

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN THE MATTER OF:

A.T.-D., et al.

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CASE NOS. CA2015-03-059
CA2015-03-060
CA2015-04-068

OPINION
6/29/2015

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. JN2012-0556, JN2012-0557

Legal Aid Society, Jonathan Ford, 10 Journal Square, 3rd Floor, Hamilton, Ohio 45011,
Guardian Ad Litem for children

Amy Ashcraft, 240 East State Street, Trenton, Ohio 45067, Guardian Ad Litem for father

Garrett Law Offices, Dawn Garrett, 9435 Waterstone Boulevard, Suite 140, Cincinnati, Ohio
45249, for appellant, B.D.

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Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee

Kim Schneider, P.O. Box 18104, Fairfield, Ohio 45018, for appellant, H.T.

S. POWELL, J.

{¶ 1} Appellants, H.T. and B.D., the biological parents of A.T.-D. and I.T.-D.,
hereinafter referred to as Mother and Father, appeal from a decision of the Butler County
Court of Common Pleas, Juvenile Division, granting permanent custody of their two children

to appellee, the Butler County Department of Job and Family Services, Children Services Division (BCDJFS). For the reasons outlined below, we affirm.

{¶ 2} On October 24, 2012, BCDJFS filed two complaints alleging A.T.-D. and I.T.-D., who were then just two and three years old, were neglected and dependent children. As part of these complaints, BCDJFS alleged Mother had contacted the agency claiming she was "overwhelmed and unable to care for her children" after Father had left them approximately one month prior, his whereabouts then unknown. The complaints also alleged that during a home visit in response to Mother's call for help, the children were found in a dark room that smelled of urine. According to the complaints, when asked about the smell, Mother claimed "the room smells because the children urinate all over the room." The complaints further alleged that the home was dirty, that it was infested with flies and roaches, and that the septic system was not working properly. After holding an emergency ex parte hearing on the matter, both A.T.-D. and I.T.-D. were placed in the temporary custody of BCDJFS. The juvenile court then appointed a guardian ad litem and a court-appointed special advocate for the children.

{¶ 3} On January 22, 2013, the juvenile court held a hearing, wherein Mother stipulated to A.T.-D. and I.T.-D. being adjudicated dependent children, with the allegation of neglect being dismissed. It is undisputed that Father did not appear at this hearing, thus prompting the juvenile court to find him in default. The juvenile court then adopted a case plan relative to Mother that required her to complete a psychological evaluation, participate in a parenting and life skills program, demonstrate an increase in her parenting skills and knowledge, and obtain and maintain stable housing and income. The psychological evaluation later revealed Mother had been diagnosed with adjustment and personality disorders.

{¶ 4} On April 23, 2013, the juvenile court held a review hearing, during which time Father made his first appearance in this matter. Following this hearing, the juvenile court also ordered Father to undergo a psychological evaluation to determine if granting him visitation time with the children was appropriate. Father, however, did not complete the psychological evaluation until several months later on November 20, 2013. The psychological evaluation indicated Father suffered from anxiety, mood and bipolar disorders, as well as mild mental retardation and a personality disorder. In addition, because there was a then pending protection order against him, the psychological evaluation also recommended Father complete a domestic violence assessment before permitting any visitation time with the children. Father subsequently completed the domestic violence assessment on January 8, 2014. The juvenile court then adopted a case plan relative to Father that required him to receive psychiatric care and individual therapy for his various mental health issues, as well as attend parenting classes. Thereafter, once the protection order had been lifted, Father was permitted weekly one-hour supervised therapeutic visitation time with the children.

{¶ 5} On February 6, 2014, over 15 months after the children were originally placed in foster care, BCDJFS filed a motion requesting permanent custody of A.T.-D. and I.T.-D. A three-day permanent custody hearing was then conducted before a juvenile court magistrate that ultimately concluded on December 15, 2014. As part of this hearing, the magistrate heard testimony from both Mother and Father, as well as from the children's foster mother and guardian ad litem, among others. Following this hearing, on December 22, 2014, the magistrate issued its decision finding it was in A.T.-D. and I.T.-D.'s best interest to grant BCDJFS permanent custody of the children. Mother and Father both filed objections to the magistrate's decision, which the juvenile court subsequently denied, thereby affirming and adopting the magistrate's decision in full.

{¶ 6} Mother and Father now appeal from the juvenile court's decision granting permanent custody of A.T.-D. and I.T.-D. to BCDJFS, collectively raising three assignments of error for review. For ease of discussion, Mother's first assignment of error and Father's single assignment of error will be addressed together.

{¶ 7} Mother's Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT'S DECISION AND ORDER GRANTING PERMANENT CUSTODY OF A.T.-D. AND I.T.-D. TO THE BUTLER COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES WAS NOT SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE AND WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 9} Father's Assignment of Error No. 1:

{¶ 10} THE COURT'S ORDER OF PERMANENT CUSTODY AND DENIAL OF LEGAL CUSTODY TO FATHER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND WAS NOT IN THE CHILDREN'S BEST INTEREST.

{¶ 11} In her first assignment of error and his single assignment, Mother and Father both argue the juvenile court's decision granting permanent custody of A.T.-D. and I.T.-D. to BCDJFS was not in the children's best interest when considering the best-interest factors provided under R.C. 2151.414(D)(1). In support of their claims, Mother and Father argue the juvenile court's decision was not supported by sufficient clear and convincing evidence and was otherwise against the manifest weight of the evidence. After a thorough review of the record, we find no merit to these claims.

{¶ 12} Before a natural parent's constitutionally protected liberty interest in the care and custody of his or her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *In*

re A.W., 12th Dist. Fayette No. CA2014-03-005, 2014-Ohio-3188, ¶ 11, citing *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982). An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient, credible evidence exists to support the juvenile court's determination. *In re S.H.*, 12th Dist. Butler Nos. CA2014-12-259 and CA2015-01-008, 2015-Ohio-1763, ¶ 11. Thus, a reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re S.U.*, 12th Dist. Clermont No. CA2014-07-055, 2014-Ohio-5748, ¶ 10. Clear and convincing evidence is "that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 42, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 13} Pursuant to R.C. 2151.414(B)(1), a court may terminate parental rights and award permanent custody to a children services agency if it makes findings pursuant to a two-part test. *In re G.F.*, 12th Dist. Butler No. CA2013-12-248, 2014-Ohio-2580, ¶ 9. Initially, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors provided under R.C. 2151.414(D). *In re D.K.W.*, 12th Dist. Clinton No. CA2014-02-001, 2014-Ohio-2896, ¶ 21. Next, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *In re I.B.*, 12th Dist. Butler No. CA2014-12-244, 2015-Ohio-1344, ¶ 12, citing R.C. 2151.414(B)(1)(a), (b), (c) and

(d). Only one of those findings must be met for the second prong of the permanent custody test to be satisfied. *In re T.D.*, 12th Dist. Preble No. CA2009-01-002, 2009-Ohio-4680, ¶ 15.

{¶ 14} In this case, the juvenile court found by clear and convincing evidence that A.T.-D. and I.T.-D. had been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period preceding the filing of BCDJFS's motion for permanent custody of the children on February 6, 2014. Neither Mother nor Father disputes this finding. Rather, as noted above, Mother and Father merely dispute the juvenile court's finding that granting permanent custody of A.T.-D. and I.T.-D to BCDJFS was in the children's best interest when considering the best-interest factors provided under R.C. 2151.414(D)(1).

{¶ 15} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing:

[T]he court shall 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 * * *;
- (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.

{¶ 16} With respect to R.C. 2151.414(D)(1)(a), the juvenile court found both A.T.-D.

and I.T.-D. had a strong bond with Mother, who the children refer to as "purple mommy" or "purple hair mommy," which Mother maintained by consistently attending her weekly supervised visitation time with the children. The juvenile court also found that the children exhibited an appropriate bond with their maternal grandmother, as well as Mother's husband, and the children's two minor aunts aged 7 and 13 years, respectively. The juvenile court further found that the children shared a strong bond with each other.

{¶ 17} However, while acknowledging these connections, the juvenile court also found the children had recently been experiencing nightmares, as well as other inappropriate behaviors, immediately following their visitation time with Mother. The juvenile court further noted at least one instance where Mother had taken the children into the bathroom during her supervised visitation time and removed their underwear. The children's foster mother later testified that she twice noticed the children's underwear had either been removed or changed following Mother's supervised visitation time.

{¶ 18} As it relates to Father, the juvenile court noted that Father was initially prohibited from seeing A.T.-D. and I.T.-D. due to a protection order that Mother had obtained based on allegations he had struck Mother and had burned I.T.-D.'s hand on a stove. Father denied these allegations. Nevertheless, since the protection order was lifted, the juvenile court found Father had been attending, albeit somewhat sporadically, his weekly one-hour supervised therapeutic visitation time with the children. The juvenile court also noted that Father had not been employed since 2009, instead receiving income solely from his social security benefits resulting from his permanent disability. The juvenile court further noted that Father, who relies heavily on public transportation, specifically acknowledged that his current residence, a minimally furnished one-bedroom apartment, was not appropriate for children.

{¶ 19} In regards to their adjustment to foster care, the juvenile court noted that the

children were "essentially non-verbal" upon being placed with their foster parents. Initially described by their foster mother as "feral," the juvenile court also found the children had exhibited poor social skills and poor personal hygiene habits. The juvenile court further noted that within days of being removed from Mother's care, the children were witnessed by their foster parents engaging in multiple instances of sexualized behavior.

{¶ 20} For instance, the children's foster mother testified that within three or four days after being placed in their home, she witnessed as the children "both had their finger, each other finger, opposite finger in their, each other's vagina." The children's foster mother also testified that she saw I.T.-D. take her legs "and she spread them like this over the chair arm to the chairs and said to me, touch, touch, hussy," which, due to the child's speech impediments, she interpreted to mean the child's vagina. Mother later testified that "hoosy" was a word she had used previously in speaking to I.T.-D. in reference to her daughter's vagina. Downplaying these concerns, however, Mother testified: "I am not the only parent in the world who has not used the specific name when it comes to a [young child.]" Yet, even then, there was also testimony that I.T.-D. was observed masturbating and is alleged to have twice put her finger into her foster sister's rectum.

{¶ 21} Despite these concerns, as well as other concerns regarding the children's anger management, the juvenile court found the children have improved since being placed in foster care and began participating in speech and occupation therapy, among other services. In addition, the juvenile court found the children now have a regular schedule, and have developed appropriate hygiene, bathing and eating routines. The juvenile court also found the children have been acclimating appropriately in their preschool classes. According to the children's foster mother, who the children refer to as their "mommy," A.T.-D. and I.T.-D. "have come leaps and bounds over the last almost two years of what, where they were as to

what they are now developmentally and speech, speech, understanding comprehension, conversation."

{¶ 22} In consideration of R.C. 2151.414(D)(1)(b), the juvenile court stated that it did not conduct an in camera interview with A.T.-D. or I.T.-D. due to their young ages and their developmental delays. However, the juvenile court did note that the report and recommendations submitted by both the guardian ad litem and the court-appointed special advocate recommended the children be placed in the permanent custody of BCDJFS. Specifically, as part of his report and recommendations, the guardian ad litem noted that Mother has "continually minimized the severity of the children's behaviors, and has not accepted any responsibility for the conditions that existed upon the children's removal." In addition, as it relates to Father, the guardian ad litem noted that although he had engaged in the required case plan services since he began participating in the case, "he is presently unable to provide a stable, safe, and appropriate home for [the children]." The report and recommendation submitted by the court-appointed special advocate echoed these sentiments.

{¶ 23} With regard to R.C. 2151.414(D)(1)(c), the juvenile court found the children were adjudicated dependent children on January 22, 2013 after BCDJFS filed its neglect and dependency complaint on October 24, 2012. Thereafter, over 15 months after the children were originally placed in foster care, BCDJFS filed its motion requesting permanent custody of the children on February 6, 2014. As noted above, this constitutes clear and convincing evidence that A.T.-D. and I.T.-D. had been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period.

{¶ 24} Finally, in consideration of R.C. 2151.414(D)(1)(d), the juvenile court found this case commenced after Mother contacted BCDJFS seeking assistance in taking care of the

children. At that time, the juvenile court found the children were in "abysmal condition in terms of their behavior, development, and physical delays" that required "significant intervention by their foster family and by professionals." The juvenile court also noted that Mother was ordered to participate in a psychological evaluation, which diagnosed her with adjustment and personality disorders, thereby requiring her to participate in individual counseling. However, although initially attending several individual counseling sessions, the juvenile court found Mother "failed to actively engage in counseling services until July of 2014, more than 20 months after the children were placed in foster care." The juvenile court also noted that no evidence was submitted regarding any progress Mother might be making as a result of her individual counseling.

{¶ 25} Continuing, as it relates to the children's sexualized behavior, the juvenile court found the evidence indicated that such behavior "has not been endorsed" in non-abused children. The juvenile court also found that because the sexualized behavior occurred almost immediately after the children were removed from Mother's care and placed with their foster parents, "the cause of the behaviors must predate that removal."

{¶ 26} In addition, as it relates to her housing issues, the juvenile court found Mother had been residing in a three-bedroom apartment with five other people; namely, her mother and her mother's fiancé, as well as her husband and the children's two minor aunts. The record also indicates that Mother kept four pet rats in the apartment. The juvenile court further found that this apartment appeared to be "minimally physically appropriate for placement of the children." Nevertheless, prior to moving into this apartment, the juvenile court noted that Mother had been residing with her husband's parents who "refused to allow either the BCDJFS or the [guardian ad litem] to visit their home."

{¶ 27} The juvenile court next found that although Father's weekly one-hour

supervised therapeutic visitation time with the children had been going well, by his own admission, Father cannot afford to care for the children considering his sole source of income was from social security benefits resulting from his permanent disability. The juvenile court also found Father then resided in a one-bedroom apartment that was "furnished with a chair and an inflatable mattress." The juvenile court further noted that Father has a significant history of mental health issues that have required him to be hospitalized approximately seven times due to anxiety or depression. The juvenile court also noted Father had cognitive limitations "which limit his ability to function and comprehend the issues involved in this case."

{¶ 28} Based on these findings, the juvenile court determined that neither Mother nor Father could provide the children with a legally secure placement. In reaching this decision, the juvenile court found "Father's psychological, psychiatric and cognitive issues are virtually insurmountable." The juvenile court also found "Mother's psychological issues, which remain as one of the cases of the condition of the children when they entered foster care, remain virtually untreated." Accordingly, the juvenile court found neither A.T.-D., nor I.T.-D. could be provided with a legally secure placement absent a grant of permanent custody to BCDJFS. As the juvenile court stated, "placement of these children in the permanent custody of the BCDJFS is in their best interests."

{¶ 29} Despite these findings, which we note are supported by sufficient, credible evidence, Mother argues the juvenile court's decision was not in A.T.-D. and I.T.-D.'s best interest because she "loved them very much, visited consistently, and maintained a strong bond with her children." Similarly, Father argues that the juvenile court's decision was not in A.T.-D. and I.T.-D.'s best interest because he has a strong bond with his children and because his children look forward to and are happy to visit with him.

{¶ 30} Yet, although a strong bond may very well exist, that is but one factor to be considered when determining the best interest of a child in a permanent custody proceeding under R.C. 2151.414(D)(1). *In re I.B.*, 12th Dist. Butler No. CA2014-12-244, 2015-Ohio-1344, ¶ 20. It is well-established that "R.C. 2151.414(D) does not give one factor 'greater weight than the others.'" *In re C.G.*, 10th Dist. Franklin Nos. 13AP-632 and 13AP-653, 2014-Ohio-279, ¶ 37, quoting *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶ 56; *In re D.R.*, 12th Dist. Butler No. CA2009-01-018, 2009-Ohio-2805, ¶ 14. Therefore, Mother and Father's arguments that the strong bond they share with the children should trump the other relevant factors and negate the juvenile court's permanent custody decision are without merit.

{¶ 31} Father also argues the juvenile court's decision to grant permanent custody of A.T.-D. and I.T.-D. to BCDJFS was not in the children's best interest considering he "has income, stable housing, and additionally would be eligible for food stamps to support his girls." However, as the record indicates, once the protection order was lifted, Father's contact with the children has been somewhat sporadic, spending only one hour of weekly supervised therapeutic visitation time with the children. In addition, Father, who relies heavily on public transportation, has not been employed since 2009, receiving only social security benefits resulting from his permanent disability. Moreover, while claiming he has stable housing, Father specifically acknowledged that his current residence, a minimally furnished one-bedroom apartment, was not appropriate for children. Therefore, Father's argument that it was in A.T.-D. and I.T.-D.'s best interest to be placed in his custody rather than with BCDJFS is without merit.

{¶ 32} In light of the foregoing, and after carefully reviewing the record in this case, we find the juvenile court's findings are supported by sufficient, credible evidence and are

otherwise not against the manifest weight of the evidence. Again, just as the juvenile court found, Mother and Father are simply not capable of providing A.T.-D. and I.T.-D. with the safety and stability that they need to overcome their significant behavior, development, and physical delays. Therefore, while Mother and Father may have a loving and bonded relationship to A.T.-D. and I.T.-D., we find no error in the juvenile court's decision finding it was in the children's best interest to be placed in the permanent custody of BCDJFS. Accordingly, Mother's first assignment of error and Father's single assignment of error are without merit and overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED BY FINDING THAT MOTHER FAILED TO REMEDY THE CONDITIONS CAUSING PLACEMENT OUTSIDE THE HOME.

{¶ 35} In her second assignment of error, Mother argues the juvenile court erred by finding she had continuously and repeatedly failed to remedy the conditions that led to A.T.-D. and I.T.-D.'s removal. However, as this court has stated previously, the finding that a child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period "obviates consideration of whether the parents have remedied the conditions which caused the removal of the children, and whether the children could not, or should not be placed with the parents." *In re T.T.*, 12th Dist. Butler Nos. CA2004-07-175 and CA2004-08-198, 2005-Ohio-240, ¶ 25. "Instead the agency must only show that granting permanent custody is in the best interest of the children." *In re A.F.*, 12th Dist. Butler No. CA2011-12-233, 2012-Ohio-2958, ¶ 37. Therefore, as discussed more fully above, because the juvenile court's findings it was in A.T.-D. and I.T.-D.'s best interest to grant permanent custody to BCDJFS was supported by sufficient, credible evidence and otherwise not against the manifest weight of the evidence, any error the juvenile court may have made would be, at

worst, harmless error. Accordingly, Mother's second assignment of error is without merit and overruled.

{¶ 36} Judgment affirmed.

M. POWELL, P.J., and RINGLAND, J., concur.