

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

K.H. (DOB 3-12-01)
MINOR CHILD

S.C. (DOB 12-9-02)
MINOR CHILD

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Craig R. Baldwin, J.

Hon. Earle E. Wise, J.

Case No. 2017CA00168

2017CA00169

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court
of Common Pleas, Family Court
Division, Case Nos. 2016JCV00175
and 2016JCV00176

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

December 27, 2017

APPEARANCES:

For Plaintiff-Appellant mother S.H.

For Defendant-Appellee

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Baldwin, J.

{¶1} Appellant S.H. appeals from the August 18, 2017 Judgment Entries of the Stark County Court of Common Pleas, Family Court Division, granting permanent custody of her two children to Stark County Department of Jobs and Family Services.

STATEMENT OF THE FACTS AND CASE

{¶2} K.H. (DOB 3/12/01) and S.C. (DOB 12/9/02) are appellant's biological children. The two have different fathers. On March 2, 2016, appellee Stark County Department of Jobs and Family Services (SCDJFS) filed a complaint in Case No. 2016JCV00175 alleging that K.H. was dependent and neglected. On the same date, appellee SCDJFS filed a complaint in Case No. 2016JCV00176 alleging that S.C. was dependent and neglected. The two girls were placed in the temporary custody of the agency.

{¶3} On May 26, 2016, the trial court found K.H. and S.C. to be dependent children and placed them in temporary custody of SCDJFS.

{¶4} Thereafter, on June 6, 2017, appellee SCDJFS filed complaints in both cases seeking permanent custody of K.H. and S.C. A hearing on the motions was held on August 16, 2017.

{¶5} At the hearing, Barbara Ballway, a caseworker at SCDJFS, testified that she was assigned to the family in March of 2016. She testified that K.H. and S.C. had remained in the temporary custody of the agency since May 26, 2016 and that such period of time was in excess of twelve of the last twenty-two months. Ballway testified that appellant last visited with K.H. and S.C. on October 11, 2016 because her visits had been suspended by the court after she was late for more than two consecutive visits in a row.

While Ballway asked appellant to come in and meet with her to pursue having the visits reinstated, appellant did not do so. Ballway further testified that K.H. and S.C. had gone AWOL from their placement several times during the life of the case and had told her that they had seen appellant during those times.

{¶16} Ballway was questioned about appellant's case plan. She testified that appellant was initially ordered in March of 2016 to complete a parenting evaluation through Northeast Ohio Behavioral Health, to submit to drug testing as requested and to submit to an assessment through CommQuest Services. According to Ballway, appellant was unsuccessfully discharged from CommQuest for lack of compliance, had not completed the parenting evaluation, and was inconsistent in her drug screens. Appellant was discharged from CommQuest on April 19, 2016 for failure to appear. Ballway testified that appellant had not been able to maintain housing or employment throughout the case and that she had been unable to maintain consistent contact with appellant because appellant's phone numbers and living situation changed frequently.

{¶17} Ballway also testified that appellant had criminal charges throughout the case. The following is an excerpt from her testimony at the hearing:

{¶18} Q: Okay. And has mother had some uh...criminal issues throughout the case?

{¶19} A: Yes, she has.

{¶10} Q: And do you know the nature of those criminal issues?

{¶11} A: I do. Um...mom was charged um...in November of '16 with possessing drug abuse instruments. She was charged in February of this year with Interference of Custody. She was charged in March of this year with Possession of Drug Abuse

Instruments. April of this year with Possession of drug abuse instruments. Um...the end of April of this, uh...4-29 of this year, she was also charged with possessing drug abuse instruments and possession of heroin.

{¶12} Q: Okay. And do those particular criminal incidents cause concern as it relates to the mothers (sic) ability to parent these children?

{¶13} A: Yes.

{¶14} Q: And why is that Ms. Ballway?

{¶15} A: Well one of the presenting reasons that we became involved was substance abuse and, and it shows that the problem has not been adequately addressed, um...which would still put the children at harm.

{¶16} Transcript at 20. Ballway agreed that appellant had not complied with any case plan requirement and testified that she attempted to assist appellant by reviewing the case plan, attempting home visits and phone calls, and making referrals for services. She stated that she had made reasonable efforts to attempt to offer services to the family.

{¶17} On cross-examination, Ballway testified that the agency's initial concerns were over appellant's addiction issues and homelessness. In addition, there was concern that the two children were chronically truant and K.H. was pregnant and needed prenatal care. According to Ballway, appellant tested positive for methamphetamines, amphetamines, cocaine and morphine. She testified that while an appointment was set up for appellant at Northeast Ohio Behavioral Healthcare, appellant did not attend.

{¶18} Appellant testified at the hearing that she had been struggling with homelessness and had been addicted to heroin since July of 2015. She testified that she got clean on May 7, 2017 after getting sick. Appellant testified that she had a massive

heart attack while having surgery for a valve replacement in June of 2017. She testified that she was discharged from the hospital on August 8, 2017 and was taken straight to jail where she had remained since her discharge. She testified that she did not see her children for a period of time because she was not good for them when she was using and was depressed. Appellant asked for more time and testified that she had a job waiting for her.

{¶19} At the best interest portion of the hearing, Ballway testified that the children did not have developmental issues but that there were mental health concerns with respect to both girls. K.H. had been diagnosed with an adjustment disorder with depression and had run away from placement four times for weeks to months at a time. Ballway testified that S.C. had also run away with her sister and that they had told her that they had seen appellant during such time. According to Ballway, K.H. told her that she had engaged in substance abuse while on the run while S.C. came back with a tattoo.

{¶20} Ballway testified that K.H. began on the Residential Treatment Center program on July 4, 2017 and would be getting mental health services there. She testified that K.H. would be there for six to twelve months. S.C. had been diagnosed with an unspecified anxiety disorder and unspecified depressive disorder and had been hospitalized three times due to self-injury. Ballway testified that S.C. was in a foster home, was enrolled in school and was doing very well in her foster home. S.C. told Ballway that she would like to be adopted by her foster mother. While family members and a third party had sought placement of the children, Ballway testified that they were not referred for home studies because they did not pass the initial home study. While the children had been placed with appellant's one sister, the sister could not handle them and their

placement in her home ended. Although the same sister later was willing to take placement of K.H., K.H. was moved from that placement after she was not going to school, prenatal appointments or counseling appointments.

{¶21} Ballway was questioned about visitation or interaction between appellant and her daughters. She testified that visitation was “pretty hard” on the girls and that appellant usually arrived late, causing visitation to be suspended. Transcript at 46. The two girls were happy to see appellant and appellant was happy to see them as well. Ballway, when asked, testified that they would benefit from a grant of permanent custody because they need permanence and stability. She testified that while there was a bond between appellant and the girls, it was not healthy and that the benefits of granting permanent custody would greatly outweigh any risks.

{¶22} On cross-examination, Ballway testified that the foster home had the potential to be an adoptive home, although the process had not been started. She admitted that K.H. was gone AWOL for the period from April 23, 2017 to July 4, 2017 while in the care of the agency and at the time was residing in a group home. She testified that appellant and the girls seemed bonded to one another and for the most part interacted appropriately. She testified that the plan was for S.C. to stay in her current foster home and that if permanent custody was granted, the agency was going to look for a permanent home for K.H. Ballway further testified that the girl’s bond was unhealthy since K.H. talked S.C. into running away from placements.

{¶23} The Guardian Ad Litem, in a report filed on August 9, 2017, had recommended that permanent custody be granted to the agency.

{¶24} Pursuant to Judgment Entries filed in both cases on August 18, 2017, the trial court found that appellant had abandoned her two children, that they had been in temporary custody of the agency for 12 or more months in a consecutive 22 months prior, and that they could not or should not be placed with appellant at the present time or within a reasonable period of time. The trial court further found that it was in their best interest for permanent custody to be granted to the agency and terminated appellant's parental rights while granting permanent custody to SCDJFS. The trial court filed Findings of Fact and Conclusions of Law on the same date.

{¶25} Appellant now raises the following assignments of error on appeal:

{¶26} "I. THE TRIAL COURT'S FINDING THAT THE CHILDREN WERE ABANDONED WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶27} II. THE TRIAL COURT'S FINDING APPELLANT COULD NOT OR SHOULD NOT BE REUNITED WITH HER CHILDREN WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶28} III. THE TRIAL COURT'S FINDING THAT PERMANENT CUSTODY WAS IN K.H. AND S.C.'S BEST INTEREST WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I, II

{¶29} Appellant, in her first assignment of error, argues that the trial court's finding that the children were abandoned was against the manifest weight of the evidence. In her second assignment of error, she argues that the trial court's finding that she could not or should not be reunited with her children within a reasonable period of time was against the manifest weight of the evidence.

{¶30} A trial court's decision to grant permanent custody of a child must be supported by clear and convincing evidence. The Ohio Supreme Court has defined “clear and convincing evidence” as “[t]hat measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty, as required beyond a reasonable doubt as in criminal cases.” *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954); *In re: Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985).

{¶31} In reviewing whether the 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, 60 (1990); *See also, C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). If the trial court's judgment is “supported by some competent, credible evidence going to all the essential elements of the case,” a reviewing court may not reverse that judgment. *Schiebel*, 55 Ohio St.3d at 74.

{¶32} “An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusion of law.” *Id.* Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), “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.”

{¶33} Moreover, deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260, 674 N.E.2d 1159.

{¶34} Pursuant to R.C. 2151.414(B), the court may grant permanent custody of a child to the movant if the court determines “that it is in the best interest of the child to grant permanent custody to the agency that filed the motion for permanent custody and that any of the following apply:

(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 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.

{¶35} The trial court, in the case sub judice, made findings pursuant to R.C. 2151.414(B)(1)(a), (B)(1)(b) and (B)(1)(d). Appellant concedes that the trial court's finding, pursuant to R.C. 2151.414(B)(1)(b), that appellant had abandoned her children was improper. However, the trial court also found by clear and convincing evidence that the children had been in the temporary custody of a public children services agency for twelve or more months of a consecutive twenty-two month period pursuant to R.C. 2151.414(B)(1)(d). Appellant does not challenge the trial court's finding. As findings under R.C. 2151.414(B)(1)(b) and R.C. 2151.414(B)(1)(d) are alternative findings, each is independently sufficient to use as a basis to grant the motion for permanent custody. *In re Daltoni*, 5th Dist. Tuscarawas No. 2007 AP 0041, 2007–Ohio–5805. This finding alone, in conjunction with a best interest finding, is sufficient to support the grant of permanent custody *In re Calhoun*, 5th Dist. Stark No. 2008CA00118, 2008–Ohio–5458, ¶ 45.

{¶36} However, even if we consider appellant's second assignment of error, we find that the trial court did not err in determining the children cannot be placed with appellant at this time or within a reasonable period pursuant to R.C. 2151.414(1)(a).

{¶37} R.C. 2151.414(E) sets forth factors a trial court is to consider in determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Specifically, Section (E) provides, in pertinent part, as follows:

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be

placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for changing parental conduct to allow them to resume and maintain parental duties....

13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

{¶38} As is discussed above, there was testimony that appellant did not complete her case plan. Appellant did not submit to a parenting evaluation, and was unsuccessfully discharged from CommQuest in April of 2016 for failure to appear. In addition, appellant had drug addiction issues and had multiple criminal offenses during the case. At the time of the hearing on August 16, 2017, appellant was in jail. Appellant also did not maintain employment or housing during the case and Ballway had problems contacting her throughout the case.

{¶39} Based on the foregoing, we find that the trial court did not err in finding that appellant could not or should not be reunited with her children within a reasonable period of time. The trial court's finding was not against the manifest weight of the evidence. Appellant's second assignment of error is, therefore, overruled.

{¶40} While appellant's first assignment of error is sustained, we find that it is moot based on our disposition of appellant's second assignment of error.

III

{¶41} Appellant, in her third assignment of error, challenges the trial court's finding that it was in the best interest of the children for permanent custody to be granted to the agency.

{¶42} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates the trial court must consider all relevant factors, including, but not limited to, the following: (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, with due regard for the maturity of the child; (3) the custodial history of the child; and (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.

{¶43} During the best interest portion of the hearing, Barbara Ballway testified that the children did not have developmental delays, but had mental health issues. While K.H. had been diagnosed with an adjustment disorder with depression, S.C. had been diagnosed with an unspecified anxiety disorder and unspecified depressive disorder and had been hospitalized three times due to self-injury. There was testimony that S.C. was doing well in a licensed foster home and that the home was a potential adoptive placement for her. Ballway testified that once K.H. was released from the Residential Treatment Center, she hoped to identify a permanent placement for her. There were not relatives suitable for appropriate placement.

{¶44} While there was testimony that the girls were bonded with appellant and each other, there was testimony that the bond was not a healthy one. Appellant's visitation was suspended after she was frequently late for visits.

{¶45} Finally, both the Guardian Ad litem and Ballway recommended that permanent custody be granted to the agency. Ballway testified that the children needed stability and permanence and that the benefits of the grant of permanent custody would greatly outweigh any risks.

{¶46} Based on the foregoing, we find that the trial court's finding that permanent custody was in the best interest of K.H. and S.C. was supported by the evidence.

{¶47} Appellant's third assignment of error is, therefore, overruled.

{¶48} Accordingly, the judgment of the Stark County Court of Common Pleas, Family Court Division, granting permanent custody of appellant's two children to Stark County Department of Jobs and Family Services is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Earle Wise, J. concur.