

[Cite as *In re N.B.*, 2017-Ohio-1376.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105028

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

[Appeal By Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 14915706 and AD 14915707

BEFORE: S. Gallagher, J., Boyle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 13, 2017

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SEAN C. GALLAGHER, J.:

{¶1} Appellant mother appeals from the orders awarding permanent custody of her two children, N.B. and D.B., to the Cuyahoga County Department of Children and Family Services (“CCDCFS”). Upon review, we affirm.

{¶2} On December 19, 2014, CCDCFS filed a complaint for neglect, dependency, and permanent custody of N.B. and D.B., along with a motion for order of predispositional temporary custody. At that time, N.B. was seven years old and D.B. was one year old. Following a hearing, the children were committed to the emergency temporary custody of CCDCFS. Several continuances occurred during the course of the proceedings.

{¶3} On September 28, 2015, the parties stipulated to an amended complaint for dependency and permanent custody, which was filed the same day. The children were adjudicated dependent and remained in the custody of CCDCFS.

{¶4} The allegations that were stipulated to regarding mother included the following:

1. A complaint for neglect, dependency, and permanent custody was previously filed * * * and the children were committed to the emergency custody of CCDCFS on September 26, 2014. The matter could not be resolved within the statutory time frame and will be dismissed upon the filing of this complaint.
2. Mother has a substance abuse problem, specifically heroin, for which she requires intensive outpatient treatment to provide adequate care for the children.

3. [deleted]
4. Mother has a mental health condition which requires treatment. Mother is diagnosed with bi-polar disorder and needs to take prescribed medication.
5. Mother needs to ensure adequate supervision of child N.B. The child had contact with a relative who previously sexually abused her.

{¶5} Each child was alleged to have a separate father. The amended complaint also included allegations pertaining to the alleged fathers, each of whom had failed to “support, visit, or communicate with his child.” In addition, the father of D.B. had a criminal conviction for drug trafficking.

{¶6} A case plan was developed for mother that included objectives for substance abuse, mental health, and housing. There were also behavioral and emotional concerns for the children.

{¶7} A hearing was held on November 10, 2015, at which the parties stipulated that reasonable efforts had been made by CCDCFS to finalize the permanency plan. The court found the same and recognized that the permanency plan goal remained reunification.

{¶8} The matter proceeded to a dispositional hearing on January 19, 2016, at which testimony and evidence were presented. The record reflects that mother had appropriate and stable housing. Mother also had been consistent with maintaining mental health services. However, there was some indication that mother would become noncompliant with her mental health counseling and medication when she was abusing illegal substances. Mother had sought her own treatment for substance abuse.

CCDCFS acknowledged that no referrals were made because mother was already engaging in services.

{¶9} The record reflects that mother began intensive outpatient drug treatment at Recovery Resources in August 2015, but she failed to complete that treatment and admitted she left the program in October 2015 after abusing drugs. The case manager for mother from Recovery Resources testified on behalf of mother. She indicated that mother had “come a long way,” “has not given up,” and was motivated because of her desire to be reunified with her children. She testified that mother had not completed the intensive outpatient program because mother “continued to test positive while she was in intensive outpatient treatment.”

{¶10} Mother did not engage in another substance abuse treatment program until December 2015. She then began an inpatient treatment program, but she left this program prior to completion because she claimed it was overwhelming her. Thus, at the time of the hearing, mother had not successfully completed an inpatient or outpatient treatment program.

{¶11} Mother reportedly had been sober as of December 25, 2016, when her drug screen was negative. This was less than a month prior to trial. Mother also intended to engage in another intensive outpatient treatment program, with an assessment scheduled the day after trial.

{¶12} The record reflects that mother generally was consistent in visitation with the children. The social worker testified that N.B. loved mother and that mother was

bonded with the children. There was testimony that N.B. gets sad during visits and feels she has to take care of her younger sibling, D.B.

{¶13} The record also reflects that the children were bonded with each other. Although they had been in several foster placements, at the time of the hearing they were in a foster-to-adopt home and were receiving ongoing counseling services. The guardian ad litem for the children recommended an award of permanent custody to CCDCFS.

{¶14} Because a decision had not been rendered in the matter, CCDCFS filed a motion for decision on August 11, 2016.¹ Thereafter the trial court issued a journal entry, which was journalized on September 6, 2016, for each child that terminated all parental rights and awarded permanent custody to CCDCFS. This appeal followed.

{¶15} Mother raises several assignments of error for our review, all of which challenge the trial court's decision to award permanent custody of the children to CCDCFS.

{¶16} “An appellate court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48, citing *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440,

¹ We are compelled to recognize the statutory directives to encourage the expeditious disposition of permanent custody matters. Pursuant to R.C. 2151.414(A)(2), “[t]he court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.” Further, pursuant to R.C. 2151.35 and Juv.R. 34(C), the court is supposed to enter judgment within seven days of the conclusion of the dispositional hearing. This matter was decided well outside those time parameters.

¶ 24. “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶17} R.C. 2151.414(B) allows a court to grant permanent custody of a child to a children services agency if, after a hearing, the court determines, by clear and convincing evidence, that permanent custody is in the best interest of the child and that any of the four conditions set forth in R.C. 2151.414(B)(1)(a)-(e) applies. As to each child, the trial court found R.C. 2151.414(B)(1)(d) applied, in that “the child has been in temporary custody of a public children services agency or private child placing agency for twelve or more months of a consecutive twenty-two month period.”

{¶18} If any of the conditions outlined in R.C. 2151.414(B)(1)(a)-(e) exists, the trial court may proceed to consider whether the grant of permanent custody to the agency is in the best interest of the child. *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, ¶ 44. In conducting a best-interest analysis under R.C. 2151.414(D), “[t]he court must consider all of the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others pursuant to the statute.” *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

{¶19} In determining the best interest of a child, R.C. 2151.414(D)(1) directs the trial court to consider “all relevant factors,” including, but not limited to the following:

(1) 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; (2) 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; (3) the custodial history of the child; (4) 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 (5) whether any of the factors set forth in R.C. 2151.414(E)(7) to (11) apply. R.C. 2151.414(D)(1)(a)-(e).

{¶20} Here, the court considered all the relevant factors pursuant to R.C. 2151.414(D) and found by clear and convincing evidence that “a grant of permanent custody is in the best interests of the child[ren].” The trial court reviewed the matter and recognized that mother's housing was adequate and appropriate, she consistently visited with the children, and she was bonded with them. The court also recognized that mother had engaged in mental health counseling and substance abuse treatment programs. However, the court found that “[m]other, however, would become non-compliant with counseling and medication when she was abusing illegal substances.” Further, the court found that “[m]other at the time of the hearing only had one month of sobriety, despite no significant progress in the sixteen months prior * * *.”

{¶21} As to each child, the court determined that mother had “failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home,” that the chemical dependency of mother is “so severe that it

makes [mother] unable to provide an adequate permanent home for the child,” that mother “allowed the child to suffer neglect,” and that “the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child’s placement with the child’s parent a threat to the child’s safety.” The trial court also made findings with regard to each child’s father, and determined that N.B.’s alleged father and D.B.’s father had each demonstrated a lack of commitment toward his child and had abandoned the child.

{¶22} Our review of the record shows that the trial court’s findings were supported by competent, credible evidence in the record. Although mother challenges the trial court’s consideration of certain factors, claims there was insufficient evidence as to the wishes of the children, and raises concerns over the children’s placement in several foster homes over the course of the case, we find that the trial court appropriately considered the relevant factors in determining the best interest of the children and that its decision was not against the manifest weight of the evidence.

{¶23} Mother also contends that the trial court’s decisions contained findings with regard to matters that were not part of the record in this case. Mother claims the trial court included findings regarding N.B.’s prior cases and with regard to letting a known former sexual predator have access to N.B. However, mother ignores her stipulation to the allegations of the amended complaint, the social worker’s testimony regarding a conversation with mother about N.B.’s prior custody with CCDCFS, and the social worker’s testimony that mother admitted to allowing family members to care for N.B.

while the former perpetrator had access to N.B. Further, to the extent any of the findings went beyond the stipulations and evidence presented, we find that the error was harmless in light of the totality of evidence presented.

{¶24} Mother further claims the trial court improperly considered the children's relationship with their foster caregivers. Mother has not cited any authority to support this argument. Notwithstanding our ability to disregard the argument for failure to comply with App.R. 16(A)(7), we find that the trial court was permitted to give consideration to "all relevant factors" in determining the best interest of the children, including the relationship of the children with foster caregivers. *See* R.C. 2151.414(D)(1)(a). In its decision, the trial court made the relevant considerations and found there were no concerns with the current foster home placement.

{¶25} Mother also claims the guardian ad litem failed to comply with the directives of Sup.R. 48(D)(13) because he never advised the court of what the children's wishes were and did not speak to the children's counselors to obtain recommendations. The record reflects that at the time of the dispositional hearing, N.B. was eight years old and D.B. was two years old. There is no doubt that D.B., given her age, was not capable of formulating a meaningful expression of her wishes. The social worker testified that although N.B. was to some degree aware of the court proceedings, she did not really express herself with regard to what was taking place. Sup.R. 48(D)(13)(g) states that the GAL is to do the matters outlined in the rule "unless impracticable or inadvisable because

of the age of the child or the specific circumstances of a particular case[.]” *See Schutz v. Schutz*, 2d Dist. Darke No. 2016-CA-6, 2017-Ohio-695, ¶ 45.

{¶26} Additionally, courts have generally refused to conclude that a guardian ad litem’s failure to comply with Sup.R. 48(D) constitutes grounds for reversal. *Miller v. Miller*, 4th Dist. Athens No. 14CA6, 2014-Ohio-5127, ¶ 17-18. Sup.R. 48(D) is a general guideline, and its directives serve “to provide the court with relevant information and an informed recommendation regarding the child’s best interest[.]” *Id.*, quoting Sup.R. 48(D). Thus, “a trial court has discretion to consider a guardian’s opinion and report even when the guardian does not comply with the directives found in Sup.R. 48(D)(13).” *In re T.S.*, 2d Dist. Greene Nos. 2016-CA-26 and 2016-CA-28, 2017-Ohio-482, ¶ 36.²

{¶27} The guardian ad litem filed multiple reports during the course of the proceedings. The reports reflect that the guardian ad litem had personally visited the children a number of times. The guardian ad litem commented upon the foster homes, the care the children were receiving, the appearance of the children, and the services being provided. The guardian ad litem also reported on the children’s visitations with mother and N.B.’s feelings toward visitation with her mother. The guardian ad litem expressed continuing concern for mother’s drug abuse problem and mental health disorders, and her drug abuse treatment. The guardian ad litem also indicated difficulties

² We also note that Sup.R. 48(D)(13) is an “‘an administrative directive’ that creates no individual rights and lacks the force of law.” *Id.*, citing *Corey v. Corey*, 2d Dist. Greene No. 2013-CA-73, 2014-Ohio-3258, ¶ 9.

in contacting and meeting with mother throughout the case, as well as mother's failure to appear for an arranged visit with the guardian ad litem. The guardian ad litem sufficiently set forth the basis for his recommendation.

{¶28} The record also reflects there was testimony concerning the interaction and interrelationship between the children and their mother. Although N.B. did not explicitly express a desire as to custody or placement, she did express that being with her mother makes her sad and that she did not want to visit her mother because she does not feel safe.

Furthermore, it is evident that mother's failure to successfully address her substance abuse problem was the overriding concern in this matter with regard to the best interest of the children. In the context of all the evidence before the trial court, mother has not demonstrated reversible error arising from any alleged deficiency in the guardian ad litem's performance, or from any failure relating to ascertaining the wishes of the children. *See In re W.H.*, 3d Dist. Marion Nos. 9-16-19 to 9-16-25, 2016-Ohio-8206, ¶ 77-81.

{¶29} Finally, mother claims the trial court erred by failing to determine whether the children were entitled to counsel. There is nothing in the guardian ad litem's reports to suggest any conflict concerning the wishes of the children, and at no point did the guardian ad litem file a motion requesting that independent counsel be appointed for the children. Although mother contends further inquiry should have been made regarding the wishes of the children, there is no indication in the record that the guardian ad litem

did not faithfully discharge his duties. The record does not reflect any reasonable basis for the juvenile court to have considered appointing independent counsel for the children.

{¶30} We recognize that the right to parent one's child is a fundamental right. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104,862 N.E.2d 816, ¶ 28. However, this right is not absolute and is subject to the ultimate welfare of the child. *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 20. Ultimately, "neglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term * * * and their best interest is the pivotal factor in permanency case." *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 35; *see also In re B.C.* at ¶ 20. "A child's best interests require permanency and a safe and secure environment." *In re Holyak*, 8th Dist. Cuyahoga No. 78890, 2001 Ohio App. LEXIS 3105, 10 (July 12, 2001).

{¶31} Upon our review of the record, we find the record contains sufficient competent, credible evidence to support the trial court's decisions under a clear and convincing standard. We are unable to conclude that the decisions were against the manifest weight of the evidence. We overrule all the assignments of error and affirm the trial court's decisions awarding permanent custody of each child to CCDCFs and terminating appellant's parental rights.

{¶32} Affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County 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.

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
MARY J. BOYLE, P.J., CONCURS IN JUDGMENT ONLY