

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
J.D.	:	Hon. John W. Wise, J.
J.P.	:	Hon. Earle E. Wise, Jr., J.
	:	
	:	
	:	Case Nos. 2019CA000028
	:	2019CA000029
	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case Nos. 216-2165 & 216-2166
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	January 21, 2020
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APPEARANCES:

For Appellant-Mother

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For Father

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For Appellee-KCDJFS

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Wise, Earle, J.

{¶ 1} Appellant-Mother, S.P., appeals the July 17, 2019 judgment entry of the Court of Common Pleas of Guernsey County, Ohio, Juvenile Division, terminating her parental rights and granting permanent custody of her children to appellee, Knox County Department of Job and Family Services.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 22, 2017, appellee filed a complaint alleging two children to be neglected and/or dependent: J.D. born July 2005, and J.P. born December 2006. Mother is appellant herein; father of the children is R.D. The children had been placed in appellee's temporary custody on December 14, 2016, pursuant to an ex parte order.

{¶ 3} An adjudicatory hearing was held on March 24, 2017, wherein the parents admitted to dependency. Temporary custody of the children remained with appellee.

{¶ 4} A dispositional hearing was held on April 19, 2017. By judgment entry filed May 8, 2017, the trial court ordered continued temporary custody of the children with appellee.

{¶ 5} On November 2, 2018, appellee filed a motion for permanent custody due to the parents' inability to complete the case plans. A hearing was held on April 25, 2019. By judgment entry filed July 17, 2019, the trial court terminated the parents' parental rights and granted appellee permanent custody of the children.

{¶ 6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

{¶ 7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD BE IN THE BEST INTERESTS OF J.P. AND J.D. TO PERMANENTLY TERMINATE THE PARENTAL RIGHTS OF THEIR PARENTS AND PLACE THEM IN THE PERMANENT CUSTODY OF KNOX COUNTY JOB AND FAMILY SERVICES, CHILDREN SERVICES DIVISION."

I

{¶ 8} In her sole assignment of error, appellant claims the trial court erred and abused its discretion in granting permanent custody of the children to appellee. We disagree.

{¶ 9} R.C.2151.414 sets forth all of the factors a trial court should consider in determining a motion for permanent custody. Subsection (B)(1) states permanent custody may be granted if the trial court determines, by clear and convincing evidence, that it is in the best interest of the child and:

(a) The child is not abandoned or orphaned * * * and 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.

(d) 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 * * *.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶ 10} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. See *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross* at 477.

{¶ 11} Appellant is not challenging any findings relative to the factors set forth in R.C. 2151.414(E).

{¶ 12} Appellant first argues the trial court violated R.C. 2151.414(A)(2) which requires a trial court to hold a permanent custody hearing "no later than one hundred twenty days after the agency files the motion for permanent custody." The motion was filed on November 2, 2018. By notice of hearing filed December 10, 2018, the trial court set a hearing date for February 27, 2019, within time. One day before the scheduled hearing date, father filed a motion for a continuance. By entry filed March 4, 2019, the

trial court granted the motion and reset the hearing for April 25, 2019, outside the time requirement for hearing. We find the trial court hearing the matter beyond the one hundred twenty day time limit was necessitated by father's request for a continuance.

{¶ 13} In addition, R.C. 2151.414(A)(2) further states: "The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court."

{¶ 14} In *In re K.H.*, 5th Dist. Licking No. 13-CA-100, 2014-Ohio-1594, ¶ 14, this court stated the following:

Because the time provisions of R.C. 2151.414(A)(2) are directory and not mandatory, the Ohio Supreme Court has held that a litigant must seek a writ of procedendo against the juvenile court if it does not comply with these time limits. *In re Davis*, 84 Ohio St.3d 520, 523-524, 1999-Ohio-0419. If a party does not seek such a writ, he is stopped from arguing on appeal that delay by the juvenile court violated his due process rights. *Id.* at 524, 705 N.E.2d 1219.

Accord In the Matter of D.B., D.B. JR., K.B., M.B., 5th Dist. Perry Nos. 14-CA-0004, 14-CA-0005, 14-CA-0006, 14-CA-0007, 2014-Ohio-3571.

{¶ 15} Appellant did not seek a writ of procedendo. Further, during the permanent custody hearing, appellant requested a six month extension to prove she could be "a

good person and a good mother to my kids." T. at 62. She has not alleged any prejudice due to the late hearing.

{¶ 16} Appellant next challenges the trial court's determination on best interests of the children under R.C. 2151.414(D)(1)-(5). She argues she visited with her children one time and requested additional visits, but was refused. She was appropriate with the children and they were all well bonded to each other.

{¶ 17} In its judgment entry filed July 17, 2019, the trial court stated it considered the factors set forth in R.C. 2151.414(D) which states the following:

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

(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;

(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;

(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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(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;

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

{¶ 18} R.C. 2151.414(E)(11) states:

The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

{¶ 19} The trial court noted the parents failed to visit the children regularly and when a visit with appellant did occur, she was unable to control the children. The children "exhibited inappropriate behaviors during visits" with appellant, and "the children's behaviors worsened" after the visits.

{¶ 20} The trial court did not discuss the wishes of the children, other than to note that the children's counselor "testified that neither child has expressed an opinion to her regarding where they want to live long term."

{¶ 21} The trial court found the "children have been in the temporary custody of KCDJFS since December 14, 2016; more than twelve months out of a consecutive twenty-two-month period."

{¶ 22} The trial court found kinship or relative placement was not an option. Appellee investigated several possible relative placements, but they were found to be unsuitable.

{¶ 23} In its recitation of the facts, the trial court stated appellee's Family Support Unit Supervisor testified that appellee was granted custody in 2016 of appellant's other child because of her ongoing drug issues. The trial court found appellant "presented no evidence that she was financially secure to the point where she could provide adequate resources to support and care for the minor children."

{¶ 24} We find clear and convincing evidence was presented to support the trial court's decision that it was in the children's best interests to be placed in appellee's permanent custody.

{¶ 25} Lastly, appellant argues the guardian ad litem failed to file a written report as required under Sup.R. 48(F). Appellant argues the lack of a written report hinders her

due process rights and her ability, through counsel, to effectively cross-exam the guardian ad litem. We note the guardian ad litem filed a report on the day of the dispositional hearing, April 19, 2017, but did not file a final report prior to the final hearing.

{¶ 26} As stated by this court in *In the Matter of: H.W.*, 5th Dist. Tuscarawas No. 2016 AP 10 0050, 2017-Ohio-7391, ¶ 15:

Sup.R. 48 sets forth appointment procedures, report requirements, and roles and responsibilities for GALs. As noted by Mother, the Rules of Superintendence do not carry the force of statutory or case law, and create no substantive rights. *Allen v. Allen*, 11th Dist. Trumbull No. 2009-T-0070, 2010-Ohio-475 ¶ 31. Because Sup.R. 48 is a general guideline that does not have the force of statutory law, Mother does not have any substantive right to enforce it. *Rice v. Rice*, 5th Dist. No. 10 CA F 11 0091, 2011–Ohio-3099, ¶ 40.

{¶ 27} The guardian ad litem was present during the hearing and after being sworn in, gave her oral recommendation of permanent custody to appellee. Appellant's counsel cross-examined the guardian and elicited testimony that she had had no recent contact with appellant, she had not recently observed appellant with the children, and she had not recently spoken with appellant's service providers. T. at 69-70.

{¶ 28} In its judgment entry, the trial court noted the guardian ad litem's recommendation. Notwithstanding the lack of a written report, we find clear and

convincing evidence was presented to support the trial court's decision on permanent custody.

{¶ 29} Appellant had not visited with the children for almost two years. T. at 25-26, 28. She had one visit and could not control the children. T. at 27. Because of inconsistent visitation, the caseworker asked the parents to write letters to the children. T. at 27, 38. Appellant did not write any letters. T. at 27, 38, 66. She has trouble reading and writing due to dyslexia. T. at 27. She was offered help to write a letter, but did not follow through with appointments. T. at 27, 66. She was in and out of jail and at the time of the hearing, had a pending felony charge for breaking and entering. T. at 27, 30, 52, 55. She was often homeless and did not have stable housing. T. at 52, 54-55, 64. On April 15, 2019, ten days prior to the hearing, appellant tested positive for "methamphetamine, amphetamines, and THC." T. at 31. She has not completed the objectives of her case plan i.e., substance treatment, legal employment, housing, mental health treatment, and parenting classes. T. at 36. In 2016, she lost custody of another child to appellee. T. at 35, 49. The children have been in appellee's temporary custody for more than twelve months out of a consecutive twenty-two-month period. T. at 4, 25.

{¶ 30} Upon review, we find the trial court did not err in granting appellee permanent custody of the children.

{¶ 31} The sole assignment of error is denied.

{¶ 32} The judgment of the Court of Common Pleas of Knox County, Ohio, Juvenile Division is hereby affirmed.

By Wise, Earle, J.
Hoffman, P.J. and
Wise, John, J. concur.
EEW/db