

[Cite as *In re T.C.*, 2018-Ohio-3593.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106762

IN RE: T.C., ET AL.
Minor Children

[Appeal By Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 17904923 and AD 17904924

BEFORE: Keough, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 30, 2018

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KATHLEEN ANN KEOUGH, J.:

{¶1} Appellant (“Mother”) appeals from the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, granting permanent custody of her minor children, T.C. and N.C., to appellee, the Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”). Finding no merit to the appeal, we affirm.

I. Background

{¶2} On March 28, 2017, CCDCFS filed a complaint alleging that newborn twins T.C. and N.C. were abused children, and requesting pre-dispositional temporary custody to the agency. The agency’s primary concerns at that time were the substance abuse issues of the children’s parents and their inability to provide stable and adequate housing for the children. At the emergency hearing, Mother stipulated to the agency’s request for emergency custody.

{¶3} At a subsequent adjudicatory hearing, Mother admitted to the amended complaint, which included allegations that the children had tested positive for heroin at birth, and that Mother (1) was heroin dependent, (2) had another child who had been committed to its biological father’s custody because of Mother’s substance abuse issues,¹ and (3) lacked sufficient income and adequate housing to provide for the twins. After

¹Not the biological father of T.C. and N.C.

accepting Mother's admissions and hearing evidence related to the children's father, the court adjudged the children abused and granted temporary custody to CCDCFS. The trial court approved a case plan, with the intention of reunification, that required Mother to complete substance abuse treatment, participate in 12-step meetings, and submit to random drug screens.

{¶4} On October 3, 2017, CCDCFS filed a motion to modify the order of temporary custody to permanent custody. The trial court held a hearing on the motion on December 7, 2017, and granted the motion. In its journal entry, the trial court noted that CCDCFS had demonstrated by clear and convincing evidence that Mother had failed to substantially remedy the conditions that caused the children's removal and had not complied with the case plan.² Accordingly, the court found that the children cannot or should not be reunited with either parent within a reasonable time, and the award of permanent custody was in the children's best interest. Mother now appeals from this judgment.

II. Law and Analysis

A. Sufficiency of Evidence

{¶5} In her first assignment of error, Mother contends that the trial court erred in granting permanent custody to the agency because there was insufficient evidence to

²The court also found by clear and convincing evidence that the biological father had abandoned the children. Mother does not challenge this finding, and Father is not a party to this appeal.

establish that she had failed to substantially remedy the conditions that caused the removal of the children from the home.

{¶6} Termination of parental rights is an alternative of last resort but is sanctioned when necessary for the welfare of a child. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694 2015-Ohio-1028, ¶ 7. Under R.C. 2151.414(B), a trial court may grant permanent custody of a child to an agency if the court determines by clear and convincing evidence that (1) an award of permanent custody is in the child's best interest, and that any of the following apply: (a) the child is abandoned; (b) the child is orphaned and no relatives are able to take permanent custody of the child; (c) the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period; (d) where the preceding three factors do not apply, the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or (e) the child has been adjudicated an abused, neglected, or dependent child on three separate occasions. R.C. 2151.414(B)(1)(a) through (e). Clear and convincing evidence is evidence that "will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *In re C.B.*, 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, ¶ 28, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶7} When determining that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent, the trial court must consider

the factors contained in R.C. 2151.414(E). If the court determines at a hearing that one or more of the factors set forth in R.C. 2151.414(E) exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parents within a reasonable period of time or should not be placed with either parent. *In re I.K.*, 8th Dist. Cuyahoga No. 96469, 2011-Ohio-4512, ¶ 8. The existence of any one of the factors is sufficient to determine that a child cannot be placed with a parent within a reasonable period of time. *In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 10 (8th Dist.), citing *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996).

{¶8} The trial court's journal entry demonstrates that the court found that R.C. 2151.414(E)(1) and (4) applied in this case:

(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.

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other action showing an unwillingness to provide an adequate permanent home for the child.

{¶9} Our review of the record demonstrates there was clear and convincing evidence to support both findings.

{¶10} CCDCFS social worker Tracey Digney testified at the hearing that the agency was advised of Mother's heroin addiction when the twins were born. She testified that Mother's case plan involved completing a drug and alcohol assessment, attending treatment, and maintaining a clean and sober lifestyle. Digney said that Mother completed an assessment but never completed any drug treatment. She said that Mother made four attempts to attend a medical detox program, but each time she either left the program against medical advice or was discharged for noncompliance with the program. She testified further that every time she sent Mother for random drug screening, Mother declined to go.

{¶11} Digney testified that CCDCFS arranged for Mother and Father to visit the children at the agency once a week from May 2017, through December 2017. She said that comments Mother made indicated that the visits were "just kind of a bother," and that Mother only attended eight visits in that time period. She said that Mother's last visit had been in October.

{¶12} Digney said that she supervised the visits, and that Mother and Father "would come and they'd be basically under the influence or withdrawing from being under the influence of whatever substance they were using that day." She said that Mother would often leave early because her hands were shaking and "she would be getting sick and needed to go medicate herself."

{¶13} Digney said that she tried to encourage Mother to enter drug treatment. She said that she would stop at Mother’s house to spend one-on-one time with her, but Mother would not answer the door. She said that the only time Mother did open the door, she was completely naked. Digney testified that as of the day of the hearing, she did not know where Mother and Father were living, and that Father’s mother had advised her in October that the couple was moving “from friend to friend to friend.”

{¶14} In light of this evidence, it is apparent that Mother continuously and repeatedly failed to substantially remedy, much less even address, the substance abuse issue that caused the twins to be placed outside the home. It is also apparent that Mother demonstrated a lack of commitment to the children — she visited them only eight times in a seven-month period, and even then, the visits were just “a bother” to her. Accordingly, the trial court properly found that the children could not be placed with Mother within a reasonable time or should not be placed with her. R.C. 2151.414(B)(1)(a).

{¶15} Mother argues, however, that the evidence was insufficient to establish that she even had a substance abuse problem because the agency did not present any drug test results, party admissions, or first-hand witness accounts of her drug use. Mother’s argument is specious. Mother admitted her heroin addiction at the adjudicatory hearing. And there were no drug test results available because Mother refused to submit to any drug testing.

{¶16} Likewise, we reject Mother’s argument that the “reasonable time” requirement of R.C. 2151.414(B)(1)(a) means she should have been given at least one year after the permanent custody hearing to complete her case plan. Under R.C. 2151.414(E)(2), a court may find that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent if the parent has a chemical dependency that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time or within one year after the date of the permanent custody hearing. Mother contends there was no evidence that she could not have addressed her substance abuse issues within a year after the hearing, and thus, pursuant to R.C. 2151.414(E)(2), the trial court erred in concluding that the children cannot be placed with her within a reasonable time or should not be placed with her.

{¶17} Mother’s argument fails because the trial court did not find R.C. 2151.414(E)(2) applicable to its determination that the children cannot be placed with Mother within a reasonable time or should not be placed with her. Rather, the trial court found that under R.C. 2151.414(E)(1), Mother had failed to substantially remedy the conditions that led to the removal of the children, and under R.C. 2151.414(E)(4), that she had demonstrated a lack of commitment to the children. Neither of these factors mentions a one-year time period.

{¶18} Finally, we find no merit to Mother’s argument that the evidence was insufficient to demonstrate that she “continuously and repeatedly” failed to remedy the

conditions that led to the children's removal because only nine months passed between the removal of the children from her custody and the grant of permanent custody to the agency. The evidence was undisputed that Mother continued to use drugs during those nine months and did not engage in any drug treatment. Thus, Mother did indeed continuously and repeatedly fail to remedy the very issue that led to the removal of the children.

{¶19} We review a trial court's grant of permanent custody for an abuse of discretion. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 554 (1994). When reviewing the trial court's custody decision, an appellate court must make "every reasonable presumption in favor of the lower court's judgment and finding of facts." *In re Brodbeck*, 97 Ohio App.3d 652, 659, 647 N.E.2d 240 (3d Dist.1994).

{¶20} In light of the evidence discussed above, the trial court did not abuse its discretion in awarding permanent custody of the children to the agency. There was clear and convincing evidence that T.C. and N.C. could not be placed with Mother within a reasonable period of time or should not be placed with her, and although not challenged by Mother, that awarding permanent custody to the agency was in the best interest of the children.³ The first assignment of error is overruled.

³Digney testified that the twins were in a foster home, and the foster mother wanted to adopt them. She testified further that there were no relatives who would be able to care for the children. The guardian ad litem testified that she had observed the children's positive interactions with the foster family and recommended permanent custody.

B. The Guardian Ad Litem's Report

{¶21} Loc.R. 20 of the Cuyahoga County Court of Common Pleas, Juvenile Division, requires a guardian ad litem to submit a written report in permanent custody cases. It further provides that the report “must be filed at least one week prior to an evidentiary court hearing, subject to court modification on a case-by-case basis.”

{¶22} In this case, the guardian ad litem submitted her report on December 4, 2017, three days prior to the permanent custody hearing, which was held on December 7, 2017.

{¶23} In her second assignment of error, Mother contends that the trial court erred in conducting the hearing only three days after the report was filed, in violation of the local court rule. She argues that “this procedural flaw voids the entire hearing and judgment entry granting permanent custody.”

{¶24} The record reflects that Mother's counsel was present at the permanent custody hearing and made no objection to the late filing. Accordingly, Mother has waived all but plain error. Plain error is found only in exceptional circumstances where error to which no objection was made in the trial court seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the process itself. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶25} In this case, we do not find that the late filing of the guardian ad litem's report affected the underlying proceedings such that it rose to the level of plain error. The record reflects that Mother had notice of the report and was given an opportunity at the hearing to be heard on the contents of the report. Further, the guardian ad litem was present at the permanent custody hearing and subject to cross-examination by Mother regarding her report and recommendation. *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485 (parties in a permanent custody hearing are entitled to cross-examine the guardian ad litem regarding his or her recommendation and the contents of any report submitted to the court). Accordingly, these are not the exceptional circumstances that rise to the level of plain error. The trial court was entitled to consider the guardian ad item's report and recommendation, and the second assignment of error is overruled.

{¶26} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, J., CONCURS;

EILEEN T. GALLAGHER, P.J., CONCURS WITH SEPARATE OPINION

EILEEN T. GALLAGHER, P.J., CONCURRING:

{¶27} I concur with the majority's holding that the trial court did not abuse its discretion in awarding permanent custody of the children to the agency. The record supports the determination that Mother failed to substantially remedy the conditions that led to the removal of her children. However, I write separately to express my concerns with the timing of the agency's motion for permanent custody in cases such as this, where the basis of the motion is primarily predicated on the parent's substance abuse issues.

{¶28} In this case, Mother's case plan was developed by the agency after temporary custody was granted on June 15, 2017. The motion for permanent custody was filed on October 3, 2017 — less than four months after temporary custody was granted. I recognize that Mother was provided a comprehensive plan to address her addiction and that Mother did not demonstrate a commitment to her rehabilitation during the relevant four-month period. Nevertheless, I question whether an individual can reasonably be expected to exhibit a complete commitment to their sobriety in such a short period of time given the magnitude of the physical and emotional addiction to heroin.

{¶29} R.C. 2151.413(D) provides that motions for permanent custody must be filed by the agency once the child has been in a children service agency's temporary

custody for 12 or more months of a consecutive 22-month period.⁴ I recognize that the agency has discretion under R.C. 2151.413(A) to file a motion for permanent custody at a earlier time when deemed appropriate. I further understand that the agency cannot assist an individual who fails to demonstrate a commitment to their own rehabilitation. With that said, however, I believe the agency should consider, when exercising its discretion, the maximum amount of time the legislature has allotted under R.C. 2151.413(D) in cases where drug addiction is the primary basis of the child's removal. This is particularly true where the record reflects that the child is being provided a safe and appropriate environment while his or her parent(s) are given the opportunity to address their addictions pursuant to their case plan.

⁴Under R.C. 2151.413(D), "a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated * * * or the date that is sixty days after the removal of the child from home."