[Cite as *In re D.H.*, 2009-Ohio-3454.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92881

IN RE: D.H.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 08932680

BEFORE: Jones, J., Gallagher, P.J., and Dyke, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant, M.R.,[1] the child's natural mother, appeals the judgment of the lower court granting permanent custody to Cuyahoga County Department of Children and Family Services ("CCDCFS"). Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} M.R.'s parental rights to her two minor children, D.H. and D.S.H. were, terminated, and permanent custody was awarded to CCDCFS. However, this appeal only concerns the rights of D.H. and does not involve M.R.'s older child, D.S.H. At two weeks of age, D.H. sustained bilateral skull fractures and an extra-axial hematoma (intracranial hemorrhage). M.R.'s explanations ranged from the child being hit with a plastic toy to rolling off steps at the apartment. None of the explanations M.R. proffered would have resulted in the injuries the child received.

{¶ 3} On February 13, 2008, a complaint requesting permanent custody and alleging that D.H. was an abused and dependent child was filed. The complaint had to be refiled on May 1, 2008 because disposition had been delayed beyond 90 days. R.C. 2151.35(B)(1). On November 19, 2008, D.H. was adjudged to be an abused and dependent child, and the matter was continued for disposition.

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[1]The parties are referred to herein by their initials or title in accordance with this court's established policy regarding non-disclosure of identities in juvenile cases.

{¶ 4} At a hearing on January 12, 2009, M.R.; mother's attorney, Gregory Stalka; mother's guardian ad litem, Michael Granito; attorney for father, Thomas Konet; guardian ad litem for the child, Harvey E. Tessler; Assistant Prosecuting Attorney, Mark Adelstein; and CCDCFS social workers, Jennifer Weir and Laverne Milligan were present.

{¶ 5} At the conclusion of the hearing, the trial court determined by clear and convincing evidence that D.H. could not be placed within a reasonable time or should not be placed with M.R. and that a grant of permanent custody was in the child's best interest. Thereupon, the lower court terminated M.R.'s and alleged father John Doe's parental rights and responsibilities and awarded permanent custody of the child to CCDCFS. The court's orders as to both children were journalized on January 29, 2009, and on February 25, 2009. M.R. timely appealed the grant of permanent custody as to D.H. only.

{¶ 6} According to the facts, M.R. brought her two-week-old daughter, D.H., to Lakewood Hospital on February 12, 2008; apparently she had been struck on the head with a plastic toy. After X-rays revealed that D.H.'s skull was fractured, she was transferred to MetroHealth Medical Center for a CT scan. The CT scan showed that the right side of D.H.'s skull was depressed. It also showed bilateral skull fractures and an extra-axial hemorrhage.

{¶ 7} According to D.H.'s doctors, the injuries were consistent with blunt force trauma and could not have been caused in the manner described by M.R. An investigation was conducted and appellant was charged with felonious assault,

endangering children, and domestic violence against D.H. M.R. was arrested on February 13, 2008 and held in the Cuyahoga County Jail. CCDCFS took emergency custody of D.H. and filed a complaint alleging abuse, neglect, and requesting permanent custody.

{¶ 8} M.R. appeared in common pleas court on October 1, 2008, and withdrew her former plea of not guilty and then pled guilty to endangering children under R.C. 2919.22(A). On October 27, 2008, the trial judge sentenced appellant to three years' community control, supervision by adult probation, submission to regular and random drug testing, and ordered that she maintain verifiable employment, proof of which to be provided to the probation department, and comply with all recommendations of Mental Health Services and with all terms of her CCDCFS plan.

{¶ 9} M.R. was released from jail on October 27, 2008. At that time D.H. had been in the custody of CCDCFS for over eight months. Although M.R. was released from custody on October 27, 2008, she did not contact CCDCFS. On November 19, 2008, M.R. appeared in juvenile court for D.H.'s adjudicatory hearing. The complaint was amended, and M.R. acknowledged that she had been found guilty of endangering children as a result of D.H.'s injuries. Accordingly, D.H. was adjudged to be an abused and dependent child under R.C. 2151.031(B) and (C) and 2151.04(D).

{¶ 10} CCDCFS made referrals for M.R. to attend parenting classes and to receive mental health services, but she refused to participate. At the time of the permanency hearing on January 12, 2009, M.R. had yet to satisfy a single case plan objective. After a full hearing on the merits, the trial court held that based on the clear

and convincing evidence presented at trial and upon considering all relevant factors, including those set forth under R.C. 2154.414(D)(1)-(5) and the guardian ad litem's recommendation, D.H. could not be placed with M.R. within a reasonable time and should not be placed with M.R., and that a grant of permanent custody was in the child's best interest.

{¶ 11} The trial court also found that CCDCFS made services available to the family, which included parenting education, drug assessment and treatment, employment services, housing services, psychological evaluation, mental health counseling, and community collaborative services. CCDCFS was found to have made reasonable efforts to prevent the initial and continued removal of D.H. from the home and to finalize a permanency plan for the child.

{¶ 12} On January 12, 2009, the trial court terminated M.R.'s parental rights and awarded permanent custody of the child to CCDCFS. On January 29, 2009, the trial court's judgment was journalized and mailed to the parties. M.R. filed a timely notice of appeal on February 25, 2009.

Assignments of Error

{¶ 13} Appellant assigns two assignments of error on appeal:

{¶ 14} "[1.] The juvenile court's determination to grant permanent custody of D.H. to CCDCFS was unsupported by clear and convincing evidence and, therefore, must be reversed as being against the manifest weight of the evidence;

{¶ 15} "[2.] The juvenile court erred as a matter of law by failing to set forth any specific findings of fact when granting permanent custody of D.H. to CCDCFS."

LEGAL ANALYSIS

Permanent Custody

{¶ 16} M.R. argues in her first assignment of error that the lower court's granting of permanent custody was unsupported by clear and convincing evidence and must therefore be reversed. The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, Cuyahoga App. No. 80620, 2002-Ohio-2968, at ¶22. A trial court must apply a two-prong test under this statute, measured by clear and convincing evidence. Id. With respect to this court's standard of review, we stated in *In re M.H.*:

> "'Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. A determination of whether something has been proven by clear and convincing evidence will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. If a burden of proof must be met with clear and convincing evidence, a reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy that burden of proof.'" Id., quoting *In re E.M.* (Nov. 8, 2001), Cuyahoga App. No. 79249."

{¶ 17} Accordingly, we must look to the record in its entirety to determine whether the trial court had sufficient evidence to clearly and convincingly find that it was in D.H.'s best interest to place her in the permanent custody of CCDCFS. We must also look to see if D.H. could not, or should not, have been placed with either parent in a reasonable time. After thoroughly reviewing the evidence, we conclude that the trial court acted properly.

{¶ 18} In *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, the Supreme Court of Ohio stated:

> "[i]n *Troxel v. Granville* (2000), 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 ***, the United States Supreme Court noted that parents' interest in the care, custody, and control of their children 'is perhaps the oldest of the fundamental liberty interests recognized by this Court.' The protection of the family unit has long been a paramount concern of the courts ***."

{¶ 19} The Ohio Supreme Court further noted that "[p]ermanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' *** Therefore, parents 'must be afforded every procedural and substantive protection the law allows.' ***" Id. at ¶10.

{¶ 20} However, parents' fundamental interest is not absolute. "Once a case reaches the disposition phase, the best interest of the child controls. The termination of parental rights should be an alternative of 'last resort.'" Id. at ¶11.

{¶ 21} Therefore, before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599.

{¶ 22} Ohio law provides for two means by which an authorized agency may seek to obtain permanent custody of a child. The agency may first obtain temporary custody and then subsequently file a motion for permanent custody, or the agency

may request permanent custody as part of its original abuse, neglect, or dependency complaint. See R.C. 2151.413, 2151.27(C) and 2151.353(A)(4).

{¶ 23} In order to grant permanent custody in its initial disposition, the trial court must apply a two-prong test. R.C. 2151.414(B). Specifically, the juvenile court must find, by clear and convincing evidence, that (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors enumerated in R.C. 2151.414(D); and (2) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, pursuant to at least one of the factors listed in R.C. 2151.414(E).

R.C. 2154.414(D)

{¶ 24} The first prong of the analysis, under R.C. 2151.414(D), provides that in determining the best interest of the child, "the court shall consider all relevant factors, including, but not limited to, the following:

> "(1) 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;
>
> "(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard to the maturity of the child;
>
> "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public service agencies *** for twelve or more months of a consecutive twenty-two month period ***;

> "(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;
>
> "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents of the child."

{¶ 25} Although the court shall consider all relevant factors, we note that this Court has consistently held that, "[o]nly one of the factors in Ohio Rev. Code Ann. § 2151.414(D) needs to be resolved in favor of the award of permanent custody. If the court finds that both Ohio Rev. Code Ann. § 2151.414(D) and (E) have been satisfied, then it may grant permanent custody of the child to a public children services agency." *In re Moore* (Aug. 31, 2000), Cuyahoga App. No. 76942.

{¶ 26} In the case at bar, the trial court considered all relevant factors, including those listed in R.C. 2151.414(D)(1)-(5) and determined that permanent custody was in D.H.'s best interest. Under R.C. 2151.414(D)(1), the court is to consider the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers, out-of-home providers, and any other person who may have significantly affected the child.

{¶ 27} Although M.R. was released in October 2008, she failed to obtain employment, stable housing, or participate in parenting education and counseling. D.H. had been in the same foster home throughout the pendency of the case, and the foster parent has expressed an intent to adopt the child. D.H. has a relationship with her sibling, D.S.H., and the children's foster families arrange visits between the two siblings. Sufficient evidence was presented concerning D.H.'s interaction and

interrelationship with M.R. and other individuals in the child's life to support the lower court's determination that permanent custody was in the child's best interest.

{¶ 28} Under R.C. 2151.414(D)(2), the court is to consider the wishes of the child as expressed directly by the child or through the child's guardian ad litem with due regard of the child's maturity. At one year of age, D.H. lacked sufficient maturity to express her own wishes regarding placement. However, the child's guardian ad litem reported that the foster parent runs a day care and the home is appropriate. D.H. was noted to be healthy and her immunizations were up to date. According to the guardian ad litem, the child needed a legally secure placement and that permanent custody should be awarded to CCDCFS so that she could be adopted. Sufficiently clear and convincing evidence was presented through the guardian ad litem's report and testimony for the trial court to have properly considered the child's wishes pursuant to R.C. 2151.414(D)(2).

{¶ 29} Under R.C. 2151.414(D)(3) the court is to consider "[t]he custodial history of the child, including whether the child has been in the temporary custody of one or more public service agencies *** for twelve or more months of a consecutive 22-month period ***." D.H. was removed from M.R.'s custody on February 9, 2008 and has remained in substitute care since that date. Sufficient clear and convincing evidence was presented for the trial court to have considered the children's custodial history and to show that the children had been in the temporary custody of CCDCFS for 12 or more months of a consecutive 22-month period.

{¶ 30} Under R.C. 2151.414(D)(4) the court is to consider 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. If a child is adjudicated an abused, neglected, or dependent child, the court may award legal custody to either parent or to any other person who, prior to the disposition hearing, files a motion requesting legal custody of the child. No motions for legal custody were filed as to D.H.

{¶ 31} Under R.C. 2151.414(D)(5) the trial court is to consider whether any of the factors under R.C. 2151.414(E)(7) through 2151.414(E)(11) apply in relation to the parents and the child. D.H. and D.S.H were placed in permanent custody on the same date. However, M.R. did not appeal the grant of permanent custody as to D.S.H. Therefore, M.R.'s parental rights have been involuntarily terminated with respect to a sibling of D.H., satisfying R.C. 2151.414(E)(11). The decision granting permanent custody of D.H. to CCDCFS is supported by clear and convincing evidence that the child cannot be placed with M.R. within a reasonable time or should not be placed with M.R. and that a grant of permanent custody is in the child's best interest.

R.C. 2151.414(E)

{¶ 32} The court may grant permanent custody if it determines by clear and convincing evidence in accordance with R.C. 2151.414(E) that the child cannot be placed with either parent within a reasonable time, or should not be placed with either parent and it determines in accordance with R.C. 2151.414(D) that the permanent

commitment is in the best interest of the child. *In re Hauserman* (Feb. 3, 2000), Cuyahoga App. No. 75831.

{¶ 33} Here, a review of the evidence demonstrates that the factors listed in R.C. 2151.414(E)(1), (2), and (6) apply to M.R.

> "(E)(1) Following 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.* ***;
>
> "(2) *Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing* pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code;
>
> ***
>
> "(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04*, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12**, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161 [2923.16.1], 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child."

R.C. 2151.414(E). (Emphasis added.)

{¶ 34} Accordingly, the evidence presented demonstrates that D.H. cannot be placed with either parent within a reasonable time or should not be placed with either parent, pursuant to at least one of the factors listed in R.C. 2151.414(E).

CCDCFS Utilized Reasonable Efforts to Assist Appellant

{¶ 35} M.R. argues that CCDCFS failed to use reasonable efforts to assist her with her case plan. M.R. further argues that she was in jail for a significant period of time and was therefore unable to comply with her case plan. We do not find M.R.'s arguments to be persuasive.

{¶ 36} M.R.'s case plan was nearly identical to the case plan that she received in D.S.H.'s case approximately two years earlier, in April 2006. M.R. was familiar with the requirements and the procedures. M.R.'s plan required that she actively participate in psychiatric and psychological services, attend and successfully complete parenting education, maintain stable housing, and obtain employment. M.R. failed to complete the requirements.

{¶ 37} M.R. argues that she was in jail from February through October 2008, and therefore unable to complete the plan. However, when M.R. was released from jail she failed to inform CCDCFS of her whereabouts for a month. When M.R. finally communicated with CCDCFS she was promptly referred for parenting and mental health services. However, M.R. refused to participate. During the 30 months that D.S.H. was in substitute care, and the year that D.H. had been in CCDCFS's care, M.R. failed to satisfy a single case plan objective. At the time of the permanent custody hearing, D.H. had been in substitute care in excess of 12 months and was in

an adoptive foster home and all of her needs were being met. Accordingly, we find no error concerning the trial court's determination that CCDCFS made reasonable efforts to assist M.R.

{¶ 38} We find that the evidence demonstrates that despite reasonable case planning and diligent efforts by CCDCFS, M.R. failed to remedy the conditions that caused D.H. to be placed outside the home. The evidence further demonstrates that M.R.'s chronic mental illness, chronic emotional illness, mental retardation, physical disability or chemical dependency was so severe that it rendered her unable to provide an adequate permanent home for D.H. at that time and within one year after the hearing. Moreover, we find no error on the part of the lower court in its determination that CCDCFS did indeed make reasonable efforts to assist M.R. with her case plan.

{¶ 39} Therefore, we conclude there is sufficient evidence to support the juvenile court's determination, clearly and convincingly, that it was in D.H.'s best interest to be placed in the permanent custody of CCDCFS.

{¶ 40} Accordingly, appellant's first assignment of error is overruled.

Findings of Fact and Conclusions of Law

{¶ 41} M.R. argues in her second assignment of error that the lower court erred when it did not submit findings of fact and conclusions of law. However, M.R. failed to request findings of fact and conclusions of law. R.C. 2151.353(A)(4) provides in pertinent part, "If the court grants permanent custody under this division, the court,

upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding." (Emphasis added.)

{¶ 42} In addition, Civ.R. 52 states, "when questions of fact are tried by the court without a jury, *judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment* pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separate from the conclusions of law." (Emphasis added.)

{¶ 43} The record in the case at bar unambiguously demonstrates M.R. made no written or oral request for findings of fact or conclusions of law prior to the permanent custody hearing, the juvenile court's judgment granting permanent custody to CCDCFS, or anytime thereafter. As a result, M.R. has failed to exemplify any error. See *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 562 N.E.2d 929. Moreover, we note the juvenile court's permanent custody order provides sufficient findings of fact and conclusions of law, when viewed with the complete record, to provide meaningful appellate review. Accordingly, we find no error on the part of the lower court.

{¶ 44} Accordingly, M.R.'s second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, P.J., and
ANN DYKE, J., CONCUR