

[Cite as *In re M.W.*, 2003-Ohio-877.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81518

IN RE: M. W.	:	JOURNAL ENTRY
	:	AND
[A. W., Appellant]	:	OPINION

DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 27, 2003
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CHARACTER OF PROCEEDING	:	CIVIL APPEAL FROM
	:	COURT OF COMMON PLEAS
	:	JUVENILE COURT DIVISION
	:	CASE NO. 98992284

JUDGMENT	:	AFFIRMED.
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DATE OF JOURNALIZATION	:	
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APPEARANCES:

For Appellant:	ANTHONY A. GEDOS, ESQ. 815 Superior Avenue., N.E. #2010 Cleveland, Ohio 44114
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Guardian ad litem for Child:	SUZANNE PICCORELLI, ESQ. 255 Falmouth Drive Rocky River, Ohio 44116
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For Appellee:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
JOSEPH C. YOUNG
Assistant Prosecuting Attorney
3343 Community College Avenue
Cleveland, Ohio 44115

ROCCO, KENNETH A., A.J.:

{¶1} Appellant A.W., biological mother of M.W., appeals from the order of the juvenile court that awarded permanent custody of her son to the Cuyahoga County Department of Children and Family Services (“the agency”).

{¶2} Appellant argues the juvenile court violated her constitutional right to due process of law; she asserts that it ignored this court’s previous directive to it, that it no longer had jurisdiction over her son, and that it waited too long to issue the order. Since none of appellant’s assertions is correct, however, the order is affirmed.

{¶3} The facts of this case previously were set forth in *In re: T.W. and M.W.* (May 3, 2001), Cuyahoga App. Nos. 78663, 78664 (“*M.W.I.*”). Particularly with regard to M.W., they briefly are stated as follows:

{¶4} Appellant gave birth to M.W. on June 17, 1998. Since the infant tested positive for cocaine, the agency immediately requested and obtained emergency temporary custody of him, and, eventually, also obtained an award of temporary custody upon the juvenile court’s subsequent adjudication of M.W. as neglected. Appellant’s father and his wife became M.W.’s foster parents. M.W. was six months old at that time, and has never lived with appellant.

{¶5} Appellant's next child, born on February 29, 2000, also was placed as an infant into the home of appellant's father and his wife. Thus, the two boys have lived together and have bonded well with their grandparents. The grandparents are qualified foster parents who expressed interest in adopting the children.

{¶6} Appellant, on the other hand, did not comply with the requirements of the agency's case plans regarding her boys. She failed to complete drug treatment, failed to provide evidence she had obtained stable housing, and failed to comply with the visitation schedules arranged for her. One of the agency's case workers testified, moreover, that during the few occasions of appellant's visits with her sons, he observed neither an apparent bond between them nor maternal attention on appellant's part.

{¶7} On May 21, 1999, the agency filed a motion for permanent custody of M.W. On September 7, 2000, following the dispositional hearing, the juvenile court denied the agency's motion, but placed M.W. into the legal custody of his foster parents.

{¶8} The agency filed an appeal of that order; appellant did not. This court determined in *M.W.* that the juvenile court lacked authority to award legal custody of M.W. to the grandparents without a prior motion filed pursuant to R.C. 2151.353(A)(3). Although "temporary custody could not be extended per R.C. 2151.353(F)", nevertheless, neither was legal custody proper. Therefore, the juvenile court's order was reversed and the case was remanded to the juvenile court "to make a disposition [of the agency's motion for permanent custody of M.W.] in accordance with the statute."

{¶9} This court went on in *M.W.* to state that R.C. 2151.414(B) guides the juvenile court "in determining whether to grant permanent custody***." After discussing the relevant factors, the following additional statements were made in *M.W.*:

{¶10} “There is clear and convincing evidence that [appellant] failed to remedy the problems which caused the children to be taken from her despite diligent efforts on the part of the agency to assist her. There is also clear and convincing evidence that [appellant] failed to visit or support the children.***

{¶11} “The record does not show an abuse of discretion on the part of the trial court in finding that there was not clear and convincing evidence that the younger boy could not be placed with [appellant] within a reasonable time.***There was no evidence that it was not in the best interest of the younger boy to remain in temporary custody pending a review by the court in six months***.

{¶12} “The law required that [M.W.], however, have resolution to (sic) his custody situation. [Pursuant to R.C. 2151.353(F)], he could not be maintained in temporary custody after two years[, but the] placement of him in the legal custody of his grandfather (sic) was in error because no motion had been filed requesting legal custody.

{¶13} “[Accordingly, t]his case is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.” (Emphasis added.)

{¶14} The record reflects several months passed before the case was returned to the juvenile court. Upon remand, the juvenile court scheduled the case for hearings in December 2001, February 2002, and May 2002, but each time continued the matter. Finally, on June 5, 2002, the juvenile court reviewed the case.

{¶15} In a journal entry filed on June 26, 2002,¹ the juvenile court determined that M.W. had been in temporary custody for more than 12 months of a consecutive 22 month

¹The time stamp mistakenly bears the date “June 26, 2003.”

period, that he neither could nor should be returned to appellant within a reasonable amount of time, and that a grant of permanent custody to the agency was in his best interest. It thus terminated appellant's parental rights.

{¶16} Appellant's appeal of the foregoing order presents the following assignment of error for review:

{¶17} "The trial court committed reversible error and denied appellant her fundamental constitutional right of due process by ignoring the clear mandate and direction of this Court of Appeals on remand by disregarding the mandate that permanent custody had been denied and that the child's sunset date had passed requiring return of the child to the appellant and where the trial court allowed over thirteen months to elapse between the time of the court of appeals decision and its illegal order granting appellee permanent custody."

{¶18} Appellant raises two arguments in her assignment of error.² She first asserts this court's previous opinion in *M.W.I* determined the juvenile court no longer had jurisdiction over her son based upon R.C. 2151.353(F), which establishes a "sunset date" for child custody determinations. This assertion is incorrect.

{¶19} Although appellant attempts to support her argument by citing *In re Travis Children* (1992), 82 Ohio App.3d 620, that appellate decision was overruled by the Ohio Supreme Court. *In re Young Children* 76 Ohio St.3d 632, 1996-Ohio-45 expressly states at the syllabus the following: "The passing of the statutory time period ('sunset date') pursuant to R.C. 2151.353(F) does not divest juvenile courts of jurisdiction to enter

²Appellant raises no argument regarding the merits of the award of permanent custody to the agency.

dispositional orders.” (Emphasis added.)

{¶20} A clear reading of this court’s opinion in *M.W.I* demonstrates the juvenile court was directed to make a disposition of the agency’s motion with regard to M.W. This hardly indicated a lack of jurisdiction over the child.

{¶21} Appellant further asserts the juvenile court’s failure to act on the case over a period of several months deprived her of her right to due process of law. However, regarding a similar assertion, this court has stated as follows:

{¶22} “Given the finding that the statutory time limitations***are directory rather than mandatory because they exist for the assurance of a prompt resolution of child custody matters rather than as a jurisdictional prerequisite to custody determinations, the remedy for a party aggrieved by a judge’s delay is to petition an appellate court for a writ of procedendo to compel the execution of [her] statutory duty. {Footnote omitted.] Failure to do so at the trial level constitutes a waiver of that issue for purposes of appeal.” *In re E.M.* (Nov. 8, 2001), Cuyahoga App. No. 79249.

{¶23} Since this court’s disposition of the agency’s appeal in *M.W.I*, therefore, did not inform the juvenile court it lacked further jurisdiction over M.W., and since appellant made no effort to force the juvenile court to issue its decision with any alacrity, appellant’s assignment of error is overruled. *In the matter of Nice*, 141 Ohio App.3d 445, 2001-Ohio-3214; *In re E.M.*, supra.

{¶24} The juvenile court’s order is affirmed.

It is ordered that appellant recover of appellee 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 Court of Common Pleas Juvenile Court Division to carry this judgment into execution.

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

KENNETH A. ROCCO
ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J. and

COLLEEN CONWAY COONEY, J. CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).