

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN THE MATTER OF:	:	
	:	
D.R., et al.	:	CASE NO. CA2009-01-018
	:	
	:	<u>OPINION</u>
	:	6/15/2009
	:	
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	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS,
JUVENILE DIVISION
Case No. JN2005-1377

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YOUNG, J.

{¶1} Appellant, Nicola C., appeals the decision of the Butler County Court of Common Pleas, Juvenile Division, granting permanent custody of her minor sons, J.R. and

D.R., to the Butler County Department of Job and Family Services (the Agency).

{¶2} In 2004, appellant moved from Michigan to Butler County with her four children, her sons J.R. and D.R., and her two daughters. In December 2005, all four children were removed from appellant's custody by the Agency due to concerns the children were receiving infrequent and inadequate medical and dental care, appellant's failure to take her children to medical and dental appointments because of transportation problems, and her marijuana use. At the time of the removal, one of her daughters had lost a tooth due to decay and another tooth was painful. Several of her teeth were eventually pulled out because of cavities. D.R. has ADHD and developmental delays, takes medication, and receives counseling and weekly speech therapy.

{¶3} J.R. suffered a stroke when he was an infant. The stroke was caused by a blood disorder and required brain surgery when he was three years old. J.R. has type 1 neurofibromatosis, systofibromyotosis (a genetic disorder), chronic headaches, and cerebral palsy. J.R. takes medication, receives weekly physical and occupational therapy at Children's Hospital in Cincinnati, daily speech therapy during the school year, and counseling. In addition, he must have an MRI done every six months, and has follow-up visits every three months with a gastroenterologist, urologist, neurologist, and neurofibromatosis special genetic testing specialist. Overall, J.R. and D.R. have two to three appointments per week.

{¶4} On December 22, 2005, the Agency filed a complaint alleging that seven-year-old J.R. and five-year-old D.R. were neglected and dependent. On January 30, 2006, the juvenile court adjudicated J.R. and D.R. dependent and awarded temporary custody to the Agency.¹ A case plan was implemented to reunify appellant with her sons. Under the plan,

1. The record indicates that during the proceedings below, appellant permanently surrendered custody of one daughter; custody of the other daughter was returned to appellant (according to the family's caseworker, the child

appellant was required to complete psychological and substance abuse evaluations, parenting classes, and follow all recommendations. On April 20, 2007, the Agency moved for permanent custody of J.R. and D.R. Hearings on the motion were held before a magistrate between June 30, 2008 and August 1, 2008. The biological father of J.R. and D.R. did not participate in the permanent custody hearings below and is not a party in this appeal.

{¶15} Testimony at the hearings indicated that since moving to Ohio, appellant has lived in four different places and has had several short-term jobs. At the time of the hearings, appellant was not working and was living with her mother. Appellant receives social security. With regard to the case plan, appellant completed a substance abuse assessment and followed through with intensive outpatient services and residential drug treatment, both of which she completed. Nonetheless, she tested positive for marijuana once in April 2007, and, on a few occasions, also tested positive for morphine and barbiturates due to some of her medication. At the time of the hearings, there were no concerns about her substance abuse. Appellant also (1) completed a psychological evaluation and asked to undergo a second evaluation but never did; (2) completed a parenting skill program at Catholic Social Services and an in-home parenting program through Development of Living Skills; and (3) received individual counseling through Catholic Social Services.

{¶16} Testimony at the hearings also indicated that appellant continues to have transportation problems. The problems started when she came to live in Ohio but failed to get an Ohio driver's license. In 2007, she spent three days in jail for driving under suspension; she was also incarcerated for 30 days for failure to perform community services (which were in lieu of paying a fine). At the time of the hearings, she owed a \$1,500 fine and was paying \$150 a month toward it. Appellant admitted driving under suspension on

has a lot less medical needs and more skills than her siblings, and requires "little maintenance").

occasions with her children in the car. At the end of the July 1, 2008 hearing, she was taken to jail on a warrant for failure to appear in court. At the August 1, 2008 hearing, the prosecutor informed the juvenile court that appellant had been sentenced to six months for driving under suspension; her "outdate" was January 27, 2009. The record shows that appellant did not understand how incarceration could affect her efforts in regaining custody of her children.

{¶7} On October 13, 2008, the magistrate issued a decision in which he found by clear and convincing evidence that (1) J.R. and D.R. had been in the temporary custody of the Agency for 12 or more months of a consecutive 22-month period; (2) it was in the best interest of J.R. and D.R. to grant permanent custody to the Agency; and (3) appellant had failed continuously and repeatedly to remedy the problems which initially caused the removal of her sons. The magistrate noted that appellant clearly and deeply loves J.R. and D.R. and fought diligently for their return, and that she participated in case plan services with reasonable diligence and completed many of them. The magistrate found, however, that despite her efforts, appellant "was unable to fully integrate the assistance [] she received into her life;" "the problems she has encountered regarding her ability to care for [J.R. and D.R.] relate to her own inherent personal, psychological, emotional, and intellectual limitations rather than to any shortcomings which could be addressed by education, counseling, or training;" and "her recent incarceration and her historical inability to adequately meet the medical needs of her young children both underscore those issues."

{¶8} Appellant filed objections to the magistrate's decision, and the juvenile court affirmed the magistrate's decision in its entirety. Appellant appeals the juvenile court's decision, raising two assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN FINDING, BY CLEAR AND CONVINCING

EVIDENCE, THAT THE BEST INTEREST OF THE CHILD[REN], PURSUANT TO THE FACTORS SET FORTH IN R.C. 2151.414(D), WAS REACHED BY GRANTING PERMANENT CUSTODY TO BUTLER COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES."

{¶11} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state must prove by clear and convincing evidence that the statutory standards have been met. See *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision regarding permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16.

{¶12} R.C. 2151.414(B) requires the juvenile court to apply a two-part test when terminating parental rights and awarding permanent custody to a children services agency. Specifically, the court must find that (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and (2) any of the following apply: the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; the child is abandoned; the child is orphaned; or the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶31-36.

{¶13} The juvenile court found by clear and convincing evidence, and appellant does not dispute, that J.R. and D.R. have been in the temporary custody of the Agency for 12 or more months of a consecutive 22-month period at the time the motion for permanent custody was filed. Accordingly, we must determine whether there was clear and convincing evidence that granting permanent custody to the Agency was in the best interest of J.R. and D.R.

{¶14} R.C. 2151.414(D) provides that in considering the best interest of a child in a

permanent custody hearing, the juvenile court must consider all relevant factors, including, but not limited to: (1) 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; (2) the wishes of the child, as expressed directly by the child or through the child's guardian ad litem; (3) the custodial history of the child, including whether the child has been in the temporary custody of a children services agency for 12 or more months of a consecutive 22-month period; (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 to the agency; and (5) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply in relation to the parents and child. The juvenile 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. *In re Schaefer*, 2006-Ohio-5513 at ¶56.

{¶15} The juvenile court in the case at bar made a number of findings in its determination that permanent custody was in the best interest of J.R. and D.R. under the R.C. 2151.414(D) factors. First, the juvenile court found, and appellant does not dispute, that the factors in R.C. 2151.414(E)(7) to (11) were not applicable to this case. See R.C. 2151.414(D)(5). The court also found, and appellant does not dispute, that J.R. and D.R. have been in the temporary custody of the Agency for more than 12 months of a consecutive 22-month period. See R.C. 2151.414(D)(3). The record supports both findings.

{¶16} J.R. and D.R. are in the same foster home and are "deeply attached to each other." The consensus was that they should absolutely not be separated. The juvenile court found that the two boys have a good relationship with appellant, their maternal grandmother (who resides with appellant), and their sister whose custody was returned to appellant. The record shows that unless she was incarcerated, appellant never missed her visitation with her sons. The juvenile court noted that appellant's recent arrest and incarceration interrupted the

boys' contact with appellant. J.R. and D.R. have no relationship with their father who has not been involved in the proceedings at all. The juvenile court further found that J.R. and D.R. are more attached and bonded with their foster family and are integrated in their foster family. Further, the foster family meets the boys' needs, medical and otherwise, which is especially important in J.R.'s case. The record shows that the boys have thrived while in the care of their foster family.

{¶17} With regard to the boys' wishes, appellant asserts that while the juvenile court interviewed both J.R. and D.R., the court relied more heavily on the recommendation of the boys' guardian ad litem (GAL). We disagree. The magistrate's decision, as adopted by the juvenile court, states that the magistrate met with both J.R. and D.R. and "interviewed [them] in camera. [D]espite [their] youth, [J.R. and D.R.] possess some insights into [their] best interests and [their] desires. [Their] communication with the court was, therefore, taken into account in this decision and in the orders issued herein. [The boys'] GAL offered a report which favors the placement of [J.R. and D.R.] in the permanent custody" of the Agency. In his report, the GAL noted that in conversations with him, the boys have generally not expressed a view as to where they want to live. Further, neither have expressed much enthusiasm about seeing appellant or their sisters.

{¶18} Appellant argues that given the fact she completed her case plan services and one of her daughters was returned to her custody, the juvenile court erred in finding it was in her sons' best interest to grant permanent custody to the Agency. We disagree. As noted earlier, according to the caseworker assigned to appellant's case, the daughter returned to appellant's custody had a lot less medical needs than her siblings, more skills, and required "little maintenance."

{¶19} Further, while appellant diligently participated in and completed case plan services, "substantial compliance with a case plan, in and of itself, does not prove that a

grant of permanent custody to an agency is erroneous. Moreover, while evidence of case plan compliance is usually relevant to the [juvenile] court's best interest determination, it is not dispositive of it." *In re C.B.*, Summit App. No. 22635, 2005-Ohio-4364, ¶15.

{¶20} Appellant deeply loves her sons and diligently fought for their return by completing case plan services. Yet, she believed her four children were wrongfully removed from her custody; further, she did not need parenting classes. While she admitted never taking D.R. to a dentist and failing to follow up with J.R.'s dental appointments, she denied there were any medical or dental issues. This attitude hampered appellant's progress under the case plan.

{¶21} The record shows that appellant lacked insight into her and others' behavior, and that she did not understand how her poor decisions affected her children. For example, appellant could not comprehend how being incarcerated could affect her children. In 2007, she was incarcerated on two different occasions for driving under suspension and for failing to perform community services. During the permanent custody hearings, she was sentenced to six months for driving under suspension. Appellant admitted driving under suspension with her children in the car, and failing to take J.R. for additional dental work (following the removal of teeth because of cavities) because she had no transportation.

{¶22} The caseworker testified that because of her constant transportation problems, appellant cannot consistently take J.R. to his numerous appointments. By contrast, appellant believed she would not forget and would have no problems going to her sons' appointments. Yet, she was unable to discuss how she would make it happen. Her driver's license was suspended and she owed a \$1,500 fine. Her mother, who lived with her, did not have a car, did not have a driver's license, and relied on services or church members for transportation.

{¶23} The record supports the juvenile court's determination that J.R. and D.R. are in need of a legally secure permanent placement that cannot be achieved by returning the boys

to appellant's custody. Given the fact that no other placement option was presented to provide a legally secure permanent placement for J.R. and D.R. other than appellant or permanent custody to the Agency, we find implicit in the juvenile court's discussion the finding that the boys' need for permanent placement could not be achieved without a grant of permanent custody to the Agency.² *In re L.C.B.*, Warren App. No. CA2008-10-135, 2009-Ohio-1838, ¶27.

{¶24} The record shows that the juvenile court found it was in the best interest of J.R. and D.R. to grant permanent custody to the Agency after a careful consideration and discussion of the statutory factors. "The juvenile court is not required to credit evidence in support of maintaining the parental relationship when evidence supporting termination outweighs it clearly and convincingly." *Id.* at ¶29, citing *In re Schaefer*, 2006-Ohio-5513.

{¶25} The juvenile court, therefore, did not err by finding by clear and convincing evidence that it was in the best interest of J.R. and D.R. to grant permanent custody to the Agency and that the statutory criteria for granting permanent custody was met. Appellant's first assignment of error is overruled.

{¶26} Assignment of Error No. 2:

{¶27} "UNDER R.C. 2151.414(E)(1), THE TRIAL COURT SHOULD NOT HAVE FOUND THAT MOTHER FAILED TO SUBSTANTIALLY REMEDY THE CONDITIONS CAUSING THE CHILDREN TO BE PLACED OUTSIDE OF THE CHILDREN'S HOME."

{¶28} The magistrate found that J.R. and D.R. could not be placed with appellant within a reasonable time and should not be placed with her because appellant had failed continuously and repeatedly to remedy the problems which initially caused the removal of her

2. Although she lived with appellant and helped with the care of the children, appellant's mother never moved for custody of any of the children. The record further shows that when appellant was a child, her mother permanently lost custody of appellant's six siblings; appellant, herself, was removed from her mother's house at age 11 and returned to her mother's custody at age 15.

sons. See R.C. 2151.414(E)(1). Appellant challenges the juvenile court's adoption of the foregoing finding on the ground it is not supported by clear and convincing evidence.³

{¶29} Juv.R. 40(D)(3)(b)(iv) provides that, except for a claim of plain error, a party waives the right to assign error on appeal with respect to the juvenile court's adoption of any factual finding or legal conclusion "unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b)." Objections must be specific and state with particularity all grounds for objection. Juv.R. 40(D)(3)(b)(ii). Failure to file specific objections is treated the same as the failure to file any objections. *In re Sox*, Mahoning App. No. 06 MA 35, 2006-Ohio-7116, ¶28.

{¶30} Although appellant filed objections to the magistrate's decision, she did not specifically object to the magistrate's foregoing finding and does not claim plain error here. She is therefore precluded from raising this issue on appeal and from challenging the juvenile court's adoption of the magistrate's finding. Juv.R. 40(D)(3)(b)(ii), (iv). Appellant's second assignment of error is overruled.

{¶31} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.

3. We note that under R.C. 2151.414(B)(1), when a child has been in the temporary custody of a children services agency for at least 12 months of a consecutive 22-month period, a juvenile court is only required to find by clear and convincing evidence that permanent custody is in the child's best interest. The juvenile court need not also find that the child cannot be placed with his parents. See *In re L.D.*, Clinton App. No. CA2004-03-007, 2004-Ohio-4000. In fact, under R.C. 2151.414(B)(1), a juvenile court must find that a child cannot be placed with his parents *only if* the child is not abandoned or orphaned or has not been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. See R.C. 2151.414(B)(1)(a). In the case at bar, the juvenile court's finding that J.R. and D.R. had been in the temporary custody of the Agency for at least 12 months of a consecutive 22-month period precluded a determination required by R.C. 2151.414(E) of whether appellant had remedied the conditions which caused the removal of her sons. *In re L.D.* at ¶14-15.

[Cite as *In re D.R.*, 2009-Ohio-2805.]