[Cite as *In re N.F.*, 2009-Ohio-6553.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN THE MATTER OF:	:	
N.F.	:	CASE NO. CA2009-07-040
	:	O P I N I O N 12/14/2009
	:	
	:	
	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2007-JC-3868

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

Anita M. Bechmann, Assistant Public Defender, 2340 Clermont Center Drive, Batavia, OH 45103, for defendants-appellants, Lisa C. and John F.

Robert Bauer, 501 West Loveland Avenue, Loveland, OH 45140, guardian ad litem

POWELL, J.

{¶1} Appellants, L.C. and J.F., appeal a decision of the Clermont County Court of Common Pleas, Juvenile Division, granting permanent custody of their child to the Clermont County Department of Job and Family Services (CCDJFS).

{¶2} N.F. was born to appellants on August 8, 2007 and on the day after, CCDJFS filed a complaint alleging that N.F. was a dependent child. The agency was granted emergency temporary custody of the child and on September 20, 2007, the trial court found that N.F. was dependent, based on a stipulation by the parents. He was placed in the temporary custody of the agency by agreement of the parties. On November 19, 2008, the agency filed for permanent custody of the child. A hearing was held on January 23, 2009 before a magistrate. On February 2, 2009, the magistrate issued a decision, granting permanent custody of N.F. to the agency. Appellants filed objections to the magistrate's decision which were overruled by the trial court on June 17, 2009.

{¶3} On appeal, appellants present one assignment of error for this court's review.

{¶4} "THE TRIAL COURT ERRED IN DETERMINING BY CLEAR AND CONVINCING EVIDENCE THAT IT WAS IN THE BEST INTERESTS OF N.F. TO GRANT PERMANENT CUSTODY TO CCDJFS."

{¶5} Before a natural parent's constitutionally protected liberty interest in the care and custody of a child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting 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.

{¶6} 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 at least 12 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; *In re Ebenschweiger,* Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶9.

{¶7} The juvenile court found by clear and convincing evidence, and appellants do not dispute, that N.F. had been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period as of the date BCDJFS filed the permanent custody motion. However, appellants dispute the trial court's finding that it is in the child's best interest to grant permanent custody to the agency.

{¶8} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶9} "(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;

{¶10} "(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;

{¶11} "(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 ending on or after March 18, 1999;

{¶12} "(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;

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

{¶14} In a written decision, the juvenile court cited the factors a court must consider in determining best interest of the child. With respect to R.C. 2151.414 (D)(1)(a), the court found that the parents have not had considerable contact with the child and have transportation problems in that neither parent drives, and a move to another county compounded the problem. The court found the mother admitted she has not bonded and that none of the parents' other children are in their custody. The court also found the child has bonded with the foster parents and his half-sister.

{¶15} With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that the guardian ad litem advocates for permanent custody. With respect to R.C. 2151.414(D)(1)(c), the juvenile court found that the child has been in the same foster home since birth and in the custody of the agency for 12 of 22 months.

{¶16} With respect to R.C. 2151.414 (D)(1)(d), the juvenile court found that the child needs a legally secure placement and that the foster parents can provide a permanent home. The court also found the parents substantially complied with the case plan as mother received treatment as recommended by the psychological evaluator. The court noted there was no recommended treatment for the father and that the psychologist relied on information as given by the agency which appears to

have some inaccuracies. The court found the parents complied with parent education and substance abuse requirements and with the safe and stable housing requirement in November 2008. The court found the father did not significantly comply with child support and the last payment was in July 2008, although the mother testified he began working for cash in October 2008. The court found that "the legally secure permanent placement this child needs cannot be achieved without a grant of permanent custody to the [a]gency." Finally, the court found that none of the factors in division (E)(7) to (11) applied.

{¶17} Based on consideration of these factors, the court stated that by clear and convincing evidence that it was in the best interest of the children to permanently terminate parental rights and grant permanent custody to the agency.

{¶18} The Revised Code provides that children should be raised "whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety." R.C. 2151.01(A). The Ohio Supreme Court has long held that parents who are suitable have a paramount right to raise and care for their children. *In re D.A.* 113 Ohio St.3d 88, 2007-Ohio-1105, ¶10; *In re Murray* (1990), 52 Ohio St.3d 155, 157; *In re Perales* (1977), 52 Ohio St.2d 89. This right has been recognized by the United States Supreme Court as "perhaps the oldest of the fundamental liberty interests recognized by this court." *Troxel v. Granville* (2000), 530 U.S. 57, 65, 120 S.Ct. 2054. In Ohio, the termination of parental rights has been described as the "family law equivalent of the death penalty in a criminal case." *In re D.A.* 113 Ohio St.3d 88, 2007-Ohio-1105, quoting *In re Smith* (1977), 77 Ohio App.3d 1.

{¶19} However, it is equally well settled that this fundamental interest of

parents is not absolute. *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825. "The constitutional right to raise one's children does not include a right to abuse, exploit, or neglect them, nor is there a right to permit others to do so." Id. at ¶34. Once a case reaches the dispositional phase, the best interest of the child controls. *In re D.A.* 113 Ohio St.3d 88, 2007-Ohio-1105. However, "[t]he termination of parental rights should be an alternative of 'last resort.'" Id., quoting *In re Cunningham* (1979), 59 Ohio St.2d 100.

{¶20} In a permanent custody case, the trial court's findings must be supported by clear and convincing evidence. R.C. 2151.414(B). "Clear and convincing evidence" has been defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 151 Ohio St. 469, paragraph three of the syllabus.

{¶21} At the hearing, Edward Stanten, an attorney with the Clermont County Child Support Agency, testified that the father in this case was under a child support obligation. Stanten testified that the father has an arrearage of $3,082.48 and that the last payment was on July 3, 2008.

{¶22} William Moore, a clinical psychologist, testified that he performed a complete psychological examination of the mother on March 10, 2006. Moore stated that the mother's reported history included seven years of involvement with child protection, a somewhat transient living arrangement, an incarceration in 2000 for an altercation involving her brother and a conviction for trafficking in drugs. Her history

also included sexual abuse at the age of 10 and 19, a developmental handicap, receipt of disability payments since the age of 12, a history of volatile and short-term relationships and a diagnosis of bipolar disorder.

{¶23} Dr. Moore stated that testing indicated an IQ consistent with mild mental retardation and borderline intellectual functioning. He also determined that the mother has mild depression and a potential for a personality disorder. Moore was also concerned because it appeared that the mother had a history of engaging in maladaptive or abusive relationships which could be a potential threat to the children. His overall impression was that the mother was easily overwhelmed with the daily requirements of living but, he felt that at the time, she seemed to be attempting to take some kind of responsibility and make modifications in her life. Moore suggested that the mother consult with a physician for antidepressant medication and that the children not be returned until she obtains psychological equilibrium.

{¶24} Moore testified that he performed a complete psychological examination of the father on August 28, 2007. He stated that he obtained background information from the agency, which included a conviction for safecracking resulting in a year in prison. The father had a history of drug use and was in drug treatment in 1996, but reported that he left after a few weeks because he was not required to be there. Moore indicated the father was not using drugs, but there was some concern regarding his use of alcohol. Moore testified that testing shows the father has an IQ that is above average, but also that he is defensive, selfish, dishonest and opportunistic. Moore stated that the father met the criteria for sycophantic or sociopathic or antisocial personality disorder and also had narcissistic pathology. When asked how the testing relates to parenting, Dr. Moore stated, that

the presentation was consistent with antisocial personality disorder, and "it was my opinion that he was not prepared to rear children in any capacity at any time." He had no recommendations because antisocial personality disorder is refractory to medicine and therapy.

{¶25} Erin Meadows, a caseworker for CCDJFS, testified that N.F. was removed from his parents at birth. She stated the parents are not married but are living together. The mother has two older children living with relatives and one other child was adopted after the mother voluntarily surrendered her rights. The father has two daughters and another child who are not living with him, but Meadows did not know the circumstances regarding these children. Meadows indicated that Dr. Moore recommended the mother see a doctor regarding medication for her psychiatric condition and the mother followed through and has been taking medication regularly. She stated that the father completed a psychiatric evaluation with Dr. Moore in 2007, and no treatment was recommended, but the agency continued the case plan despite Dr. Moore's statement that the father was unfit to parent.

{¶26} Meadows testified that the case plan required the parents to obtain safe and stable housing. She stated that since the time the child was born, the parents lived with relatives of the mother and with the father's parents for "a pretty long time." She stated that she did not visit the paternal grandparents' home to see if it was appropriate for a child because she wanted the parents to live on their own, so she really did not see if the home was safe and stable. Meadows stated that she asked the parents to obtain independent housing, but the parents did not do so until signing a lease for an apartment in November 2008. When questioned regarding the need for independent housing, Meadows stated that the agency wanted the parents to be

able to show some stability for the child and live on their own and care for themselves and the child. She stated that she has visited the new home and it is clean, has a nursery and furniture and is appropriate for a child.

{¶27} Meadows also testified that the mother receives SSI, and the case plan required the father to obtain employment. She stated that the father reported he is working holding signs, and is paid in cash by the company. Meadows stated that this was not verified because the father does not get pay stubs. According to Meadows, the case plan also required the parents to complete parenting education classes and these classes were successfully completed. The father was also required to attend substance abuse classes through CRC. She testified that the father was treated for alcohol dependence and successfully completed this requirement.

{¶28} Finally, Meadows testified that visitation was scheduled for an hour, once a week at the agency. She stated that from August 2007, there should have been 70 visits, but only 23 visits actually occurred. Meadows testified that the parents indicated that a lack of transportation was the issue in missing visitations and they were living in Georgetown, in Brown County, but visits were scheduled at the agency in Clermont County. She was unsure about the father, but knew the mother did not drive and that the couple did not have a car. She indicated that the mother visited with the child few times by making arrangements with the foster mother. Because of missed visitations, the parents were required to be at the agency two hours prior to a visit so that the child could be transported to the agency. At one point, the parents were required to arrive at 9:00 for a 12:00 visit and the mother told Meadows on several occasions that transportation was a problem. Meadows also testified that in December, the parents started visiting regularly and the agency no

longer required them to be there two hours before a visit.

{¶29} Julie Jordon, an adoption supervisor for CCDJFS, testified that N.F. is doing well developmentally, the foster home is appropriate and he is placed with his half-sister. She stated that within 90 days of granting permanent custody a match conference would be held. She stated that since the child has been in the foster home for over six months, an adoption by the foster parents could be finalized within 4 to 6 months.

{¶30} The mother testified and admitted a conviction in 2004 for drug trafficking in Clermont County and that she completed probation two years ago. She stated visits in Clermont County were difficult due to transportation problems in coming from Georgetown. She testified that she visited with the child several times outside of agency visits by contact directly with the foster mother, who at times came and picked the mother up in Georgetown for visits. She admitted that she has not bonded with the child, since the child was removed at birth from the hospital. The mother also testified that she has been taking lithium for a bipolar condition since before N.F.'s birth. She has been regular in taking her medication, and only quit taking it during her pregnancy and resumed once N.F. was born. The mother also stated she was aware the father had domestic violence allegations against him by his wife, but she believed it was verbal, not physical, and the father and his wife have been separated for four or five years. Finally, she stated that the couple was now able to afford independent housing as her SSI benefits, along with back benefits, were awarded after two years.

{¶31} The child's paternal grandmother also testified at the hearing. She stated that the foster parents brought the child to Georgetown for visits several times

and she took the parents on some visits. The grandmother also stated that when the parents were living in her home, there was enough room for the child there. She explained that she has been raising the father's two older girls since the time of his divorce.

{¶32} The guardian ad litem prepared a half-page report stating that he had reviewed the court and agency files, attended court hearings, reviewed documents and case plans. He stated that the child has been with the foster parents since birth and until recently the parents did not have a stable home or employment. He indicated the reports by Dr. Moore raised "grave concerns" about their ability to parent. Based on this, he recommended permanent custody.

{¶33} After careful and conscientious review of the evidence presented in this case, we find that it does not rise to the level of clear and convincing evidence as required in permanent custody cases. As mentioned above, the dependency finding was stipulated by the mother. No evidence was presented at the dependency hearing regarding any of the facts that led to the agency's decision to remove N.F. from appellants at birth. Likewise, at the permanent custody hearing, none of the evidence regarding the agency's prior contacts with appellants was presented. Instead, the submission of evidence, by means of testimony, focused on the parents' completion of the case plan. However, the case plan itself was not admitted in evidence and is not contained in the court file. In the same manner, while Dr. Moore testified, largely in broad terms, regarding his evaluations of the parents, these reports themselves were not admitted into evidence.

{¶34} It is clear from a review of the record in this case that the parties and witnesses were familiar with appellants and their history with the agency. Several

references were made to the mother's previous case involving her daughter, which was ongoing when N.F. was removed from the home. At an earlier hearing, the parties indicated that they were proceeding on the same case plan as had been prepared in the sibling's case. Nothing related to the sibling's case, including a case plan, was placed in the court file, nor was there any testimony regarding what led to the agency's involvement with these parents, nor any previous efforts on their behalf. Nor was any type of judicial notice taken of the facts in that case or previous efforts on the part of the agency or parents. While it is apparent in reading the transcript and reviewing the court file that there was a long history with the mother prior to this case and that the father was involved in some manner when the mother's other child was removed from the home, no details regarding these facts were presented, and this court cannot speculate regarding the extent of the agency's involvement or the parents' actions regarding facts that are not before us.[1]

{¶35} Accordingly, the evidence which is before this court for review consists of a child who has been found dependent on an unknown basis, testimony regarding the parents' progress on a case plan which is itself not in evidence, and a psychologist's testimony regarding evaluations he performed without the actual reports admitted in evidence. Moreover, the evidence at the hearing shows that the parents substantially complied with the case plan. They completed parenting classes, substance abuse requirements, and obtained independent housing. The

1. For example, the complaint states that the couple had an older child who was in the agency's custody due to the agency's extensive history with the mother and her two older children. The complaint alleged the mother had a history of physical abuse, substantial emotional maltreatment, substantial neglect, and that she had been convicted of felony drug trafficking. However, no evidence was presented at the dependency hearing regarding these allegations and the parents stipulated to a finding of dependency, not to the facts of the complaint. Dr. Moore also briefly references past problems in his reported history of the parents, but does not discuss these facts in detail.

mother followed through on the recommendations of the psychologist, and the father reportedly has obtained employment. However, not all requirements were met. Although the father paid child support initially, he did not pay as required under the order. The parents also admitted they did not visit as required under the case plan due to transportation problems, although there were some number of visits that occurred outside the agency.

{¶36} In fact, in closing arguments, the prosecutor stated, "This case is somewhat unusual in that parents rarely do what they're asked by the Children's Service Agency. In this case the parents did most everything required of them." The prosecutor then argued that the parents did "most everything" except to maintain regular contact with their son through agency visits. While the evidence shows the parents failed to attend agency visitations with their son, the evidence also shows that transportation was a problem. At an earlier hearing and in court documents references were made to the possibility of getting the parents to a place where they could take advantage of some sort of transportation assistance, no testimony or evidence was presented that this was ever offered as an option to the parents or that any other attempts were made to address the transportation problems.

{¶37} While the facts before us, taken with an extensive history and other details, may be sufficient to meet a clear and convincing level of proof to support a grant of permanent custody, these limited facts, standing alone, do not satisfy the requisite degree of proof. As mentioned above, it is clear the parties were familiar with the history and facts surrounding this case; however this court is limited to the record before us. Cases involving the termination of parental rights are difficult and are of critical importance and therefore, it is imperative that the parties create a

record that reflects all of the relevant evidence in the case.

{¶38} Accordingly, we find the evidence in this case is insufficient to support the trial court's finding that granting permanent custody of N.F. to the agency was in the best interest of the child. While nothing prevents the agency from filing a second motion for permanent custody and supplying a full record of the facts of this case, we emphasize the importance of creating a reviewable record on appeal in permanent custody cases as further delay thwarts the timely resolution of these cases of critical importance.

{¶39} Judgment reversed.

BRESSLER, P.J., and HENDRICKSON, J., concur.