

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: D. R.

C. A. No. 25005

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-4-330

DECISION AND JOURNAL ENTRY

Dated: March 17, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} This case involves the legal custody of a minor. The juvenile court removed the child from his mother’s custody shortly after his premature birth and later placed him in the home of a maternal aunt, where he has lived ever since. The issue raised on appeal by the mother is whether the trial court incorrectly placed the child in the legal custody of the maternal aunt. This Court affirms because the evidence before the trial court demonstrated that the aunt had been providing a suitable home for the child for almost one year and that, during that same period, the mother had made little progress working on the reunification goals of her case plan.

FACTS

{¶2} Teresa D. is the natural mother of D.R., born April 27, 2008. The father of the child has not participated in these proceedings. Ms. D. has six other children who are not at issue in this appeal. D.R. was born at 32 weeks gestation and was admitted to Akron Children’s

Hospital. He was removed from his mother's custody shortly after his birth because she had pending dependency cases involving four of her other children and the agency was concerned that she had not been complying with the reunification goals of her case plan. She had also attempted to conceal her pregnancy with D.R. from Children Services.

{¶3} D.R. was placed in the home of a maternal aunt, where he continued to live throughout this case. Children Services eventually moved to have D.R. placed in the legal custody of the aunt. Following a hearing on the motion, a magistrate decided that D.R. should be placed in the legal custody of the aunt, as that was in the child's best interest. The trial court adopted the magistrate's decision and entered an independent judgment, pending the filing of timely written objections. Ms. D. objected to the magistrate's decision, maintaining that the magistrate erred in finding that it was in D.R.'s best interest to be placed in the legal custody of the aunt. The trial court overruled the mother's objection and placed D.R. in the legal custody of the aunt.

BEST INTEREST OF THE CHILD

{¶4} Ms. D. has argued that the trial court incorrectly placed D.R. in the legal custody of his aunt and has pointed specifically to evidence presented at the hearing by Children Services that was disputed by other evidence. Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App. 3d 156, 2003-Ohio-2852, at ¶17. "Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child." *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23 (citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11). The juvenile court's

disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead “leaves intact ‘residual parental rights, privileges, and responsibilities.’” *In re Shepherd*, 4th Dist. No. 00CA12, 2001 WL 802209 at *7 (Mar. 26, 2001) (quoting R.C. 2151.01.1(B)(19)). The trial court’s decision to grant or deny a motion for legal custody is within its sound discretion and will not be reversed absent an abuse of discretion. *In re M.S.*, 9th Dist. No. 22158, 2005-Ohio-10, at ¶11.

{¶5} Although Ms. D. has primarily argued that the trial court erred in failing to grant an extension of temporary custody, this Court will not reach the merits of that challenge because she failed to preserve it for appellate review. Rule 40(D)(3)(b)(iv) of the Ohio Rules of Juvenile Procedure provides that, “[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion ... unless the party has objected to that finding or conclusion as required by [Rule] 40(D)(3)(b).” Although Ms. D. filed objections to the magistrate’s decision, she did not object to the magistrate’s failure to grant a six-month extension of temporary custody. Moreover, although Ms. D. had requested a continuance of the legal custody hearing, none of the parties requested an extension of temporary custody. Consequently, Ms. D. cannot assign this as error on appeal and this Court will not address the merits of that part of her assignment of error.

{¶6} Ms. D. has also implicitly asserted that it was in D.R.’s best interest to be reunited with her because she had made significant progress on the reunification goals of the case plan. Although Ms. D. testified about the progress she had made, other evidence at the hearing demonstrated that she had made little progress toward reunification.

{¶7} Ms. D. had lost custody of each of her seven children over the years due to her ongoing mental health and anger management problems and the lack of stability in her life. None of her children had been returned to her care. Rather, each had been placed in the homes of various relatives. Ms. D. had demonstrated an ongoing reluctance to work with Children Services toward reunification with any of her children, including D.R. D.R. had never lived with her and her only relationship with the child was through weekly visitation, yet Ms. D. did not attend the weekly visits on a consistent basis. At the time of the hearing, one year after D.R.'s removal from her custody, Ms. D. still lacked stable housing and employment and was not complying with either the substance abuse or mental health components of her case plan.

{¶8} The caseworker also expressed concern that Ms. D. had been dishonest with Children Services and the trial court by misinforming them about where she was working or living. For example, she reported to the court that she was employed 12 hours a day, five days a week, at a particular restaurant, but Children Services was able to verify through the owner of the restaurant that she had never been employed there. Children Services also presented evidence that she had misinformed the court about where she was living.

{¶9} Given Ms. D's lack of progress working toward reunification with D.R. or any of her other children, Children Services did not support returning D.R. to her care and further recommended that the visits between them continue to be supervised. The guardian ad litem was also opposed to returning D.R. to Ms. D's custody.

{¶10} Children Services believed that D.R.'s aunt should have legal custody of D.R. and had filed a motion requesting that change of disposition. D.R. had been living in the aunt's home since shortly after his birth. The aunt had been providing him with a suitable home and had been meeting all of his needs for nearly a year. Because of D.R.'s preterm birth, the aunt had enrolled

him in the Help Me Grow developmental program to work on his gross motor skills. At the time of the hearing, he was not exhibiting any developmental delays. The aunt had stable employment as a paralegal and had a four-bedroom home, in which she lived with her own four children. Although the aunt's home is in Williams County, a three-hour drive from Akron, the aunt drove D.R. to visits with the mother each week and also arranged for him to visit with some of his half-siblings in the Akron area.

{¶11} Given the evidence before the trial court, it reasonably concluded that legal custody to the aunt was in D.R.'s best interest. The trial court did not err by placing D.R. in the legal custody of the maternal aunt. The assignment of error is overruled.

III.

{¶12} The 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

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

RONALD T. GATTS, attorney at law, for appellant.

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

AMY RUSSELL, guardian ad litem.