

Released June 11, 2019

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

IN THE MATTER OF:	:	Case No. 18CA3856
	:	
Z.M. AND K.B.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
ADJUDGED NEGLECTED/	:	
DEPENDENT CHILDREN	:	
	:	

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for Appellant.

David M. Huddleston, New Boston, Ohio, for Appellee.

Smith, P. J.

{¶1} K.B., the children’s biological mother, appeals the trial court’s judgment that granted Scioto County Children Services permanent custody of her two children: four-year-old K.B. and eight-year-old Z.M. The mother raises the following assignment of error:

“1. The Trial Court’s award of permanent custody of [Z.M.] and [K.B.] to the Scioto County Children Services was against the manifest weight and sufficiency of the evidence.”

{¶2} In late April 2016, the agency received a report that the mother was discovered passed out and unresponsive inside a parked car. The report further indicated that both children were inside the car at the time and that

they appeared to have been there for several hours. Emergency medical personnel responded, administered Narcan to the mother, and took her to the emergency room. The mother tested positive for marijuana, cocaine, heroin and amphetamines.

{¶3} The agency requested an ex-parte order placing the children in its temporary custody and also filed complaints that alleged the children were neglected and dependent. The agency additionally requested the court to grant it temporary custody of the children. The court subsequently granted the agency's request for an ex-parte emergency custody order. A few months later, the court adjudicated the children neglected and dependent and placed the children in the agency's temporary custody. Approximately one year later, the agency filed permanent custody motions.

{¶4} On April 12, 2018, the court held a hearing to consider the agency's permanent custody motions. At the hearing, caseworker Renee Ginn stated that the agency developed a case plan for the family. Ginn explained that the case plan required the mother to (1) complete a drug and alcohol assessment and follow any treatment recommendations, (2) complete parenting classes, and (3) obtain adequate housing. Ginn reported that the mother has not completed a drug and alcohol treatment program, despite three attempts. Ginn related that the mother entered three separate treatment

programs throughout the pendency of the case but did not successfully complete any of the programs. Ginn testified that although the mother appeared to have adequate housing, she failed to complete a parenting class.

{¶5} Ginn further related that the mother did not have consistent contact with the children. Ginn stated that between July 2016 through September 25, 2017, the mother did not have any contact with the children. Ginn explained that the mother had been in jail between April 2017 and September 2017. She indicated that the mother contacted the agency upon her September 2017 release from jail. Ginn testified that the mother visited the children between September 2017 and November 2017, that she last visited the children in November 2017 and has not had any contact with the agency since that time.

{¶6} Ginn stated that the father has had little involvement in the case and that he has not successfully completed the case plan.

{¶7} Ginn testified that the children have been in the agency's temporary custody since April 28, 2016. Ginn related that between April 2016 and May 2017, the agency placed the children in several different homes. Ginn stated that in early June 2017, the children entered their current foster home. Ginn indicated that the foster family would like to adopt the children.

{¶8} After a five-day recess, the hearing resumed on April 17, 2018, with Ginn’s continued testimony. She testified that the agency learned that on April 11, 2018, the mother entered a ninety-day treatment program. This was the day before the commencement of the permanent custody hearing.

{¶9} The mother testified that she currently lives in a treatment facility but that she maintains a permanent residence to which she will return after completing the treatment program. The mother admitted that she has struggled with drug abuse and that she has been in and out of prison and jail.

{¶10} The mother requested the court to give her another chance to regain custody of her children. She explained that “before” she was not “ready to have [her] kids” and that she did not believe that it was in their best interest to be with her. The mother stated that she now believes that she can adequately care for and provide for the children. She explained that she “really feel[s] like God has removed the desire for [her] to use [drugs].”

{¶11} On October 19, 2018, the trial court granted the agency permanent custody of the children. The court found that the children have been in appellee’s temporary custody for twelve or more months of a consecutive twenty-two-month period and that placing the children in the agency’s permanent custody was in their best interest.

{¶12} With respect to the children’s interactions and interrelationships, the court found that the children’s relationship with the mother is “tenuous.” The court observed that the mother visited with the children, albeit sporadically. The court remarked that the mother had “extended periods of time” when she did not have any contact with the children or the agency. The court additionally noted that the mother has not completed her case plan goals and struggled to consistently engage in drug and alcohol treatment. The court found that the children’s relationship with their father is non-existent. The court commented that the children are doing well in their current foster placement and that the foster family would like to adopt the children.

{¶13} The court additionally found that the children cannot achieve a legally secure permanent placement without granting the agency permanent custody of the children. The court observed that neither parent successfully completed the case plan.

{¶14} The court thus granted the agency permanent custody of the children. This appeal followed.

{¶15} In her sole assignment of error, appellant argues that the trial court’s decision to award the agency permanent custody of the children is against the manifest weight of the evidence. She additionally alleges there

was not sufficient evidence to support the trial court's decision. Appellant asserts that "she made good faith efforts to overcome her significant problems," but "she was not able to fully complete her treatment and recovery to the satisfaction of the trial court or the agency." Appellant claims that by the time of the permanent custody hearing, she "had a renewed faith and a sincere desire to not expose her children to a lifetime of what she herself had endured." Appellant contends that her "late breakthrough" shows that the trial court should not have chosen to award the agency permanent custody of the children. Appellant further argues that the court did not adequately consider her status as the children's biological parent.

A. Standard of Review

{¶16} A reviewing court generally will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 53 (4th Dist.). When an appellate court reviews whether a trial court's permanent custody decision is against the manifest weight of the evidence, the court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest

miscarriage of justice that the [judgment] must be reversed and a new trial ordered.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist. 2001), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶17} In a permanent custody case, the ultimate question for a reviewing court is “whether the juvenile court’s findings * * * were supported by clear and convincing evidence.” *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 43. In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). “Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court’s decision is not against the manifest weight of the evidence.” *R.M.* at ¶ 55.

{¶18} Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when

resolving the conflicts in evidence, “clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.” *Thompkins* at 387, 678 N.E.2d 541, quoting *Martin* at 175, 485 N.E.2d 717. A reviewing court should find a trial court’s permanent custody decision against the manifest weight of the evidence only in the “exceptional case in which the evidence weighs heavily against the [decision].” *Id.*, quoting *Martin* at 175, 485 N.E.2d 717.

B. Permanent Custody Principles

{¶19} A parent has a “fundamental liberty interest” in the care, custody, and management of his or her child and an “essential” and “basic civil right” to raise his or her children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990); accord *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶ 8-9. A parent’s rights, however, are not absolute. *D.A.* at ¶ 11. Rather, “it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.” *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting *In re R.J.C.*, 300 So.2d 54, 58 (Fla.App.1974). Thus, the State may terminate parental rights when a child’s best interest demands such termination. *D.A.* at ¶ 11.

C. Permanent Custody Framework

{¶20} A children services agency may obtain permanent custody of a child by (1) requesting it in the abuse, neglect or dependency complaint under R.C. 2151.353, or (2) filing a motion under R.C. 2151.413 after obtaining temporary custody. In this case, the agency sought permanent custody of the children by filing a motion under R.C. 2151.413. When an agency files a permanent custody motion under R.C. 2151.413, R.C. 2151.414 applies. See R.C. 2151.414(A).

{¶21} R.C. 2151.414(B)(1) specifies that a trial court may grant a children services agency permanent custody of a child if the court finds, by clear and convincing evidence, that (1) the child's best interest would be served by the award of permanent custody, and (2) any of the following conditions applies:

- (a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and 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.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶22} In the case at bar, the trial court found that the children have been in the agency's temporary custody for more than twelve months of a consecutive twenty-two-month period, and thus R.C. 2151.414(B)(1)(d) applies. The mother does not challenge the trial court's R.C. 2151.414(B)(1)(d) finding. Therefore, we do not address it.

{¶23} R.C. 2151.414(D)(1) requires a trial court to consider all relevant, as well as specific, factors to determine whether a child's best interest will be served by granting a children services agency permanent custody. The specific factors include: (1) the child's interaction and

interrelationship 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 child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (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 factors listed under R.C. 2151.414(E)(7) to (11) apply.

{¶24} Determining whether granting permanent custody to a children services agency will promote a child's best interest involves a delicate balancing of "all relevant [best interest] factors," as well as the "five enumerated statutory factors." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 57, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56; accord *In re C.G.*, 9th Dist. Summit Nos. 24097 and 24099, 2008-Ohio-3773, 2008 WL 2906526, ¶ 28; *In re N.W.*, 10th Dist. Franklin Nos. 07AP-590 and 07AP-591, 2008-Ohio-297, 2008 WL 224356, ¶ 19. However, none of the best interest factors requires a court to give it "greater weight or heightened significance." *C.F.* at ¶ 57. Instead, the trial court considers the totality of the circumstances when making its best interest determination. *In re K.M.S.*, 3d Dist. Marion Nos.

9–15–37, 9–15–38, and 9-15-39, 2017-Ohio-142, 2017 WL 168864, ¶ 24; *In re A.C.*, 9th Dist. Summit No. 27328, 2014-Ohio-4918, 2014 WL 5690571, ¶ 46. In general, “[a] child’s best interest is served by placing the child in a permanent situation that fosters growth, stability, and security.” *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916, 2016 WL 915012, ¶ 66, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

D. Analysis of Best Interest Factors

1. Children’s Interactions and Interrelationships

{¶25} The mother has not consistently visited the children throughout the pendency of the case. Even after she was released from jail in September 2017, she only visited the children through November 2017. She did not have any further contact with the agency or the children until the permanent custody hearing. Thus, the evidence supports a finding that the children and the mother do not share a positive interrelationship.

{¶26} The children do not have a relationship with their father.

{¶27} The children have lived with the same foster family since June 2017, and the foster family would like to adopt the children.

{¶28} We recognize the mother’s assertion that the court should strive to preserve familial bonds. We further agree that family unity and blood

relationship may be “important factors” that a trial court evaluating a child’s best interest should consider. However, the mere existence of a blood relationship is not controlling. See *In re J.B.*, 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013-Ohio-1703, 2013 WL 1799681, ¶ 31. Instead, “neglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term * * * and their best interest is the pivotal factor in permanency case[s].” *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, 2009 WL 3321019, ¶ 35. Thus, while biological relationships may be important considerations, they are not controlling when ascertaining a child’s best interest. See *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, 2013 WL 1799853, ¶ 163; accord *In re J.F.*, 2018-Ohio-96, 102 N.E.3d 1264, ¶ 65 (8th Dist.) (stating that the “existence of a positive relationship,” by itself, is not determinative of the child’s best interest); *In re S.S.-I*, 4th Dist. Athens No. 17CA44, 2018-Ohio-1349, 2018 WL 1720650, ¶ 76.

2. Children’s Wishes

{¶29} The trial court did not consider the children’s direct wishes. We observe, however, that the guardian ad litem filed a written report with the court and recommended that the court grant appellee permanent custody of the children. See *In re S.M.*, 4th Dist. Highland No. 14CA4, 2014–Ohio–

2961, ¶ 32 (noting that R.C. 2151.414 permits the court to consider child's wishes as the child expresses directly or through the guardian ad litem).

3. Custodial History

{¶30} The older child, Z.M., was removed from the mother's custody at birth, but he was returned to the mother a few months later. He remained in her custody until April 2016. The younger child, K.B., lived with the mother from birth until she was a few months shy of her second birthday. Since that time, both K.B. and Z.M. have been in the agency's continuous temporary custody. The children thus have been in the agency's continuous temporary custody for more than twelve months of a consecutive twenty-two-month period.

4. Legally Secure Permanent Placement

{¶31} "Although the Ohio Revised Code does not define the term, 'legally secure permanent placement,' this Court and others have generally interpreted the phrase to mean a safe, stable, consistent environment where a child's needs will be met." *In re M.B.*, 4th Dist. Highland No. 15CA19, 2016-Ohio-793, 2016 WL 818754, ¶ 56, citing *In re Dyal*, 4th Dist. Hocking No. 01CA12, 2001 WL 925423, *9 (Aug. 9, 2001) (implying that "legally secure permanent placement" means a "stable, safe, and nurturing environment"); *see also In re K.M.*, 10th Dist. Franklin Nos. 15AP-64 and

15AP-66, 2015-Ohio-4682, 2015 WL 7079930, ¶ 28 (observing that legally secure permanent placement requires more than stable home and income but also requires environment that will provide for child's needs); *In re J.H.*, 11th Dist. Lake No. 2012-L-126, 2013-Ohio-1293, 2013 WL 1294646, ¶ 95 (stating that mother unable to provide legally secure permanent placement when she lacked physical and emotional stability and that father unable to do so when he lacked grasp of parenting concepts); *In re J.W.*, 171 Ohio App.3d 248, 2007-Ohio-2007, 870 N.E.2d 245, ¶ 34 (10th Dist.) (Sadler, J., dissenting) (stating that a legally secure permanent placement means “a placement that is stable and consistent”). Thus, “[a] legally secure permanent placement is more than a house with four walls. Rather, it generally encompasses a stable environment where a child will live in safety with one or more dependable adults who will provide for the child’s needs.” *M.B.* at ¶ 56. Furthermore, a trial court that is evaluating a child’s need for a legally secure permanent placement and whether the child can achieve that type of placement need not determine that terminating parental rights is “not only a necessary option, but also the only option.” *Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532 at ¶ 64. Rather, once the court finds the existence of any one of the R.C. 2151.414(B)(1)(a)-(e) factors, R.C.

2151.414(D)(1) requires the court to weigh “all the relevant factors * * * to find the best option for the child.” *Id.*

{¶32} In the case at bar, the evidence supports the trial court’s finding that the children need a legally secure permanent placement and that they cannot achieve this type of placement without granting the agency permanent custody. The mother has consistently struggled with her drug addiction. Throughout the pendency of the case, the mother attempted to complete three different treatment programs and could not successfully complete any of them.

{¶33} We commend the mother for entering a treatment program the day before the permanent custody hearing. However, the trial court could have reasonably determined that the mother’s eleventh-hour attempt to enter yet another treatment program was too little, too late. Furthermore, even if the mother successfully completed the program she recently entered, her completion of the program does not necessarily mean that she would continue to remain drug-free and able to care for the children. This court has recognized that a parent’s past history is one of the best predictors of future behavior. *In re West*, 4th Dist. Athens No. 05CA4, 2005-Ohio-2977, 2005 WL 1400029, ¶ 28, citing *In re A.S.*, 12th Dist. Butler Nos. CA2004–07–182 and CA2004-08-185, 2004-Ohio-6323, 2004 WL 2698408, ¶ 37 (“Past

history is often the best predictor of future conduct. While surely people can change, the facts do not indicate that [the biological parents] have the motivation or ability to follow through and do what is necessary to regain custody of their child.”); *In re Vaughn*, 4th Dist. Adams No. 00CA692, 2000 WL 33226177, *7 (Dec. 6, 2000) (“To further the interests of the children, the court must consider any evidence available to it, including a parent’s pattern of conduct. Some of the most reliable evidence for the court to consider is the past history of the children and the parents.”); *see also In re Brown*, 60 Ohio App.3d 136, 139, 573 N.E.2d 1217 (1st Dist.1989) (stating that the mother’s “past parenting history and her ability to comply with prior reunification plans regarding her other children were relevant considerations in the juvenile court’s dispositional determination” to award a children services agency permanent custody). Admittedly, the mother’s fourth attempt at a treatment program might prove successful. Nevertheless, over the course of nearly two years, she was unable to complete and conquer her drug addiction.

{¶34} Additionally, the trial court could have determined that giving the children the permanency and stability that they need, rather than continuing to hold them in custodial limbo while the mother attempts to show that she will remain drug-free, would better serve their best interest.

As this court has noted in the past, the permanent custody statutes do not contemplate leaving children in custodial limbo for an extended period of time while a parent attempts to establish that the parent can provide the child with a legally secure permanent placement. *Matter of S.S.-I*, 4th Dist.

Athens No. 17CA44, 2018-Ohio-1349, 2018 WL 1720650, ¶ 72, citing R.C. 2151.415(D)(4) (prohibiting court from granting “an agency more than two extensions of temporary custody” and from ordering “an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier, regardless of whether any extensions have been previously ordered pursuant to division (D) of this section”). Additionally, keeping children in limbo is not in their best interests. *In re B.C.*, 141 Ohio St.3d 55, 2014–Ohio–4558, 21 N.E.3d 308, ¶ 20, quoting *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513–514, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982) (““There is little that can be as detrimental to a child’s sound development as uncertainty over whether he is to remain in his current “home,” under the care of his parents or foster parents, especially when such uncertainty is prolonged.””). Thus, the trial court had no obligation to continue to hold the children in custodial limbo while the mother attempted

to show, once again, that she could complete a treatment program and remain drug-free.

{¶35} Furthermore, we have repeatedly recognized that trial courts need not experiment with a child's welfare:

“* * * [A] child should not have to endure the inevitable to its great detriment and harm in order to give the * * * [parent] an opportunity to prove her suitability. To anticipate the future, however, is at most, a difficult basis for a judicial determination. The child's present condition and environment is the subject for decision not the expected or anticipated behavior of unsuitability or unfitness of the * * * [parent]. * * * The law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm.”

In re W.C.J., 4th Dist. Jackson No. 14CA3, 2014-Ohio-5841, 2014 WL 7477958, ¶ 48, quoting *In re Bishop*, 36 Ohio App.3d 123, 126, 521 N.E.2d 838 (5th Dist.1987).

{¶36} Accordingly, based upon the foregoing reasons, we find no merit to the mother's arguments. The trial court's decision granting permanent custody of the children to the agency is supported by clear and convincing evidence and is not against the manifest weight of the evidence. Therefore, we overrule the mother's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas 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.

Hess, J. and McFarland, J.: Concur with Judgment and Opinion

For the Court,

BY: _____
Jason P. Smith, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

