

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

IN THE MATTER OF:

M.O.

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CASE NOS. CA2011-01-003
CA2011-01-008

OPINION
6/13/2011

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 09-D00544

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PIPER, J.

{¶1} Appellants, the biological parents of M.O. (Mother and Father), appeal the decision of the Warren County Court of Common Pleas, Juvenile Division, granting

permanent custody of their daughter to Warren County Children Services (WCCS). We affirm the decision of the juvenile court.

{¶2} Mother, who was already married to another man, married Father and the two resided together. M.O. was born issue of this relationship. Mother's sister, with whom Father and Mother were living, asked Father to move out of the house when she discovered he had been incarcerated for credit card theft. Father then moved to Virginia to be near his other children and family.

{¶3} WCCS became involved with M.O. when it received information that Mother, M.O.'s only caregiver, had been incarcerated on drug charges. On January 16, 2009, WCCS filed a complaint alleging that M.O. was dependent after she had been removed from Mother's custody and placed into emergency shelter care. M.O., who was two years old at the time of her removal, was placed in foster care with Amy and Joe McReynolds.

{¶4} On March 16, 2009, Father returned to Ohio from Virginia and moved for legal custody of M.O. On March 17, 2009, M.O. was adjudicated dependent as alleged in WCCS's complaint. A dispositional hearing was held, and M.O. was placed in the temporary custody of WCCS. After WCCS was granted extensions of temporary custody, Father withdrew his motion for legal custody. On August 6, 2010, the state moved for permanent custody, and Father renewed his motion for legal custody on August 31, 2010.

{¶5} At various times since M.O. was adjudicated dependent, Father has had several visitation schedules including supervised visits, unsupervised day visits, and overnights. However, Mother has never had unsupervised visitations due to her substance abuse problems. WCCS worked with Mother and Father to develop a case plan, which called for clean drug screens, mental health assessments, as well as stable employment and housing. Neither Father nor Mother has been able to maintain the employment and housing called for in the plans.

{¶6} After WCCS moved for permanent custody, the juvenile court held a three-day hearing during which it heard testimony from Mother, Father, Amy McReynolds, and children's therapist Deborah Joy, as well as case workers from WCCS, the children's guardian ad litem (GAL), and two witnesses who testified to Father's past housing and employment situations. The juvenile court granted permanent custody to WCCS and terminated all of Mother and Father's parental rights and responsibilities. Mother and Father filed separate appeals, raising the following assignments of error.

{¶7} Father's Assignment of Error No. 1:

{¶8} "THE COURT ERRED IN GRANTING PERMANENT CUSTODY OF THE CHILD TO WARREN COUNTY CHILDREN'S SERVICES."

{¶9} Mother's Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN FINDING, BY CLEAR AND CONVINCING EVIDENCE, THAT THE BEST INTEREST OF THE CHILD, PURSUANT TO THE FACTORS SET FORTH IN R.C. 2151.414(D), WAS REACHED BY GRANTING PERMANENT CUSTODY TO WARREN COUNTY CHILDREN SERVICES."

{¶11} In their first assignment of error, Mother and Father argue that the juvenile court erred in granting custody to WCCS. This argument lacks merit.

{¶12} Before natural parents' constitutionally protected liberty interest in the care and custody of their child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in

the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520.

{¶13} Pursuant to R.C. 2151.414(B)(1), a court may terminate parental rights and award permanent custody to a children services agency if it makes findings pursuant to a two-part test. First, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D). Second, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re E.B.*, Warren App. Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶14} The juvenile court found by clear and convincing evidence, and Mother and Father do not deny, that M.O. has been in the temporary custody of WCCS for more than 12 months of a consecutive 22-month period as of the date WCCS filed the permanent custody motion. However, Mother and Father dispute the juvenile court's finding that granting permanent custody of M.O. to WCCS is in the child's best interest.

{¶15} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶16} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶17} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶18} "(c) The custodial history of the child, including whether the child has been in

the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ***;

{¶19} "(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶20} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶21} With respect to R.C. 2151.414 (D)(1)(a), the juvenile court found that M.O. has been in the McReynolds' custody and care for almost two years as of the hearing date, and that she is bonded to them and doing well in their custody. The juvenile court also found that M.O. regards the McReynolds as her primary caregivers and looks to them for her nurturance. Conversely, the juvenile court found that contact with Mother and Father adversely affects M.O.

{¶22} The record indicates that M.O. has rapidly progressed since the time she entered the foster family's care two years ago. When M.O. first arrived at the McReynolds, she was recovering from dental surgery in which 10 of her baby teeth were removed, and two teeth were unsuccessfully capped. After the two capped teeth were removed, M.O. was left with eight of her 20 baby teeth. Upon her arrival with the McReynolds, M.O. was also sickly, scared, and clingy, and vomited and had a watery diarrhea. M.O. knew only a few words, and was forced to use nonverbal communication techniques with her foster family.

{¶23} Since her time with the McReynolds, M.O. has developed rapidly. She is now potty trained, speaks very well, and attends preschool where she is doing well socially and academically. M.O. also responds well to discipline and correction from the McReynolds, and behaves well for them. M.O. has also benefited from weekly sessions with children's therapist, Deborah Joy.

{¶24} The record also indicates that M.O. has responded negatively to visitation with

Mother and Father. Before most visits, M.O. complains of an upset stomach, and often has diarrhea preceding or on her way to the visits. In an attempt to make M.O. more comfortable with the visits, Amy McReynolds placed a picture of Mother on the refrigerator and talked positively of Mother to M.O. However, M.O. would throw the picture of Mother, sit her chair leg on the picture, or step on it.

{¶25} Amy McReynolds testified that M.O.'s behavior after returning from visits was often "chaotic" and that she would demonstrate angry or aggressive behavior such as hitting the family's dogs, kicking the seats of Amy's van, squeezing her baby doll's head, or fighting with her foster siblings. After one visit, M.O. punched the van window with her fist after Mother hugged her and shut the door. M.O. also pointed to angry or sad faces during her sessions with Deborah Joy when asked to point to the face that describes her feelings after visits.

{¶26} After returning from visits, M.O. would also exhibit signs of regressive behavior such as being "clingy" with Amy, speaking "baby talk," wanting to be held like a baby, having nightmares, or purposely moving her bowls on the bathroom floor instead of using the toilet. Amy also testified that Mother and Father would return M.O.'s clothes after their visits and that they would often be wet with urine or smelling heavily of smoke.

{¶27} With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that M.O.'s GAL suggested granting WCCS permanent custody. Although the juvenile court did not interview M.O. directly, it found M.O.'s behavior indicative of her desire to stay with her foster parents rather than being reunified with Mother or Father.

{¶28} According to the record, M.O.'s GAL testified at the hearing and recommended that the juvenile court grant permanent custody to WCCS because Mother and Father are unable to provide for M.O.'s needs and have not shown the stability necessary to support M.O. The GAL also stated that M.O. has thrived with her foster family and that removing her

from them would be detrimental. The record also demonstrates that M.O.'s behavior, as discussed above, is indicative of her desire to remain with the McReynolds rather than be reunified with Mother and Father.

{¶29} With respect to R.C. 2151.414(D)(1)(c), the juvenile court found, and Mother and Father agree, that M.O. has been in the custody of WCCS for more than 12 months of a consecutive 22-month period as of the date WCCS filed the permanent custody motion.

{¶30} With respect to R.C. 2151.414 (D)(1)(d), the juvenile court found that M.O. needs a legally secure permanent placement and that such placement cannot be achieved without a grant of permanent custody to WCCS. The juvenile court specifically found that M.O. has shown signs of confusion regarding who her real parents are, and that M.O. often discusses this issue during her sessions with Deborah Joy and with her foster parents.

{¶31} According to the record, M.O. repeatedly questions her situation as it relates to Mother and Father, and needs constant reassurance of her position. During the first therapy session, Deborah Joy explained to M.O. that she was placed with the McReynolds because Mother and Father were unable to care for her. M.O., who refers to the explanation as "the sad story," asks Joy and the McReynolds to tell her the sad story and questions why she was not born to the McReynolds instead of Mother and Father. Amy McReynolds testified that even though she and her husband encouraged M.O. to call them by the names Mi-Mi and Dew, she refers to them as Mommy and Dad the majority of the time.

{¶32} The juvenile court also considered Mother and Father's inability to maintain stable housing and employment, and that they move frequently and change jobs on a regular basis. At the time of the hearing, the record indicates that Mother and Father had been effectively homeless for several periods during the pendency of the case, have been evicted from homes, and that they were residing in a hotel room at the time of the hearing.

{¶33} Similarly, neither party is able to maintain stable employment. Due to Mother's

incarceration or residence in substance treatment facilities, Mother has not been able to maintain employment and was not employed at the time of the hearing. Father, who was working part-time at a dollar store at the time of the hearing, also had several jobs during the pendency of the case, and was unable to maintain stable employment. A WCCS case worker testified that Father had nine jobs from April 2009 to December 2010, and that the longest he's been in any one job was "just a few months." Father also testified that he had insufficient income to support M.O. due to his job situation at the time of the hearing. During the hearing, the state posed the following question, "so if [M.O.] were returned to your home today, you would have no way to support her?" Father answered that he would not.

{¶34} The juvenile court found that the factors in divisions (E)(7) to (11) of R.C. 2151.414(D)(1) did not apply in relation to the parents and child.

{¶35} After reviewing the record, we find sufficient credible evidence to support the juvenile court's determination that granting WCCS permanent custody is in M.O.'s best interest. Mother's and Father's first assignments of error are overruled.

{¶36} Father's Assignment of Error No. 2:

{¶37} "THE COURT ERRED IN RELYING ON OHIO REVISED CODE §2151.414(D)(2) IN MAKING ITS DECISION ON PERMANENT CUSTODY."

{¶38} In his second assignment of error, Father claims that R.C. 2151.414(D)(2) is unconstitutional because it presumes unfitness of a parent once a child is in a children services agency's custody for more than 12 months of a consecutive 22-month period. There is no merit to this argument.

{¶39} Initially, we note that Father did not assert this argument to the juvenile court, and has therefore waived this argument on appeal. "The failure to raise at the trial court level the constitutionality of a statute or its application, when the issue is apparent at the time of trial, waives the issue and deviates from this state's orderly procedure. The issue therefore

need not be heard for the first time on appeal." *In re W.D.*, Franklin App. No. 09AP-590, 2009-Ohio-6903, ¶11.

{¶40} Even so, Father's argument that R.C. 2151.414(D)(2) is unconstitutional has been addressed and rejected by many appellate districts in the state of Ohio. See *In re C.R.*, Belmont App. No. 06BE53, 2007-Ohio-3179, at ¶49; *In re Workman*, Vinton App. No. 02CA574, 2003-Ohio-2220, at ¶40; *In re Bray*, Franklin App. No. 04AP-842, 2005-Ohio-1540, ¶7-9; *In re Fricke*, Allen App. Nos. 1-02-75, 1-02-76, and 1-02-77, 2003-Ohio-1116, at ¶9. Like these districts, we find that R.C. 2151.414(D)(2) is not unconstitutional.

{¶41} As stated in *In re Workman*, "inherent within R.C. 2151.414(B)(1)(d) rests the finding that the parent is unable, unsuitable, or unfit to care for the child. If the child has been placed in a children services agency's temporary custody for at least twelve months of the prior twenty-two months, some reason must exist why the child has not been in the parent's care. The reason normally would be because the parent has been unable to demonstrate that the parent is able, suitable, or fit to care for the child." 2003-Ohio-2220 at ¶39.

{¶42} Prior to WCCS instituting a permanent custody proceeding under R.C. 2151.414(B)(1)(d), Father was given over 12 months to demonstrate that he was able, suitable, or fit to care for M.O. Although Father was given ample opportunity to maintain stable employment and housing, he had nine jobs, was evicted from homes, and was living in a hotel at the time of the hearing. For these reasons, as well as those stated above, M.O. could not be in Father's care. Contrary to his argument, Father was not deprived of the ability to be reunified with M.O. or to demonstrate his ability, suitability, or fitness to care for her because of the statute, but rather, due to his own choices. Because R.C. 2151.414(B) is constitutional, Father's second assignment of error is overruled.

{¶43} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.

[Cite as *In re M.O.*, 2011-Ohio-2855.]