

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN RE: :
E.M.D.R.E. : CASE NO. CA2010-08-207
: OPINION
: 2/14/2011
:
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2007-0074

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi,
Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for Butler
County Department of Job & Family Services

Billy Guinigundo, 5331 South Gilmore Road, Fairfield, Ohio 45014, for appellant, L.E.

Paul Becker, 1733 South Breiel Blvd., Middletown, Ohio 45044, guardian ad litem for
L.E.

C.G., 220 South 9th Street, Hamilton, Ohio 45011, pro se

Leslie Kennedy, 10 Journal Square, 3rd Floor, Hamilton, Ohio 45011, guardian ad litem
for E.M.D.R.E.

RINGLAND, J.

{¶1} Appellant, the biological mother of E.M.D.R.E., appeals a decision of the
Butler County Juvenile Court granting permanent custody of the child to the Butler
County Department of Job and Family Services.

{¶2} E.M.D.R.E. was removed from her home in February 2007 and was adjudicated a dependent child. On February 1, 2008, BCDJFS moved for permanent custody of the child. After a hearing on the motion, a magistrate granted permanent custody of the child to the agency and the trial court overruled objections to the magistrate's decision.

{¶3} On appeal, we found no error in the trial court's determination that permanent custody was in the best interest of the child or in the court's determination that the child could not be placed with either parent within a reasonable time or should not be placed with either parent. *In re E.M.D.R.E.*, Butler App. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925, ¶51. However, we found that the court applied an incorrect statutory provision to those findings and determined that it was required to grant permanent custody. *Id.* We remanded the case to the trial court to determine if, having made the findings above, permanent custody was appropriate under the correct statutory provision.

{¶4} A hearing was held before a magistrate on April 28, 2010. Appellant argued that the court should consider additional evidence and testimony from the time period of the previous decision until the hearing date in making its decision. The magistrate reviewed the findings and facts and conclusions from its previous decision and reviewed them in light of the correct statutory standard and issued a decision on May 6, 2010, granting permanent custody of E.M.D.R.E. to the agency. Appellant filed objections to the decision which were overruled by the trial court on July 16, 2010.

{¶5} Appellant now appeals the trial court's decision, raising the following assignment of error for our review:

{¶16} "THE TRIAL COURT ERRED WHEN IT FOUND CLEAR AND CONVINCING EVIDENCE THAT A GRANT OF PERMANENT CUSTODY WAS IN THE CHILD'S BEST INTEREST."

{¶17} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520.

{¶18} Pursuant to R.C. 2151.414(B)(1), a court may terminate parental rights and award permanent custody to a children services agency if it makes findings pursuant to a two-part test. First, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D). Second, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re E.B.*, Warren App. Nos. CA2009-10-139; CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶9} In this case the trial court found that permanent custody was in the child's best interest and that she could not be placed with either parent within a reasonable time or should not be placed with her parents. Appellant argues that there is a lack of evidence that granting permanent custody to the agency was in the child's best interest because the court did not allow the introduction of new or updated information on remand. Appellant argues that because additional evidence was not allowed, the record is incomplete and does not meet the clear and convincing standard required in permanent custody cases.

{¶10} However, in the previous appeal of this case, we reviewed the trial court's finding that permanent custody was in E.M.D.R.E.'s best interest. *In re E.M.D.R.E.*, Butler App. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925, ¶21-33. We also reviewed the trial court's determination that the child could not be placed with her parents within a reasonable time or should not be placed with her parents. *Id.* at ¶37-43. This court found that these findings were supported by the evidence and found no merit to appellant's arguments regarding these findings.

{¶11} As mentioned above, the case was remanded because the section of the Ohio Revised Code used by the trial court in determining whether to grant permanent custody was not applicable in this case. *Id.* at ¶50. The section used by the trial court required that if a court made the above findings, it "shall grant" permanent custody. On remand, we instructed the trial court to apply the correct "may grant" standard in R.C. 2151.414(B)(1).¹ Nothing in our previous decision indicated that the court should hear

1. Our decision stated, "*** we find no error in the court's determination that is in the child's best interest to grant permanent custody to the agency or in the court's determination that the child cannot be placed with either parent or should not be placed with her parents. However, once those findings were made, the court erroneously determined that it was required to grant permanent custody under the 'shall grant' language in R.C. 2151.414(B)(2). Accordingly, we must reverse the trial court's decision and remand this case to the trial court to determine if, having made those findings, permanent custody is proper under the "may grant"

additional evidence on remand, as our review of the trial court's factual findings and legal findings were determined to be supported by the evidence.

{¶12} It is well-established that decisions of a reviewing court regarding legal questions remain the law of the case for all subsequent proceedings at both the trial and appellate levels. *Otten v. Tuttle*, Clermont App. No. CA2009-09-055, 2010-Ohio-5424, ¶29. Upon remand of a case, a lower court is without authority to extend or vary the mandate given. *Id.*, *Singleton v. Singleton* (1994), 95 Ohio App.3d 467, 471. Since this court determined that the juvenile court's determination regarding best interest was supported by the evidence and remanded only for the court to apply the correct statutory standard to its findings, the trial court correctly followed the mandate of this court on remand, and did not err in failing to allow additional evidence to be submitted. Accordingly, appellant's assignment of error is overruled.

{¶13} Judgment affirmed.

POWELL, P.J., and BRESSLER, J., concur.

standard in R.C. 2151.414(B)(1). *In re E.M.D.R.E.*, Butler App. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925, ¶51.