

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: A. S.

C.A. No. 25512

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-3-180

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

Per Curiam.

{¶1} Appellant, Bernette A., (“Mother”) appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, A.S., and placed her in the permanent custody of Summit County Children Services Board (“CSB”). This Court affirms.

I.

{¶2} Bernette A. is the mother of A.S., born March 10, 2005. The biological father of the child is unknown. Mother has four other children, currently 14, 13, 11, and 2 years of age, but the present case concerns the custody of only five-year-old A.S. Mother’s three oldest children have been in the care of the maternal grandmother (“Grandmother”) for at least five years, having been placed there voluntarily by Mother while she was incarcerated. Mother’s parental rights to her fifth child, B.A., were involuntarily terminated by the juvenile court in

2009. *In re B.A.* (Mar. 30, 2009), Summit County Court of Common Pleas, Juvenile Division, Case No. DN08-02-0116.

{¶3} Facts relevant to the present matter began with a complaint filed by CSB shortly after the premature birth of Mother's youngest child, B.A. The child was medically fragile and at high risk of infection. Mother failed to attend scheduled educational sessions to learn how to care for the child, and she failed to otherwise visit or bond with the child. Through its complaint, the agency alleged that B.A. was neglected and dependent, and sought emergency temporary custody of him.

{¶4} Approximately one month later, CSB attempted to verify that three-year-old A.S., who was still in the care of Mother, was receiving appropriate care. According to the allegations of the complaint, filed on March 3, 2008, Mother would not allow the agency to verify that the child's needs were being met. CSB, therefore, filed another complaint, alleging that A.S. was dependent, and sought an order for the protective supervision of the child. Accordingly, at that point in time, the custody of both B.A. and A.S. was before the trial court. On April 21, 2008, the court adjudicated B.A. to be a dependent and neglected child, and adjudicated A.S. to be a dependent child. The court continued B.A. in emergency temporary custody and placed A.S. under the protective supervision of the agency.

{¶5} Four days later, A.S. was removed from Mother's home pursuant to Juv.R. 6 when Mother was arrested as a result of a drug raid conducted by Akron police. Cocaine was discovered in the pocket of a man who was present in the home with Mother. Mother was not sentenced to jail time, but was placed on probation. The record does not indicate the basis of her conviction. An older sibling was also in the home at the time, but that child was returned to the custody of the Grandmother. After these events, CSB was granted temporary custody of B.A.

and A.S. A.S. was placed in the same foster home where her younger brother had been placed earlier.

{¶6} A case plan was adopted by the trial court, which required Mother to: (1) attend visitation; (2) obtain a psychological parenting evaluation and follow through with all recommendations; and (3) submit to random drug screens as requested by CSB and, if any screens are positive, obtain a substance abuse assessment. In March 2009, the case plan was amended to include counseling of A.S. because of aggressive behaviors. She had begun kicking and hitting her foster caregivers. She also made a mess of her room after Grandmother told her she did not have to listen to her foster caregivers or go to time-outs. Mother and Grandmother were advised not to encourage poor behavior by A.S.

{¶7} Also in March 2009, the trial court considered a motion for the permanent custody of both children. At that time, Mother asked that both children be placed with Grandmother because she had no home or job. In addition, Mother was not present at the hearing because she was incarcerated on a recent charge of theft from a department store. At the conclusion of the hearing, the trial court granted permanent custody of B.A. to CSB, finding that the biological family had not become adequately trained in B.A.'s medical needs and lacked a bond with him.

{¶8} The court found differently as to A.S., however. The trial court noted that A.S. had no special needs and was found to be well-bonded with Grandmother and the three older siblings who resided with her. The trial court noted that A.S. had only been in custody for nine months before the motion for permanent custody was filed. The child's father abandoned her and Mother had made little progress on her case plan, but the trial court was not convinced that the severance of the child's ties with her biological family was in her best interest. At the same time, the trial court was not willing to place the child with Grandmother until a recent disclosure

that A.S. may have been sexually offended by a sibling in Grandmother's care was fully investigated. Accordingly, the trial court denied the motion for permanent custody of A.S. and granted a six-month extension of temporary custody to allow the family to further their efforts toward reunification. By September 2009, A.S.'s counselor had ruled out any concerns of sexual abuse of A.S.

{¶9} CSB filed a motion for permanent custody of A.S. on January 5, 2010. Mother filed her own motion for legal custody or, in the alternative, for legal custody to Grandmother. On July 13, 2010, the trial court granted permanent custody of A.S. to CSB, finding that the child had been in custody for more than 12 of 22 consecutive months and also finding that permanent custody was in the best interest of the child. Mother appeals and assigns one error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED IN FINDING THAT PERMANENT CUSTODY WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE; THE GRANT OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE; AND WAS CONTRARY TO THE BEST INTEREST OF THE MINOR CHILD.”

{¶10} Mother argues that the judgment of the trial court, finding that permanent custody was in the best interest of the child, was not supported by clear and convincing evidence and was against the weight of the evidence. Before a juvenile court may terminate parental rights and award permanent custody of a child to a proper moving agency, 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 a consecutive 22-month period, 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) that 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.

{¶11} The trial court found that the first prong of the permanent custody test was satisfied because A.S. had been in the temporary custody of CSB for at least 12 of 22 consecutive months. Mother does not contest that finding, but rather challenges only the finding that permanent custody was in the best interest of the child.

{¶12} When determining whether a grant of permanent custody is in a child's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the child, the custodial history of the child, the child's need for permanence in his life, and whether any of the factors set forth in R.C. 2151.414(E)(7) through (11) apply to the situation. See *In re R.G.*, 9th Dist. Nos. 24834 & 24850, 2009-Ohio-6284, at ¶11 and R.C. 2151.414(D)(1)(e). "Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors." *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711. See, also *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, at ¶24.

{¶13} When evaluating whether a judgment is against the manifest weight of the evidence in a permanent custody case, this Court reviews the entire record and

"weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the [judgment]." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶14} Accordingly, before reversing a judgment as being against the manifest weight of the evidence in this context, the court must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice. See *In re M.C.*, 9th Dist. No. 24797, 2009-Ohio-5544, at ¶8 and ¶17.

{¶15} The initial goal in this case was reunification of A.S. with Mother. At the time of the March 2009 hearing, the focus had shifted to Grandmother because Mother was incarcerated, and she did not have a job or residence of her own. By the time of the permanent custody hearing on which this appeal is based, Mother had a job, had plans to take classes for medical billing, and was about to move into her own residence. She, therefore, sought custody in her own right or, alternatively, to Grandmother.

{¶16} A.S. worked with two counselors during this case. First, Elizabeth Franczak, from Child Guidance and Family Solutions, worked with A.S. on her aggressive behavior, learning to cope with change, and dealing with the stress of being removed from her home. She diagnosed A.S. with neglect.

{¶17} Next, Deborah Pittak, from Northeast Ohio Behavioral Health, found that A.S. had many of the characteristics of reactive attachment disorder, although the condition was not “full-blown.” The characteristics of the disorder which the child had were that she was superficially engaged, was defiant, had a lot of nonsense chatter, and had begun trying to divide her caregivers. Ms. Pittak emphasized that children with this disorder are challenging because they do not respond to normal parenting. For example, you might have to tell the child to do the opposite from what you actually wish them to do. Ms. Pittak’s goals were to decrease her aggression, increase parenting management, and increase attachment and socialization.

According to Ms. Pittak, the cause of these symptoms is usually a break in attachment, such as from a parent being in jail, movement from different homes, and a lack of the primary attachment. Ms. Pittak believed that the child had had her first consistent parenting while in the foster home.

{¶18} Mother was said to have had a close relationship with her daughter when this case began, but it has deteriorated over time. Mother's attendance at scheduled visits was sporadic, and she was also incarcerated for nine months during the pendency of the case. A.S. grew to not want to come to visits and would cry and fight with her transporters, saying that she would rather stay at school.

{¶19} Tanya Vanderveen, the interim caseworker, testified about some of the unpleasant interaction between Mother and A.S. during visits. Mother was not pleased with the care given to A.S.'s hair by the foster parents. Mother's response was to take A.S. into the kitchen area of the visitation center and wash her hair while the child screamed. According to Ms. Vanderveen, the child screamed another hour while Mother fixed her hair. Also, Mother often changed her daughter's clothing because she believed it was not clean or somehow inappropriate. Mother testified that she often went out to get food for her daughter during visits, apparently taking time out of the visit to do so.

{¶20} In addition to failing to visit regularly, Mother was not otherwise compliant with her case plan. One of her early drug tests was positive for marijuana, but she never completed a drug assessment. Mother did not attend A.S.'s therapy sessions with her. Mother complained that, although Grandmother was informed about the sessions, she was not. On the other hand, Mother also testified that Grandmother kept her informed about A.S. and she was living in

Grandmother's home at that time. Caseworker Flett stated that Mother made no effort to contact her and recommit to the case plan when she was released from prison in November 2009.

{¶21} Mother's criminal history included convictions for theft in January 1998, forgery in March 1999, and escape in December 1999. She was also incarcerated at other points in time, but the record is not clear as to the type of convictions she had. Mother was apparently in prison in 2005 when she gave custody of her three oldest children to Grandmother. She was also incarcerated sometime between 2005 and 2008, because Grandmother had custody of A.S. during that time. At the time of A.S.'s removal after the drug raid in April 2008, Mother was placed on probation. Mother had a theft conviction in early 2009, violating the terms of her probation, and served nine months in the Ohio Women's Reformatory until November 25, 2009.

{¶22} Mother alternatively asked for custody to be awarded to Grandmother, who had custody of the three older siblings, ages 11, 13, and 14. Grandmother stated that she was willing to assume custody of five-year-old A.S. as well, and A.S. was said to have a comfort level with her. Ms. Flett believed that A.S. was more closely bonded to Grandmother than to Mother, but that bond also decreased over time. Moreover, the agency presented evidence that, although Grandmother may have been able to provide a suitable home for A.S.'s much older siblings, she would not provide a suitable placement to meet the long-term needs of such a young child.

{¶23} Melissa Vein, the kinship care assessor, evaluated Grandmother's home as a possible placement for A.S. Ms. Vein testified that Grandmother was cooperative in the interview process. Ms. Vein expressed concern, however, with the fact that Mother, who had an extensive criminal history and issues of drug abuse, was either living in the same home or visiting there daily. Ms. Vein believed that Grandmother tends to minimize her daughter's problems and disputes the need to supervise her during visits with the children at her home.

Grandmother had stated that she did not understand why Mother did not have custody of A.S. since she did not beat her or yell at her. Ms. Vein was concerned with Grandmother's ability to protect A.S., given her lack of understanding of why Mother does not have custody and Mother's frequent access to her home. She noted that Grandmother appeared to be very lethargic generally and even fell asleep during one visit. Ms. Vein reported that Grandmother had diagnoses of depression, anxiety, high blood pressure, degenerative disk disease, diabetes type 2, pancreatitis, and chronic pain. Ms. Vein's conclusion was that Grandmother should not be approved for placement of A.S.

{¶24} Caseworker Flett testified similarly regarding her concern that Grandmother would not be willing or able to protect A.S. in the future. Ms. Flett explained that Grandmother claimed to want to protect all the children and indicated that she would not allow Mother around them, but at the same time, Grandmother stated she did not understand why she should supervise Mother with the children and does not know why B.A. was adopted. Notably, one of the children in her custody was at Mother's home when the drug raid occurred, apparently because Grandmother had allowed the child to stay there.

{¶25} Other service providers raised concerns about placing A.S. with Grandmother. Ms. Pittak thought that Grandmother often seemed confused by details. For example, she did not understand that B.A.'s adoption was a permanent placement. She also had some confusion about the custody process and procedures, and never understood why Mother did not have custody of A.S. Ms. Pittak believed Grandmother also had difficulty focusing on some of A.S.'s conditions and needs.

{¶26} Another concern was that Grandmother did not initiate interaction with A.S. at visits and remained disengaged. The aides urged her to get more involved with the child, and

she reluctantly tried, but she also explained that she preferred just watching A.S. If there were other children present, A.S. would play with them, but if there were not, then sometimes the aide or the caseworker would play with A.S. so that she was not playing alone. The CSB visitation aide testified that Grandmother was often “low energy” and dozed off for 25 minutes during one visit. According to the guardian ad litem, Grandmother got very emotional and loud at another visit, upsetting A.S. By April 2009, the interaction between family members had become so inappropriate and the visits had become so upsetting to A.S., that Ms. Pittak, recommended that visits should take place in her office.

{¶27} Grandmother testified at the hearing. She stated that she is bonded with A.S. and is willing to assume custody of her. Grandmother’s testimony was conflicting in several respects, however. Although she admitted that she fell asleep at a visit for a few seconds due to her medications, she also said that her medications did not affect her. She said she wanted custody of A.S. and could handle it, but there were also reports that she was occasionally overwhelmed by the responsibilities of the three children she already had. She testified that she would supervise A.S. and Mother, but also said that she has no problem with Mother coming to her home to visit with the children and has no concerns with leaving her alone with A.S.

{¶28} Grandmother’s counselor was called to testify. She explained that Grandmother has been diagnosed with depression and anxiety. Her activities are somewhat limited by the fact that she does not drive. The counselor also stated that Grandmother does not interact with others as much as she could due to her high anxiety. She has some panic attacks and “spells” from stress and depression, but she is psychologically stable and compliant with her treatment and medications. She believes Grandmother is a very nurturing, caring, stable person and she also believes that kinship placements are the most advantageous. The witness conceded, however,

that she never saw Grandmother in a parental position and, therefore, cannot express whether she could take on that role.

{¶29} The guardian ad litem believes that A.S. loves both her Mother and Grandmother. And while some visits are positive, many are tense and stressful. Mother focuses on issues of hair, grooming, clothing, and things that A.S. “isn’t into.” A.S. squirms and cries until she stops. The guardian ad litem explained that Grandmother has slept or been “out of sync” at visits. She does not tend to play with A.S. and the child has to play by herself or with other children.

{¶30} As to other relationships of the child, A.S. is very close to her younger brother, B.A. The two children hug, wrestle on the floor, and kiss each other. She knows his needs and understands his illness. She is also close to her foster parents and their relatives. Therapist Pittak testified that it would be hard on A.S. to be permanently separated from her younger brother. The foster parents have indicated that they are interested in adopting A.S. should that become a possibility.

{¶31} The wishes of the child were expressed by Beverly Burton Lee, the guardian ad litem. She concluded that it would be in the best interest of the child to be placed in the permanent custody of CSB. She was said to be doing very well in her foster home. Ms. Lee believed that the biological family had a great deal of negativity within it and A.S. cannot be herself with them, whereas she is very happy and accepted in her foster home. When Ms. Lee asked the child whether she would like to go home with Grandmother, A.S. said “not right now.” She did not ask the child whether she wanted to go home with Mother. The guardian ad litem believed that the consistency A.S. has been shown within the foster family will assist her in her growth and development.

{¶32} Although A.S. was technically in Mother's custody for the first three years of her life, A.S. stayed with Grandmother much of that time. Since then, A.S. has been placed in the same home as her brother, who has now been adopted by those parents.

{¶33} There was testimony before the trial court that permanent custody was in the child's best interest. Therapist Pittak testified that although Mother loves her daughter, she has not demonstrated the ability to parent A.S. on a consistent basis. As to Grandmother, she found it difficult to actively interact with A.S. during visits, and there was concern that Grandmother did not appreciate the need to protect A.S. if she were awarded custody. There are no other relatives willing to provide for her care.

{¶34} As to the fifth best interest factor, Mother has had her parental rights permanently terminated with respect to a sibling of A.S. See R.C. 2151.414(D)(1)(e) and R.C. 2151.414(E)(11).

{¶35} Upon review of the record, this Court concludes that there was clear and convincing evidence before the trial court from which it could find that permanent custody was in the child's best interests. Furthermore, the record does not support a conclusion that the trial court clearly lost its way and created a manifest miscarriage of justice. Consequently, the trial court did not err in denying Mother's motion for legal custody to herself or Grandmother, in terminating Mother's parental rights, and in placing A.S. in the permanent custody of CSB. Mother's sole assignment of error is overruled.

III.

{¶36} Mother's assignment of error is overruled. The judgment of the Summit 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 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.

EVE. V. BELFANCE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

CARR, J.
DISSENTS, SAYING:

{¶37} I respectfully dissent from the majority's decision because the trial court could have achieved a legally secure permanent placement of A.S. through a less drastic dispositional placement. As this Court has frequently emphasized, the termination of parental rights has been

described as “the family law equivalent of the death penalty in a criminal case.” *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, ¶14, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Permanent custody to a children services agency is a disposition of last resort, after the court has ruled out potential placements that would preserve the family, such as legal custody to a relative. See *In re A.A.*, 9th Dist. No. 22196, 2004-Ohio-5955, at ¶18-19. In this case, although CSB did not believe that Grandmother could provide the ideal placement for A.S., she had been providing a suitable home for A.S.’s older siblings for five years; A.S. had developed a bond with those members of her family; and Grandmother was willing to take long-term custody of her. CSB has not explained why Grandmother provides a suitable placement for the older siblings but cannot do so for A.S. Moreover, when the trial court denied CSB’s prior motion for permanent custody of A.S., it explicitly found that legal custody to Grandmother was a “viable option” for a permanent placement of A.S., stressing that A.S. had spent “a great deal of time” with Grandmother prior to her removal from the home, that her visits with Grandmother were appropriate, and that there was a close bond between A.S., Grandmother, and the older siblings. Because the trial court should have placed A.S. in the legal custody of Grandmother, rather than severing A.S.’s ties to her family, I would reverse the judgment of the trial court.

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

LINDA BENNETT, Attorney at law for CASA/GAL.