

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: T. T.

C. A. No. 24727

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 06-10-1027

DECISION AND JOURNAL ENTRY

Dated: September 2, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} This appeal involves the permanent custody of a minor. The issues raised on appeal by the mother and the father are 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 mother has also maintained that the trial court incorrectly based its permanent custody decision on the fact that the child had been in the temporary custody of Children Services for more than 12 of the prior 22 months because the agency did not include that ground in its motion. This Court has concluded that there was ample evidence to support the trial court’s permanent custody decision and that the mother has failed to demonstrate that she was prejudiced by the agency’s failure to state the “12 of 22” ground in its motion.

FACTS

{¶2} Brandy Deem and Henry T. are the natural parents of T.T., born January 15, 2003. On October 16, 2006, Children Services filed a complaint alleging that T.T. was a neglected and dependent child. T.T. had been removed from the home a few days earlier by the Barberton Police Department because the mother had attempted to commit suicide by hanging herself while her son was taking a nap in another room. The father had been incarcerated since before T.T. was born.

{¶3} Because T.T. was removed from the home due to his mother's untreated mental health issues, the case plan focused primarily on that problem. Children Services also learned that the mother had a substance abuse problem and a history of domestic violence, both as the victim and as the aggressor. To identify the mother's specific parenting needs and treatment goals, Children Services required the mother to obtain a parenting assessment with a licensed psychologist, who would diagnose the mother's mental health and other parenting problems. The psychologist would also make appropriate recommendations for addressing each of the identified problems. The mother, however, did not obtain a parenting assessment until 13 months after T.T. was removed from her home, so her reunification goals were not properly focused until that time.

{¶4} The psychologist who performed the parenting assessment diagnosed the mother with borderline personality disorder and drug and alcohol dependence. He also identified serious anger management problems and a need to obtain suitable employment and housing. Although the mother made progress toward resolving her problems with drugs and alcohol, unemployment, and lack of stable housing, she did not adequately address her serious mental health and anger management problems. Although the mother conceded that she had attempted suicide and/or had

suicidal thoughts numerous times over the years and that she had been the victim of violence and had used physical violence against her child, she tended to minimize these problems and did not believe that she needed treatment.

{¶5} On September 24, 2008, Children Services moved for permanent custody of T.T. The trial court held a hearing on the permanent custody motion as well as motions to place T.T. in the legal custody of the mother or, alternatively, to place him in the legal custody of the maternal grandmother or the paternal grandparents. The trial court found that T.T. had been in the temporary custody of Children Services for more than 12 of the prior 22 months and that permanent custody was in his best interest. Consequently, the trial court terminated parental rights and placed T.T. in the permanent custody of Children Services.

{¶6} The mother and the father timely appealed. The mother has raised two assignments of error and the father has raised one.

BEST INTEREST OF THE CHILD

{¶7} The father's sole assignment of error and the mother's second assignment of error are challenges to the trial court's finding that permanent custody is in the child's best interest. When determining whether a grant of permanent custody is in the child's best interest, the juvenile court must consider all relevant factors, including those enumerated in Section 2151.41.4(D) of the Ohio Revised Code: the interaction and interrelationships of the child, the wishes of the child, the custodial history of the child, and the child's need for permanence in his life. See *In re S.N.*, 9th Dist. No. 23571, 2007-Ohio-2196, at ¶27.

{¶8} There was no parent-child relationship between T.T. and his father because there had been almost no interaction between the two. T.T. had no visits with his father during this two-year case because of the father's ongoing incarceration. In fact, the father had been

incarcerated throughout T.T.'s lifetime, and T.T. had met him only a few times when the mother took him to visits at the prison.

{¶9} The mother's interaction with T.T. had been limited to weekly visits that were highly supervised for most of the case planning period, because of concerns about the mother's mental health. Children Services eventually allowed the mother to have longer, unsupervised visits with T.T., but several witnesses observed deterioration of the child's behavior after the visits were expanded. T.T. began having nightmares, wetting his pants, throwing tantrums, and was unusually disruptive at his preschool and foster home. The caseworker recognized that a visitation change may lead to temporary behavior problems and that the child should be given time to adjust. She expressed her concern, however, that T.T.'s behavior problems did not diminish during a period of two months. T.T.'s counselor testified that she had worked with many other children involved with Children Services and that none of them had reacted so negatively to an expansion of parental visitation. Because of concerns expressed by T.T.'s counselor and the foster mother, the unsupervised visits were discontinued after two months and Children Services began supervising all visits again. T.T.'s behavior problems gradually subsided after Children Services resumed supervision of the visits.

{¶10} Witnesses agreed that the mother visited T.T. regularly and her behavior with him was usually appropriate. Several witnesses further observed, however, that T.T. was often reluctant to attend visits with his mother. The child was typically unenthusiastic before and during the visits and he often had to be physically prompted to walk into the visitation center. T.T. showed little emotion when each visit came to an end and rarely talked about his mother to others. The guardian ad litem observed that, although T.T. was typically talkative, happy, and

playful in his interactions with others, he was much more reserved and non-emotional around his mother.

{¶11} T.T.'s interaction with his foster family, on the other hand, was very positive. T.T. had been living with the same foster family for more than two years and had bonded with the foster parents as well as their three children. The caseworker observed that T.T. was very comfortable in the foster home.

{¶12} Because T.T. was only six years old at the time of the permanent custody hearing, the guardian ad litem spoke on his behalf. Although T.T.'s counselor had testified that the child was conflicted about where he wanted to live because he loved the mother and his foster mother, T.T. had told the guardian ad litem that he did not want to return to his mother's home but wanted to stay with the foster family. The guardian ad litem also expressed her opinion that permanent custody was in T.T.'s best interest.

{¶13} The custodial history of T.T. included two years prior to the permanent custody hearing spent in the temporary custody of Children Services. During that time, the mother had failed to adequately address her mental health and anger management problems. The psychologist who evaluated the mother had diagnosed her with borderline personality disorder. He explained that this mental illness can be difficult to treat, particularly because of the lack of insight that is characteristic of the disorder. He opined that the mother would require weekly counseling for at least one year before she could provide suitable care for T.T.

{¶14} Although the mother had participated in counseling with unlicensed providers, she did not start counseling with a licensed counselor until shortly before the hearing. Moreover, the mother's attendance at counseling had been inconsistent, and she had made little progress because she continued to deny that she had a mental health problem. The mother had also failed

to complete an intensive anger management program. Several witnesses, including the guardian ad litem, expressed serious concern about the mother's refusal or inability to recognize the severity of her mental health and anger problems.

{¶15} During this same period, T.T. had made progress in foster care working to address his developmental delays and behavior problems. The foster mother noticed shortly after T.T. came to her home that he displayed an elevated level of aggression. She had T.T. evaluated, and he was diagnosed with attention deficit hyperactivity disorder. After he started taking medication consistently, T.T.'s aggression and impulsive behaviors decreased. The foster mother enrolled T.T. in speech therapy and an early intervention preschool to address his developmental delays. T.T. also began regular counseling while in foster care. Several witnesses testified that T.T.'s behavior and speech had improved significantly.

{¶16} Prior to this case, T.T. had spent the first three and a half years of his life living in the mother's custody. The mother admitted that T.T. had witnessed her being the victim of domestic violence. T.T. told his counselor about seeing his mother hurt by the "mean daddy," whom the mother explained was a former boyfriend. The mother was hospitalized after one of the incidents.

{¶17} The mother also recognized that she had trouble controlling her anger with T.T. and admitted that she had used physical violence against him. On one occasion just weeks after T.T.'s third birthday, the mother gave him a black eye because he spilled lasagna on the couch. The mother tended to blame T.T. for causing her to lose control and respond to his actions with violence. The psychologist who performed the mother's parenting assessment testified that she admitted that she had hit T.T. on more than one occasion. The mother led the psychologist to believe that she had physically disciplined T.T. on a regular basis.

{¶18} After well over two years in agency custody, T.T. was in need of a legally secure permanent placement. Neither the mother nor the father was in a position to provide T.T. with a suitable home at the time of the hearing. The caseworker testified that Children Services had pursued potential placements with relatives but had been unable to find a suitable permanent placement for T.T.

{¶19} Although the maternal grandmother was seeking legal custody of T.T., the mother had admitted that the grandmother had physically abused her as a child. Children Services was also concerned that the maternal grandmother lacked an understanding of the severity of the mother's mental health problem and would be likely to leave T.T. in her care without supervision. The maternal grandmother also lacked independent housing.

{¶20} The paternal grandparents also requested legal custody of T.T., but they had never even met the child. They did not attempt to visit him during the pendency of this case and did not request legal custody until he had already been in agency custody for more than two years. The guardian ad litem also expressed her concern that the grandparents did not seem to understand the severity of the problems of T.T.'s parents and that, if granted custody, they might simply return T.T. to one of them.

{¶21} The trial court reasonably concluded that a legally secure permanent placement for T.T. could only be achieved by granting permanent custody to Children Services so that T.T. could be placed for adoption. The foster parents had made no decision, but had expressed an interest in pursuing adoption of T.T.

{¶22} The trial court had ample evidence before it to support its finding that permanent custody was in T.T.'s best interest. The father's sole assignment of error and the mother's second assignment of error are overruled.

LACK OF NOTICE OF THE “12 OF 22” GROUND

{¶23} The mother’s first assignment of error is that the trial court incorrectly relied on the so-called “12 of 22” ground for permanent custody because Children Services failed to include that ground in its motion. Permanent custody hearings are commenced by the filing of a motion under Section 2151.41.3 of the Ohio Revised Code. Section 2151.41.4 authorizes a juvenile court to terminate parental rights and award permanent custody of the child to a proper moving agency if the court finds 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); 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). See R.C. 2151.41.4(B)(1),(2); see also *In re William S.*, 75 Ohio St. 3d 95, 99 (1996).

{¶24} On September 24, 2008, Children Services moved for permanent custody asserting: (1) that T.T. could not be returned to his parents within a reasonable time and should not be returned to them due to numerous factors under Section 2151.41.4(E), and (2) that permanent custody was in the best interest of T.T. The motion did not include the “12 of 22” ground as a basis for permanent custody.

{¶25} Despite the failure of Children Services to allege such a ground in its motion, the trial court found that the first prong of the permanent custody test was satisfied because T.T. had been in the temporary custody of Children Services for more than 12 of the prior 22 months. Although the mother has not disputed that the trial court’s finding was supported by the record,

she has asserted that the trial court lacked authority to base its decision on the “12 of 22” ground because Children Services failed to include that ground in its permanent custody motion.

{¶26} Rule 19 of the Ohio Rules of Juvenile Procedure provides that “[a]n application to the court for an order shall be by motion.” It further requires that the motion “shall state with particularity the grounds upon which it is made[.]” “The purpose of [Rule] 19 is to provide the nonmoving party notice of the allegations in the motion so that they can respond appropriately.” *In re Lane*, 4th Dist. No. 02CA61, 2003-Ohio-3755, at ¶8 (citing Fink, Greenbaum, & Wilson, Guide to the Ohio Rules of Civil Procedure, § 7.9 (2003 ed.)).

{¶27} The mother contends that, because Children Services did not assert the “12 of 22” ground in its motion for permanent custody, she was denied her right to due process because she had no notice or opportunity to defend against this ground at the permanent custody hearing. To demonstrate a denial of due process, however, an appellant typically must make a showing of identifiable prejudice. *Estes v. Texas*, 381 U.S. 532, 542 (1965). The mother failed to argue to the trial court, nor has she demonstrated on appeal, that her defense was prejudiced by the failure of Children Services to specify the “12 of 22” ground in its motion for permanent custody.

{¶28} The permanent custody hearing was held over four days. Due to extended gaps between the hearing dates, the hearing commenced on January 20 and ended on February 24, 2009. This issue was first discussed on the record at the close of Children Services’ case on January 23, 2009. At that time, the trial court implicitly agreed with the mother that the motion failed to include the “12 of 22” ground as a basis for permanent custody. The trial court indicated that it would have to do some research into whether Children Services’ failure to allege the “12 of 22” ground in the motion precluded the court from considering it as a basis for permanent custody.

{¶29} One month later, on February 24, 2009, the issue was discussed on the record again at the close of the parents' cases. The trial court had apparently considered the issue and indicated to the parties that it was inclined to consider the "12 of 22" ground as a basis for permanent custody, despite the agency's failure to include it in the motion. Although the trial court gave the parents an opportunity to argue the issue further, they merely restated their position that the "12 of 22" ground was not properly before the court because Children Services had not alleged it in the motion.

{¶30} The parents had one month to prepare an argument to convince the trial court that their due process rights had been violated by deficiency of the permanent custody motion, yet neither parent offered any explanation of how their defense had been impacted. The attorney for the mother argued simply that, had she been given notice of the "12 of 22" ground, she "may have defended this case in a different way." The attorney failed to offer any explanation of what she could have done differently to change the outcome of this case. Even on appeal several months later, the mother has failed to explain how the lack of notice prejudiced her defense in any way.

{¶31} This Court has recognized that there could be defenses to this ground for permanent custody. The "12 of 22" ground is not always a simple time calculation, but under certain facts, the inclusion of certain periods of time might be debatable. See, e.g., *In re E.T.*, 9th Dist. No. 23017, 2006-Ohio-2413, at ¶73 (suggesting that the time might be tolled during an appeal from the adjudication); *In re K.G.*, 9th Dist Nos. 03CA0066, 03CA0067, and 03CA0068, 2004-Ohio-1421, at ¶19 (emphasizing that the parents must be given "the full 12 months to work toward reunification").

{¶32} The record in this case demonstrates that T.T. was in the temporary custody of Children Services for all 22 of the prior 22 months at the time Children Services moved for permanent custody and that Children Services had been offering reunification services to the mother that entire time. Because nothing in the record suggests any potential defense to the “12 of 22” ground in this case, this Court cannot conclude that the mother was prejudiced by the deficiency of the permanent custody motion. The mother’s first assignment of error is overruled.

CONCLUSION

{¶33} The parents’ assignments of error are 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 appellants.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JILL FANKHAUSER, attorney at law, for appellant.

LEONARD J. BREIDING, II, attorney at law, for appellant.

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