

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

ARIANA FLANAGAN

MINOR CHILD

JUDGES:

Hon. John W. Wise, P. .
Hon. Julie A. Edwards, J.
Hon. John F. Boggins, J.

Case No. 2004CA00181

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Juvenile Division, Case No. JU
127912

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

October 1, 2004

APPEARANCES:

For Plaintiff-Appellee

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Wise, P. J.

{¶1} Appellant Joshua Flanagan, the father of Ariana Flanagan, appeals the decision of the Stark County Court of Common Pleas, Juvenile Division, that granted permanent custody to Appellee Stark County Department of Job and Family Services (“agency”). The following facts give rise to this appeal.

{¶2} The agency became involved in this matter on July 25, 2003, one day after Ariana’s birth, when it filed a complaint alleging Ariana was dependent and neglected. The agency sought temporary custody of Ariana. Thereafter, on August 20, 2003, the trial court found Ariana to be a dependent child and placed her in the temporary custody of the agency. At almost six-weeks old, the agency placed Ariana with a cousin. The trial court adopted a case plan, which neither parent successfully completed.

{¶3} Appellant subsequently filed a motion for a change of legal custody. Appellant sought to have the paternal great-grandmother, Phyllis Lamp, awarded custody of Ariana. On March 10, 2003, the agency filed a motion for permanent custody. The trial court conducted a hearing on the agency’s motion on April 27, 2004, at which it considered appellant’s motion for change of custody. On May 10, 2004, the trial court filed its findings of fact and conclusions of law in which it terminated appellant’s parental rights and granted permanent custody to the agency.

{¶4} Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶5} “I. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW WHEN IT FAILED TO GRANT CUSTODY OF THE MINOR CHILD TO A RELATIVE.

{¶6} “II. THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

I

{¶7} In his First Assignment of Error, appellant maintains the trial court abused its discretion when it failed to grant custody of Ariana to the paternal great-grandmother, Phyllis Lamp. We disagree.

{¶8} R.C. 2151.412(G) permits a trial court to consider members of a child’s extended family for purposes of placement. This statute provides:

{¶9} “(G) In the agency’s development of a case plan and the court’s review of the case plan, the child’s health and safety shall be the paramount concern. The agency and the court shall be guided by the following priorities:

“* * *

{¶10} “(2) If both parents of the child have abandoned the child, have relinquished custody of the child, have become incapable of supporting or caring for the child even with reasonable assistance, or have a detrimental effect on the health, and best interest of the child, the child should be placed in the legal custody of a suitable member of the child’s extended family;

“* * *”

{¶11} Appellant claims, pursuant to R.C. 2151.412(G), the trial court should have awarded legal custody of Ariana to her great-grandmother, Phyllis Lamp. *In the Matter of Devant Ray & Jequan Rollinson* (Apr. 27, 1998), Stark App. No. 97-CA-00243, at 7, we explained that [t]he language of R.C. 2151.412(G) is precatory rather than mandatory. [Citations omitted.] Consequently, this statute does not require the trial court to act in a specific manner, but rather suggests criteria to be considered in making its decision regarding case plan goals.”

{¶12} An appellate court should not substitute its judgment for that of the trial court when competent and credible evidence going to all the essential elements of the case exists. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, syllabus. This standard is used by appellate courts when reviewing awards of permanent custody of children to children services agencies. *Jones v. Lucas Cty. Children Services Bd.* (1988), 46 Ohio App.3d 85, 86. The reason for this deference to the trial court’s findings is that the judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶13} In the case sub judice, the trial court concluded, in its findings of fact and conclusions of law, that Phyllis Lamp should not have legal custody of Ariana because of Ms. Lamp’s age and the age of the two children she is caring for at the present time. Findings of Fact and Conclusions of Law, May 10, 2004, at 2. The record contains competent and credible evidence to support the trial court’s conclusion.

{¶14} Specifically, Ms. Lamp testified that she currently has legal custody of two of her great-grandchildren, ages two and three. Tr. Hrng., Mar. 10, 2004, at 92. Ms.

Lamp is sixty-nine years old. *Id.* at 88. Ms. Lamp did not get involved at the beginning of this case because she did not have room at her house, for Ariana, and was in the process of having two rooms added to her house. *Id.* at 89-90. Ms. Lamp did not express an interest in having legal custody of Ariana, until late February or early March, when she telephoned Cindy Moore. *Id.* at 89. Ms. Lamp had previously informed the guardian ad-litem that she could not care for Ariana because she had her hands full with the other two children and did not have room for her. *Id.* at 91. Finally, Ms. Lamp admitted that she has never seen Ariana. *Id.* at 92, 93.

{¶15} Based upon Ms. Lamp's testimony, we conclude the trial court's decision to deny Ms. Lamp legal custody is supported by competent and credible evidence.

{¶16} Appellant's First Assignment of Error is overruled.

II

{¶17} Appellant maintains, in his Second Assignment of Error, the trial court's judgment that the best interests of Ariana would be served by granting permanent custody to the agency was against the manifest weight and sufficiency of the evidence. We disagree.

{¶18} As noted above, we will not reverse the trial court's decision when competent and credible evidence going to all the essential elements of the case exists. *C.E. Morris Co., supra.*

{¶19} R.C. 2151.414(B) enables the court to grant permanent custody if the court determines by clear and convincing evidence that it is in the best interest of the child. R.C. 2151.414(D) sets out the factors relevant to determining the best interests of the child. The relevant factors include, but are not limited to, the following:

{¶20} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child;

{¶21} "(2) 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;

{¶22} "(3) 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 ending on or after March 18, 1999;

{¶23} "(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;

{¶24} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶25} In the case sub judice, the record supports the conclusion that Ariana's best interests would be served by the granting of permanent custody. Ariana is a healthy Caucasian girl born July 24, 2003. Tr. Mar. 10, 2004, at 64. Ariana has no physical or developmental delays. Id. The caseworker, Valgean Martin, testified there is a bond between Ariana and her cousin. Id. at 65. The agency placed Ariana, with her cousin, when she was almost six weeks old. Id. at 64. Further, no bond exists between Ariana and appellant as he has only visited with her on two occasions. Id. at 65. Ms. Martin testified that at her last visit, Ariana was very distant from her mother and that the bond is stronger with her cousin. Id. at 66. Finally, Ms. Martin indicated that Ariana's

cousin is interested in adopting her rather than accepting a change of legal custody. Id. at 67.

{¶26} Based upon the above evidence, we find the trial court's judgment was not against the manifest weight of the evidence and sufficient evidence was submitted to support the trial court's determination regarding best interests of the minor child.

{¶27} Appellant's Second Assignment of Error is overruled.

{¶28} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is hereby affirmed.

By: Wise, P. J.

Edwards, J., and

Boggins, J., concur.

JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

ARIANA FLANAGAN

MINOR CHILD

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JUDGMENT ENTRY

Case No. 2004CA00181

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

Costs assessed to appellant.

JUDGES