

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

IN THE MATTER OF: :  
 :  
 C.C., et al. : CASE NOS. CA2011-11-113  
 : CA2011-11-127  
 :  
 : OPINION  
 : 3/26/2012  
 :  
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APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. 10-D00603

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**POWELL, P.J.**

{¶ 1} Appellants, the biological parents of four children, appeal a decision of the  
Juvenile Division of the Warren County Court of Common Pleas granting permanent custody  
of the children to Warren County Children Services.

{¶ 2} Appellants are the biological parents of C.C., A.C., L.C., and K.C., who at the time this case began, ranged in ages from 22 months to six years. On August 4, 2010, the father was on probation for permitting drug sales and the mother was on probation for aggravated drug trafficking. On that date, both parents were arrested and incarcerated after they tested positive for cocaine during drug screens at pretrial services. As a result of the positive drug tests, the father was charged with contempt of court and the mother was charged with trafficking in drugs.

{¶ 3} Due to their parents' incarceration, the children were left without a caregiver and were placed in the emergency shelter care of Warren County Children Services. The agency filed a complaint on August 5, 2010, alleging the children were dependent. The court adjudicated the children dependent on September 27, 2010, based on stipulations by the parties, and granted temporary custody to the agency.

{¶ 4} A case plan was prepared that required the parents to complete drug and mental health assessments and to follow treatment recommendations. The plan also required the parents to obtain employment and stable housing. The parents were granted visitation with the children for two hours once a week.

{¶ 5} According to the caseworker, visitation went well for about a month, and then the parents began to be very inconsistent in attending scheduled visits. The parents would often call and try to reschedule or would not show at all for visitations. In late January, the visits were suspended due to the negative impact the missed visitations were having on the children.

{¶ 6} The parents both completed drug and alcohol assessments. However, neither completed the recommendations from these assessments. During the case, the parents informed the caseworker they were employed at several different places, but failed to provide any documentation of employment. In March 2011, a new caseworker assigned to the

parents met with them and discussed the case plan and its requirements. The caseworker again met with the parents in April and discussed the case plan requirements in detail. The father completed a second drug and alcohol assessment in April, but told the caseworker he wanted to receive services through the Veteran's Administration rather than with the agency that completed the assessment.

{¶ 7} In May 2011, the mother's probation officer filed a warrant because the mother failed to complete drug treatment and drug screens as required in her criminal case. The mother called the caseworker on May 17, 2011, and left a voicemail indicating she would like to discuss adoption services for the children. However, when the caseworker attempted to return the message, the mother's cell phone did not have minutes on it, and he was unable to make contact or leave a message. The caseworker did not have any contact with the mother after that point.

{¶ 8} The father did not have any contact with the agency after the April 2011 meeting until August 11, 2011, when his probation officer notified the caseworker that the father was in jail. On speaking with the caseworker, the father indicated that he believed the mother was living in Cincinnati, but he would not discuss further information out of fear that the mother would be deported to her native country. The caseworker again discussed the case plan requirements with the father.

{¶ 9} On July 6, 2011, the agency filed a motion for permanent custody of the children. A hearing was held on September 26, 2011, and on October 25, 2011, the court issued a decision granting permanent custody of the children to the agency. The parents now separately appeal the trial court's decision, each raising one assignment of error for our review.

{¶ 10} 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*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982). 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 (7th Dist.). 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*, 138 Ohio App.3d 510, 520 (12th Dist. 2000).

{¶ 11} 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.*, 12th Dist. Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶ 22.

{¶ 12} The juvenile court found by clear and convincing evidence that it was in the children's best interest to grant permanent custody to the agency. With regard to the second required finding for granting permanent custody, the court found that the children were abandoned. In addition, the court also found that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent.

{¶ 13} On appeal, the father argues that the court erred in determining that it was in the best interest of the children to grant permanent custody of the children to the agency.

The mother argues that the court erred in determining that the children were abandoned and in considering whether the children could be placed with their parents in a reasonable time.

Abandonment

{¶ 14} The Ohio Revised Code provides that for purposes of 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 a period of ninety days." R.C. 2151.011(C).

{¶ 15} In this case, the mother argues that the court could not find the children were abandoned because the court itself ordered the visitation to stop. As mentioned above, the parents' visitation was suspended after concerns arose regarding the negative impact the parents' missed visitations were having on the children. The agency moved to suspend visitation because the missed visits were causing emotional distress to the children, the parents were not actively involved in drug treatment, had not started mental health recommendations, and were without stable housing or income. The court granted the motion suspending visitation on February 9, 2011. However, the order stated that the agency was permitted to reinstate visitation at its discretion.

{¶ 16} The mother does not dispute that she has not had any contact with her children since January 2011, but instead argues that the state cannot argue abandonment when the parents were complying with court orders by not visiting the children. She argues it is "unconscionable . . . that the state could terminate contact for ninety days and then claim that they should have custody because the parents have not seen the children."

{¶ 17} The trial court found that the parents have not had any contact with the children since January 2011 and that visits were suspended on February 9, 2011, due to the parents' failure to visit regularly. The court also found that more than five months elapsed from the last contact until the permanent custody motion was filed and the parents did

nothing to obtain a reinstatement of their visitation in the interim. The court stated that rather than working on reinstating visitation, the parents failed to work on case plan services, used illegal drugs, evaded arrest and spent time incarcerated. Accordingly, the court found that the children were abandoned.

**{¶ 18}** We find no error in the trial court's determination that the children were abandoned. First, R.C. 2151.011(C) states that abandonment is presumed when parents have "failed to visit or maintain contact with the child for more than ninety days \* \* \*." Although the parents were unable to visit the children because visitations were suspended, there was no testimony that they were in any way prevented from maintaining contact with the children by other means, such as telephone calls, letters or cards.

**{¶ 19}** Second, although the trial court granted the motion to suspend visitation, it did not do so arbitrarily. It was the parents' voluntary action in failing to consistently visit with the children, along with their failure to begin making any progress on the case plan, which led to the suspension of visitation. Moreover, both caseworkers testified that they had conversations with the parents regarding the steps the parents needed to take in order to resume visitations, beginning with working on the case plan requirements. Yet, neither parent began working on the requirements of the case plan. Under these facts, the trial court did not err in determining that the children were abandoned.

Placement with Parents Under R.C. 2151.414(B)(1)(d)

**{¶ 20}** The mother also argues that the court should not have considered whether the children could be placed with their parents within a reasonable time under R.C. 2151.414(B)(1)(a) because the court had already determined that the children are abandoned.

**{¶ 21}** As stated above, before a court can grant permanent custody of a child to a children services agency, in addition to making a finding that permanent custody is in the

child's best interest, the court must make one of four additional findings: 1) the child is orphaned; 2) the child is abandoned; 3) the child has been in agency custody for 12 of 22 months; or 4) the child cannot be placed with either parent within a reasonable time or should not be placed with the child's parents. R.C. 2151.414(B)(1). *In re E.B.*, 12th Dist. Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶ 22.

{¶ 22} The court found both that the children were abandoned and that the children could not be placed with either of their parents within a reasonable time. Although the mother cites to the wrong statutory provisions to support her argument, she correctly states that the finding that a child cannot be placed with either parent within a reasonable time applies in this case only if the child is not abandoned.<sup>1</sup> This court has previously examined the language of this statute and determined that a determination whether a child can be placed with either parent within a reasonable time, only applies where the other three factors in R.C. 2151.414(B)(1) do not apply. *Id.*

{¶ 23} However, nothing in general or specifically in this statute prevents a court from making alternative findings. The court specifically stated that the language of the statute provides that permanent custody may be granted on the basis that a child cannot be placed

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1. Mother argues in her brief that R.C. 2151.414(B)(1), which provides the standard for granting permanent custody, excludes permanent custody motions under R.C. 2151.414(B)(2) by its language, and that R.C. 2151.414(B)(2) applies in cases where it is alleged that the children cannot be placed with their parents within a reasonable time. While appellant is correct that R.C. 2151.414(B)(1) excludes cases in which 2151.414(B)(2) applies, the (B)(2) subsection, by its plain language only applies to cases in which a determination has been made that reasonable efforts are not required under 2151.413. *In re N.E.*, 12th Dist. No. CA2009-12-300, 2010-Ohio-1815, ¶ 22; *In re E.M.D.R.E.*, 12th Dist. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925.

with either parent within a reasonable time when the child is not abandoned pursuant to R.C. 2151.414(B)(1)(b). The court acknowledged that it had determined that the children were abandoned, but notwithstanding that finding, also, as an alternative finding, determined that the children could not be placed with either parent within a reasonable time. Moreover, the mother cannot establish any prejudice from this finding, as only one of the two findings was necessary to grant permanent custody, and we have determined that the court's finding that the children were abandoned was not error.

Best Interest

{¶ 24} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, the court shall consider all relevant factors, including, but not limited to the following:

- (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;
- (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;
- (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 \* \* \*;
- (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;
- (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶ 25} In considering the children's best interest, the court found that the children were initially removed because the parents were arrested on drug-related charges and there was no one else to care for the children. The court found that the mother was convicted of possession of criminal tools and sentenced to three years of community control. The mother violated the community control because of two positive drug tests and her failure to



successfully complete substance abuse treatment. The court found that a warrant was issued for the mother's arrest and she remains at large with her whereabouts unknown. The court concluded that despite an awareness of her obligations under the case plan and the consequences of failing to complete the case plan services, the mother completed none of the case plan services.

**{¶ 26}** The court found that the father was convicted of permitting drug abuse and was granted intervention in lieu of conviction (ILC) for the offense. The father violated the terms of his ILC by failing to report to his probation officer, testing positive for cocaine and failing to complete a substance abuse program. The court further found that a warrant was issued for the father's arrest and on May 24, 2011, the father was found guilty of the violation, continued on ILC and ordered to successfully complete the Veteran's Administration residential treatment program. The court found that the father began the program on September 12, 2011.

**{¶ 27}** In addition, the court found that the father is a veteran of the war in Afghanistan and suffers from traumatic brain injury and post-traumatic stress disorder and is now receiving mental health services from the Veteran's Administration for these conditions. The court found the father has neither employment nor housing and he admits that his situation is no different from when the children were removed in August 2010.

**{¶ 28}** The court found that the parents had weekly two-hour supervised visitation which went well until the parents' attendance became sporadic. Visitation was suspended in January 2011 due to the irregular nature of the parents' attendance. The court found that due to their legal and/or substance abuse problems, the parents have not seen the children since January 2011.

**{¶ 29}** The court continued its consideration of the children's best interest by noting that the children are all in foster care with their second cousin. The court indicated that

initially only the older two children came to live with the foster parents and both had severe tooth decay which has been addressed by the foster parents. The oldest child had behavior problems initially and was diagnosed with attention deficit hyperactivity disorder and post-traumatic stress disorder. The child is in bi-weekly therapy and is doing much better. The court indicated that the second-oldest child was initially angry on removal, but has now settled into a routine with the foster family and is doing well. The court found that the two younger children came to live with the foster family in June 2011 and their placement has gone very well. The court determined that the children are all bonded with the foster parents, who desire to adopt the children.

**{¶ 30}** The court also considered the children's need for permanency and found that they could not be placed with either of their parents within a reasonable time, nor were any other placement options viable. The court also noted that the children's guardian ad litem recommended granting permanent custody to the agency. Based on its consideration of the factors, the trial court determined, by clear and convincing evidence, that permanent custody was in the best interest of the children.

**{¶ 31}** On appeal, the father does not dispute that he did not see the children for more than 90 days or that he failed to complete case plan services. Instead, he argues that the agency did not allow enough time for completion of case plan services and with time, he can provide a legally secure placement for the children.

**{¶ 32}** We find no merit to the father's argument that the court erred in determining it was in the children's best interest to grant permanent custody to the agency. The children were removed from their parents in August 2010 and shortly thereafter a case plan was prepared. The parents underwent substance abuse assessments but did little else to work towards the case plan goals. By January 2011, the parents' visitation had become erratic to the point of causing emotional problems with the children. Thereafter, both parents lost

contact with the agency for a long period of time. In July 2011, eleven months after the children were removed from their home, the parents' situation showed no improvement, and the agency filed for permanent custody. Two weeks before the September 2011 permanent custody hearing, over a year after the children's removal, and only after ordered to do so in his criminal case, the father finally began substance abuse treatment and was seeking mental health treatment.

{¶ 33} R.C. Chapter 2151 evidences a clear purpose in preventing children from languishing in the foster care system for years. See e.g. *In re M.W.*, 9th District 11CA009975, 2011-Ohio-3886. In this case, the children are in need of a legally secure placement and the father admitted that although he has just begun treatment, his situation is the same as when the children were removed. The lack of housing and employment, along with problems with sobriety and the criminal justice system still exist. The parents were given a reasonable period to demonstrate a willingness to complete their case plan objectives and failed to evidence a commitment to their children.

{¶ 34} In conclusion, we find no merit to the mother's sole assignment of error regarding the court's abandonment finding and consideration of whether the children could be placed with either parent within a reasonable time. We also find no merit to the father's sole assignment of error regarding the court's finding that permanent custody was in the children's best interest. Both assignments of error are overruled.

{¶ 35} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.