

[Cite as *In re K.M.*, 2011-Ohio-349.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95374

**IN RE: K.M.
A Minor Child**

(Appeal by Father)

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 07900889

BEFORE: Gallagher, J., Blackmon, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant D.M. (“father”) appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, that granted permanent custody of his biological daughter K.M. to the Cuyahoga County Department of Children and Family Services (“CCDCFS”).¹ For the reasons stated herein, we affirm the judgment of the juvenile court.

{¶ 2} On August 1, 2007, CCDCFS filed a complaint for dependency and requesting temporary custody of K.M. On October 10, 2007, the child was adjudged dependent and was committed to the temporary custody of CCDCFS. K.M. has mental health disorders and severe behavioral issues. As indicated by the juvenile court, “she apparently suffered tremendous neglect in her mother’s home.”

{¶ 3} At a hearing held on June 11, 2008, it was observed that K.M.’s biological mother was not following through with the case plan, that father was doing fine with visiting, and that K.M. was transitioning into a therapeutic foster home. Father expressed that he was not interested in reunification at the time because he could not “handle the violence.” CCDCFS expressed that it was looking at filing for permanent custody.

{¶ 4} On August 14, 2008, the court granted an extension of temporary custody to CCDCFS. K.M. had been doing well in the foster home. The

¹ The parties are referred to herein by their initials or title in accordance with this court’s established policy regarding nondisclosure of identities in juvenile cases.

court recognized that father was to receive services to help him deal with K.M.'s behavior with the goal of K.M. being returned to his home.

{¶ 5} On January 7, 2009, the court granted another extension of temporary custody. K.M. was doing well in her placement, but it was recognized that it was too early for K.M. to return to father. Although overnight visits with father had been "okay," there had been minor incidents, K.M. still had certain behavioral issues to be worked out, and there had been issues involving father's other daughter. Father had been cooperating with the case plan, and the goal remained a gradual reunification in father's home.

{¶ 6} On June 15, 2009, CCDCFS filed a motion to modify temporary custody to permanent custody. Permanent custody was sought because K.M.'s biological mother did not wish to be involved with K.M. and father was unable to provide for K.M.'s basic needs. The juvenile court held a hearing on the motion on March 30, 2010. At that time, K.M. was at Berea Children's Home.

{¶ 7} It was the opinion of CCDCFS that K.M. could be placed with a foster home with the goal of seeking permanency for K.M. in an adoptive home. Although K.M. had successful visitation with father, there was evidence that father was unable to manage K.M., and on some occasions, her behavior would deteriorate after visitation. This assertion was supported by medical documentation. The social worker believed that K.M.'s visits with

father were hurting efforts to stabilize K.M.'s behavior. It was also observed that K.M.'s prior adoption placements did not work because of K.M.'s disruptive behavior. It was conceded that there was no adoptive home currently in place for K.M. The social worker testified that although it would be difficult to place K.M. in an adoptive home, it was not impossible and she had a chance for permanent placement.

{¶ 8} Several therapists believed that K.M. should not be separated from father and that contact between K.M. and father should continue. Further, it was acknowledged that K.M. did not wish to have her relationship with father terminated, and there was evidence that K.M. loved her father and spending time with him. Over the last three years, K.M. would spend on average an hour a week, holidays, and occasional overnights with father, but the visit time had decreased in recent time. The guardian ad litem testified that he did not see anything positive from terminating father's relationship and that he believed K.M. would become more violent as a result of such action. K.M., who was aware of the situation, had exhibited an increase in her explosive behavior. Nevertheless, CCDCFS believed that permanent custody was in the best interest of K.M.

{¶ 9} K.M., who was only 12 years old at the time of the hearing, had been in the temporary custody of CCDCFS for two and a half years. CCDCFS had been unable to reunify K.M. with father because he was not

able to provide for her care and basic needs. CCDCFS believed that K.M. deserved to have a family-like setting in spite of her special needs and that permanent custody would allow for a better permanency plan and be more effective for achieving permanent arrangements for K.M.

{¶ 10} Following the hearing, the juvenile court granted the motion for permanent custody to CCDCFS. Father has appealed the judgment of the juvenile court. He has raised one assignment of error for review that provides as follows: “I. The court’s decision to award permanent custody to CCDCFS was not in the best interest of the child and/or supported by clear and convincing evidence.”

{¶ 11} In order to terminate parental rights and grant permanent custody to a county agency, the record must demonstrate by clear and convincing evidence the existence of one of the conditions set forth in R.C. 2151.414(B)(1)(a)-(d) and that permanent custody is in the best interest of the child, by considering the five factors set forth in R.C. 2151.414(D). Clear and convincing evidence is that quantum of evidence that instills in the trier of fact a firm belief or conviction as to the allegations sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

{¶ 12} In this case, pursuant to R.C. 2151.414(B), the juvenile court determined by clear and convincing evidence that K.M. has “been in the temporary custody of a public children services agency * * * for twelve or

more months of a consecutive twenty-two month period.” It is undisputed that this requirement was met. The juvenile court further determined that K.M. had been abandoned by her mother and could not or should not be placed with her parents within a reasonable time.

{¶ 13} Next, the juvenile court was required to determine that permanent custody is in the best interest of the child by considering all the relevant factors, including, but not limited to, the five factors set forth in R.C. 2151.414(D). Those factors include the following: (1) the interaction and interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child’s need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions (E)(7) to (11) apply. R.C. 2151.414(D).

{¶ 14} In this case, the juvenile court conducted an evidentiary hearing and considered the testimony and evidence presented. In determining whether a grant of permanent custody to CCDCFS was in the best interest of K.M., the court considered all relevant factors, including those listed in R.C. 2151.414(D)(1)-(5).

{¶ 15} The court recognized that K.M. had been in the custody of CCDCFS since 2007, that she had been abandoned by her mother, that she had been removed from father’s care because he was unable to care for her

due to her behavioral issues, that nobody had argued she could be reunified with her biological family, and that no other relative or interested party had filed for legal custody. The court observed that CCDCFS had made numerous attempts to avoid asking for permanent custody, that the parties' efforts to work toward reunification with father had been unsuccessful, and that the court could not order a planned permanent living arrangement.

{¶ 16} The court considered that the social worker, who had the most contact with K.M., believed an adoptive home could be found and that permanent custody was in K.M.'s best interest. The court observed that medical records supported CCDCFS's contention that K.M.'s contact with her father and other family members caused an increase in the child's behavioral problems. The court did not find K.M. had such a significant and positive bond with the biological family that adoption would not be in her best interest.

{¶ 17} The court also considered that the guardian ad litem recommended denying permanent custody. However, the court determined that a denial of permanent custody would not be in K.M.'s best interest. The court stated in part as follows: "The Court cannot say that this child must be confined to institutional placement for the remainder of her childhood. Nor can the Court say the inconsistent and sometimes problematic contact she has with her biological family outweighs her right to a stable, permanent

home.”

{¶ 18} Father questions the strategic choice of CCDCFS not to request a planned permanent living arrangement (“PPLA”) and states it was recognized that reunification with father would be a slow, gradual process. He claims that a PPLA would have been a preferred resolution in this case. However, it is undisputed that CCDCFS did not request this form of disposition.

{¶ 19} A PPLA is an order by which the juvenile court grants legal custody of a child to an agency without terminating parental rights. R.C. 2151.011(B)(37). However, R.C. 2151.353(A)(5) does not authorize the juvenile court to consider a PPLA unless the children services agency has requested such a disposition. *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, 852 N.E.2d 1187, ¶ 37. Therefore, a juvenile court lacks authority to place a child in a PPLA when the agency does not request this disposition. *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, syllabus. *Id.* In this instance, without a request for a PPLA from CCDCFS, the juvenile court could not order this disposition.

{¶ 20} The facts in this case raise a concern about the limitations placed on planned permanent living arrangements. CCDCFS made a predetermined decision that agency custody is better because it at least creates the possibility of an adoption down the road, even though that possibility may be remote and has failed in the past. We are concerned that

where the best interests of the child are paramount, the court is denied the opportunity to consider all available options. While we must apply the Ohio Supreme Court's interpretation of PPLA, we note the dissent's observation in *In re A.B.* where it referenced that "Reading R.C. 2151.353(A) in isolation would give children services agency more authority and discretion than the juvenile court to determine the appropriate placement of a dependent or neglected child." *Id.* at ¶ 46, Pfiefer, J., dissenting.

{¶ 21} We recognize that in this case the trial court considered whether PPLA could have been a viable option, but found that the conditions for a PPLA disposition under R.C. 2151.353(a)(b) or (c) were not applicable. The trial court also determined that it would not be in the child's best interest to simply deny permanent custody. As recognized in *In re A.B.*, the statutory language is indicative of the view that "[PPLA] is to be considered as a last resort for the child" and reflects "the General Assembly's goal is to avoid allowing children to languish indefinitely in foster care." *Id.* at ¶ 36.

{¶ 22} In finding that granting permanent custody of K.M. to CCDCFS is in the child's best interest, the juvenile court thoroughly considered the evidence and testimony presented. Our review reflects that although K.M. loves her father and has a positive relationship with him, there was evidence that K.M.'s behavior would deteriorate after visitation, and these visits were hurting efforts to stabilize K.M.'s behavior. At the time of the hearing, K.M.

had been in the custody of CCDCFS for two and a half years. Despite several extensions of temporary custody and the efforts to achieve reunification with father, father remained unable to care for K.M., and no interested person had come forward seeking legal custody of the child.

{¶ 23} Father argues that K.M. has a positive relationship with him, she wishes to continue that relationship, and the guardian ad litem and several therapists believe terminating this relationship is not in her best interest. Although K.M. and father had a good relationship, this court has previously stated, “the mere existence of a good relationship is insufficient. Overall, we are concerned with the best interest of the child, not the mere existence of a relationship.” *In re R.N.*, Cuyahoga App. No. 83121, 2004-Ohio-2560. This court also has recognized that “[a] child’s best interests require permanency and a safe and secure environment.” *In re Holyak* (July 12, 2001), Cuyahoga App. No. 78890. In this case, the juvenile court recognized that K.M.’s relationship with her biological family was outweighed by “her right to a stable and permanent home.”

{¶ 24} Father also argues that there was a dispute as to whether or not permanent placement through adoption was a viable option. He argues that two prior attempts to obtain permanent adoptive status failed because of K.M.’s behavior. The Ohio Supreme Court has recognized that the current statutory framework does not expressly require the court to consider the

child's probability of being adopted in making a best-interest determination under R.C. 2151.414(D). *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 14. In any event, the juvenile court recognized that the social worker believed an adoptive home could be found for K.M.

{¶ 25} Upon our review of the record, we find there is clear and convincing evidence in the record to support the juvenile court's determination that permanent custody is in the best interest of K.M. We conclude that the juvenile court did not err in granting permanent custody to CCDCFS. Accordingly, we overrule the sole assignment of error.

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.

SEAN C. GALLAGHER, JUDGE

PATRICIA A. BLACKMON, P.J., and
KENNETH A. ROCCO, J., CONCUR