

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: I. W.

C.A. No. 25583

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 08-02-140

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

BELFANCE, Presiding Judge.

{¶1} Appellant, Kristen T., has appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, I.W., and placed him in the permanent custody of Summit County Children Services Board (“CSB”). This Court affirms.

FACTS

{¶2} I.W. was born on February 18, 2008, to Kristen T. (“Mother”) and David W. (“Father”). Mother has appealed from the order that terminated her parental rights to I.W. As to Father, although he cared about his son, he eventually concluded that he was not in a position to take care of him and voluntarily surrendered his parental rights.

{¶3} CSB sought custody of I.W. two days after his birth, alleging that neither of the parents would be able to meet his needs. Mother and Father each had significant behavioral and

mental health issues, and they lived in separate group homes, neither of which permitted children to reside with the residents. In addition, there was a history of violence between the parents.

{¶4} Each parent was given a case plan, but neither made meaningful progress towards reunification with I.W. Following a hearing held on CSB's motion for permanent custody as well as on a relative's motion for legal custody, the trial court denied the motion for legal custody and granted permanent custody to CSB.

{¶5} Mother has appealed from the trial court judgment. In lieu of a merit brief, her appellate counsel filed a brief in accordance with *Anders v. California* (1967), 386 U.S. 738, in which he concluded that there were no meritorious issues to raise on Mother's behalf and that an appeal would be frivolous. Counsel moved the Court to accept the *Anders* Brief in lieu of a merit brief and to permit him to withdraw from the case. Mother was served with a copy of that brief and filed a response. She has argued that she should have custody of her child, but did not assign any additional legal errors. CSB did not file an appellate brief.

POSSIBLE ISSUE FOR REVIEW

{¶6} Mother's counsel presented one possible issue for review: whether the juvenile court's order granting permanent custody is supported by clear and convincing evidence and whether it is supported by the manifest weight of the evidence. Mother's counsel concluded that there is no merit in such a claim.

{¶7} 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. Clear and convincing evidence is that which will “produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶8} The trial court found that the first prong of the permanent custody test was satisfied because the child had been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. That finding is supported by the record. Therefore, the trial court considered whether permanent custody was in the child’s best interest.

{¶9} 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 R.C. 2151.414(D): (1) the child’s personal interactions and relationships; (2) the child’s wishes regarding placement; (3) the custodial history of the child; (4) whether there are appropriate alternatives to permanent custody; and (5) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply. R.C. 2151.414(D).

{¶10} 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.

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.

BEST INTEREST OF THE CHILD

{¶11} I.W. is a special needs child who, at six months of age, was diagnosed with global delays across all the domains. He was referred for early intervention services, including occupational, physical, and speech therapy. He had a protruding tongue and completed a swallow study that disclosed a need to use a thickener for his liquids. He began attending a day care class for special needs children. He has problems with hearing and had a tube put in one of his ears. When he turned two years of age, I.W. was found to be at a ten to twelve-month level of development

{¶12} I.W.'s relationship with his foster mother is a strong one. He looked to her for comfort, cried when he had to leave her, and was happy to return to her. According to the caseworker, the foster mother takes very good care of I.W. and she makes sure the child is ready for medical appointments and for family visits. The caseworker also indicated that the foster mother was very enthusiastic about receiving services in her home and providing therapies for I.W. While in foster care, I.W. has developed physically and emotionally. When the agency decided to file for permanent custody, the foster mother expressed a willingness to pursue adoption. She did not want him to have to move again. I.W. also gets along well with another child living in the foster home.

{¶13} I.W. had an opportunity to see his parents at separate weekly visitations held at the CSB visitation center. Each of the parents has significant mental and behavioral concerns.

Mother was principally raised by her maternal aunt, Michelle Yates. As a young adult, Mother left the Yates home to stay with a series of friends and eventually ended up in an abandoned building. When Ms. Yates learned where Mother was living, she approached the Summit County Board for Developmental Disabilities about getting Mother placed in a group home because she believed she could not maintain Mother's health and safety. In addition, and at about the same time, a guardianship was established for Mother through Advocacy and Protective Services.

{¶14} Mother has been diagnosed with pervasive developmental disability, borderline intellectual functioning, posttraumatic stress disorder, and attention deficit disorder. As a result of her disabilities and diagnoses, Mother was said to have a low tolerance for frustration and a tendency to become verbally and physically aggressive. Mother demonstrated her aggressive tendencies by ripping a telephone out of the wall at the group home, losing her vocational job placement due to aggressive behavior against a co-worker, and having "heated" arguments with Ms. Yates.

{¶15} According to Mother's case manager from the local board for developmental disabilities, Mother is not able to take care of herself independently and requires 24-hour staff supervision to maintain her health, safety, and welfare. She believes that Mother has not demonstrated the skills to take care of herself and doubts her ability to take care of a child. The case manager believes that it is in Mother's best interest to remain in her group home. There, Mother is offered daily structure, prepared meals, housekeeping services, security, and assistance with medical appointments and medications. She is able to visit the Yates home on alternate weekends. In addition, Mother is engaged in various therapy groups and activities to assist her in developing better coping skills, anger management skills, and tolerance against frustration. She

is also involved in a program at the Blick Clinic to help her develop skills for another vocational job placement.

{¶16} Upon the initiation of this case, Mother was given a reunification case plan that included a psychological and parenting assessment and mental health counseling. The goals of the case plan were to help Mother to address her unrestrained impulses, anger, and mental health issues and to understand how those issues impacted her parenting ability.

{¶17} The psychologist who conducted the assessments testified that Mother's knowledge of parenting skills was poor. For example, Mother had trouble understanding normal body temperature or how to properly take a temperature, even after instruction. When asked to describe the child's history, Mother would report it inaccurately. For instance, she reported that I.W. used more words than he actually could, and that he choked on foods that did not in fact cause him a problem. Mother was reportedly very defensive at the suggestion that I.W. had any problems or delays, but, at the same time, she insisted that she was the only person that could help him. The psychologist believed that Mother did not really understand her child's disabilities.

{¶18} The CSB caseworker testified that although Mother completed a psychological/parenting evaluation and parenting classes, she had not been able to implement the skills she was supposed to have learned. Mother would take a learning point from her parenting class and insist on implementing it in one way without making any adjustments for her child. In addition, Mother had not mastered her anger issues. There were reports of Mother ripping a phone from the wall of the group home, slamming doors, and using assaultive behavior during her vocational job assignment. She had been stalking Father and violated a restraining order issued against her. On one occasion, Mother did not like the answer given to her request for

visits outside the agency. She angrily left the visitation center and almost swung the door back on I.W. who was toddling behind her. The caseworker stopped the door from striking the child and picked him up. According to the caseworker, Ms. Yates was also present, but did nothing to help the child or to correct Mother's behavior.

{¶19} A CSB visitation aide described her experience in monitoring the parents' visits over the course of one and one-half years. The parents visited separately, but the child reacted similarly to both of them. The aide explained that it was usually difficult to remove I.W. from his foster mother, because he would cry and reach for her. Once inside the visitation center, the child would typically grab his coat, say "bye" to everyone, and try to go up the stairs to leave the center. At the conclusion of the visit, I.W. would reach out to the foster mother and appeared to be happy to be with her again.

{¶20} The aide testified that, although the parents were given information about I.W.'s dietary restrictions and a list of permissible foods, Mother became upset that she could not give her son pizza crust. Mother also gave him cereal puffs against advice that this food could cause him to choke. The aide further indicated that Mother did not focus on I.W. during visits, but instead, would ask the aide questions about what Father did during his visit. A second aide testified similarly, stating that Mother did not actively interact with her child while they were together and that I.W. tended to play alone during visits. On another occasion, after Mother had been harassing Father through phone calls, Mother reportedly said she wished he would get hit by a truck and die.

{¶21} Ms. Yates was also considered as a potential custodian, and her home was considered as a possible site for visits. In January 2009, CSB conducted an assessment of the Yates' home. The assessor found that Ms. Yates' immediate family required a good deal of

attention. She found that Ms. Yates' son was in counseling and on medication for behavioral problems, her daughter had learning disabilities, and her husband, from whom she was separated, presented safety concerns because of a conviction for misdemeanor child endangerment. The assessor believed that adding I.W. to the home, with all of his special needs, would overextend Ms. Yates.

{¶22} Ms. Yates was incorporated into Mother's counseling sessions in order to address their "chaotic" relationship and to better address the options for future placement. Although Ms. Yates was receptive to the psychologist's suggestions, she failed to implement them consistently. The psychologist explained that Mother had difficulty with authority, and that there was concern as to whether Ms. Yates could manage Mother's behavior.

{¶23} Ms. Yates testified in support of her motion for legal custody and contended that her experience in raising three special needs children, including Mother, would help her in caring for I.W. The caseworker stated in response that I.W.'s problems are different, however. He has significant global developmental delays and a lack of normal physiological development. He requires physical, occupational, and speech therapy, as well as doctor appointments and treatments.

{¶24} The caseworker noted that Ms. Yates had recently obtained a nursing degree and would be working 12-hour shifts, a schedule that could be difficult to accommodate with day care. In addition to other members of the family, Ms. Yates also had a grandchild. The caseworker expressed concern that Ms. Yates was already strained by having a new job and caring for all the needy members of her family, such that assuming custody of I.W. would be too much for her, especially if Mother were also in the home occasionally. Because Ms. Yates already had "a full plate," the agency was concerned that I.W.'s numerous services would not be

maintained by Ms. Yates. Ms. Yates, herself, stated that if taking custody of I.W. could pose a risk to her losing her grandchild, she would not want to do that.

{¶25} The caseworker believed and told Ms. Yates that Mother was not ever going to be able to improve her parenting ability or have any more self-control. Ms. Yates seemed to understand that, but then would intermittently say she still wanted to co-parent with Mother. The caseworker believed Mother was not able to control her own behavior and that her family members could not control her either. The caseworker believed that Ms. Yates had trouble saying no to Mother and that she attempted to accommodate her instead. For example, she let Mother back into her home after she believed Mother had put her granddaughter at risk through her behavior. The caseworker believed that if I.W. was placed in a home with Mother, one of them was likely to be hurt.

{¶26} Notwithstanding her awareness of the agency's concern for the safety of Mother and child if they were placed together, Ms. Yates applied to the probate court to either allow Mother to be her own guardian or for the court to name her as Mother's guardian. The probate court denied a change of guardian. The probate court also denied Ms. Yates' request to permit Mother to live independently or with Ms. Yates, as opposed to living in the group home. Adding to the concerns regarding Ms. Yates, there was evidence before the trial court that Ms. Yates had disregarded prohibitions against allowing her husband, because of his history of violence with children, to be around I.W. or allowing Mother, because of her history of violence and poor understanding of child care, to be alone with I.W.

{¶27} Because of the young age of the child, the trial court was permitted to consider the opinion of the guardian ad litem as to the child's wishes for placement. The guardian ad litem believed an award of permanent custody to CSB was in the best interest of the child.

{¶28} The custodial history of I.W. is that he was removed from Mother two days after his birth and he has been in the custody of CSB since that time, including at least 12 of 22 consecutive months. Two attempts to place I.W. with a paternal aunt were unsuccessful. He has been with the same foster mother for the bulk of the time he has been in the temporary custody of the agency.

{¶29} There was testimony before the trial court that I.W. needed a permanent home and that moving him again could be detrimental to his development. The caseworker testified that the child is at a critical stage for attachment issues and that a placement change at this point could be very detrimental to the child. In fact, she testified that if I.W. were removed from his foster parents, she would expect to see regression in him. She stated that such changes can cause developmental delays and difficulties with future attachment. Other potential difficulties include the possibility of eating problems, sleep problems, aggression, and loss of trust in the new caregiver.

CONCLUSION

{¶30} There was ample evidence before the trial court to support its conclusion that permanent custody was in the best interest of the child. The issue presented for review by Mother's attorney lacks merit. Mother's responsive filing clearly reveals that she loves her son, but contains no arguments that were not otherwise considered by this Court. Moreover, this Court has carefully reviewed the entire record, and that review has failed to reveal the existence of reversible error. Accordingly, this appeal is without merit and wholly frivolous under *Anders v. California* (1967), 386 U.S. 738. The request by Mother's attorney for permission to withdraw is granted. 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

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

PAUL GRANT, Attorney at Law, for Appellee.

MARY LYNN PAC-URAR, Attorney at Law, for Appellee.

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

JOE KERNAN, Attorney at Law, for CASA/GAL.