

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

IN THE MATTER OF C.B., : Case No. 16CA22  
ADJUDICATED DEPENDENT CHILD : DECISION AND  
 : JUDGMENT ENTRY  
 :  
 : **RELEASED: 12/12/16**

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APPEARANCES:

Susan M. Zurface Daniels, Cincinnati, Ohio, for appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, and James Roeder, Highland County Assistant Prosecuting Attorney, Hillsboro, Ohio, for appellee.

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Harsha, J.

{¶1} The Highland County Court of Common Pleas, Juvenile Division, granted permanent custody of C.B., an adjudicated dependent child, to the Highland County Department of Job and Family Services, Children Services Division (“agency”). The court determined that appellant, Chad Bates, the biological father, had abandoned his child.

{¶2} Bates argues that the trial court erred in terminating his parental rights based on abandonment, which he claims is against the manifest weight of the evidence. We reject his argument because the trial court’s finding was supported by evidence, including Bates’s own testimony, that he had never met the child during the child’s entire life, that he had only talked to the child once during the nearly 14 months that the child was in the agency’s custody and that he had not made any other attempts to talk with or contact his child either before or after that solitary call. And the guardian ad litem stated in her report that Bates had not had contact with his child since the agency’s

commencement of the case in June 2015. In addition, Bates's trial counsel conceded during his closing argument that because Bates had no contact with the child due to his incarceration, the case thus turned on whether awarding permanent custody of the child to the agency was in the child's best interest. Therefore, we overrule Bates's sole assignment of error and affirm the trial court's judgment.

## I. FACTS

{¶3} In May 2012, Rachael Roll, aka Parks, gave birth to C.B. Genetic testing subsequently established that Bates is the child's father. However, he was incarcerated on an aggravated robbery conviction from before the child was born until his release date in October 2016.

{¶4} In June 2015, the Greenfield Police Department located Roll with C.B. in a van containing a mobile methamphetamine lab and Roll admitted to the police that she had recently used methamphetamine, marijuana, and heroin and that she was homeless. A couple days later, the agency filed a complaint alleging that C.B. was an abused, neglected, and dependent child and requesting emergency temporary custody of the child, which the court granted on June 8, 2015. Roll stipulated to the truth of the allegations in the agency's complaint and admitted that the child was a dependent child. The juvenile court adjudicated C.B. a dependent child and vested the agency with temporary custody. In August 2015, the juvenile court ordered that these findings be made binding on Bates, who had been served with a copy of the agency's complaint, summons, and notice of hearing, but had not appeared in the proceeding.

{¶5} In April 2016, the agency filed a motion for permanent custody of C.B. In its motion the agency noted that the child's parents were both unemployed and

incarcerated, neither parent had visited with C.B. since he had been placed in the custody of the agency in June 2015, and that Bates had never met the child because he had been incarcerated before the child's birth.

{¶16} The juvenile court hearing on the agency's motion produced the following evidence. Bates testified that he had been incarcerated for aggravated robbery from before C.B. was born through the date of the hearing and was scheduled to be released in early October 2016, and that he would be on post-release control for five years following his release from prison. Bates conceded that he had never met his son, but claimed that before the agency obtained custody of C.B., he had talked twice by telephone to his son when he was at Bev Croy's<sup>1</sup> house and "[p]robably once" when he was at Bates's mother's house. Roll testified that when she had custody of C.B., she did not allow contact between the child and Bates because she did not think prison was an appropriate place for visitation.

{¶17} Bates was present by telephone for a May 24, 2016 semi-annual review of the case. Bates admitted on cross-examination that during the review, he was informed that he could set up telephone calls and write letters to contact his son, but he had not done so. Bates further conceded on cross-examination that other than one telephone conversation with his son that was set up by the agency before the semi-annual review, he had not made any other attempts to arrange for phone calls to speak with his son. An agency employee testified that she had no records of any visits between Bates and his son at the Family Advocacy Center.

{¶18} During closing argument the agency's counsel contended that both parents had abandoned the child and that it would be in the best interest of the child to

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<sup>1</sup> Croy testified that she is C.B.'s maternal great aunt.

be placed in the permanent custody of the agency. Bates's trial counsel effectively conceded that Bates had abandoned his son, but argued that the agency had not established that it was in the child's best interest to be placed in the agency's permanent custody:

MR. KIRK: In regards to the contact, obviously the father concedes that he has been in prison, I think the testimony and evidence demonstrates that, he's not denying that, and he has not had contact. Early on the mother did not bring the child to the father, and now since the case has started, Children's Services has a policy where they do not bring children to the prison, so he has not had contact.

It really turns on the best interest at this point. Is it in the best interest of [C.B.] to be placed in the permanent custody of the Agency? Or, is it in the best interest for some other alternative.

\* \* \*

[T]here is still time, and I think it would be in the best interests to [C.B.] to get an opportunity to get to know his father, and I think his father is going to be released soon enough that that could happen.

{¶9} The juvenile court indicated that it would consider the testimony and exhibits introduced at the hearing as well as the case file and the guardian ad litem's report. In her report the guardian ad litem noted that on a case plan, Bates wrote that he was "emotionally unstable, scared and nervous" over the prospect of losing his son. The guardian ad litem concluded that both parents had abandoned the child because neither parent had had any contact with the child since the agency commenced the case in June 2015. She recommended that the court grant the agency's motion for permanent custody.

{¶10} The juvenile court entered a judgment granting the agency's motion for permanent custody of C.B. and terminating the mother's and father's parental rights. The juvenile court found by clear and convincing evidence that both parents had

statutorily abandoned their child and that it was in the child's best interest to grant the agency's motion for permanent custody. Bates appealed.

## II. ASSIGNMENT OF ERROR

{¶11} Bates assigns the following error for our review:

THE TRIAL COURT ERRED IN TERMINATING THE PARENTAL RIGHTS OF CHAD BATES ON THE GROUNDS OF ABANDONMENT PURSUANT TO § 2151.414(B)(1)(b) OF THE OHIO REVISED CODE.

## III. LAW AND ANALYSIS

### A. Standard of Review

{¶12} In general a reviewing court will not reverse a trial court's judgment in a permanent custody case unless it is against the manifest weight of the evidence. See *In re T.J.*, 4th Dist. Highland Nos. 15CA15 and 15CA16, 2016-Ohio-163, ¶ 25. "To determine whether a permanent custody decision is against the manifest weight of the evidence, an appellate court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving evidentiary conflicts, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Id.* at ¶ 25, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20. In reviewing evidence under this standard, we defer to the trial court's determinations of matters of credibility, which are crucial in these cases, where demeanor and attitude are not reflected well by the written record. *Eastley* at ¶ 21; *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997).

{¶13} In a permanent custody case the dispositive issue on appeal 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; R.C. 2151.414(B)(1). “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.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus; *State ex rel. Pietrangelo v. Avon Lake*, \_\_\_ Ohio St.3d \_\_\_, 2016-Ohio-5725, \_\_\_ N.E.3d \_\_\_, ¶ 14. “[I]f 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.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 55 (4th Dist.).

{¶14} “The essential question we must resolve when reviewing a permanent custody decision under the manifest weight of the evidence standard is whether the amount of competent, credible evidence presented at trial produced in the court’s mind a firm belief or conviction that permanent custody was warranted.” *T.J.* at ¶ 26.

#### B. Permanent Custody Principles

{¶15} “The United States Supreme Court has stated that parents’ interest in the care, custody, and control of their children ‘is perhaps the oldest of the fundamental liberty interests recognized by this Court.’” *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 19, quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). “It is irrefutable that parents have fundamental constitutional rights free from government intervention in their decisions on the custody and

caretaking of their children.” *In re Mullen*, 129 Ohio St.3d 217, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 26, citing *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 16. “It is also irrefutable that those rights are not absolute.” *Mullen* at ¶ 26; *In re D.A.*, 113 Ohio St.3d 88 2007-Ohio-1105, 862 N.E.2d 829, ¶ 11. Instead, “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.*, 200 So.2d 54, 58 (Fla.App.1974). Thus, the state may terminate parental rights when the child’s best interest requires it. *D.A.* at ¶ 11.

#### C. Permanent Custody Framework

{¶16} R.C. 2151.414(B)(1) 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 and that one of the five circumstances set forth applies. The pertinent circumstance that the juvenile court found here was that “[t]he child is abandoned.” R.C. 2151.414(B)(1)(b).

#### D. Juvenile Court’s Finding that C.B. was

##### Abandoned by Bates

{¶17} In his sole assignment of error Bates does not contest the trial court’s conclusion that awarding permanent custody of C.B. to the agency is in the child’s best interest. Instead, he asserts that the trial court erred in terminating his parental rights based on abandonment under R.C. 2151.414(B)(1)(b). In essence, he claims that the trial court’s finding that he abandoned his son is against the manifest weight of the evidence.

**{¶18}** The trial court found that Bates had testified that he had never met his son, but had talked with him a couple times. The court concluded by clear and convincing evidence that he had abandoned his child. The trial court's conclusion is supported by competent, credible evidence that was sufficient to produce in its mind a firm belief or conclusion that permanent custody was warranted.

**{¶19}** Bates himself testified that he had not met his son during the child's entire life because he had been incarcerated on an aggravated robbery conviction from before the child was born until his scheduled release in early October 2016. Additionally there is some evidence that at some point during the agency's nearly 14-month period of custody of C.B. beginning in early June 2015 until the early August 2016 permanent custody hearing that he talked with his son by telephone in a call arranged by the agency. However, he failed to attempt to converse or correspond with his son either before or after that solitary call. In fact, Bates conceded that although the agency instructed him at a May 2016 semi-annual review that he could set up telephone calls and write letters to contact his son, he failed to do so. Moreover, an agency employee testified that she had no records of any visits between Bates and his son at the Family Advocacy Center.

**{¶20}** In addition the child's guardian ad litem concluded in her report that Bates had abandoned his son because he had not had any contact with him since the agency obtained custody of the child in June 2015.

**{¶21}** For purposes of R.C. Chapter 2151, "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with

the child after that period of ninety days.” R.C. 2151.011(C). The evidence was uncontroverted that Bates had never visited his child. And at best, the evidence indicated only one potential telephone contact between Bates and his son at some unspecified time before a May 2016 semi-annual review. Regardless of when that solitary telephone contact between Bates and his son occurred during the near 14-month period during which the agency had custody of C.B. from June 2015 until the August 2016 permanent custody hearing, there was at least one three-month period during that time when Bates did not have any contact with his son whatsoever. Therefore, the statutory presumption that he had abandoned his son arose under R.C. 2151.011(C).

{¶22} Bates claims that he rebutted this presumption because he was unable to visit his child due to his incarceration and that he had made reasonable attempts to preserve his relationship with his son when Roll had custody of the child.

{¶23} We reject Bates’s claims. Precedent supports application of the presumption of abandonment to incarcerated parents who do not visit or contact their child for the 90-day period, and that presumption is not rebutted by evidence that the parents resumed contact with the child after that period had expired. See *In re S.B.*, 2009-Ohio-3619, 916 N.E.2d 1110, ¶ 33-35 (10th Dist.), citing *In re Wright*, 5th Dist. Stark No. 2003CA00347, 2004-Ohio-1094, ¶ 19-20.

{¶24} Moreover, although the agency may have prevented Bates from physically visiting the child while he was in prison, there was no evidence that it prevented him from contacting his son in other ways, e.g., by telephone or mail. In fact, he admitted that the agency instructed him on how to contact his son in this manner, but he

ultimately declined to do so. Under comparable circumstances, appellate courts have upheld awards of permanent custody based on abandonment. See *In re A.W.*, 9th Dist. Lorain No. 08CA00936, 2009-Ohio-1827, ¶ 7 (“Although Father was incarcerated for half of [a] year, he could have attempted to contact A.W. through letters or telephone calls, \* \* \* but he did not”); *In re C.C.*, 12th Dist. Warren Nos. CA2011-11-113 and CA2011-11-127, 2012-Ohio-1291, ¶ 18 (“Although the parents were unable to visit the children because visitations were suspended, there was no testimony that they were in any way prevented from maintaining contact with the children through other means, such a telephone calls, letters or cards”).

{¶25} Furthermore, Bates’s reliance on Roll’s prevention of him from contacting the child is misplaced because she did not have custody of his son after the agency obtained custody in June 2015.

{¶26} Finally, Bates’s own trial counsel effectively conceded in his closing argument that Bates had abandoned his son when counsel instead argued that the dispositive issue was whether an award of permanent custody to the agency would be in the best interest of the child. “ ‘Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make.’ ” *Martin v. Jones*, 2015-Ohio-3168, \_\_\_ N.E.3d \_\_\_, ¶ 2 (4th Dist.), quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 494, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27.

{¶27} After weighing the evidence and all reasonable inferences, considering the credibility of the witnesses after according the requisite deference to the trial court’s determinations, we conclude that in resolving evidentiary conflicts, the trial court did not clearly lose its way or create a manifest miscarriage of justice so that we must reverse

its judgment awarding permanent custody of C.B. to the agency. We overrule Bates's assignment of error and affirm the judgment of the trial court.

#### V. CONCLUSION

{¶28} The trial court's determination that Bates had abandoned his child is not against the manifest weight of the evidence. Having overruled his sole assignment of error, we affirm the judgment of the trial court awarding permanent custody of the child to the agency.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, 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.**