

[Cite as *In re A.W.*, 2010-Ohio-817.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: A.W.

C.A. No. 09CA009631

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 06JC12341

DECISION AND JOURNAL ENTRY

Dated: March 8, 2010

CARR, Judge.

{¶1} Appellant, Tina Reising (“Mother”), appeals from a judgment of the Lorain County Court of Common Pleas, Juvenile Division, that terminated her parental rights to one of her minor children and placed the child in the permanent custody of Lorain County Children Services (“LCCS”). This Court reverses and remands because LCCS failed to prove that permanent custody was in the child’s best interest.

I.

{¶2} Mother is the natural mother of A.W., born March 19, 1997, as well as two other children who are not parties to this appeal. A.W.’s father is deceased. This case began on February 17, 2006, when all three children were removed from Mother’s custody due to allegations that A.W. had been physically abused by her step-father. There were also concerns about domestic violence between Mother and the step-father.

{¶3} Mother and the step-father apparently made substantial progress on the reunification goals of the case plan, and, on October 2, 2007, A.W. and her younger half-brother, J.R., were returned to Mother's custody under an order of protective supervision. A.W.'s older sibling was apparently placed in the legal custody of her grandparents and later reached the age of majority.

{¶4} LCCS later indicated to the court that it had no concerns about the continued placement of J.R. in Mother's home, but it remained concerned about Mother's ability to handle A.W.'s mental health and behavioral problems. A.W. was later placed in a mental health treatment facility, after she had repeatedly threatened to harm others, including Mother, A.W.'s half-brother, and teachers at school. A.W.'s admission into the treatment facility resulted from juvenile delinquency proceedings, but the record does not include any further details about those proceedings, other than testimony by the caseworker that A.W. was found incompetent.

{¶5} Although A.W. apparently suffered from serious mental health problems and continued to reside in the mental health facility throughout the remainder of this case, the record reveals very few details about A.W.'s mental health or behavioral problems. The record fails to include any expert testimony or medical or psychological records to explain A.W.'s mental health history, her specific symptoms or diagnoses, her treatment plan, or the prognosis for her future. The caseworker merely testified that A.W. had been diagnosed with post-traumatic stress disorder, attention deficit hyperactivity disorder, oppositional defiance disorder, and moderate mental retardation.

{¶6} While residing in the treatment facility, A.W. was again removed from Mother's custody in June 2008 due to concerns by LCCS that she may have been sexually molested by her step-father. While A.W. was in the treatment facility, she revealed to one of her counselors

during play therapy that she had been sexually abused by her step-father. On June 17, 2008, LCCS filed a motion to have A.W. placed in its temporary custody, which the trial court granted.

{¶7} Police investigated the agency's concern that A.W. had been sexually molested by her step-father, but the step-father was never charged. Although Mother initially supported A.W.'s disclosure about the sexual abuse, as time went by, Mother decided that she did not believe that A.W. had been sexually abused.

{¶8} On March 25, 2009, LCCS moved for permanent custody of A.W. The primary grounds for its motion were Mother's alleged inability to deal with A.W.'s mental health needs as well as the agency's concern that Mother could not protect A.W. from future sexual abuse in the home. Following a hearing on the motion for permanent custody, the trial court found that A.W. could not be placed with either parent within a reasonable time or should not be placed with them and that permanent custody was in her best interest. Mother appeals and raises two assignments of error that will be addressed together because they are closely related.

II.

ASSIGNMENT OF ERROR I

“[LCCS] FAILED TO MEET ITS BURDEN OF PROOF WHEN IT DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT IT WAS IN A.W.'S BEST INTEREST TO [BE PLACED IN THE PERMANENT] CUSTODY OF [LCCS] PURSUANT TO R.C. [] 2151.414(B)(1).”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT'S DECISION TO GRANT PERMANENT CUSTODY TO [LCCS] WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶9} Mother maintains that the trial court's decision to place A.W. in the permanent custody of LCCS was not supported by sufficient evidence and was against the manifest weight of the evidence. Before a juvenile court can terminate parental rights and award to a proper

moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99.

{¶10} The trial court found that the first prong of the test was satisfied because A.W. could not be returned to Mother within a reasonable time or should not be returned to her and Mother does not directly challenge that finding. She instead maintains that the trial court's finding that permanent custody was in A.W.'s best interest was not supported by the evidence. This Court agrees.

{¶11} To satisfy the best interest prong of the permanent custody test, LCCS was required to establish, by clear and convincing evidence, that the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). When determining whether a grant of permanent custody is in the child's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the child, and the child's need for permanence in her life. See *In re R.G.*, 9th Dist. Nos. 24834 and 24850, 2009-Ohio-6284, at ¶11. "Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of

the enumerated factors.” *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711. See, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, ¶24.

{¶12} The trial court stated in its order that it had considered all of the best interest factors. However, the trial court’s consideration of those factors was necessarily limited to the scope of the paucity of evidence actually presented by LCCS. In *In re A.D.*, 9th Dist. No. 02CA008090, 2002-Ohio-6032, this Court reversed a permanent custody judgment because the agency failed to prove that permanent custody was in the best interests of the children. Because “there were so many holes in the evidence on the mandatory factors,” this Court held that the agency had failed to meet its burden of presenting clear and convincing evidence to establish that permanent custody was in the children’s best interests. *Id.* at ¶28. Of particular significance in *In re A.D.* was the lack of any evidence concerning the mother’s interaction with her children, the interrelationship between the two siblings, and the custodial history of the children during their involvement with the agency or during the ten years prior to their removal from the home. See *id.* at ¶21-22, 25.

{¶13} In this case, the agency’s attempt to prove that permanent custody was in A.W.’s best interest likewise fell far short of clear and convincing evidence. Clear and convincing evidence is that 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 Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. LCCS presented so little evidence about A.W. and her family that it tended to raise more questions about her best interest than it answered. Given the evidence before the trial court, it would have been impossible for it to form a “firm belief” about whether permanent custody was in A.W.’s best interest.

{¶14} The first best interest factor involves the interaction and interrelationship of the child with her parents, siblings, and other relatives and significant people in her life. As this Court has stressed, the first best interest factor is “highly significant” and “focuses on a critical component of the permanent custody test: whether there is a family relationship that should be preserved.” *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶11, citing *In re Smith*, supra. LCCS presented minimal evidence about Mother’s interaction with A.W. Moreover, most of the evidence that it did present tended to weigh in favor of preserving the family relationship.

{¶15} LCCS presented evidence that Mother and A.W. loved each other very much and that they are both attached to each other. One of A.W.’s counselors testified that it is “so clear” that Mother is “terribly devoted to her daughter and loves her very much.” There was also evidence that A.W. would become upset after her visits with Mother because she was afraid that Mother was not coming back.

{¶16} Although LCCS presented evidence that A.W. was upset that Mother did not believe her allegations of sexual abuse, the evidence surrounding these allegations was vague at best. However, the record reveals that Mother did support A.W. when initially informed of the allegations. Notwithstanding, the agency and the trial court faulted Mother for failing to believe that A.W. had been sexually molested by her step-father, yet it gave no explanation of why Mother was required to continue to believe the allegations when the criminal investigation had been closed and no charges were filed against the step-father. Moreover, the agency offered no explanation of why, if it believed that the step-father was a sexual offender, it had no concerns about the continued placement of J.R. in the home. J.R. had remained in the home with Mother and A.W.’s step-father, who is J.R.’s father, throughout this case. The order of protective supervision was eventually terminated and J.R.’s dependency case was closed.

{¶17} LCCS also attempted to establish that Mother was unable to control A.W.'s behavioral problems, but the record demonstrated that even the trained staff at the mental health facility was unable to control her outbursts or to prevent her from leaving the facility. After well over a year in the facility, A.W.'s volatile behavior had shown little improvement. She continued to threaten to harm to herself and others and she ran away from the facility several times per week.

{¶18} Significantly lacking in LCCS's evidence pertaining to A.W.'s relationship with Mother was any evidence to explain how terminating this relationship would impact A.W. Given that A.W. was an already disturbed and emotionally fragile child, who loved Mother and was bonded to her, the impact of terminating their 12-year relationship could potentially be devastating to this child. Evidence of A.W.'s likely emotional reaction to the termination was another critical piece of information that should have been considered by the trial court in its best interest determination.

{¶19} There was likewise an absence of evidence of the interaction and interrelationship between A.W. and her younger half-sibling, J.R. The siblings had apparently lived together for seven years prior to this case. Given that termination of Mother's parental rights to A.W. also terminated A.W.'s sibling relationship with J.R., "the strength of bond and the relationship between these siblings certainly should have entered into the best interest equation." See *In re A.D.* at ¶22. Unfortunately, however, LCCS offered no evidence about the relationship between A.W. and her half-sibling J.R., her older sibling, or any of her other family members. Given the minimal evidence presented on the first prong of the best interest test, it was impossible for the trial court to determine whether this was a family relationship that should be preserved.

{¶20} LCCS presented no evidence about A.W.’s wishes, despite the fact that she was 12 years old at the time of the hearing. Although A.W. suffered from emotional problems, there was no evidence that she was not capable of expressing her own wishes. The guardian ad litem did not testify at the hearing, but submitted a brief report that recommended permanent custody to LCCS because Mother lacked the ability to care for A.W. in her home.

{¶21} A.W.’s custodial history included approximately 20 months in the temporary custody of LCCS over the previous three years. As this Court has repeatedly noted, however, “the time period in and of itself cannot be held against the parent without considering the reasons for it and the implications that it had on this child.” *In re Smith*, supra; 9th Dist. No. 20711; *In re C.M.* at ¶16. For more than 18 months before the permanent custody hearing, A.W. had been living in a residential mental health treatment facility. As emphasized already, LCCS presented few details about A.W.’s mental illness or her treatment at the facility except that she continued to exhibit behavioral problems. The caseworker testified that Mother did not seem to understand the severity of A.W.’s problems, yet it presented little evidence for the court to comprehend how A.W.’s mental illness and behavioral problems should impact the best interest decision.

{¶22} A.W.’s custodial history also included a much longer period of time that was spent in Mother’s custody. A.W. had apparently spent ten years of her life in the custody of Mother, yet the trial court had before it almost no evidence about that history. The ten-year period that A.W. lived with her mother and siblings, coupled with the love and strong bond between Mother and A.W., should have been considered in the trial court’s best interest analysis, but there was no evidence before it to enable it to do so. Although the same statement is repeated in LCCS affidavits throughout the record that this family “has an extensive history with [LCCS] dating back to 1998[,]” there is no evidence in the record about that prior history, other

than that LCCS had received referrals about this family. There is nothing to suggest that there were any prior cases or that A.W. had ever before been removed from the home.

{¶23} The trial court was also required to consider A.W.'s need for a legally secure permanent placement and whether such a placement could be achieved without granting permanent custody to LCCS. Mother maintains that the trial court should have considered the less drastic placement of a planned permanent living arrangement ("PPLA"). Because LCCS had not moved for a PPLA placement, however, that dispositional option was not available to the trial court. *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, at ¶37.

{¶24} Nonetheless, implicit in this factor is the need for the agency to prove that a legally secure permanent placement for A.W. would likely be achieved through a grant of permanent custody to the agency. In contrast to most permanent custody appeals heard by this Court, there was no evidence that this child was any more likely to achieve a legally secure permanent placement in the permanent custody of the agency than she would be in her current, temporary placement. LCCS had been unable to find an adoptive placement for A.W. In fact, although the caseworker testified that LCCS hoped that it would be able to find an adoptive placement, she conceded that the agency had been unable to find even a temporary placement for A.W. outside the mental health facility. Given the lack of evidence about A.W.'s mental health history, her treatment plan, or her prognosis for the future, it was unclear whether the agency could ever find a suitable permanent placement for this child.

{¶25} This Court must again emphasize that the focus of this appeal is not whether Mother should regain custody of A.W. Rather, the issue on appeal is whether the agency established, by clear and convincing evidence, that Mother's parent-child relationship with A.W., as well as A.W.'s relationship with Mother and the rest of her family, should be involuntarily

terminated. Although no one best interest factor is controlling, the trial court cannot terminate parental rights without considering each of the mandatory factors set forth in R.C. 2151.414(D). *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, at ¶56. In light of the history that LCCS had with this family, LCCS may have been privy to much more information than was actually presented to the trial court. However, LCCS presented so little evidence pertaining to the best interest factors that it was impossible for the trial court to adequately consider what was in A.W.'s best interest. Because LCCS did not meet its burden in this case to prove that permanent custody was in A.W.'s best interest, the assignments of error are sustained.

III.

{¶26} Mother's assignments of error are sustained. The judgment of the Lorain County Court of Common Pleas, Juvenile Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed and
the cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

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