[Cite as *In re N.M.*, 2010-Ohio-56.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF N.M.

DEPENDENT CHILD

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 AP 09 0044,
2009 AP 09 0045

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Juvenile Court, Case No. 08 JN 00098
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 8, 2010

APPEARANCES:

For Appellant Jennifer Morris	Guardian ad Litem
JOHN ANDREW GARTRELL 215 W. Fourth St. Dover, Ohio 44622	KAREN DUMMERMUTH 349 E. High Ave P.O. Box 494 New Philadelphia, Ohio 44663
For Job and Family Services	For N.M.
DAVID HAVERFIELD 389 16th St. SW New Philadelphia, Ohio 44663	E. MARIE SEIBER 431 Center Street Dennison, Ohio 44621

Hoffman, J.

{¶1} In Tuscarawas County Appellate Case No. 2009AP090044, Appellant Jennifer Morris ("Mother") appeals the August 19, 2009 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, Juvenile Division, which placed her daughter, N.M., in a planned permanent living arrangement while remaining in the custody of Appellee Tuscarawas County Job and Family Services ("TCJFS"). In Tuscarawas County Appellate Case No. 2009AP090045, minor child, N.M., appeals the same.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 28, 2009, TCJFS filed a complaint in the Tuscarawas County Court of Common Pleas, Juvenile Division, alleging N.M and her brother to be neglected and dependent.[1] The trial court placed the children in the temporary custody of the TCJFS. The children were initially removed from Mother's home after TCJFS had been advised N.M. and her brother had been left alone while Mother was incarcerated on a warrant from another county.[2]

{¶3} The trial court conducted an adjudicatory hearing on April 28, 2008, at which Mother and Father stipulated to a finding N.M. and her brother were dependent. The trial court ordered N.M. and her brother remain in the temporary custody of TCJFS

[1] Brother turned eighteen years of age during the pendency of this case, and is no longer in the custody of TCJFS. Accordingly, brother is not subject to the within appeal.

[2] Bobby Mitchem ("Father") had little contact with N.M. and her brother prior to the filing of the case. Following the adoption of the case plan, Father stopped appearing for visitation and court proceedings. He is not a party to this appeal.

and ordered visitation continue to be supervised at TCJFS, or at Personal and Family Counseling Center as was acceptable to TCJFS.

{¶4} The trial court held the dispositional hearing on May 21, 2008. Mother consented to the guardian ad litem's recommendation the children remain in the temporary custody of TCJFS. The trial court approved and adopted the case plan. The trial court ordered Mother's visits remain supervised as was acceptable to TCJFS. Thereafter, on June 16, 2008, TCJFS filed a motion to modify visitation orders. Therein, TCJFS asked the trial court to modify the current visitation order to allow visitation between Mother and the children "as accessible to the agency." TCJFS cited Mother's substantial engagement in all case plan services in support of the request. Via Agreed Judgment Entry filed June 17, 2008, the trial court ordered the prior visitation order be modified to allow visitation between Mother and the children "as acceptable to Tuscarawas Job and Family Services."

{¶5} On January 8, 2009, TCJFS filed a motion to extend temporary custody, noting Mother had made substantial progress on all of the aspects of her case plan, but needed additional time in order to demonstrate the progress would be longstanding, and to permit her to resolve some outstanding issues. In the motion, TCJFS detailed the aspects of the case plan Mother had completed including individual counseling, positive parenting, undergoing a psychological evaluation, and receiving psychiatric care through Community Mental Healthcare. TCJFS further indicated Mother had completed a new drug and alcohol assessment as the result of a DUI charge which arose during the pendency of the case, and reported ongoing compliance with recommendations from the same. The family had engaged in family therapy sessions which had been

marginally effective. Mother had recently become re-employed, but had not maintained stable housing for an extended period of time.

{¶6} The trial court conducted an annual review hearing on February 9, 2009. Upon consent of the parties, the trial court granted TCJFS's motion to extend temporary custody for an additional six months. The trial court ordered Mother be allowed to have limited unsupervised visitation with the children as was acceptable to TCJFS. The trial court terminated TCJFS's temporary custody of N.M.'s brother and removed him from the case plan as he had attained the age of eighteen and left foster care.

{¶7} On April 29, 2009, Mother filed a motion to expand visitation, requesting additional visitation to include unsupervised overnight visits with N.M. The trial court scheduled a hearing on the motion for July 14, 2009. Prior to the hearing, the trial court appointed Attorney E. Marie Seiber as counsel for N.M.

{¶8} At the hearing, Mother testified she resides in Strasburg, Ohio, with her boyfriend, Patrick McCluney, and his eight year old daughter M.M. Mother works as a nursing assistant at Country Lawn Nursing Home, earning $11.00 per hour. She has worked at her present job for a little over two months. Prior to moving to Strasburg, Mother resided in Scio, Ohio, living with Mike Lively. Mother explained she and Lively have known each other for over twenty years, and although they were "kind of dating", they came to realize they were more friends than anything. Mother lived with Lively for approximately six months. When asked about her work history by the guardian ad litem, Mother detailed her employment, which revealed she was employed by a number of nursing homes, but did not stay employed for longer than six months at any one place.

{¶9} On cross-examination, Mother conceded stability was important for N.M. Mother discussed what she had done during the course of the case to demonstrate she would be able to provide N.M. with a stable residence, citing her employment and her intent not to move. Mother acknowledged she moved three times during the pendency of the case, and lived with two different men. Prior to the commencement of the case, Mother was married for approximately six months to Howard Morris, a registered sex offender. Mother did not know Morris was a sex offender when she married him. Mother lived in Strasburg at the time, but moved to Scio as Morris was bothering her. Mother knew her current boyfriend had a criminal history, but did not know the type of offense for which he served prison time. Prior to returning to Strasburg from Scio, Mother discussed the situation with her caseworker, Kristy Masten, who expressed concerns about her moving from place to place during the case. Although Masten suggested Mother stay in Scio to demonstrate she could take care of herself, Mother explained she had already told her landlord she was moving. Mother acknowledged she had a pending OVI in municipal court, and was attending AA meetings.

{¶10} Patrick McCluney, Mother's boyfriend, testified the Tuscarawas County Court of Common Pleas had awarded him custody of his daughter over four years prior to the instant hearing. McCluney stated he works as a heavy equipment operator and has been with his current employer for over five years, earning $42,000/year. McCluney acknowledged his addiction to alcohol or drugs had led to his being convicted of a number of offenses. Although he has an occasional beer, McCluney does not use any illegal drugs. McCluney noted he had no concerns for his daughter when she was in Mother's care. On cross-examination, McCluney stated he and Mother had dated

earlier, but had broken up after she was arrested on the warrant because the charge upon which the warrant was issued was a child endangering charge, and he was concerned for his daughter. When Mother began working on her case plan, the couple started dating again. McCluney did not know why Mother was originally charged with child endangering, but understood the charges had been dismissed. Following his testimony, the trial court ordered McCluney to undergo a drug screen, which was negative.

{¶11} During closing remarks, Attorney David Haverfield of TCJFS stated the agency's intention was to file for a planned permanent living arrangement for N.M. Attorney Haverfield explained N.M. had had her share of problems in foster care, including drug problems, and the agency had no confidence in Mother's ability to maintain N.M. and keep the child on course. Attorney Haverfield expressed, and the guardian ad litem concurred, Mother's lack of stability was a tremendous problem.

{¶12} Via Judgment Entry filed July 15, 2009, the trial court denied Mother's motion to expand visitation. The trial court found Mother had failed to substantially remedy the issues which originally caused the removal of the children from her home, citing a pattern of multiple jobs, and live-in boyfriends. The trial court also found Mother showed no insight into the affects of her behavior on N.M. and demonstrated little knowledge or insight into N.M.'s current behavior.

{¶13} Also on July 15, 2009, TCJFS filed a Motion to Modify Prior Disposition, asking the trial court order for an order modifying its previous disposition of N.M. from temporary custody with the agency to an order for a planned permanent living arrangement. TCJFS cited the concerns raised by the trial court following the July 14,

2009 hearing. The trial court conducted a hearing on TCJFS's motion on August 18, 2009. Mother testified the trial court should consider returning N.M. to her because the girl should be with her mother, she loves N.M., and is able to provide for her. Mother was adamant she could meet N.M.'s needs, make sure N.M. regularly attended school, and deal with the girl's propensity to lie.

{¶14} Kristina Masten, the ongoing case manager for the family, testified N.M. is sixteen years old and is currently in a therapeutic foster home. Masten stated, although N.M. has had some problems in foster care, she has done fairly well. Masten explained N.M. had been placed on a diversion program through Coshocton County Juvenile Court after she was found smoking marijuana at school. Masten added N.M. has issues with lying and needs constant supervision. N.M.'s counselor has indicated N.M. lies often and believes the girl needs to be in a stable structured home environment. Since entering foster care, N.M. has done much better in school, is not failing any classes, and is academically on track. Masten expressed concerns with Mother's ability to make sure N.M. goes to school as well as Mother's ability to provide adequate supervision for N.M. N.M. has indicated a desire to return to Mother and told Masten she (N.M.) would make it work, and McCluney would help make sure N.M. goes to school. N.M. feels Mother has changed and will do better.

{¶15} With respect to Mother's compliance with her case plan, Masten testified Mother completed the positive parenting program through Personal and Family Counseling, and completed a psychological evaluation with Dr. Misra at Community Mental Healthcare, who recommended individual counseling and psychiatric treatment. Although Mother saw Dr. Conrad at Community Mental Healthcare, she missed several

appointments in January, and February, 2009, then, in March, 2009, she informed the office she was discontinuing services. Mother attended four counseling sessions, after which Mother and her counselor mutually agreed to discontinue therapy. Masten was concerned about Mother's ability to provide a stable home, citing Mother's numerous job changes, periods of unemployment, and her quickness to move in with men she does not know well enough. Mother completed an initial drug and alcohol assessment which recommended no further treatment. However, after Mother was charged with OVI and a hit and skip in August, 2008, she underwent a second drug and alcohol assessment. After the second assessment was completed in December, 2008, it was recommended Mother attend AA meetings for a minimum of six months. Mother had provided Masten with attendance sheets which showed she attended fourteen meetings between October, and December, 2008. Mother told Masten she continued to attend AA in January, and February, 2009, but did not provide the case worker with any proof of that attendance. Although Mother had completed some of her case plan services, Masten did not feel Mother had received much benefit there from. Masten added she did not feel Mother had ever taken full responsibility for why the children were removed from her care in the first place.

{¶16} Mother's testimony reiterated her testimony at the July 14, 2009 hearing. Mother expressed her opinion she had led a stable life for N.M.

{¶17} Via Judgment Entry filed August 19, 2009, the trial court granted TCJFS's motion to modify prior disposition, finding it was in N.M.'s best interest to do so. The trial court cited the same concerns it had when denying the motion for extended visitation. The trial court noted, "The Court is particularly concerned that even after the

Court generalized its concerns on July 15, 2009, (Mother) still has made no attempt to address these issues nor did she demonstrate any real understanding of the Court's concerns. * * * She cannot articulate any reasons that her children were removed and characterizes her life as stable overall. After eighteen months, her overall case plan services remain incomplete, and she demonstrates no understanding of her daughter's therapeutic needs." August 19, 2009 Judgment Entry at 2, unpaginated.

{¶18} It is from this judgment entry Mother appeals, raising as error:

{¶19} "I. THE TRIAL COURT ERRED IN GRANTING PLANNED PERMANENT LIVING ARRANGEMENT TO JOB AND FAMILY SERVICES ABSENT CLEAR AND CONVINCING EVIDENCE THAT SUCH AN AWARD WAS IN THE BEST INTERESTS OF THE CHILD."

{¶20} N.M. also appeals, raising as error:

{¶21} "I. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FIND THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE REQUIREMENTS OF R.C.§2151.353(5) WERE MET.

{¶22} "II. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FIND THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT DENYING EXPANDED VISITATION BETWEEN MOTHER, JENNIFER MORRIS, AND N.M. AND PLACING N.M. IN A PLANNED PERMANENT LIVING ARRANGEMENT ('PPLA') WHEREIN THE CHILDREN'S BEST INTEREST."

{¶23} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.1(C).

Mother Appeal I

N.M. Appeal I, II

{¶24} Because Mother's assignment of error and N.M.'s assignments of error require similar analysis, we shall address said assignments of error together. In her sole assignment of error, Mother contends the trial court erred in placing N.M. in a planned permanent living arrangement because TCJFS failed to present clear and convincing evidence such was in the best interest of N.M. In her first assignment of error, N.M. maintains the trial court committed reversible error in finding TCJFS established the requirements of R.C. 2151.353(A)(5) by clear and convincing evidence. In her second assignment of error, N.M. asserts the trial court committed reversible error in finding TCJFS established by clear and convincing evidence it was in her best interest to deny expanded visitation with Mother and to place her in a planned permanent living arrangement.

{¶25} A planned permanent living arrangement "is an alternative form of custody in which the child is placed in a foster home or institution, with the intention that the child will remain in that home or institution until he is no longer in the county child services system." *In re D.B.,* Cuyahoga App. No. 81421, 2003-Ohio-3521, ¶ 6. "A PPLA does not sever the parental bonds as permanent custody does, but it also does not provide the child with a legally permanent placement." Id.

{¶26} Pursuant to R.C. 2151.353(A)(5), a PPLA is appropriate if the court finds, by clear and convincing evidence, that it is in the best interest of the child and one of the following conditions is met:

{¶27} "(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care now and for the foreseeable future beyond the date of the dispositional hearing held pursuant to section 2151.35 of the Revised Code.

{¶28} "(b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child, as determined in accordance with division (D)(1) of section 2151.414 of the Revised Code, and the child retains a significant and positive relationship with a parent or relative.

{¶29} "(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available to the child, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing the child for independent living." R.C. 2151.353.

{¶30} In the instant action, the trial court found (c) applicable as well as (b).

{¶31} "An appellate court will not reverse a trial court's determination concerning parental rights and child custody unless the determination is not supported by sufficient evidence to meet the clear and convincing standard of proof." *In re Dylan C.* (1997), 121 Ohio App.3d 115, 121, 699 N.E.2d 107. "Clear and convincing evidence is that level of proof which would cause the trier of fact to develop a firm belief or conviction as to the facts sought to be proven." Id.

{¶32} When a trial court determines the best interest of a child, it is required by R.C. 2151.414(D) to consider all relevant factors, including:

{¶33} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care givers and out-of-home providers, and any other person who may significantly affect the child;

{¶34} "(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;

{¶35} "(3) 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;

{¶36} "(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;

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

{¶38} The trial court's decision to place N.M. in a PPLA was based, in part, upon its disapproval of Mother's lifestyle. The trial court made repeated comments expressing its opinion Mother's moving in with various males has and would continue to have a negative impact on N.M. While we find it would be improper to base its decision solely upon disproval of Mother's moral conduct, it appears clear such conduct impacted Mother's ability to provide N.M. with a stable home environment which caused the original removal of N.M. and her brother from Mother's home. Testimony was presented expressing concerns over Mother's ability to positively parent N.M. and questioning the ability of N.M. to decide what is in her own best interest.

{¶39} We find there was sufficient competent and credible evidence to support the trial court's decision, and the trial court did not abuse its discretion in placing N.M. in a PPLA.

{¶40} Based upon the foregoing, Mother's sole assignment of error, and N.M.'s first and second assignments of error are overruled.

{¶41} The judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF N.M.

DEPENDENT CHILD :
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: JUDGMENT ENTRY
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: Case No. 2009 AP 09 0044

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF N.M.

DEPENDENT CHILD :
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: JUDGMENT ENTRY
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: Case No. 2009 AP 09 0045

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY