

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
J.M. et al.,	:	No. 15AP-234
(G.S.,	:	(C.P.C. No. 12JU-6048)
Appellant).	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on September 29, 2015

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*Skinner & Associates, LLC, and Todd A. Fichtenberg, for  
appellant G.S.*

*Robert J. McClaren, for appellee Franklin County Children  
Services.*

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

TYACK, J.

{¶ 1} Appellant, G.S., appeals the decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which terminated the parental rights of G.S. and J.M., Sr. and had their children permanently committed to Franklin County Children Services ("FCCS"). For the following reasons, we affirm the decision of the trial court.

{¶ 2} Appellant assigns two errors for our consideration:

I. The trial court's finding that FCCS's motion for permanent custody was supported by clear and convincing evidence is against the manifest weight of evidence.

II. The trial court abused its discretion by denying Appellant G.S.'s motion for a continuance.

{¶ 3} On February 8, 2012, J.M., Jr., and M.M. (the "children") of the mother G.S. and father J.M., Sr. were removed from the home of G.S. and placed in a foster home under the temporary custody of FCCS. On June 11, 2012, the trial court adopted the magistrate's decision finding the children to be dependent minor children and then committed them to the temporary custody of FCCS. FCCS filed a motion for permanent custody on June 24, 2013. After a three-day hearing, on September 10, 2014, February 9, 2015, and February 13, 2015, the trial court granted permanent custody to FCCS and terminated G.S. and J.M., Sr.'s parental rights on March 16, 2015. G.S. timely appealed the trial court's order, and the appeal is properly before this court.

{¶ 4} G.S.'s first assignment of error argues that the trial court's finding that FCCS's motion for permanent custody being supported by clear and convincing evidence is actually against the manifest weight of the evidence.

{¶ 5} Pursuant to R.C. 2151.353(A)(2), the children were adjudicated as dependent and placed in the temporary custody of FCCS. FCCS filed a motion for permanent custody pursuant to R.C. 2151.413(A). FCCS must meet the requirements of R.C. 2151.414(B)(1) in order to be granted permanent custody. The statute states, in pertinent part:

[T]he court may grant permanent custody of a child to a movant if the court determines at the hearing \* \* \* by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

\* \* \*

(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 \* \* \*.

R.C. 2151.414(B)(1). The fact that the children have been in temporary custody for more than 12 months has not been contested. Once the trial court finds that one of the circumstances of R.C. 2151.414(B)(1) applies, then it must determine by clear and convincing evidence whether a grant of permanent custody is in the best interest of the

child. R.C. 2151.414(B)(1). "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477 (1954). It is an intermediate standard, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. *Id.* Clear and convincing does not mean clear and *unequivocal*. *Id.*

{¶ 6} The trial court then determines the best interest of the child considering all relevant factors including, but not limited to:

- (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 \* \* \*;
- (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). The trial court, after many factual determinations, concluded that it was in the children's best interest to be permanently committed to FCCS for the purpose of adoption.

{¶ 7} 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 N.W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶ 6; *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶ 28. Decisions supported by 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. *Melvin v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-975, 2011-Ohio-3317, ¶ 34; see *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978). A trial court's findings of fact are presumed correct, and "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to decide." *Eagle Land Title Agency v. Affiliated Mtge. Co.*, 10th Dist. No. 95APG12-1617 (June 27, 1996), citing *State v. Thomas*, 70 Ohio St.2d 79 (1982). This presumption arises because 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." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 8} We note, at the onset of our analysis, the well-established law that the right to parent one's children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28. Parents have a "fundamental liberty interest" in the care, custody, and management of the child. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In recognition of the significance of that fundamental interest, the Supreme Court of Ohio has described the permanent termination of parental rights as "the family law equivalent of the death penalty in a criminal case." *In re Hayes*, 79 Ohio St.3d 46, 48 (1997). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.*

{¶ 9} The trial court found many facts on which it relied in its determination, including:

The children lack adequate care, supervision, school attendance, adequate food, and stable housing, because of the mother's severe chemical addiction and dependence on her high school aged children for child care for these [at the time of removal] two infants. The father is in prison until 2018 on a conviction for being a drug dealer. The mother has entered and failed drug treatment many times and relapsed out of every program in which she has enrolled.

The children had been placed together in the same foster home for three years. The foster parents wish to adopt these two children. There are 11 children in the foster home, including [J.M., Jr. and M.M.].

(R. 265, Permanent Custody Judgment Entry, 1-2.) The trial court, when determining the best interest of the children, stated the interactions and interrelationship of the children with various parties when going through the relevant factors of R.C. 2151.414(D)(1)(a): that the children were bonded to their parents, that they were very bonded to each other and their foster caregivers, and that they were limited to acquaintance only with relatives. (R. 265, Permanent Custody Judgment Entry, 5.) The trial court also listed the other factors of R.C. 2151.414(D)(1):

(b) The wishes of the children are for placement with foster parents as a result of the stability experienced in the foster home, which were expressed by the children to the Guardian ad Litem (GAL). The maturity of the children are [J.M., Jr.], six years of age, and [M.M.], five years of age.

(c) The custodial history of the children are as follows: from birth ([J.M., Jr.], DOB 10/28/08, [M.M.], DOB 11/18/09), to February 8, 2012, in mother's care. From February 8, 2012, to February 13, 2015, in foster care.

(d) The children need a legally secure permanent placement. That type of placement cannot be achieved without a grant of permanent custody to Franklin County Children Services. The mother did not maintain stable housing without eviction.

(R. 265, Permanent Custody Judgment Entry, 5.) The trial court determined that R.C. 2151.414(E)(10) does apply as the children are considered abandoned by the father due to J.M., Sr.'s incarceration until 2018.

{¶ 10} The trial court also considered other testimony and evidence: there was a determination at pre-trial that a separate attorney for the children was not necessary as there was no conflict between the wishes of the children and the position of the guardian ad litem ("GAL"); that the GAL supports the motion for permanent custody; that housing was not established; that employment was sometimes established, and that G.S. likes to be employed but drug use interfered with her employment.

{¶ 11} The trial court also found that G.S. visited very consistently and had few missed visits and that both parents needed mental health evaluation. The father, J.M., Sr., did not complete his evaluation, but G.S. did, and she was diagnosed with post-traumatic stress disorder ("PTSD"), bi-polar disorder, and obsessive-compulsive disorder.

G.S. was prescribed three medications, and she started but did not finish counseling. The trial court also found:

[G.S.]'s chronic drug abuse addiction causing her drug use needs to take priority over the custodial needs of the children. Specifically, [G.S.]'s inability to maintain housing on a consistent and stable basis. She used most of her income for the purchase of drugs instead of making rent payments.

(R. 265, Permanent Custody Judgment Entry, 6.) The trial court also found that drug screens were completed many times and were positive on some occasions.

{¶ 12} G.S. makes several arguments that the trial court was mistaken in its interpretation of the evidence or did not take certain evidence into account. G.S. argues that the trial court was mistaken that she is only bonded rather than very bonded with her children. The trial court found that G.S. visits her children faithfully and consistently. A case worker stated that, during visits, G.S. would hug and kiss the children, and give them snacks and other treats. The GAL stated that G.S. is bonded with the children and that the children love her. (Feb. 13, 2015 Tr. 150.)

{¶ 13} The children had been in foster care for three years, longer than they lived with G.S. (Sept. 10, 2014 Tr. 33.) The GAL testified: "The children are very bonded with the foster parents. They are very bonded with the other children in the foster home; that seemed to be their normal environment. They have their bedroom, toys, clothes. They seem very happy there." (Feb. 13, 2015 Tr. 149-50.) It is clear from the testimony of the GAL, who had made observations of both G.S. and the foster family within one week of the end of the hearing, that the trial court's finding that G.S. is bonded and the foster parents are very bonded is not against the manifest weight of the evidence.

{¶ 14} G.S. argues that J.M., Jr. and M.M. have expressed a desire to live with her. G.S. testified that the children have said that they want to come home with her. (Feb. 13, 2015 Tr. 138.) G.S. also questions the reliability and consistency of the GAL's testimony:

Both times, [M.M.] has been very clear with me that she wants to stay in the foster home. When I was at the foster home and asked [J.M., Jr.], [J.M., Jr.] was very clear that he wanted to stay in the foster home. When I asked [J.M., Jr.] that after the visit with the aunt and uncle that I just did on February 5<sup>th</sup>, he still indicated that he wanted to stay at the foster home, but it was difficult to - - he was very avoid - - he

did not wanna (sic) discuss it. It was very difficult to get him to focus on the topic.

(Feb. 13, 2015 Tr. 157-58.) While there is conflicting testimony from the GAL and G.S., we believe that the finding of fact of the trial court is correct. We take into account that the children certainly could have expressed a desire to live with both their mother and the foster family at different times. The record does not cause us to question the reliability or consistency of the GAL's testimony. The trial court's finding is not against the manifest weight of the evidence that the children expressed a desire to stay in the foster home.

{¶ 15} G.S. argues that the children could be placed with their paternal uncle who filed a motion for custody so permanent placement would not be required. The testimony shows that, while the uncle had been working on obtaining custody, he was not able to complete a background check based on his citizenship status. Further, the home study that had been completed when the children were placed with the uncle had expired since such studies are only valid for one year.

{¶ 16} G.S. also argues that the adoption by the foster family is not guaranteed. The GAL expressed some concern over the 11 total children in the foster home including M.M. and J.M., Jr. G.S. argues that the children could live with her and that she would be able to provide housing on a short notice. G.S. testified that she is adequately managing her mental health and drug addiction. However, at the time of the end of the hearing, G.S. was living in temporary housing and was not permitted to have the children live with or visit her. In the months between the hearing dates, G.S. stayed with friends and relatives. Before the hearing, G.S. lived in a number of places and was incarcerated part of the time. The only independent housing indicated was the home from which the children were originally removed, which G.S. no longer has access to.

{¶ 17} The trial court found in regards to G.S. at the time permanent custody was assigned: "[G.S.'s] present drug treatment program at Southeast Mental Health Center, in addition to medication for mental health treatment for PTSD, depression, schizoaffective disorder, also includes a residential housing component with no provision for child custody. [G.S.] would need to go to a shelter at this time if she were to have custody." (R. 265, Permanent Custody Judgment Entry, 2.) Further, it was indicated that it could be

months or up to one year before G.S. could have her own housing. The testimony and evidence of the record supports the trial court's conclusion.

{¶ 18} Having examined the record, we find that the various findings of fact and conclusions of the trial court are supported by the evidence. We find that the trial court's decision terminating the parental rights of G.S. and J.M., Sr. and having the children permanently committed to FCCS is supported by clear and convincing evidence and is not against the manifest weight of the evidence.

{¶ 19} The first assignment of error is overruled.

{¶ 20} The second assignment of error argues that the trial court abused its discretion in denying G.S.'s motion for a continuance at trial on February 9, 2015. On September 10, 2014, the first day of the hearing, the trial court granted a continuance and ordered that a custody evaluation be completed on the children by a counselor, to be arranged by the GAL, and to be given to the court at the next hearing date. These evaluations were never completed or returned to the court. G.S. argues that, had these evaluations been in front of the court, it would have made a difference in the case, and that is why the continuance of February 9, 2015 was requested. This was one of two reasons for requesting the continuance, the second being that G.S. had failed to show up for the hearing on that day. The continuance was denied after hearing from the attorneys present. G.S. fortunately did eventually make an appearance that morning and was able to participate in the hearing after her arrival.

{¶ 21} An appellate court will not reverse based on a denial of a continuance unless the trial court abused its discretion. *In re B.G.W.*, 10th Dist. No. 08AP-181, 2008-Ohio-3693, ¶ 23. "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*, 5 Ohio St.3d 217, 219 (1983). When an appellate court considers whether denying a continuance is an abuse of discretion, several factors are considered: (1) the length of the delay, (2) prior continuances, (3) presence of legitimate reasons for the request, (4) the defendant's participation that led to a request for a continuance, and (5) any other relevant factors. *State v. Unger*, 67 Ohio St.2d 65, 67-68, (1981).



{¶ 22} Additionally, the request for a continuance was made on the day of the hearing, which requires good cause to be shown for it to be granted. Loc.R. 2 of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch; *In re A.P.*, 10th Dist. No. 08AP-186, 2009-Ohio-438, ¶ 5.

{¶ 23} First, G.S. argues that the length of the requested continuance would only have been until the evaluation results were before the court. However, the primary purpose of the continuance was because, at the time, G.S. had failed to appear before the court, and there was no indication of when the results of the evaluations would be completed. Second, there had already been many continuances granted in this case. Some of them G.S. supported.

{¶ 24} Third, while there is a legitimate reason for the request, namely, that there were evaluations done through Netcare, no report had come before the court in the five months since the beginning of the hearing. Also, the Netcare evaluations were not the original evaluations intended by the court. The court intended what would have been a very cost-prohibitive psychological evaluations. There is also indication in the record that these evaluations were ordered when the children's aunt was still interested in having them placed in her home.

{¶ 25} Fourth, the February 9, 2015 continuance was requested by and only supported by appellant's attorney, not any other party. It was denied with the focus of the motion being the fact that G.S. had failed to appear.

{¶ 26} Lastly, the minor children's best interests, a factor the trial court could consider, supports the trial court's decision to deny a continuance, as the children had been in foster care for three years and potentially had an opportunity for adoptive placement. *In re B.G.W.* at ¶ 27. It is not necessary to determine whether there was good cause shown for the continuance as it is clear that the motion was made primarily because G.S. had failed to appear and the ancillary reason of custody evaluations had lost much of its relevance as the evaluations were not the ones the court intended and the purpose, to evaluate placement of the children with their aunt, had been eliminated.

{¶ 27} Having examined the relevant factors, we do not find that the trial court abused its discretion in denying the continuance.

{¶ 28} The second assignment of error is overruled.

{¶ 29} Having overruled the two assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

*Judgment affirmed.*

LUPER SCHUSTER and HORTON, JJ., concur.

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