

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

IN RE: E.F. (aka E.T.), : Case No. 16CA22  
ADJUDICATED DEPENDENT CHILD : DECISION AND  
 : JUDGMENT ENTRY  
 :  
 : **RELEASED: 1/9/17**

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APPEARANCES:

Frank A. Lavelle, Athens, Ohio, for appellant.

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

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Harsha, J.

{¶1} The Athens County juvenile court granted permanent custody of E.F., an adjudicated dependent child, to the Athens County Children Services (“agency”). The court determined that appellant, Kayla Fannon, and Samuel Thompson, the biological parents, had their parental rights terminated for E.F.’s older full sibling and they failed to introduce evidence that, notwithstanding the prior termination, they could provide a legally secure permanent placement and adequate care for E.F..

{¶2} Fannon argues that the juvenile court erred in terminating her parental rights because a prior adjudication of abuse concerning E.F.’s sibling should not automatically result in termination of parental rights for a subsequent child. We reject her argument because it is based on a faulty premise: the juvenile court’s finding was not based solely on her prior adjudication of abuse. When a parent has had prior parental rights terminated, Ohio law requires the parent to present clear and convincing evidence that, notwithstanding the prior termination, the parent can provide a legally

secure permanent placement and adequate care for the current child's health, welfare and safety. The juvenile court found that Fannon failed to present any evidence to satisfy that requirement. Thus, the juvenile court's decision was not based solely on the prior adjudication, but also on Fannon's failure to satisfy her burden of proof. We overrule Fannon's first assignment of error.

{¶3} Fannon also argues that the juvenile court's finding that it was in E.F.'s best interest to award permanent custody to the agency was not supported by clear and convincing evidence. She contends that a paternal great-grandmother was able to provide a legally secure placement and would be able to meet all of E.F.'s needs. However, an agency caseworker testified that she was concerned that placement with the relative would be unsafe for E.F. because of the likelihood that Fannon and Thompson would continue to have close contact and control over him. And the grandmother had shown little concern for the sibling's welfare when the prior abuse was occurring. Finally, the guardian ad litem also testified that she believed placement with the agency was preferable to relative placement because there was a strong likelihood that E.F. would be adopted into his full sibling's adoptive family. The court considered all relevant factors, including placement with a relative, and determined that it would not serve the child's best interest to award custody to the relative based on the testimony presented at the hearing. Thus, the juvenile court's decision was not against the manifest weight of the evidence. We overrule Fannon's second assignment of error and affirm the juvenile court's judgment.

## I. FACTS

{¶4} In 2014, the juvenile court adjudicated Fannon and Thompson's older child, A.T., an abused child and granted the agency permanent custody. An Athens County Grand Jury indicted Fannon and Thompson on criminal charges of child endangering and permitting child abuse concerning A.T. In July 2016, prior to the criminal trial, Fannon gave birth to E.F. The agency obtained immediate emergency temporary custody of E.F. and requested permanent custody.

{¶5} In September 2016 the juvenile court held a permanent custody hearing on the agency's motion. Agency caseworker Kathi Vanmeter testified that the agency sought permanent custody of E.F. because his older full sibling, A.T., had sustained serious injuries as an infant at the hands of Fannon and Thompson. As a result, Fannon and Thompson's parental rights to A.T. were involuntarily terminated and the agency received permanent custody. Vanmeter testified that they had considered kinship placement but determined that it was not recommended because of concerns that Fannon and Thompson would have access to E.F. Vanmeter testified that the agency planned to place E.F. in the adoptive family with his full sibling.

{¶6} The guardian ad litem Jenny Stotts testified that she believed it was in E.F.'s best interest to be in the agency's permanent custody because of Fannon and Thompson's abuse of A.T. Stotts testified that the parents inflicted severe, multiple injuries to A.T. over the course of several incidents. Therefore, Stotts had serious concerns for E.F.'s safety and the safety of any child who had contact with them. Stotts testified that E.F.'s placement with his sibling A.T. would be very positive for him, and that she talked to A.T.'s adoptive family, who stated they would like to adopt E.F.

{¶7} Virginia Burk, the paternal great-grandmother, testified that she wanted legal custody of E.F. Burk testified that, if subject to a court order, she would not permit Fannon and Thompson to have any contact with E.F. However, Burk testified that she currently has ongoing contact with Fannon and Thompson and drove them to court that day. She also testified that she visited them several times a week when A.T. was in their care. Burk acknowledged that A.T. suffered injuries, but she testified that she did not believe Fannon and Thompson caused the injuries.

{¶8} Fannon and Thompson did not testify. There was no evidence presented about whether either parent could provide a legally secure permanent placement and adequate care for the health, welfare, and safety of E.F.

{¶9} The juvenile court entered a judgment granting the agency's motion for permanent custody of E.F. and terminating the mother and father's parental rights. The juvenile court found by clear and convincing evidence that E.F. cannot be placed with either parent within a reasonable time and should not be placed with either parent and that it was in the child's best interest to grant the agency's motion for permanent custody. Fannon appealed.

## II. ASSIGNMENTS OF ERROR

{¶10} Fannon assigns the following errors for our review:

1. A PRIOR ADJUDICATION OF ABUSE PERTAINING TO A CHILD'S SIBLING SHOULD NOT AUTOMATICALLY RESULT IN TERMINATION OF PARENTAL RIGHTS OF A SUBSEQUENT CHILD. SUCH RESULT WAS IMPROPER AS A MATTER OF LAW.
2. THE TRIAL COURT'S FINDING THAT A GRANT OF PERMANENT CUSTODY TO THE AGENCY WAS IN THE CHILD'S BEST INTEREST, WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

## III. LAW AND ANALYSIS

## A. Standard of Review

{¶11} 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).

{¶12} 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.).

{¶13} “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

{¶14} “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

{¶15} R.C. 2151.353(A)(4) permits a trial court to grant permanent custody of a child that is adjudicated an abused, neglected, or dependent to a children services agency if the court determines: (1) that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent as provided in R.C. 2151.414(E) and (2) that the permanent commitment is in the best interest of the child as provided in R.C. 2151.414(D)(1)(a)-(e). The relevant portion of R.C. 2151.414(E) provides:

In determining \* \* \* whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, \* \* \* that one or more of the following exists as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

\* \* \*

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child \* \* \* and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

{¶16} The pertinent provision governing the juvenile court's finding that E.F. could not be placed with his parents within a reasonable time was that "these parents had their parental rights terminated with respect to E.F.'s full older sibling \* \* \*" and "[t]hey offer no explanations or assurances that any child could ever be safely left in their possession." Decision, p.6; R.C. 2151.414(D)(1)(e) and R.C. 2151.414(E)(11).

**{¶17}** The juvenile court also considered the best interest factors in R.C. 2151.414(D)(1)(a)-(e), including the paternal great-grandmother's request for legal custody, which the court characterized an "eleventh hour" effort, and found that it was in the child's best interest to award permanent custody to the agency.

D. Juvenile Court's Findings Under R.C. 2151.414(E)

**{¶18}** Fannon acknowledges that because she had parental rights terminated with respect to E.F.'s sibling, she had the burden to prove by clear and convincing evidence that she can provide a legally secure permanent placement and adequate care for E.F.'s health, welfare, and safety. Fannon also admits that she failed to demonstrate at the hearing that she can provide a legally secure placement and adequate care. Fannon contends that she chose not to testify at the hearing because of the pending criminal case arising from her abuse of E.F.'s older sibling.

**{¶19}** Nevertheless, Fannon argues that the juvenile court award of permanent custody to the agency was improper as a matter of law because a prior adjudication of abuse pertaining to a sibling should not automatically result in termination of parental rights of a subsequent child. Fannon contends that there was no evidence that she would harm or abuse E.F., only that it "could happen" based on the prior adjudication. In essence, she argues that her strategic decision not to present any evidence of her ability to provide placement and care for the child should relieve her of that evidentiary burden and shift it to the agency to prove that she would harm or abuse E.F. Fannon cites no authority to support her argument.

**{¶20}** The statute is not written as Fannon would have it; her strategic decision not to present evidence of her abilities to secure placement and adequate care for E.F.



does not shift the burden to the agency to prove that she cannot. Thus, the premise of Fannon's argument is faulty. Moreover, Fannon mischaracterizes the juvenile court's decision. The juvenile court did not automatically terminate her parental rights to E.F. solely because her parental rights had been terminated for a sibling without considering whether she met her statutorily required burden of proof. The record shows that Fannon presented no evidence about her present ability to care for E.F. The juvenile court correctly applied subsection (E)(11) and found that Fannon had failed to prove she can provide a legally secure permanent placement and adequate care. We overrule Fannon's first assignment of error.<sup>1</sup>

#### E. Juvenile Court's Best Interest Finding

{¶21} Fannon argues that the juvenile court did not adequately consider the best interest factors set forth in R.C. 2151.414(D)(1) because E.F. will be denied "any contact with *all* of his blood relatives." (Emphasis sic) She also argued a paternal great-grandmother requested legal custody and testified that she would care for E.F.

{¶22} "In a best-interests analysis under R.C. 2151.414(D), a court must consider 'all relevant factors,' including five enumerated statutory factors \* \* \*. No one element is given greater weight or heightened significance." *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶ 57, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N .E.2d 532, ¶ 6. The five enumerated 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

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<sup>1</sup> Fannon does not specifically raise a constitutional challenge to the statute.

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.

**{¶23}** Although a court should weigh whether a child can be placed with a relative or non-relative, it is only one of the relevant factors to determine what placement option is in the child's best interest. *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18, 15CA19, 2016-Ohio-916, ¶ 66-67 (“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”).

**{¶24}** Clear and convincing evidence supports the juvenile court's determination that awarding the agency permanent custody is in E.F.'s best interest. The juvenile court examined the best interest factors and determined that E.F. was born in July 2016, was three months old at the time of the permanent custody hearing, and had been in the agency's custody since birth. The court found that E.F. was well provided for and lovingly cared for by his foster care family. As for the child's interaction with his relatives, the juvenile court considered E.F.'s relationship with his parents, siblings and relatives and place importance on the possible outcome that E.F. could be place in the same adoptive family as his sibling:

Fortunately, [the agency] became aware of this child at or about the time of his birth and was able, through this Court's orders, to immediately assume custody before the child could be taken from the hospital by these parents. E.F. has lived in foster care his entire young life, and is well provided for and lovingly cared for. He has a full sibling who was seriously abused by these parents as a baby, and one of the possible outcomes here involves these two children being in the same adoptive family.

Fannon's contention that the juvenile court did not adequately consider E.F.'s contact with "all of his blood relatives" is belied by the court's consideration of the possibility that E.F. and his full sibling could be raised together in the same adoptive family. See R.C. 2151.414(D)(1)(a)-(c).

**{¶25}** The juvenile court considered the child's need for a legally secure permanent placement when it rejected the paternal great-grandmother's request for legal custody. See R.C. 2151.414(D)(1)(d). The court found that granting legal custody to the great-grandmother would fail to terminate all parental rights – Fannon and Thompson would retain residual parenting rights – and allow for the legal possibility of the biological parents regaining control or custody of the child.

**{¶26}** Last, the juvenile court determined whether any factors in divisions (E)(7) to (11) apply. See R.C. 2151.414(D)(1)(e). The juvenile court found that under (E)(11) Fannon's prior parental rights to E.F.'s sibling terminated and that the parents' physical abuse of his sibling was "so compelling and sickening as to conclude that these parents, who still present as a couple, should never be allowed to have even 'possession', let alone custody, of a helpless little child."

**{¶27}** After weighing the evidence and all reasonable inferences, considering the credibility of the witnesses after according the requisite deference to the juvenile court's determinations, we conclude that in resolving evidentiary conflicts the juvenile court did not clearly lose its way or create a manifest miscarriage of justice. We overrule Fannon's second assignment of error and affirm the judgment of the juvenile court.

## V. CONCLUSION

**{¶28}** The trial court's determination that E.F. should not be placed with either parent and that the permanent commitment is in the best interest of the child is not against the manifest weight of the evidence. Having overruled her assignments of error, we affirm the judgment of the juvenile 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 Athens 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. & Hoover, 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.**