

[Cite as *In re K. S.*, 2009-Ohio-3694.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: K. S.

C. A. Nos.    24599 and 24612

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    DN 06-8-771

DECISION AND JOURNAL ENTRY

Dated: July 29, 2009

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WHITMORE, Judge.

{¶1} Nicole S., the mother of K.S., and Ted and Wendy L., the maternal great aunt and uncle of K.S., have separately appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that granted legal custody of K.S. to her father, Thomas S. This Court affirms.

I

{¶2} K.S., born August 7, 2006, is the child of Nicole S. (“Mother”) and Thomas S. (“Father”). The parents are unmarried and Father’s paternity was not established until several months after her birth. Ted and Wendy L. (“Relatives”) are the maternal great aunt and uncle of K.S., with whom K.S. was placed during the pendency of this case.

{¶3} Because both Mother and K.S. tested positive for cocaine at the birth of the child, Summit County Children’s Services (“CSB”) filed a complaint in juvenile court on August 11, 2006, alleging that K.S. was abused, neglected, and dependent, and sought temporary custody.

When K.S. was released from the hospital, the agency placed her with Relatives, where she remained throughout this case. In due course, K.S. was found to be an abused and dependent child, and temporary custody was awarded to the agency.

{¶4} The case plan required both parents to: (1) obtain housing and employment in order to meet the needs of the child; (2) obtain a parenting assessment and complete a parenting program; and (3) obtain a mental health assessment and address issues of anger. In addition, Father was required to establish paternity and complete a chemical dependency assessment.

{¶5} On June 6, 2007, CSB moved for a six-month extension based upon Father's progress on his case plan objectives while also noting Mother's lack of progress on hers. The trial court granted the six-month extension based on the significant case plan compliance by Father.

{¶6} On February 27, 2008, the trial court began a three-day dispositional hearing before a magistrate on competing motions for legal custody filed by Father and Relatives. Following the hearing, the magistrate issued a decision, granting legal custody to Relatives. CSB and Father each filed objections to the magistrate's decision, challenging, inter alia, the decision as being against the weight of the evidence. On January 6, 2009, the trial judge rejected the decision of the magistrate and granted legal custody to Father, finding that an award of legal custody to the Father was in the best interest of the child and further finding that the weight of the evidence supported such award. Mother and Relatives have each appealed from the judgment of the trial court.

## II

### Assignment of Error

“THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LEGAL CUSTODY TO THE FATHER, AS ITS DECISION WAS AGAINST THE

MANIFEST WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO THE BEST INTEREST OF THE MINOR CHILD.”

{¶7} Mother and Relatives have each assigned the identical error for review. Both have argued that the evidence fails to support the judgment of the trial court, and that it would be in the best interest of the child to be placed in the legal custody of Relatives. In specific, Mother has not sought legal custody for herself, but rather with Relatives.

{¶8} Following an adjudication of neglect, dependency, or abuse, the juvenile court’s determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, at ¶17. “Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child.” *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11.

{¶9} The record reveals that K.S. was removed from Mother’s custody at birth after testing positive for cocaine. She remained with Relatives throughout the case. K.S. was diagnosed with and receives regular medical treatment for asthma and hypertonia, a medical condition which was said to periodically cause her joints to stiffen. She has also had medical problems with acid reflux, kidney and bladder issues, and ear infections. The child’s critical medical needs have lessened during the last eight or nine months.

{¶10} Relatives were married in 2001. They have no children together, but Wendy has three children: a 19-year old male and 13-year-old twins, from two prior relationships. Wendy works 32 hours per week as a bartender. Ted voluntarily used family medical leave from his job at Roadway Express in order to address the occasionally critical medical needs of K.S. Ted’s parents provided frequent child care for K.S. and have a good relationship with the child. By all

accounts, Relatives provided attentive and loving care for K.S. While this couple has certainly asserted that they would be better caregivers than Father, Ted admitted that Father is very loving and concerned about his daughter.

{¶11} At the conclusion of the custody hearing, Mother was serving a 30-day sentence on an outstanding warrant for failure to appear. Prior to that, she was in Oriana House for 100 days, where she attended classes on parenting, anger management and personal counseling. She admits to a problem with cocaine, marijuana, and alcohol, as well as many arrests for solicitation. She has been incarcerated six times. She has not made any meaningful progress on her case plan. Mother expressed concern with Father's past demonstrations of temper towards her, but believes Father genuinely cares about K.S. Mother does not seek legal custody for herself, but supports Relatives in their effort to obtain legal custody. She requests only visitation.

{¶12} Regarding Father, his case plan required him to establish paternity, conduct a parenting assessment, complete parenting classes, complete anger management classes, maintain safe and appropriate housing, and be able to meet K.S.'s basic needs. Jacqueline Abrams-Rodkey, the CSB caseworker initially assigned to this case, acknowledged that Father had some problems with anger management and alcohol abuse at a young age, but she was confident that those issues were fully and successfully addressed through case planning. She stated that, based on Father's case plan efforts, he no longer demonstrated any problems that would preclude him from meeting the needs of his daughter.

{¶13} According to Ms. Abrams-Rodkey, when Father learned that he was the father of K.S., he immediately became much more engaged in the process. She said Father has, in fact, done everything that the agency asked of him. His visitation schedule began slowly with one

hour weekly, but, over the course of these proceedings, it has progressed until Father currently provides care for K.S. for half of every week. All the reviews of Father's interaction with his daughter were very positive. He received "glowing reports" from the provider of his parenting class. The caseworker stated that Father has a support system that includes his mother, girlfriend, and church, as well as Relatives. Ms. Abrams-Rodkey concluded by saying that it is "vital" that K.S. be with her father. She felt "strongly" that K.S. should spend the majority of her time with Father, and that Mother and Relatives should share a standard order of visitation, which is every other weekend and one day during the week.

{¶14} Carolyn Dibble, who served as caseworker for four to six weeks while Ms. Abrams-Rodkey was on medical leave, testified that CSB recommends legal custody be awarded to Father with visitation to Relatives and supervised visitation for Mother.

{¶15} Angela Kille, the guardian ad litem, testified that, although Relatives would be wonderful custodians for K.S., she believed it was in the best interest of K.S. to be placed in the legal custody of Father. She emphasized that Father did nothing to cause the initial removal of the child or to bring about court involvement. Rather, once this case began, Father did everything that CSB asked of him and, according to Ms. Kille, he did it all "extremely well." She admitted that Father has a lot to learn and K.S. requires a lot of attention, but Father has demonstrated that he is capable of learning, has attended classes, and is knowledgeable enough to get help when required. Based on her experience, Ms. Kille expressed confidence Father will qualify for medical insurance for K.S. She recommended that legal custody be awarded to Father and that Relatives have standard visitation, with Mother's visits being supervised by Relatives.

{¶16} Based on the record, the trial judge found that Relatives have proved to be appropriate caregivers, but that Father is an appropriate caregiver as well. The judge found that Father has consistently demonstrated that he loves his daughter and he is able and willing to parent her. She concluded that the evidence supported a finding that an award of legal custody to Father was in the best interest of K.S.

{¶17} On appeal, Mother and Relatives have argued that the evidence does not support the judgment of the trial court and that legal custody should be awarded to Relatives instead. Specifically, Mother has complained about Father's living arrangements and behaviors at the time she became pregnant, and has also complained that he lacks present resources to provide for the child's needs. The evidence overwhelmingly supports the trial court's conclusion that, since Father's paternity was established, he has behaved appropriately and has taken his responsibilities for his daughter seriously. He currently resides with his mother, a retired school teacher and frequent care-giver, in a home that CSB found to be appropriate. Father has become actively involved in his church. Though he recently quit a sales job to return to his construction job, there is no evidence that Father has been unemployed or unable to provide for his daughter. In addition, Father has a girlfriend who is in her last year of college, who has developed a caring relationship with K.S., and whom he expects to marry.

{¶18} Next, Mother has argued that Father did not know enough about his daughter's medical conditions or become involved enough in her medical care. The record demonstrates that Father was not often informed of her appointments or hospitalizations until after the fact, and he attended asthma classes to learn how to better deal with that condition in his daughter. Although there were some mix-ups with medication when overnight visits were first instituted, there is no evidence that that has happened since. There is also no evidence that Father would

not provide medical insurance for K.S. The trial court found that there was no reason to believe that Father will not make and keep any medical appointments that his daughter requires.

{¶19} Upon review, the record demonstrates that there was ample evidence before the trial court from which it could conclude that legal custody with Father was in the child's best interests. Mother's assignment of error is overruled. Relatives' assignment of error is overruled.

### III

{¶20} Mother's assignment of error and Relatives' assignment of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

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BETH WHITMORE  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

DONALD J. MALARCIK, Attorney at Law, for Appellants.

DEREK CEK, Attorney at Law, for Appellee.

ANGIE KILLE, Attorney at Law, GAL.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.