

[Cite as *In re C.B.*, 2017-Ohio-4303.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105027

IN RE: C.B., ET AL.
Minor Children

[Appeal by S.B., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 13916496 and AD 13916497

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

RELEASED AND JOURNALIZED: June 15, 2017

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MARY EILEEN KILBANE, P.J.:

{¶1} Appellant, S.B. (“Mother”), appeals from the juvenile court’s judgment granting permanent custody of her twin boys, both of whom have the initials C.B., to the Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”). For the reasons set forth below, we affirm.

{¶2} On November 12, 2013, Cleveland police officers responded to Mother’s home. The officers found the home to be in an unsafe condition, so they removed eight-month-old twin boys from the home and care of their Mother. One day later, CCDCFS filed a complaint alleging the boys to be neglected and dependent and requesting a disposition of temporary custody to the agency. A motion for predispositional emergency custody to the agency was filed and granted on that same day.

{¶3} On March 7, 2014, the trial court held an adjudicatory hearing. At this hearing, Mother admitted to the following allegations in the amended complaint that are relevant to our review:

2. On November 12, 2013, the family home was observed to be in such a deplorable and unsafe condition that Cleveland police officers removed the children from the home.
3. Mother lacks adequate cognitive abilities.
4. Mother has failed to take the [one] child, C.B., to recommended follow up medical appointments.
5. Mother fails to provide the children with their nutritional needs.
6. Mother fails to provide the children with safe and adequate housing to meet their basic shelter needs. Mother has lacked stable housing for the past several years and remains without adequate housing.

7. Mother has three other children who were adjudicated neglected. Two of those children were placed in the predispositional custody of CCDCFS on an emergency basis on November 12, 2013. The third child was placed in the predispositional custody of CCDCFS in May 2013.
8. Alleged father T.H. has failed to establish paternity and has failed to support, visit or communicate with the children since their births.

{¶4} The trial court adjudicated the twins neglected and dependent and granted temporary custody to the agency. The trial court also approved a case plan for the family.

{¶5} On July 29, 2014, more than eight months after the twins were removed from Mother's care, CCDCFS filed a motion to modify the temporary custody orders to permanent custody. A trial was held on August 16, 2016, more than two years after the motion for permanent custody was filed. By the time the permanent custody trial was held, Mother's three older children had been committed to the legal custody of their father, and the twins had been in the agency's custody for nearly three years.

{¶6} After hearing testimony from Dr. Randall Baenen, Ph.D. ("Dr. Baenen"), a licensed psychologist who completed a psychological evaluation of Mother, and the CCDCFS social worker, the trial court granted the agency's motions for permanent custody as to both of the twin boys. In its orders, the court found that a grant of permanent custody is in the children's best interest, and the children cannot be placed with either parent within a reasonable period of time or should not be placed with their parents.

{¶7} Mother now appeals, asserting the following single assignment of error for our review:

Assignment of Error

The trial court erred in granting the motion for permanent custody as such decision was against the manifest weight of the evidence.

{¶8} In her sole assignment of error, Mother argues that the trial court's decision to grant the motion for permanent custody to CCDCFS was against the manifest weight of the evidence and not supported by clear and convincing evidence.

{¶9} The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, _ 22. In accordance with R.C. 2151.414(B), the trial court is required to grant permanent custody of a child to the state if it determines, by clear and convincing evidence, that: (1) granting permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors enumerated in R.C. 2151.414(D); and (2) the child cannot be placed with either parent within a reasonable time period or should not be placed with either parent if any one of the factors listed in R.C. 2151.414(E) are present. *In re J.T.*, 8th Dist. Cuyahoga Nos. 93240 and 93241, 2009-Ohio-6224, ¶ 42.

{¶10} Clear and convincing evidence is defined as

that measure or degree of proof which is more than a mere "preponderance of the evidence" but not to the extent of such certainty required "beyond a reasonable doubt" in criminal cases, and 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 Awkal, 95 Ohio App.3d 309, 642 N.E.2d 424 (8th Dist.1994), fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987).

{¶11} Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, _ 24, citing *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). 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. *Id.*

Best-Interest Determination

{¶12} Mother argues that the trial court erred in finding that it was in the children's best interest to be placed in the permanent custody of CCDCFS. R.C. 2151.414(D) requires that in determining the best interest of the child, the court must consider all relevant factors, including, but not limited to the following:

- (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child;
- (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;
- (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 for twelve or more months of a consecutive twenty-two-month period * * *;

- (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;
- (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶13} Although a trial court is required to consider each of the above factors in making its permanent custody determination, this court has noted that “[o]nly one of these factors needs to be resolved in favor of the award of permanent custody.” *In re N.P.*, 8th Dist. Cuyahoga Nos. 97846, 97847, 97848, 97849, 97850, 97851, 97852, 97853, 97854, and 97855, 2012-Ohio-4298, ¶ 20, citing *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000).

{¶14} In considering these factors the trial court noted that the three-year-old twins had not been in Mother's care since they were eight months old. Therefore, the twins had been in CCDCFS custody for twelve or more months of a consecutive twenty-two-month period as described in R.C. 2151.413(D). The trial court heard testimony of the social worker that the twins did not appear to be bonded to Mother and were well cared for by the foster parent.

{¶15} Mother argues that she had substantially complied with her case plan and had remedied the unlivable conditions in the home. The record reflects, however, that at the time of the permanent custody trial, Mother's home lacked gas utility service and was periodically overcrowded with various people whom she permitted to engage in acts of

violence in the home. The social worker testified that during visitation, Mother did not demonstrate the ability to independently manage the twins and required prompts from the social worker to appropriately respond to them. In addition to the recommendation of the social worker, the children's guardian ad litem recommended to the court that it grant permanent custody to the agency.

{¶16} Mother also asserts that the agency did not use reasonable case planning and diligent efforts to assist her with remedying the problems that led to the removal of the twins. The social worker testified to the myriad of programs and resources to which she referred Mother to address her mental health, domestic violence, and parenting issues. The trial court found that despite Mother's completion of such courses, she still exhibited behaviors that put her children at risk. A good faith effort to implement a reunification plan "means an honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage." *In re Howard*, 8th Dist. Cuyahoga No. 78573, 2002-Ohio-5818, ¶ 10, citing *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011 (12th Dist.1992). The issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute. *Id.*

{¶17} We conclude that the trial court properly found that a grant of permanent custody was in the children's best interest.

Placement with Either Parent

{¶18} Mother also argues that CCDCFS failed to establish by clear and convincing evidence that she “failed continuously and repeatedly to substantially remedy the conditions that initially caused her children to be placed outside her home” and that she “would not be able to parent her children within a reasonable time.” The trial court’s determination of whether a child cannot or should not be placed with either parent within a reasonable time is guided by R.C. 2151.414(E). *In re P.C.*, 8th Dist. Cuyahoga Nos. 94540 and 90541, 2008-Ohio-3458, ¶ 19. That section sets forth 16 factors for the court’s determination and provides that if the trial court finds by clear and convincing evidence that any of the 16 factors exists, the court must enter a finding that the child cannot or should not be placed with either parent within a reasonable period of time. *Id.* Here, the trial court found that a number of factors detailed in R.C. 2151.414(E) applied, specifically that factors (1), (2), (4) and (16) of that division applied to Mother and the twins.

{¶19} In relevant part, R.C. 2151.414(E) states:

(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.

(2) Chronic mental illness, chronic emotional illness, intellectual disability, 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 * * *;

* * *

(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;

* * *

(16) Any other factor the court considers relevant.

{¶20} In making the determination that the first factor applied, the trial court reasoned that

[Mother] was referred for psychological services at Murtis Taylor and was inconsistent with counseling as well as medication. Although [Mother] completed a parenting class, [she] could not implement the strategies. [Mother] was referred for Domestic Violence and although she completed the course, still engaged with in [sic] behavior that placed the family at risk.

The trial court also determined that factors 2 and 4 applied because “it is apparent that the Mother’s low cognitive functioning prevents her from consistently engaging in counseling or maintaining medication compliance to ensure psychological stability” and “[Mother] has been inconsistent with parenting time, appearing for 50 percent of the scheduled times and has failed to financially and emotionally support the children.” The trial court also found it relevant that “[Mother] continually engages in relationships that are unhealthy and places her housing and children at risk.”

{¶21} We find that the record reflects that there was sufficient credible, clear, and convincing evidence before the trial court in support of these findings.

Hearsay

{¶22} Mother also asserts that the trial court's conclusions pursuant to R.C. 2151.414(E)(2) were not supported by clear and convincing evidence because the trial court improperly relied upon inadmissible hearsay evidence from Dr. Baenen. She notes that the court allowed him to testify about the results of cognitive testing that was completed by his colleague, Dr. Justice.

{¶23} Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible in permanent custody hearings because they are adjudicatory in nature and require compliance with the rules of evidence.

In re M.H., 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, at _ 48, citing *In re Brofford*, 83 Ohio App.3d 869, 878, 615 N.E.2d 1120 (10th Dist.1992). The erroneous admission of hearsay evidence is harmless if other evidence, apart from the erroneously admitted evidence, has been offered to prove that which the challenged evidence was offered to prove. *Id.*

{¶24} We agree that such testimony was hearsay, but find it to be harmless error because Mother's cognitive abilities were already a part of the record. She admitted at the adjudicatory hearing that she lacks adequate cognitive abilities. Moreover, as we

discussed above, the trial court's findings based on additional factors under R.C. 2151.414(E) require a finding that the children should not be placed with either parent.

{¶25} Based on the foregoing, we conclude that the trial court had before it sufficient clear and convincing evidence to support its determination that it was in the best interest of the children to commit them to the permanent custody of the agency and that they should not have been placed with Mother.

{¶26} Accordingly, we overrule Mother's single assignment of error.

{¶27} Judgment affirmed.

It is ordered that appellee recover of appellant 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 common pleas court, 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR