[Cite as *In re E.M.*, 2015-Ohio-641.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN RE: E.M.	C.A. No. 14AP0030
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 13-0631-AND

DECISION AND JOURNAL ENTRY

Dated: February 23, 2015

MOORE, Judge.

{¶1} Appellant, Tia M. ("Mother"), has appealed from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, E.M., and placed the child in the permanent custody of Wayne County Children Services Board ("CSB"). This Court reverses.

I.

{¶2} Appellant is the mother of E.M., born April 24, 2013. Justin M. was determined through genetic testing to be the child's biological father. He surrendered his parental rights to E.M. at the permanent custody hearing and is not a party to this appeal.

{¶3} Shortly after E.M.'s birth, a caseworker from CSB met with Mother and Dakota S., her then boyfriend, at the hospital upon reported concerns of homelessness, poor hygiene, drug abuse, and cognitive issues. The agency attempted to create a voluntary safety plan for the family. When Mother was released from the hospital, she took E.M. to stay at the home of a

friend for a few days and then to the home of the child's maternal grandmother ("Grandmother"). A CSB employee visited Grandmother's home while Mother and child were staying there. After the visit, Grandmother anticipated that the child would be remaining there.

{¶4} On May 3, 2013, however, CSB filed a complaint in juvenile court, alleging that the child was dependent and neglected, and sought custody of the child. At the shelter care hearing, a CSB employee expressed concern with Mother's lack of bonding with E.M. as well as her intention to leave Grandmother's home and reside with E.M. and Dakota S. in "Tent City," a homeless encampment in Wooster. The witness also expressed concern with the mental health of Dakota S. and indicated that he had made some outlandish statements, such as claiming to be the chief of the Wooster Fire Department. At the conclusion of the hearing, the trial court granted emergency temporary custody of E.M. to the agency. The agency placed E.M. in foster care, and he remained there throughout the case.

{¶5} At the adjudicatory hearing, Mother stipulated to a finding of dependency under R.C. 2151.04(C). The remaining allegations were dismissed. Mother also agreed to a disposition of temporary custody. The trial court adopted a reunification case plan for Mother that addressed parenting, housing, mental health, substance abuse, and the need to obtain benefits or employment. The case plan offered her visitation twice weekly. Mother enrolled in parenting classes and scheduled evaluations for mental health and substance abuse, but did not keep her appointments and failed to reschedule them. Mother's efforts to attend visitation began well, but soon faded. There is no evidence that she obtained housing or secured income.

{¶6} On April 2, 2014, CSB moved for permanent custody. Mother opposed the motion and alternatively sought an award of legal custody to Grandmother. Although Mother's attorney sought a continuance, the permanent custody hearing proceeded in Mother's absence.

Following the hearing, the trial court found that Mother had abandoned E.M. and that permanent custody was in the child's best interest. Accordingly, the trial court denied Grandmother's motion for legal custody, terminated Mother's parental rights, and granted CSB's motion for permanent custody of E.M. Mother appealed and assigned four errors for review.

{¶7} Upon consideration, this Court determined that in order to decide this appeal, it was necessary to resolve the question of whether there was clear and convincing evidence of abandonment before the trial court. Consequently, the parties were ordered to brief that question and the case was re-argued. Because this assignment of error is determinative, we confine our review accordingly.

II.

SUPPLEMENTAL ASSIGNMENT OF ERROR

THE WAYNE COUNTY JUVENILE COURT ERRED BY FINDING THAT E.M. WAS ABANDONED.

{¶8} Mother argues that the trial court erred in granting permanent custody of her child to CSB because the evidence failed to clearly and convincingly establish that she had abandoned her child. Before a juvenile court may terminate parental rights and award permanent custody of a child to a proper moving agency, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that one of the enumerated factors in R.C. 2151.414(B)(1)(a)-(e) apply, and (2) that permanent custody is in the best interest of the child. R.C. 2151.414(B)(1).

{¶9} In its judgment entry, the trial court found that the first prong of the permanent custody test was satisfied on the basis of abandonment. *See* R.C. 2151.414(B)(1)(b). No other first prong finding was made by the trial court. This Court cannot make a factual finding in the first instance because such a ruling would exceed our jurisdiction as an appellate court. *See In re E.T.*, 9th Dist. Summit No. 22720, 2005-Ohio-6087, ¶ 15, citing Section 3(B)(2), Article IV,

Ohio Constitution. Consequently, if the judgment granting permanent custody in this case is supported, it must be upon a finding of abandonment. As to the second prong of the permanent custody test, the trial court found that permanent custody was in the best interest of the child.

Background

{¶10} In an action to terminate parental rights, due process requires the State to support its allegations with at least clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 747-748 (1982). Because parents have a fundamental liberty interest in the care, custody, and management of their children, this level of certainty is necessary to preserve fundamental fairness in a government-initiated proceeding that threatens an individual with a deprivation of the custody of his or her child. *Id.* at 756, 759. *See also In re Adoption of Zschach*, 75 Ohio St.3d 648, 653 (1996). "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky* at 759. "If the State prevails, it will have worked a unique kind of deprivation[.]" *Id.*, quoting *Lassiter v. Dept. of Social Services of Durham Cty., N.C.*, 452 U.S.18, 27 (1981). "Few forms of state action are both so severe and so irreversible" as the termination of parental rights. *Santosky* at 759.

{¶11} The *Santosky* court cautioned that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. * * * When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54. Therefore, when a court determines whether to permanently terminate parental rights, the court must grant the affected parent "every procedural and substantive protection the law allows." *In re Smith*, 77 Ohio App.3d 1, 16 (6th Dist.1991).

{¶12} Consistent with these principles, Ohio has statutorily mandated that before a juvenile court may grant a motion for the termination of parental rights, the court must find each of the elements on which it bases its decision to be supported by clear and convincing evidence. *See* R.C. 2151.414(B)(1). In this case, the trial court based its first prong finding on abandonment. Due process requires that the trial court may do so only if the evidence offered in support of abandonment was clear and convincing. Ohio defines clear and convincing evidence as that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. On review, this Court must "examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Id.* at 477.

Abandonment

{¶13} R.C. 2151.011(C) states that, for purposes of R.C. Chapter 2151, "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days." This provision does not provide a definition of abandonment, but rather explains that when a parent fails to visit or maintain contact with his or her child for more than 90 days, there is a presumption of abandonment, which a parent may rebut. *In re N.C.P.*, 5th Dist. Stark No. 2014CA00083, 2014-Ohio-3694, ¶ 24-26.

{¶14} In considering whether the evidence clearly and convincingly supports a finding that Mother abandoned her child by failing to visit or to maintain contact with him for more than 90 days, we begin with the documented fact that E.M. was removed from Mother's care and placed in the emergency temporary custody of the agency on May 3, 2013, and the additional fact that CSB filed its motion for permanent custody of E.M. on April 2, 2014, eleven months

later. Any ground for permanent custody on which the trial court relies must exist at the time the motion for permanent custody is filed. *See In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-641, ¶ 24.

{¶15} CSB claims that Mother failed to visit with E.M. for 90 days or more during this period of time and the trial court so found. The evidence adduced on this claim came largely from the testimony of Caseworker Martha Jackson-Hill and State's Exhibit A, which consisted of monthly visitation reports jointly issued by the caseworker and the supervisor and which were mailed to Mother. Ms. Jackson-Hill testified that visits were initially scheduled for twice a week, but she later "had to bump it down" to once a week. According to State's Exhibit A, that scheduling change was made in mid-February 2014.

Visits

{¶16} We next consider the visits attended by Mother that are documented in the record. The caseworker testified that Mother attended visits "the first couple of times" (T. 11) after the child was removed from her care in May 2013. However, the May 2013 letter included in State's Exhibit A indicates that Mother attended all six of the scheduled visits before May 21, 2013, the date of the letter. The June 2013 letter indicates that Mother visited on June 7, 2014. The July 2013 letter indicates that a visit took place on July 16, 2013. The September 2013 letter indicates that Mother confirmed a visit for September 16, 2013, but that the visit was cancelled by the agency because the child was ill. The same letter also indicates that E.M. was ill again on September 18, 2013, but it does not indicate whether or not Mother sought to confirm a visit for that date. Ms. Jackson-Hill testified that she personally observed a visit in October 2013. She did not know the exact date of the visit (T. 47), but she believed it was in "early October." (T. 11). The November 2013 letter indicates that Mother did not confirm visits scheduled for

October 21, 22, 28, or 29, and furthermore does not indicate that Mother attended any visits in October. Thus, the single visit that Caseworker Jackson-Hill admitted to having personally observed is not recorded in the agency's monthly report of visits.

{¶17} The next notable documentation was in the December 2013 letter from CSB, which contains the following comment: "I understand you are and have been incarcerated in Wayne County Jail until February 2014. I'll make arrangements for a home visit with the authorities while you are there." The letter was signed by Martha Jackson-Hill, M.A., Caseworker II, and by Mike Smith, LSW, Social Service Supervisor. There is no evidence in the record as to whether or when this visit may have taken place, no testimony as to why it would not have taken place after having been promised, and no testimony by Ms. Jackson-Hill regarding this visit one way or the other. There is no letter for January 2014. The February 2014 letter indicates that visits were "not scheduled" for January because of Mother's incarceration. The March 2013 and April 2013 letters do not indicate that any visits took place during their respective reporting periods. The motion for permanent custody was filed on April 2, 2014.

Possible Periods of Presumed Abandonment

{¶18} Based on this record, the first period to consider for presumed abandonment would be from the time of the July 16, 2013 visit until October 14, 2013, which is 90 days later. The trial court did not rely on this period of time to satisfy its finding of abandonment. That may be because any presumption of abandonment during that time period would be satisfactorily rebutted by the fact that Mother confirmed a visit for September 16, 2013, even though the visit was cancelled by the agency due to E.M.'s illness. We also note that the caseworker's best recollection of the October 2013 visit, which she observed, was that it took place in "early"

October. The monthly letters provide no evidence as to when that visit took place. The record does not clearly and convincingly establish abandonment during this period of time.

{¶19} The second period of time to consider for abandonment is from the unspecified date of the October 2013 visit until April 2, 2014, when the motion for permanent custody was filed. This period includes the December 2013 letter, in which the agency wrote that it would arrange a visit between Mother and E.M. because Mother was incarcerated. The record does not clearly and convincingly establish that the promised visit did not take place.

{¶20} This period of time also includes a January 2014 meeting between the caseworker and Mother at the Wayne County Jail during which Mother requested that E.M. be brought to the jail for a visit. The caseworker refused and advised Mother that her visits were "suspended" while she was in jail. This is despite the fact that she was a signatory on the recently issued December 2013 letter promising Mother a visit while she was incarcerated.

{¶21} On cross-examination, the caseworker testified that she was not opposed to facilitating visits by children in the Wayne County Jail, but that she had never done so. She stated that she did not believe it would be safe or healthy to have visits at the jail. When asked if it was agency policy to *not* have such visits, the caseworker stated: "I'll have to ask them." (T. 46). When specifically asked why visits were not being arranged for Mother, she replied that it was because Mother "wasn't making any effort on anything[.]" (T. 46). Ms. Jackson-Hill also stated that she did not know and could not determine from the case file whether Mother had requested a visit from the caseworker previously assigned to the case during an earlier period of incarceration.

{¶22} Mother was apparently incarcerated during the trial court proceedings because there are multiple references by several witnesses to that fact, but the evidence regarding the

basis and dates of Mother's incarceration are unclear. There is no documentary evidence of any criminal conviction of Mother and no evidence of specific dates for her incarceration. To this point, upon being asked the reason Mother was in jail, Caseworker Jackson-Hill responded that it was "underage prohibitions or something like that." (T. 13). As to the times when Mother was incarcerated, Ms. Jackson-Hill testified that Mother was in jail "a couple of times" (T. 13) during these proceedings. She went on to refer to "the June/July period, then we had another period from December to February that she was in jail." (T. 13). Where abandonment is the statutory basis for a court's termination of parental rights, this vague and imprecise testimony is not the sort of evidence upon which a permanent custody decision can be based. CSB failed to introduce any proof of conviction to establish the specific crime or crimes for which Mother may have been convicted or of the dates of her alleged incarceration. Certified copies of any judgments of conviction should have been readily available to the agency.

{¶23} CSB had alternately told Mother that she would not be permitted to have visits in jail, that her visits were "suspended," "cancelled," or even "not scheduled" while she was in jail. This information was conveyed to Mother personally by her caseworker or in writing through the monthly letters signed by the caseworker and the supervisor.[1] Notwithstanding these reports to Mother, Ms. Jackson-Hill stated in her testimony to the court that the agency offered Mother visitation "on a continual basis, actually, from I believe the very beginning of this case." She

[1] The June 2013 letter from State's Exhibit A indicated that most of Mother's June visits were "cancelled" because she was in jail. It also indicated: "At this time, I understand you are sentenced to 60 days in the Holmes County Jail. Visitation will be canceled until your release." The July 2013 letter indicated that four visits in July were "cancelled" because Mother was in jail. In January 2014, Caseworker Jackson-Hill advised Mother that her visits were "suspended" while she was in jail. The February 2014 letter indicated: "Due to being incarcerated, visits were *not scheduled* for the month of January 2014. Your release date from Wayne County Jail was February 2, 2014; however, you were transported to Holmes County Jail for a few days." (Emphasis added.)

confirmed that Mother was "offered scheduled visitation [] every week since the child came into care[.]" (T. 11). Unfortunately, CSB did not address this question in its appellate brief. The record does not clearly and convincingly establish abandonment during this period of time either.

Conclusion

{¶24} As explained above, the agency bears the burden of clearly and convincingly satisfying the statutory requirements in a case involving the termination of parental rights. Therefore, the burden to establish abandonment of her child through an absence of visits by Mother is upon the agency. Upon consideration, we conclude that the agency failed to meet its burden. Absent clear and convincing evidence of abandonment, the judgment granting permanent custody of E.M. to CSB cannot stand. Mother's Supplemental Assignment of Error is sustained. Based on our resolution of the Supplemental Assignment of Error, we decline to address Mother's remaining assignments of error as they have been rendered moot. *See* App.R. 12(A)(1)(c).

{¶25} Our decision today should not be construed as determining that Mother should regain custody of E.M., nor does it mandate that CSB should not, in the future, seek permanent custody. It may well be that Mother is unable to adequately parent her child. Rather, our decision emphasizes once again that such a severe and irreversible determination regarding one of our fundamental liberty interests must be made in full compliance with Ohio's statutory law and consistently with due process.

III.

{¶26} Mother's Supplemental Assignment of Error is sustained. Mother's remaining assignments of error are rendered moot and we decline to address them. *See* App.R. 12(A)(1)(c). The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is reversed and remanded for further proceedings.

Judgment reversed
and 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 Wayne, 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(C). 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.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
CONCURS.

CARR, J.
CONCURRING.

{¶27} I concur in the judgment of the Court and agree with the assessment that the evidence put forth by CSB regarding the issue of abandonment fails to meet the constitutionally mandated standard of clear and convincing evidence. However, I write separately to indicate my concern that abandonment is not an appropriate finding in this case.

{¶28} First, while R.C. 2151.011(C) describes a situation that creates a presumption of abandonment, it does not define the term. Rather, as considered by the Ohio Supreme Court, I believe that abandonment evokes an intention to permanently end a relationship with a child. *See, e.g., In re Masters*, 165 Ohio St. 503 (1956) (abandonment evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child); *In re N.C.P.*, 5th Dist. Stark No. 2014CA00083, 2014-Ohio-3694, ¶ 25. I do not believe Mother demonstrated an intention to permanently end her relationship with her child in this case. Despite Mother having periods of no contact with her child, that is not the same thing as affirmatively deciding that she wishes to have no further contact with him ever again.

{¶29} In addition, I do not believe the legislature intended the finding of abandonment to apply to a parent who is incarcerated for a relatively short period of time. There are at least two other statutory provisions that are more directly relevant and appropriate to situations where parents have been incarcerated and which may be relied upon to support a finding that a child cannot or should not be placed with a parent within a reasonable time. *See* R.C. 2151.414(E)(12) (parent is incarcerated at the time of the filing of the motion or the permanent custody hearing and will not be available for 18 or more months) and R.C. 2151.414(E)(13) (parent is repeatedly incarcerated, which prevents parent from providing care for the child). In cases involving more serious crimes and lengthier sentences than that of Mother, even more relationship or functional

issues are likely to be involved and thus there may be additional factors on which to base any claim to terminate parental rights.

{¶30} Here, Mother was apparently sentenced for a relatively short period of time. Even ninety-day prison sentences are a commonplace penalty for misdemeanors. Surely, in such cases, the sentencing judge does not intend that, where the defendant is a parent, the penalty should include the additional sanction of permanently losing a relationship with his or her child. While this may seem extreme, such a penalty can certainly exist - as it nearly did here - and, furthermore, it may fall on women more often than men. *See* Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 Berkeley J. Gender L. & Just. 78, 86 (2011). When men are incarcerated, there is often a mother to take care of the children. The reverse is less often true.

{¶31} While it may seem inviting to utilize an objective standard of 90 days to establish a portion of the permanent custody test, a matter that generally requires so much subjective analysis, when abandonment is applied to a situation such as this, the analysis can become forced in ways that risk trivializing the significant issue involved - the ending of a permanent relationship between a parent and child. Thus, instead of considering whether the parent and child have a positive and loving relationship that may be salvaged and whether the parent can properly care for the child, the analysis can devolve into wondering whether the parent utilized sufficient determination or resourcefulness when requesting a particular visit or whether a visit fell on Day 89 or 91. The termination of parental rights should rely on more solid ground than this.

{¶32} Moreover, because this case may be retried, I note my concern that CSB failed to present clear and convincing evidence in other areas of its case as well. For example, I am

concerned with the manner in which CSB responded to Grandmother's efforts to obtain legal custody. Her request for regular visits was refused because the "person that we are focused on is [Mother]." The caseworker admitted that grandparents were offered visits in other cases, but, in explanation, simply said "[t]hat's other cases." When the guardian ad litem made her recommendation for permanent custody, she relied, at least in part, on the fact that Grandmother was offered monthly visits, but did not attend them. This does not reflect the "fundamentally fair procedures" that should apply to any intervention by the state into a parent-child relationship. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

{¶33} In addition, CSB expressed concern that, in light of the child's medical needs, Grandmother could not provide care for the child because she was a smoker, but the agency did not introduce proper medical evidence of those needs. The caseworker testified that "[E.M.] has some respiratory issues" and "he's sort of an asthmatic child," but CSB offered neither testimony from the child's medical providers nor properly authenticated medical records to establish the child's specific medical diagnosis, current condition, and particular needs going forward. Also, the caseworker testified that she "suspect[ed] * * * [Grandmother] has some health issues," without clearly explaining what they were or eliciting any medical evidence of such issues. Similarly, the caseworker testified that E.M. "suffered some withdrawal symptoms" in an apparent effort to disparage Mother's prenatal care. Yet, CSB did not present any medical evidence that established the presence of drugs in either the child or Mother at any time during this case.

{¶34} If this case is retried, it should be done in full recognition and appreciation for Ohio's statutory mandates and the principles of due process of law that apply to the vital interest that is involved in the parent-child relationship.

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.

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