

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

In The Matter Of:

	:		:
	:	Appellate Case No. 23657	
		Z. W.	:
	:	Trial Court Case No. JC 0611716	
	:		
	:	(Civil Appeal from	
	:	Common Pleas Court, Juvenile)	
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OPINION

Rendered on the 9<sup>th</sup> day of April, 2010.

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FAIN, J.

{¶ 1} Appellant Kahshan W. appeals from a judgment granting permanent custody of her minor child, Z.W., to the Montgomery County Children's Services Agency.<sup>1</sup> Kahshan

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<sup>1</sup>For purposes of convenience, we will refer to the parties as Kahshan and MCCS.

contends that the judgment is not supported by clear and convincing evidence. We conclude that the record contains clear and convincing evidence that an award of permanent custody to MCCA is in the best interests of Z.W. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In November 2006, MCCA filed an abuse and dependency complaint regarding Kahshan's daughter, Z.W., who had tested positive for cocaine at birth. The complaint alleged that Kahshan had a long history of substance abuse issues, which MCCA had tried to address since 2003. MCCA also alleged that no relatives were available at the time to care for the child. MCCA was awarded interim temporary custody on an ex parte basis when Z.W. was three days old, and the order was subsequently confirmed at a shelter care hearing in mid-November 2006. MCCA placed Z.W. with a foster-care family, which cared for Z.W. from the time that she was three days old, up to and including the time of the permanent custody hearing in February 2009.

{¶ 3} In December 2006, Z.W.'s guardian ad litem (GAL) filed a report, recommending that MCCA be given temporary custody. At the time, Kahshan was living with her mother, Carolyn W., in a one-bedroom apartment, and was working on her case plan. The trial court held a dispositional hearing in February 2007, and again awarded temporary custody to MCCA. The court noted that Kahshan had not completed her case-plan objectives, and no relatives or non-relatives were able, willing, or suitable to care for the child. Both Kahshan and the maternal grandmother, Carolyn W., attended this hearing.

{¶ 4} A series of review hearings and hearings on extensions of temporary custody

were held during the next two years, culminating in a February 2009 hearing on MCCA's request for permanent custody. At the time of the February 2009 hearing, Z.W. was two years and three months old, and had resided with the same foster family since birth. Z.W. had bonded with the foster family, which wanted to adopt.

{¶ 5} It is undisputed that Kahshan failed to make progress on her case-plan objectives during the pendency of the case. Despite receiving appropriate referrals from MCCA, Kahshan failed to follow substance-abuse recommendations, failed to locate and maintain stable housing, and failed to register for parenting classes. She also did not consistently visit her child.

{¶ 6} The maternal grandmother, Carolyn, regularly visited with Z.W. from the beginning of the case. According to the caseworker, Carolyn first expressed some interest in obtaining custody in December 2007. MCCA completed a criminal background check, which did not disclose any problems. However, MCCA did not permit the caseworker to perform a home study, because Carolyn lived in a one-bedroom apartment that was not adequate. MCCA informed Carolyn of the need to obtain a larger apartment, and offered standard services for assisting in that situation, which included payment of either the first month's deposit on a larger apartment, or the first month's rent. MCCA was also able to help secure a bed and possibly some dressers. Carolyn did not take advantage of these services, because she was not certain if she could afford to continue paying for a larger apartment.

{¶ 7} In April 2008, the GAL recommended that MCCA seek permanent custody, due to Kahshan's lack of progress and lack of visitation, and the lack of a bond between Kahshan and Z.W. Kahshan and Carolyn subsequently appeared at a hearing in July 2008.

The GAL filed a report in October 2008, noting that he had discussed issues with Kahshan and Carolyn after the July 2008 hearing, and had asked for a home visit with each of them. Neither Kahshan nor Carolyn had replied to follow-up correspondence requesting a home visit. The GAL again recommended that MCCA file for permanent custody.

{¶ 8} MCCA filed for permanent custody in late October 2008, nearly two years after it had originally assumed temporary custody of Z.W. MCCA indicated in an affidavit that Kahshan visited the child on Sundays at Carolyn's home, but had made no effort to address her substance-abuse issues, and had not contacted the agency. The affidavit also indicated that Carolyn had indicated an interest in custody, but had insufficient space in her apartment. Finally, the affidavit stated that the foster parents had indicated a desire to adopt and a willingness to continue contact with the biological family.

{¶ 9} The Fourth Supplemental Report of the GAL, filed in November 2008, indicated that the GAL had met with Carolyn that month, and Carolyn stated that she could not afford a larger apartment. Because Carolyn's apartment had only one bedroom, Z.W. would have to sleep in the same bedroom as Carolyn. At the time, Carolyn's eight-year old grandson, Zion, visited every other weekend, and slept with Carolyn. The GAL also visited with Z.W. and her foster family, and concluded that Z.W. was clearly bonded to the foster family and needed permanency.

{¶ 10} In February 2009, the magistrate held a hearing on permanent custody. An MCCA caseworker testified that Carolyn was still living in a one-bedroom apartment and had not taken advantage of the offered services. The caseworker had been in Carolyn's apartment and concluded that the apartment was not large enough to meet the agency's or the state standards. During the two years the case had been pending, the caseworker had

continued to encourage Carolyn to seek appropriate housing, but that did not happen. Carolyn did regularly visit with Z.W.

{¶ 11} Carolyn testified at the hearing. She stated that she had told M CCS from the beginning that she would like to obtain custody if Kahshan did not do what she was supposed to do. Carolyn contended that M CCS had not provided referrals to assist with housing or daycare. Nonetheless, Carolyn did not take any action on her own. At the time of the hearing, Carolyn was working full-time, and expressed reservations about whether she would be able to find day-care for Z.W. that would be geographically appropriate and fit with her work hours. Carolyn also expressed concern about whether she could afford a larger apartment. Carolyn had not filed a pro se motion for custody, as recommended by the GAL, because she did not have enough money for the filing fee, nor could she take the time off from work to file the papers. Carolyn testified that she intended to retire from her job in nine or ten months if she received custody. Carolyn was 65 at the time of the hearing, and did not offer any concrete evidence at the hearing about how she might financially take care of herself and Z.W. if she retired, beyond expressing a hope that she might be able to earn more income after she retired.

{¶ 12} After hearing the testimony, the magistrate filed a decision concluding that an award of permanent custody to M CCS would be in Z.W.'s best interests. The magistrate noted that Z.W.'s parents had substantially failed to remedy the problems that initially led to Z.W.'s placement outside the home.<sup>2</sup> The magistrate further concluded that Kahshan's chemical dependency was so severe that Kahshan could not provide an adequate

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<sup>2</sup>A possible father of Z.W. was identified, but M CCS was never able to locate him, and he never participated in the case plan.

permanent home for Z.W. at the current time or within one year after the time the permanent custody hearing was held. In addition, the magistrate noted that even though Carolyn had said she wanted custody, she had not filed a motion for custody, and had not obtained a home large enough for the child. The magistrate further observed that Carolyn was financially strapped before adding a child to her household, was 65 years old, and had not considered who might be able to care for the child in the event that Carolyn encountered medical issues. Finally, the magistrate concluded that Z.W. needed a legally secure permanent placement, which could only be achieved by awarding permanent custody to MCCS.

{¶ 13} Kahshan objected to the magistrate's decision in March 2009. After the transcript of the custody hearing was filed, Kahshan filed supplemental objections in August 2009. The objections did not raise issues as to Kahshan's failure to comply with the case plan; they were based on the decision not to allow Carolyn to assume custody. Kahshan also filed additional supplemental objections, claiming that Carolyn had moved into a two-bedroom apartment. However, no evidence was submitted to support this assertion.

{¶ 14} In late August 2009, the trial judge filed a decision overruling Kahshan's objections and adopting the decision of the magistrate. The judge discussed the factors in R.C. 2151.414(D), and concluded that permanent placement with MCCS would be in Z.W.'s best interests. The judge also stressed that MCCS had, in fact, considered Carolyn as a potential guardian, even though placement with relatives is not a prerequisite to granting an agency permanent custody. The judge expressed concern about Carolyn's apartment size, finances, and physical ability to raise a two-year old child.

{¶ 15} The judge additionally questioned Carolyn's vigor in assuming legal custody,

given Carolyn's failure to upgrade her residence despite two years of agency recommendations and financial incentives, and Carolyn's failure to file for legal custody, despite the GAL's recommendation that she do so. Finally, the judge noted an interest in creating stability in the child's life. The foster family had properly cared for Z.W. since she was three days old, and Z.W. was thriving. The judge, therefore, concluded that permanent custody would be in Z.W.'s best interests.

{¶ 16} Kahshan now appeals from the judgment granting permanent custody of Z.W. to MCCS.

## II

{¶ 17} Kahshan's sole assignment of error is as follows:

{¶ 18} "THE TRIAL COURT ERRED IN GRANTING CHILDREN'S SERVICES' MOTION FOR PERMANENT CUSTODY."

{¶ 19} Under this assignment of error, Kahshan contends that the trial court's decision is not supported by clear and convincing evidence, because a legally secure placement could have been achieved by granting custody to the maternal grandmother, Carolyn W. Kahshan contends that MCCS did not properly inform Carolyn of available government assistance. Kahshan further argues that the trial court improperly focused on the size of Carolyn's home.

{¶ 20} It is undisputed that Z.W. had been in the temporary custody of MCCS for twelve or more months of a consecutive 22 month period. Under these circumstances, R.C. 2151.414(B)(1) permits the court to grant permanent custody to the agency, if the court determines at a hearing held pursuant to R.C. 2151.414(A), "by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to

the agency that filed the motion for permanent custody \* \* \*.” “Where children have been in agency custody for the required time, the agency does not have to establish that the child cannot be placed with a parent within a reasonable time or should not be placed with a parent. The only consideration is the child's best interests.” *In re A.U.*, Montgomery App. Nos. 20583, 20585, 2004-Ohio-6219, at ¶ 26.

{¶ 21} R.C. 2151.414(D)(1) lists relevant factors that courts must consider in determining the best interest of a child. These factors include, but are not limited to, the following items:

{¶ 22} “(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;

{¶ 23} “(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;

{¶ 24} “(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 \* \* \* ;

{¶ 25} “(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;

{¶ 26} “(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.”

{¶ 27} The trial court specifically considered and addressed the factors in R.C. 2151.414(D)(1)(a) through (d).<sup>3</sup> In reviewing such decisions, an appellate court “ ‘will not

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<sup>3</sup>The court did not discuss the factors in R.C. 2151.414(E)(7) - (11). They have



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.' \* \* \* " '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.' " *Miller v. Greene Cty. Children's Serv. Bd.*, 162 Ohio App.3d 416, 2005-Ohio-4035, at ¶ 31 (citation omitted).

{¶ 28} After reviewing the record, we conclude that the trial court's determination is supported by sufficient evidence to meet the clear and convincing standard of proof. In accordance with R.C. 2151.414(D)(1)(a), the trial court considered the interaction of Z.W. with both the foster family and grandmother. Although the court recognized Carolyn's desire to maintain a relationship with Z.W., the court expressed legitimate concern about certain matters, including Carolyn's lack of vigor in pursuing custody. The court's concerns are well-supported by the record.

{¶ 29} We have previously stressed that " 'courts do not have to first consider placing children with relatives before they may award permanent custody to a children services agency.' \* \* \* Instead, the trial court must determine what placement would be in the best interests of the child." *In re A.U.*, 2004-Ohio-6219, at ¶ 36, quoting from *In re Amanda Williams* (Sept. 15, 2000), Montgomery App. No. 18217. Accordingly, the trial court did not have to first consider placing the child with Carolyn, nor did the court have to give Carolyn priority. The court was free to consider what would be in Z.W.'s best interest.

{¶ 30} Regarding R.C. 2151.414(D)(1)(b), the GAL noted that Z.W. had been in the custody of her foster family since three days after birth, that Z.W. was on target

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likewise not been addressed by the State or by Kahshan, and do not appear to apply.

developmentally, was extremely communicative for her young age, and had bonded with the foster family. The trial court did not err in relying on this evidence, particularly since a two-year old child would be unable to directly express custodial wishes.

{¶ 31} R.C. 2151.414(D)(1)(c) requires consideration of whether a child has been in agency custody for 12 or more of the last 22 months. This was easily satisfied. Z.W. had continuously been in agency custody for almost two years when the agency filed for permanent custody in late October 2008. The evidence in the record supports the trial court's finding, under R.C. 2151.414(D)(1)(d), by clear and convincing proof, that Z.W. needs a legally secure permanent placement that cannot be provided absent a grant of permanent custody.

{¶ 32} Carolyn testified that she wanted custody from the beginning and had voiced that desire. Despite this fact, Carolyn failed for more than two years to take any steps to place herself in a position where her desire could become a reality. This was not the agency's fault.

{¶ 33} In her brief, Kahshan takes umbrage at the significance the trial court placed on the size of Carolyn's apartment, noting that a young child and the child's custodian sharing a one-bedroom apartment "happens throughout America all the time." In determining Z.W.'s best interests, the trial court was free to consider the respective advantages and disadvantages of the alternative proposed living arrangements, including size.

{¶ 34} We conclude that the trial court did not err in finding that an award of permanent custody to MCCS would be in Z.W.'s best interests. Kahshan's sole assignment of error is overruled.

III

{¶ 35} Kahshan's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Nick Kuntz