

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
L.M.,	:	No. 10AP-445
	:	(C.P.C. No. 09JU01-512)
(L.M.,	:	
	:	(ACCELERATED CALENDAR)
Appellant).	:	
In the Matter of:	:	
L.M.,	:	No. 10AP-447
	:	(C.P.C. No. 09JU01-511)
(L.M.,	:	
	:	(ACCELERATED CALENDAR)
Appellant).	:	

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D E C I S I O N

Rendered on November 9, 2010

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*John J. Peden*, for appellant.

*Susan M. Kawalec and Robert J. McClaren*, for appellee  
Franklin County Children Services.

*Daniel Fletcher*, Guardian ad Litem.

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

CONNOR, J.

{¶1} Appellant, L.M. ("appellant" or "mother"), appeals from two judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which terminated her parental rights and awarded permanent custody of her two

children, L.M. I and L.M. II, to Franklin County Children Services ("FCCS"). For the following reasons, we affirm the decisions of the trial court.

{¶2} On or about October 16, 2008, FCCS received a professional referral alleging L.M. I was an abused child. As a result, FCCS filed complaints alleging L.M. I was an abused, neglected and dependent child, and L.M. II was a dependent child. A temporary order of custody was granted to FCCS regarding both children. Because these temporary orders of custody were due to expire by operation of law, the complaints were dismissed and re-filed on January 13, 2009 and FCCS was again granted temporary custody.

{¶3} The re-filed complaints alleged that on October 12, 2008, L.M. I, age four months at that time, was transported to Children's Hospital due to unresponsiveness and subsequently suffered seizures. Testing revealed L.M. I's sodium levels were extremely low. Mother admitted to feeding L.M. I with diluted formula. This, along with diarrhea, likely caused L.M. I's low sodium levels (hyponatremia) and seizures. This incident marked L.M. I's fourth admission to the hospital with symptoms of uncertain etiology. The complaints also alleged mother did not have stable housing or a source of income. The complaints further alleged mother has a history with FCCS dating back to 2000, and has an older child in the legal custody of a relative.

{¶4} Pursuant to a hearing held on April 8, 2009, L.M. II was found to be a dependent minor and L.M. I was found to be an abused minor. Orders of temporary court commitment were granted to FCCS on that date. The magistrate journalized these findings pursuant to entries filed on April 15, 2009.

{¶5} In May 2009, reunification case plans were approved and adopted, which included the following goals for mother: obtain and maintain stable, independent housing; obtain and maintain employment and/or a means to support her children; obtain medical coverage for herself and her children; complete parenting classes; cooperate with FCCS to provide medical releases as well as releases for her probation officer and her anger management counselor; be able to meet the children's basic needs; complete a psychological exam; and provide random urine screens upon request.

{¶6} On August 28, 2009, FCCS filed motions for permanent custody. Amended motions for permanent custody were subsequently filed on January 15, 2010. In the amended motions, FCCS alleged, inter alia, the following: the children were abandoned; the children have been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period; the children cannot be placed with either parent within a reasonable time or should not be placed with either parent; mother failed to complete various case plan objectives, which included obtaining employment as well as stable and independent housing, and utilizing medical, psychiatric, psychological, or other resources made available to her for the purpose of changing her conduct in order to allow her to resume parental duties.

{¶7} A trial on the motion for permanent custody was held on the following non-consecutive days: March 18, March 29, March 31, and April 6, 2010. Both mother and the alleged father of L.M. I were present and represented by counsel. The alleged father of L.M. II was not present, although the record demonstrated proof of publication had been completed.

{¶8} In its case-in-chief, FCCS introduced the testimony of mother, the alleged father of L.M. I, foster mother Donna Noble, FCCS caseworker Michelle McKarn, and the Guardian ad Litem, Daniel Fletcher. Appellant presented the following three witnesses in her case-in-chief: Janet Greene (appellant's aunt), Darlene Hicks (appellant's mother), and Laquisha Miller (appellant's sister). The alleged father of L.M. I did not present any witnesses.

{¶9} On April 19, 2010, after considering the testimony and evidence presented, the trial court issued judgment entries terminating the parties' parental rights. Specifically, the juvenile court found, by clear and convincing evidence, that the children had been in the custody of FCCS for 12 months or more of a consecutive 22-month period and that it was in the best interest of the children to grant permanent custody to FCCS.

{¶10} Appellant filed a timely appeal asserting the following assignments of error for our review:

Assignment of Error – I

The Trial Court committed reversible error when it failed to consider the best interest of the children by not acting on requests from two different relatives for custody of the children.

Assignment of Error – II

The Trial Court committed an abuse of discretion by arbitrarily choosing to hear the motion for permanent custody and mak[ing] no ruling as to the two pending motions for custody from independent parties. This amounts to reversible error.

{¶11} 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. Permanent custody judgments which

are supported by some competent, credible evidence going to all essential elements of a case will not be reversed as being against the manifest weight of the evidence. *In re Brofford* (1992), 83 Ohio App.3d 869, 876-77. In considering a trial court's decision to grant permanent custody to FCCS, this court must determine from the record whether the trial court had sufficient evidence before it. *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887.

{¶12} An appellate court should not substitute its judgment for that of the trial court when there is competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. Clear and convincing evidence is the 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. *In re Abram*, 10th Dist. No. 04AP-220, 2004-Ohio-5435. Clear and convincing evidence does not mean the evidence must be clear and unequivocal, nor does it require proof beyond a reasonable doubt. *Id.* The reviewing court must weigh the evidence in order to determine whether the trier 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. *In re R.L.*, 10th Dist. No. 07AP-36, 2007-Ohio-3553, ¶6, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶13} " 'The discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316.

{¶14} However, it is also "well recognized that the right to raise a child is an 'essential' and 'basic' civil right." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' " *In re Hayes*, ¶48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Accordingly, parents must receive every procedural and substantive protection the law permits. *Id.* "Because an award of permanent custody is the most drastic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children." *In re Swisher*, 10th Dist. No. 02AP-1408, 2003-Ohio-5446, ¶26, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 105.

{¶15} A decision to award permanent custody requires the trial court to conduct a hearing and make a two-part finding. A trial court may grant permanent custody of a child to an agency if the court determines, by clear and convincing evidence, that: (1) it is in the best interest of the child; and (2) that one of the following factors set forth under R.C. 2151.414(B)(1) applies: (a) the child cannot or should not be placed with the parents; (b) the child is abandoned; (c) the child is orphaned; or (d) the child has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶23-27.

{¶16} As stated above, R.C. 2151.414(B) sets forth a two-pronged test that the juvenile court must apply when deciding a motion for permanent custody. *In re: J.S.E.*, 11th Dist. No. 2009-P-0091, 2010-Ohio-2412, ¶20. Typically, the juvenile court will determine whether one of the four circumstances delineated in R.C. 2141.414(B)(1)(a)

through (d) is present before making a determination regarding the best interest of the child. *Id.*

{¶17} Here, appellant does not challenge the trial court's finding under R.C. 2151.414(B)(1)(d) that the children had been in the custody of FCCS for at least 12 of 22 consecutive months. Instead, in her first assignment of error, appellant only argues the trial court failed to consider the best interest of the children when it failed to act on the motions filed by two family members requesting legal custody of the children. Furthermore, in her second assignment of error, mother asserts the trial court's decision to hear the permanent custody motion first and to decline to rule on the other two custody motions was arbitrary and thus constitutes reversible error. Because these two assignments of error are intertwined, we shall address them together.

{¶18} Appellant's aunt, Janet Greene, filed a motion for legal custody of L.M. II and L.M. I on March 18, 2010, less than two hours before the permanent custody hearing was scheduled to begin. At the hearing, the juvenile court informed Ms. Greene that the permanent custody motion would be heard first, and if that motion was denied, her motion for custody would be addressed. Then, on March 22, 2010, prior to the beginning of the second day of trial, Darlene Hicks, the mother of appellant and the maternal grandmother of the children, filed a motion for custody. The trial court made a similar determination with respect to the priority of Ms. Hicks' motion for legal custody and proceeded with the permanent custody motion filed by FCCS.

{¶19} Appellant now argues the juvenile court should have considered the custody motions of the relatives at the hearing, prior to making a final determination on the permanent custody motion. Appellant submits that new evidence in a trial can be

presented up until the close of the case. Additionally, appellant denies that this argument is presented on behalf of Ms. Greene or Ms. Hicks, neither of whom appealed the trial court's determination, and therefore claims standing is not an issue. Instead, appellant simply asserts that the trial court's failure to consider the relatives' motions for custody and its failure to allow the relatives to participate in the hearing constitutes a failure to determine the best interest of the children. Appellant further argues the trial court's decision to proceed first on the permanent custody motion without ruling on the other motions for custody constitutes an abuse of discretion.

{¶20} In response to mother's arguments, FCCS submits mother lacks standing to assert any claims filed on behalf of her nonappealing, nonparty relatives. Even if mother did have standing to assert these claims, FCCS asserts appellant's trial counsel had a full opportunity to question mother's relatives in order to demonstrate their suitability for custody and counsel was unable to show that they were suitable. Additionally, FCCS argues the trial court is not required to explicitly rule upon the relatives' motions for legal custody, nor is the trial court required to consider placing a child with a relative prior to granting permanent custody. Based upon testimony presented at the hearing, which revealed Ms. Greene and Ms. Hicks were not suitable for custody, FCCS asserts the trial court properly exercised its discretion in failing to grant either relative's motion for legal custody. Furthermore, FCCS argues the juvenile court properly analyzed the best interest factors and determined permanent custody was in the best interest of the children.

{¶21} Despite appellant's statement to the contrary, appellant's first assignment of error appears to assert the purported rights of Ms. Greene and Ms. Hicks to pursue



custody as relatives. This court has repeatedly questioned whether an appellant has standing to assert the rights of others who are not parties to this appeal. See *In re S.W.*, 10th Dist. No. 05AP-1368, 2006-Ohio-2958, ¶30, cert. denied in *Z.W. v. Franklin Cty. Children Servs.* (2007), 549 U.S. 1183, 127 S.Ct. 1152; *In re [A.C.]*, 10th Dist. No. 03AP-348, 2003-Ohio-5344, ¶7 (father lacked standing to assert the claims of a relative who was not a party to the appeal); *In the Matter of M.K.*, 10th Dist. No. 09AP-1141, 2010-Ohio-2194, ¶19; *In re W.A.*, 10th Dist. No. 06AP-485, 2006-Ohio-5750, ¶20, discretionary appeal not allowed, 112 Ohio St.3d 1422, 2006-Ohio-6712; and *In re D.T.* (May 6, 2008), 10th Dist. No. 07AP-853, ¶8, discretionary appeal not allowed, 119 Ohio St.3d 1416, 2008-Ohio-3880.

{¶22} Although appellant cites to *In re Smith* (1991), 77 Ohio App.3d 1, for the proposition that an appealing party may assert an error against a nonappealing party when the error is prejudicial to the rights of the appealing party, we find that case to be distinguishable from the instant case. In *Smith*, the interests of the appellants-parents were aligned with the interests of five of their children, all of whom sought reunification. However, the guardian for the children, who also served in a dual capacity as attorney for the children, was not recommending that the children be returned to their parents. Thus, the interests of the Smith children were prejudiced by the lack of separate counsel and because those interests were the same as the interests expressed by the Smith parents, the parents were found to have standing to assert the issue as an assignment of error. Such is not the case here, since the children are too young to express their wishes, and thus there can be no conflict.

{¶23} However, even assuming, for the sake of argument, that mother does have standing to assert this particular challenge, a juvenile court considering permanent custody in a dispositional hearing has the discretion to award legal custody to either parent or to any person who files a motion for legal custody. *In re Zorns*, 10th Dist. No. 02AP-1297, 2003-Ohio-664, ¶28; R.C. 2151.353(A)(3). Furthermore, R.C. 2151.353(A)(3) does not require a juvenile court to consider placing children with a relative prior to granting permanent custody to an agency, because relatives are not afforded the same presumptive rights conferred upon a parent. *In re Zorns* at ¶28. See also *In re Dyal*, 4th Dist. No. 01CA11, 2001-Ohio-2383 ("a juvenile court need not find, by clear and convincing evidence, that a relative is an unsuitable placement option prior to granting the permanent custody request"); *In re S.W.* at ¶30; *In re Poke*, 4th Dist. No. 05CA15, 2005-Ohio-5226; and *In re Turner*, 5th Dist. No. 2006CA00062, 2006-Ohio-4906, ¶35.

{¶24} In her second assignment of error, appellant argues that the juvenile court abused its discretion by arbitrarily choosing to hear the motion for permanent custody prior to hearing the motions for legal custody filed by the two relatives and by failing to explicitly rule on those two motions.

{¶25} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151. Because the juvenile court is not required to make a determination regarding a relative's motion for legal custody prior to granting permanent custody to an agency, we find the trial court's decision to first address the permanent custody motion was not arbitrary and therefore did not constitute an abuse of discretion.

{¶26} In her first assignment of error, appellant has also argued that because the trial court failed to consider the relatives' requests for custody and declined to allow the relatives to participate in the trial or to have counsel appointed for them, the trial court failed to determine the best interests of the children. We disagree.

{¶27} Mother complains that Ms. Greene and Ms. Hicks were not joined as parties, were not allowed to participate in the hearing, and were not appointed counsel. However, both motions for legal custody were filed at the "eleventh hour." Ms. Greene's motion was filed less than two hours before the hearing was to begin and Ms. Hicks' motion was filed after a day of testimony and evidence had already been heard. Furthermore, a trial court has wide discretion in determining the parties to a juvenile court action. See *In re D.T.* at ¶13. Appellant has cited to nothing which required the trial court to allow Ms. Greene or Ms. Hicks to intervene or to be joined as parties. In addition, although the trial court did not explicitly make a ruling with respect to Ms. Greene's and Ms. Hicks' motions, which essentially requested that they be joined as parties and considered for custody,<sup>1</sup> by failing to rule on said motions, the trial court, in effect, denied the motions. See *Vahdati'bana v. Scott R. Roberts & Assoc., L.P.A.*, 10th Dist. No. 07AP-581, 2008-Ohio-1219.

{¶28} Furthermore, although the trial court did not join Ms. Greene or Ms. Hicks as parties or specifically hear their motions for legal custody simultaneously with the motion for permanent custody, the trial court did hear testimony about these relatives, their involvement with the children, and the suitability for custody. Michelle McKarn, the FCCS caseworker involved with the family, testified that Ms. Green had previously been

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<sup>1</sup> Filed simultaneously with both motions for legal custody were motions to add a new party.

considered for placement of the children, but her home study was denied due to a lack of income. Ms. Green herself admitted this was true. Ms. Green also testified that she had not seen the children since they were placed into foster care more than one year ago.

{¶29} In addition, the caseworker testified that she had contacted Ms. Hicks twice during the pendency of the case to determine whether Ms. Hicks was interested in having the children placed in her care. However, both times Ms. Hicks indicated she did not want custody of L.M. II and L.M. I. The caseworker testified that she had this discussion with Ms. Hicks early in the case after the children were removed and then again in May 2009. Ms. Hicks admitted that she had known for nearly a year that FCCS intended to seek permanent custody of the children. She also admitted that she was never very close to L.M. I and that since this case has been pending, she had only visited with the children on two occasions. In addition, she conceded she was not familiar with the specifics of L.M. I's special needs, although she did indicate she was willing to learn about them in order to take care of him.

{¶30} Moreover, the Guardian ad Litem pointed out that Ms. Greene and Ms. Hicks both lacked insight into the special needs of the children, suggesting it was not in the best interest of the children to be placed with either relative.

{¶31} Therefore, although the trial court did not actually hear the relatives' motions for legal custody, it is evident that the trial court heard testimony about the suitability of these relatives at the same time that it heard evidence regarding mother's failure to complete various components of the case plan, as well as her lack of understanding of L.M. I's special needs, particularly his feeding issues.

{¶32} Finally, appellant argues the trial court failed to determine the best interests of the minor children by failing to hear the relatives' motions for legal custody. In determining the best interest of the child, the trial court is required to consider all relevant factors, including, but not limited to: (1) the interaction and interrelationship of the child with the parents, siblings, relatives, foster caregivers, 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 Guardian ad Litem, with due regard for the child's maturity; (3) the custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies for 12 or more months of a consecutive 22-month period; (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (5) whether any of the factors in divisions (E)(7) to (11) of R.C. 2151.414 are applicable.

{¶33} As to the fifth factor listed above, the factors set forth in R.C. 2151.414(E)(7) through (11) include: (1) whether the parents have been convicted of or pled guilty to various crimes; (2) whether medical treatment or food has been withheld from the child; (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse; (4) whether the parent has abandoned the child; and (5) whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶34} Here, we find the trial court properly analyzed, applied, and considered the best interest factors. The trial court analyzed the "bond" the children had with the mother, the foster mother, grandmother, and the great aunt. Based upon the testimony

presented, the trial court properly found the children had "no bond" with Ms. Hicks or Ms. Greene, but that they had "some bond" with mother and were "very bonded" with the foster mother, and also bonded to each other. (April 19, 2010 Judgment Entry, R. 137 at 5-6.) The trial court noted that the children were too young to express their wishes regarding custody. Also, as previously indicated, the trial court found that the children had been in the custody of FCCS for 12 or more months of a 22-month period. Additionally, the trial court referenced the children's need for a legally secure placement and found that such placement could not be achieved without a grant of permanent custody to FCCS. Finally, the trial court determined that none of the factors set forth in R.C. 2151.414(E)(7) through (11) were applicable.

{¶35} These findings are supported by the evidence and testimony presented during the hearing. In addition to the discussion of the testimony set forth above, the record also demonstrates that both children have made amazing strides since their placement with the foster family. The foster mother testified that when L.M. II first came to live with them, she was assessed as having a large adaptive behavior delay, a speech delay, and a low cognitive score. Once she began attending an MRDD preschool and was placed in a structured environment with a regular routine, she overcame her speech delay and her cognitive skills were no longer affected. In addition, the caseworker testified that L.M. II was previously a very frightened child who has now developed into a child who will readily engage with the caseworker and who has a very strong bond with her foster family. The caseworker also indicated L.M. II identifies her foster home as her home and cares for and trusts her foster parents and looks to them for attention, comfort, and questions.

{¶36} With respect to L.M. I, the foster mother described L.M. I as having developmental delays in the areas of gross motor skills, fine motor skills, and speech, as well as serious feeding issues. He also suffers from constipation, acid reflux, and possibly asthma. As a result of these issues, he requires a very structured day that involves various exercises and therapies designed to assist him in learning to eat without choking, to become more mobile, and to develop basic speech skills, as well as gross and fine motor skills. The caseworker testified that he has made amazing progress in terms of his developmental delays, including learning to walk and becoming more audible, as well as learning to successfully capture the attention of his foster parents when he wants or needs something. She also testified that the foster parents were very loving and diligent in their efforts to care for L.M. I, as the routine for addressing his special needs takes a lot of work and commitment.

{¶37} Based upon all of this testimony, the trial court's findings that L.M. I is too fragile to risk being placed with a family member recognizes that it is not in his best interest to be placed with family members who are completely unfamiliar with his special needs and with the commitment required to meet them, and that L.M. I and L.M. II should remain together, due to their strong bond and his special needs. Furthermore, given mother's family's failure to express any interest in being involved until the "eleventh hour," mother's failure to complete certain objectives in the case plan and to remedy the problems which initially caused the children to be placed outside the home, and the children's need for legally secure placement that will meet L.M. I's special needs and allow them to continue to make progress and thrive, the trial court's findings in applying the best interest factors are supported by the record.

{¶38} Accordingly, we overrule appellant's first and second assignments of error and affirm the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

*Judgments affirmed.*

BROWN and KLATT, JJ., concur.

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