

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

IN THE MATTER OF:

E.P. : CASE NOS. CA2009-11-022
CA2009-11-023
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: OPINION
: 6/17/2010
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:

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 09AND0024

David B. Bender, Fayette County Prosecuting Attorney, James Roach, 1st Floor,
Courthouse 110 East Court Street, Washington C.H., Ohio 43160, for Fayette County
Department of Job and Family Services

John H. Roszmann, 321 East Court Street, P.O. Box 475, Washington C.H., Ohio
43160, for appellant B.J.

Joshua Beasley, 8 East Main Street, West Jefferson, Ohio 43162, for appellant A.P.

Landis Terhune-Olaker, P.O. Box 895, Washington C.H., Ohio 43160, guardian ad litem

RINGLAND, J.

{¶1} Appellants, the biological parents of E.P., appeal a decision of the Fayette
County Court of Common Pleas, Juvenile Division, granting permanent custody of the
child to Fayette County Children Services (FCCS).

{¶2} E.P. was born prematurely on August 15, 2008. She suffered from various medical problems, including respiratory difficulties, severe reflux reaction and the absence of a thyroid gland. She remained in the hospital for six weeks after birth. On discharge, she was placed on an apnea monitor to measure heart and breathing rates and to alert her parents if the rates dropped too low. The monitor was to be attached at all times, and the mother was instructed twice at the hospital on how to use the equipment. E.P. was also placed on thyroid medication and the mother was instructed two times on how to administer the medication.

{¶3} On October 17, 2008, after the child's discharge from the hospital, she was examined by her pediatrician, Dr. Lenora Fitton. At this visit, Dr. Fitton stressed the importance of complying with the prescribed treatments for the child. She explained the risk of Sudden Infant Death Syndrome without the monitor and how a failure to comply with administering the thyroid medication as prescribed could result in mental retardation and decreased stature. The child was again examined by Dr. Fitton on November 24, 2008. A visit was scheduled for December 24, 2008, but the parents did not keep the appointment.

{¶4} Police officers were called to the home on January 9, 2009 for a domestic disturbance. An officer determined that E.P. appeared very unhealthy and contacted FCCS. FCCS contacted Dr. Fitton and took the child to the hospital where she was examined. On examination at the hospital, Dr. Fitton found the child was not very clean, had little clothing on and only parts of the apnea monitor were attached. In addition, the parts of the monitor that were on the child were attached improperly. The pediatrician observed bruising on the child's head in multiple locations and based on the stages of healing, determined that the bruising occurred on different days. Based on location and

appearance of the bruises, Dr. Fitton determined the bruising was not accidental and that one bruise on the face appeared to be a thumbprint bruise.

{¶15} Dr. Fitton also determined that E.P. had a thrush infection and explained that people without a thyroid are at greater risk for this type of infection. The child also had chest congestion. Testing revealed E.P.'s thyroid level was extremely out of the normal 110 range at a level of 265.92. The pediatrician stated that the elevated level demonstrated the child was not getting her thyroid medication as prescribed. Erica Haycock, a FCCS worker, determined that the thyroid medication was prescribed on October 17, but the prescription was not filled until December 26. Haycock indicated that, based on the number of pills remaining in the bottle on removal, the child had not been receiving the medication as prescribed.

{¶16} FCCS removed the child from the home and on January 14, 2009, filed a complaint alleging E.P. was abused, neglected and dependent. The complaint was amended on January 20 to include a request for permanent custody of the child. At a pretrial hearing on February 4, 2009, the court granted the guardian ad litem's request for a psychological evaluation of the mother. The father's attorney requested a psychological evaluation of his client; however, because of questions regarding paternity, the court ordered paternity testing to be completed before a psychological evaluation. The evaluation was eventually completed after the father admitted signing the parental registry and withdrew his request for genetic testing. Among other findings, the psychological reports indicated the mother had long-term mental health issues and that the father had an increased potential for child abuse along with under-developed cognitive abilities that limit his parenting ability in several key dimensions.

{¶7} An adjudication hearing was held on September 10, 2009.¹ The court issued a decision on November 13, 2009 granting permanent custody of E.P. to the agency.

{¶8} The parents now appeal the trial court's decision to grant permanent custody of the child to FCCS. The father raises two assignments of error for our review, challenging the reasonable efforts of the agency and the manifest weight of the evidence. The mother raises a single assignment of error challenging the sufficiency of the evidence in conformity with the applicable law.

Reasonable Efforts

{¶9} In his first assignment of error, the father argues that the trial court erred in not requiring FCCS to use reasonable efforts to reunify the child with her father. He contends that the court abused its discretion in granting permanent custody without requiring FCCS to develop a case plan with reunification as the goal without a finding of futility as required by R.C. 2151.419.²

{¶10} Under the Revised Code, a trial court is generally mandated to determine whether an agency has made reasonable efforts to "prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home." R.C. 2151.419(A)(1).

1. We note that the transcript of the adjudication hearing begins with the testimony of a witness already in progress. No explanation for this omission was provided by either the record or by the parties. None of the parties have supplemented the record as provided in App.R.9, nor does there appear to be any dispute regarding what evidence was presented or the court's factual findings. We therefore presume the regularity of the record in this regard.

2. In 1985, the Ohio Supreme Court determined that a court is not required to order a reunification plan when permanent custody is sought as part of the original disposition under R.C. 2151.353(A)(4). *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, paragraph two of the syllabus. However, this decision was based on statutory language as it existed prior to substantial amendments. Although courts continue to cite *Baxter* for this proposition, no cases have discussed the impact of these statutory changes on the holding. Because it is not necessary to our determination, and because the parties have not argued the application of these cases to the case at bar, we will not address *Baxter's* application to these facts.

The "reasonable efforts" determination applies to certain types of hearings in which a court removes a child from the home or continues the removal of a child from the home. Id; see, also, *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104.

{¶11} The statute also provides that if any of certain exceptions apply, "the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the child from the home, eliminate the continued removal of the child from the child's home, and return the child to the child's home." R.C. 2151.419(A)(2). Appellant argues that because the court did not make a finding that any of the exceptions apply, it erred in failing to make a finding "with regards to reasonable efforts to reunify the family."

{¶12} We begin by noting that although the court failed to make a finding with regard to the exceptions in R.C. 2151.419(A)(2), as argued by the state in its brief, subsection (A)(2)(b) would apply to the facts of the case. This subsection provides that reasonable efforts are not required when "[t]he parent from whom the child was removed has repeatedly withheld medical treatment * * * from the child when the parent has the means to provide the treatment * * *." The facts of this case show that the parents failed to administer the child's thyroid medication and failed to use the apnea monitor as instructed. The court made a finding in the permanent custody decision that "the parents have demonstrated their lack of appreciation for the child's medical needs and have gravely risked her health by not complying with her ordered treatment regimen" but did not specifically make a finding that reasonable efforts were not required.

{¶13} Moreover, despite appellant's argument that the court did not make reasonable effort findings, the court did, in fact, make these findings. At the initial

hearing after E.P. was removed from the home, the court stated in its decision that the agency did not have time for reasonable efforts because of the emergency nature of the removal. The agency then filed a case plan with a permanent goal of adoption for the child. At a pretrial hearing, the court made a finding that the agency made reasonable efforts to prevent the continued removal of the child from the home. At that point, the court and the parties discussed whether a case plan with reunification as a goal should be filed in light of the circumstances in the case. The agency stated that it was trying to establish a permanent arrangement that would involve adoption, and questioned whether it should file a case plan as an alternative in case the request for permanent custody was not granted. The court stated that considering the circumstances that the permanent custody motion was pending, the mother was currently incarcerated and psychological reports were to be completed soon, at this juncture, it was not going to require an alternative case plan with a reunification goal. An entry filed as part of this hearing stated that the agency had made reasonable efforts to prevent the continued removal of the child.

{¶14} At the adjudication hearing, the court found that the child had been abused and neglected by her parents and that the issue of permanent custody of the child was pending as part of the disposition hearing. The court again discussed the issue of the case plan as the mother had been released from her incarceration. The court again found that in light of the circumstances, the mother should be added to the current case plan to allow for visitation, but an alternative plan was not required. In the adjudication entry, the court found that the agency had made reasonable efforts to provide permanency for the child by filing for permanent custody.

{¶15} While a finding that reasonable efforts were not required under R.C.

2151.419(A)(2) would have been more appropriate, the court did not err in determining that reasonable efforts were made under the circumstances. "Reasonable efforts" does not mean all available efforts. *In re K.M.*, Butler App. No. CA2004-02-052, 2004-Ohio-4152. Otherwise there would always be an argument that an additional service, no matter how remote, may make reunification possible. *Id.* In discussing reasonable efforts, the statute states that when a child is removed from the home "during an emergency in which the child could not safely remain at home, and the agency did not have prior contact with the child, the court is not prohibited, solely because the agency did not make reasonable efforts during the emergency to prevent the removal of the child, from determining that the agency made those reasonable efforts." R.C. 2151.419(A)(1). Furthermore, the statute requires that "[i]n determining whether reasonable efforts were made, the child's health and safety shall be paramount." *Id.*

{¶16} In this case, E.P. was removed from the home on an emergency basis, due to serious concerns about her health and safety which occurred as a result of abuse and neglect by her parents. Following the removal, the mother was incarcerated after a conviction for child endangering. The court ordered psychological evaluations of the parents in order to determine whether the parents would be able to provide a safe environment for the child. As the agency had requested permanent custody as an initial disposition and there was a threat of additional serious harm to the child, it was reasonable for the court to examine the ability of the parents to safely care for the child before requiring any type of reunification plan. "[T]he law does not require the court to experiment with the child's welfare to see if * * * [the child] will suffer great detriment or harm." *In re S.J.J.*, Butler App. No. CA2006-02-021, 2006-Ohio-6354, at ¶12. Considering these facts, with the child's safety and health as the paramount concern,

the court did not err in finding reasonable efforts were made under the circumstances. Accordingly, the father's first assignment of error is overruled.

Sufficiency and Manifest Weight

{¶17} The mother challenges the sufficiency of the evidence in her sole assignment of error and the father challenges the manifest weight of the evidence in his second assignment of error. At the hearing, testimony was presented regarding the medical needs of the child and the parents' failure to follow-through with the requirements of the apnea monitor and thyroid medication. The mother admitted that she was instructed at least two times on how to use the monitor and administer the medication. There was testimony that the mother indicated the child bruised her forehead when she was being held and "jumped out of the mother's arms" but no further explanation was ever given regarding the other bruises by either parent. The agency worker testified that while the one hour a week visitations generally went well, the father had problems initially setting up visits and did not follow through with instructions at first so that it was April before the visits began.

{¶18} The caseworker testified that the child is doing well in foster care and her medical needs are being carefully met and that the foster parents are willing to adopt E.P. The caseworker stated that family placement was explored, but there were no appropriate family members to take custody. She stated that the maternal grandmother had an extensive history with the agency along with a criminal history and the paternal grandfather also had a history with the agency and there was some concern regarding an allegation of sexual abuse of the mother's sister.

{¶19} The caseworker stated that the agency felt permanent custody was in the child's best interest because the safety concerns regarding the child and her medication

will continue to be present and the situation is not one where the agency can try and see if the parents can do it correctly because of the serious concerns to the health of the child. She indicated the parents had admitted they were told and shown what to do, but have proven that they were unable to follow directions. She also indicated even basic needs were a concern because the mother did not have an appropriate home and there were concerns regarding her parents. The father had moved four times and there was concern because he had not shown he was able to initiate or follow through on the things he was required to do and he had to be told multiple times to make appointments for visitation and the psychological assessment, causing concern over whether he would follow through on medical appointments for the child.

{¶20} 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. As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Instead, our 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.

{¶21} "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶22} Ohio law provides two ways an authorized agency may seek to obtain

permanent custody of a child. An agency may first obtain temporary custody of the child, then subsequently file a motion for permanent custody, or an agency may request permanent custody as part of its original abuse, neglect or dependency complaint. See R.C. 2151.413, R.C. 2151.27(C) and R.C. 2151.353(A)(4). In this case, FCCS filed for permanent custody as part of the original complaint.

{¶23} In order to grant permanent custody as part of its original disposition, a juvenile court must apply a two-prong test. First, using the factors in R.C. 2151.414(E), the court must determine that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. Second, using the factors in R.C. 2151.414(D), the court must determine that permanent custody is in the best interest of the child. R.C. 2151.353(A)(4).

{¶24} The juvenile court found that the mother was convicted of child endangering, was placed in the River City Correctional Facility and released. The court also found that both parents had special education, neither completed high school and neither is employed. The court further found that the mother resides with her mother, who has prior involvement with FCCS, including the removal of her children from the home. The grandmother also has a recent felony drug conviction and served time in prison. E.P.'s mother testified that she would live with her father if custody is returned to her, but admitted that her father was mentally and emotionally abusive to her and has heart problems and other medical issues. E.P.'s father lived with his father, and then his mother, then in a trailer and now lives in a house with a sister, and the sister's friend and her child. The court found neither parent has a driver's license, but both intend to live outside the county, and that the child's medical appointments, which she must attend, are in the county. Finally, the court found that most importantly, the parents had

demonstrated a lack of appreciation for the child's medical needs and they have gravely risked her health by not complying with her ordered treatment regimen. For those reasons, the court found that E.P. should not be placed with either of her parents.

{¶25} When considering the first prong of this analysis, R.C. 2151.414(E) provides that if one of several factors apply, a court shall make a finding that the child cannot be placed with either parent or should not be placed with either parent. Under section (E)(6) a court must consider whether a parent has been convicted of one of several enumerated offenses involving children, including child endangering under 2919.22(A). Section (E)(8) provides that the court must consider whether the parent has repeatedly withheld medical treatment from the child. Under section (E)(16) the court must consider any other factor the court finds relevant.

{¶26} The court's determination that E.P. cannot or should not be placed with either of her parents is supported by the evidence. The evidence shows that the mother was convicted of child endangering under R.C. 2919.22(A). The child suffered bruising and her medical needs were ignored by the parents, putting her health in danger. The actions of the parents show a lack of appreciation of the seriousness of the child's medical condition.

{¶27} 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:

{¶28} "(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;

{¶29} "(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;

{¶30} "(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 ending on or after March 18, 1999;

{¶31} "(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;

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

{¶33} In determining it was in E.P.'s best interest for permanent custody to be granted to the agency, the court found that there is little evidence of the interaction of the child and her parents, the child is doing well in foster care and her medical needs are diligently being met and she is thriving with the foster family. The court further found that the child needs not only a legally secure placement, but also a medically secure and reliable placement because of her ongoing medical concerns and her parents did not provide this security. In addition, the guardian ad litem recommended granting permanent custody and determined that the child cannot be placed with either parent. The court concluded that the parents allowed the child to suffer neglect of a serious and life-threatening nature and there is a likelihood that this situation may occur again if the child is returned to either parent.

{¶34} The court further found that although the parents argued that they have not received services from the agency, the evidence is clear and convincing that giving custody to either parent would threaten the health and safety of the child as the

evidence shows the parents are unable to care for this "medically fragile child." The court acknowledged that the mother started G.E.D. and parenting classes after her conviction for child endangering and that the father had previously attended some parenting classes as part of an anger management requirement in another court case. The court also acknowledged that visitation went well, but the visitation was for short, supervised periods and there were times the parents had to be instructed on caring for the child. In addition, the court found neither parent has a stable home and both parents are lacking in any type of appropriate familial support system to assist them.

{¶35} We find no error in the trial court's determination regarding E.P.'s best interest as the court's findings are supported by the evidence. Accordingly, the trial court's decision to grant permanent custody is supported by sufficient evidence and is not against the manifest weight of the evidence. The father's second assignment of error and the mother's sole assignment of error are overruled.

{¶36} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.