

[Cite as *In re M.H.*, 2016-Ohio-3407.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN RE:	: Case No. 15CA39
M.H.,	:
	:
ADJUDICATED DEPENDENT	DECISION & JUDGMENT ENTRY
CHILD.	:
	:

APPEARANCES:

James A. Wallace, Athens, Ohio, for Appellant

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee

CIVIL CASE FROM COMMON PLEAS COURT, JUVENILE DIVISION

DATE JOURNALIZED: 6-7-16

ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court, Juvenile Division, judgment that granted Athens County Children Services (ACCS) permanent custody of six-year-old M.H. Y.H., the child's father and appellant herein, assigns the following error for review:

“THE TRIAL COURT’S FINDING THAT A GRANT OF PERMANENT CUSTODY TO ACCS WAS IN THE CHILD’S BEST INTEREST WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.”

{¶ 2} On June 25, 2015, M.H. reported to her daycare provider that the previous night, her mother put a plastic bag on her head while she was in bed and told her to go to sleep. The child explained that she tried to remove the bag, but her mother struggled to keep the bag on her head.

The next day, ACCS requested emergency custody and filed an abuse, neglect, and dependency complaint and requested temporary custody.

{¶ 3} On July 2, 2015, ACCS filed an amended complaint that requested permanent custody. ACCS alleged that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. ACCS claimed that the child cannot be placed with the mother due to her attempts to harm the child. ACCS asserted that in addition to the most recent incident when the mother attempted to harm the child, on July 26, 2014 the mother called 911 to report that she had tried to smother the child with a pillow. At that time, the mother was admitted to Appalachian Behavioral Health, and the child was placed in ACCS's temporary custody. In February 2015, the child was returned to her mother's care and in May 2015, ACCS terminated the case.

{¶ 4} ACCS also asserted that the child cannot be placed with the father due to his father's imprisonment. ACCS alleged that the father has been incarcerated since February 28, 2014 and is not scheduled to be released until January 6, 2017.

{¶ 5} On September 17, 2015, the trial court adjudicated the child dependent and dismissed the abuse and neglect allegations. The court continued the child in ACCS's temporary custody.

{¶ 6} On November 3, 2015, the trial court held a hearing to consider ACCS's permanent custody complaint. At the start of the hearing, the child's mother entered a voluntary surrender of her parental rights. Appellant testified that although he will remain in prison until January 6, 2017, he would like his father to have custody of the child. Appellant explained that when he is released from prison, he would live with his father and the child and would try to take responsibility for raising the child.

{¶ 7} ACCS caseworker Tara Carsey testified that she worked with the child both times that she was removed from her mother's care. Carsey stated that she visited the father in prison to discuss his wishes and the father informed her that he would like one of his parents to have custody. Carsey stated that ACCS allowed the grandfather to have monthly two-hour visits with the child.

{¶ 8} Carsey further testified that the child is doing well in foster care and in school. Carsey explained that the child receives trauma focused counseling to help address the trauma suffered as a result of her mother's actions. Carsey stated that ACCS was aware of the grandfather's desire to have custody of the child, but ACCS had concerns that the grandfather would continue to allow the mother to have contact with the child. Carsey also testified that the child stated that she would like to remain in her current foster home.

{¶ 9} The child's guardian ad litem testified that she attempted to visit the grandfather's home to review it for possible placement, but he stated that the home was not ready for the child. The guardian ad litem stated that the child is doing well in the foster home and related her belief that awarding ACCS permanent custody is in the child's best interest.

{¶ 10} The child's grandfather testified that he is willing to care for the child. He stated that he currently lives in a two-bedroom home that would be suitable for the child, and that he informed the guardian ad litem that the house was not ready for the child because he had recently moved into it and had not completed unpacking boxes.

{¶ 11} The grandfather also testified that he shares a "great relationship" with the child, and before ACCS obtained custody, he saw her three or four days per week. The grandfather stated that if he had custody, he would obey any court order that prohibited the child from seeing

her mother. He testified that he believes that allowing him to have temporary custody until the father's release from prison is in her best interest. The grandfather stated that he believes that placing her with family rather than strangers, would be best for the child. The grandfather also explained that he has completed some steps of the adoption process and that he understood that he would be able to petition to adopt the child if ACCS is awarded permanent custody.

{¶ 12} On November 17, 2015, the trial court awarded ACCS permanent custody of M.H.. The court determined that awarding ACCS permanent custody is in the child's best interest. With respect to the child's interactions and interrelationships, the court explained:

“Mother experiences significant mental illness and has twice attempted to harm (or kill) her daughter by strangulation or suffocation. Mother and father separated in April 2013, and since that time, father has seen very little of M.H. In fact, he has seen her only twice in the last two and one-half years. Paternal grandparents are divorced with grandmother living in Colorado. Grandfather has the most consistent history of appropriate interaction with M.H. and wishes to continue that in some fashion. He has verbally offered himself as a caregiver, and wants more visitation than the once a month he currently receives. All evidence suggests that he and M.H. have a bonded relationship.”

The court considered the child's wishes and stated:

“M.H. is a six year old who reports that she does not want to go home to mother. She has adjusted well to her foster parents, and states that she would like to stay there. It is unclear if other options were considered by her, just as it is unclear how much weight should be given to her stated wishes, given her broken home and traumatic events.”

{¶ 13} The court also reviewed the child's custodial history and found that the parents separated in April 2013. Before the parents separated, the child lived with both parents. After the parents separated, the child lived with her mother until ACCS obtained emergency custody in July 2014. The child was in ACCS's temporary custody from July 28, 2014 through February 23, 2015, and again from June 2015 through the present.

{¶ 14} With respect to the child's need for a legally secure permanent placement and whether she could achieve a permanent placement without granting ACCS permanent custody, the court explained:

“This little girl needs and deserves a legally secure placement. Mother, apparently recognizing the risk that her own mental illness represents to her daughter, has surrendered her rights. Father is in prison, and at the filing of this complaint, had over eighteen months remaining on his sentence. Paternal grandfather testified at court that he wants to care for her, but there is no motion before this Court beyond the prayer for permanent custody in ACCS's amended complaint. While grandfather would remain eligible to apply for adoption, ACCS is already signaling its concern that bio-father, and even mother, might find their way back into M.H.'s life due to the logical family relationships formed over the years. In any case, the only option properly before this Court is an award of permanent custody.”

{¶ 15} The court also found that the child could not be placed with either parent within a reasonable time, or should not be placed with either parent. The court found that R.C. 2151.414(E)(1), (4), and (12) applied. The court determined that the mother's surrender of parental rights showed that the mother acknowledged that the problems that led to the child's removal have not been remedied. The court noted that the father is incarcerated and will remain incarcerated for at least eighteen months beyond the date ACCS filed the permanent custody complaint. The court further found that the father demonstrated a lack of commitment by failing to regularly support, visit, or communicate with the child. The court observed that the father has seen his daughter only twice in the last two and one-half years.

{¶ 16} The court additionally found that ACCS used reasonable efforts to prevent the child's removal:

“ACCS has worked with this family since at least July 2014. Case management, service referrals, visitation, substitute care have been provided. * * * These efforts did not prevent or eliminate the need for removal because father

remains incarcerated and mother's mental health is too fragile to risk even unsupervised visits."

{¶ 17} The court thus awarded ACCS permanent custody of the child. This appeal followed.

{¶ 18} In his sole assignment of error, appellant contends that the trial court's decision to award ACCS permanent custody is against the manifest weight of the evidence. In particular, appellant asserts that clear and convincing evidence fails to support the trial court's finding that awarding ACCS permanent custody is in the child's best interest. Appellant argues that the trial court did not adequately weigh the relationship the child's grandfather had formed with the child, that the grandfather has an adequate home for the child, and that the grandfather is willing to take custody of the child.

A

STANDARD OF REVIEW

{¶ 19} Generally, a reviewing court will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. E.g., In re B.E., 4th Dist. Highland No. 13CA26, 2014–Ohio–3178, ¶27; In re R.S., 4th Dist. Highland No. 13CA22, 2013–Ohio–5569, ¶29.

“Weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.””

Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶12, quoting State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting Black’s Law Dictionary 1594 (6th ed.1990).

{¶ 20} When an appellate court reviews whether a trial court’s permanent custody decision is against the manifest weight of the evidence, the court ““weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder 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.”” Eastley at ¶20, quoting Tewarson v. Simon, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001), quoting Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Accord In re Pittman, 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶23–24.

{¶ 21} The question that we must resolve when reviewing a permanent custody decision under the manifest weight of the evidence standard is “whether the juvenile court’s findings * * * were supported by clear and convincing evidence.” In re K.H., 119 Ohio St.3d 538, 2008–Ohio–4825, 895 N.E.2d 809, ¶43. “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. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.”

In re Estate of Haynes, 25 Ohio St.3d 101, 103–04, 495 N.E.2d 23 (1986). In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to

satisfy the requisite degree of proof.” State v. Schiebel, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). Accord In re Holcomb, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954) (“Once the clear and convincing standard has been met to the satisfaction of the [trial] court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof.”). Accord In re Adoption of Lay, 25 Ohio St.3d 41, 42–43, 495 N.E.2d 9 (1986). Cf. In re Adoption of Masa, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986) (stating that whether a fact has been “proven by clear and convincing evidence in a particular case is a determination for the [trial] court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence”). Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court’s decision is not against the manifest weight of the evidence. In re R.M., 4th Dist. Athens Nos. 12CA43 and 12CA44, 2013–Ohio–3588, ¶62; In re R.L., 2nd Dist. Greene Nos. 2012CA32 and 2012CA33, 2012–Ohio–6049, ¶17, quoting In re A.U., 2nd Dist. Montgomery No. 22287, 2008–Ohio–187, ¶9 (“A reviewing court will not overturn a court’s grant of permanent custody to the state as being contrary to the manifest weight of the evidence ‘if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements * * * have been established.’”). Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, “‘clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.’” Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A

reviewing court should find a trial court's permanent custody decision against the manifest weight of the evidence only in the "exceptional case in which the evidence weighs heavily against the [decision]." Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio App.3d at 175; accord State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 22} Furthermore, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. Eastley at ¶21. As the Eastley court explained:

“[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *

If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.”

Id., quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does not translate to the record well.” Davis v. Flickinger, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997). Accord In re Christian, 4th Dist. Athens No. 04CA10, 2004–Ohio–3146, ¶7. As the Ohio Supreme Court long-ago explained:

“In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.”

Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). Furthermore, unlike an ordinary civil proceeding in which a jury has no contact with the parties before a trial, in a permanent

custody case a trial court judge may have significant contact with the parties before a permanent custody motion is even filed. In such a situation, it is not unreasonable to presume that the trial court judge had far more opportunities to evaluate the credibility, demeanor, attitude, etc., of the parties than this court ever could from a mere reading of the permanent custody hearing transcript.

B

PERMANENT CUSTODY PRINCIPLES

{¶ 23} A parent has a “fundamental liberty interest” in the care, custody, and management of his or her child and an “essential” and “basic civil right” to raise his or her children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Murray, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990); accord In re D.A., 113 Ohio St.3d 88, 2007–Ohio–1105, 862 N.E.2d 829. A parent’s rights, however, are not absolute. D.A. at ¶11. Rather, ““it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the pole star or controlling principle to be observed.”” In re Cunningham, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting In re R.J.C., 300 So.2d 54, 58 (Fla.App.1974). Thus, the state may terminate parental rights when a child’s best interest demands such termination. D.A. at ¶11.

{¶ 24} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child’s best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. R.C. 2151.414(A)(1). Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying principles of R.C. Chapter 2151:

(A) To provide for the care, protection, and mental and physical development of children * * *;

* * *

(B) To achieve the foregoing purpose[], whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety.

C

PERMANENT CUSTODY FRAMEWORK

{¶ 25} R.C. 2151.414(B)(1)(a) permits a trial court to grant permanent custody of a child to a children services agency if the court determines, by clear and convincing evidence, that the child's best interest would be served by the award of permanent custody and that:

The child is not abandoned or orphaned 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 ending on or after March 18, 1999, 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.

{¶ 26} In the case at bar, appellant does not challenge the trial court's R.C. 2151.414(B)(1)(a) finding. Instead, appellant challenges the trial court's best interest finding. We limit our review accordingly.

D

BEST INTEREST

{¶ 27} R.C. 2151.414(D) requires a trial court to consider specific factors to determine whether a child's best interests will be served by granting a children services agency permanent custody. The factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or

through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (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 factors listed under R.C. 2151.414(E)(7) to (11) apply.

{¶ 28} In the case sub judice, the record contains ample clear and convincing evidence that awarding ACCS permanent custody is in the child's best interest. With respect to the child's interactions and interrelationships, the evidence demonstrates that the child does not share a healthy relationship with her mother. Additionally, the mother voluntarily surrendered her parental rights. The child has had little contact with her father since he and the mother separated. The child appears to share a positive relationship with her grandfather. The child is doing well in her foster home.

{¶ 29} Regarding the child's wishes, the child stated that she would like to remain in her foster home. We further note that the guardian ad litem recommended that the court award ACCS permanent custody.

{¶ 30} With respect to the child's custodial history, the evidence shows that the child has been twice removed from her mother's care. The child was in ACCS's temporary custody between July 2014 and February 2015. The child was in her mother's care from February 2015 through June 2015, when ACCS again removed her. The child has been in ACCS's temporary custody since that time. Before ACCS's involvement, the child lived with either both parents or her mother.

{¶ 31} Regarding the child's need for a legally secure permanent placement and whether that placement can be achieved without granting ACCS permanent custody, the evidence

demonstrates that the mother will not be able to provide the child with a secure placement. The mother admirably recognized her inability to provide the child with a legally secure permanent home and thus surrendered her parental rights. The father is in prison until January 2017, and at the time ACCS filed its permanent custody motion, the father would be unable to provide the child with a legally secure permanent home for at least eighteen months. The grandfather offered his home as a placement for the child, but ACCS expressed concerns whether the grandfather would allow the mother to have contact with the child. No other suitable placements exist.

{¶ 32} Based upon the totality of the foregoing factors, we believe that the trial court could have formed a firm belief that awarding ACCS permanent custody is in the child's best interest. Thus, its best interest finding is not against the manifest weight of the evidence.

{¶ 33} While we recognize appellant's concern that the trial court did not adequately consider the grandfather as a possible placement for the child, we point out that a trial court need not determine that terminating parental rights is "the only option" or that no suitable person is available for placement. In re Schaefer, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶64 (2006). Rather, R.C. 2151.414 requires the court to weigh "all the relevant factors * * * to find the best option for the child." Id. "The statute does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors." Id. A child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security. In re Adoption of Ridenour, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). Therefore, courts are not required to favor relative or non-relative placement if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody. Schaefer at ¶64;

accord In re T.G., 4th Dist. Athens No. 15CA24, 2015–Ohio–5330, ¶24; In re V.C., 8th Dist. Cuyahoga No. 102903, 2015–Ohio–4991, ¶61 (stating that relative’s positive relationship with child and willingness to provide an appropriate home did not trump child’s best interest). Additionally, we observe that “[i]f permanent custody is in the child’s best interest, legal custody or placement with [a parent or other relative] necessarily is not.” In re K.M., 9th Dist. Medina No. 14CA0025–M, 2014–Ohio–4268, ¶9.

{¶ 34} In the case at bar, we determined that clear and convincing evidence supports the trial court’s finding that awarding ACCS permanent custody is in the child’s best interest. Thus, placement with the grandfather necessarily is not.

{¶ 35} Moreover, we recognize that “[f]amily unity and blood relationship” may be “vital factors” to consider, but neither is controlling. In re J.B., 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013–Ohio–1703, ¶31. Indeed, “neglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term * * * and their best interest is the pivotal factor in permanency case.” In re T.S., 8th Dist. Cuyahoga No. 92816, 2009–Ohio–5496, ¶35. Thus, while biological relationships may be important considerations, they are not controlling when ascertaining a child’s best interest. In re J.B., 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013–Ohio–1706, ¶111. Thus, the trial court was not required to favor an option that would have preserved a familial relationship with the grandfather when the circumstances show that the child’s best interest would be better served by placing her in ACCS’s permanent custody.

{¶ 36} Accordingly, based upon the foregoing reasons, we overrule appellant’s sole assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.