[Cite as *In re K. G.*, 2010-Ohio-4399.]

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

IN RE: K. G.	C.A. No. 10CA0016
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 09-0891-PCU

DECISION AND JOURNAL ENTRY

Dated: September 20, 2010

CARR, Presiding Judge.

{¶1} Appellant, Alicia G., appeals from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, K.G., and placed him in the permanent custody of the Wayne County Children Services Board ("CSB"). This Court affirms.

I.

{¶2} Alicia G. is the mother of K.G., born September 8, 2008. The biological father of the child, Steven K., is not a party to the present appeal. K.G.'s father visited his son once during the proceedings, but made no other effort to comply with a case plan or to seek custody, explaining that he did not feel he would be able to provide the home K.G. should have.

{¶3} According to the initial complaint filed by CSB, hospital personnel contacted CSB shortly after the child's birth because Mother was expected to remain hospitalized while K.G. was ready to be released, and Mother was unable to provide an interim caregiver. In

addition, hospital personnel expressed concern with Mother's ability to parent K.G. Specifically, they noted that Mother was not feeding or changing K.G.'s diapers without a nurse's intercession. Mother was said to leave the baby lying in his crib in her room with his shirt and blanket dirty with vomit. She was also said to leave K.G. in the nursery for long periods of time without checking on him. Further, Mother reported a history of depression, anxiety, and seizures, and was not taking any medications for those conditions. On this basis, K.G. was placed in the emergency temporary custody of the agency on September 19, 2008.

{¶4} At a shelter care hearing conducted approximately two weeks later, the trial court found that it was in the best interest of the child to be returned home under the protective supervision of the agency. Six weeks later, CSB filed an amended complaint, which was based on renewed concerns that Mother was not able to properly care for the child. CSB indicated that it learned from the child's pediatrician that K.G. was not gaining weight as expected and had been diagnosed with scabies and severe diaper rash with extensive bleeding.

{¶5} On December 11, 2008, the trial court adjudicated K.G. to be a dependent child and placed him in the temporary custody of CSB. The court adopted a case plan that required Mother to: (1) participate with K.G. in Help Me Grow and Families Learning Together; (2) complete a psychological evaluation to assess her mental health needs and follow recommendations; (3) complete a drug and alcohol assessment and follow recommendations; and (4) provide for the basic needs of her child. Weekly supervised visits were scheduled.

{¶6} The psychologist assessed Mother as having a full-scale IQ of 64 and found that she had a long history of depression and psychological problems, epilepsy, and attention deficit hyperactivity disorder ("ADHD"). He diagnosed Mother with a major depressive disorder; recurrent and severe with psychotic features; post-traumatic stress disorder based on sexual

abuse as an adolescent; a cognitive disorder not otherwise specified; poly-substance dependence in early remission; mild mental retardation; a pervasive personality disorder with passive dependent traits and compulsive features; and a general adaptive functioning level that would suggest difficulty in meeting the everyday challenges of life and in taking care of other people. He recommended that Mother see a neurologist and possibly a psychiatrist for depression and anger, obtain medications for ADHD and epilepsy, see a psychotherapist for her mental health issues, and see a counselor for substance abuse issues. Subsequent case plan amendments added requirements for drug screening before scheduled visits and obtaining additional help with parenting skills.

{¶7} K.G. was also assessed and was found to have delays in such skills as crawling, walking, and grasping objects. The child currently receives weekly physical therapy.

{¶8} Mother was incarcerated from June through November 2009 on charges of breaking and entering, theft, and arson. In October 2009, CSB moved for permanent custody, and the matter proceeded to hearing. On March 30, 2010, the trial court terminated the parents' parental rights and awarded permanent custody to the agency. Mother appeals and assigns three errors for review.

II.

ASSIGNMENT OF ERROR I

> "The termination of parental rights was granted with input from a guardian ad litem who did not follow Rule 48 of Superintendence and therefore [his] testimony was given undue weight."

{¶9} Mother contends that K.G.'s guardian ad litem failed to comply with the rules of conduct for guardians ad litem as set forth in Rule 48 of the Rules of Superintendence for Ohio Courts and, therefore, his testimony in support of permanent custody was given undue weight by

the trial court. Specifically, Mother claims the guardian ad litem failed to comply with three portions of Sup.R. 48 and that enforcement of the rule is compulsory. In response, CSB contends that Mother entered no objection to the guardian ad litem's report or testimony and also contends that the Rules of Superintendence are merely guidelines for judges and do not create substantive rights in individuals.

{¶10} The Supreme Court of Ohio recently adopted Sup.R. 48 to govern guardian ad litem standards in Ohio and has indicated that this is the first rule that sets statewide standards regarding the appointment, responsibilities, training and reporting requirements of guardians ad litem. http://www.sconet.state.oh.us/GAL. The rule became effective March 1, 2009. The Rules of Superintendence are promulgated by the Ohio Supreme Court pursuant to Section 5(A)(1), Article IV, of the Ohio Constitution. Sup.R. 1(B).

{¶11} Through decisional law, the Supreme Court has indicated that the Rules of Superintendence are not designed to alter basic substantive rights. See *State v. Singer* (1977), 50 Ohio St.2d 103, 110. Certain portions of some Rules of Superintendence have been awarded mandatory status. See, e.g., *State ex rel Hillyer v. Tuscarawas Cty Bd. of Commrs*. (1994), 70 Ohio St.3d 94, 99; *Smith v. Dartt*, 6th Dist. No. L-05-1124, 2005-Ohio-1885, at ¶3. Ordinarily however, Ohio appellate courts have indicated that the Rules of Superintendence are general guidelines for the conduct of the courts and do not create substantive rights in individuals or procedural law. See, e.g., *Sultaana v. Giant Eagle*, 8th Dist. No. 90294, 2008-Ohio-3658, at ¶45; *State v. Porter* (9th Dist., 1976), 49 Ohio App.2d 227, 230; *State v. Gettys* (1976), 49 Ohio App.2d 241, 243; *State v. Smith* (1976), 47 Ohio App.2d 317, 328 (Krenzler, J. concurring).

{¶12} Sup.R. 48 has only recently become effective and there is little case law interpreting its application. Certainly, Sup.R. 48 provides, at the least, good guidelines for the

conduct of a guardian ad litem in meeting his or her responsibilities in representing the best interest of a child in order to provide the court with relevant information and an informed recommendation. Sup.R. 48(A) and (D). The Eleventh District Court of Appeals has specifically considered whether certain failures to comply with Sup.R. 48 constitute reversible error. *Allen v. Allen*, 11th Dist. No. 2009-T-0070, 2010-Ohio-475, at ¶29-31. In that case, the guardian ad litem did not attend the final day of hearings, in contravention of Sup.R. 48(D)(4) (stating that the guardian ad litem shall appear and participate at relevant hearings) and did not make his written report available to the parties until the day before the final hearing, in violation of Sup.R. 48(F)(2) (stating that the final report shall be made available to the parties seven days before the final hearing). Id. at ¶30. Although these actions by the guardian ad litem did not strictly comply with the rule, the appellate court concluded that the Rules of Superintendence do not have the force of a statute and that these violations of Sup.R. 48 are not grounds for reversal. Id. at ¶31.

{¶13} In the present case, Mother's argument goes to the weight of the guardian's testimony and not to admissibility or process. Upon consideration of the matters cited by Mother, we conclude that the argument presents no basis for reversal.

{¶14} Mother first complains that the guardian ad litem did not observe Mother with K.G., whereas Sup. R. 48(D)(13)(a) states that "unless impracticable or inadvisable *** a guardian ad litem shall *** observe the child with each parent." The guardian ad litem acknowledged that he did not observe K.G. with Mother, but asserted that he attempted to do so on two occasions. Regarding the first attempt, the guardian ad litem was informed on the morning of the visit that the visit was cancelled. The witness could not recall the reason for the cancellation, and we cannot otherwise discern the reason for that cancellation from the record.

Concerning the second attempt, the guardian ad litem waited 45 minutes for Mother, but she did not appear or call during that time. Some time after the guardian ad litem left, Mother did show up and reported having had transportation problems. Exhibit B, CSB's schedule of visitation results, indicates that Mother did not visit because she overslept on that day.

{¶15} The trial court did otherwise have some evidence for its consideration regarding the conduct of visits between Mother and K.G. because the caseworker testified to the visits she observed. The caseworker testified that Mother was able to take parenting instruction from her, but also that Mother needed instruction on basic parenting skills, such as burping the baby when bottle-feeding him and soothing the baby with techniques other than feeding, such as rocking or patting. The caseworker testified that Mother was encouraged to bring food or other items to visits, particularly for a lengthy four-hour visit, but she never did so. Mother was said to send text-messages and make cell-phone calls excessively during her visits. However, Mother never physically harmed the child or did anything that endangered him.

{¶16} Next, Mother complains that the guardian ad litem had little contact with Mother and never went to her residence, while Sup. R. 48(D)(13) states that the guardian ad litem "shall make reasonable efforts to *** contact all parties." The rule does not indicate that a guardian ad litem shall make repeated contacts. This guardian ad litem visited with Mother once while she was in jail, spoke with her on the telephone, and spoke with her a few times "in the hallway," presumably at CSB offices or in the courthouse. It is true that the guardian ad litem never went to Mother's residence, but the rule does not require that. In any event, there is no evidence that Mother ever had a stable home of her own. Mother was evicted from the apartment that she shared with a boyfriend shortly before the guardian ad litem was appointed, was incarcerated for

the next five to six months, and then slept on a couch at her sister's home for the three months before the permanent custody hearing.

{¶17} Finally, Mother complains that the guardian ad litem did not solicit information regarding her involvement with the Cadet and STEPS programs or obtain information about her drug screens from providers including her probation officer prior to the hearing. In support of her argument, she cites Sup.R. 48(D)(13)(f) and (g), which state that "the guardian ad litem shall *** [r]eview criminal, civil, educational and administrative records" and "[i]nterview *** medical and mental health providers, child protective service workers and relevant court personnel and obtain copies of relevant records."

{¶18} The guardian ad litem did review some records and interviewed some providers prior to the hearing. In particular, the guardian ad litem testified that he had reviewed the psychological assessment of Mother and interviewed K.G.'s pediatrician before the hearing. Additionally, the guardian ad litem attended the permanent custody hearing and heard testimony regarding Mother's efforts in substance abuse programs and counseling sessions. At the conclusion of the hearing, he testified that the evidence he had heard reinforced his previously held opinion and his recommendation that the child should be placed in the permanent custody of CSB.

{¶19} Moreover, the substance of the material that the guardian ad litem had not obtained in advance of the hearing was not persuasively in Mother's favor. As to the Cadet program, the in-court testimony revealed that Mother had been an active participant, but that she had only completed two weeks of the nine-week program. Regarding the STEPS program, Mother met with Counselor Jeff Higginson only once and had just recently signed up for the Choices program, which typically lasts four to five months. Finally, Mother's probation officer

testified that Mother had met regularly with her since her release from jail, but that she had recently conceded drug use.

{¶20} The record does not demonstrate that the conduct of the guardian ad litem was unreasonable or in disregard of the rule. Nor has Mother demonstrated prejudice resulting from that conduct. Moreover, Mother's assignment of error goes to the weight of the evidence, not the admissibility of it. The trial court heard the context and the explanations of the guardian ad litem in regard to his investigations and in support of his recommendations. The witness was subjected to thorough cross-examination by Mother's trial counsel. The judge was entitled to believe or disbelieve his testimony and to consider it in light of all the other testimony presented at the hearing. Moreover, Mother has failed to point to any specific findings in the ten-page judgment entry that demonstrate that the trial judge erroneously relied on the testimony of the guardian ad litem. Nor does she suggest that any particular finding is unreasonable or otherwise unsupported by the evidence because of improper reliance on the testimony of the guardian ad litem. In addition to the guardian ad litem, the caseworker and a psychologist testified in support of CSB's motion for permanent custody. Mother's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "The termination of Mother's rights to [K.G.] was granted against the manifest weight of the evidence presented before the Court."

{¶21} Mother contends that the weight of the evidence does not support the judgment of the trial court. In so doing, she specifically challenges the evidence in regard to a finding pursuant to R.C. 2151.414(E)(1), representing a failure of the parents to remedy problems that initially caused the removal of the child despite reasonable case planning and diligent efforts by the agency.

{¶22} Even if there were merit in Mother's argument, it would not constitute reversible error because the trial court made two additional findings pursuant to R.C. 2151.414(E) that are not challenged. R.C. 2151.414(E) provides that the trial court may determine that "one or more" of its subsidiary factors exist. Consequently, even if there were merit in Mother's argument, the unchallenged findings continue to stand and may support the judgment of the trial court as well. Mother has not challenged the trial court finding that permanent custody is in the best interest of the child. See R.C. 2151.414(B)(1). Accordingly, Mother's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "The Court's determination that [CSB] made reasonable efforts to eliminate the continued removal of the child from the child's home was against the manifest weight of the evidence presented before the Court."

{¶23} Mother has argued that the trial court erred in violation of R.C. 2151.419 when it found that the agency had made reasonable efforts to prevent the continued removal of the child from the child's home. CSB answered by citing *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, which held that the specific requirement to make a reasonable efforts determination, as set forth in R.C. 2151.419, does not apply to motions for permanent custody brought pursuant to R.C. 2151.413 or to hearings held on such motions pursuant to R.C. 2151.414. Id at ¶41. CSB's citation appears to be on point, and Mother has not responded to the argument.

{¶24} In that decision, the Ohio Supreme Court stated that R.C. 2151.419 applies only at hearings which "involve adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children, all of which occur prior to a decision transferring permanent custody to the state." Id. In the present case, the trial court found that the agency had made reasonable efforts at all the requisite times. It made

such findings at the time the child was initially removed on September 19, 2008; when the agency returned the child to the home after a shelter care hearing on October 3, 2008; when the child was placed in emergency temporary custody a second time on November 20, 2008; when it continued the child in emergency custody on December 2, 2008; and when it issued its adjudicatory and dispositional findings on December 11, 2008. Mother has not indicated or demonstrated with record evidence that she entered objections to the efforts of CSB during the course of these proceedings or to these findings. This Court must, therefore, presume the propriety of the reasonable efforts findings. See *In re T.K.*, 9th Dist. No. 24006, 2008-Ohio-1687, at ¶22, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, R.C. 2151.419 does not obligate the trial court to make an additional finding of reasonable efforts at the time of the permanent custody hearing.

{¶25} Nonetheless, this Court would also find Mother's argument that CSB did not make reasonable efforts lacks merit. In support of her argument, Mother claims that a number of the services offered by CSB were not viable options for her. Frequently, however, this was a result of her own doing. For example, Mother was referred to an in-patient substance abuse facility, but because of her behavioral issues and arson conviction, she was found to be ineligible for the program. Mother also complains that extended visits were never offered to her. The record indicates that Mother had at least one four-hour visit, but she failed to bring supplies and/or activities for that visit as recommended by her caseworker. When asked why visits were not extended, the caseworker explained that Mother was continuing to miss visits. In fact, Mother attended less than half of the scheduled visits. This explanation is reasonable and would support a decision not to extend the length or frequency of visits. When asked about problems during visits that might have been part of the reason for not extending visits, the caseworker

cited Mother's excessive use of her cell phone and the fact that Mother did not request extended visits. Because Mother needed more assistance with parenting techniques, the caseworker arranged for a provider to attend Mother's visits and help her with that. Mother was only required to make the phone call to start the program, but she failed to do so. Certainly, the fact that Mother served a five to six-month jail sentence in the middle of these proceeding deprived her of the ability to engage in some opportunities, but that is not the fault of CSB. Mother also complains that she was denied visitation during her incarceration, but Mother never requested that K.G. be brought to the jail for a visit, although she asked the caseworker about him and had the opportunity to make such a request. The question of bringing a child, especially an infant, into a jail would not be automatically implemented as it invokes a discretionary decision with due regard for the best interest of the child as well as safety issues.

{¶26} Mother's third assignment of error is overruled.

III.

{¶27} Mother's three assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, 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 Wayne, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

REBECCA A. CLARK, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.