

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

IN THE MATTER OF	:	CASE NO. 09CA28
	:	
K.B.	:	<b>Released: February 22, 2010</b>
	:	
Adjudicated Dependant Child.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>

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APPEARANCES:

Susan M. Zurface Daniels, Hillsboro, Ohio, for Appellant.

James B. Grandey, Highland County Prosecutor, and Anneka P. Collins, Highland County Assistant Prosecutor, Hillsboro, Ohio, for Plaintiff-Appellee.

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McFarland, P. J.:

{¶1} Appellant Brittany Baker, mother of K.B., appeals the decision of the Highland County Court of Common Pleas, Juvenile Division, granting permanent custody of K.B. to Plaintiff-Appellee, Highland County Children Services. Baker argues the trial court erred in: 1) denying her motion to continue the proceedings; and 2) granting permanent custody of K.B. to Children Services after only two months of a six-month case plan had elapsed. Here, the trial court did not abuse its discretion in denying Baker's motion for a continuance, therefore, we overrule her first assignment of error. Because there is clear and convincing evidence that it

was in K.B.'s best interest, and because it was established that K.B. could not or should not be placed with Baker in a reasonable amount of time, the trial court properly awarded permanent custody to Highland County Children Services. Accordingly, we overrule both assignments of error and affirm the decision of the trial court.

### I. Facts

{¶2} Brittany Baker gave birth to her third child, K.B., in Highland County in January 2009. K.B.'s father has never been identified. At the time of K.B.'s birth, Baker's first two children were in the custody of Greene County Children Services and that agency had filed for permanent custody of them. Two days after K.B.'s birth, Highland County Children Services obtained emergency temporary custody of K.B. because Baker had tested positive for opiates and benzodiazepines.

{¶3} In April 2009, Baker stipulated that K.B. was a dependant child under R.C. 2151.04(A), and Highland County Children Services was granted temporary custody for a period of six months. To facilitate the possible reunification of Baker and K.B., the agency also prepared a revised case plan which set forth a number of objectives for Baker. In May, Greene County Children Services was granted permanent custody of Baker's two older children.

{¶4} On June 23, 2009, after leaving a supervised visit with K.B., Baker was arrested for a probation violation and jailed. Two days later, Highland County Children Services moved for permanent custody of K.B. Baker served 25 days in jail for the probation violation.

{¶5} The permanency hearing took place in August 2009. At the outset of the hearing, Baker's counsel made an oral motion for a continuance, but the trial court denied the motion. After a full hearing, the trial court granted permanent custody of K.B. to Highland County Children Services. Following that decision, Baker timely filed the current appeal.

## II. Assignments of Error

1. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING THE MOTHER – APPELLANT'S MOTION TO CONTINUE IN ORDER TO PREPARE FOR TRIAL WHEN THE AGENCY CONVERTED THE CASE FROM REUNIFICATION TO PERMANENCY LESS THAN TWO (2) MONTHS AFTER AN AGREEMENT HAD BEEN REACHED AND A CASE PLAN HAD BEEN JOURNALIZED, WHEN THE AGENCY'S MOTION FOR PERMANENCY WAS FILED BASED ON A PERMANENCY FINDING IN ANOTHER COURT, WHICH EFFECTIVELY SHIFTS THE BURDEN OF PROOF PURSUANT TO O.R.C. § 2151.414(E)(11) AND COUNSEL'S REQUEST WAS REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.
2. THE TRIAL COURT ERRED IN FINDING THAT PERMANENCY SHOULD BE GRANTED ON THE BASIS OF AN INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OUT OF GREENE COUNTY INVOLVING TWO (2) OTHER CHILDREN WHEN THE INVOLUNTARY TERMINATION OCCURRED AFTER THE AGENCY AND MOTHER

NEGOTIATED AN AGREEMENT FOR THE TEMPORARY CUSTODY OF THE MINOR CHILD, K.B., WHICH PROVIDED FOR REUNIFICATION UPON COMPLETION OF A CASE PLAN REQUIRING SIX (6) MONTHS COMPLIANCE AND WHERE THE AGENCY THEN MOVED FOR PERMANENT CUSTODY TWO (2) MONTHS AFTER JOURNALIZATION OF THAT AGREEMENT AND CASE PLAN.

### III. First Assignment of Error

{¶6} In her first assignment of error, Baker argues the trial court erred in not granting her request for a continuance at the outset of the permanent custody hearing.

{¶7} “Continuances shall be granted only when imperative to secure fair treatment for the parties.” Juv.R. 23. An appellate court must not reverse a trial court’s denial of a continuance unless the trial court abused its discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078; *In re Brown*, 4th Dist. No. 06CA4, 2006-Ohio-2863, at ¶23. Abuse of discretion is more than an error of judgment. Rather, it indicates that a ruling was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, when applying the abuse of discretion standard, we may not substitute our judgment for that of the trial court. *Berk v. Matthews* (1993), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶8} When determining whether a trial court abused its discretion in denying a continuance, the reviewing court must consider a number of factors, including: the length of the requested delay; prior continuances requested and received; the presence or absence of legitimate reasons for the requested delay; the appellant's participation or contribution to the circumstances giving rise to the request for a continuance; and any other relevant factors. *Unger* at 67-68; *In re Fortney*, 162 Ohio App.3d 170, 2005-Ohio-3618, 832 N.E.2d 1257, at ¶60. Though these factors provide guidance, “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Unger* at 67, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841.

{¶9} Applying the factors listed in *Unger* to the case sub judice, we find that Baker did not specify the time she sought to delay the proceedings. Further, she did not request prior continuances in the case at hand.<sup>1</sup> But her stated reasons for the continuance, and her contribution to the circumstances giving rise to the request, weigh heavily against her.

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<sup>1</sup> Baker had requested, and apparently received, numerous continuances in the Greene County custody case involving her older two children.

{¶10} Though, in her brief, Baker states that because of limited contact with counsel she was not ready to proceed, it is clear that her primary motivation was to give herself more time to comply with her case plan. Thus, she sought to delay the proceedings not because she was unprepared, but because it would allow her more time to change the negative behavior that the court would be evaluating in determining custody. Her counsel stated as much during the hearing: “ \* \* \* and I don’t think she really wants a continuance of this hearing, per se – I think she wants more time to work the case plan and try to keep this family in tact.” We agree with Children Services that such a rationale, though perhaps relevant for purposes of determining whether permanent custody should be granted, are not grounds for continuing the hearing.

{¶11} Further, to the extent that Baker was unprepared, she was, herself, largely responsible. She argues in her brief that she did not have enough time to consult with counsel prior to the permanency hearing. She notes that though Children Services filed for permanent custody on June 25 and the hearing did not take place until August 17, she was incarcerated from June 23 to July 17, leaving her only a month to prepare. At the hearing, Baker’s counsel stated that because of the incarceration he hadn’t

had any contact with Baker “until just a few minutes ago.” But this lack of communication was clearly due to Baker’s own inaction.

{¶12} More than a month before the hearing, Baker told a caseworker that she intended to ask for a continuance. Despite this, it is undisputed that Baker made no attempt to contact her counsel at any time prior to the hearing nor attempted to contact the court. Leaving aside her culpability for the incarceration which may have curtailed her ability to communicate with counsel, Baker was released a month before the hearing. In that time she took no steps to prepare, neither discussing the merits of the case with counsel, nor asking him to move for a continuance, nor even attempting to contact him.

{¶13} In such circumstances, and considering that Baker’s admitted primary motivation for the continuance was not because she was unprepared, but because she wanted more time to conform to her case plan, we cannot say the trial court abused its discretion in denying the motion. Accordingly, we overrule Baker’s first assignment of error.

#### IV. Second Assignment of Error

{¶14} Baker’s second assignment of error directly challenges the trial court’s decision to award permanent custody of K.B. to Highland County Children Services. She states that Highland County Children

Services filed for permanent custody of K.B. on the basis of Greene County Children Services' termination of her parental rights over her two older children. And because Highland County Children Services filed for permanent custody only two months into her amended six-month case plan, she argues the trial court's decision was error. We first address the proper standard of review regarding an award of permanent custody.

{¶15} An appellate court will not overrule a trial court's decision regarding permanent custody if there is competent and credible evidence to support the judgment. *In re McCain*, 4th Dist. No. 06CA654, 2007-Ohio-1429, at ¶8. "If the trial court's judgment is supported by some competent, credible evidence going to all the essential elements of the case, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court." *In re Buck*, 4th Dist. No. 06CA3123, 2007-Ohio-1491, at ¶7. Therefore, an appellate court's review of a decision to award permanent custody is deferential. *McCain* at ¶8.

{¶16} "An agency seeking permanent custody bears the burden of proving its case by clear and convincing evidence." *In re Perry*, 4th Dist. Nos. 06CA648, 06CA649, 2006-Ohio-6128, at ¶13. Clear and convincing evidence has been defined as "[t]he 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.” *McCain* at ¶9, citing *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23.

{¶17} Under R.C. 2151.414(B)(1), an agency seeking permanent custody must meet a two-part test before terminating parental rights and awarding permanent custody. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, at ¶31. First, one of conditions listed in R.C. 2151.414(B)(1) must apply:

{¶18} “(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, \* \* \* 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.

{¶19} (b) The child is abandoned.

{¶20} (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶21} (d) 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 \* \* \* .”

{¶22} Further, to determine under R.C. 2151.414(B)(1)(a) whether a child cannot or should not be placed with either parent within a reasonable period of time, a court must look to the guidelines provided by R.C. 2151.414(E). *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829 at ¶17. If the court finds, by clear and convincing evidence, that one or more of the factors listed in R.C. 2151.414(E) applies, it must enter a finding that the child cannot or should not be placed with the parent. *Id.*

{¶23} An agency seeking permanent custody must also demonstrate by clear and convincing evidence that such action is in the best interest of the child. R.C. 2151.414(D) sets forth the factors a court must consider in the best interest analysis:

{¶24} “(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;

{¶25} (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;

{¶26} (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, or 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 and, 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;

{¶27} (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;

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

{¶29} Applying the two-part permanent custody test to the case sub judice, the trial court determined that, under 2151.414(B)(1)(a), K.B. could not be placed with Baker within a reasonable time. In making that determination, the court found that at least three of the factors listed in R.C. 2151.414(E) applied. The court found that (E)(1) applied because Baker had continuously and repeatedly failed to remedy her drug problem, she

repeatedly failed to comply with Family Recovery Services due to unexcused absences, and she had repeatedly tested positive for illegal drugs. Because Baker had visited K.B. only 13 of the 28 times available to her, the trial court determined Baker showed a lack of commitment to K.B. and that R.C. 2151.414(E)(4) applied. Finally, because Greene County involuntarily terminated Baker's parental rights concerning her older two children, the court found that (E)(11) applied.

{¶30} We agree with the trial court's determination that there was clear and convincing evidence that K.B. could not or should not be placed with Baker in a reasonable amount of time. At least three of the factors listed in R.C. 2151.414(E) applied, any one of which would require such finding. As such, we turn to the second part of the permanent custody test, the best interest of the child analysis.

{¶31} Testimony at the hearing established that K.B. has integrated well with her foster family. The foster family has established a strong bond with her and indicated they will seek adoption if permitted. K.B. has been in the care of her foster family for her entire life; she was removed from Baker's custody two days after birth. As previously stated, Baker's parental rights were involuntarily terminated regarding her two older children, which is another factor to be considered in the best interest analysis. Most

importantly, Children Services presented clear and convincing evidence that a secure placement for K.B. could not be achieved without a grant of permanent custody.

{¶32} Though Baker states that permanent custody should not be awarded because she needs more time to comply with her case plan, there is little or no evidence that she has made any changes in the behavior which led to her losing temporary custody of K.B. and permanent custody of her older two children. K.B. was removed from her care in January 2009 because Baker tested positive for opiates and benzodiazepines at K.B.'s birth. Between that time and the permanency hearing in August, Baker had spent 25 days in jail on a probation violation. She had only sporadically taken advantage of supervised visits with K.B. She had continued to use illegal drugs, repeatedly failing drug screens and admitting to use at other times. Despite agency attempts to provide support, Baker had repeatedly been terminated from rehabilitation programs due to non-compliance and unexcused absences.

{¶33} Baker contends she needed more time to comply with her case plan. But her self-destructive pattern of behavior remained unchanged for the seven months between giving birth to K.B. and the hearing for permanent custody. Accordingly, there was clear and convincing evidence

for the trial court to determine that K.B.'s best interest was to be placed in the permanent custody of Highland County Children Services. Because it was in K.B.'s best interest, and because she could not be placed with Baker in a reasonable amount of time, the two-part permanency test required by R.C. 2151.414(B)(1) was satisfied. As such, Baker's second assignment of error is also overruled.

#### V. Conclusion

{¶34} In our view, neither of Baker's assignments of error are warranted. From the record, it is clear her primary motive for asking for a continuance was simply to allow her more time to comply with her case plan. Further, to the extent she was unprepared for the hearing, she, herself, was largely responsible because she made no attempt to contact her attorney. Accordingly, the trial court did not abuse its discretion in denying her motion for a continuance. As to her second assignment of error, enough evidence was provided at the hearing for the trial court to determine, by clear and convincing evidence, that K.B. could not or should not be placed with Baker in a reasonable amount of time, and that it was in K.B.'s best interest that Highland County Children Services be awarded permanent custody. Thus, the trial court's decision is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the 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 Highland County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

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

For the Court,

BY: \_\_\_\_\_  
Judge Matthew W. McFarland  
Presiding 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.**