

[Cite as *In re G.W.*, 2016-Ohio-5242.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103706

IN RE: G.W. and B.V.
Minor Children

[Appeal By Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 14911185 and AD 14911186

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

RELEASED AND JOURNALIZED: August 4, 2016

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SEAN C. GALLAGHER, P.J.:

{¶1} Appellant mother appeals the juvenile court's decision to award legal custody of her two children, G.W. and B.V., to their paternal grandparents. Upon review, we affirm.

{¶2} On September 2, 2014, the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "the agency") filed a complaint alleging the children to be abused and neglected and requesting a disposition of temporary custody to the paternal grandparents. After the children were committed to the emergency custody of CCDCFS, the agency placed the children with the paternal grandparents. An adjudicatory hearing was held. The parents stipulated to an amended complaint, which made allegations concerning a methamphetamine laboratory linked to mother's boyfriend and found in the home where mother and the children were residing; a domestic incident in which the children were at risk of harm when mother was threatened by her intoxicated boyfriend and mother became involved in an argument with him in the presence of the children; the substance-abuse problems of both parents; the prior removal of the children from their parents' care because of the parents' substance abuse; and father's lack of stable housing.

{¶3} The court adjudicated the children to be neglected and abused and committed the children to the temporary custody of CCDCFS. After further proceedings, CCDCFS filed a motion to modify the order of temporary custody of the children to legal custody to the paternal grandparents. An evidentiary hearing was held before a court magistrate. Prior to the hearing, the magistrate conducted an in camera interview with the children.

{¶4} A social worker for CCDCFS testified to services offered to the parents to facilitate the goal of reunification. She testified that father was not compliant with his case plan. He did not complete substance abuse treatment, stopped cooperating with random urine screens, and did not complete the mental health program to which he was referred. Also, CCDCFS was unaware of his housing status. According to the testimony of the paternal grandparents, father does not reside with them and only visits two or three times per month for one or two hours. The social worker testified that father expressed that he felt the children should be in the care of the paternal grandparents.

{¶5} With regard to mother, the social worker testified that mother completed a domestic violence program and a parenting class. The social worker testified that mother did not participate in the recommended services for substance-abuse treatment and had not completed the substance-abuse portion of the case plan. The record reflects that mother had been attending AA classes and submitting urine screens. Also, mother had self-referred to a free clinic and had a certificate of completion and a perfect attendance award for non-intensive outpatient treatment. The social worker testified that the agency had not worked with the program before and was not able to verify the extent of the services in which mother participated. Further, the last update on mental health services was in March 2015 and showed that mother was compliant with attendance but had not followed through with the medication recommendation. The social worker was not able to get current information because she had difficulty contacting mother and was unable to obtain a release.

{¶6} The social worker indicated that the children had been living with their paternal grandparents for over a year. The older child did not wish to visit with mother, and the younger child sometimes questioned whether he wished to visit mother. The social worker expressed safety concerns regarding mother. The social worker alleged that mother had written a concerning letter to the boyfriend, who was incarcerated, after mother had indicated she was no longer involved with him. Additionally, the social worker testified that mother told her that there was no need for her to visit mother in her home.

{¶7} The social worker also testified that the paternal grandmother had tested positive for marijuana in October 2014. She successfully completed a treatment program, which ended in March 2015. The paternal grandmother had regular urine screens until the program was completed. The social worker testified that her recommendation was an award of legal custody of the children to the paternal grandparents.

{¶8} The paternal grandmother testified to her previous marijuana use, but stated she completed treatment and did not currently use any illegal drugs. She testified to a recent drug test with negative results. She testified that she did not believe father was suitable to be a parent to the children. She testified to safety concerns with mother. There was evidence that the paternal grandparents had paid for a surgery for one of the children.

{¶9} The guardian ad litem recommended an award of legal custody to the paternal

grandparents. He expressed every confidence that the paternal grandparents would promote visitation with mother.

{¶10} At the conclusion of the hearing, the court magistrate found reasonable efforts had been made by CCDCFS and that a grant of legal custody was in the best interest of both children. The court magistrate stated the following on the record:

I have listened to all of the testimony very carefully. I've also * * * interviewed both children individually on two separate occasions. And it is clear to me as relates to [the older child] that some work needs to be done. He is not prepared quite frankly. I asked the question as well. He was open to the possibility in the future, but he was not open to the possibility now of visitation with his mother. Both children also indicate problems and issues with the father as well.

This Court's mission is to serve the best interest of the children. Having listened to the testimony, while I noticed mom's certificates of completion, they really don't address what this program is, what issues. They're certificates saying she showed up. It does not indicate a treatment. This program, I have no information as to the validity of it, what the program was, what it addressed. These are merely certificates of appreciation, of attendance. While I can appreciate mom showed up, it doesn't really indicate any testing, it doesn't do that.

I do find that there has not been substantial compliance with the case plan on the part of either the mother or the father. The case plan is approved. The permanency plan of reunification is approved. I do believe the Agency has made reasonable efforts to the best of their ability to finalize that plan of reunification. It does not help that the social worker was not able to contact mother.

While I agree that family counseling may have helped, you have to know where mom is and be able to reach her I think to order family counseling. I am somewhat troubled by the fact that the grandmother did use an illegal substance during the period of time that this case has been pending and that there was a consideration of that.

But taking into account all of the testimony that I heard as well as the

two interviews with the children, I am going to grant the Agency's motion to terminate temporary custody and grant legal custody of both [children] to [the paternal grandparents].¹

{¶11} In the case of each child, the magistrate issued a decision to terminate temporary custody and commit the child to the legal custody of the paternal grandparents.

Mother filed objections to the magistrate's decisions that were overruled by the juvenile court. The juvenile court issued a decision in each case that approved and adopted the magistrate's decision, committed the child to the legal custody of the paternal grandparents, and ordered supervised visitation to mother. With respect to each child, the court found that significant progress had not been made on the case plan by mother and by father, that progress had not been made in alleviating the cause for the removal of the child from the home, that the child's continued residence in or return to the home would be contrary to the child's best interest and welfare, and that the placement of the child is appropriate. The court further found as follows:

[CCDCFS] has made reasonable efforts to finalize the permanency plan for the child. These efforts are mother completed Domestic Violence Program, and Parenting Class on her own. Mother was referred for substance abuse treatment at Recovery Resources, but she failed to complete services. Mother was referred to the center for Mental Health

¹ We note that the court indicated on the record that there was to be continued drug testing of the paternal grandmother.

Counseling and Treatment including medication. Mother is not compliant with treatment as of last report in March 2015. There is not a current report because the Social Worker was unable to get mother to sign a release.

Mother self referred herself to the Free Clinic and she has a certificate of completion, and a perfect attendance form for non-intensive outpatient treatment, both dated January, 2015. Social Worker has had difficulty contacting. Father was referred for substance abuse treatment but failed to complete treatment. He was referred for Mental Health Treatment but failed to complete treatment. Father has completed a parenting class. Father is in agreement with the child being placed in the care and custody of Paternal Grandparents. [Child] is involved with Group, and Individual Counseling. [Child] is a healthy child, and is happy with [the] placement. *

* *

{¶12} Mother timely filed this appeal. She raises five assignments of error for our review.

{¶13} Under her first assignment of error, mother claims she was denied due process because the court awarded legal custody to a nonparent without making a finding of parental unfitness and without requiring clear and convincing evidence. However, a finding of parental unfitness is not a requirement for an award of legal custody, and clear and convincing evidence is not the correct burden of proof.

{¶14} As recognized by the Ohio Supreme Court, “no statute requires a finding of

parental unfitness as a prerequisite to an award of legal custody in cases where a child is adjudged abused, neglected, or dependent.” *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶ 21. Furthermore, such an adjudication “is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child’s custodial and/or noncustodial parents.” *Id.* at ¶ 21.

{¶15} An award of legal custody does not divest parents of residual parental rights and responsibilities and does not permanently foreclose the right of either parent to regain custody in accordance with the law. *Id.* at ¶ 23; *see also* R.C. 2151.42. Because parental rights are not being permanently terminated when a juvenile court awards legal custody, the applicable standard of proof is a preponderance of the evidence. *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 10.

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

{¶17} Under her second assignment of error, mother claims the court erred by conducting an in camera interview with the children without making a record of the examination. Mother relies upon Juv.R. 37(A), which requires the court to make a record “of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates.” However, the rule provides that “in all other proceedings * * * a record shall be made upon request of a party or upon motion of the court.” This court has previously held that an in camera interview with a child falls under the “all other

proceedings” category, under which a court is not required to make a record absent a request by a party. *In re P.C.*, 8th Dist. Cuyahoga Nos. 94540 and 90541, 2008-Ohio-3458, ¶ 13. Appellant has not argued, nor does the record reflect, that a party requested that the in camera interview be recorded; nor has appellant shown that the lack of a record of the interview prejudiced her in the case. The second assignment of error is overruled.

{¶18} Under her third assignment of error, mother claims the award of legal custody to the paternal grandparents is against the manifest weight of the evidence and constitutes a denial of due process of law. Mother challenges the juvenile court’s determination that the agency made reasonable efforts. Mother also challenges the court’s best interest determination.

{¶19} Pursuant to R.C. 2151.353(A), after a child has been adjudicated abused, neglected, or dependent, the court may “[a]ward legal custody of the child to * * * any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.” R.C. 2151.353(A)(3).

{¶20} R.C. 2151.419(A)(1) requires a determination as to whether the public children’s services agency made reasonable efforts to prevent removal, to eliminate continued removal, or to return the child safely to the home. The agency has the burden of proving it made reasonable efforts. R.C. 2151.419(A)(1). Pursuant to R.C.

2151.419(B), the court is required to “issue written findings of fact setting forth the reasons supporting its determination” and “shall briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child’s home or enable the child to return safely home.”

{¶21} Further, the court must determine the appropriateness of legal custody in accordance with the best interest of the child as supported by a preponderance of the evidence presented at the dispositional hearing. *See In re T.R.*, 8th Dist. Cuyahoga No. 102071, 2015-Ohio-4177, ¶ 44. A “preponderance of the evidence” is “evidence that is more probable, more persuasive, or of greater probative value.” *Id.*, quoting *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7. The factors listed under R.C. 2151.414(D) may be instructive in determining what is in a child’s best interest in a legal custody case. *Id.* at ¶ 48. The factors include the following: the interaction of the child with the child’s parents, relatives, and caregivers; the wishes of the child, as expressed directly by the child or through the child’s guardian ad litem; the custodial history of the child; and the child’s need for a legally secure permanent placement. R.C. 2151.414(D). A decision regarding legal custody is within the sound discretion of the juvenile court. *In re T.R.* at ¶ 45.

{¶22} In each case, the court made a finding that reasonable efforts were made by CCDCFS. It also made written findings of fact supporting this determination and set forth the relevant services provided by the agency and explained why those services did

not enable the child to return safely home. The court recognized both the services to which mother was referred by CCDCFS, as well as those in which she self-referred. The court recognized the programs that mother participated and completed, as well as those in which she failed to complete or was not compliant. The court also recognized the difficulties of the social worker in obtaining a release from mother and with contacting mother. The court found that significant progress had not been made on the case plan by mother and by father, and that progress had not been made in alleviating the cause for the removal of the child from the home. The court's findings are supported by the record. Although mother complains of the efforts made by CCDCFS following her move, the record reflects a difficulty in communication created on mother's part, as opposed to the agency's. The court's determination that the agency used reasonable efforts was supported by the record, and we find no abuse of discretion by the juvenile court.

{¶23} In each case, the juvenile court also determined that the child's continued residence in or return to the home would be contrary to the child's best interest and welfare. The record supports the award of legal custody as being in each child's best interests. The children were adjudicated as neglected and abused. The older child did not wish to visit with mother, and the younger child sometimes questioned visitation. The children had been in the care of their paternal grandparents for over a year. The parents had not substantially complied with their case plans; concerns remained for the safety of the children, and the children were in need of legally secure placement. Upon the record before us, we find that the juvenile court did not abuse its discretion in

determining an award of legal custody was in the best interest of each child.

{¶24} We find the juvenile court's decision was supported by a preponderance of the evidence and was not against the manifest weight of the evidence. The third assignment of error is overruled.

{¶25} Under her fourth assignment of error, mother claims the restrictions placed on her visitation violate R.C. 2151.353. Specifically, mother relies on R.C. 2151.353(A)(3)(c), which refers to "the privilege of reasonable visitation" afforded to the parents of the child, who retain residual parental rights, privileges, and responsibilities. That privilege is among the acknowledgments to be made in a statement of understanding for legal custody signed by the proposed legal custodian of the child pursuant to R.C. 2151.353(A).

{¶26} At the hearing, the court reviewed the statements of understanding on the record and the paternal grandparents acknowledged the residual parental rights, including the privilege of reasonable visitation. The court allowed for visitation of each child by mother, but recognized that the children needed to be at a point that they were willing to do visitation. The court instructed the agency to "investigate the possibility of family counseling" to facilitate visitation. In the case of B.V., who is the younger child, the juvenile court ordered that "Mother may have supervised visits with [the child]." In the case of G.W., the older child, the juvenile court ordered that "Mother may have supervised visits with child when and if the child agrees or child's counselor deems it beneficial." Further, the court scheduled a review in six months when it would revisit

the issue of visitation.

{¶27} Upon our review, we find that the juvenile court acted within its discretion in placing the restrictions upon mother's visitation and that the court awarded mother reasonable visitation. The fourth assignment of error is overruled.

{¶28} Under her fifth assignment of error, mother claims the juvenile court committed prejudicial error and violated R.C. 2151.353(F)(1) by failing to issue an entry continuing its jurisdiction in the journal. Mother misconstrues the language of the statute. R.C. 2151.353(F)(1) provides the court with continuing jurisdiction over any child for whom the court issues an order of disposition until the child turns 18. The statute requires an entry continuing jurisdiction when the court's jurisdiction is retained beyond the child's 18th birthday to enable the child to graduate from school. R.C. 2151.353(F)(1). Further, pursuant to R.C. 2151.353(K)(1), when the legal custodian resides in another county at the time of the award of legal custody, the court retains continuing jurisdiction for at least one year. The fifth assignment of error is overruled.

{¶29} 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 issue out of this court directing the common pleas court, 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR