

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE S.V.K., ET AL. :
 : No. 108038
Minor Children :
 :
[Appeal by S.R., Mother] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 15, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD15918095 and AD16900271

Appearances:

Judith M. Kowalski, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Rachel V. Eisenberg, Assistant Prosecuting
Attorney, *for appellee*, CCDCFS.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Appellant-Mother, S.R., appeals from the decision of the Juvenile Division of the Cuyahoga County Court of Common Pleas (the “juvenile court”) terminating her parental rights and granting permanent custody of her children, S.V.K. and S.K., to the appellee Cuyahoga County Division of Children and Family

Services (“CCDCFS” or “the agency”). Mother raises the following assignments of error for review:

1. The trial court erred to the prejudice of the appellant and against the best interests of the children when it denied a continuance for the appellant-mother, depriving her of her right to due process and abusing its discretion, as the Mother’s attorney informed the court her absence was due to medical reasons.
2. The trial court erred in finding that permanent custody was in the best interests of the children.

{¶ 2} After careful review of the record and relevant case law, we affirm the juvenile court’s judgment.

I. Procedural and Factual History

{¶ 3} S.R. is the mother of the minor children S.V.K. and S.K. On December 30, 2015, CCDCFS filed a complaint¹ alleging that S.V.K., born August 15, 2014, was an abused child based upon an incident of domestic violence between Mother and Father that was committed in the presence of S.V.K. on December 16, 2015. In the motion, the agency noted that the child was previously committed to the temporary custody of the agency due to a domestic violence incident in January 2015 that involved Mother stabbing the child’s father in the shoulder. The child was subsequently returned to Mother with protective supervision on December 3, 2015, just two weeks before the child was returned to the emergency custody of CCDCFS on December 17, 2015. The agency further asserted that Mother “has a history of

¹ The agency’s complaint originally requested a disposition of permanent custody. However, the motion was subsequently amended to a prayer for temporary custody.

abusing alcohol,” “has criminal convictions related to her substance abuse problem,” and “has five other children that were adjudicated and removed from her care.”

{¶ 4} Just weeks after the December 2015 incident of domestic violence, Mother gave birth to S.K. on January 1, 2016. On January 8, 2016, the agency filed a complaint seeking the temporary custody of S.K. The complaint alleged S.K. to be a dependent child and reiterated the agency’s concerns with Mother’s history of domestic violence and substance abuse.

{¶ 5} In March 2016, S.V.K. was adjudicated abused and was committed to the temporary custody of CCDCFS. In April 2016, S.K was adjudicated dependent and was committed to the temporary custody of CCDCFS. CCDCFS then filed a case plan for Mother, requiring Mother to complete a substance-abuse assessment and follow recommendations, cooperate with random drug screening, complete parenting classes, complete domestic violence classes, and obtain safe and appropriate housing. The permanency plan for each child was reunification with Mother.

{¶ 6} On December 6, 2016, the agency sought an extension of temporary custody for the children, which the trial court granted. On June 8, 2017, the agency sought a second extension of temporary custody for the children, which the trial court also granted.

{¶ 7} However, on September 28, 2017, the agency filed a consolidated motion to modify temporary custody of the children to permanent custody. In the motion, CCDCFS worker of record, Shamatee White (“White”), averred that Mother

failed to comply with certain aspects of her respective case plans that were filed and approved by the court. Specifically, White opined that Mother (1) has failed to maintain sobriety, (2) does not consistently comply with requests for drug screens, (3) has continued to engage in domestic violence, and (4) continues to exhibit poor decision-making skills that put the children at risk of harm.

{¶ 8} Following several continuances, the permanent custody hearing was held on November 19, 2018. Present in court was counsel for Mother, counsel for Father, CCDCFS child protection specialist White, and the children’s guardian ad litem, Vickie Jones. Both Mother and Father failed to appear.

{¶ 9} At the onset of the hearing, counsel for Mother requested a continuance “to give [Mother] the opportunity to appear.” Counsel noted that Mother “had health issues” and that the court had previously granted Mother a continuance in September 2018 “for that specific reason.” Counsel expressed that while she had spoken with Mother “on two occasions” since the last continuance was granted, Mother did not appear for a scheduled appointment and did not respond to counsel’s attempt to communicate via an email correspondence. Following a discussion on the record, the trial court denied counsel’s request for a continuance, stating “I think I’ve given mom ample opportunity to show up.”

{¶ 10} CCDCFS child protection specialist, Shamatee White, testified on behalf of the agency. White testified that she first became involved in this case in December 2016. In an effort to become familiar with the agency’s case, White reviewed Mother’s case history, her case plan, and the case-plan services provided

by the agency. White testified that she learned Mother has a total of seven children and has been involved with CCDCFS since 2013. Regarding the children that are not the subject of this case, White stated that Mother's other children are not currently under her care and are "in the legal custody of a relative." Mother has a "history of substance abuse," "ongoing mental health services," and "a history of domestic violence with her paramour." White stated that Mother has been diagnosed with depression, anxiety, psychosis, schizophrenia, and other psychotic disorders. She was also diagnosed with a poly-substance and other substance-related disorders.

{¶ 11} White reiterated that Mother's case plan included objectives for domestic violence, substance abuse, basic needs, and mental health. White testified that Mother has completed domestic-violence services but has "continuously had domestic incidents with one of her paramours." In addition to the separate incidents of domestic violence involving Father, White stated that the agency also became aware of alleged incidents of violence committed against Mother's other children. On one occasion, Mother was alleged to have physically abused one of her children with a "wooden board." The child was required to go to the hospital for her injuries. Thus, White opined that Mother has not benefited from the domestic-violence services.

{¶ 12} With respect to her case-plan objective for parenting, White testified that Mother completed supportive parenting classes in 2017 and was receiving support services during visits in her home. However, despite her participation in the parenting classes, the agency received a substantiated referral for physical abuse

in August 2017. White testified that the referral stemmed from an incident where Mother became intoxicated during a visit and fell on top of S.V.K. Mother's fall broke a table and caused another child, who was in the custody of a family member, to sustain a "busted lip."

{¶ 13} Regarding the case-plan component for substance abuse, White testified that since the August 2017 incident, Mother has "refused to take drug screens for the agency." In addition, the agency obtained certified journal entries from FrontLine Services indicating that Mother tested positive for PCP, cocaine, and amphetamines in April 2018. White testified that she did not have a "sobriety date" for Mother due to her failure to submit to drug screens and her refusal to sign a release of information form with Recovery Resources. Thus, White testified that there is "a concern that [Mother] hasn't benefitted from her substance abuse services."

{¶ 14} White conducted a home visit with Mother in April 2018. During the visit, however, Mother refused to allow White into the kitchen to see if there was sufficient food in the home. White testified that she learned that Mother no longer resides at her old address, and as of the date of the permanent custody hearing, White had no information regarding where Mother was living.

{¶ 15} Regarding Mother's interaction with the children, White testified that Mother would often cancel visits after the agency filed the motion for permanent custody. White estimated that Mother did not visit the children for approximately four months in the beginning of 2018. However, in the "three or four months" before

the permanent custody hearing, Mother did not miss a visit. White stated that Mother is appropriate with the children during her supervised visits.

{¶ 16} Under the totality of the foregoing circumstances, White opined that permanent custody in favor of the agency was in the children's best interests. White explained that S.V.K. and S.K. were placed together in a foster home and share a close relationship.

{¶ 17} White briefly testified about the children's biological father, E.K., who had a history of substance abuse and domestic violence. White testified that Father did not complete his intensive outpatient substance-abuse treatment, and did not complete his domestic violence services. In addition, White testified that Father has not obtained stable housing and only appeared for one supervised visit with the children.

{¶ 18} The children's guardian ad litem, Vickie Jones, provided a written and oral report. At the conclusion of the permanent custody hearing, the GAL opined that permanent custody was in the best interests of the children, stating:

[Mother] has not benefited from any services, continues to put the children at risk. She spent a lot of time hiding [Father] at her home even while there were restraining orders and indications from myself and Children and Family Services that it wouldn't be appropriate for them to be living together.

* * *

At this point we're not in a position where either one of the children can be returned to [Father] or [Mother]. It wouldn't be safe to do so, and I'd recommend granting the motion for permanent custody for both of those children.

{¶ 19} On November 26, 2018, the trial court issued separate journal entries terminating Mother’s parental rights and ordering S.V.K. and S.K. to be placed in the permanent custody of CCDCFS. In each case, the court determined by clear and convincing evidence that the children “[have] been in temporary custody of the Cuyahoga County Division of Children and Family Services which is for twelve (12) months or more months of a consecutive twenty-two (22) month period.” In addition, the juvenile court found “by clear and convincing evidence that a grant of permanent custody is in the best interests of the child[ren] and the child[ren] cannot be placed with one of the child[ren]’s parents within a reasonable time or should not be placed with either parent.”

{¶ 20} Mother now brings this timely appeal.

II. Law and Analysis

A. Denial of Continuance

{¶ 21} In her first assignment of error, Mother argues the trial court erred by denying her request to continue the permanent custody hearing. Mother contends that her “absence was beyond her control, and apparently unintentional, as is usually the case when a person is ill and has health issues.”

{¶ 22} The decision to grant or deny a motion for a continuance rests in the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981). An abuse of discretion occurs where the trial court’s decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 23} The right to parent one’s children is a fundamental right protected by the Due Process Clause of the United States and Ohio Constitutions. *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 9. A fundamental requirement of due process is notice and the opportunity to be heard. *Id.*

{¶ 24} A parent’s right to be present at a custody hearing is not absolute, however. *Id.* at ¶ 10, citing *In re C.G.*, 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 19. While courts must ensure that due process is provided in parental termination proceedings, “a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding.” *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.). Any potential prejudice to a party denied a continuance is weighed against a trial court’s “right to control its own docket and the public’s interest in the prompt and efficient dispatch of justice.” *Unger* at 67.

{¶ 25} In *Unger*, the Ohio Supreme Court noted that “[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*, 67 Ohio St.2d at 67, 423 N.E.2d 1078. The Supreme Court identified certain factors a court should consider in evaluating a motion for a continuance. These factors include:

the length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68.

{¶ 26} Juv.R. 23 is also instructive. The rule provides that “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.”

Loc.R. 49(C) of the Cuyahoga County Court of Common Pleas, Juvenile Division, further provides:

No case will be continued on the day of trial or hearing except for good cause shown, which cause was not known to the party or counsel prior to the date of trial or hearing, and provided that the party and/or counsel have used diligence to be ready for trial and have notified or made diligent efforts to notify the opposing party or counsel as soon as he/she became aware of the necessity to request a postponement. This rule may not be waived by consent of counsel.

{¶ 27} In this case, the record demonstrates that Mother was previously granted a continuance because she was required to undergo a medical surgery. Nevertheless, rather than diligently communicating with the trial court about her “health issues” in the days leading to the rescheduled permanent custody hearing, the continuance was not requested until the day of the permanent custody hearing. Trial counsel made no indication that Mother’s failure to appear was the result of an emergency. Furthermore, counsel indicated that the late nature of the request for a continuance was predicated on Mother’s failure to communicate with counsel prior to the permanent custody hearing. For instance, trial counsel conceded that Mother

failed to appear for two scheduled appointments and did not reply to an email correspondence. Under these circumstances, we find Mother failed to exhibit the necessary level of cooperation and communication to reasonably argue her due process rights were violated by the trial court's decision to proceed with the hearing in her absence.

{¶ 28} Moreover, the record reflects that a continuance would have caused great inconvenience to the agency witness, opposing counsel, the guardian ad litem, and court personnel, who were present and ready to proceed with the hearing. As set forth in the transcript, the nature of this case required the presence of approximately six separate attorneys. Thus, rescheduling the permanent custody proceeding for a second time would have impaired the trial court's ability to control its own docket.

{¶ 29} Similarly, a review of the record indicates that trial counsel was adequately prepared for the case. Counsel was familiar with the procedural history of Mother's case, the scope of her case-plan objectives, the extent of Mother's compliance with the case-plan services, and the complexities of the relevant statutory provisions. Moreover, counsel thoroughly cross-examined the agency's social worker, raised various evidentiary objections on Mother's behalf, and zealously attempted to protect Mother's interests during closing arguments.

{¶ 30} Applying Loc.Juv.R. 49(C) and the *Unger* factors to the present case, we find the trial court did not abuse its discretion in denying trial counsel's motion for a continuance and proceeding with the hearing in Mother's absence. Given the

duration of the children's involvement with CCDCFS and the need to secure a permanent placement, the trial court's judgment was rendered with the children's best interests in mind. Accordingly, Mother's first assignment of error is overruled.

B. Best-Interests Determination

{¶ 31} In her second assignment of error, Mother argues the juvenile court erred in finding that permanent custody was in the best interests of the children.

{¶ 32} When adjudicating a motion for permanent custody, juvenile courts apply a two-prong test pursuant to R.C. 2151.414(B)(1). First, the court must find one of the following: (a) 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; (b) the child is abandoned; (c) the child is orphaned, and there are no relatives of the child who are able to take permanent custody; or (d) the child has been in the temporary custody of the agency for twelve or more months of a consecutive twenty-two-month period. R.C. 2151.414. Second, the court must determine that it is in the best interest of the child to grant permanent custody to the agency.

{¶ 33} "An appellate court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence." *In re Jacobs*, 11th Dist. Geauga No. 99-G-2231, 2000 Ohio App. LEXIS 3859, 11 (Aug. 25, 2000), citing *In re Taylor*, 11th Dist. Ashtabula No. 97-A-0046, 1999 Ohio App. LEXIS 2620 (June 11, 1999). The Ohio Supreme Court defines clear and convincing evidence 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.

In re K.H., 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 42, quoting *Cross v. Ledford* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 34} In this case, the juvenile court determined that the children have been in the temporary custody of a public children services agency for 12 or more months of a consecutive 22-month period. *See* R.C. 2151.414(B)(1)(d). This finding is not challenged and is supported by the record. As stated, the motion for permanent custody was filed in September 2017, while S.V.K. has been in the agency’s temporary custody since March 2016, and S.K. has been in the agency’s custody since April 2016.

{¶ 35} Where R.C. 2151.414(B)(1)(d) applies, the agency need not also find that the child cannot or should not be placed with either parent within a reasonable time. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1172, ¶ 21. Accordingly, because the juvenile court found clear and convincing evidence to exist to support a finding under R.C. 2151.414(B)(1)(d), it was not required to make any other finding under R.C. 2151.414(B).

{¶ 36} Nevertheless, the juvenile court made an alternative finding pursuant to R.C. 2151.414(B)(1)(a) and found by clear and convincing evidence that “the child cannot be placed with one of the child’s parents within a reasonable period of time

and should not be placed with either parent.” On appeal, Mother contends that because “she did complete some case plan services and was visiting the children during the pendency of the case,” the record supports her position that “the children could have been returned to her in a reasonable time.” Though not required, we shall address her argument.

{¶ 37} The trial court’s determination of whether the child cannot or should not be placed with either parent is guided by R.C. 2151.414(E). This section sets forth 16 factors that the trial court may consider in its determination. It provides that if the trial court finds by clear and convincing evidence that any of the 16 factors exists, the court must enter a finding that the child cannot or should not be placed with either parent within a reasonable period of time. *In re D.J.*, 8th Dist. Cuyahoga No. 88646, 2007-Ohio-1974, ¶ 64.

{¶ 38} In its separate judgment entries awarding permanent custody to CCDCFS, the juvenile court found by clear and convincing evidence that each child could not be placed with Mother within a reasonable time or should not be placed with Mother. The court relied on the factors set forth under 2151.414(E)(1)-(4), (11) and (14), stating, in relevant part:

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.

Mother has a chronic mental illness and 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 and, as anticipated, within one (1) year after the Court holds the hearing in this matter.

Up until the last three (3) or four (4) months, Mother has neglected the child between the date of the original complaint was filed and the filing of this motion by the failure to regularly visit, communicate, or support the child.

Mother has demonstrated a lack of commitment towards the child by failing to regularly support, visit up until the last three (3) or four (4) months, communicate with the child when able to do so, or by her actions, has shown an unwillingness to provide an adequate, permanent home for the child.

Mother has had parental rights terminated involuntarily with respect to a sibling of the child.

Mother is unwilling to provide food, clothing, shelter, or other necessities for the child as evidenced by [her] unwillingness to successfully complete a case plan so [she] can provide care for the child.

{¶ 39} The existence of one R.C. 2151.414(E) factor alone will support a finding that a child cannot be reunified with the parents within a reasonable time.

See In re William S., 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 50.

{¶ 40} In this case, the testimony presented at the permanent custody hearing plainly demonstrates that Mother failed to substantially remedy her substance abuse, domestic violence, housing, and mental health issues. Regarding Mother's substance abuse issues, the record reflects that Mother was intoxicated during a visit with the children in August 2017 and has since refused to submit to drug screens. Mother further tested positive for PCP, cocaine, and amphetamines in April 2018. In addition, the record clearly demonstrated Mother's lack of

commitment towards the children, as evidenced by her failure to appear at the hearing and her inability to secure safe and appropriate housing. Finally, and perhaps most importantly, White provided extensive testimony regarding Mother's failure to remedy her domestic violence issues. Despite her completion of domestic violence services, Mother has continued to engage in violent behavior, including acts that placed her children in danger of physical harm. Under these circumstances, the trial court's conclusion that the children cannot or should not be placed with Mother within a reasonable period of time was supported by clear and convincing evidence in the record.

{¶ 41} Once the trial court determines any of the conditions outlined in R.C. 2151.414(B)(1)(a)-(e) exists, the court may proceed to consider whether the grant of permanent custody to the agency is in the best interest of the child. *In re A.P.*, 8th Dist. Cuyahoga No. 104130, 2016-Ohio-5849, ¶ 21.

{¶ 42} In determining the best interest of a child, R.C. 2151.414(D)(1) directs the trial court to consider "all relevant factors," including, but not limited to the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents, 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, with due regard for the maturity of the child; (3) the custodial history of the child; (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; and (5) whether any of the factors

set forth in R.C. 2151.414(E)(7) to (E)(11) apply. R.C. 2151.414(D)(1)(a)-(e). In conducting a best-interest analysis under R.C. 2151.414(D), “[t]he 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 pursuant to the statute.” *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

{¶ 43} We review a trial court’s determination of a child’s best interest under R.C. 2151.414(D) for an abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. While a trial court’s discretion in a custody proceeding is broad, it is not absolute. “A trial court’s failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 60, citing *In re T.W.*, 8th Dist. Cuyahoga No. 85845, 2005-Ohio-5446, ¶ 27, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 574 N.E.2d 1055 (1991).

{¶ 44} As stated, the juvenile court in this case determined by clear and convincing evidence that “a grant of permanent custody is in the best interests of [each] child.” In challenging the juvenile court’s conclusion on appeal, Mother contends that she was making substantial progress on her case plan, and shares a “positive and loving” bond with her children. Mother therefore submits that the best interests of S.V.K. and S.K. would be served by returning the children to her care.

{¶ 45} We find no abuse of discretion in the trial court’s conclusion that permanent custody is in the best interests of the children. In this case, the agency’s social worker testified that permanent custody was in the children’s best interests

based on the custodial history of the children, their need for legally secure permanent placement, and Mother's inability to provide such placement given her failure to remedy the conditions that led to the removal of the children. As discussed, Mother has not demonstrated the ability to stay sober and continues to engage in violent conduct that places her children in danger of physical harm. While Mother successfully completed portions of her case-plan objectives, her ongoing conduct has demonstrated that she has not benefitted from those services. *See In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 25 (8th Dist.) ("A parent can successfully complete the terms of a case plan yet not substantially remedy the conditions that caused the children to be removed — the case plan is simply a means to a goal, but not the goal itself."). The GAL agreed, stating that Mother has not benefited from any services and continues to put the children at risk. Under these circumstances, we find the juvenile court's determination that permanent custody is in each child's best interest is supported by competent, credible evidence in the record.

{¶ 46} Mother's second assignment of error is overruled.

{¶ 47} 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 issue out of this court directing the common pleas court, juvenile division, 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.**

EILEEN T. GALLGHER, PRESIDING JUDGE

**PATRICIA ANN BLACKMON, J., and
MICHELLE J. SHEEHAN, J., CONCUR**