

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92781

In Re: T.B., ET AL.

APPELLANT

JUDGMENT:
AFFIRMED

Appeal from the Cuyahoga County Court
of Common Pleas, Juvenile Division
Case Nos. AD 07900891 and AD 07900892

BEFORE: Dyke, J., Blackmon, P.J., and Stewart, J.

RELEASED: August 6, 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).

ANN DYKE, J.:

{¶ 1} E.C., the mother¹ of T.B. and C.B., appeals from the order of the juvenile court that awarded permanent custody of the children to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). For the reasons set forth below, we affirm.

{¶ 2} The evidence establishes that the family first became involved with the CCDCFS in September 2005, following the birth of T.B., who was a drug-exposed newborn. At that time, the CCDCFS filed for court-ordered protective supervision of the family and assisted the parents with a case plan in order to keep T.B. from being removed from the home. In April 2007, C.B. was born. He was drug exposed and tested positive for marijuana at birth. The children were removed from the home on May 1, 2007, and the CCDCFS sought temporary custody, alleging that both parents have substance abuse problems and could not provide for the basic needs of the children. The trial court granted the motion for temporary custody on August 2, 2007.

{¶ 3} The case plan, which was periodically amended, addressed the following: the parents’ substance abuse issues, the parents’ inability to function independently and their lack of income and stable housing, the mother’s lack of emotional stability, parenting skills, domestic violence concerns, and T.B.’s need for developmental services. Both parents were provided with copies of the case plan and noted their assent to it. The mother subsequently assented to the referral of

¹Although the father participated in the lower court proceedings for a period of time, he did not appear at the hearing on the permanent custody motion and is not a party to this appeal.

this matter to the drug court unit. By June 25, 2008, however, the drug court magistrate discharged her from the drug court program, upon learning that she had not appeared at scheduled meetings and drug screens and had no contact with her treatment team during the past two weeks.²

{¶ 4} On April 22, 2008, the CCDCFS filed a motion for permanent custody alleging in relevant part as follows:

{¶ 5} “A. [M]other has failed continuously and repeatedly to substantially remedy the conditions causing [the children] to be placed outside the home. Mother has failed to successfully complete drug treatment, obtain stable housing, consistently address her mental and emotional health issues, and address issues of domestic violence;

{¶ 6} “B. Mother has a chronic mental and emotional illness that is so severe that it prevents her from being able to provide the children with an adequate permanent home * * *.”

{¶ 7} The matter proceeded to hearing on January 12, 2009. The record further reflects that the trial court appointed a guardian ad litem for the mother. The mother was also represented by a public defender.

{¶ 8} Sally Tamosiunas, a social worker with the CCDCFS testified that she works in the Sobriety Treatment and Recovery Team (“START”) program and was assigned to work with the mother. According to Tamosiunas, the family first became involved with the CCDCFS in September 2005, following the birth of T.B., who was a

² The record also indicates that on March 26, 2008, the drug court magistrate noted

drug-exposed newborn. At that time, the CCDCFS filed for court-ordered protective supervision of the family and assisted the parents with a case plan in order to keep T.B. from being removed from the home. In May 2007, C.B. was born. He was drug exposed and positive for marijuana at birth. In May 2007, the CCDCFS was granted emergency custody of the children. Tamosiunas further testified that the father has substance abuse issues and did not provide for the children's basic needs. Other relatives were considered for possible placement of the children but were deemed inappropriate, or failed to provide information to the CCDCFS and the children were placed in foster care. A case plan was implemented and the parents were made aware of its requirements.

{¶ 9} According to Tamosiunas, the requirements of the case plan have remained substantially the same since 2005. It includes objectives dealing with the mother's sobriety, emotional health, parenting education, domestic violence, basic needs, and developmental services for T.B.

{¶ 10} With regard to the issue of the mother's drug use, Tamosiunas testified that the mother had been referred for drug assessments approximately five times and completed at least two assessments. As a result of the drug assessments, the mother was diagnosed as marijuana dependent and was referred to intensive outpatient treatment in October 2007. The mother did not complete the outpatient program, however, and was discharged. The mother was next referred to an after-care program at Recovery Resources. She attended a few sessions there but did

that the mother had provided forged documentation of her sobriety meeting attendance.

not successfully complete the program and was discharged in June 2008. Since that time, Tamosiunas requested that the mother undergo an additional drug assessment, attend 12-step meetings, a home group, and provide urine samples, but the mother has not complied with these requests. According to Tamosiunas, the mother has not completed the sobriety objective of the case plan.

{¶ 11} With regard to the issue of the mother's emotional stability, Tamosiunas testified that in early 2008, the mother was referred to a psychiatrist after she expressed a fear of leaving her home and reported seeing a little boy walking around her home with her and her father following her. The mother failed to keep all of her scheduled appointments, however, and the psychiatrist was therefore unable to complete an assessment of her emotional health. The psychiatrist also prescribed medication for the mother free of cost but she did not pick it up. According to Tamosiunas, the mother has not completed this objective of the case plan.

{¶ 12} With regard to the issue of parenting education, Tamosiunas testified that this objective was included because one of the children has special needs. The mother did not complete the parenting program, and Tamosiunas testified that she has ongoing concerns about whether the mother can get the children to their appointments.

{¶ 13} With regard to the issue of domestic violence, Tamosiunas testified that this objective was included following an altercation between the father and mother, and following an incident where the mother appeared at a hearing with an injury that

she stated was inflicted by the father. The mother was scheduled to attend a domestic violence program in May 2008 but failed to do so and was discharged.

{¶ 14} With regard to the issue of basic needs, Tamosiunas testified that this objective was included because the mother did not have stable housing. The CCDCFS also offered to place her at a shelter, which would have expedited a housing plan, but the mother refused. The CCDCFS also offered the mother a job readiness program but she refused this offer as well. According to Tamosiunas, the mother refuses to provide the CCDCFS with addresses where she may be reached, and missed two scheduled visitations with the children in June 2008.

{¶ 15} Tamosiunas stated that during the first year of the program, the CCDCFS had weekly contact with the mother and outlined all of the case plan services. Tamosiunas also offered to transport the mother to the various programs.³

{¶ 16} T.B. was developmentally delayed as to speech but he attends a special preschool program and is now at an age-appropriate speech level. He attends other appointments to address other delays and the foster mother keeps the required appointments and works with the children on their developmental issues. According to Tamosiunas, neither parent is capable of providing this care to the children.

{¶ 17} Finally, Tamosiunas testified that the children have been in foster care for eighteen months and have a very strong bond with their foster mother, whom

³Tamosiunas also outlined the objectives as to the father; his struggles with marijuana and alcohol, his referrals for treatment and services, and his failures to successfully complete his case plan objectives.

they view as a parental figure. The foster mother is willing to provide a permanent home for both children. According to Tamosiunas, the award of permanent custody to the CCDCFS is in the best interests of the children because the parents are unable to care for them, and have made “zero case plan progress” and the children are in need of a permanent placement.

{¶ 18} On cross-examination, Tamosiunas acknowledged that the mother’s last drug screen, in June 2008, was negative. Tamosiunas additionally stated that the mother’s visits with the children were changed from weekly to biweekly after the mother missed several scheduled visits. For the most part, however, the mother’s parenting was appropriate during the visitations. As to the issue of domestic violence, Tamosiunas admitted that neither parent had filed charges against the other. Finally, Tamosiunas admitted that one of the mother’s relatives expressed an interest in caring for the children but her application was still pending since she had not provided the required documentation. A second relative was also considered but she stated that she could only take one of the children and has provided the names of other relatives to contact.

{¶ 19} For her case, the mother testified that she last used marijuana in September 2007. She did not complete the after-care drug treatment program because she obtained a job that conflicted with it. She stated that she sees a psychiatrist at Huron Road Hospital and takes medication that this psychiatrist prescribes, so there was no need to pick up medication prescribed by the second psychiatrist. As to housing, the mother testified that she went to a shelter but left

after being told that her name would be placed on a waiting list. The mother testified that her visitations were cut due to her failure to comply with the case plan and not for missing scheduled visits, and she testified that she has either finished or is willing to participate in each objective of the case plan. She testified that although she is not in a position to take care of her children right now, she can change and take care of them in “at least” six months.

{¶ 20} On cross-examination, the mother admitted that she was discharged after unsuccessfully completing the drug programs, and she has not complied with requests for an additional drug assessment. She admitted that she has missed urine screen appointments since June of 2008 but she denied using drugs. She has not attended the domestic violence program, and attended only one mental health appointment.

{¶ 21} Jacqueline Overton, the aunt of the children’s father, testified that she informed Tamosiunas that she could only care for one of the children, since she already has custody of another relative’s child. She further explained, however, that “if all else failed” she would take both boys so that they would not be adopted by a non-family member. She also stated that she initially thought that she would be overwhelmed by having three children but no longer believes that to be the case. She admitted that it would be difficult for a child to be taken away from care givers to whom he had bonded and also admitted that she had only visited with the children on three occasions while they were in foster care.

{¶ 22} The trial court subsequently determined that the CCDCFs had shown by clear and convincing evidence that permanent custody is in the children's best interests and that the children could not be placed with the parents within a reasonable time. The court found that the parents had continuously and repeatedly failed to remedy the conditions causing the children to be placed outside the home, and demonstrated a lack of commitment to the children by actions showing an unwillingness to provide an adequate home. The mother now appeals and assigns two errors for our review.

{¶ 23} For her first assignment of error, the mother asserts that the trial court erred in failing to appoint a guardian ad litem for her during her participation in the drug court program, and further complains that the guardian ad litem who appeared at the hearing on her behalf did not provide effective representation.

{¶ 24} Pursuant to Juv.R. 4(B), the juvenile court may appoint a guardian ad litem for an incompetent parent. Accord R.C. 2151.281(C), which states:

{¶ 25} "In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child in which the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of that parent."

{¶ 26} The duties of a guardian ad litem include "investigation, mediation, monitoring court proceedings, and monitoring the services provided * * * and [filing] any motions and other court papers that are in the best interest of the [ward]." R.C. 2151.281(I). A guardian ad litem is given wide latitude to carry out his or her

responsibilities on behalf of the ward. *In re C.T.*, 119 Ohio St.3d 494, 895 N.E.2d 527, 2008-Ohio-4570.

{¶ 27} With regard to the trial court's failure to appoint a guardian ad litem for the mother during the drug court proceedings, the record indicates that the mother appeared for numerous drug court hearings before she was ultimately discharged from the program after breaking contact with the treatment team for two weeks. The record of each of the hearings that she attended, however, demonstrates that she was able to understand the proceedings, determine what was expected of her, and put forth some effort toward compliance. The record contains no indication that the mother was incompetent, and she was ably represented by a public defender in all of the drug court proceedings. We therefore cannot conclude that the trial court erred in failing to appoint a guardian ad litem for her at this time.

{¶ 28} We further note that after the point at which the CCDDFS outlined mental health concerns regarding the mother, a guardian ad litem was appointed for her for the hearing on the permanent custody motion.

{¶ 29} With regard to the issue of the performance of the guardian ad litem, we note that a claim that counsel was ineffective during permanent custody proceedings is analyzed under the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. See *In re D.R.*, Cuyahoga App. No. 90067, 2008-Ohio-46. Pursuant to this test, the appellant must show must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

{¶ 30} In this matter, the guardian ad litem appeared for the hearing but did not question any of the witnesses. The record further indicates that the mother testified at the hearing. Her position throughout direct and cross-examination was that she needed more time to fully resolve the issues that caused the children to be removed from the home. Although the record indicates that the mother gets treatment for mental health issues, the key question concerned the mother's compliance with taking her medication and the record does not manifest that she was incompetent. Accordingly, while the guardian ad litem did not actively participate in the hearing, we cannot say and the record does not demonstrate that the mother was prejudiced and deprived of a fair trial as a result of the guardian ad litem's representation. The claim of ineffective assistance must therefore fail.

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

{¶ 32} For her second assignment of error, the mother asserts that because her mental health and drug issues were listed in support of the CCDCFs motion for permanent custody, the trial court erred by failing to conduct a psychological evaluation of her and failed to obtain evidence as to her prognosis.

{¶ 33} When reviewing a trial court's judgment on child custody cases, the appropriate standard of review is whether the trial court abused its discretion. *In re T.F.*, Cuyahoga App. Nos. 91438 and 91472, 2008-Ohio-6652. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *Id.*

{¶ 34} R.C. 2151.414(B)(1) provides:

{¶ 35} “[T]he court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶ 36} “* * *

{¶ 37} “(2) * * * if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

{¶ 38} “* * *

{¶ 39} “(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

{¶ 40} “(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;

{¶ 41} “(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;

{¶ 42} “(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;

{¶ 43} “(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;

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

{¶ 45} (E) * * * If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶ 46} “(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. 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 the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 47} “* * *

{¶ 48} “(4) 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; * * *.”

{¶ 49} Although the court must consider all of the R.C. 2151.414(D) factors, only one of them needs to be resolved in favor of the award of permanent custody in order for the trial court to terminate parental rights. See *In re Z.T.*, Cuyahoga App. No. 88009, 2007-Ohio-827; *In re T.M.*, Cuyahoga App. No. 83933, 2004-Ohio-5222.

{¶ 50} In this case, the trial court found by clear and convincing evidence that the award of permanent custody was in the children's best interest. The court noted that the continued residence of the children in the home would be contrary to their best interests and welfare, and that they cannot be placed with the parents within a reasonable time. The court also explained that although the CCDCFS made diligent efforts to remedy the problems that caused the children to be placed outside the

home, the parents continuously and repeatedly failed to substantially remedy the conditions that caused the children to be placed outside the home and demonstrated a lack of commitment to the children. These conclusions are fully supported in the record. The mother did not successfully complete the drug treatment programs and failed to appear for urine drug screens, and she did not obtain stable housing. Although she stated that she had a job, no details were provided to the court and she provided no proof of income, she did not take complete the parenting or domestic violence classes to which she was referred, and missed scheduled visitation. Moreover, there was no evidence that she could care for the children, and in particular, meet T.B.'s requirements for developmental assistance, and the mother admitted that she would need at least six months to be able to provide for them, despite their need for a permanent home. Accord *In re T.F.*, supra, (permanent custody to CCDCFS upheld where the mother did not comply with the case plan, i.e., did not complete substance abuse treatment, did not obtain stable housing, refused to undergo a psychological assessment or attend domestic violence counseling, had no source of income at the time of the hearing, could not address the emotional needs of the children who were progressing in foster care, and foster parents desired to give them a permanent home).

{¶ 51} Although the mother complains that there was no evidence as to her prognosis, and she insisted that in perhaps six months she could remedy the issues that led to the county's custody over the children, the record indicates that the children had been in the temporary custody of the agency for 12 or more months of a

consecutive 22-month period, and this meets R.C. 2151.414(B)(1)(d), and that (2) * *
* the child cannot be placed with one of the child's parents within a reasonable time
or should not be placed with either parent * * *.” Permanent custody has also been
upheld in light of “uncertain” evidence of the parent’s prognosis on addiction issues.
See *In re J.J.*, Cuyahoga App. No. 86276, 2007-Ohio-535.

{¶ 52} Moreover, we note that the children were in temporary custody of the
CCDCFS for 20 months, prior to the permanent custody hearing, and this time
period has been upheld in other cases. *In re Strader*, Stark App. No. 2008 CA
00255, 2009-Ohio-1292; *In the Matter of: Baby C*, Franklin App. Nos. 05AP-1254,
05AP-1256, 2006-Ohio-2067.

{¶ 53} Finally, as to the mother’s complaint that the county did not present
expert testimony regarding her ability to parent or to recover, we note that the
statutory requirements for an award of permanent custody have been deemed met in
other instances where no expert testimony is offered. See *In re the Matter of V.H.*,
Franklin App. No. 05AP-325, 2006-Ohio-532; *In re the Matter of Moses* (Feb. 21,
1992), Lucas App. No. L-91-033.

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

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 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.

ANN DYKE, JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY