

[Cite as *In re J.B.*, 2010-Ohio-83.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93483

IN RE: J.B., ET AL.

APPELLANT

**JUDGMENT:
AFFIRMED**

Appeal from the Cuyahoga County Court
of Common Pleas, Juvenile Division
Case Nos. AD 06901469 and AD 07901290

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED: January 14, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} This matter involves the appeal of appellant-mother, Jennifer B.¹ (“Mother”), concerning the determination of the trial court, which awarded permanent custody of two of her children, J.B. and J.E., to the Cuyahoga County Department of Children and Family Services (“CCDCFS” or “Agency”). For the reasons that follow, we affirm.

{¶ 2} J.B. was born September 24, 2006. On October 2, 2006, CCDCFS filed a complaint for dependency and protective supervision of J.B. for reasons including: Mother tested positive for opiates during pregnancy; Mother’s loss of custody of three older children; Mother’s conviction for attempted child endangering; and her lack of stable housing and sufficient income to provide for J.B.²

{¶ 3} On December 5, 2006, the Juvenile Court appointed a guardian ad litem and counsel (“GAL”) for J.B. Later that month, the court found J.B. to be dependent. J.B. was placed in the protective supervision of CCDCFS but committed to Mother’s legal custody. Mother was ordered to attend at least one “12-step” meeting per week. In February 2007, it was determined that Mother had relapsed; however, protective supervision was continued provided case plan compliance continued.

¹The parties are referred to herein by their initials or title in accordance with this Court’s established policy regarding non-disclosure of identities in juvenile cases.

²The Complaint included allegations concerning J.B.’s father as well.

{¶ 4} On April 20, 2007, Mother was on a waiting list for in-patient drug treatment. On October 10, 2007, the court found Mother in direct contempt for failure to comply with ordered treatment. The court imposed a jail term that was suspended on the condition that Mother would attend Recovery Resources. She was discharged from Recovery Resources for failure to attend. J.B. was then committed to the emergency care and custody of CCDCFS. CCDCFS was later granted temporary custody of J.B. On June 12, 2008, CCDCFS moved to modify temporary custody of J.B. to permanent custody. Mother executed a waiver of service of summons that was filed on August 7, 2008.

{¶ 5} On November 19, 2007, Mother gave birth to J.E. On November 21, 2007, CCDCFS filed a complaint for dependency and temporary custody of J.E. on grounds that included: Mother tested positive for opiates on day of J.E.'s birth; Mother had a severe substance abuse problem that prevented her from providing a safe and stable home for the child; and Mother had been discharged from a number of treatment programs. The complaint stated numerous other itemized reasons in support and also contained allegations concerning J.E.'s alleged father. In December 2007, the court appointed a guardian ad litem and counsel for J.E. Mother's appointed counsel for J.B. was also appointed to represent her in regard to J.E.

{¶ 6} On January 25, 2008, Mother's counsel requested a continuance of the dispositional hearing in J.E.'s matter, which the court granted. In February 2008, J.E. was committed to the temporary custody of CCDCFS. On June 12,

2008, CCDCFS filed a motion to modify temporary custody of J.E. to permanent custody. Mother executed a waiver of service that was filed on August 14, 2008.

{¶ 7} On December 3, 2008, the GAL submitted his report and recommendations for both J.E. and J.B. The court continued the hearing on the motions for permanent custody for a combined hearing on both on January 28, 2009. The court then granted an oral continuance until April 1, 2009. The court issued an order dated April 1, 2009 that specifically indicated in both matters, "Mother requested that she not be transported for hearing. Mother makes her appearance through counsel."³ This fact was also placed on the record at the April 1, 2009 hearing.

{¶ 8} The following evidence was presented at the April 1, 2009 hearing: Deborah Carr testified first. She was employed by CCDCFS as the supervisor of the START⁴ unit, which works exclusively with infants testing positive for drugs and mothers who used drugs or alcohol during pregnancy.

{¶ 9} Mother became involved with Carr's START unit in August 2006. The matter was referred to CCDCFS due to Mother's drug use during her pregnancy. CCDCFS sought protective custody at J.B.'s birth. J.E. was later born having a positive drug result and hepatitis C. Consequently, CCDCFS sought and was granted emergency temporary custody of both children.

³This order is contained in the lower court file of J.E. at R. 88 and in the lower court file of J.B. at R. 118.

⁴Sobriety Treatment and Recovery Teams.

{¶ 10} Carr supervised the case that was assigned to Eric Ploscik, who worked with Carr on it. They had weekly conferences on the matter. When Ploscik left CCDCFS, Carr took over the case.

{¶ 11} At the time of the hearing, J.B. was two and one-half years old, born September 24, 2006. J.E. was 16 months old, born November 19, 2007.

{¶ 12} CCDCFS was unable to locate any appropriate relatives willing to be primary caregivers for either child. The children were placed in a foster home, where they remained at the time of the hearing. According to Carr, both children were doing well in the placement with services that they receive.

{¶ 13} A case plan was originally developed for J.B. in 2006 and it was amended and updated when J.E. was born in 2007. Mother was included in the case plan from its inception with the following objectives: “substance abuse, basic needs, which is housing, employment, emotional stability, paternity, and parenting.”

{¶ 14} J.B.’s father opted out and did not want to participate in any services. CCDCFS helped Mother and J.E.’s alleged father with getting treatment. CCDCFS made referrals for housing but J.E.’s parents did not follow through. There was no verified income and neither had stable employment.

{¶ 15} Carr said that it was very difficult communicating with the parents because they were “evasive.” They did not have stable housing, they were not in contact with the social worker or her or the family advocate. Carr testified that

she was not asked by any parent about the how the children were doing. Mother and J.E.'s alleged father came to visits sporadically.

{¶ 16} Mother never kept any appointments to complete the psychological evaluation for the emotional stability component of the case plan. J.E.'s father did complete an evaluation. It was recommended that he complete treatment and remain sober and obtain ongoing counseling. He did not do so.

{¶ 17} None of the parents completed the parenting objectives. Although Mother and J.E.'s alleged father always said they would cooperate with completing the case plan, they never did. Both neglected to submit samples for drug testing on a number of occasions. The alleged father was banned from the agency after getting into a fight.

{¶ 18} The last contact Carr could recall between Mother and the children was in January. She recalled J.E.'s alleged father's last visit being in April 2008 prior to his incarceration. J.B.'s father had little contact, if any, after the child's birth.

{¶ 19} J.E.'s father was charged with child endangering and served a jail term. The victim was one of Mother's older children. Mother was also charged in connection with that incident and was convicted.

{¶ 20} Mother had three other children who were removed from her custody. Two of these children were adopted, and the third was placed in the custody of an interested individual.

{¶ 21} Carr identified Agency Exhibits 3, 4, and 5 that were the journal entries of Mother's criminal convictions, which reflect Mother's convictions for attempted endangering children, attempted trafficking in drugs, and drug possession, respectively. Carr also testified about the children's fathers' criminal records.

{¶ 22} During the time the children had been in CCDCFS custody, the parents did not provide any support for the children's basic needs. Mother, however, brought toys when she came for her January 2008 visit. All the items on the case plan still needed to be addressed at the time of the hearing. Mother was homeless, substance abuse was still involved, and emotional stability had not been addressed. Carr stated it was CCDCFS' recommendation that it was in the children's best interest to award it permanent custody of them. The children were in adoptive placement, doing well, and thriving according to Carr.

{¶ 23} On cross-examination, Carr stated that Mother was living with her mom at one point. Mother was kicked out of treatment programs. Carr stated Mother may have completed one inpatient treatment in 2007. Carr indicated she would need to refer to the family advocate notes for treatment information.

{¶ 24} Carr believed that Mother was appropriate during her visits with the children.

{¶ 25} The next witness was Alesia Hankins, who was a family advocate for CCDCFS' START unit. She assisted parents with treatment and recovery.

She was involved in Mother's case plan. She met Mother while she was pregnant with J.B. in 2006 due to Mother's drug use at that time.

{¶ 26} Mother had several relapses throughout the case. Mother had gone to five inpatient treatments that she had not completed. The total number of requested urine screens done was "about 110," of which Mother tested positive for drugs 37 times, had 48 no-shows, and self-admitted to using drugs 20 times.⁵

{¶ 27} J.E.'s alleged father went to a program but did not follow up on the recommendations. J.B.'s father refused to participate in services. Hankins said J.B.'s father "got violent" at a visit and never returned for future visits. Hankins was involved with visitations "quite a bit." She observed the parents arguing with personnel at different times. She described J.E.'s alleged father as being verbally abusive to Mother most of the time at the visits.

{¶ 28} Mother's interaction with the children was initially okay but, as the case went on, Mother missed visits and J.B. became less interested in seeing her. Mother's last visit was in January. They later learned that Mother was incarcerated, which prevented her visitation until March 2009. The March visit did not occur due to Mother's transfer from jail directly to the treatment center.

{¶ 29} Mother was frequently homeless. Mother did not keep in contact with Hankins. Mother's mom "barred" her from the property due to drug use.

⁵This would total 105 requested tests.

{¶ 30} During cross-examination, Hankins estimated that Mother had about 25 negative drug test results out of 110, but would accept Mother's counsel's calculation of 38 as being accurate.⁶ At the time of the hearing, Hankins learned that Mother was in a treatment facility in Akron. Hankins approximated that Mother's longest stretch of sobriety lasted about two and one-half months. The records indicate a five-month period with no positive drug test results. In her opinion, Mother does not want to do the work to stay sober.

{¶ 31} The GAL recommended, as he had in his report, that it was in the best interest of both J.B. and J.E. to grant permanent custody in favor of the CCDCFS for both children.

{¶ 32} On April 30, 2009, the trial court issued a journal entry, including its findings and granted permanent custody of J.B. and J.E. to CCDCFS. Mother appeals this decision and raises two assignments of error for our review.

{¶ 33} "1. Appellant was denied the right to effective assistance of counsel in a permanent custody case involving her two minor children when her court-appointed attorney failed to seek a court order for appellant to be transported to the hearing from a drug treatment facility so that she could participate in and testify at the hearing or, in the alternative, when he failed to seek a continuance of the dispositional hearing."

⁶Later, under examination by the GAL, Hankins confirmed that certain dates reflected a negative test result for alcohol but positive results for other illegal substances, including crack cocaine, marijuana, amphetamines, and benzodiazepine.

{¶ 34} At the time of the hearing, Mother was in a drug treatment program in Akron, Ohio.

{¶ 35} At the outset of the April 1, 2009 proceedings, the court stated on the record: “Mother makes her appearance through counsel having request[ed] that she not be transported from her institution.” There are separate orders in each case reflecting this fact.

{¶ 36} Mother asserts ineffective assistance of counsel on the basis that her appointed attorney did not request the Juvenile Court to issue a transport order to secure her presence at the permanent custody proceedings notwithstanding her contrary instructions.

{¶ 37} There is no evidence in the record that would contradict the court’s representations about Mother’s request to proceed in her absence. While Mother appears now to be suggesting that her decision may not have been knowing, intelligent, or voluntary,⁷ she does not deny making the request. Counsel is not required to force a parent’s participation in custody proceedings. E.g., *In re B.F.*, Miami App. No. 2008 CA 11, 2008-Ohio-5156, ¶38 (overruling ineffective assistance of counsel claim where mother was afforded opportunity but chose not to attend the custody hearing). There is no basis in this record

⁷As to Mother’s knowledge of custody proceedings, we note that this was not her first involvement with custody proceedings being that three of her older children were previously removed from her custody.

from which we could conclude that counsel was ineffective for abiding by the direction of his client to proceed in her absence.

{¶ 38} The permanent custody hearing provided an opportunity for Mother to be heard. It was her own actions that prevented her from being heard. See *In re Davis* (May 17, 2000), Summit App. No. 19636 (father not denied due process where, despite notification that his parental rights might be terminated, he did not ask to be transported to the hearing, did not ask to be deposed in anticipation of the hearing, did not communicate his whereabouts to his attorney, and did not attend the hearing).

{¶ 39} Assignment of Error I is overruled.

{¶ 40} “II. The judgment of the trial court is against the manifest weight of the evidence and constitutes a denial of due process of law.”

{¶ 41} In this assignment of error, Mother contends that the trial court erred when it granted permanent custody of her children to CCDCFS in the absence of clear and convincing evidence. CCDCFS maintains the court did not abuse its discretion when it determined the best interest of the children would be served by granting CCDCFS permanent custody. The issue presented here concerns the permanent custody of the children.

{¶ 42} In considering an award of permanent custody, the court must first determine whether, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody. R.C. 2151.414(D). In determining the best interest of the child during the permanent custody hearing, the court must

consider the factors listed in R.C. 2151.414(D), which include the reasonable probability the child will be adopted; the interaction of the child with parents, siblings, and foster parents; the wishes of the child; the custodial history of the child; and the child's need for a legally secure permanent placement.

{¶ 43} In addition to determining the child's best interest, the court must make a second determination before granting permanent custody: it must determine whether the child can be placed with a parent within a reasonable time or should not be placed with the parent. R.C. 2151.414(B)(1)(a). The court is required to enter a finding that the child cannot be placed with a parent within a reasonable time if any factors set forth in R.C. 2151.414(E) apply.

{¶ 44} Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence.

1. R.C. 2151.414(E)

{¶ 45} R.C. 2151.414(E) includes the following factors:

{¶ 46} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made

available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties;

{¶ 47} “(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code;

{¶ 48} “* * *

{¶ 49} “(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶ 50} “* * *

{¶ 51} “(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child;

{¶ 52} “(7) The parent has been convicted of or pleaded guilty to one of the following:

{¶ 53} “* * *

{¶ 54} “(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent’s household at the time of the offense is the victim of the offense;

{¶ 55} “* * *

{¶ 56} “(e) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a) or (d) of this section.

{¶ 57} “* * *

{¶ 58} “(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least 18 months after the filing of the motion for permanent custody or the dispositional hearing.

{¶ 59} “(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

{¶ 60} “(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.”

{¶ 61} The trial court found that all of the above factors applied with regard to the award of permanent custody to CCDCFS. The existence of any one of the factors can be sufficient grounds for the trial court to determine that the children could not be placed with either parent within a reasonable time. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶50.

{¶ 62} Mother contends that the evidence failed to support one of the predicate factors of R.C. 2151.414(E)(1) through (16). Upon review, we find that at least four of the court's findings pursuant to R.C. 2151.414(E) were supported by evidence in the record as to Mother. R.C. 2151.414(E)(1), (2), (4), (13) and (14). Therefore, the court's determination is not against the manifest weight of the evidence in this regard.

2. R.C. 2151.414(D)

{¶ 63} Mother also contends that even if R.C. 2141.414(E) was satisfied, the termination of her parental rights was still not in the best interest of the children.

{¶ 64} With regard to both J.B. and J.E., the court found as follows: "Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the age of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for 12 or more months of a consecutive 22-month period; 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; and the report of the Guardian Ad Litem, the court finds by clear and convincing evidence that a grant of permanent custody is in the best interest of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent."

{¶ 65} The record contains ample evidence upon which the trial court relied in making its determination, including, but not limited to, the report and recommendations of the GAL for the children. Mother had an extensive history of substance abuse and dependence, showed an inability to successfully complete treatment programs, abused drugs during and after her pregnancy, had numerous positive drug test results, lacked stable housing, did not have

employment, and was otherwise unable to provide a suitable environment in which to raise her children. J.B.'s father refused services and did not participate in the case plan. J.E.'s father also failed to complete the case plan. Mother and both fathers had criminal records, including Mother's conviction for attempted child endangering. There is evidence that none of the parents provided support to the children during the time they were in the custody of CCDCFS and their visits were sporadic. J.E. was never in Mother's custody and, according to testimony, J.B. became less interested in seeing Mother. Other testimony established that the children were doing well and thriving in their foster placement. The siblings were bonded to one another.

{¶ 66} Based on the record, the trial court's findings were supported by clear and convincing evidence.

{¶ 67} Assignment of Error II is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Juvenile Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR