[Cite as *In re A.S.*, 2010-Ohio-4147.]

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

IN RE:	:	
	:	Appellate Case Nos. 23804
A.S.	:	23812
	:	
	:	Trial Court Case No. JC-2007-9805
	:	
	:	(Civil Appeal from Common Pleas
	:	Court, Juvenile Division)
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O P I N I O N

Rendered on the 3rd day of September, 2010.

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FAIN, J.

{¶ 1} Biological father, A., and paternal grandmother, N.S., appeal from an order of the Montgomery County Court of Common Pleas, Juvenile Division,

awarding custody of A.S., a minor child, to the Montgomery County Department of Job and Family Services, Children Services Division (MCCS). The grandmother[1] and the father both contend that the trial court abused its discretion by awarding custody of the child to MCCS rather than to the grandmother. The grandmother further contends that the magistrate erred with regard to visitation.

{¶ 2} From our review of the record, we conclude that the trial court's decision regarding custody is supported by clear and convincing evidence that the award of custody to MCCS is in the child's best interest. We further conclude that any argument regarding visitation is moot.

{¶ 3} The judgment of the trial court is Affirmed.

I

{¶ 4} A.S. was born on September 13, 2007 at The Ohio State University Medical Center. The child's mother, M.C., was incarcerated at the time. Because she was born prematurely, the child remained in the hospital while her mother returned to prison. The child's father was also in jail awaiting trial on numerous felony charges at the time of the birth. At the time of the birth, the mother was not certain who was the father of the child; but as noted below, paternity testing confirmed that A. was indeed the biological father. Prior to giving birth, the mother contacted the paternal grandmother, and informed her that she was "going to be a grandmother."

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[1]All references herein to the "grandmother" are to the paternal grandmother. A.S.'s maternal grandmother is not involved in this appeal.

{¶ 5} Two weeks after A.S. was born, MCCS filed a complaint alleging neglect and dependency. An order of temporary custody was issued, and on October 1, eighteen days after A.S.'s birth, she was released from the hospital to foster parents D.W. and M.W. The Ws had been contacted by the birth mother, due to the fact that they had adopted four of M.C.'s children from a previous relationship. The mother indicated that she wanted the Ws to adopt the child.

{¶ 6} The mother also provided the grandmother with contact information on the Ws. The grandmother contacted D.W. (The foster mother) to establish visitation with the child. D.W. met with the grandmother on five separate occasions to facilitate visitation with the child; MCCS was not involved with these visits. The record is not clear regarding the dates of these visits, but it appears that they took place from December 2007 through the first few months of 2008.

{¶ 7} In November, 2007, a Guardian Ad Litem appointed to represent the child issued a report indicating that the mother had sent the GAL a letter requesting that the child be adopted by the Ws. The report of the GAL also noted that a call had been received from the child's paternal grandmother, who "indicated that she feels that she is too old to raise [A.S.] and that [A.S.] should be with her siblings in her current placement [with the foster parents]." The report went on to state, "the paternal grandmother did indicate that she would like to visit with [A.S.]."

{¶ 8} In November, 2007, the trial court issued an order requiring paternity testing. In February, 2008, a report was submitted to the court, the results of which indicated a 99.99999% probability that A. is the biological father. It is not clear from

the record when the trial court established paternity; however, all parties acknowledge that A. was determined to be the father of the child some time in mid-2008.

{¶ 9} In April, 2008, MCCS began a home study of the grandmother's residence. That same month, the grandmother appeared for fingerprinting. According to the case worker, the fingerprints were returned in June or July of that year, and indicated that the grandmother did not have any criminal history. The home study and the fingerprint report were filed in the agency's records. The home study had been delayed as a result of MCCS having filed a motion seeking permanent custody of A.S. in May, 2008. According to the case worker, the home study was no longer viewed as necessary by MCCS since it had filed for permanent custody and due to its belief that the grandmother was seeking visitation only, not custody of the child.

{¶ 10} In July, 2008, the grandmother filed a motion to intervene and seeking grandparent visitation rights. She also sought overnight visits with the child, but MCCS denied the request on the basis that a home study of the grandmother's residence had not been completed. Thereafter, on August 20, 2008, the grandmother filed a motion amending her request for visitation rights to one seeking permanent custody of the child. The Ws also filed a motion to intervene and for custody of the child.

{¶ 11} In October 2008, the magistrate ordered MCCS to facilitate visitation between the grandmother and the child. The grandmother was permitted twice weekly visits with the child at MCCS facilities. In November, the magistrate issued

an order requiring MCCS to conduct a home study on the grandmother. MCCS initiated the home study, but could not locate the fingerprint results previously filed. The caseworker requested a copy of the fingerprint results from the F.B.I., but never received a copy thereof.

{¶ 12} That same month, the father was tried and convicted as charged. He was subsequently sentenced to a twenty-five year prison term.

{¶ 13} In December 2008, the grandmother called the caseworker's supervisor because the child was not produced for visitation at the end of that month. The agency again failed to produce the child for a January visit. Indeed, of approximately twenty-three scheduled visits, only twelve to fourteen visits took place. It appears that the loss of visitation was not the fault of the grandmother.

{¶ 14} In early January 2009, the caseworker's supervisor asked for the results of the home study, despite the lack of the fingerprint report. The supervisor indicated that she then "declined" or "refused" the home study due to: (1) the lack of a fingerprint report; (2) concerns about the grandmother's commitment to the child; and (3) concerns about whether the grandmother was capable of caring for the child. Nevertheless, the supervisor forwarded the home study to her manager, "because we were so close to a court date." The home study was ultimately logged in as "disapproved."

{¶ 15} The magistrate held a two-day hearing on the issue of permanent custody, beginning January 26, 2009. The magistrate issued a decision denying the grandmother's petition for custody and awarding permanent custody to MCCS. The magistrate also determined that the grandmother would be permitted to continue

visitation with the child pending the trial court's review of the objections to the permanent custody decision. The magistrate ordered the GAL to speak with John Kinsel, who was to assess the relationship between the child and the grandmother and then determine the frequency of visitation.

{¶ 16} The grandmother and the father filed objections to the magistrate's permanent custody decision. While the objections were pending, the grandmother also filed a motion for an increase in the interim visitation. The magistrate held a hearing on the visitation issue in late October 2009, during which the grandmother attempted to introduce a mental health assessment performed by John Kinsel in May 2009. The magistrate refused to consider the report, but permitted the grandmother to proffer it in the record, for purposes of appellate review.

{¶ 17} Thereafter, the trial court overruled objections and adopted the decision of the magistrate. The trial court declined to review the Kinsel report. The grandmother and the father filed separate appeals, which have been consolidated for review.

II

{¶ 18} The grandmother's First Assignment of Error states as follows:

{¶ 19} "THE TRIAL COURT ERRED IN UPHOLDING THE MAGISTRATE'S DECISION GRANTING PERMANENT CUSTODY TO THE AGENCY."

{¶ 20} The grandmother contends that the record does not support the trial court's adoption of the magistrate's decision. She argues that the evidence does not support a finding that an award of custody to MCCS is in the best interest of the

child. She also contends that the agency did not make reasonable efforts to place the child with her, because the agency had determined "from the beginning" that the child should be adopted by the Ws.

{¶ 21} In a proceeding for the termination of parental rights, all of the court's findings must be supported by clear and convincing evidence. R.C. 2151.414(E); *In re J.R.,* Montgomery App. No. 21749, 2007-Ohio-186, at ¶ 9. An order terminating parental rights will not be overturned as being against the manifest weight of the evidence if the record contains competent, credible evidence upon which the trial court could have formed a firm belief that the statutory elements for a termination of parental rights have been established. *In re Forrest S.* (1995), 102 Ohio App.3d 338, 344-345. The credibility of the witnesses, and the weight to be given to their testimony, are primarily matters for the trial court, as the finder of fact, to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. R.C. 2151.414(B)(1) provides that the court may grant an agency's motion for permanent custody of a child if it finds, by clear and convincing evidence, that it is in the best interest of the child to award permanent custody of the child to the agency, and the court makes one of the four alternative findings set out in R.C. 2151.414(B)(1). One of those alternative findings is that 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." R.C. 2151.414(B)(1)(a). Another alternative finding is that 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 ***." R.C. 2151.414(B)(1)(d).

{¶ 22} The magistrate found, by clear and convincing evidence, that the child could not be placed with either parent. This is supported by the record, which shows that the father is currently serving a twenty-five year prison sentence and that the mother clearly evinced her intent to give the child up for adoption. Furthermore, the record shows that the mother refused to take any steps to complete her case plan. No one disputes this finding.

{¶ 23} The magistrate also found, by clear and convincing evidence, that the child had been in the custody of MCCS for more than twelve of twenty-two consecutive months. This is evident from the record, which shows that the child resided with the foster family from the time she was released from the hospital until the final hearing; a period of fourteen months.

{¶ 24} Given these findings, the remaining factual determination that the trial court was required to make was whether an award of permanent custody to MCCS was in the child's best interest. 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:

{¶ 25} "(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;

{¶ 26} "(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;

{¶ 27} "(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 * * *;

{¶ 28} "(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;

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

{¶ 30} With regard to the first factor, the record demonstrates that the child has no relationship with her mother and father. The evidence further shows that the child does have a relationship with the grandmother, but that at the time of the final hearing that relationship was secondary to that of the child and her foster family, with whom she was well-bonded. The record shows that the child had resided, for her entire life, in the foster home with her four half-siblings, to whom she is emotionally bonded. The evidence also showed a strong attachment to the foster parents.

{¶ 31} The grandmother contends that had MCCS made appropriate efforts, the child would have been more than adequately bonded with her.[2] The grandmother also complains that the magistrate and trial court did not review the report of John Kinsel, a clinical counselor who performs mental health assessments for young children. Kinsel evaluated the child along with the grandmother and D.W. in early 2009. Kinsel then issued a report that was not considered by the magistrate

[2] The efforts of the agency with regard to developing the child's relationship with the grandmother will be discussed later.

or by the trial court, because it was completed after the final hearing date. The trial court did not abuse its discretion by failing to consider evidence that was not offered until after the evidentiary hearing before the magistrate was concluded, and the permanent custody issue was submitted to the court for decision. Even if the trial court had considered that report, we conclude that the outcome would not have changed. At best, that report indicates that the grandmother is a loving grandparent, and that she and the child have been able to develop a positive relationship with one another. The report further stated that the child would benefit by continuing to have a relationship with her. But the report also acknowledges that the child showed a "primary attachment relationship [to D.W.] consistent with their 'life long' time together." The report further found that the child was able to develop a relationship with the grandmother precisely because she "first developed such an attachment to Ms. W. [since] the optimal time to develop a healthy attachment to a primary caregiver is during the first year of life." Finally, the report stated that "Ms. [W.] is clearly [the child's] primary attachment figure. [The grandmother] is rapidly becoming an important secondary attachment figure. Optimal social/emotional development in young children is based on continuity. From a developmental perspective, it is in [the child's] best interest to allow both of these relationships to continue and flourish."

{¶ 32} Next, the magistrate addressed the second factor – the wishes of the child – and found that the child was too young to express her wishes. We do note, along with the trial court, that the Guardian Ad Litem issued a report in which he recommended that MCCS be awarded custody.

{¶ 33} The third factor – the custodial history of the child – was examined.

The record shows that the child has lived with the foster family, including her four half-siblings, for her entire life.

{¶ 34} Finally, the magistrate and the trial court found that the child's need for a legally secure placement could only be achieved by an award of custody to MCCS. In support, the Magistrate further found that although the grandmother is "able and willing to provide an adequate home for the child[,] the Court does not find it to be in the child's best interest to be torn from the home and family she has come to know as her home and family. The child has become accustomed to having her biological siblings as well as the other children in the home. To be removed from the foster parents and the siblings and other children to live with the paternal grandmother with no other young children in the home would unquestionably be traumatic for the child. The child has a limited bond with the paternal grandmother. The paternal grandmother has expressed that she has been uncertain as to whether she can provide long-term care for the child. If the paternal grandmother could not provide long-term care for the child, the child would again be displaced to another home."

{¶ 35} We conclude that the magistrate and trial court did not abuse their discretion with regard to the above findings. Until she filed for custody in August 2008, the grandmother expressed reservations about her ability to care for the child due to her age. Before then, she never indicated that she wanted custody; she only said she wanted visitation with the child.

{¶ 36} We next address the question of whether the agency hindered the grandmother in developing a relationship with the child. The grandmother contends that she was not able to fully bond with the child because the agency did not

promptly conduct a home study, thereby preventing her from having overnight visitation with the child. The record shows that the agency had started a home-study with regard to the grandmother when she was identified by the father as a relative with whom the child could be placed, but the agency halted the process when the grandmother asserted that she could not provide long-term care for the child. It appears that the agency re-initiated the home study once the caseworker became aware that the grandmother intended to pursue custody. Although the home study was not completed until shortly before the final hearing, the grandmother was able to visit with the child on a regular basis. Some visits were hindered due to the child having pinkeye, or due to weather and lack of transportation. The lack of overnight visitation is not dispositive here, since record shows that when offered longer visitations as a make-up for the missed visits, the grandmother appeared hesitant about her ability to keep the child for a period of even seven hours. In short, we find nothing in the record to indicate that the agency intentionally failed to conduct a home-study in a timely manner or that it purposefully hampered visitation.

{¶ 37} "Courts are not required to favor a relative if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody." *In re A.A.,* Greene App. No.2008 CA 53, 2009-Ohio-2172, ¶ 19. "Relatives seeking the placement of the child are not afforded the same presumptive rights that a biological parent receives as a matter of law, and the willingness of a relative to care for the child does not alter the statutory factors to be considered in granting permanent custody." Id.

{¶ 38} The fact that the grandmother is a relative of the child was one factor for

the court to consider. The fact that the grandmother was sixty-six years old at the time of the hearing was another. Also significant is the fact that the grandmother initially told the GAL and the agency that she felt she was too old to assume custody and that she did not believe that she could care for the child. When coupled with the attachment the child has to her half-siblings and foster parents, we conclude that the trial court was within its discretion in finding that awarding permanent custody of the child to the agency was in the child's best interest.

{¶ 39} We conclude that the trial court did not abuse its discretion by awarding permanent custody of the child to MCCS. Accordingly, the grandmother's First Assignment of Error is overruled.

III

{¶ 40} The grandmother's Second Assignment of Error provides as follows:

{¶ 41} "THE TRIAL COURT ERRED IN UPHOLDING THE MAGISTRATE'S DECISION UNILATERALLY DECREASING VISITATION WITHOUT PERMITTING A FAIR HEARING."

{¶ 42} The grandmother contends that the magistrate erred by deciding, following the October 2009 hearing, that the visitation between the grandmother and the child should be decreased. The visitation the magistrate and the trial court ordered was intended to be visitation pending the ultimate disposition of the agency's petition for permanent custody. Given our disposition of the First Assignment of Error, we conclude that this issue has been rendered moot.

{¶ 43} The grandmother's Second Assignment of Error is overruled.

IV

{¶ 44} The father asserts the following as his sole assignment of error:

{¶ 45} "THE TRIAL COURT ABUSED ITS DISCRETION IN UPHOLDING THE MAGISTRATE'S DECISION GRANTING PERMANENT CUSTODY TO MCCS."

{¶ 46} The father contends that the trial court abused its discretion by awarding custody to MCCS rather than to his mother. We have reviewed his argument in support, and conclude that this is without merit for the same reasons set forth in our disposition of the grandmother's First Assignment of Error, set forth in Part II, above.

{¶ 47} The father's sole assignment of error is overruled.

V

{¶ 48} All of the assignments of error asserted by both appellants having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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