

[Cite as *In re M.S.*, 2015-Ohio-882.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101902, 101903, 101904 and 101905

IN RE: M.S., ET AL.
Minor Children

[Appeal By A.S., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 10908889, AD 10908890,
AD10908891, and AD 10908892

BEFORE: Boyle, J., Jones, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 12, 2015

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MARY J. BOYLE, J.:

{¶1} In this consolidated appeal, appellant-mother, An.S. (“mother”), appeals the juvenile court’s judgment granting permanent custody of her four minor children — A.S. (d.o.b. December 16, 2003); T.S. (d.o.b. July 30, 2005); L.S. (d.o.b. July 23, 2007); and M.S. (d.o.b. April 7, 2010) (collectively “the children”) — to Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”). She raises a single assignment of error for our review:

The trial court erred in granting the motion for permanent custody as such a decision was against the manifest weight of the evidence.

{¶2} Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶3} In May 2010, CCDCFS filed a complaint in the juvenile court, seeking protective supervision of all four children and alleging that all four children were neglected and dependent. Specifically, the complaint alleged, among other things, the following:

(1) Mother has a history of alcohol abuse and admitted to drinking during the first four months of pregnancy with M.S.;

(2) M.S. has numerous congenital problems, kidney and heart abnormalities, developmental delays, and feeding difficulties;

(3) A.S., the eldest child, missed more than 24 days of school during the 2009-2010 school year and that mother failed to work with the school to address A.S.’s behavioral issues;

(4) mother and her paramour have engaged in at least two domestic violence incidents in the home;

(5) mother, who admits to being very overwhelmed and depressed, needs a mental health

assessment; and

(6) the alleged fathers of A.S., L.S., and M.S. have failed to establish paternity and failed to support, visit, or communicate with the children; the father of T.S. visits and communicates with the child on an inconsistent basis.

{¶4} On October 12, 2010, the magistrate found the children to be neglected and dependent after mother admitted to the allegations of an amended complaint, which deleted the allegation that mother engaged in at least two domestic violence incidents in the home and further indicated that mother stopped drinking upon recently learning that she was pregnant. In November 2010, the children were committed to the protective supervision of CCDCFS but remained in the legal custody and physical care of the mother. The trial judge approved and adopted the magistrate's decisions on January 6, 2011.

{¶5} The case plan developed for the family included (1) mother completing an alcohol and drug assessment and refraining from consuming alcohol; (2) mother signing necessary paperwork for A.S. to obtain a behavioral health assessment; (3) mother following through with L.S. receiving the recommended speech therapy and to ensure that he attends appointments; (4) mother taking M.S. to necessary medical appointments; (5) mother ensuring that A.S. attends school unless excused by medical or other service professional; and (5) the alleged fathers establishing paternity and providing support to their children.

{¶6} On March 18, 2011, the agency filed a motion to modify protective supervision to temporary custody. On this day, the children were also removed from the mother's home pursuant to an ex parte order, and three days later, the children were ordered into the emergency custody of CCDCFS. According to the record, the agency obtained emergency custody after (1) mother refused alcohol and drug treatment and continued to consume alcohol; (2) A.S. and T.S.

missed over 35 days of school; and (3) mother continued to use physical discipline on the children.

{¶7} After the children were removed from the home, mother started participating in the case plan, which included obtaining treatment for alcohol abuse and receiving parenting education. Mother's visitation time with the children also increased with the court ultimately approving overnight, unsupervised visitation, beginning on November 23, 2011.

{¶8} On November 9, 2011, mother gave birth to her fifth child, who was placed under protective supervision but is not subject to this underlying case.

{¶9} On April 10, 2012, the agency filed a motion to terminate temporary custody with an order of protective supervision for the four children. The agency administration, however, subsequently vetoed reunification as a result of mother using excessive physical discipline on T.S. during an overnight visit and concerns over possible alcohol use.

{¶10} On February 5, 2013, mother's sixth child was born, who was also placed under the protective supervision of the agency. This child, however, is not subject to the underlying case.

{¶11} On March 25, 2013 — after two extensions of temporary custody — the agency moved to modify temporary custody to permanent custody on the basis that (1) “children have been in the temporary custody of CCDCFS for twelve or more months of a consecutive twenty-two month period,” and (2) the award of permanent custody is in the children's best interest. In support of its motion, the agency attached the affidavit of Shamelle Middleton, the CCDCFS social worker assigned to the family, who averred, among other things, the following:

- A case plan was filed with Juvenile Court and approved which requires that mother complete a substance abuse assessment and follow through with all recommendations; complete parenting education; participate in individual counseling; follow through with specialized counseling and medication monitoring for the children; utilize community supports and services; and

complete a psychological evaluation and follow through with all recommendations.

- Mother has completed a substance abuse assessment and the recommended treatment for her substance of choice, i.e., alcohol. However, mother has failed to demonstrate that she is maintaining sobriety and has provided an altered screening sample as recently as March 5, 2013.

- Mother has completed a psychological evaluation, which found that she “is not currently a fit or stable parent and should not have unsupervised visits with her children.”

{¶12} Middleton further stated that the fathers of T.S., M.S., and L.S. have failed to consistently support, visit, or communicate with the children, and that the father of A.S. has failed to establish paternity and has failed to consistently support, visit, or communicate with A.S.

{¶13} The matter eventually proceeded to an evidentiary hearing held on May 8, 2014 and continued until August 1, 2014. In July 2014, mother gave birth to her seventh child, who is not subject to the underlying case.

{¶14} At the hearing, Middleton testified to mother’s case plan history, reiterating many of the allegations contained in her affidavit in support of the agency’s motion for permanent custody.

{¶15} Middleton initially explained that she is no longer the assigned case worker to the family and that she was removed after mother had threatened her. Middleton, however, handled the case from the filing of the complaint in May 2010 up until May 2014, when mother’s behavior toward Middleton escalated, and the agency elected to have a new case worker assigned.

{¶16} Middleton testified that once the children were removed from mother’s care, mother started complying with her case plan objectives and ultimately completed an alcohol and

drug assessment, an intensive outpatient program, and parenting education. Middleton further explained that as mother progressed with her case plan, her visitation time progressed and that the agency ultimately filed a motion to terminate temporary custody to reunify the children with mother. The agency, however, subsequently withdrew the motion based on concerns of mother's use of physical discipline during an overnight, unsupervised visit in March 2012. Specifically, Middleton testified that she observed "choke marks" around T.S.'s neck when she went to the mother's home to check up on the visit. The record also reveals that the agency had reports of mother consuming alcohol again around this time.

{¶17} Middleton further explained that the agency ultimately decided to seek permanent custody of the children based on the 24-month time frame of the children being in the temporary custody of the agency and after mother had another incident of inappropriate excessive physical discipline, despite the agency's attempts of getting mother further parenting education to learn other ways of discipline. Specifically, Middleton testified that mother had another incident in March 2013 where she used a brush to physically discipline T.S., the oldest daughter, during an extended visit in the mother's home. Middleton stated that the foster parents took T.S. to the hospital after observing the bruises on T.S.'s hand and that the incident had been called into the hotline. Middleton further indicated that mother was not attending AA meetings in accordance with her case plan and that mother had a diluted urine screen in March 2013.

{¶18} Middleton also testified as to the specialized needs of each of the children and the specific services that the agency was providing to meet those needs, including therapy services through their therapeutic network foster home and psychiatric care through psychiatric providers.

{¶19} Middleton explained that as of May 2014, M.S.'s foster parent and L.S.'s foster parent expressed a willingness to adopt them but that an adoptive placement had not yet been

identified for A.S. and T.S.— the two older children. Middleton further testified as to the agency’s efforts to first find a relative to care for the children but that no relative was able.

{¶20} On cross-examination, Middleton testified that mother completed many of her case plan objectives but that some goals remained, namely, mother attending AA meetings and utilizing outside support systems for herself and her family. Middleton also testified that the children’s goals in the case plan remained ongoing, which included them receiving services for their educational and mental health needs. Middleton further testified that mother did not interact well with her children on a consistent basis during the supervised visits. Middleton acknowledged that mother has expressed a desire to have her children returned to her but testified on redirect that mother has expressed a desire not to have T.S., her eldest daughter, returned to her care. This testimony is also substantiated in the case file. The record reveals that the agency had mother complete a psychological evaluation in June 2012 after mother stated her desire to terminate her parental rights with respect to T.S.

{¶21} After hearing from Middleton, the court heard from the guardian ad litem (“GAL”), who recommended that the agency’s motion for permanent custody be granted. According to the GAL, mother’s interactions with her children are minimal and inconsistent, mother has failed to participate in individualized counseling, and that mother “has not worked well with anyone in regard to the specialized counseling and medications that she needs for her children.”

{¶22} After hearing the evidence presented and considering the GAL’s recommendation, the trial court issued separate decisions awarding CCDCFS permanent custody of A.S., T.S., L.S., and M.S.

{¶23} From those decisions, mother appeals. The fathers have not appealed.

Permanent Custody

{¶24} The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, ¶ 22. R.C. 2151.414 sets forth a two-part test courts must apply when deciding whether to award permanent custody to a public services agency. R.C. 2151.414 requires the court to find, by clear and convincing evidence, that (1) granting permanent custody of the child to the agency is in the best interest of the child under R.C. 2151.414(D), and (2) either the child (a) cannot be placed with either parent within a reasonable period of time or should not be placed with either parent if any one of the factors in R.C. 2151.414(E) are present; (b) is abandoned; (c) is orphaned and no relatives are able to take permanent custody of the child; or (d) has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(a)-(d). *In re J.M-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 26.

{¶25} An appellate court will not reverse a juvenile court's decision awarding permanent custody to an agency if the judgment is supported by clear and convincing evidence. *In re J.M-R.* Clear and convincing evidence is defined as:

that measure or degree of proof which is more than a mere "preponderance of the evidence" but not to the extent of such certainty 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.

In re Awkal, 95 Ohio App.3d 309, 642 N.E.2d 424 (8th Dist.1994), fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 512 N.E.2d 979 (1987).

Second Prong: One of the Enumerated Factors of R.C. 2151.414(B)(1)

{¶26} Mother first argues that the agency failed to establish by clear and convincing

evidence that she would not be able to parent her children within a reasonable time based on an analysis of R.C. 2151.414(E), including evidence that she failed to substantially remedy the conditions that initially caused her children to be placed outside her home. She further attacks the trial court's finding that the agency "used reasonable case planning and diligent efforts in assisting" her with regard to remedying the problems that caused the children to be placed outside the home. Mother contends that an analysis under R.C. 2151.414(E) is mandatory before the court may terminate her parental rights and that under such analysis, the record fails to support the necessary determination.

{¶27} But mother confuses the requirements of the permanent custody statute. R.C. 2151.414(B)(1) requires only *one* of the factors to exist in order to satisfy the second prong of the statute. As this court has repeatedly recognized, "application of [R.C. 2151.414(E)] is unnecessary, however, because an award of permanent custody under R.C. 2151.414(B)(1)(d) requires no such determination." *In re K. & K.H.*, 8th Dist. Cuyahoga No. 83410, 2004-Ohio-4629, ¶ 31, citing *In re C.N.*, 8th Dist. Cuyahoga No. 81813, 2003-Ohio-2048, ¶ 22; *see also In re C.H.*, 8th Dist. Cuyahoga No. 95151, 2010-Ohio-5617, ¶ 14. And here, the agency moved for permanent custody based on R.C. 2151.414(B)(1)(d), which the trial court found that it had proven by clear and convincing evidence, finding that the children have been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. Indeed, the record reflects that the children entered temporary custody on May 21, 2011 — 60 days after they were removed from mother's home — and that the permanent custody motion was filed on March 22, 2013.¹ Therefore, the children had been in the temporary custody of the

¹ In January 2012, the court modified the agency's order from protective supervision and committed the children to the temporary custody of the agency. Under R.C. 2151.414(B)(1)(d), a child is considered to be taken into custody either 60 days after initial removal or at the time of adjudication, whichever occurs first. Here, the

agency for 22 months of a consecutive 22-month period at the time of filing; notably, mother does not dispute this finding.

{¶28} The second prong of R.C. 2151.414(B)(1) is therefore satisfied and the best interest of the children is the only remaining issue.

{¶29} We note, however, that the trial court applied R.C. 2151.414(E) and found that several of the 16 factors listed in the statute applied, concluding that the children “cannot be placed with one of the child’s parents within a reasonable time or should not be placed with either parent.” The trial court found, among other things, that mother “failed continuously and repeatedly to remedy the conditions” causing the children to be placed outside the children’s home. Contrary to mother’s claim, this finding is supported by clear and convincing evidence.

{¶30} While it is true that mother completed most of her case plan objectives, she did not complete everything. For example, mother’s case plan included utilizing community supports and services for herself that included attending AA meetings. Mother, however, failed to comply with this component. Furthermore, despite receiving certain services to accomplish her case plan goals, mother failed to benefit from these services. Mother completed an alcohol and drug assessment and outpatient services, yet she later indicated an unwillingness to maintain a sober lifestyle. Similarly, mother completed parenting education to address healthy ways to discipline her children, yet she failed to exercise such tactics when dealing with her children. After nearly two years of the children being in the agency’s custody, a concern still existed for the safety of the children under the mother’s supervision based on her discipline method and consumption of alcohol. The agency’s attempts to reunite the children with their mother were thwarted by mother’s inappropriate use of excessive physical discipline, resulting in injury to at

least one child.

{¶31} It is well settled that a parent's successful completion of the terms of a case plan is not dispositive on the issue of reunification. *In re A.C., Jr.*, 8th Dist. Cuyahoga Nos. 99764-99769, 2013-Ohio-4377, ¶ 43. Indeed, "[a] parent can successfully complete the terms of a case plan yet not substantially remedy the conditions that caused the children to be removed." *In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 25 (8th Dist.).

{¶32} Moreover, mother failed to demonstrate an ability or willingness to care for the special needs of the children. Indeed, the record reveals that mother repeatedly minimized the special needs of the children, which included her refusal to work with the trauma based therapist assigned to A.S. and refusal to administer his medications. And the record supports the trial court's finding that the mother failed to demonstrate an ability to supervise and care for all four children. Indeed, when mother's visitation increased to unsupervised, overnight visits, M.S. suffered a second-degree burn to her arm and the children reported incidents of physical abuse.

{¶33} Finally, the record reveals that the agency utilized reasonable case planning and exercised diligent efforts to reunify mother with the children prior to seeking permanent custody of the children. But unfortunately, mother refused to take responsibility for her role in the children's removal and failed to benefit from the services offered. As for mother's assertion that the agency failed to reasonably investigate a placement with a relative for the children, this claim is unsupported by the record. The agency diligently investigated possible placements for the children but no relative proved willing or able to take the children.

First Prong: Best Interest Determination

{¶34} When determining whether a grant of permanent custody is in the children's best interest, the juvenile court must consider the following factors under R.C. 2151.414(D)(1):

- (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;
- (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;
- (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 * * *;
- (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;
- (e) Whether any of the factors in divisions (E)(7) to (11) apply in relation to the parents and child.

{¶35} This court has consistently held that only one of the factors set forth in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to award permanent custody to a proper agency. *In re J.M-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 37, citing *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827, ¶ 56.

{¶36} Mother contends that the trial court erred in finding “that it was in the children’s best interest to be placed in the permanent custody of CCDCFS.” She argues that “she was certainly in a position to assume custody of her children at the time of the hearing, especially considering that she had another baby at home with her.” She further argues that she substantially complied with her case plan, thereby evidencing her ability to care for the children.

{¶37} Mother’s arguments, however, fail to account for the factors contained in R.C. 2151.414(D)(1). And while the agency may believe that mother is able to care for her three younger children, this alone does not negate the fact that the mother failed to demonstrate the

ability to safely care for her four older children during the pendency of this case. Applying the R.C. 2151.414(D)(1) factors to the case at hand, clear and convincing evidence exists that the award of permanent custody to the agency serves the best interests of the children.

{¶38} First, both the guardian ad litem and the caseworker described mother's interactions with the children as inconsistent and minimal during the supervised visits. Mother lost the privilege of having unsupervised visitation after she demonstrated an inability to safely manage the children. The record is replete with evidence of mother blaming T.S., who was only six years old at the time, for the mother's own struggle in managing the children. While all four children were not placed together at the time of the permanent custody hearing, the record reveals that they were placed in therapeutic foster homes where their special needs were being met.

{¶39} As for the children's fathers, the court found that they have all abandoned their children. Notably, none of the fathers appealed the trial court's award of permanent custody.

{¶40} Second, the custodial history of the children coupled with their need for a legal secure placement weigh strongly in support of the trial court's decision to grant permanent custody. The children had been in the agency's custody for over three years at the time of the permanent custody hearing. Each attempt by the agency to reunite the children with their mother failed because of mother's use of excessive physical discipline, jeopardizing the safety of the children. The record therefore reveals that the children's need for a permanent placement can only be achieved by the granting of permanent custody to the agency.

{¶41} Accordingly, because we find clear and convincing evidence to support the trial court's award of permanent custody, we overrule the sole assignment of error.

{¶42} 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.

MARY J. BOYLE, JUDGE

LARRY A. JONES, SR., P.J., and
SEAN C. GALLAGHER, J., CONCUR