[Cite as *In re R.H.*, 2009-Ohio-5583.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
		No. 09AP-127
R.H.,	:	(C.P.C. No. 06JU09-13360)
(M.H.,	:	(REGULAR CALENDAR)
Appellant).	:	
In re:	:	
		No. 09AP-370
J.J.H.,	:	(C.P.C. No. 05JU08-11432)
(M.H.,	:	(REGULAR CALENDAR)
Appellant).	:	
In re:	:	
		No. 09AP-371
F.H.,	:	(C.P.C. No. 05JU08-11436)
(M.H.,	:	(REGULAR CALENDAR)
Appellant).	:	
In re:	:	
		No. 09AP-372
J.H.,	:	(C.P.C. No. 05JU08-11439)
(M.H.,	:	(REGULAR CALENDAR)
Appellant).	:	
In re :	:	
		No. 09AP-536
J.J.H.,	:	(C.P.C. No. 05JU08-11432)
(J.J.H.,	:	(REGULAR CALENDAR)
(Appellant).	:	

D E C I S I O N

Rendered on October 22, 2009

Jeffrey D. Reynard, for J.J.H.

Huma Khan, for M.H.

Angela Lloyd, Guardian ad litem.

Robert J. McClaren, for Franklin County Children Services.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

KLATT, J.

{¶1} Appellant, M.H. (the mother of J.J.H., F.H., R.H., and J.H.), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, awarding permanent custody of those children to appellee, Franklin County Children Services ("FCCS"). J.J.H. appeals from the same judgment. For the following reasons, we affirm that judgment.

{¶2} In 2005, appellant lived with her two oldest children, J.J.H., born May 15, 2003, and F.H., born July 7, 2004. In the spring of 2005, F.H. sustained broken bones at her home in two separate incidents. After appellant sought treatment for F.H.'s injuries, FCCS removed F.H. and J.J.H. from appellant's home in May 2005 because of the injuries and appellant's conflicting explanations for the injuries. A month later, on June 14, 2005, appellant gave birth to J.H. FCCS took custody of J.H. immediately from the hospital.

{¶3} On August 8, 2005, FCCS filed a complaint in the trial court alleging that F.H. was an abused, neglected, and dependent child. The same day, FCCS filed complaints alleging that J.J.H. and J.H. were dependent children. The complaints alleged that F.H. sustained two fractured bones within one month and that appellant provided conflicting statements as to how the child sustained the injuries. The complaints also noted the agency's concerns regarding appellant's mental health and appellant's ability to safely care for the children. On September 26, 2005, a magistrate adjudicated F.H. to be a neglected and dependent child and adjudicated J.J.H. and J.H. to be dependent children. The magistrate awarded temporary custody of each child to FCCS. The trial court subsequently approved and adopted the magistrate's adjudications.

{¶4} On October 11, 2005, the trial court adopted and approved a case plan for the reunification of the family. Significant components of that plan required appellant to: (1) maintain stable housing and employment; (2) participate in parenting programs; (3) undergo psychological evaluations; (4) participate in individual counseling; (5) attend scheduled visitations with her children; and, (6) undergo a drug and alcohol assessment and complete random urine screens for drugs. The plan also required appellant to follow up with any recommendations made and to utilize the skills learned in her parenting classes.

{¶5} On August 4, 2006, appellant gave birth to R.H. FCCS took custody of R.H. immediately from the hospital and on September 1, 2006, filed a complaint in the trial court alleging that R.H. was a dependent child. The complaint noted that FCCS had temporary custody of appellant's three older children. The complaint alleged that appellant had overdosed on Coumadine in an attempt to terminate this pregnancy. The

complaint further alleged that appellant had a history of mental illness and unstable housing. On November 8, 2006, a magistrate adjudicated R.H. to be a dependent child and awarded temporary custody of the child to FCCS. The trial court subsequently approved and adopted the magistrate's adjudications.

{¶6} As the case proceeded, appellant participated in individual counseling and two separate parenting programs, completed a drug and alcohol assessment, and was psychologically evaluated two times. Those evaluations revealed that appellant was mildly mentally retarded and moderately depressed. Appellant also attended the majority of visitation offered with her children.

{¶7} On July 6, 2007, FCCS moved, pursuant to R.C. 2151.413, for an award of permanent custody of the children. FCCS alleged that appellant was unable to retain and apply the parenting skills taught in the parenting programs. FCCS also alleged that appellant's parenting instructor expressed concerns that the children's safety would be at risk if they were returned to appellant's care.

{¶8} After a multi-day hearing, the trial court found by clear and convincing evidence that an award of permanent custody to FCCS was in the best interest of the children. Accordingly, the trial court divested appellant[1] of her parental rights, privileges, and obligations and awarded permanent custody of the children to FCCS.

{¶9} Appellant appeals only the award of permanent custody of R.H. to FCCS and assigns the following errors:

> 1. THE TRIAL COURT ERRED IN GRANTING FRANKLIN COUNTY CHILDREN SERVICES PERMANENT CUSTODY OF THE CHILD, AS REASONABLE PLANNING AND

[1] The father(s) of any of the children were not involved in this case.

> DILLIGENT EFFORTS TO REUNIFY MOTHER AND CHILD WERE NOT MADE.
>
> 2. THE TRIAL COURT ERRED IN FINDING THAT BY CLEAR AND CONVINCING EVIDENCE THE CHILD COULD NOT BE PLACED WITH HIS MOTHER WITHIN A REASONABLE TIME OR SHOULD NOT BE PLACED WITH HIS MOTHER IN THE FORESEEABLE FUTURE.

{¶10} J.J.H. also appeals and assigns the following error:

> [J.J.H.]'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE PERMANENT CUSTODY ORDER, WHICH WAS OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶11} At the outset, we recognize that parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388; *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054. The Supreme Court of Ohio has recognized the essential and basic rights of a parent to raise his or her child. *In re Murray* (1990), 52 Ohio St.3d 155, 157. These rights, however, are not absolute. *In re Awkal* (1994), 95 Ohio App.3d 309, 315; *In re Sims,* 7th Dist. No. 02-JE-2, 2002-Ohio-3458, ¶23. A parent's natural rights are always subject to the ultimate welfare of the child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 106. Thus, in certain circumstances, the state may terminate the parental rights of natural parents when it is in the best interest of the child. *In re Harmon* (Sept. 25, 2000), 4th Dist. No. 00CA-2694; *In re Wise* (1994), 96 Ohio App.3d 619, 624. The permanent termination of parental rights has been described as " 'the family law equivalent of the death penalty in a criminal case." ' *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Therefore, parents "must be afforded every procedural and substantive protection the law allows." Id.

{¶12} A decision to award permanent custody requires the trial court to take a two-step approach. First, a trial court must find whether 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 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.

R.C. 2151.414(B)(1).

{¶13} Once the trial court finds that one of these circumstances apply, the trial court then must determine whether a grant of permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). FCCS must prove by clear and convincing evidence that an award of permanent custody is in the child's best interest. Id. In determining the best

interest of a child, a trial court is required to consider all relevant factors including, but not limited to, the following:

> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
>
> (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period, 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;
>
> (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D)(1).

{¶14} A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones,* 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶28. "Judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *In re Decker,* 4th Dist. No. 00CA039, 2001-Ohio-2380; *Young v. Univ. of Akron,* 10th Dist.

No. 04AP-318, 2004-Ohio-6720, ¶25 (citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, paragraph one of the syllabus).

{¶15} In connection with the first step of the permanent custody analysis, appellant's second assignment of error and J.J.H.'s sole assignment of error each contend that FCCS failed to prove that R.H. and J.J.H. could not be placed with appellant within a reasonable time or should not be placed with her. R.C. 2151.414(B)(1)(a). However, under the plain language of R.C. 2151.414(B)(1), the court need not determine whether the child can or should be placed with either parent within a reasonable time, if the trial court concludes that the child had been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(d); *In re D.C.*, 10th Dist. No. 08AP-1010, 2009-Ohio-2145, ¶10. Here, the trial court made this "12 of 22" finding for both children. Therefore, we must initially determine whether R.H. and J.J.H. had been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. *In re J.W.*, 10th Dist. No. 06AP-864, 2007-Ohio-1419, ¶15 (no need to address whether or not child cannot be placed with parent or should not be placed with parent because the trial court properly proceeded under the "12 of 22" provision); *In re J.S*, 10th Dist. No. 05AP-615, 2006-Ohio-702, fn. 3 (same).

{¶16} We note, however, that FCCS can rely on the "12 of 22" provision only if the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period preceding the filing of the motion for permanent custody. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶26. Therefore, any time accruing between the time the motion for permanent custody is filed and the hearing does not count in the "12 of 22" analysis. *In re Dylan B.*, 5th Dist. No. 2007-CA-00362, 2008-Ohio-

2283, ¶24-26 (agency's motion filed before it had temporary custody of child for 12 months could not be granted on that ground). For purposes of R.C. 2151.414(B)(1), a child enters the temporary custody of an agency "on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home." Id.

{¶17} FCCS filed its motions for permanent custody for each child in this case on July 6, 2007. J.J.H. was adjudicated dependent pursuant to R.C. 2151.28 on September 26, 2005. He was removed from his home on May 11, 2005 and has not lived with appellant since that date. Accordingly, J.J.H. entered temporary custody of FCCS 60 days after May 11, 2005, or July 10, 2005. Therefore, he had been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period preceding the filing of the motion for permanent custody. In light of this, the trial court did not need to determine whether J.J.H. cannot or should not be placed with appellant within a reasonable time. Therefore, we overrule this portion of J.J.H.'s assignment of error.

{¶18} In contrast, R.H. was born on August 4, 2006 and was immediately removed from appellant's custody. Sixty days following FCCS' removal of R.H. from appellant's custody is approximately October 4, 2006. R.H. was adjudicated dependent on November 8, 2006. Neither October 4, 2006 nor November 8, 2006 is more than 12 months prior to the date FCCS filed the motion for permanent custody. Thus, FCCS could not rely on the "12 of 22" provision and, instead, had to prove that R.H. could not be placed with appellant within a reasonable time or should not be placed with appellant. *In re Bowers*, 7th Dist. No. 04 MA 216, 2005-Ohio-4376, ¶43 (noting that because agency

filed motion before it had temporary custody of child for 12 months, trial court required to find that child could not be placed with parent within a reasonable time or should not be placed with parents).

{¶19} The trial court found that R.H. cannot be placed with appellant within a reasonable time or should not be placed with her. In making this determination, the trial court had to find, by clear and convincing evidence, that one or more of the circumstances in R.C. 2151.414(E) existed. Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Holcomb* (1985), 18 Ohio St.3d 361, 368; *Cross v. Ledford* (1954), 161 Ohio St. 469, 477. Where the degree of proof required to sustain an issue is clear and convincing, 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. *In re B.L.*, 10th Dist No. 04AP-1108, 2005-Ohio-1151, ¶29 (citing *In re Gomer*, 3d Dist. No. 16-03-19, 2004-Ohio-1723, ¶12).

{¶20} In this case, the trial court found that a number of the R.C. 2151.414(E) circumstances existed. First, the trial court determined that following removal of the child, and notwithstanding reasonable case planning and FCCS' diligent efforts to assist appellant to remedy the problems that initially caused the child's removal, appellant failed continuously and repeatedly to substantially remedy the conditions causing the child to be removed. The trial court concluded that appellant did not utilize services that were available to her, i.e., parenting classes and individual counseling. R.C. 2151.414(E)(1).

{¶21} The trial court also determined that: (1) pursuant to R.C. 2151.414(E)(2), appellant suffers from mild mental retardation that makes her unable to provide an adequate permanent home for R.H. at the present time and within one year of the custody hearing, and (2) pursuant to R.C. 2151.414(E)(16), appellant cannot provide a safe, stable, structured, nurturing and stimulating environment.

{¶22} In essence, these findings all involve two issues: appellant's inability to safely care for and provide for her children, and her inability to learn and apply parenting skills. Each witness called by FCCS expressed concerns about these issues.

{¶23} As part of appellant's case plan, Dr. Douglas Pawlarczyk, a psychologist who does evaluations for Netcare Access, evaluated appellant twice: once in 2006 and again in 2008. The doctor testified that appellant's I.Q. scores fell within the mild range of mental retardation. He concluded that appellant's adaptive skills were consistent with those low scores. He also concluded that appellant suffered from a mild to moderate level of depression, mainly caused by the removal of her children. The doctor testified that appellant's limited cognitive and adaptive skills would make it difficult for her to recognize and respond to her children's needs. The doctor also noted that appellant often became agitated and irritated during visits with her children. He even had to intervene at one point during a visit out of concern for the safety of the children. He concluded that she was unable to deal with the children's attention-seeking behavior.

{¶24} Craig Fitzgerald, the FCCS case worker assigned to this family, testified that he observed half of appellant's visits with the children. He testified that appellant first attended parenting classes at Directions for Youth sometime in 2007. After those classes, he observed visits during which appellant would get frustrated with the children

and would rely on others at the visits to assist. She was unable to utilize skills that were taught in her parenting program. As a result, FCCS referred appellant to another, more tailored, parenting program. This was a comprehensive in-home parenting class where advisors came to appellant's home during visits and would coach her and work with her in dealing with the children. This in-home training lasted six or seven months. The training was terminated after appellant demonstrated an inability to utilize the skills taught in the program. Despite these programs, appellant was still not utilizing the necessary parenting skills. Fitzgerald believed that the children's safety would be in jeopardy if appellant was responsible for supervising her children. (Tr. at 88).

{¶25} Fitzgerald also expressed his concerns regarding appellant's employment and monthly income and, consequently, her ability to maintain stable housing. According to appellant, medical issues have prevented her from working for almost a year. She makes money by doing odd jobs in the neighborhood and relies on her current boyfriend for money. Appellant requested the agency to help her pay her rent shortly before the hearing in this matter. Although she had lived in her current home for almost a year at the time of the hearing, she had moved three or four times since this case opened.

{¶26} Given the testimony addressing appellant's inability to safely care and provide for her children, and her inability to learn and apply parenting skills, the trial court had sufficient evidence before it to determine that one or more of the circumstances in R.C. 2151.414(E) existed. Accordingly, the trial court did not err when it determined that R.H. cannot be placed with appellant within a reasonable time or should not be placed with her. Therefore, we overrule appellant's second assignment of error.

{¶27} J.J.H. contends in his sole assignment of error that the trial court's decision that an award of permanent custody was in his best interest was against the manifest weight of the evidence. We disagree because there is competent, credible evidence in the record supporting the trial court's best interest finding. *In re G.B.*, 10th Dist. No. 04AP-1024, 2005-Ohio-3141, ¶19.

{¶28} To determine whether an award of permanent custody is in the child's best interest, the trial court must consider the factors set forth in R.C. 2151.414(D)(1). The trial court addressed each of those factors.

{¶29} R.C. 2151.414(D)(1)(a) addresses the interaction of the child with his parents, relatives, and foster parents. Fitzgerald testified that the children are all bonded with each other. He also described the children's bond with appellant. All of the children called appellant "Mom" and they were excited to visit with her. He did note a "special bond" between J.J.H. and appellant. He also testified that he thought a bond existed between the children and their foster mother. This factor does not weigh in favor of the trial court's decision as it relates to J.J.H.

{¶30} R.C. 2151.414(D)(1)(b) concerns the wishes of the child as expressed by him or through the guardian ad litem. J.J.H. expressed his wish to live with appellant. The other children were too young to express their wishes. The children's guardian ad litem, however, was in favor of an award of permanent custody to FCCS. In regards to J.J.H., this factor weighs against the trial court's decision.

{¶31} Next, R.C. 2151.414(D)(1)(c) concerns the custodial history of the child. J.J.H. spent the first two years of his life with appellant. FCCS removed J.J.H. from

appellant's care in May 2005 and he has been in foster care since that time, a period of more than 4 years. This factor weighs in favor of the trial court's decision.

{¶32} R.C. 2151.414(D)(1)(d) assesses whether the child's need for a legally secure placement could be achieved without a grant of permanent custody to FCCS. The trial court concluded that appellant could not provide a legally secure placement because of her inability to meet her children's minimal needs of care and safety. As set forth earlier, Dr. Pawlarczyk's and Fitzgerald's testimony supports this conclusion. Additionally, appellant is unable to maintain consistent employment and, therefore, sufficient income to support her children. This factor weighs in favor of the trial court's decision.

{¶33} Finally, R.C. 2151.414(D)(1)(e) takes into account whether certain of the R.C. 2151.414(E) findings exist. None of these findings are applicable in this case.

{¶34} Notwithstanding J.J.H.'s wishes, the record reflects competent, credible evidence upon which the trial court could rely in determining that an award of permanent custody was in J.J.H.'s best interest. Accordingly, the award of permanent custody to FCCS is not against the manifest weight of the evidence. This portion of J.J.H.'s assignment of error is overruled.

{¶35} Finally, appellant's first assignment of error contends that FCCS failed to make reasonable efforts to reunify her and R.H. We disagree.

{¶36} The Supreme Court of Ohio has recently clarified that an agency must make reasonable efforts to reunify the family during the proceedings prior to the termination of parental rights. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶43. Reasonable efforts are efforts to " 'resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed. * * *' " Id. at ¶28 (quoting

Will L. Crossley, Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation (2003), 12 B.U.Pub.Int.L.J. 259, 260). If the agency has not established that reasonable efforts have been made prior to the hearing on a motion for permanent custody, then it must demonstrate such efforts at that hearing. Id.; *In re D.C.*, at ¶14.

{¶37} The trial court found that FCCS made reasonable efforts to reunify appellant and R.H. Appellant argues that FCCS did not make reasonable efforts because her case plan was not narrowly tailored to meet her particular needs in light of her mental disability. Appellant's argument for narrowly tailored services focuses only on FCCS' efforts as they relate to her parenting programs. Appellant does not challenge FCCS' efforts to assist her in complying with the other components of her case plan.

{¶38} In regards to the parenting component of appellant's case plan, the trial court noted the agency's use of in-home parenting training for appellant. Fitzgerald testified that appellant did not demonstrate the ability to learn and apply parenting skills after she completed her first parenting program. Therefore, FCCS referred appellant to the second training program, which consisted of one-on-one in-home help from providers who were able to assist appellant while she was with her children. Dr. Pawlarczyk testified that this type of interactive, hands-on training was more appropriate for appellant and more effective then simply attending parenting programs. However, if this in-home training failed, he concluded that it would be difficult to find any other type of parenting skills training that could be helpful. Despite this significant in-home training, appellant was unable to understand and utilize the parenting skills necessary to safely and

adequately care for her children. Fitzgerald did not know of any other parenting skills training that would be helpful if the in-home training was unsuccessful.

{¶39} The record reflects that FCCS made reasonable efforts to reunify this family and, specifically, tailored those efforts in light of appellant's mental disability by referring her to specialized, in-home parenting training that was more appropriate for appellant. Therefore, we overrule appellant's first assignment of error.

{¶40} In conclusion, we overrule appellant's two assignments of error and J.J.H.'s sole assignment of error. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

FRENCH, P.J., and McGRATH, J., concur.

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