

[Cite as *In re A.W.*, 2020-Ohio-3461.]

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE A.W. :
Minor Child : No. 109003
[Appeal by C.W., Mother] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 25, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD16918202

Appearances:

Thomas Rein, *for appellant.*

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

MICHELLE J. SHEEHAN, J.:

{¶ 1} Appellant C.W. (“Mother”) appeals from the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division, granting legal custody

of Mother's minor child, A.W., to E.C. and L.C. ("Caregivers").¹ Because we find the trial court did not abuse its discretion, we affirm.

I. Procedural History

{¶ 2} On or about November 4, 2016, A.W.'s sibling was hospitalized due to a near drowning, which was purportedly caused by Mother's failure to appropriately supervise A.W. and her sibling. On December 15, 2016, the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "the agency") filed a complaint alleging A.W. and her sibling to be neglected and dependent. The complaint alleged that Mother lacked appropriate judgment and parenting skills; Mother "has a pattern of leaving her children in the care of relatives without first confirming that the relative is willing to provide care for the children"; Mother has two other children previously adjudicated abused and placed in the legal custody of a relative due to Mother's failure to supervise the children and Mother's substance abuse; Mother displays symptoms of mental health conditions that prevent her from providing adequate care for the children; and A.W.'s alleged father has failed to establish paternity and has failed to support, visit, or communicate with the child since her birth.

¹ In Cuyahoga J.C. Nos. AD16918202 and AD16918203, the trial court addressed custody issues concerning Mother's two minor children, A.W. and A.R. In *In re A.R.*, Cuyahoga J.C. No. AD16918203, the minor child was committed to the legal custody of the paternal grandmother. This appeal pertains only to the trial court's disposition regarding A.W.

{¶ 3} The agency also requested emergency predispositional temporary custody of the two minor children. Following a hearing, A.W. and her sibling were committed to the emergency temporary custody of the agency.

{¶ 4} On March 24, 2017, following a hearing, the court adjudicated A.W. neglected and dependent, and she was committed to the temporary custody of the agency. The court twice granted extensions of temporary custody, finding insufficient progress on the case plan and finding that progress had not been made in alleviating the cause for the removal of the child from the home.

{¶ 5} On December 3, 2018, following the two extensions of temporary custody, the agency filed a motion to modify temporary custody to legal custody of A.W. to Caregivers. At this time, A.W. had been in the temporary custody of the agency for 21 months, and she had been placed with Caregivers, who were initially thought to be A.W.'s grandparents. Paternity testing later demonstrated that Caregivers' son was not A.W.'s biological father. Caregivers have nonetheless remained an interested party and A.W.'s caregivers.

{¶ 6} In its motion, the agency alleged that Mother failed to complete the objectives of the agency's case plan for reunification, including mental health services, substance abuse services, and parenting. The agency stated that Mother had not been compliant with the services offered and remained unable to provide a safe and permanent home for the child, and A.W.'s father failed to make himself available to the agency. Additionally, the agency reported that Caregivers were able

to provide for the needs of the child on a daily basis and were willing to provide a safe and permanent home for A.W.

{¶ 7} On December 11, 2018, Mother filed a motion for legal custody to maternal grandmother, C.W. (“Grandmother”). And on June 17, 2019, the magistrate held a hearing on both motions, wherein CCDCFS social services worker Kenneth Orłowski testified, and the guardian ad litem (“GAL”), Carla Golubovic, testified concerning her report and recommendation that was filed with the court. Also at the hearing, Caregivers signed a statement of understanding.

{¶ 8} Following the hearing, the magistrate granted the agency’s motion to modify temporary custody to legal custody to Caregivers and denied the motion for legal custody to Grandmother. On July 23, 2019, Mother filed objections to the magistrate’s decision. On August 30, 2019, the court overruled Mother’s objections and adopted the magistrate’s decision.

{¶ 9} In adopting the magistrate’s decision, the trial court found that there had not been significant progress on the case plan by Mother and progress had not been made in alleviating the cause for removal of the child from the home. The trial court further found as follows: the agency made reasonable efforts to make it possible for the child to safely return home through supportive services; the agency made reasonable efforts to finalize the permanency plan, including offering substance abuse and mental health treatment; Mother failed to participate in the offered services; Mother is currently incarcerated and unable to care for the child;

Mother has a lengthy criminal history; and the alleged father has failed to provide support for the child and his whereabouts are unknown.

{¶ 10} In approving the permanency plan of legal custody to Caregivers, the court noted that A.W. has been in the agency's temporary custody since January 3, 2017, has been placed with Caregivers since December 2016, is "well-bonded" to Caregivers, is "fully integrated" into their family, and is engaged in several family activities and "several age appropriate activities." The court also stated that although paternity testing excluded Caregivers' son as A.W.'s biological father, A.W. views Caregivers as her grandparents and she has a strong bond with Caregivers. The court therefore found placement appropriate and awarded legal custody to Caregivers.

{¶ 11} Mother now appeals.

II. Substantive Facts

{¶ 12} At the hearing on the legal custody motions, Kenneth Orlowski was the agency's social services worker assigned to the matter concerning A.W. Orlowski testified that A.W. and her sibling had been in the agency's custody for more than two years, and A.W.'s two older brothers were also in the agency's legal custody. Orlowski testified that A.W. and her sibling were initially removed from the home following an incident wherein Mother purportedly left A.W. and her sibling in the bathtub unattended. Upon returning to the bathtub, Mother found A.W.'s sibling unresponsive and she was transported to the hospital where she ultimately recovered.

{¶ 13} At the time of the hearing, Mother was incarcerated and, according to Orlowski, she had been incarcerated multiple times. Orlowski testified that although Mother completed the parenting classes, the multiple incarcerations have prevented the agency from determining whether Mother has benefitted from the classes. Orlowski reported that Mother has failed to complete treatment to address her mental health and substance abuse, stating that the case plan has been followed “hit or miss.” He stated that mental health and substance abuse concerns are continuing, and Mother has failed to engage in any services when not incarcerated. Mother’s most recent drug screen test was positive for illegal substances. Additionally, Mother’s visitations with the child have been “somewhat inconsistent,” due in part to Mother’s repeated incarcerations. And according to the social worker, Mother is not now, or in the near future, in any position to care for A.W.

{¶ 14} Orlowski also testified that the case plan included a requirement that the alleged father establish paternity and, if paternity was established, he was to build a relationship with the child. As of the date of the hearing, however, the alleged father has failed to establish paternity and his whereabouts are unknown. And to Orlowski’s knowledge, the alleged father has failed to visit or communicate with the child or support the child in any way, and he has not made himself available to the caseworker.

{¶ 15} A.W. was born in 2014. She was placed with Caregivers in December 2016. Orlowski stated that at the time of her placement, Caregivers were believed to be A.W.’s grandparents. Later paternity testing proved that untrue. Caregivers

remained interested parties, however, and they desire to have custody of A.W., regardless of their familial status. Orłowski testified that A.W. is “very bonded” with Caregivers and refers to them as grandparents. He further testified that A.W. “listens when [Caregivers] ask her to do things. She pays attention to what they do. They’ll spend time together, watch [television] together. They joke around with each other. * * * They appear to be very bonded. They spend a lot of time together. She basically treats them as though they are her grandparents.” Additionally, Orłowski testified that Caregivers’ home is clean and uncluttered, contains no major hazards, is large enough so that A.W. has her own bedroom, and is appropriate for A.W. Finally, Orłowski reported that Caregivers facilitate visits between A.W. and her siblings and Caregivers appreciate the importance of continuing to facilitate these visits.

{¶ 16} Concerning Grandmother, Orłowski testified that the agency has several concerns. Orłowski noted that Mother lives with Grandmother when she is not incarcerated, and the incident of the near-drowning occurred in Grandmother’s home where the children were residing at the time. Grandmother has also demonstrated aggression and has verbally lashed out. For instance, the agency’s security removed Grandmother from a staffing meeting when Grandmother “grew upset” during the discussion of legal custody to Caregivers and “became verbally aggressive towards [Caregivers].” Orłowski also testified that Grandmother’s home is currently being “rehabbed” and is not appropriate in its present condition. The social worker further reported that there has been a recent concern about the

behavior of A.W.'s older brothers of whom Grandmother has legal custody. According to Orlowski, although there has not yet been an agency investigation, it was reported that the boys "hav[e] a tendency to tug at [A.W.'s] clothing" and they "tried to take off [her] pants." And because it has not been investigated as of the hearing date, it remains a concern.

{¶ 17} Finally, Orlowski testified that earlier in the case, when the agency initially discussed the possibility of A.W.'s placement with Grandmother, Grandmother had indicated she was "not ready." According to Orlowski, A.W. has bonded with Caregivers, she has "started to build a life" with them, is involved with them, and has friends. Orlowski believes that legal custody with Caregivers is in A.W.'s best interest.

{¶ 18} Carla Golubovic, the GAL, also testified concerning her report and recommendation filed with the court. Golubovic testified that legal custody of A.W. to Caregivers is in the child's best interest. She stated that Caregivers are very committed to A.W., they meet all of the child's basic needs, they do their best to facilitate a relationship between all of the siblings as well as A.W.'s extended family, and A.W. has acclimated into Caregivers' family. The GAL further testified that while Grandmother is "a very loving, committed mother and grandmother," legal custody to Grandmother would not necessarily be in A.W.'s best interest, because Grandmother has very young grandsons in her care, she works outside the home, her home is being renovated, and there is a concern regarding "possible sex play or sex abuse involving the boys" and "some supervision issues."

III. Legal Custody

{¶ 19} Mother contends that the trial court erred in granting permanent custody to the agency, because (1) the decision was against the manifest weight of the evidence; and (2) the agency “failed to meet its burden as required under R.C. 2151.414.” We note, however, that the trial court did not grant permanent custody to the agency. Rather, the trial court ordered “[t]he child * * * committed to [the] legal custody of [Caregivers].” We will therefore address Mother’s appeal under a legal custody analysis.

{¶ 20} Under R.C. 2151.353(A)(3), the court may award legal custody of a child who has been adjudicated abused, neglected, or dependent to any person who filed a motion requesting legal custody of the child prior to the dispositional hearing.

“Legal custody” is

a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities.

R.C. 2151.011(B)(21). A legal custodian must comply with statutory requirements, including signing a statement of understanding for legal custody.

R.C. 2151.353(A)(3)(a)-(d).

{¶ 21} Legal custody is “‘significantly different’ than the termination of parental rights. Unlike a case in which parental rights are terminated, where a parent loses legal custody of his or her child, the parent retains residual parental

rights, privileges and responsibilities and is not permanently foreclosed from regaining custody.” *In re M.S.*, 8th Dist. Cuyahoga No. 108567, 2019-Ohio-5128, ¶ 32, citing *In re T.R.*, 8th Dist. Cuyahoga No. 102071, 2015-Ohio-4177, ¶ 32, and R.C. 2151.353(A)(3)(c).

{¶ 22} Where a juvenile court awards legal custody following an adjudication of abuse, neglect, or dependency, “it does so by examining what would be in the best interest of the child based on a preponderance of the evidence.” *In re T.R.* at ¶ 44, quoting *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 11, 14. A “preponderance of the evidence” means evidence that is “more probable, more persuasive, or of greater value.” *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7, quoting *In re D.P.*, 10th Dist. Franklin No. 05AP-117, 2005-Ohio-5097, ¶ 52.

{¶ 23} The best interest of the child is “of paramount concern” when making custody determinations. *In re M.J.M.* at ¶ 14. But unlike a permanent custody case in which the trial court considers the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court must consider in determining the child’s best interest in a legal custody case. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, ¶ 15. There is no “specific test or set of criteria” that must be applied or considered in determining what is in a child’s best interest in a legal custody case. *In re T.R.* at ¶ 48. However, this court has found the factors delineated in R.C. 2151.414(D) to be “instructive.” *In re D.T.*, 8th Dist. Cuyahoga Nos. 100970

and 100971, 2014-Ohio-4818, ¶ 20, citing *In re E.A.*, 8th Dist. Cuyahoga No. 99065, 2013-Ohio-1193, ¶ 13.

{¶ 24} The best interest factors include: the interaction of the child with the child’s parents, siblings, relatives, and foster caregivers; 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 12 or more months of a consecutive 22-month period; and the child’s need for a legally secure permanent placement. R.C. 2151.414(D).

{¶ 25} There is generally a statutory preference that a child be placed with relatives when possible in a custody matter. R.C. 2151.412(H)(2) (When neither parent is capable of supporting the child or caring for the child’s best interests, “the child should be placed in the legal custody of a suitable member of the child’s extended family.”). This preference for family placement, however, is not mandatory. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, at ¶ 18.

{¶ 26} The decision whether to grant a request for legal custody is within the sound discretion of the juvenile court. *In re M.S.*, 8th Dist. Cuyahoga No. 108567, 2019-Ohio-5128, at ¶ 33. We therefore review a trial court’s legal custody determination for an abuse of discretion. *In re G.M.* at ¶ 14. “When considering the court’s ultimate decision on whether the facts as determined would make it in the child’s best interests to be placed in legal custody, we apply the abuse of discretion standard.” *Id.*, citing *In re B.H.*, 8th Dist. Cuyahoga No. 95794, 2011-Ohio-1967, ¶ 10.

{¶ 27} An abuse of discretion occurs when a trial court’s decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A decision is unreasonable if there is “no sound reasoning process that would support that decision.” *In re C.D.Y.*, 8th Dist. Cuyahoga No. 108355, 2019-Ohio-4262, ¶ 8, quoting *Baxter v. Thomas*, 8th Dist. Cuyahoga No. 101186, 2015-Ohio-2148, ¶ 21. A decision is arbitrary if it is made “without consideration of or regard for facts [or] circumstances.” *In re C.D.Y.* at ¶ 8, quoting *Black’s Law Dictionary* 125 (10th Ed.2014).

{¶ 28} Here, the record shows that at the time of the motions hearing on legal custody, A.W. had been in the temporary custody of the agency for more than two years. She has been with Caregivers more than half of her young life. Caregivers have provided an appropriate home, where the child is fully integrated into Caregivers’ family, with whom she has a strong bond and where all of her basic needs are met. Although Caregivers are not in fact A.W.’s grandparents, A.W. calls them her grandparents and Caregivers remain interested in legal custody. Additionally, Caregivers facilitate regular visits between A.W. and her siblings and extended family.

{¶ 29} Finally, the record demonstrates that Caregivers meet the child’s need for a legally secure permanent placement. Because A.W. had been in the agency’s temporary custody for more than two years, temporary custody could not be extended again. *See In re D.J.*, 8th Dist. Cuyahoga No. 107203, 2019-Ohio-1645, ¶ 35; R.C. 2151.415(D)(4). Moreover, A.W.’s parents had not made any progress

towards reunification. Father has failed to build a relationship with A.W., and his current whereabouts are unknown. Mother has failed to address her mental health and substance abuse issues, she has not benefitted from her parenting classes, and at the time of the hearing, she was incarcerated.

{¶ 30} In light of the foregoing, we cannot conclude that the trial court abused its discretion by finding that an award of legal custody to Caregivers would be in the child's best interests. Mother's assignments of error are therefore overruled.

{¶ 31} Judgment affirmed.

It is ordered that appellee recover of 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.

MICHELLE J. SHEEHAN, JUDGE

EILEEN T. GALLAGHER, A.J., and
EILEEN A. GALLAGHER, J., CONCUR