

[Cite as *In re A.K.*, 2015-Ohio-1848.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102164

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

[Appeal by Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 12919975

BEFORE: Laster Mays, J., Boyle, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 14, 2015

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ANITA LASTER MAYS, J.:

{¶1} Appellant Father appeals the juvenile court's decisions that granted permanent custody of his child, A.K., to the Cuyahoga County Division of Children and Family Services ("CCDCFS") and denied his motion to award legal custody to his sister. As required by App.R. 11.1(D), this court has expedited the hearing and disposition of this appeal. The juvenile court's order is affirmed.

I. Procedural and Factual History

{¶2} A.K. was born on November 21, 2012. According to the record, Mother has six other children who were not in her care at the time of A.K.'s birth, had a history with CCDCFS, and had tested positive for marijuana one week prior to the birth. A.K. did not test positive.

{¶3} On December 3, 2012, CCDCFS filed a complaint in juvenile court alleging that A.K. was a dependent child and seeking predisposition and disposition temporary custody of her. The complaint alleged that: (1) Mother had ongoing substance abuse (marijuana) issues but had failed to complete programs and maintain sobriety in spite of several referrals for treatment, (2) Mother lacked stable housing and income, (3) of Mother's six other children, three lived with other family members and three were placed through CCDCFS, and (4) none of Mother's other children were fathered by Father.

{¶4} As to Father, the complaint stated that he had failed to establish paternity, and had failed to support, visit, or communicate with the child since her birth. The

complaint indicated that Father had a criminal history that included crimes of violence and drug offenses. The juvenile court granted predispositional custody to CCDCFS, appointed a guardian ad litem (“GAL”) for A.K., and committed A.K. to the care of a foster care parent who had experience with premature babies.

{¶5} CCDCFS filed a case plan with the court on December 14, 2012. Mother was to take steps regarding rehabilitation, parenting, and related requirements with the goal of reunification. Mother was permitted to have supervised weekly two-hour visits with A.K. at the foster family’s home. Father was to establish paternity and to provide appropriate financial and emotional support for A.K.

{¶6} On December 17, 2012, the juvenile court conducted a pretrial conference at which Father appeared. A.K.’s parents were advised of their rights pursuant to Juv.R. 29.

{¶7} In January 2013, CCDCFS filed an updated case plan stating that Mother was involved in a domestically violent relationship with Father, and that both parents had histories of drug and alcohol abuse. The updated case plan required the parents to achieve sobriety and counseling for parenting and undesirable behaviors; visitation was not altered. In February 2013, CCDCFS assigned a new social worker to the case.

{¶8} On February 13, 2013, the juvenile court, acting through a magistrate, adjudicated A.K. to be dependent and, on February 27, 2013, granted temporary custody of her to CCDCFS. The magistrate found that no suitable relatives could be located. The court scheduled the semi-annual review hearing for November 2013.

{¶9} In June 2013, A.K.'s original GAL resigned, and the court appointed another. On June 27, 2013, CCDCFS filed for permanent custody of A.K.

{¶10} According to the affidavit in support of the motion, as of June 20, 2013, Father: (1) established paternity, (2) had not visited with the child, and (3) was unable to care for the child due to incarceration for several charges including a domestic violence charge with Mother as the victim. The affiant stated that none of Father's relatives were available to care for A.K.

{¶11} On August 11, 2013, the juvenile court appointed new counsel for Father. On October 22, 2013, the juvenile court conducted a hearing at which neither the parents nor their counsel were present. The resulting journal entry found that CCDCFS made reasonable efforts to reunify the family and should finalize a permanency plan.

{¶12} On November 6, 2013, CCDCFS filed the amended case plan. By this time, Father had been released from jail and was on community control. The parents were required to participate in domestic violence counseling and the foster family was to work with the parents toward reunification with A.K. Mother's two-hour visitation was moved to the agency, and, though it appears from the record that Father visited A.K. at the agency prior to that date, Father was formally granted a one-hour weekly visitation with A.K. at the agency.

{¶13} At the semi-annual review hearing conducted by the juvenile court in November 2013, Father did not attend; he had been incarcerated for violating his community control sanctions. Father's sister, H.J., attempted to attend in order to be

considered for custody, however, Mother reacted hysterically. The juvenile court asked H.J. to leave.

{¶14} On February 3, 2014, Father filed a witness list for the dispositional hearing, originally scheduled for April 1, 2014. He designated H.J. as one of his witnesses. Father filed a motion for “Legal Custody to Interested Individual,” i.e., H.J., in March 2014.

{¶15} The juvenile court subsequently scheduled the matter for disposition to be held on May 6, 2014. On May 1, 2014, A.K.’s GAL filed her report and recommendation with the court. The GAL recommended at that time that H.J. should be provided with a schedule of visitation with A.K. The GAL wanted time to determine if H.J. demonstrated commitment and if the two could establish bonding. The GAL, however, reserved the right to modify the recommendation based upon new evidence introduced prior to or during a full hearing on the matter.

{¶16} The juvenile court ultimately conducted the full dispositional hearing on August 8, 2014. All parties attended the trial. CCDCFS first presented the testimony of Tawana James (“James”), the social worker assigned to A.K.’s case.

1. Social Worker’s Testimony

{¶17} James recommended that CCDCFS be awarded permanent custody of A.K. and that she remain with the foster family for potential adoption. James testified in relevant part to the following facts.

{¶18} Throughout the period of temporary custody, Mother continued to test positive for marijuana, alcohol, and opiates. James learned that, just before February 2013, Mother had taken Father to visit A.K. at the foster home, and that Mother told the foster family that Father was her brother.

{¶19} Father had complied in part with the case plan, i.e., he established paternity, and during his release on community control for the domestic violence case in October and November 2013, he had successful visits with A.K. at the agency for one hour per week. At one of his October 2013 visits, Father brought H.J. However, Father had been unable to take part in the case plan after November 2013 because he was incarcerated for his community control violation.

{¶20} Mother and H.J. did not like each other; H.J. blamed Mother for reporting the community control violation. Thus, after November 2013, when Father was in jail, H.J. was not permitted to visit A.K.; James told H.J. that Mother's visitation could not be reduced to allow H.J. to visit. Beginning in May 2014, Mother split her two-hour visits at the agency evenly with H.J.

{¶21} James conducted a caregiver investigation of H.J.'s apartment in March 2014. H.J. and her fiancé, who also resided at the apartment, both passed the background checks. H.J. was employed at the Cleveland Clinic as an environmental specialist, i.e., a housekeeper. Although James did not contact the clinic to verify employment, she observed that H.J. possessed work uniforms. H.J. said she would arrange for day care for A.K.

{¶22} James stated that she advised H.J. of the responsibilities of being a legal custodian and that H.J. “seemed like really uninterested.” James opined that H.J. had failed to bond with A.K. because, during most of the estimated ten visits, H.J. would just sit and watch A.K. play. James further stated that, although H.J. brought a toy on one occasion, at most of the visits, A.K. would walk off, either to be with the social workers or to play with other children in the room. On one occasion, A.K. fell; rather than go to her, H.J. simply watched. James acknowledged that, after she gave H.J. some advice, her interaction with A.K. improved. James further acknowledged that H.J. was only 23 years old.

{¶23} James described A.K. as slightly overweight and anxious. A.K. had been treated for a problem with walking, and probably would be upset by a change of placement.

2. Intake Worker’s Testimony

{¶24} Shante Frazier (“Frazier”), the CCDCFS intake worker, testified that she observed a single one-hour visit by H.J. with A.K. at the agency on May 23, 2014. After Mother spent some time with A.K., Frazier took her and handed A.K. to H.J., who held the child on her lap. H.J. at some point began “surfing the web” on her phone. From this, Frazier opined that there was little to no bonding between the two.

3. Advantage Health Care Representative's Testimony

{¶25} A representative from Advantage Health Care testified regarding her company's business records. H.J. provided a hair sample but was unable to urinate while being observed; H.J. told her that she last smoked marijuana in May 2014.

4. H.J.'s Testimony

{¶26} H.J. testified to the following facts. She is Father's younger sister. She had been employed by Cleveland Clinic for three years and had been with her fiancé for four years. Both she and her fiancé passed the background investigation, and she has never been involved with CCDCFS. H.J. wanted custody because A.K. should be with her family rather than grow up "in the system." H.J. was willing to be responsible for, care for, and be there for her niece; she denied acting as a "stop gap" for Father until his release from prison.

{¶27} H.J. has a close family relationship with her mother and brothers. H.J. attended an October 2013 visit that her brother had with A.K., but the social worker told her afterward that only the parents were allowed to visit. The social worker later told her that A.K.'s visiting time with her parents could not be split to allow H.J. to visit her.

{¶28} H.J. did not seek custody until March 2014 because Father was trying to comply with the case plan to obtain custody. H.J. missed a first appointment to visit A.K. in April 2014 because she worked second shift, had her cell phone on silent, and accidentally overslept. However, H.J. immediately contacted the social worker that morning to explain.

{¶29} H.J. had six or seven visits beginning on May 1, 2014, with A.K., was never late for a visit, and did not miss any other visits. The other families visiting in the same room distracted A.K.; she wanted to play with the other children. H.J.’s interaction with A.K. improved over time, but H.J. had not had a chance to really become engaged with her. H.J. admitted she had cell phone conversation with Father at one visit because he wanted to speak with A.K. H.J. admitted that she had smoked marijuana, but she asserted that she was not a habitual smoker, would never smoke around a child, and would voluntarily submit to random testing if granted custody.

5. The Guardian Ad Litem

{¶30} The GAL testified that she never observed a visit between H.J. and A.K. due to scheduling conflicts, but she received reports and spoke with others who observed them. The GAL was “comfortable making a recommendation without seeing a single visit.” Although she agreed that H.J. had not received the opportunity to visit with A.K. frequently or for longer periods of time, the GAL stated that A.K. “needs a safe, secure, stable home,” which could “be achieved by a grant of permanent custody to the Division of Children and Family Services.”

{¶31} After considering the evidence, the trial court determined it to be in A.K.’s best interest to grant permanent custody to CCDCFS pursuant to R.C. 2151.414(B)(1)(a), 2151.414 (D)(1), and 2151.414 (E)(1), (2), (4), (10), and (13). The juvenile court also denied Father’s motion to award custody to H.J.; the court determined that A.K. had

bonded with her foster family, and the foster family was best able to address her special physical and emotional needs.

II. Law and Analysis

{¶32} Father appeals from the juvenile court's disposition. In his single assignment of error, he argues that the permanent custody award of A.K. to CCDCFS violated his right to due process of law; he contends it can be inferred from the record that, while Mother would remain involved in A.K.'s life, he would be excluded.¹ He contends that the evidence supported an award of legal custody of A.K. to H.J. This court cannot agree.

{¶33} In order to terminate parental rights and grant permanent custody to a county agency, the record must demonstrate by clear and convincing evidence the following: (1) the existence of one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d); and, (2) permanent custody is in the best interest of the child. *In re: S.H.*, 8th Dist. Cuyahoga Nos. 97992, 97993, and 97994, 2012-Ohio-4064, ¶ 27. "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. *In re Y.V.*, 8th Dist. Cuyahoga No. 96061, 2011-Ohio-2409, ¶ 13, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

¹We reject the Father's inference in his argument with respect to his assignment of error that R.C. 3107.63 is relevant to this case because the statute applies solely to voluntary private placement adoptions.

{¶34} When determining the child’s best interest pursuant to R.C. 2151.414(D)(1), courts analyze the following factors: (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 R.C. 2151.414(E)(7) to (11) apply. The “best interest determination” focuses on the child, not the parent. R.C. 2151.414(C); *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994). The discretion that the juvenile court enjoys in deciding whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court’s decision will have on the lives of the parties concerned. *Id.* at 316.

{¶35} In this case, the record demonstrated pursuant to R.C. 2151.414(B)(1)(a) that A.K. “cannot be placed with either of [her] parents within a reasonable time or should not be placed with [her] parents.” Father does not dispute that this requirement was met. The existence of that one factor alone can support a finding that the agency should be granted permanent custody of the child. *In re S.G.*, 8th Dist. Cuyahoga No. 100441, 2014-Ohio-1088, ¶ 16, citing *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996).

{¶36} The juvenile court also considered A.K.’s custodial history, her interactions with her family members and her foster family, and her need for legally secure placement. R.C. 2151.414(D)(1). The court further “considered all relevant evidence” and

determined that clear and convincing evidence demonstrated: (1) Father failed “substantially [to] remedy the conditions causing the child to be placed outside the child’s home,” (2) Father “demonstrated a lack of commitment toward the child by * * * actions showing an unwillingness to provide an adequate permanent home for the child,” and (3) Father was “repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.” R.C. 2151.414(E). The record supports these determinations. Under these circumstances, the court was required to “enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent.” *Id.*

{¶37} The juvenile court also found that A.K.’s best interest was served by granting permanent custody to the agency. This finding also was supported by clear and convincing evidence. Her GAL stated that A.K. had special needs and medical issues that the foster family understood and helped her overcome. James indicated that A.K. was well bonded with her foster family, and her personality would not let her deal well with change. Both the GAL and James believed A.K. needed a secure placement. *In re: C.J.*, 8th Dist. Cuyahoga Nos. 100532 and 100534, 2014-Ohio-2403, ¶ 29.

{¶38} Father implies in his assignment of error that the juvenile court failed to give the requisite consideration to granting legal custody of A.K. to his sister. However, the record reflects the opposite. H.J. underwent a thorough examination at trial. The juvenile court stated there was “evidence that there is no bond between the proposed legal custodian,” and that “multiple witnesses” testified regarding the poor interaction between

aunt and child at their visits. The GAL's recommendation is to the same effect. The child's health and safety is of "paramount concern"; thus, "other than parents, no preference exists for family members in custody awards." *Id.* at ¶ 32, citing *In re M.W.*, 8th Dist. Cuyahoga No. 96817, 2011-Ohio-6444, ¶ 26.

{¶39} Because the award of permanent custody to CCDCFS in this case is supported by clear and convincing evidence, Father's assignment of error is overruled.

{¶40} The juvenile court's order is 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.

ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR