

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: C. K.

C. A. No. 24616

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 06-10-0967

DECISION AND JOURNAL ENTRY

Dated: June 17, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} This case involves the permanent custody of a minor. The father of the child voluntarily relinquished his parental rights and is not a party to this appeal. The issue raised on appeal by the mother is whether Summit County Children Services Board failed to present clear and convincing evidence that permanent custody was in the best interest of the child. The agency's evidence at the hearing focused primarily on the mother's failure to control her long-standing addiction to heroin during the 27 months that this case was pending. Despite completing several drug treatment programs, she had been unable to maintain sobriety outside of a treatment setting. This Court has concluded that the evidence presented by Children Services supported the trial court's decision to terminate parental rights. It notes, however, that either through a lack of effort by Children Services or the prosecuting attorney, this case falls within a

developing pattern of Children Services presenting minimal evidence on significant issues in cases of a type that has been called the civil equivalent of the death penalty.

FACTS

{¶2} C.K. was born December 6, 2005. On September 30, 2006, police removed the child from the custody of the mother pursuant to Rule 6 of the Ohio Rules of Juvenile Procedure following the arrest of both parents on drug paraphernalia charges. During a traffic stop of the parents' vehicle, police found two used syringes and a spoon for cooking drugs, both containing heroin residue, in the child's diaper bag. On November 13, 2006, the trial court adjudicated C.K. a neglected and dependent child.

{¶3} After taking the child into emergency custody, Children Services discovered that the mother had been struggling with an addiction to heroin for many years. The mother also had been diagnosed with bipolar disorder, but had not been receiving regular treatment. Consequently, Children Services prepared a case plan that focused mainly on the mother's need to achieve and maintain sobriety and consistently receive mental health treatment before she could be reunited with her child.

{¶4} During a case planning period of more than two years, however, the mother was not able to remain sober for more than a few months at a time. She was terminated from her first residential treatment program because she used heroin while in the facility. C.K.'s father, who was also a heroin user, had apparently visited the Mother at the facility and brought her heroin. The mother later completed a different drug treatment program and, although she was able to stay sober in the controlled environment of the treatment facility, she relapsed shortly after completing the program. The mother spent the next two years in and out of drug treatment programs due to her repeated relapses. At one point during the case planning period, she had a

momentary “slip” and used heroin only briefly. At other times, however, the mother relapsed to using heroin on a daily basis for periods as long as several months.

{¶5} During September 2008, the mother gave birth to another child and, by her own admission, had continued to use heroin during her pregnancy and after the birth of that child. Because the mother then resided in Cuyahoga County, the younger child was eventually taken into custody by the Cuyahoga County Department of Children and Family Services.

{¶6} On September 8, 2008, Children Services moved for permanent custody of C.K. Following a hearing on the motion, the trial court found that C.K. had been in the temporary custody of Children Services for more than 12 of the prior 22 months and that permanent custody was in her best interest. Consequently, the trial court terminated parental rights and placed C.K. in the permanent custody of Children Services. The mother appealed, raising one assignment of error.

PERMANENT CUSTODY

{¶7} The mother’s assignment of error is that the trial court’s permanent custody decision was not supported by the evidence presented at the hearing. Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, 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 the prior 22 months, 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) 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).

{¶8} The trial court found that the first prong of the permanent custody test was satisfied because C.K. had been in the temporary custody of Children Services for at least 12 of the prior 22 months and the mother has not contested that finding. The mother has only challenged the best interest prong of the permanent custody test.

{¶9} When determining whether a grant of permanent custody is in the child's best interests, the juvenile court must consider all the relevant factors, including those enumerated in Section 2151.41.4(D) of the Ohio Revised Code: the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives. See *In re S.N.*, 9th Dist. No. 23571, 2007-Ohio-2196, at ¶27.

{¶10} This Court has emphasized repeatedly that the first best interest factor is "highly significant" as it focuses on "whether there is a family relationship that should be preserved." See, e.g., *In re Smith*, 9th Dist. No. 20711, 2002 WL 5178 at *4 (Jan. 2, 2002); *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶11. Unfortunately, Children Services presented minimal evidence about the mother's interaction with C.K. during the 27 months that this case was pending. Children Services indicated that, for most of the case, the visits had been limited to weekly, supervised visitation due to the mother's unresolved drug and mental health problems. The caseworker further testified that the mother seemed to understand C.K.'s needs and that her interaction with C.K. during visits was usually appropriate. Beyond that, the agency presented no evidence about the impact of the Mother's drug and mental health issues on her interaction with her child.

{¶11} Most notably, Children Services presented no evidence about the mother's rate of attendance at visitation throughout the 27 months that this case was pending. Presumably, the mother failed to visit with C.K. for many months between the time she spent in residential drug treatment programs, at least one of which was a lock-down program for 63 days; during her extended periods of heroin relapse; and possibly when she gave birth to her younger child in another county, but Children Services presented no evidence to that effect.

{¶12} When the mother relapsed to daily heroin use for several months, she likely either stopped coming to visits or came to the visits under the influence of heroin, but Children Services presented no evidence to demonstrate how, if at all, the mother's multiple relapses impacted her interaction with her child. In this case even more so than others, given that its 27-month duration represented more than seventy percent of C.K.'s young life, the agency should have presented evidence about the frequency and quality of interaction between mother and child. See *In re K.E.*, 9th Dist. No. 24571, 2009-Ohio-2672, at ¶39 (emphasizing that evidence about the parent's attendance at visitation was or should have been available to Children Services and should have been offered into evidence at the hearing).

{¶13} The guardian ad litem spoke on behalf of C.K., who was only three years old at the time of the permanent custody hearing. The guardian ad litem, who had been assigned to C.K. for more than two years, opined that permanent custody was in the child's best interest. Although the guardian recognized that the mother loved C.K., her primary concern was the mother's failure to gain control of her addiction to heroin. She emphasized that, despite participating in repeated treatment programs over a period of more than two years, the mother had been unable to maintain prolonged periods of sobriety outside of residential treatment. The

guardian also expressed concern that the mother had not been receiving regular mental health treatment for her bipolar disorder.

{¶14} C.K. had spent most of her three-year life in the custody of Children Services. She was removed from her mother's custody when she was 10 months old and had spent the next two years in the temporary custody of Children Services. As this Court has repeatedly noted, however, "the time period in and of itself cannot be held against the parent without considering the reasons for it and the implications that it had on this child." See, e.g., *In re Smith*, 9th Dist. No. 20711, 2002 WL 5178 at *5 (Jan. 2, 2002); *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶16.

{¶15} C.K. had remained in the temporary custody of Children Services to allow the mother more time to work on her problems with substance abuse, mental health, and homelessness, among others. The mother admitted to having been addicted to heroin for several years. During the 27-month case planning period, the mother entered four different residential drug treatment programs and successfully completed one of them. Although the mother was able to abstain from using heroin while enrolled in some of the treatment programs, she was never able to maintain ongoing sobriety after leaving the residential treatment setting.

{¶16} Four months before the permanent custody hearing, the mother gave birth to another child in Cuyahoga County. The mother admitted that she used heroin during that pregnancy and that she used heroin on a regular basis for a two-month period after the child's birth. At the time of the permanent custody hearing, the mother's younger child was in the custody of Cuyahoga County Department of Children and Family Services and the mother had begun another residential drug treatment program to comply with the Cuyahoga County case plan.

{¶17} After 27 months, the mother was not in any better position to provide a suitable home for C.K. than she had been when C.K. was removed from her custody. She had been unable to remain sober outside a controlled treatment environment on even a short-term basis. She also had not been consistent with her mental health treatment and still had no employment or housing.

{¶18} C.K. had been in a temporary placement for most of her life. The caseworker testified that Children Services had been unable to find a permanent placement for C.K. other than permanent custody and adoption. Children Services had investigated the possibility of placing C.K. with a relative, but none of the relatives was willing and able to provide a suitable long-term home for the child. Therefore, the trial court reasonably concluded that a legally secure permanent placement could only be achieved by placing C.K. in the permanent custody of CSB.

{¶19} There was ample evidence before the trial court to support its conclusion that permanent custody was in the best interest of C.K. The assignment of error is overruled.

CONCLUSION

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

Judgment affirmed.

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

WHITMORE, J.
MOORE, P. J.
CONCUR

APPEARANCES:

CHRISTOPHER R. SNYDER, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.