

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

In re: K.N., P.N., and C.N.,	:	Case No. 10CA7
	:	
Adjudicated Dependent Children.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
	:	Released 5/20/10

APPEARANCES:

Thomas L. Cornn, Athens, Ohio, for appellant.

C. David Warren, ATHENS COUNTY PROSECUTOR, and George J. Reitmeier, ATHENS COUNTY ASSISTANT PROSECUTOR, for appellee.

Harsha, J.

{¶1} S.N. (“Mother”) appeals the trial court’s decision awarding permanent custody of three of her four children, K.N., P.N., and C.N., to Athens County Children Services (“ACCS”). She contends that the trial court’s findings that 1.) permanent custody was in the children’s best interest and 2.) the children could not be placed with her within a reasonable time and should not be placed with her, were not supported by clear and convincing evidence. However, we conclude the record contains the requisite degree of proof to support the court’s findings.

{¶2} The court’s best interest determination is supported by evidence that the parents failed to adequately supervise the children and protect them from the risk of sexual abuse. The record also contains evidence that the parents could not fully understand the children’s emotional and behavioral problems and that at the time of the permanent custody hearing, Mother did not have a safe, suitable home for the children.

Moreover, the court's finding regarding placement of the children is supported by evidence that despite assistance from ACCS, Mother continuously and repeatedly failed to substantially remedy problems with her parenting skills that led to the placement of the children outside the home. Accordingly, we conclude clear and convincing evidence supports the trial court's judgment.

I. Facts

{¶3} Mother and her husband, J.N. ("Father"), are the parents of T.N., K.N., P.N., and C.N. In December 2007, ACCS obtained an ex parte emergency custody order for T.N. The next day, the agency filed complaints alleging that T.N. (age 14), K.N. (age 13), P.N. (age 10), and C.N. (age 8) were abused, neglected, and dependent children. ACCS alleged that in April 2007 the parents agreed to a safety plan after the agency received a report of sexual activity among the children. Subsequently, ACCS learned the parents violated the plan by failing to properly supervise the children when Mother informed them that T.N. sexually abused K.N. again. The agency also alleged that the parents failed to bring K.N. and P.N. to counseling on a consistent basis to deal with the children's mental health issues. Prior to the adjudication, T.N. remained in the emergency custody of ACCS, but the other children remained with their parents.

{¶4} Based on the agreement of the parties, in February 2008 the trial court adjudicated the children as dependent and dismissed the allegations of abuse and neglect. ACCS got temporary custody of T.N. and protective supervision orders regarding K.N., P.N., and C.N.

{¶5} In April 2008, the agency obtained an ex parte emergency custody order for the three youngest children and filed an emergency motion asking the court to

modify its disposition and grant ACCS temporary custody of the children. The agency alleged that Mother could not recognize situations that presented a danger to her children and protect them. ACCS alleged that although Mother had agreed to a new safety plan to prevent sexual abuse, the family moved into a home with a man that Mother believed raped her sister and that Mother told a caseworker she did not trust him around the children. Moreover, under the safety plan the children were to have separate bedrooms with alarms on the doors. But Mother had admitted that she did not always set the alarms, and on one occasion she let the children sleep together in a camper.

{¶6} In response to the agency's motion, the parents signed and the court approved a 30-day voluntary agreement for care. The court also signed a 30-day extension of that agreement because the parents had still not obtained suitable housing when the first agreement was set to expire. The day the extension expired, the trial court granted ACCS emergency custody of K.N. based on allegations that her bedroom had not been attached to the family's home and had no furniture. In addition, the agency alleged that K.N. expressed fear for her safety.

{¶7} Less than two weeks after C.N. and P.N. went home, ACCS again obtained emergency custody of them. This time, the order was based on allegations that Father left Mother, which caused instability in the home environment and Mother's mental health. Mother allegedly admitted to a caseworker that she threatened to slit the throats of Father, P.N., and C.N. The next day, Father confirmed that Mother threatened to slit their throats, and he told a caseworker that Mother threatened to bury the children in the backyard and shoot herself. The parents have been separated since

this incident occurred.

{¶8} In August 2008, the court gave ACCS temporary custody of K.N., P.N., and C.N., and they were placed in foster care. The court found that ACCS made reasonable efforts to reunify the family and ordered the parents to submit to a psychological evaluation.

{¶9} In March 2009, ACCS filed a motion for permanent custody of all four children. After a hearing, the court granted the motion in October 2009. Mother appealed this decision. However, in response to a request from ACCS, we remanded the case to the trial court so it could consider ACCS's motion for relief from the judgment.

{¶10} Subsequently, the trial court vacated its judgment as to K.N., P.N., and C.N. and filed a new journal entry granting ACCS permanent custody of the children. Mother then dismissed her appeal of the October 2009 decision and filed this appeal of the January 2010 decision concerning K.N., P.N., and C.N. Mother does not appeal the trial court's decision to grant ACCS permanent custody of T.N.

II. Assignment of Error

{¶11} Mother assigns the following error for our review:

ATHENS COUNTY CHILDREN SERVICES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PERMANENT CUSTODY WAS IN THE CHILDREN'S BEST INTEREST AND THAT THE CHILDREN CANNOT BE REUNIFIED WITH THEIR MOTHER.

III. Permanent Custody Award

A. Burden of Proof

{¶12} A permanent custody award must be based upon clear and convincing evidence. R.C. 2151.414(B)(1); *In re A.V.*, Lawrence App. No. 08CA31, 2009-Ohio-

886, at ¶13. The Supreme Court of Ohio has defined “clear and convincing evidence” as “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104, 495 N.E.2d 23. In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

B. Standard of Review

{¶13} “Even under the clear and convincing standard, our review is deferential.” *In re Buck*, Scioto App. No. 06CA3123, 2007-Ohio-1491, at ¶7. “[A]n appellate court will not reverse a trial court’s permanent custody decision if some competent and credible evidence supports the judgment.” *In re K.J.*, Athens App. No. 08CA14, 2008-Ohio-5227, at ¶10, citing *In re Perry*, Vinton App. Nos. 06CA648 & 06CA649, 2006-Ohio-6128, at ¶40, in turn, citing *Schiebel* at 74. The credibility of witnesses and weight of the evidence are issues primarily for the trial court, as the trier of fact. *In re Ohler*, Hocking App. No. 04CA8, 2005-Ohio-1583, at ¶15, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (noting that “[t]he underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of

the proffered testimony”). Moreover, deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does *not* translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260, 674 N.E.2d 1159.

C. Requirements for Permanent Custody Awards

{¶14} Under R.C. 2151.414(B)(1), a juvenile court cannot make an award of permanent custody of a child to a children services agency unless it finds by clear and convincing evidence that that the grant of permanent custody is in the best interest of the child. R.C. 2151.414(D) requires the trial court to consider all relevant factors in determining whether the child’s best interests would be served by granting the permanent custody motion. These factors include but are not limited to: (1) the interaction and interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child’s need for a legally secure placement and whether such a placement can be achieved without a grant of permanent custody to the agency; and (5) whether any of the factors in divisions (E)(7) to (11) apply. R.C. 2151.414(D).

{¶15} The trial court found that R.C. 2151.414(B)(1)(a) applied in this case. Under that provision, a juvenile court cannot make an award of permanent custody of a child to a children services agency unless it finds by clear and convincing evidence that:

(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in

another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

And R.C. 2151.414(E) provides guidelines for a court to determine whether a child cannot be placed with the parents in a reasonable time or should not be placed with the parents. *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, at ¶17.

{¶16} In addition, “except for some narrowly defined statutory exceptions, the state must make reasonable efforts to reunify the family before terminating parental rights. If the agency has not already proven reasonable efforts, it must do so at the hearing on a motion for permanent custody.” *In re A.M.*, Adams App. No. 08CA862, 2008-Ohio-4835, at ¶15, quoting *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, at ¶4. Here, the trial court found that ACCS made reasonable efforts prior to the permanent custody hearing. Mother does not challenge that finding.

D. Analysis

{¶17} In her sole assignment of error, Mother contends that the following findings by the trial court were against the manifest weight of the evidence: 1.) the permanent custody award was in the best interest of the children, and 2.) the children could not be placed with her within a reasonable time or should not be placed with her.

1. Best Interest

{¶18} The trial court expressly considered all of the best interest factors set forth in R.C. 2151.414(D) in reaching its decision. First, it addressed the interrelationship of the children with others and found that T.N.'s inappropriate sexual activity made it unsafe and unwise to consider reestablishing a proper sibling relationship with his sisters or brother. The court also found that although the children's paternal grandfather

testified that he would support the children's reunification with Father, the court had "serious concerns" about sexual abuse concerning at least one of the grandfather's male friends. Contrary to Mother's assertion, the trial court never specifically found that she regularly visited the children. The court did note that both parents loved their children "in their own way." But the court found that the two girls were thriving in their foster home, and in general, the behavior and educational accomplishments of the girls and P.N. had improved in foster care.

{¶19} Competent, credible evidence supports these findings. Nicole Huey, T.N.'s program clinician at the Center for Child and Family Development, testified that during the course of treatment, T.N. told her about multiple sexual incidents between himself and his siblings, beginning when T.N. was six years old. Huey felt it was still unsafe for T.N. to be around his siblings. Moreover, Mother shared the court's concerns about the grandfather's friend.

{¶20} In addition, June Safranek, an ACCS caseworker, acknowledged that Mother had a good relationship with the children. However, Safranek testified that the girls had adjusted well to foster care. In fact, K.N. "loved" her foster home. The agency had to move P.N. to a therapeutic foster home due to behavioral problems, but Safranek testified that his behavior had since improved and he seemed happy. Susie Reisig, a case manager at Tri-County Mental Health ("Tri-County"), testified that she had provided the family with parenting and behavioral management services since November 2003. Mother and Father had some difficulty following plans she set. Reisig observed an improvement in the children's behavior and grades after they entered foster care.

{¶21} In addition, the court considered the wishes of the children. Contrary to Mother's assertion, the court never found that the children wished to live with her. Instead, the court noted that their mental health counselor testified that the children talked about going home to their mom or dad but had expressed a concern for their own safety. And the court's in-camera discussion with the children "did not prove particularly helpful" for the court's decision. "The girls were very pleasant and appropriate, and [P.N.] discussed missing his pets."

{¶22} The record contains competent, credible evidence to support the court's findings regarding the children's uncertainty about where they wanted to live. Robert Williams, the guardian ad litem, and Nicole Dennis, the children's counselor at Tri-County, testified about the children's wishes. Both testified that K.N. wanted to stay in foster care until recently, when she became hesitant about her preference. She recently told Williams that she wanted to go home "and ride around in a 4-wheel drive vehicle[.]" But he could not determine from this statement if she wanted to return to the family farm or live with her mom. Dennis testified that K.N. recently told her that she wanted to speak with the judge and tell him she changed her mind and wanted to live with her mom. But then K.N. said she was not sure where she wanted to live. Williams testified that C.N. seemed happy in foster care, but he could not get a clear statement from her on where she wanted to live. Dennis agreed that C.N. was a "hard one to read" because she was happy in foster care but mentioned wanting to go home. Both testified that P.N. wanted to live with his dad. However, Dennis testified that all of the children recognized the safety issues at the family farm.

{¶23} The court also set forth the custodial history of children. Mother does not

challenge the court's timeline and the record confirms it is accurate.

{¶24} In addition, the court addressed the children's need for a legally secure permanent placement and found that "[t]he children need and deserve a legally secure placement that can only be provided with a grant of permanent custody to ACCS." And competent, credible evidence also supports this finding. Based on Huey's testimony, it appears that T.N. sexually abused his sisters over the course of approximately eight years – from age six until age 14 when ACCS obtained emergency custody of him.

{¶25} Mother argues that the children were removed from the home because of this abuse, and because T.N. is no longer in the home, the other children should be returned to her. But notably, the younger children were removed from the home several months after the court placed T.N. in the agency's custody. T.N.'s sexually abusive behavior certainly factored into the agency's decision to pursue custody of the other children, but Mother oversimplifies the reasons for their removal. She minimalizes the role her own deficiencies in protecting and supervising the children played in the abuse. And she fails to recognize the risk of sexual abuse the younger children face from sources aside from T.N.

{¶26} Safranek testified that no two children in the family should be permitted to share a bedroom and that the children should not be together unsupervised. Since the girls had been "sexualized" by their past experiences, Safranek felt there was potential for continued abuse among the siblings that "would not just be limited to the boy/girl relationship." Although Mother testified that she could protect her children now with "door alarms and stuff," Safranek testified that in the past the parents failed to use alarms on the doors to protect the children as the agency instructed them. Moreover,

the record contains evidence that the children risk abuse from people aside from each other. Safranek testified that T.N. told her at least three family members had abused him in the past. Dennis testified that K.N. had been abused by multiple perpetrators. Safranek also testified that the family moved in with the grandfather and grandfather's friend – a man Mother believed sexually abused her sister in childhood. And Mother testified that at one point, K.N. told her this man had “touched her and had done things to her.”

{¶27} Mother claims that she can recognize risks to the children and protect them. As evidence of this claim, she points to the fact that she told ACCS when she learned of inappropriate sexual contact between the children. But as we noted above, there is evidence that this contact occurred for eight years undetected by the parents. Mother also claims that her psychological evaluation shows that she has the mental capacity to care for the children, recognize risks in their surroundings, and identify their educational problems. Fred Lee, the clinical psychologist who made the evaluation, testified that Mother's results indicated that she generally would not have difficulty in these areas. However, his testing also revealed that Mother had issues with depression and mood stability. He testified that Mother was inclined to simplify complex circumstances and try to “[g]et through them as quickly as possible and be done with them, and * * * that has implications for her ability to well attend to her children.” Lee thought the mood instability contributed to this problem. Lee also testified that Mother is “inclined to respond to stressors in a particularly dramatic or overly reactive” way. He testified that in stressful situations, Mother was “particularly vulnerable” to being unable to recognize and avoid risks to her children.

{¶28} Furthermore, ACCS presented evidence that the parents could not address the children's special educational and behavioral needs. Dennis testified that K.N. is a sexually abused child with bipolar disorder, P.N. has bipolar disorder and pervasive development disorder, and C.N. is a sexually abused child with an anxiety disorder. Dennis also testified that K.N. and P.N. had learning disabilities and needed medication to stabilize their moods.

{¶29} Williams testified that he felt the parents did not "understand the depth of troubles that their children have educationally and emotionally[.]" Initially he thought the request for permanent custody was premature. But after learning more about the situation, he testified that the children needed "a different environment to grow and learn in." Reisig also testified that she thought the parents were not capable of addressing all the children's special educational and behavioral needs. And Safranek testified that to her knowledge, the parents had not stayed involved in K.N. or C.N.'s education.

{¶30} In addition, it is clear from Mother's testimony that at the time of the permanent custody hearing, she could not provide the children with safe, suitable housing. During her morning testimony, Mother testified that she and her boyfriend shared a one-bedroom apartment and that she was still "looking for a bigger place[.]" Mother testified that she and her mom were "kinda in the process now of buying a house" but there was nothing she had her eye on at the time of the hearing. In her afternoon testimony, Mother claimed that during the lunch recess she and her mom put a \$1000 down payment on a house. On cross-examination, counsel asked Mother a number of questions regarding her expenses. Finally, counsel stated, "Well, I'm just trying to see if you can afford this?" Mother responded, "I'm not going to say either way

yes or no” and later said, “I don’t know.” And when asked if she thought ACCS would approve of the house as a suitable residence for the children, she responded “[w]ith a little bit of improvement, yes.” Thus even if the trial court credited Mother’s testimony about the purchase, Mother admitted she did not know if she could afford the house and its accompanying expenses and that it was not yet suitable for the children.

{¶31} In contrast, ACCS presented evidence that the children were happy and thriving in foster care, both behaviorally and educationally. Safranek and Williams testified that granting the agency permanent custody would be in the children’s best interest. And Safranek testified that the children would continue to receive health care and mental health counseling if the agency received permanent custody. Thus ample evidence supports the court’s finding that “[t]he children need and deserve a legally secure placement that can only be provided with a grant of permanent custody to ACCS.”

{¶32} The court also noted that none of the factors in R.C. 2151.414(E)(7)-(E)(11) applied. Mother does not dispute this finding.

{¶33} Based on our review of the evidence, we find that clear and convincing evidence supports the trial court’s finding that the permanent custody award was in the children’s best interest.

B. Placement with Parents

{¶34} Mother also argues that the trial court erred in finding that the children could not be placed with her within a reasonable time or should not be placed with her. R.C. 2151.414(E)(1) provides:

In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised

Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(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.

{¶135} In its decision, the trial court addressed this provision and found that:

Both parents have serious deficiencies in their parenting skills. There have been significant issues with lack of supervision and inappropriate supervision. Both the girls have disclosed incidents of being sexually abused. T.N., the oldest boy (now 16), is very damaged and unstable. K.N., P.N., and C.N. are engaged in counseling and will be for the foreseeable future. Efforts to get the parents to provide a stable, safe home environment have failed. The parents have separated, and each has a new significant other. After ACCS worked with the family in their home, removal of these children became necessary. Notwithstanding reasonable case planning and diligent efforts by ACCS to assist the parents to remedy the problems that caused the removal, the parents failed continuously and repeatedly to substantially remedy the underlying problems. They may simply not be capable of such fundamental change. Their psychological profiles suggest substantial issues such as concrete thinking. They also frequently rationalize conduct and minimize responsibility. And, as noted earlier, they have each independently entered into new relationships with significant others.

The guardian ad litem testified that when he started working on this case he thought ACCS's request for permanent custody might have been precipitous. However, after seeing more of the family dynamics and learning the depths of the issues, he became convinced that such action

was in the children's best interests.

{¶36} In challenging the court's R.C. 2151.414(E)(1) finding, Mother repeats the arguments she made against the court's best interest finding, i.e. she primarily focuses on the fact that T.N. was removed from the home and that she moved away from the family farm where much of the sexual abuse occurred. But as we have already noted, Mother's argument oversimplifies the case and minimalizes her own role in the children's removal.

{¶37} We conclude clear and convincing evidence supports the trial court's finding that the children could not be placed with Mother in a reasonable time or should not be placed with her. As the trial court notes, the record contains evidence that the parents have demonstrated serious deficiencies in their parenting skills, particularly in the area of supervision. After T.N. was removed from the home, ACCS initially did not pursue temporary custody of the three youngest children. Instead, the agency provided the parents with case management services in an effort to keep the rest of the family together. But again, the parents failed to use door alarms as ACCS recommended and moved into a home with a person that Mother suspected was a child molester, contributing to the children's placement in the agency's custody.

{¶38} And as the trial court notes, evidence indicates the parents may not be capable of fundamental change. Lee testified that Mother was inclined to simplify complex circumstances and that in stressful situations, she was "particularly vulnerable" to being unable to recognize and avoid risks to her children. And as the court also noted, the parents continue to minimize their own responsibility in this matter. At the permanent custody hearing, the parents blamed each other for exposing the children to

a risk of sexual abuse. Mother blamed Father for allowing the grandfather's friend to be around the children. And Father testified that he felt there was no proof that the grandfather's friend was a child molester even though Mother testified that K.N. told her that this man had "touched her and had done things to her." Moreover, the parents blamed each other for an incident in which the children were unsupervised and "touching each other" in a game of truth or dare. Mother left the house in the morning, and Father testified that he called her at noon after he took a sleeping pill because he could not keep his eyes open to watch the children. But Mother did not return to the house until 7:30 p.m.

{¶39} Additionally, ACCS presented evidence that the parents did not take advantage of all the services the agency provided or recommended. Safranek testified that the parents did not show up for appointments with an ACCS parent mentor. And mother did not attend monthly team meetings about the case. Although DeLange testified that Mother had an adjustment disorder with depression and anxiety, Mother missed several counseling sessions before she stopped going altogether. Mother blamed some of the missed sessions on transportation issues, but Safranek testified that she did not recall Mother contacting her about getting ACCS's help with transportation. And Mother testified that she felt the sessions were not doing any good and that she "didn't need" counseling. Thus, the record contains clear and convincing evidence that in spite of ACCS's efforts, Mother continuously and repeatedly failed to substantially remedy one of the problems leading to the children's removal – her inability to properly supervise and protect the children.

{¶40} Accordingly, we overrule Mother's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County 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. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.