[Cite as *In re K.H.*, 2010-Ohio-1609.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN RE:	:	
	:	Appellate Case No. 2009-CA-80
K.H.	:	
	:	Trial Court Case No. 2008-0780
	:	
	:	(Civil Appeal from Clark County
	:	DomesticRelations/Juvenile Court)
	:	

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O P I N I O N

Rendered on the 9th day of April, 2010.

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STEPHEN A. SCHUMAKER, Atty. Reg. #0014643, by ROGER A. WARD, Atty. Reg. #0065394, Clark County Prosecutor's Office, 50 East Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee, Clark County Dept. Of Job & Family Services

ROBERT HENDRIX, Atty. Reg. #0084442, 87 South Progress Drive, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee, R.C.

KATHRYN L. BOWLING, Bowling Law Offices, 111 West 1st Street, Suite 2005, Dayton, Ohio 45402
Attorney for Defendant-Appellant, M. H.

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FAIN, J.

{¶ 1} The mother of K.H., appeals from an order of the Clark County Juvenile Court awarding the permanent custody of the child, who was born April 15, 2008, to the Clark County Children Services Board. The mother contends that the evidence in the

record does not support the trial court's finding, by clear and convincing evidence, that the child could not be placed with her within a reasonable time, or should not be placed with her, and that it was in the child's best interest to be permanently committed to the Board.[1]

{¶ 2} We conclude that there is evidence in the record to support the trial court's findings. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} K.H. was born April 15, 2008. Her mother was not married. The child was born two months prematurely. Upon her release from the hospital on April 24, 2008, the child was placed in the temporary care of foster parents. The child remained in the care of the foster parents, who were then seeking to adopt her, on July 14, 2009, the date of the hearing on the Board's motion for permanent custody.

{¶ 4} The mother, who had not had the good fortune to be raised in a stable, nurturing environment, was 33 when K.H. was born. She has three other children. The youngest of these suffers from Cerebral Palsy. He was in foster care, and the mother was working on a case plan in his case when K.H. was born.

{¶ 5} Less than a month after K.H.'s birth, the mother was incarcerated for a felony. At the time of the hearing, she had a release date in December, 2009, hoped to be released earlier, and was due within a few days to be transferred to a half-way house in Cincinnati.

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[1]At the hearing, it was the mother's position that her child should not be placed with the father, so she cannot now complain, and does not appear to be complaining, that the trial court found that the child should not be placed with the father.

{¶ 6} Due to her incarceration, the mother was not present at the hearing, but her attorney was present, and he expressed confidence that the exhibits presented by her at the hearing, including her handwritten letter to the judge, would adequately set forth her position:

{¶ 7} "THE COURT: You feel confident the exhibits you would introduce today would fully and adequately represent her position in the case?

{¶ 8} "MR. SOMMER [representing the mother]: Yes. I discussed that with her before Exhibit No. 1 [her letter to the court] was prepared. And it was prepared specifically to address the permanent custody issue and to provide the testimony that she would offer if she were here.

{¶ 9} "THE COURT: You told her to put in writing what she would like to tell me were she here in person?

{¶ 10} "MR. SOMMER: That's correct.

{¶ 11} "THE COURT: And you believe that exhibit adequately does do that?

{¶ 12} "MR. SOMMER: Yes, I do.

{¶ 13} * * *

{¶ 14} "THE COURT: Okay. All right. And then would you represent to the Court that as counsel on her behalf, the introduction of Exhibit A [the letter] would fully and adequately represent her position and set forth her testimony?

{¶ 15} "MR. SOMMER: Yes, I would.

{¶ 16} "THE COURT: We don't need any further testimony in the form of depositions or interrogatories?

{¶ 17} "MR. SOMMER: I don't believe so."

{¶ 18} One of the exhibits admitted without objection at the trial was an evaluation of the mother by Daniel D. Hrinko, Psy.D., who testified as an expert on behalf of the Board. The evaluation was performed on April 23, 2008, after K.H.'s birth, but before the mother's incarceration. Parts of this evaluation are worth quoting:

{¶ 19} "[The mother] reported that Children's Services became involved in her situation last year. She acknowledged 'doing nothing' on her service plan until last month stating that her time in jail [on a prior conviction] was 'a wake-up call.' She stated she was expected to attend parenting classes, demonstrate her skills and supervised visitation, and complete a psychological evaluation. She stated that she was unable to perform these tasks because of her ongoing legal problems. She went on to state that she missed visitation because 'I was so wrapped up with other things.'

{¶ 20} "She currently lives alone. She has a history of multiple unstable relationships with extremely negative individuals. Her most recent relationship lasted three years with * * * who is reported to have a significant addiction to marijuana. She also reported that he was involved with printing checks on a computer and had been convicted of credit card fraud. In an attempt to help him, she used her credit card to pay his financial obligations and fines. She also wrote checks knowing they were not valid, made cash advances, and wrote checks on closed accounts in an attempt to support herself in early 2006. Because her credit card was no longer valid, and many of the checks she wrote were not valid, she has been charged with multiple criminal offenses. She reported they moved to Columbus in October, 2007 for a 'new start.' However, she reported that he resumed his previous behaviors. After spending 40 days in jail, she has returned to Springfield.

{¶ 21} "**Employment**: [The mother] has a history of sporadic employment at various places with various changes in job, and no evidence of consistent employment. Her most positive term of employment was while living in Tennessee when she worked at various clerical positions. She was able to maintain employment for a period of time at Madison County Hospital in a clerical position, but left that job when she moved to Clark County.

{¶ 22} "[The mother] frequently has experienced chaotic home and family life along with frequent moves which often has interfered with her ability to maintain stable employment.

{¶ 23} "At this time, she is not working stating that her felony convictions make it difficult for her to obtain employment opportunities. She reported that she will be starting and [sic] employment support program in June.

{¶ 24} * * *

{¶ 25} "**Legal History**: [The mother] is currently on probation in several counties and has charges pending in other counties due to charges of credit card fraud, forging checks, and other similar criminal behaviors. She was incarcerated during much of January and February 2008. She reported no time served in state prisons.

{¶ 26} "She reported being on probation and [in?] Clark County with the expectation that she make restitution. She is optimistic that she will be able to complete this by May 9, 2008. Her cases in Champaign County have been closed since she completed restitution. She is currently on probation in Cuyahoga County and Montgomery County, and has a revocation hearing scheduled in Madison County for failing to report to her probation officer. [The mother] reported the reason for her not

reporting was due to being incarcerated in Montgomery County. She failed to contact them and clarify this upon her release. As a result, she may face additional time in jail. Records indicate that she failed to report to her probation officer on August 1, September 5, October 3, November 7, and December 5, 2007 all of which occurred before her incarceration in the Montgomery County jail. She also failed to appear for trial in Cuyahoga County on November 14, 2007.

{¶ 27} "[The mother] has previously been convicted of writing 16 bad checks in 1995 in Champaign County, Ohio. She denied any other criminal behaviors, arrests, or convictions.

{¶ 28} * * *

{¶ 29} "She has a history of extremely poor judgment particularly in the way she manages relationships and her priorities. She has difficulty accepting responsibility for her mistakes although she states that she has 'opened her eyes' and is beginning to accept the fact that she has contributed to many problems through her in [own?] action. She voices [to]day an understanding of the fact that she has engaged in damaging relationships and failed to provide appropriate supervision and guidance for her children. However, her admissions are done in a relatively bland manner devoid of reasonable and appropriate affect suggesting that she maybe [sic] cognitively aware, but remains emotionally detached or unaware of the real implications of her actions on others. As a result, her superficial admission of responsibility lacks credibility and a sense of durability.

{¶ 30} * * *

{¶ 31} "**Discussion of Strengths and Weaknesses**: [The mother] is being

evaluated at the request of the Clark County Department of Job and Family Services to see if she is able to properly [and] appropriately care for her son, [her third child], who has special needs of his own. [The mother] has a history of engaging in inappropriate and unstable relationships and placing herself [in] situations that clearly overwhelm her capabilities to manage her own life and properly care for her children. This has resulted in a chaotic and unstable life for many years.

{¶ 32} "Her childhood home provided no opportunity to learn the nature of trusting, honest, and stable relationships. As a result, [the mother] appears to have developed into an individual who is unsure of herself, views herself in a negative manner, has difficulty with honest and trusting relationships, and is often overwhelmed by her own emotional needs. Further, she rationalizes her problems as being the responsibility of others painting herself as a victim. This contributes to anger, frustration, and hostility and interferes with the probability that she will benefit from supportive, counseling, and other helpful services. Her coping skills are extremely limited using isolation, withdrawal, and dishonesty as primary methods of attempting to reduce the emotional pain she experiences.

{¶ 33} "Her son, [her third child], has a history of requiring specialized services for medical, social, and emotional development and is likely to require services for much of his life. While in her care, [the mother] was unable to provide adequately for these needs creating a situation where [the third child] failed to benefit from these services that were prescribed as being necessary to promote development. During this time, [the mother] admits that her life was chaotic due, in part, to choices she made. Her mismanagement of funds, maintenance of inappropriate relationships with

boyfriends, and inviting unstable people into her life, overwhelmed her limited coping skills and interfered with her ability to adequately and appropriately meet the needs of all of her children, particularly [her third child].

{¶ 34} "[The mother] was given opportunities to pursue a course of action that would assist her in developing and improving her ability to adequately care for this child. By her own admission, she refused to participate in this plan continuing many inappropriate relationships, illegal behaviors, and failing to properly provide adequate services for her son.

{¶ 35} "At this time, the Department of Job and Family Services is requesting that the court terminate [the mother's] parental rights by taking permanent custody of [her third child]. In spite of the fact that [the mother] is an intelligent person who was beginning to make superficial acknowledgment of her weaknesses, difficulties, and contributions to her chaotic life, it is the opinion of this evaluator that her ability to be deceptive, dishonest, and superficial as a primary means of coping with life's challenges will continue to interfere with her ability to independently provide appropriate care and nurturing for [her third child]."

{¶ 36} This case came to trial upon the motion of the Board for permanent custody and the motion of K.H.'s father's aunt (hereinafter, the great aunt) for temporary custody. The Board was represented by counsel. The great aunt was present and was represented by counsel. The mother was not present, being incarcerated, but was represented by counsel. The father was present, and testified, but was not represented by counsel.

{¶ 37} Following the hearing, the trial court awarded permanent custody to the

Board. From the order awarding permanent custody to the Board, the mother appeals.

II

{¶ 38} The mother has set forth one assignment of error, with two sub-parts, as follows:

{¶ 39} "THE COURT'S GRANT OF PERMANENT CUSTODY TO CLARK COUNTY CHILDREN SERVICES CONSTITUTED AN ABUSE OF DISCRETION.

{¶ 40} "A. The Trial Court erred in determining that reunification with one parent was not foreseeable, thereby granting Permanent Custody to the Agency.

{¶ 41} "B. Even if the Court were to find that reunification with one parent was not possible within a reasonable time, Legal Custody should have been granted to child's relative."

{¶ 42} A juvenile court may award permanent custody of a dependent child to a "public children services agency or private child placing agency, if the court determines in accordance with division (E) of section 2151.414 of the Revised Code that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D)(1) of section 2151.414 of the Revised Code that the permanent commitment is in the best interest of the child." R.C. 2151.353(A)(4).

{¶ 43} In her letter to the court, admitted in evidence as Exhibit A, the mother says: "[K.H.'s] father has failed to remain in her life. I feel that placing her with him or his family is detrimental to her as well as unsafe." Consequently, the mother cannot

now be heard to complain, and does not appear to be complaining, that K.H. should have been placed with her father.

{¶ 44} The trial court found, by clear and convincing evidence, that the child cannot be placed with either parent within a reasonable period of time or should not be placed with either parent. As far as the mother is concerned, this finding is not surprising, in view of the report of Dr. Hrinko received in evidence and quoted extensively in Part I, above. In fact, the focus of the trial was not on this issue at all, but on the issue of whether the child's best interest would be better served by a permanent placement with the agency or by temporary custody by the grand aunt.

{¶ 45} The issue of whether the child could be placed with either parent within a reasonable time, or should not be placed with either parent, was virtually conceded:

{¶ 46} "MR. HENDRIX [representing the grand aunt]: * * * . I don't think the Agency has met its burden in regards to terminating the paternal [sic] rights and responsibilities. I think if there were only the parents involved in this case, they've met their burden and then some; however, there is an appropriate relative here with an approved home study. * * *.

{¶ 47} * * *

{¶ 48} "MR. WARD [representing the Board]: Your Honor, I believe that the – as Mr. Hendrix indicated, the case against the parents is overwhelming and as such as to be a non-issue at this point. * * * .

{¶ 49} * * *

{¶ 50} "MR. SOMMER [representing the mother]: I think it would be appropriate to dismiss the motion for permanent custody for the reasons that Mr. Hendrix has set

forth."

{¶ 51} We conclude that the evidence in this record is sufficient to support the trial court's finding, by clear and convincing evidence, that K.H. should not be placed with either parent. This alone would satisfy the preliminary requirement of R.C. 2151.353(A)(4), before reaching the best-interest test. We further conclude that the evidence is sufficient to support the trial court's finding that K.H. cannot be placed with either parent within a reasonable time. Dr. Hrinko's observations concerning the mother, expressed in his report, concerning which he testified at trial, support both a finding that the child cannot be placed with the mother within a reasonable time, and that the child should not be placed with the mother.

{¶ 52} The remaining factual issue that the trial court was required to determine was whether an award of permanent custody to the Board was in the child's best interest. In this connection, the mother relies upon R.C. 2151.414(D)(2), which provides that permanent custody is in a dependent child's best interest if *all* of four enumerated facts apply.

{¶ 53} The mother argues that the logical converse of R.C. 2151.414(D)(2) also applies. She argues that if it is the case that not all of the enumerated facts in division (D)(2) exist, i.e., if at least one of those enumerated facts does not exist, then the statute establishes that an award of permanent custody to the public agency is not in the child's best interest. If this were a valid construction of the statute, a juvenile court would never have to conduct a weighing of a child's best interest under division (D)(1), applying the factors set forth therein, as well as other "relevant" factors; the court need only determine whether all of the facts set forth in division (D)(2) exist. If so, the

permanent placement is in the child's best interest; if not, then the permanent placement is not in the child's best interest.

{¶ 54} We do not give the statute the construction urged by the mother. As we understand division (D)(2), if all of the facts enumerated therein apply, then an award of permanent custody is in the child's best interest, and the trial court need not perform the weighing specified in division (D)(1). But if it is not the case that all of the facts enumerated in division (D)(2) exist; that is, if any one of the facts enumerated in division (D)(2) does not exist, then the trial court must proceed to the weighing of factors set forth in division (D)(1) to determine the child's best interest.

{¶ 55} If the mother's construction of division (D)(2) were correct, then any relative or any "interested party" would have an effective veto over an award of permanent custody to a public agency. The last of the four facts enumerated in division (D)(2) is that: "Prior to the dispositional hearing, no relative or other interested party has filed, or has been identified in, a motion for legal custody of the child." Under the mother's construction, all that a relative or "interested party" would have to do, to stop a motion by a public agency for permanent custody dead in its tracks, would be to file a motion for legal custody of the child. Once a motion for legal custody by a relative or interested party has been filed, it can never be the case that: "Prior to the dispositional hearing, no relative or other interested party has filed, or has been identified in, a motion for legal custody of the child." Therefore, under the mother's construction, by operation of division (D)(2), it would not be in the best interest of the child for the public agency's motion to be granted, no matter how clearly unsuitable the "relative or other interested party" might be as a custodian. We do not understand this

to have been the intent of the General Assembly in enacting R.C. 2151.414(D)(2).

{¶ 56} As we construe it, division (D)(2) provides that if: (1) the trial court has determined, by clear and convincing evidence, that the child cannot be placed with either parent within a reasonable time, or should not be placed with either parent; *and* (2) the child has been in the agency's custody for two years or longer and no longer qualifies for temporary custody; *and* (3) the child does not meet the requirements for a planned permanent living arrangement; *and* (4) no one has come forward to seek legal custody of the child, then, in that case, where there is no practical alternative to a permanent placement by the agency, the General Assembly has made a legislative determination that it is not in the best interest of the child to remain in legal limbo – the agency should be allowed to move forward with a permanent placement for that child. But if any one of those four conditions is not satisfied – e.g., someone has come forward, like the grand aunt in this case, to seek legal custody of the child – then the trial court should perform the weighing of factors set forth in division (D)(1) and make a judicial determination of the child's best interest.

{¶ 57} The trial court, weighing the factors set forth in R.C. 2151.414(D)(1), found that permanent placement with the Board was in the child's best interest. It is clear that the trial court considered the alternative of awarding temporary custody to the grand aunt – that was the principal focus of the hearing.

{¶ 58} That the grand aunt was a relative of the child was one factor for the trial court to consider. That the grand aunt was 66 years of age at the time of the hearing was another. There was evidence that the grand aunt had had successful, positive visitations with the child. There was also evidence that the child had bonded to the

foster mother, who had had the child's custody since the child left the hospital after birth, and that the child had a good relationship with the foster father, who was on deployment in Iraq at the time of the hearing, but who visited the child weekly by webcam. There was evidence that the child was thriving under the care of the foster parents, who desired to adopt her.

{¶ 59} Dr. Hrinko, who evaluated the child, testified concerning the importance of a good bond with a primary caregiver for a child of K.H.'s age:

{¶ 60} "Research in a variety of fields clearly shows that the establishment of a trusting and comfortable relationship with a primary caregiver or psychological parent is a foundation stone for many future behaviors in terms of a person's ability to form and maintain their own relationships, their ability to understand the stability and consistency of the world around them, the ability to trust and deal with those around them, such as teachers, employers, spouses, policemen, et cetera. And that disruptions in this psychological parent relationship, particularly between the ages of one and four, are often associated with many social ills and personal problems throughout life.

{¶ 61} "Q. Such as?

{¶ 62} "A. People who have disrupted primary relationships and instability during this age are significantly more likely to get involved in criminal behaviors as adults. They have significantly higher rates of divorce due to instability in relationships. As adolescents and latency-age children, they tend to have much higher rates of conduct problems, oppositional behaviors and other similar things.

{¶ 63} "Q. So you're not saying that disruption guarantees this, but statistically,

it increases the likelihood of these things occurring?

{¶ 64} "A. That is correct. It's not a foregone conclusion, but the probability of these problems increases significantly when these types of relationships are disruptive."

{¶ 65} Dr. Hrinko's observations concerning the importance of stability of attachment to a primary caregiver are also factors that the trial court could appropriately consider in determining the best interest of the child.

{¶ 66} As the mother recognizes in her brief, the weighing necessarily involved in making the determination of a child's best interest necessarily clothes the trial court with substantial discretion in making that determination, and the proper standard for review of that decision is abuse of discretion. We have reviewed the entire transcript of the testimony in this case, including the testimony of the grand aunt. She makes a good impression. We are convinced that she would lovingly care for this child "as long as she has breath," as she, herself put it.

{¶ 67} But the foster mother also testified. She also made a good impression.

{¶ 68} Perhaps we would have given the edge to the grand aunt, as a close relative of the child, notwithstanding Dr. Hrinko's testimony concerning the advantages of stability. But we cannot say that the trial court abused its discretion in finding that an award of permanent custody to the Board was in this child's best interest.

{¶ 69} The mother's assignment of error, including both sub-parts, is overruled.

III

{¶ 70} The mother's assignment of error having been overruled, the order of the

trial court awarding permanent custody to the Board is Affirmed.

. . . . . .

BROGAN and FROELICH, JJ., concur.