[Cite as *In re K. S.*, 2009-Ohio-3622.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

In the Matter of: K. S.

Court of Appeals No. WD-09-008

Trial Court No. 2005 JC 1163

DECISION AND JUDGMENT

Decided: July 23, 2009

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James A. Hammer and Joel Kuhlman, for appellant.

Paul A. Dobson, Wood County Prosecuting Attorney, and
Charles Bergman, Assistant Prosecuting Attorney, for appellee.

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HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, Juvenile Division, which terminated appellant's parental rights to her son, K. S., born December 15, 2004, and awarded permanent custody to the Wood County Department of Job and Family Services ("WDJFS").

{¶ 2} On July 29, 2005, WDJFS filed a complaint in dependency and moved for temporary custody of K.S. and his half-brother, who is not involved in the instant appeal. On September 1, 2005, the juvenile court found K.S. and his half-sibling to be dependent children. The judge further ordered WDJFS to provide protective supervision of the

children and to formulate a case plan for their mother/appellant. Although he was served with notice throughout the lower court proceedings, K.S.'s father never appeared[1].

{¶ 3} Pursuant to her case plan, appellant was to obtain an anger management assessment at Behavioral Connections of Wood County and to submit to random toxicology screens. Appellant was also ordered to get a drug and alcohol assessment at Behavioral Connections of Wood County. However, she failed to appear for her appointments and was not assessed until February 1, 2006. A toxicology screen was performed on that date, and appellant tested positive for cocaine. It was recommended that appellant receive intensive outpatient treatment, but she did not follow up on the services to be provided to her, and her case was closed by that drug treatment facility.

{¶ 4} Protective supervision of appellant's children continued for the next several months. On March 20, 2006, WDJFS filed a motion for temporary custody of K.S., asserting that appellant was arrested for possession of cocaine and that K.S. was present in the car at the time of his mother's arrest. As a result of this incident, appellant was found guilty of child endangering and of attempted possession of cocaine. She was placed on probation. About the same time as appellant's arrest, one of her toxicology screens tested positive for cocaine.

{¶ 5} On March 23, 2006, temporary custody of K.S. was awarded to WDJFS, and he was placed in foster care. Appellant was ordered to obtain a drug and alcohol assessment, an anger management assessment, and to submit to random drug testing

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[1]According to one caseworker, K.S.'s father did visit his son twice in 2006 and expressed an interest in taking custody of his child. Nonetheless, the father never

screens. She was granted supervised visitation at the Wood County Job and Family Services agency. During this period, appellant failed to get a drug and alcohol assessment and to submit to a number of the toxicology tests. Eventually, appellant was again assessed at Behavioral Connections, but attended only two sessions of counseling and failed to follow through with any recommendations. In addition, appellant did not appear for visitation twice. She was also late for visitation on some occasions without calling in advance; therefore, that particular visitation would be cancelled or the foster family would be required to wait for appellant's appearance. Appellant did avail herself of in-home parenting classes.

{¶ 6} In March 2007, appellant entered a guilty plea to one count of failing to comply with the order or signal of a police officer, a felony of the fourth degree, and one count of child endangerment, also a felony of the fourth degree. She was sentenced to a total of one year in prison. Between January and September 2006, the month she was imprisoned, appellant was asked to submit to 17 random toxicology screening tests. Of this number, she appeared for ten. Of the random tests that appellant did take one registered positive for cocaine; two of the other tests evidenced traces of cocaine in her urine[2].

{¶ 7} After she was released from prison on October 10, 2007, WDJFS provided appellant with another opportunity to reunify with K.S. and his half-brother. Her reunification plan again included an alcohol and drug assessment, as well as requiring

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followed through on this expressed interest.

random toxicology screens on a weekly basis. Pursuant to the plan, she was also to obtain adequate housing for herself and her sons, to find employment or to qualify for assistance, and to engage in appropriate behavior during her weekly supervised visitation with her children. She was credited with the completion of an anger management class that she had taken during her incarceration.

{¶ 8} In November 2007, Melissa Tokar, appellant's caseworker, told appellant that if she continued to miss her appointments for toxicology screens over the next three weeks, the agency would file a motion for permanent custody of her children. Due to appellant's continued noncompliance with her case plan, WDJFS filed a motion for permanent custody of K.S. on April 2, 2008. Because the hearing on this motion was subsequently continued at appellant's request to a date falling beyond the 120 day period mandated by R.C. 2151.414(A)(2), the family services agency was required to file a second motion for permanent custody on September 8, 2008.

{¶ 9} At the permanent custody hearing evidence was offered to show that from October 2007 to December 2008, appellant missed 70 percent of her random toxicology screens. She also attended visitation with her children only 57 or 58 percent of the time. Appellant never underwent the third drug and alcohol assessment at Behavioral Connections. She was currently residing in Toledo, Lucas County, Ohio. In September 2008, appellant gave birth to her third child, who was approximately two months old at the time of the hearing. Appellant was working part-time at the International House of

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[2]To register as positive, the amount of cocaine in the urine must reach a certain level. Any amount below that number must be considered a negative.

Pancakes and was receiving medicaid and food stamps. K. S.'s CASA/guardian ad litem recommended that it would be in the best interest of this child to terminate appellant's parental rights and award permanent custody to WCDJFS.

{¶ 10} On January 5, 2009, the juvenile court entered a judgment in which it terminated appellant's parental rights and the parental rights of his father. The court awarded permanent custody of this child to WDJFS. The trial judge made a specific finding that K.S.'s father had abandoned him within the meaning of R.C. 2151.414(C). The court also based a finding that K.S. could not be placed with his father within a reasonable period of time or should not be placed with his father upon R.C. 2151.414(E)(4)[3] and (E)(10)[4]. As to appellant, the judge premised his conclusion that K.S. could not be placed with her within a reasonable period of time or should not be placed with her upon R.C. 2151.414(E)(1)[5], (E)(4), and (E)(6)[6]. He also determined,

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[3]R.C. 2151.414(E)(4) provides: "The parent has 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;

[4]R.C. 2151.414(E)(10) reads: "The parent has abandoned the child."

[5]R.C. 2151.414(E)(1) exists when clear and convincing evidence is offered to show that "[f]ollowing 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

after an examination of the best interest factors found in R.C. 2151.414(D), that it would be in the best interest of K.S. to award permanent custody to WDJFS. Appellant timely appealed this judgment. She asserts that the following error occurred in the trial court proceedings:

{¶ 11} "The trial court erred in determining that Appellant Mother's parental rights should be terminated, and the State of Ohio's Motion for Permanent Custody should be granted, pursuant to Section 2151.353, Section 2151.413, and Section 2151.414 of the Ohio Revised Code."

{¶ 12} We start with the precept holding that parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky v. Kramer* (1982), 455 U.S. 745, paragraph one of the syllabus. Thus, parents have essential and basic civil rights to raise their own children. *In re Murray* (1990), 52 Ohio St.3d 155, 157. These rights, however, are not absolute. *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105 ¶ 11. Parental rights are completely subject to the ultimate welfare of a child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 106. Nevertheless, before a juvenile court can terminate parental rights and award permanent custody to a public or private children services agency, it must find that clear and convincing evidence supports

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the purpose of changing parental conduct to allow them to resume and maintain parental duties."

[6]The condition outlined in R.C. 2151.414(E)(6) is established when clear and convincing evidence shows that a parent has been convicted of or pleaded guilty to child endangering in violation of R.C. 2919.22.

both portions of the permanent custody test set forth in R.C. 2151.414(B)(1). *In re Christopher G.*, 6th Dist. No. L-06-1188, 2006-Ohio-6294, ¶ 14.

{¶ 13} Under R.C. 2151.414(B)(1), a juvenile court can terminate parental rights and award permanent custody of a child to a public children services agency if it finds, based upon clear and convincing evidence, that it is in the best interest of the child and *any* of the following conditions exist: (1) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent ; (2) the child is abandoned; (3); the child is orphaned and there are no relatives who are able to take permanent custody; or (4) the child was in the temporary custody of one or more public services agency for 12 or more months of a consecutive 22 month period commencing on or after March 18, 1999.

{¶ 14} In reaching its determination of whether a child cannot be placed with either or both parents within a reasonable period of time or should not be placed with either or both parents, a court is guided by R.C. 2151.414(E). This statutory section sets forth 16 conditions that the court is required to employ in making its determination. The statute provides that if the trial court finds by clear and convincing evidence that any one of the 16 conditions exist, the court must enter the requisite finding. *In re R.H.*, 8th Dist. No. 84051, 2004-Ohio-5734, ¶ 11.

{¶ 15} The juvenile court must then also decide that, pursuant to the factors set forth in R.C. 2151.414(D), clear and convincing evidence shows permanent custody is in the best interest of the child. R.C. 2151.414(B)(1); *In re William S.* (1996), 75 Ohio St.3d 95, 99. Clear and convincing evidence is that evidence which will cause the trier of

fact to develop a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 16} Appellant first claims, in essence, that the trial court was required to find that the exact same R.C. 2151.414(E) conditions existed as to both parents to support its finding that K.S. could not be placed with either of them within a reasonable time or should not be placed with either of them. Because R.C. 2151.414(E)(4) is the only common condition cited by the trial court with regard to both parents, appellant argues that this is the only condition that the court could rely upon to support its finding that K.S. could not be placed with her within a reasonable time or should not be placed with her. We disagree. The clear and unambiguous language of R.C. 2151.414(E) reads, in relevant part:

{¶ 17} "In determining at a hearing * * * whether a child cannot be placed with *either* parent within a reasonable 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 * * * that one or more of the following [conditions] exist as to *each* parent * * *."

{¶ 18} The use of the words "either" and "each" refers to each parent individually. See "each" *Merriam-Webster Online Dictionary*. 2009. http://www.merriam-webster.com ("being one of two or more considered individually"); "either" *Merriam-Webster Online Dictionary*. 2009. http://www.merriam-webster.com ("being the one or the other of two"). Thus, the trial court could, and did, find that different conditions listed in R.C. 2151.414(E) applied to each parent.

{¶ 19} Moreover, clear and convincing evidence, as set forth infra, was offered to show that the conditions in R.C. 2151.414(E)(1), (4), and/or (6) exist as to appellant. In addition, we find that, despite appellant's arguments to the contrary, WCDJFS made reasonable and diligent efforts, as required by R.C. 2151.414(E)(1)[7] to assist her in remedying those conditions that caused K.S. to be removed from her care. Therefore, the trial court did not err in holding that K.S. could not be placed with appellant within a reasonable period of time or should not be placed with appellant.

{¶ 20} Appellant also maintains that the trial court failed to discuss all of the enumerated factors set forth in R.C. 2151.414(D) in determining whether a grant of permanent custody to WCDJFS was in the best interest of K.S. She contends that this alleged failure deprived her of the right to know the "particular causes that resulted in the loss of [K.S.]" and to inform her of the basis for its findings. Appellant concedes that the court below expressly discussed factors R.C. 2151.414(D)(1)-(4) in its judgment entry,

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[7]WCDJS did make reasonable efforts by implementing a plan to assist appellant in remedying the problem, drug abuse that led to a child endangering conviction, which caused her son to be removed from her care. When appellant complained that she could not visit K.S., attend her counseling appointments, obtain a drug and alcohol assessment, or provide a toxicology screen due to a lack of transportation(despite the fact that while living in Toledo she lived only short distance from the drug testing center and admitted that she could have taken a bus to get to there), the agency provided her with gasoline cards. WCDJFS also brought K.S. to visit his mother while she was incarcerated and encouraged her to behave in an appropriate manner during visitation. As set forth above, it was appellant who failed to make any reasonable effort to avail herself of all of the services offered by WCDJFS over a three year period. Moreover, in a relatively recent case, the Supreme Court of Ohio indicated that R.C. 2151.419, the "reasonable efforts"

but alleges that the court failed to discuss each and every factor set forth in R.C. 2151.414(E)(7)-(11).

{¶ 21} Before granting permanent custody a court must find that a termination of parental rights is in the child's best interest. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶ 56. In reaching this finding, the court is required to consider all relevant factors, but does not need to express that consideration in its judgment entry. *In re Nicholas A.*, 6th Dist. No. L-04-1303, 2005-Ohio-2104, ¶ 23 (Citations omitted.). These factors include, but are not limited to:

{¶ 22} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child;

{¶ 23} "(2) 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;

{¶ 24} "(3) The custodial history of the child;

{¶ 25} "(4) 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.

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

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statute does not apply in a hearing on a motion for permanent custody filed pursuant to R.C. 2151.413 and 2151.414. *In re C.F.*, 113 Ohio St.3d 73, 81; 2007-Ohio-1104, ¶ 41.

{¶ 27} Our review of R.C. 2151.414(E)(7)-(11) reveals that most of the factors set forth therein were not relevant to the trial courts determination of the best interest of K.S. Of the remaining factors, it is clear from a reading of the trial court's judgment entry that the trial court did consider these factors, e.g., R.C. 2151.414(E)(7) refers to the offense of child endangering in violation of R.C. 2919.22, but was not required to articulate each in his judgment entry. Therefore, we appellant's argument in this regard is without merit.

{¶ 28} Consequently, appellant's sole assignment of is found not well-taken. The judgment of the Wood County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE