refused to provide transportation for her when she was residing in Coshocton County. Mother concedes she had missed her appointment for her psychological evaluation, and it had not been re-scheduled at the time of the hearing. Mother indicated she no longer had transportation issues because she was now able to borrow a truck. Mother also argued she had now acquired stable housing. She concludes with more time, she could successfully complete the requirements of the case plan.

I

{¶15} In her first assignment of error, appellant argues the court erred in awarding legal custody of the children to the relatives because appellee failed to expend reasonable efforts to re-unite the children with her.

{¶16} R.C. 2151.419 provides that (except under circumstances which do not apply here) when a court removes a child from the child's home or continues the removal of a child from the child's home the court must determine whether the public children's services agency or private child placing agency that filed the complaint in the case, removed the child from the home, has custody of the child, or will be given custody of the child, has made reasonable efforts to prevent the removal of the child from the child's home, has made reasonable efforts to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return home safely. The agency has the burden of proving it has made reasonable efforts. The statute provides in determining whether reasonable efforts were made, the child's health and safety is paramount.

{¶17} Various sections of the Revised Code provide that an agency has a duty to make reasonable efforts to preserve or reunify the family unit. For example, R.C. 2151.412 requires the agency to prepare and maintain a case plan; R.C. 2151.414 requires an agency to make reasonable case planning and diligent efforts to assist parents to remedy the problems that caused removal of the child. *In Re: C.F.*, 113 Ohio St. 3d 73, 2007-Ohio-1104, 862 N.E. 2d 816 at paragraph 29. However, the Revised Code does not expressly address what constitutes reasonable efforts. *Id.*

{¶18} This court has found where the evidence establishes that the agency provided services designed to alleviate the problem which led to the child's removal, made diligent efforts to assist the parents in remedying the problem, and attempted to transition the child back into the family home, the agency has proven reasonable efforts. *In re K.R.*, Stark App. No. 2009 CA 00061, 2009 -Ohio- 4350.

{¶19} A reviewing court will not disturb the trial court's decision as being against the manifest weight of the evidence if the decision is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279. The trial court here properly applied the clear and convincing standard. Clear and convincing evidence is more than a mere preponderance of the evidence, and produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E. 2d 118, syllabus by the court, paragraph three.

{¶20} We have reviewed the record, and we find the trial court did not err in finding the agency had made reasonable efforts to reunite the family because it offered services to achieve all the goals listed in the reunification plan.

{¶21} The first assignment of error is overruled.

II

{¶22} In her second assignment of error mother argues she was given only a limited amount of time to work on her case plan. The case plan was approved by the court at the dispositional hearing on August 28, 2007, and appellee filed for legal custody on November 1, 2007. Appellee concedes this is a short time, but asserts where there is little or no parental involvement, it is not required to sit and wait, when

the children require permanency. Appellee argues the record does not support mother's assertion she made some effort to comply with the requirements of the case plan. Appellee also urges legal custody was a disposition that was available on August 28, but instead of seeking legal custody to relatives then, the appellee offered a case plan and services in an effort to reunite the family.

{¶23} As appellee points out, this was a grant of legal custody, not permanent custody. Legal custody does not divest parents of residual parental rights, privileges, and responsibilities. *In Re: C.R.*, 108 Ohio St. 3d 369, 2006-Ohio-1191, 843 N.E. 2d 1188, at paragraph 17. This means mother may petition the court for a modification of custody in the future. *Id.*

{¶24} We agree the children need permanency in their lives, and mother has not shown she can provide this now or in the foreseeable future. Mother is not divested of all her parental rights and can make further efforts to regain visitation rights or custody.

{¶25} The second assignment of error is overruled.

III

{¶26} In her third assignment of error, mother argues the court denied her due process of law in issuing a no-contact, no visitation order between mother and the two children only two months after the court ordered the adoption of the case plan.

{¶27} Mother reiterates her arguments regarding the short period of time the agency gave her to implement the case plan.

{¶28} Mother does not point out any procedural irregularities or problems with notice or service of process that might give rise to a constitutional violation. Instead, she reminds us parents have a fundamental liberty interest in the custody, care, and

management of their children. *In Re: Shaeffer Children* (1993), 67 Ohio St. 3d 1451, 619 N.E. 2d 419. Mother urges to deny her any contact or visitation with the children, and to deny further participation in case plan services after only two months, is a violation of her right to fundamentally fair procedures.

{¶29} The trial court did not bar all contact between mother and the children forever. The court ordered no contact until further order. As noted supra, mother is not foreclosed from making further efforts. In fact, mother's actions in missing scheduled visits had caused the cancellation of visitation even while the case was pending.

{¶30} We find the trial court did not violate any of mother's fundamental constitutional rights to due process.

{¶31} The third assignment of error is overruled.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, of Tuscarawas County, Ohio, is affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

"/S/"HON. W. SCOTT GWIN

"/S/"HON. JULIE A. EDWARDS

"/S/"HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: A.K. AND J.D.,
DEPENDENT CHILDREN

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JUDGMENT ENTRY

CASE NO. 2009 AP 05 0025

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, of Tuscarawas County, Ohio, is affirmed. Costs to appellant.

“/S/”HON. W. SCOTT GWIN

“/S/”HON. JULIE A. EDWARDS

"/S/"HON. PATRICIA A. DELANEY