[Cite as *In re J.M.*, 2010-Ohio-1967.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: J.M.	C.A. No. 24827
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DN 07 03 0220

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

MOORE, Judge.

{¶1} Appellant, Earsheka M. ("Mother") has appealed from the decision of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, J.M., and placed the child in the permanent custody of the Summit County Children Services Board ("CSB"). This Court reverses.

I.

{¶2} After the trial court entered judgment, it appointed appellate counsel for Mother. That attorney filed a brief in this Court, accompanied by a motion to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. In support of her request, and pursuant to the guidelines set forth in *Ander*s, Mother's appellate counsel asserted that after an extensive review of the record, she was unable to find any valid, arguable issues for appeal. As a result, counsel submitted a brief setting forth two possible issues for review, but concluded by stating that there were no meritorious issues for review. See *Anders*, 386 U.S. at 744.

{¶3} After counsel fulfilled these requirements, this Court was required to conduct a full examination of the proceedings to decide whether the appeal would be wholly frivolous. Id. Based upon our review of the record, we determined that there were at least two arguable issues for appeal which were not cited by Mother's attorney and are not wholly frivolous. Accordingly, we granted counsel's request to withdraw, and, as required by *Anders*, appointed new counsel to brief the identified issues along with any other issues new counsel may discern. See id. New counsel filed an appellate brief presenting two assignments of error on behalf of Mother, which are now encompassed within this appeal.

{¶4} Unfortunately, this is not the first time this Court has encountered a permanent custody case where we have had to appoint new counsel either because of an improperly constructed *Anders* brief or because this Court has identified arguable issues in the record and then, in fact, ultimately reversed the decision of the trial court. Such circumstances are unsettling. Not only could this situation threaten the diligent representation to which parents faced with permanent separation from their children are entitled, but it infuses unnecessary delay into the appellate process when Ohio has sought to expedite the appeal of permanent custody proceedings. See App.R. 11.2(C). Attorneys have a duty to closely scrutinize cases and conduct any necessary research before making the judgment that an *Anders* brief is appropriate. An *Anders* brief should be utilized by appellate counsel only on very rare occasions and after a conscientious review of the record, always insuring that clients receive the diligent and active representation to which they are entitled. See *In re K.D.*, 9th Dist. No. 06CA0027, 2006-Ohio-4730, at ¶16; *Anders*, 386 U.S. at 744-745.

FACTS

{¶5} J.M. was born on May 13, 1994. She lived with Mother initially, but after a period of time, her care was assumed by her grandmother and step-grandfather. In 2004, the juvenile court became involved and officially granted legal custody of J.M. to the child's grandmother. The present action began in February 2007, when the grandparents were no longer willing or able to keep then twelve-year-old J.M. in their home due to her unruly behavior. Nor could her parents assume her care. At that time, Mother was unemployed and had a substance abuse problem. The child's father was deceased. Therefore, CSB filed a complaint in the juvenile court, and on April 9, 2007, the trial court found the child to be dependent and placed her in the temporary custody of the agency. A case plan was created with the goal of reunifying J.M. with Mother.

{¶6} On January 15, 2008, CSB moved for permanent custody of J.M., claiming that she could not be placed with Mother within a reasonable time or should not be returned to her and that permanent custody was in her best interest. At the June 20, 2008 hearing, CSB withdrew its motion for permanent custody and the grandparents obtained legal custody of J.M. with protective supervision in a renewed effort to provide for her care. Before long, the grandparents again had problems addressing J.M.'s behavior and finally decided that they could no longer keep her in their home. The trial court granted CSB's motion for temporary custody on January 30, 2009. On February 10, 2009, CSB filed a second motion for permanent custody, asserting that J.M. could not be returned to Mother within a reasonable time or should not be returned to her and that permanent custody was in the child's best interest. As in the case of the first motion for permanent custody, no other grounds were alleged by CSB.

{¶7} On May 29, 2009, the trial court terminated Mother's parental rights and granted permanent custody to CSB. In so doing, the trial court did not enter a finding on CSB's claim that J.M. could not be returned to Mother within a reasonable time or should not be returned to her, but instead relied solely on a finding not alleged by CSB, that J.M. had been in the temporary custody of the agency for more than 12 of 22 consecutive months. Mother now appeals and assigns two errors for review. Because the arguments are inter-related, the assignments of error will be discussed together.

II.

ASSIGNMENT OF ERROR I

> "The Trial Court erred and/or abused its discretion in making legal and factual findings that were not properly before the court."

ASSIGNMENT OF ERROR II

> "The Trial Court erred as a matter of law in its finding that JM had been in the Agency's temporary custody for more [than] 12 of 22 consecutive months."

{¶8} An application to the court for consideration of an order of permanent custody is made by filing a motion under R.C. 2151.413. R.C. 2151.414, then, 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 of 22 continuous 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 R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99.

{¶9} On January 15, 2008, CSB moved for permanent custody asserting: (1) that J.M. could not be returned to her parents within a reasonable time or should not be returned to them, and (2) that permanent custody was in the best interest of J.M. After another attempt at legal custody with the grandparents, CSB filed a second motion for permanent custody on February 10, 2009, asserting the same grounds. Neither motion included the "12 of 22" ground as a basis for permanent custody.

{¶10} Despite the failure of CSB to allege "12 of 22" in either of its motions, the trial court found that the first prong of the permanent custody test was satisfied solely because J.M. had been in the temporary custody of CSB for more than 12 of 22 continuous months. The trial court did not enter a finding that J.M. could not be placed in the custody of a parent within a reasonable time or should not be returned to a parent, as alleged by CSB in satisfaction of the first prong of the permanent custody test. Mother has asserted that the trial court lacked authority to base its decision on the "12 of 22" ground because CSB failed to include that ground in either of its motions, and also because the child was not actually in the temporary custody of the agency for 12 months. In response, CSB concedes that it did not allege R.C. 2151.414(B)(1)(d), the so-called "12 of 22" provision, as a ground supporting permanent custody in either of its two motions, but contends that there was no prejudice to Mother because the agency argued "12 of 22" in its opening and closing arguments and also because J.M. had actually been in the temporary custody of the agency for more than 12 of 22 consecutive months.

{¶11} The right to raise a child is an essential and basic civil right, and, therefore, parents in a permanent custody case "'must be afforded every procedural and substantive protection the law allows.'" *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. "Our courts have long recognized that due process requires both

notice and an opportunity to be heard." *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, at ¶13, citing *Hagar v. Reclamation Dist. No. 108* (1884), 111 U.S. 701, 708; *Caldwell v. Carthage* (1892), 49 Ohio St. 334, 348. Specifically in a permanent custody case, "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is an "elementary and fundamental requirement of due process[.]" *Thompkins*, 2007-Ohio-5238, at ¶13, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314.

{¶12} The United States Supreme Court has explained that an elevated level of procedural due process should be accorded to parties for whom the potential for loss is great, and that parents in a permanent custody case are among those to whom a greater level of protection is due. *Santosky v. Kramer* (1982), 455 U.S. 745, 758. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" (Internal citations and quotations omitted.) Id. at 758. And, it is "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right." Id. at 758-759, quoting *Lassiter v. Dept. of Social Services* (1981), 452 U.S. 18, at 27, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, at 651. When the State initiates a parental rights termination proceeding, it seeks "not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one." (Internal citations omitted.) *Lassiter*, 452 U.S. at 27. In reaching these conclusions, the United States Supreme Court, has considered that "[t]he

State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." *Santosky*, 455 U.S. at 763.

{¶13} The Ohio Supreme Court has specifically recognized the importance of providing notice to parents involved in a permanent custody proceeding of the grounds upon which the action is sought and against which the parents must defend. In *In re Fassinger* (1975), 42 Ohio St.2d 505, the court held that a permanent custody motion was deficient because it failed to assert any ground for a change from temporary to permanent custody "with sufficient definiteness that the parents could be apprised of the charge they would be required to meet." Id. at 507. Therefore, the order granting permanent custody could not stand. The court in *Fassinger* concluded that to permanently remove children from their parents "without proper notice, summons, and hearing, would be manifestly unfair." Id.

{¶14} Under a 1980 amendment to the permanent custody statutes, "a new complaint [to request permanent custody] is no longer necessary, and such may now be done by motion, *** but the amendment did not change the basic right of due process." *In re Massie* (March 30, 1984), 4th Dist. No. 477, at *1. "Whether done by a separate complaint, or by motion in a case in which the court has on-going jurisdiction, the parent is still entitled to have specific allegations of fact made against him so that he has the opportunity to meet and defend against the charges. Due process requires no less." Id. See, also, *In re Fleming* (July 22, 1993), 8th Dist. No. 63911, at *8 (parents must be given notice of the operative facts underlying any motion for permanent custody so that they gather relevant evidence and prepare a defense). This district has held similarly. See, e.g., *In re Tan* (Nov. 24, 1982), 9th Dist. No. 10654, at *4 (finding that *Fassinger* "directs that parents be given sufficient notice of the grounds of a permanent custody request that they will have to meet").

{¶15} The Ohio Rules of Juvenile Procedure are in accord with these principles. Juv.R. 19 provides that "[a]n application to the court for an order shall be by motion" and further provides that the motion "shall state with particularity the grounds upon which it is made[.]" See, also, Civ.R. 7(B). "The purpose of Juv.R. 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 (2003 ed.), Section 7.9.

{¶16} Absent a clear statement of the grounds upon which the motion is made, parents will not have proper notice of the grounds against which they are bound to defend. CSB did not include "12 of 22" in either of its two motions for permanent custody. Nor did it argue that position during the hearing. CSB has maintained, on appeal, that its admitted failure to include "12 of 22" in its motion for permanent custody is overcome by the fact that it argued "12 of 22" in its opening and closing arguments at the hearing on the motion. Our review of the record does not reveal that the agency did so. There is no indication that the opening argument of CSB's attorney was made in the context of R.C. 2151.414(B)(1)(d). Instead, the record demonstrates that the relevant portion of the opening argument was directed to R.C. 2151.414(D)(3), the second-prong best interest factor regarding the custodial history of the child. Such an argument is entirely consistent with the claims presented in both of CSB's written motions for permanent custody, but does not raise R.C. 2151.414(B)(1)(d), the "12 of 22" provision applicable to the first prong of the permanent custody test. Nor is there any indication that CSB's closing argument was directed to R.C. 2151.414(B)(1)(d). CSB never sought to amend either of its motions for permanent custody to include the ground specified in R.C. 2151.414(B)(1)(d), nor

did the trial court grant such a motion. An argument based on R.C. 2151.414(D)(3) does not satisfy the due process notice requirement as to R.C. 2151.414(B)(1)(d).

{¶17} In the course of holding that a motion for permanent custody which is based on "12 of 22" may only be filed after 12 months of reunification efforts have accrued, the Ohio Supreme Court has explained that "'a motion for permanent custody must allege grounds that currently exist.' *** A juvenile court lacks authority to grant an agency's motion on R.C. 2151.414(B)(1)(d) grounds if those grounds were not satisfied when the motion was filed." *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, at ¶24, quoting *In re K.G.*, 9th Dist. Nos. 03CA0066, 03CA0067, 03CA0068, 2004-Ohio-1421 at ¶13. It is implicit in the holdings of *In re C.W.* and *In re K.G.* that parents involved in permanent custody proceedings must be given notice of the grounds against which they must defend.

{¶18} We conclude that, in granting a motion for permanent custody, a trial court may not rely upon a ground unless that ground has been properly brought to the attention of the parents in a timely fashion. This conclusion reflects our long history of recognizing that due process fundamentally requires both notice and an opportunity to be heard and is implicit in the recent holdings of *In re C.W.* and *In re K.G.*

{¶19} CSB has also argued that there is no prejudice to Mother because the child was actually in the temporary custody of the agency for more than 12 of 22 continuous months. Mother disputes that factual claim. CSB cites *In re T.T.*, 9th Dist. No. 24727, 2009-Ohio-4513, at ¶26, in support of its position. In that case, this Court affirmed the judgment of the trial court which relied on "12 of 22" in sole satisfaction of the first prong of the permanent custody test although that ground was not included in the agency's motion. *In re T.T.*, 2009-Ohio-4513, at ¶32. The facts of that case, however, are very different from those in the present case. In *In re*

T.T., the claim that the child had been in the agency's temporary custody for more than 12 months was clearly brought to the attention of both the parent and the trial court during the hearing, and the parent had an entire month, given recesses in the hearing, in which to prepare a defense, but failed to do so. Id. at ¶28. Significantly, the parent did not dispute the factual claim that the child had been in the temporary custody of the agency for more than 22 months at the time the motion for permanent custody was filed. Id. at ¶30. On appeal, this Court concluded that the record supported the fact that the child had been in the temporary custody of the agency for more than 12 months and also that the agency had been offering reunification services to the mother during the entire time. Id. at ¶32. Accordingly, the parent in *In re T.T.* was given notice of the ground and an opportunity to defend against it, neither of which exists in the present case.

{¶20} Although this court concluded that "12 of 22" was present in *In re T.T.*, it also recognized that "12 of 22" ground "is not always a simple time calculation [because,] under certain facts, the inclusion of certain periods of time might be debatable." *In re T.T.*, 2009-Ohio-4513, at ¶31. For example, the time may be tolled during an appeal from adjudication or following the filing of a motion for permanent custody when the motion is grounded upon "12 of 22." Id., citing *In re E.T.*, 9th Dist No. 23017, 2006-Ohio-2413, at ¶73, and *In re K.G.*, 2004-Ohio-1421, at ¶19.

{¶21} In the present case, the existence of "12 of 22" is far from clear. The record demonstrates – and the parties agree – that J.M. was in the temporary custody of the agency for nine months and six days from the time of adjudication until the filing of the first motion for permanent custody, and also that J.M. was subsequently in the legal custody of her grandparents for five months. The fundamental point of dispute between the parties is the characterization of the five-month period between the filing of the first motion for permanent custody and the

hearing on that motion, and whether that time should accrue under R.C. 2151.414(B)(1)(d) and be held against Mother. Without actually deciding the question, we conclude that the issue does not present a simple time calculation and is certainly debatable. See *In re T.T.*, 2009-Ohio-4513, at ¶31.

{¶22} Clearly, that time would not accrue under R.C. 2151.414(B)(1)(d) if CSB *had included* "12 of 22" as a ground in its first motion for permanent custody. See *In re C.W.*, 2004-Ohio-6411, at ¶26. CSB claims that the time should accrue because the first motion for permanent custody was subsequently withdrawn, albeit not until the day of the hearing. It would seem incongruous, at the least, to permit that time to count against the parent when the agency *failed to include* it as a ground in either of its motions.

{¶23} This Court has held and the Ohio Supreme Court has affirmed that an agency may not bring a motion for permanent custody on the ground of "12 of 22" until at least 12 months of reunification efforts have taken place. *In re K.G.*, 2004-Ohio-1421, at ¶21; *In re C.W.*, 2004-Ohio-6411, at ¶23. *In re K.G.* indicated that permitting an agency to file a motion for permanent custody based on "12 of 22" grounds before the 12-month period had elapsed could become a "slippery slope." *In re K.G.*, 2004-Ohio-1421, at ¶27. If such a procedure were allowed,

> "an agency could feasibly file its motion for permanent custody on the '12 of 22' ground after a child had been in its temporary custody for only one or two months, and then wait for several months of delays. Rather than receiving 12 months of reasonable efforts by the agency to reunite the family, a parent's opportunity to work toward reunification could be reduced to a few short months. Such a result could not have been the intent of the legislature in enacting the '12 of 22' ground for permanent custody." Id.

The Ohio Supreme Court also concluded that, "in light of the purpose of R.C. Chapter 2151 and a court's obligation to provide parents with procedural protections in permanent custody proceedings, an agency must afford parents the full 12-month period to work toward

reunification before moving for permanent custody on R.C. 2151.414(B)(1)(d) grounds." *In re C.W.*, 2004-Ohio-6411, at ¶23. An opposite result "undermines the purposes of R.C. Chapter 2151 and interferes with the protection of parental rights afforded by the legislature." Id. at ¶25. Accepting the argument of CSB in the present case would raise the same concerns indicated by this court in *In re K.G.* and by the Ohio Supreme Court in *In re C.W.* as to whether the parent had been given 12 full months of reasonable efforts towards reunification.

{¶24} In sum, the issue of the characterization of the five-month period from the filing of the first motion for permanent custody until the hearing is certainly not easily resolved, and represents a claim against which Mother should have had an opportunity to defend because it was ultimately held against her. Mother did not have that opportunity in this case. The lack of notice of grounds against her and an opportunity to defend in a case as significant as one involving the termination of parental rights constitutes prejudice to Mother. Therefore, we cannot conclude that there was no prejudice to Mother as argued by CSB.

{¶25} Accordingly, Mother's first assignment of error is sustained. The second assignment of error is rendered moot.

III.

{¶26} Mother's first assignment of error is sustained. Mother's second assignment of error is rendered moot. The judgment of the Summit County Court of Common Please, Juvenile Division, is reversed and remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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 Appellee.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J
CONCUR

APPEARANCES:

JILL FANKHAUSER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.