

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J.B., K.B., MINORS

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Craig R. Baldwin, J.

Case Nos. 2017CA00180 and  
2017CA00181

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Family Court Division  
Case Nos. 2016JCV00618 and  
2016JCV00619

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 29, 2018

APPEARANCES:

For Appellee

For Appellant

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*Hoffman, J.*

{¶1} In Stark App. No. 2017CA00180, Appellant Melodi Bowers (“Mother”) appeals the August 28, 2017 Judgment Entry, and Findings of Fact and Conclusions of Law entered by the Stark County Court of Common Pleas, Family Court Division, which terminated her parental rights, privileges, and responsibilities with respect to her minor child (“Child 1”), and granted custody of Child 1 to Appellee Stark County Department of Job and Family Services (“SCDJFS”). In Stark App. No. 2017CA00181, Mother appeals a second August 28, 2017 Judgment Entry, and Findings of Fact and Conclusions of Law also entered by the Stark County Court of Common Pleas, Family Court Division, which terminated her parental rights, privileges, and responsibilities to her other minor child (“Child 2”), and granted permanent custody of Child 2 to SCDJS.

#### STATEMENT OF THE CASE AND FACTS

{¶2} Mother and Rory Bowers (“Father”)<sup>1</sup> are the biological parents of Child 1 and Child 2. On August 1, 2016, SCDJFS filed complaints, alleging Child 1 and Child 2 were dependent, neglected, and/or abused children. The allegations in the complaints centered on Mother’s severe drug use, her lack of parenting skills, the family’s lack of appropriate housing, and the children’s poor hygiene. The trial court conducted a shelter care hearing on the same day. After Mother and Father stipulated to a finding of probable cause, the trial court found probable cause and placed the children in the emergency temporary custody of SCDJFS. The trial court appointed Attorney Mary Lou Sekula as attorney and guardian ad litem for the children.

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<sup>1</sup> Father is not a party to either Appeal.

{¶13} At an adjudicatory hearing on September 30, 2016, the trial court found the children to be neglected and placed them in the temporary custody of SCDJFS. The trial court approved and adopted the case plan.

{¶14} The trial court conducted a review hearing on January 27, 2017, and found Mother was still using illicit drugs, had recently been evicted, and was not progressing on her case plan. The trial court again approved and adopted the case plan, and maintained the status quo.

{¶15} At a review hearing on May 30, 2017, the trial court found the children had recently disclosed Father had perpetrated persistent sexual abuse upon them in the past. The trial court also found there was evidence to believe Mother knew about the abuse and did nothing to prevent it from occurring or to protect the children. Further, Mother and Father had left the state of Ohio and moved to Florida. The trial court issued a No Contact Order, which also included the children's paternal grandparents.

{¶16} SCDJFS filed motions for permanent custody on June 16, 2017. Mother was served by certified mail. Attorney Sekula submitted her Guardian ad Litem Report on June 23, 2017, recommending the children be placed in the permanent custody of SCDJFS. The trial court conducted a review hearing on June 27, 2017, and found Mother was not making progress on her case plan, continued to disbelieve the children's statements regarding Father's sexual abuse, and had moved to Florida with Father after he was interviewed by police.

{¶17} The trial court conducted a hearing on the motions for permanent custody on August 10, 2017. Mother did not attend the hearing. Her counsel requested a continuance. Counsel for Mother offered no explanation for Mother's absence and could

not assure the trial court Mother would appear at a future date. Counsel for Mother also acknowledged Mother had been served and knew about the scheduled hearing. The trial court denied Mother's request for continuance and proceeded with the hearing.

{¶8} Vickie Mitchell, the ongoing case worker, testified SCDJFS became involved with the family after police responded to the home and found Mother on the front lawn, “drooling and incoherent” and under the influence of drugs. Police administered Narcan and Mother was transported to the hospital. Father was not present and could not be reached. The children were constantly filthy and were repeatedly left unsupervised. The home was in deplorable condition with animal waste covering the floor and food rotting. In addition, there were no working utilities and the home was infested with bugs.

{¶9} Mother's case plan required her to undergo a parenting evaluation at Northeast Ohio Behavior Health and follow all recommendations. The evaluation revealed Mother had a significant drug abuse history. Mother engaged in drug seeking behavior by “doctor shopping.” The evaluator recommended Mother undergo intensive substance abuse treatment, preferably at an in-patient facility; demonstrate an ability to maintain sobriety outside of a controlled setting for at least 9 months; find a sponsor; attend at least two to four 12 step meetings a week; engage in individual counseling, joint counseling with the children after she demonstrates a commitment to her sobriety, and joint counseling with Father; secure and maintain gainful employment; and secure appropriate housing. Once she maintained her sobriety for at least four months, Mother was to begin Goodwill parenting classes.

{¶10} Mother completed a substance abuse assessment at Quest. She sporadically attended group counseling. Mother underwent substance abuse treatment. Although it was recommended she continue aftercare, she failed to do so. Mother's most recent urine screen was negative, however, prior tests were positive for cocaine. Mother had not submitted a urine screen since April, 2017. She did not find a sponsor or attend 12 step meetings. Because Mother was unable to demonstrate at least four months of sobriety, she never began parenting classes. Mother did not obtain independent or stable housing. Mother's services stopped after she and Father moved to Florida in April, 2017.

{¶11} SCDJF's initial concerns centered upon Mother and Father's substance abuse and the unsanitary conditions in the home. However, in April, 2017, the children disclosed they had been sexually abused by Father. SCDJFS was especially alarmed as the Agency had learned Father was the alleged perpetrator of sexual abuse involving a young girl in a 2012 Summit County Department of Job and Family Service's case. Child 2 underwent a forensic evaluation. Child 1 was interviewed and provided specific details of Father rubbing the children's vaginal areas, taking nude photographs of the children, and forcing them to perform oral sex on him. Father told the children it was a secret. After the police interviewed Father, Mother and Father left Ohio, and moved into the paternal grandmother's home in Florida. Mother did not believe the allegations, and would not leave Father and return to Ohio to work on her case plan.

{¶12} Prior to the sexual abuse allegations coming to light, Mother and Father visited the children together on a weekly basis. Initially, visitation occurred at Goodwill. However, following the visits, the children's behavior regressed significantly. The children began to complain of stomach aches, used baby talk, and defecated in their pants.

Mother appeared under the influence during her visits and minimally interacted with the children. Mother did not bring food or snacks for the children to the visits. However, on one visit, Mother brought a sandwich for Father. Mother last visited the children in April, 2017. Mother's last contact with SCDJFS was via email in June, 2017.

**{¶13}** Carrie Schnirring, a psychology assistant at Northeast Ohio Behavioral Health, conducted a sexual abuse evaluation of Child 2. Child 2 stated the abuse occurred in the living room after Father closed the curtain. Child 2 felt sad, scared, and disgusted, and did not want to talk about the abuse. Child 2 was able to express what happened using an anatomically correct diagram, stating Father rubbed her vagina over her clothing with his hands. Child 2 told Schnirring about "starving". Child 2 spoke of her fear parents were dead as they could not be awakened. Father gave the children "bad whoopings" with his hand or a belt. Father gave the children little white pills to help them sleep. Schnirring diagnosed Child 2 with Adjustment Disorder with Mixed Anxiety and Depressed Mood. Child 2 is currently involved in trauma therapy.

**{¶14}** Dr. Aimee Thomas, a licensed psychologist and professional clinical counselor with Northeast Ohio Behavioral Health, completed parenting evaluations of Mother and Father. Due to Mother's use of mood altering substances, Dr. Thomas was unable to make an accurate psychological diagnosis. Dr. Thomas stated, "Although [Mother] may meet the criteria for medically based mental health disorders, this examiner is unable to assign such diagnosis until [Mother] demonstrates the ability to abstain from all mood altering substances, including prescribed medications, for at least nine months." Dr. Thomas diagnosed Mother with Substance Abuse Mood Disorder, Opiate Abuse Disorder, Cocaine Abuse Disorder, Rule out Benzodiazepine Abuse Disorder and Other

Specified Personality Disorder – histrionic and dependent traits, labile mood, and anger issues. Mother’s prognosis was “not favorable”. Dr. Thomas recommended Mother not regain custody of the children.

**{¶15}** During the best interest portion of the hearing, the evidence revealed the children are Caucasian. They have no health or behavioral issues. Child 1 was slightly delayed educationally in math and reading, but is now doing well and is on track in school. Both children had significant tooth decay when they came into custody, but such has been remedied. Both children see a counselor at least once each week. Initially, Child 1 was very anxious about basic necessities such as food, utilities, and a clean shelter. Now that the children are in a stable foster home, Child 1 feels safe. The children are placed in the same foster home. Although the foster parents are not interested in adopting the children, they are willing to care for the children until an adoptive home is found. Another couple has expressed an interest in adopting the children.

**{¶16}** SCDJFS explored relative placement. Mother had no relatives who were capable of caring for the children. Paternal grandmother initially expressed an interest in placement, but refused to establish a relationship with the children. Paternal grandmother was more concerned about when the children would be returned to Father. The children love their parents and miss them. They are worried about Mother. However, the children have clearly expressed a desire not to go back to their parents’ home.

**{¶17}** Via separate Judgment Entries, and Findings of Fact and Conclusions of Law filed August 28, 2017, the trial court terminated Mother’s parental rights, privileges, and responsibilities with respect to Child 1 and Child 2, and granted permanent custody of the children to SCDJFS. The trial court found the children could not and should not be

placed with Mother, and it was in the children's best interest to grant permanent custody to SCDJFS.

{¶18} It is from these judgment entries Mother appeals.

{¶19} In Stark App. No. 2017CA00180, Mother raises the following assignments of error:

I. THE TRIAL COURT ERRED IN DENYING MOTHER'S MOTION TO CONTINUE THE PERMANENT CUSTODY TRIAL.

II. THE TRIAL COURT'S DECISION AWARDED PERMANENT CUSTODY TO THE AGENCY WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

{¶20} In Stark App. No. 2017CA00181, Mother assigns the following as error:

I. THE TRIAL COURT ERRED IN DENYING MOTHER'S MOTION TO CONTINUE THE PERMANENT CUSTODY TRIAL.

II. THE TRIAL COURT'S DECISION AWARDED PERMANENT CUSTODY TO THE AGENCY WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.



{¶21} These cases come to us on the expedited calendar and shall be considered in compliance with App. R. 11.2(C).

Stark App. No. 2017CA00180

I

Stark App. No. 2017CA00181

I

{¶22} Because Mother's first assignments of error in both appeals are identical, we shall address them together. In her first assignments of error, Mother asserts the trial court erred in denying her motion to continue the permanent custody trial. We disagree.

{¶23} The decision to grant or deny a motion to continue is entrusted to the broad discretion of the trial court. *Hartt v. Munobe*, 67 Ohio St.3d 3, 9, 615 N.E.2d 617 (1993). Ordinarily, a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Wheat*, 5th Dist. Licking App. No.2003–CA–00057, 2004–Ohio–2088. An abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶24} In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test which takes into account a variety of competing considerations, including the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; and whether the defendant

contributed to the circumstance which gives rise to the request for a continuance. *State v. Unger*, 67 Ohio St.2d 65, 67–68, 423 N.E.2d 1078 (1981).

{¶25} Counsel for Mother requested the continuance because Mother failed to appear at the hearing. Counsel advised the trial court Mother had, in fact, known about the hearing, but offered no explanation for Mother's absence. Counsel did not provide the trial court with assurance Mother would attend a future hearing if the motion was granted.

{¶26} Based upon the information presented to the trial court, the absence of sufficient grounds for the continuance, and the children's need for permanency, we find the trial court did not err in denying Mother's request for a continuance.

{¶27} Mother's first assignments of error are overruled.

Stark App. No. 2017CA00180

II

Stark App. No. 2017CA00181

II

{¶28} Again, because Mother's second assignments of error in both appeals are identical, we shall address them together. In her second assignments of error, Mother contends the trial court's award of permanent custody to SCDJFS was not supported by clear and convincing evidence.

{¶29} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA5758. Accordingly, judgments supported by

some 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. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279.

**{¶30}** R.C. 2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates the trial court schedule a hearing and provide notice upon the filing of a motion for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

**{¶31}** Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (a) the child is not abandoned or orphaned, 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; or (d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

**{¶32}** Therefore, R.C. 2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial court will usually determine whether one of the four circumstances delineated in R.C.

2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶33} If the child is not abandoned or orphaned, the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the trial court must consider all relevant evidence before making this determination. The trial court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R.C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶34} Mother predicates these assignments of error on three grounds. First, Mother argues the trial court's finding the children were abandoned was not supported by credible, competent evidence due to the trial court's issuance of the No Contact Order on May 3, 2017. Next, Mother submits the trial court's determination the children could not or should not be placed with Mother within a reasonable time was not supported by clear and convincing evidence. Finally, Mother maintains the placement of the children with SCDJFS was not in their best interest because of the risk the children could be separated through adoption, which would not be in their best interest. We shall address each assertion in turn.

#### *Abandonment*

{¶35} R.C. 2151.011(C) provides "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than

ninety days, regardless of whether the parents resume contact with the child after that period of ninety days.”

{¶36} In the instant action, the trial court granted permanent custody of the children to SCDJFS based upon its determination, by clear and convincing evidence, it was in their best interest to grant permanent custody to the Agency and the children were abandoned. See, R.C. 2151.414(B)(1)(b).

{¶37} Mother does not dispute the fact more than 90 consecutive days passed since she last visited or had contact with the children. However, she asserts those days should not be counted as “abandonment” because the trial court issued a No Contact Order which prevented her from seeing them. We disagree. We find Mother’s voluntary actions created the circumstances which led to the issuance of the Order.

{¶38} The trial court issued the No Contact Order on May 3, 2017, after the children disclosed Father had sexually abused them. The trial court found Mother was aware of the abuse, but failed to protect the children. Mother moved to Florida with Father after he was interviewed by police regarding the children’s allegations. Mother refused to leave Father and return to Ohio to work on her case plan.

{¶39} Accordingly, under these circumstances, we find no error in the trial court’s finding the children were abandoned as contemplated by R.C. 2151.011(C).

*Cannot be placed with Mother within a Reasonable Period of Time*

{¶40} Even if the children had not been abandoned by Mother, the evidence presented at the permanent custody hearing supports the trial court’s alternative finding

the children cannot or should not be placed with Mother within a reasonable period of time.

{¶41} Mother failed to make significant progress on her case plan. She was unable to maintain her sobriety for any extended period of time. Mother did not commence parenting classes at Goodwill as she was unable to remain sober for four months. Mother completed a substance abuse assessment at Quest, and sporadically attended group counseling. Mother underwent substance abuse treatment. However, despite recommendations she continue aftercare, she failed to do so. Mother's most recent urine screen was negative, however, prior tests were positive for cocaine. Mother had not submitted a urine screen since April, 2017. She did not find a sponsor or attend 12 step meetings. Mother did not obtain independent or stable housing. Mother's services stopped after she and Father moved to Florida in April, 2017.

{¶42} Dr. Thomas was unable make an accurate psychological diagnosis due to Mother's use of mood altering substances, noting Mother may meet the criteria for medically based mental health disorders, but she could not assign such until Mother demonstrated the ability to abstain from all mood altering substances for at least nine months. Dr. Thomas did ultimately diagnose Mother with Substance Abuse Mood Disorder, Opiate Abuse Disorder, Cocaine Abuse Disorder, Rule out Benzodiazepine Abuse Disorder and Other Specified Personality Disorder – histrionic and dependent traits, labile mood, and anger issues. Mother's prognosis was "not favorable". Dr. Thomas recommended Mother not regain custody of the children.

{¶43} Based upon the foregoing, we find the trial court did not err in finding the children cannot and should not be placed with Mother within a reasonable time.

*Best Interest*

**{¶44}** 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.

**{¶45}** The best interest of the child is the primary consideration in permanent custody cases. *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979).

**{¶46}** As set forth in our Statement of the Case and Facts, *supra*, the children are Caucasian, and they have no health or behavioral issues. Child 1 was slightly delayed educationally in math and reading, but is currently doing well and on track in school. Both children see a counselor at least once each week. Initially, Child 1 was very anxious about basic necessities, but feels safe as a result of the stability of the foster home. The children are placed in the same foster home. Although the foster home is not interested in adopting the children, they are willing to care for the children until an adoptive home is found. Another couple recently met the children and expressed an interest in adopting them.

**{¶47}** SCDJFS explored relative placement. Mother had no relatives who were capable of caring for the children. Paternal grandmother initially expressed an interest in placement, but refused to establish a relationship with the children. She did not believe the children's disclosures about Father's sexual abuse of them. Paternal grandmother intended to return the children to Father if she was given custody.

**{¶48}** The children love Mother and miss her. They are worried about Mother. However, the children have clearly expressed a desire not to go back to their parents' home. They did not believe Mother would keep them safe from Father or be able to provide for their basic needs.

**{¶49}** Mother's assertion permanent custody was not in the children's best interest centered on the fact SCDJFS could not guarantee the children would be adopted or remain together indefinitely. Caseworker Mitchell testified every effort would be made to ensure the children remain together. SCDJFS was making efforts to find an adoptive home for the children. A family recently met the children and expressed an interest in adopting them. Meanwhile, the foster family would continue to care for them.

**{¶50}** We find the trial court's finding it was in the children's best interest to grant permanent custody to SCDJFS was supported by clear and convincing evidence.

**{¶51}** Mother's second assignments of error are overruled.



**{¶52}** The judgments of the Stark County Court of Common Pleas, Family Court Division, are affirmed.

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur

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