

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE S.S. & P.E.

C. A. No. 23999

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN-06-01-0041
 DN-06-01-0042

DECISION AND JOURNAL ENTRY

Dated: April 9, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

INTRODUCTION

{¶1} The permanent custody of two minors is at issue in this case. The mother of the children has asserted that the trial court erred in granting permanent custody of them to the Summit County Children Services Board. This Court has reviewed the record and determined that the mother has demonstrated no prejudicial error by the trial court in terminating her parental rights and placing the children in the permanent custody of the agency.

FACTS

{¶2} Rachel E. is the mother of P.E., born March 13, 2001, and S.S., born October 11, 2004. At the time of these proceedings, she was married, but her husband was neither the biological father of either child, nor was he living with the family. The biological father of P.E. is unknown. The biological father of S.S. was minimally involved in the trial proceedings and is not a party to this appeal.

{¶3} The Children Services Board first became involved with this family in January 2006 when they were being evicted from their home. The agency was concerned, not only with the family's lack of safe, stable housing, but also with the mother's failure to attend to her mental health needs and substance abuse issues and her ability to meet the basic needs of her children. On January 12, 2006, the agency filed a complaint in the juvenile court, alleging that the children were neglected and dependent and seeking an order for protective supervision. In due course, the trial court adjudicated the children to be dependent and granted an order of protective supervision. The court adopted a case plan that required the mother to: (1) complete a parenting evaluation and follow recommendations for additional services; (2) complete a substance abuse assessment and random drug screens and follow additional recommendations; (3) obtain and maintain safe, independent housing; (4) continue to meet the children's basic needs, including engaging the services of Help Me Grow and following the recommendations of

health care professionals; and (5) complete a psychological/psychiatric evaluation and follow all recommendations.

{¶4} The case plan included therapeutic services for P.E. in an effort to address the fact that she had been sexually abused by the mother's thirteen-year-old brother in 2003 when P.E. was three years old. The mother had discovered the boy abusing her daughter and reported the matter to authorities. She had not, however, gotten therapeutic services for P.E. beyond an intake interview and one counseling session. At the time of the permanent custody hearing, her brother was in a residential treatment facility and was expected to remain there for two years.

{¶5} In ensuing quarterly review hearings, concerns with the same issues were repeated. In January 2007, the agency obtained a change of disposition to temporary custody when the mother lost housing once again and refused to stay in a shelter as agreed. Eventually, the agency moved for permanent custody, and the mother moved for a six-month extension of temporary custody. Following a hearing on both motions, the trial court granted the agency's motion for permanent custody and denied the mother's motion for an extension of temporary custody. The mother has assigned one error.

PERMANENT CUSTODY

{¶6} The mother's sole assignment of error is that the trial court incorrectly granted the agency's motion for permanent custody. Before a juvenile court may terminate parental rights and award permanent custody of a child to a

proper moving agency, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under Section 2151.41.4(E) of the Ohio Revised Code; and (2) that the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under Section 2151.41.4(D) of the Ohio Revised Code. See R.C. 2151.41.4(B)(1) and 2151.41.4(B)(2); see, also, *In re William S.*, 75 Ohio St. 3d 95, 99 (1996).

{¶7} The trial court found that the first prong of the permanent custody test was satisfied because the children could not be placed with either parent within a reasonable time or should not be placed with either parent based upon the factors of Section 2151.41.4(E) of the Ohio Revised Code. In reference to P.E.'s father, the trial court found that he had demonstrated a lack of commitment, the predicate factor described in Subsection 2151.41.4(E)(4), and had abandoned P.E., the predicate factor described in Subsection 2151.41.4(E)(10). In reference to the mother, the trial court found that she had failed to remedy the conditions that brought her children into care, the predicate factor described in Subsection 2151.41.4(E)(1) of the Ohio Revised Code.

{¶8} The mother has argued that the trial court erred when, in the process of granting permanent custody, it wrote that the children “came into care” as a result of homelessness, mental health, and substance abuse and found that the mother failed to remedy these conditions. The mother has asserted that the children were ordered into the custody of the agency as a result of homelessness, and not due to mental health and substance abuse issues.

{¶9} Section 2151.41.4(E)(1), upon which the trial court relied in determining that the first prong of the permanent custody test was satisfied, is applicable to situations in which “the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child’s home.” Homelessness was the “condition” that caused the children to be placed outside the home and, therefore, was the condition subject to evaluation under Section 2151.41.4(E)(1).

{¶10} The record demonstrates that the agency began this case based on all three issues: homelessness, mental health, and substance abuse. Later, the disposition of the children was changed from protective supervision to temporary custody when their mother was evicted from her home, had no place to live, and refused to stay at an available shelter. The mental health and substance abuse issues had not been resolved and continued to be matters of concern. Furthermore, those issues are undoubtedly part of the cause of the mother’s housing difficulties. To this point, the guardian ad litem specifically testified that this mother needed to

address her own mental health problems as a prerequisite to being able to address any of the children's basic needs. Nevertheless, since, in considering the question presented by the first prong of the permanent custody test, the trial court specifically found that the mother had failed to remedy the condition of homelessness, it thereby satisfied the requirements of Section 2151.41.4(E)(1). The court's additional findings that the mother also failed to remedy her mental health and substance abuse problems are superfluous and do not constitute prejudicial error.

{¶11} The record supports the trial court's conclusion that the mother failed to remedy her homelessness. Sabrina Walker, the protective worker assigned to this case by the Children's Services Board, testified that the mother had demonstrated very minimal compliance with her case plan. According to Ms. Walker, the mother's failure to address the need for safe, stable housing contributed to a lack of stability and sense of security and permanency for the children. Ms. Walker added that the family has lived with people who posed a danger to the children. The mother admitted that the family lived in at least ten separate places during this case. Two of the people with whom the family has lived were said to be sexual offenders and another had a long criminal record. Eight adults and six dogs lived in one of the homes. The guardian ad litem testified that P.E. had become withdrawn while staying in that home. Ms. Walker

indicated that, when the mother allowed paramours into her life, it negatively impacted her and her children.

{¶12} As noted above, the agency was preparing to file a motion for emergency temporary custody of the children in January 2007, when the mother indicated that she was being evicted from yet another residence, had no place to go, and was unable to find a place in a shelter. The protective worker was able to locate a place for the family in the Harvest Home shelter. The agency agreed that it would not seek custody of the children, provided the family stayed at the shelter until more permanent housing was located. The trial court made this agreement part of a court order. The mother entered the shelter on January 9, 2007, but left four days later to live with friends, despite the court order. In court, she claimed that she had left the shelter because a worker jerked her son by the arm. There was no contemporaneous evidence of that having happened, however, or of that being the reason for her departure. Leah Gibson, a social worker from the Harvest Home shelter, testified that the mother had offered no complaints about the shelter, and was initially cooperative, but had not followed the shelter's rules.

{¶13} The mother has also argued that her homelessness was actually caused by the agency and the magistrate because they ordered her to leave a home in which she had had a good support system in order to obtain independent housing. The record indicates, however, that the agency asked her to leave that home because it had received a referral that drugs were being sold from the home

and, according to the protective worker, the mother had acknowledged that fact. In addition, the same journal entry cited by the mother as evidence of the supposed good support system indicates that the mother had been struggling with sobriety and that her last three drug screens had been positive for marijuana. The journal entry further indicates that she had not yet engaged the Help Me Grow program, as required by her case plan. Further, although the mother had been diagnosed as bipolar, she was not taking her medication. The magistrate concluded the journal entry by indicating that it was doubtful that the children would be able to remain with their mother if she did not provide evidence of sobriety, engage with mental health treatment, “and maintain a stable support system.”

{¶14} As to the second prong of the permanent custody test, the trial court found that permanent custody was in the best interests of the children. When making this determination, a juvenile court must consider: (1) the child’s personal interactions and relationships; (2) the child’s wishes regarding placement; (3) the custodial history of the child; (4) whether there are appropriate alternatives to permanent custody, and (5) whether any of the factors in R.C. 2151.41.4(E)(7) to (11) apply. R.C. 2151.41.4(D). Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all the enumerated factors. See *In re Smith*, 9th Dist. No. 20711, 2002 WL 5178, at *3; see, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, at ¶24. Further, the Supreme Court has directed that no one factor is

to be given greater weight or heightened significance over another. *In re Schaefer*, 111 Ohio St. 3d 498, 2006-Ohio-5513, at ¶56.

{¶15} That permanent custody is in the best interest of the child must be established by clear and convincing evidence. *In re D.A.*, 113 Ohio St. 3d 88, 2007-Ohio-1105, at ¶12. Clear and convincing evidence is that 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 Adoption of Holcomb*, 18 Ohio St. 3d 361, 368 (1985) (quoting *Cross v. Ledford*, 161 Ohio St. 469, paragraph three of the syllabus (1954)).

{¶16} The first best interest factor requires consideration of the relevant personal interactions and interrelationships of the children. See R.C. 2151.41.4(D)(1). The trial court found that, although the children were bonded to their mother, the children’s strongest bond was with each other. The court also found that the mother obviously loved her children and that they loved her. It expressed concern, however, about the mother’s ability to parent the children. It noted that she exposed the children to a great deal of instability by frequent changes from one home to another and the constant flow of people through those homes. In addition, the court concluded that the mother had failed to meet P.E.’s need for counseling related to sexual abuse.

{¶17} The court’s findings are supported by the evidence that was before it. The mother maintained that she had always been a good mother, but merely

had problems with housing. She stated that she consistently visited the children and played games with them, interacted with them, and helped P.E. with her school work during the visits.

{¶18} Mary Anne Kickel, the guardian ad litem who had been assigned to this case since February 2006, pointed out that things go well between the mother and her children as long as there are “no bumps in the road.” Ms. Kickel believed that the mother lacked the parenting skills to know what to do, for example, when one of the children runs out of the room, gets in one of her moods, or engages in a power struggle with the mother. The mother does not know, according to Ms. Kickel, how to be consistent or apply consequences to the children’s behaviors. When they are together, the mother appears to overreact in the same way that P.E. overreacts. Ms. Kickel also noted that taking her mental health medications would have been an important step for keeping the mother on an even keel so that she could better deal with her children.

{¶19} Importantly, Ms. Kickel stated that P.E. does not feel safe or protected when she is with her mother. She pointed to the instability that existed when P.E. was with her mother: the constant moves and the many people in all the homes. She also pointed to the fact that the abuse of P.E. occurred while the child was living with her mother and the fact that the mother constantly exposed the children to dangerous people. Ms. Kickel felt that the mother let some of those people influence her in negative ways.

{¶20} Ms. Kickel also addressed the needs of the younger child, S.S. She stated that S.S. is a strong-willed three-year-old who is very affectionate, but often engages in power struggles. He requires constant discipline, and Ms. Kickel believed that the mother lacks the parenting skills to keep him under control.

{¶21} The children were said to be very close to their foster family and to be thriving in their care. They socialized and interacted easily with the family. The foster family was not a foster-to-adopt family, and the agency indicated that, if permanent custody were granted, it would seek to place the children together in the same home.

{¶22} A parent's efforts to fulfill a case plan may be relevant to determining the nature of the relationship between parent and child. See *In re A.S.*, 9th Dist. Nos. 23064, 23074, 2006-Ohio-2977, at ¶32. The record demonstrates that the mother failed to comply with the case plan in this case. The protective worker testified that she was unable to obtain reports from some service providers because the mother failed to sign the necessary release forms. For her part, the mother has argued that this problem was not her fault, claiming that she had signed the forms given her by the protective worker, and, therefore, that the problem was caused by either the agency or the providers. Regardless of the cause of this difficulty, however, there is sufficient evidence in the record, including the mother's own testimony, to establish that she did not comply with the requirements of her case plan. For example, while the mother claimed that she

completed mental health, psychiatric, and psychological assessments, she admitted that she never attended any follow-up counseling sessions, despite the fact that she sometimes hears voices, has a great deal of anxiety, has mood swings, has bi-polar disorder, has previously been treated for depression, has attempted suicide, and has been sexually abused. She admitted that she never obtained a substance abuse assessment and that she did not report for some requested drug screens because “[I d]idn’t feel like I needed to go.” The mother maintained that she did not have a drug problem, but when asked why she never got the assessment, she only replied, “I don’t know.”

{¶23} As to the requirement of addressing P.E.’s mental health needs, the mother did not feel that the child had a problem in dealing with the abuse. She admitted that she did call Child Guidance in 2003, 2004, and 2005 to address what she believed were general behavioral difficulties, but then did not follow through with any appointments, stating she did not feel that the child needed counseling. She did testify that she would keep P.E. in counseling now because she was persuaded by hearing the testimony of the counselor. She also claimed that she would follow through with her own mental health plan if she gets her children back. Of course, the mother had also agreed to comply with her case plan at the beginning of these proceedings, but failed to comply with it in nearly every regard. Significantly, the mother maintained that her mental health treatment affected only herself and not her children. In sum, the record demonstrates that the mother

failed to comply with her case plan objectives and this failure further demonstrates a lack of understanding of how her problems affect her children, a lack of insight into the mental health problems of her daughter, and a lack of judgment in attempting to provide for the needs of her family.

{¶24} Regarding the second best interest factor, the trial court found that the children were not of sufficient age or discretion to express an opinion as to their custody. The court relied, instead, upon the testimony of the guardian ad litem, stating that permanent custody was in the children's best interests. In coming to this conclusion, the guardian ad litem was concerned not only with housing, but also with the people with whom the mother surrounded herself, her mental health problems, her substance abuse problems, her lack of follow through, and her failure to put the children before herself. The guardian ad litem also stated that, while P.E. loves her mother, the child appreciated the safety and security of knowing where she will wake up the next day.

{¶25} The third best interest factor relates to the custodial history of the children. The agency initially became involved with the family in December 2005, when P.E. was three years old and S.S. was one. At that time, the agency was granted an order of protective supervision and custody was maintained with the mother. Approximately one year later, the children were placed in the temporary custody of the agency. The children were placed with a foster family

and remained there for nine months until the time of the permanent custody hearing, when P.E. was six years old and S.S. was four.

{¶26} Testimony by Sue Tysinger, P.E.’s kindergarten teacher, is relevant to consideration of this factor. She first met P.E. in January 2007, and, at that time, P.E. refused to participate socially or complete any school work. She did not know any letters or sounds and was performing below the level of the other children. It was, according to the teacher, as if the child had never been in school before. P.E. was retained in kindergarten for the next year and had the same teacher. This time, Ms. Tysinger found a total turnaround in the child. P.E. participated in classroom activities, was eager to learn, was chatty, and socialized with other children. Academically, she was still below average, but had improved. Ms. Tysinger believed that P.E. had made great strides in the last year, which corresponded to the period when the children had been in foster care.

{¶27} Also relevant is the fact that, since she has been in foster care, P.E. has been involved in individual and group counseling at Child Guidance, addressing sexualized behavior, boundaries, and self esteem. Lauren Woods, the child’s counselor, testified that P.E. occasionally exhibited confusion. Ms. Woods was concerned about P.E.’s mental health. She testified that P.E. occasionally seems “really present” and age-appropriate, but, at other times, she “seems like she’s somewhere else.” Ms. Woods believed that the child might have a dissociative condition, meaning that, when something triggered the memory of a

traumatic event, her mind went elsewhere as a means of protecting herself. The counselor concluded by saying that P.E. may need several episodes of treatment, with the need for further counseling occurring after various triggers, such as puberty. She could not predict how long the treatment might take, and also indicated that it probably would have been better for P.E. to have received treatment sooner, rather than waiting three years. The failure to provide counseling could cause P.E. to attempt to suppress her problems.

{¶28} Guardian ad litem Mary Anne Kickel testified similarly and indicated that P.E. can be very moody and had occasionally exhibited a blank stare. She also testified that she had observed huge changes in P.E. since the child entered foster care. She noted that the child's vocabulary has expanded, she has "come out," and she now talks and interacts with other children. In addition, Ms. Kickel said P.E. now generally seems to be calm, secure, and is making great progress academically and socially.

{¶29} The fourth best interest factor requires consideration of whether there are any alternatives to permanent custody that may provide the children with a legally secure permanent placement. P.E.'s father is unknown, and S.S.'s father told the protective worker that he was not interested in assuming custody. The guardian ad litem stated that she believed permanent custody was in the best interests of the children. The trial court found that there are no suitable relatives who could care for the children.

{¶30} The mother has argued that Deborah Wozniak, the maternal grandmother, was an acceptable alternative for custody and has contended that the agency wrongfully refused to place the children with her because it believed she had been placed on medical oxygen. Apparently, the maternal grandmother was on an apnea breathing machine at night as opposed to oxygen. In any event, that does not appear to have played a significant role in the consideration of either the agency or the trial court. The record reveals that the trial court was influenced by the fact that Ms. Wozniak has a history of alcoholism, depression, and suicide attempts. Moreover, as noted by the trial court, the maternal grandmother did not appear at the hearing to assert her desire for custody. In addition, it was Ms. Wozniak's son who abused P.E. While he is currently in a residential treatment facility and the maternal grandfather asserted that he would bar any contact between his son and P.E. in the future, neither the agency nor the guardian ad litem was comfortable with such an arrangement. The guardian ad litem believed that P.E. should not be placed in a home in which there was any possibility that she would ever come into contact with her assailant, and the protective worker stated, similarly, that the agency never wanted the children to live with the maternal grandparents because of its concern that their son would visit the family. According to the protective worker, the maternal grandmother was, in fact, unsure whether she was willing to forfeit visits by her son. Therefore, the trial court

properly found that only permanent custody could assure a legally secure permanent placement for the children.

{¶31} Upon consideration, this Court concludes that the judgment of the juvenile court was supported by clear and convincing evidence and that no prejudicial error has been demonstrated. The mother's sole assignment of error is, therefore, overruled.

CONCLUSION

{¶32} The mother's assignment of error is overruled. The judgment of the Summit County Common Pleas Court, Juvenile Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this

judgment to the parties and to make a notation of the mailing in the docket,
pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

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