

[Cite as *In re T.S.*, 2009-Ohio-5496.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92816**

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**IN RE: T.S.  
A Minor Child**

**APPEAL BY  
Mother/Appellant**

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. AD 08935791

**BEFORE:** McMonagle, P.J., Celebrezze, J., and Jones, J.

**RELEASED:** October 15, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall be to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Appellant-mother appeals from the judgment of the Common Pleas Court, Juvenile Division, granting permanent custody of her child, T.S.,<sup>1</sup> to appellee, the Cuyahoga County Department of Children and Family Services (“CCDCFS” or the “Agency”). We affirm.

{¶ 2} T.S. was adjudicated neglected and dependent in 2004. After a dispositional hearing in December 2005, the trial court denied the Agency’s prayer for temporary custody and awarded legal custody of T.S. and his sister to M.D., an interested individual.

{¶ 3} Over two and a-half years later, in July 2008, M.D. called CCDCFS and stated that she was no longer willing to care for T.S. CCDCFS subsequently filed a complaint alleging T.S. to be a neglected and dependent child, with a prayer for permanent custody. In August 2008, he was committed to the predispositional temporary custody of CCDCFS and placed in a foster home with his older brother, M.S.

{¶ 4} An adjudicatory hearing was held in October 2008. The trial court began by asking appellant if she needed the assistance of a guardian ad litem. Appellant’s attorney informed the court that she had spoken with

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<sup>1</sup>The parties are referred to by their initials in accord with this court’s policy of non-disclosure of identities in juvenile cases.

appellant and determined that appellant understood her rights, was capable of acting in her own best interests, and did not require a guardian ad litem. Upon questioning, CCDCFS social worker April Palidar told the court that she too did not believe appellant needed a guardian ad litem.

{¶ 5} The trial court then accepted appellant's admissions to the complaint, which included admissions that T.S. had been removed from her care three times in the past due to her substance abuse, mental health, and basic needs issues, and that she had severe mental health issues that made her presently unable to provide an adequate home for T.S. Appellant also admitted that she had twice been referred for drug treatment but had failed to benefit from the treatment, and was currently on bond related to charges of compelling prostitution, endangering children, and complicity involving unlawful sexual contact with a minor. Additionally, appellant stipulated that three other children had been removed from her care, she was presently unable to provide for T.S., had not provided any support for him since December 2005, and had had only minimal contact with him in the past year.

{¶ 6} At the subsequent dispositional hearing, social worker Palidar told the court that when she was assigned to the case in September 2004, appellant's case plan objectives were substance abuse treatment, parenting

education, emotional stability, and stable housing. Palidar stated that although appellant had participated in drug treatment, she failed to remain drug free. She participated in a substance abuse/mental health treatment program at Recovery Resources in September 2004, but relapsed in October 2005 and refused to re-enter treatment. CCDCFS made additional referrals for appellant in March and May 2006; appellant completed the assessments but did not follow through with treatment. After testing positive for cocaine in May 2007, appellant was again referred but declined treatment. In September 2007, she participated in substance abuse treatment under the supervision of the probation department in connection with her criminal case. She relapsed in July 2008, just before she was sent to prison.

{¶ 7} Palidar testified that while she had the case, appellant had 11 different addresses; the longest appellant lived in one place was nine months. Palidar stated that appellant worked at temporary jobs only sporadically and had relied on her stepfather, who was now deceased, for financial support.

{¶ 8} With respect to parenting education, Palidar stated that appellant had completed an in-home parenting program, but the program manager had reported that appellant had not benefitted from the instruction and had not met her parenting goals.

{¶ 9} Regarding the mental health component of the plan, Palidar stated that in addition to the dual diagnosis treatment at Recovery Resources, appellant obtained some mental health counseling at MetroHealth Medical Center. But she had recently told Palidar that she had discontinued the program.

{¶ 10} Finally, Palidar reported that although T.S.'s foster mother was "thinking" about whether to adopt T.S., she had not yet decided whether to do so.

{¶ 11} Appellant testified that she had been sober since June 2007. She stated that she contacted Palidar in July 2008 and told her she had relapsed so she could get into a treatment program and work on her case plan objectives, even though she had not, in fact, relapsed. Appellant began out-patient treatment, but did not complete the program due to her incarceration.

{¶ 12} Appellant admitted that she had not provided any support for T.S. during the over two and a-half years he was in the legal custody of M.D., and acknowledged that she had failed to visit or communicate with him for over a year of that time, although she had begun short weekly visits with him prior to her incarceration.

{¶ 13} With regard to her mental health, appellant testified that she had been seeing a psychiatrist at MetroHealth prior to her incarceration and was taking medication for depression. Appellant testified that she had been participating in drug treatment and parenting classes while in prison. She testified further that she wanted T.S. to stay in foster care with his brother and that she hoped to regain custody at some point in the future.

{¶ 14} Jean Brandt, T.S.'s guardian ad litem, recommended that the Agency's motion for permanent custody be denied. She reported that T.S. was happy in his current foster home placement and wished to remain there. She reported that he did not wish to be moved to any permanent placement and was content where he was living.

{¶ 15} The trial court subsequently terminated appellant's parental rights and committed T.S. to the permanent custody of CCDCFS. Appellant appeals from this judgment.

### **I. Appointment of a Guardian ad litem**

{¶ 16} In any proceeding concerning an alleged or adjudicated neglected or dependent child in which the parent appears to be mentally incompetent or is under 18 years of age, the court shall appoint a guardian ad litem to protect the parent's interests. R.C. 2151.281(C); Juv.R. 4(B)(3). Appellant, who is

over 18 years of age, argues that the trial court committed reversible error by not appointing a guardian ad litem to protect her interests.

{¶ 17} Neither appellant nor her counsel objected to a lack of assistance from a guardian at any time during the proceedings, however. Accordingly, appellant has waived this issue on appeal in the absence of plain error. *In re James King-Bolen*, 9<sup>th</sup> Dist. Nos. C.A. 3196-M, C.A. 3201-M, C.A. 3231-M, and C.A. 3200-M, 2001-Ohio-1412. Unless the error seriously affects the basic fairness of the judicial process, such error will not be reversed on appeal. *Id.* We find no plain error.

{¶ 18} The failure to appoint a guardian ad litem does not constitute reversible error where no request for a guardian ad litem was made. *In re K.P.*, 8<sup>th</sup> Dist. No. 82709, 2004-Ohio-1448, ¶24, citing *King-Bolen*, *supra*. Here, not only did appellant not request a guardian ad litem, she affirmatively represented to the court (through counsel) that she did not require the assistance of a guardian ad litem and was capable of assisting in her own defense.

{¶ 19} Moreover, there was no indication whatsoever that appellant appeared mentally incompetent during the trial court proceedings. Thus, appellant's citation to *In re DeShawna Pledgure* (Jan. 26, 1998), 5<sup>th</sup> Dist. No. 1997CA00192, is misplaced. In *Pledgure*, an automobile accident left the

mother physically and mentally disabled. The probate court subsequently declared her mentally incompetent and appointed guardianship of her estate and person to another. The court of appeals held that the juvenile court should have appointed a guardian ad litem in the subsequent permanent custody proceeding, as the mother had been declared mentally incompetent. As appellant was never declared mentally incompetent, this case is not similar to *Pledgure*.

{¶ 20} Appellant's argument that "CCDCFS cannot claim that she is incompetent to care for her child and at the same time claim that she is not incompetent to require the appointment of a guardian ad litem" likewise fails.

CCDCFS never claimed that appellant was mentally incompetent, only that she had a chronic mental illness that made her unable to provide an adequate permanent home for T.S. Chronic mental illness, as listed in R.C. 2151.414(E)(2) as one of the factors relevant to a finding that the child cannot or should not be placed with a parent, is not equivalent to a finding of mental incompetence that would trigger appointment of a guardian ad litem. See, e.g., *In re K.P.*, supra at ¶22 (a mental impairment does not necessarily mean that the adult is mentally incompetent).

{¶ 21} Finally, even if the trial court's failure to sua sponte appoint a guardian ad litem were considered error, appellant is required to show that

she was prejudiced by that error. *Id.* Appellant makes no argument that appointing a guardian ad litem would have changed the outcome of the trial and, therefore, has failed to demonstrate any prejudice.

{¶ 22} Appellant's first assignment of error is overruled.

## **II. The Manifest Weight of the Evidence, The Wishes of the Child, and the Recommendation of the Guardian ad litem**

{¶ 23} In cases of abuse, neglect, and dependency, a juvenile court may grant permanent custody of a child to the state if the court determines, by clear and convincing evidence, that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent, and further, that permanent custody is in the child's best interest. R.C. 2151.414 (B), (D), and (E).

{¶ 24} Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to cause a trier of fact to develop a firm belief or conviction as to the facts sought to be established. *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104. Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. Judgments supported by competent, credible evidence going to all the

essential elements of the case will not be reversed as being against the manifest weight of the evidence. Id.

{¶ 25} In her fourth assignment of error, appellant argues that the trial court's judgment was against the manifest weight of the evidence. She argues in her second assignment of error that the trial court's failure to state in its journal entry that CCDCFs had proved the statutory requirements by clear and convincing evidence is reversible error. And in her third assignment of error, she argues that the trial court failed to consider T.S.'s wishes, as communicated through his guardian ad litem, in ordering permanent custody to the Agency. Appellant's arguments have no merit.

{¶ 26} Courts look to the factors set forth in R.C. 2151.414(E) to determine whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. If even one of the factors exists, the court is mandated to enter a finding that the child cannot or should not be placed with the parents. *In re Hauserman* (Feb. 3, 2000), 8<sup>th</sup> Dist. No. 75831.

{¶ 27} The trial court found that five statutory factors applied in this case: (1) following the placement of T.S. outside the home and notwithstanding reasonable efforts by CCDCFs, appellant had failed to

remedy the conditions that caused T.S. to be removed from the home;<sup>2</sup> (2) appellant had a chronic substance abuse problem that was so severe it prevented her from providing an adequate home for T.S. at present and within one year after the hearing;<sup>3</sup> (3) the parents had demonstrated a lack of commitment to T.S. by failing to regularly support, visit, or communicate with him when able to do so;<sup>4</sup> (4) appellant had been convicted of or pleaded guilty to an offense listed in R.C. 2151.414(E)(6) or (7);<sup>5</sup> and (5) the parents and his legal guardian had abandoned T.S.<sup>6</sup>

{¶ 28} The record clearly and convincingly supports the trial court's findings. The evidence demonstrated that appellant had failed to remedy the conditions that had caused T.S. to be removed from the home. She had not met her case plan goals and still had substance abuse, mental health, and parenting issues. Further, the evidence established that appellant had been indicted for compelling prostitution, endangering children, and complicity regarding unlawful sexual conduct with a minor. The charges

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<sup>2</sup>R.C. 2151.414(E)(1).

<sup>3</sup>R.C. 2151.414(E)(2).

<sup>4</sup>R.C. 2151.414(E)(4).

<sup>5</sup>R.C. 2151.414(E)(6) and (7).

<sup>6</sup>R.C. 2151.414(E)(10).

stemmed from her efforts to persuade a 12-year-old girl to have sexual relations with a 30-year-old male in exchange for crack cocaine. Appellant had pled guilty to endangering children under R.C. 2919.22(A), one of the enumerated offenses under R.C. 2151.414(E)(6), and was sentenced to one-year incarceration; she began serving her sentence on August 28, 2008, a little more than one month before the dispositional hearing.

{¶ 29} The evidence further established that appellant's substance abuse problem had continued for years, despite some attempts at treatment, and she had relapsed only a few months before the permanent custody hearing. Furthermore, even if appellant completed substance abuse treatment while in prison, she would be required to demonstrate six months of sobriety and stable housing after her release before T.S. could be placed with her. Thus, she would not have been able to care for T.S. within one year of the dispositional hearing.

{¶ 30} Finally, appellant had not provided any financial support for T.S. in the over two and-half years he was in M.D.'s legal custody, and had not communicated with him for at least one year of that time; M.D., T.S.'s legal guardian, no longer wanted to care for him; and T.S.'s father had not visited or communicated with him at all during the four years CCDCFs had the case.

Clearly, T.S.'s parents had demonstrated a lack of commitment to him and he was abandoned by both his parents and legal guardian.

{¶ 31} Although appellant claims that she had no contact with T.S. for some time because she thought there was a restraining order against her, and hence had not abandoned him, the court need find only one of the R.C. 2151.414(E) factors to conclude that the child cannot or should not be placed with either parent. Even assuming appellant had not abandoned T.S. under R.C. 2151.414(E)(10), as more than one of the other factors was demonstrated by the evidence, the trial court did not err in finding that T.S. could not be placed with either parent within a reasonable period of time and should not be placed with them.

{¶ 32} The trial court also did not err in finding that permanent custody was in T.S.'s best interest. R.C. 2151.414(D) requires that in determining the best interest of the child, the court must consider all relevant factors, including, but not limited to: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the wishes of the child as expressed directly by the child or through the child's guardian ad litem; (3) the custodial history of the child; (4) 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; and (5) whether any of the factors in R.C. 2151.414(E)(7) through (11) are applicable. Although the trial court is required to consider each of the factors in making its permanent custody determination, only one of these factors needs to be resolved in favor of the award of permanent custody. *In re D.W.*, 8<sup>th</sup> Dist. No. 84547, 2005-Ohio-1867, ¶20.

{¶ 33} In its journal entry awarding permanent custody to CCDCFS, the trial court stated that it had considered all of these factors in determining that permanent custody was in T.S.'s best interest. Appellant complains that the entry consisted only of boilerplate language tracking the language of the statute, so she cannot be sure the trial court "carefully and thoroughly analyzed the evidence." Appellant's argument fails, as the statute does not require the court to list those factors or conditions it found applicable before making its determination that permanent custody is in the child's best interest. *In re I.M.*, 8<sup>th</sup> Dist. Nos. 82669 and 82695, 2003-Ohio-7069, ¶27.

{¶ 34} Appellant also contends that the trial court's finding was in error because it disregarded T.S.'s wishes, as communicated through his guardian ad litem, that he did not want an award of permanent custody. However, "the ultimate decision in any proceeding is for the judge, and the trial court does not err in making an order contrary to the recommendation of the

guardian ad litem.” *In re Howard* (1997), 119 Ohio App.3d 201, 206. A trial court is not required to follow the recommendation of a guardian ad litem. *In re P.P.*, 2<sup>nd</sup> Dist. No. 19582, 2003-Ohio-1051, ¶24.

{¶ 35} Appellant also complains that the trial court erred because it should have concluded that a legally secure placement could have been achieved with an award of temporary, rather than permanent, custody to the Agency so she could work on resolving her issues and possibly regain custody.

As this court has recognized, however, neglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term, are not required to “languish” in legally insecure placements for years while natural parents are unwilling or unable to correct serious parenting deficiencies, and their best interest is the pivotal factor in permanency case. *In re Mayle* (July 27, 2000), 8<sup>th</sup> Dist. Nos. 76739 and 77165.

{¶ 36} Despite the trial court’s failure to use the words “clear and convincing evidence” in its journal entry, the record was replete with clear and convincing evidence that permanent placement, rather than temporary custody, was in T.S.’s best interest. Appellant had demonstrated her inability to correct her parenting deficiencies. She had pled guilty to criminal offenses involving a child (although not her own) and was currently incarcerated. She had had only minimal contact with T.S. in the last four

years and, even in the best case scenario, would not have been able to care for him for another year after the dispositional hearing. She had unresolved substance abuse and mental health issues and had not provided any financial support for T.S. in years. By contrast, T.S. was in a stable foster home with his brother where he was thriving. Although the foster mother had not definitely committed, she had expressed interest in adopting him.

{¶ 37} In light of this evidence, the trial court did not err in granting permanent custody of T.S. to CCDCFS. Appellant's second, third, and fourth assignments of error are overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and  
LARRY A. JONES, J., CONCUR