

[Cite as *In re Morales/Mendez Children*, 2006-Ohio-6384.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

JUDGES:

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

MORALES/MENDEZ CHILDREN

Case No. 2006 CA 00251

MINOR CHILDREN

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Juvenile Division, Case No.
JU129677

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 4, 2006

APPEARANCES:

For Appellee

For Appellants

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Wise, P. J.

{¶1} Appellants Carlos Morales (born in 1994), Gabriela Mendez (born in 1999), and Marcella Mendez (born in 2000), minor children, appeal the decision of the Stark County Court of Common Pleas, Juvenile Division, which granted permanent custody of them to Appellee Stark County Department of Job and Family Services (“SCDJFS”). The relevant facts leading to this appeal are as follows.

{¶2} Carlos, Gabriela, and Marcella are the children of Madeline Morales. On December 15, 2003, SCDJFS filed a complaint alleging dependency and neglect concerning these three children. The concerns centered on Madeline’s mental health issues, substance abuse, domestic violence history, and lack of supervision. On March 5, 2004, the children were found to be dependent, and temporary custody was maintained with SCDJFS. On January 12, 2005, SCDJFS filed a notice of extended visitation, indicating the agency was attempting reunification between the mother and Carlos and Marcella. (Due to concerns related to Madeline’s coping with Gabriela’s autism issues, Gabriela remained in agency custody). However, due to the emergence of new concerns, Carlos and Marcella were again placed in the temporary custody of SCDJFS on August 17, 2005. On September 14, 2005, SCDJFS moved to place Carlos and Marcella in a planned permanent living arrangement (“PPLA”). A similar motion was made as to Gabriela on October 12, 2005. The court ultimately granted PPLA for all three children.

{¶3} SCDJFS thereafter withdrew pursuit of the PPLA approach, and filed a motion for permanent custody on May 25, 2006. The trial court conducted an evidentiary hearing on July 20, 2006. The court issued a judgment entry with separate

findings of fact and conclusions of law on July 28, 2006, granting permanent custody of all three children to SCDJFS.

{¶4} The children, via their attorney, filed a notice of appeal on August 9, 2006. They herein raise the following two Assignments of Error:

{¶5} “I. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING PERMANENT CUSTODY TO APPELLANT’S (SIC) PARENTS OR RELATIVES.

{¶6} “II. THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTEREST OF THE MINOR CHILDREN WOULD BE SERVED BY GRANTING PERMANENT CUSTODY TO SCDJFS IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I.

{¶7} In their First Assignment of Error, appellants argue the trial court abused its discretion in declining to grant a change of legal custody to their maternal grandparents or their maternal aunt. We disagree.

{¶8} The General Assembly has provided dispositional options which impact the role of relatives in dependency, neglect, and abuse cases. See *In re Cunningham*, Stark App.No. 2003CA00161, 2003-Ohio-4271, ¶ 11. Among these are R.C. 2151.415(A)(3), which permits a grant of legal custody to a relative, and R.C. 2151.415(F), which permits a parent to file a motion seeking relative placement of the child. *Id.* Nonetheless, as an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App.No. CA-5758.

{¶9} In the case sub judice, Madeline, the children's mother, filed a motion requesting legal custody to the children's aunt, Janette Rosario, just seven days before the permanent custody trial. Madeline then filed an alternate motion requesting legal custody to the children's maternal grandparents, Roberto and Rosa Ofray, just one day before said trial. All three relatives were called to testify by Madeline. The aunt had only recently moved to Ohio from Florida, and had had no contact with the children for two or three years. Tr. at 123. She had no independent housing or employment, and relied on a boyfriend for spending money. Tr. at 125. The grandparents, who live in upstate New York, had also had limited contact with the children over the prior three years, and had limited bedroom space at their residence. Tr. at 143-144. We also note the trial court expressed particular concern that these relatives expressed belief that the children should be with their mother. Findings of Fact and Conclusions of Law, July 28, 2006, at 17-18. A trial court may properly recognize that legal custody to third parties will not provide a legal barrier to a parent's future attempted assertions of his or her residual rights concerning the child. See *In re Fell*, Guernsey App.No. 05 CA 9, 2005-Ohio-5299, ¶ 35, citing Juv.R. 2(Z).

{¶10} Upon review, we conclude the trial court did not abuse its discretion in declining to grant a change of legal custody to the aforementioned relatives. Appellants' First Assignment of Error is overruled.

II.

{¶11} In their Second Assignment of Error, appellants contend the trial court's conclusion that permanent custody would be in their best interests was not supported by the evidence. We disagree.

{¶12} In determining the best interest of a child, the trial court is required to consider the factors contained in R.C. 2151.414(D). These factors are as follows:

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

{¶14} "(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;

{¶15} "(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;

{¶16} "(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;

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

{¶18} Appellants correctly note that the witnesses in this case recounted that Madeline loved her children, that a bond continued between Madeline and them, and that they had at various times expressed desiring to return to their mother. Nonetheless, according to the testimony of ongoing caseworker Vicki Mitchell, Gabriela has autism and is a special needs child, but Madeline has not addressed or demonstrated the ability to care for these concerns. Tr. at 17-23, 31-32. All three of the children are thriving in their current foster placement; when Carlos and Marcella were returned for a

time to Madeline's care, they both experienced significant behavioral problems. Tr. at 18. Marcella's problems escalated to the point that her safety became an issue. Id. The visitations with the children were frequently hampered by Madeline's inability to control them, although the problem subsided upon their return to the foster mother. Tr. at 22. Madeline has relapsed in terms of drug usage by testing positive for cocaine use, and she has been inconsistent with her mental health medication, generally denying she has a mental health condition, despite her diagnosis of bi-polar disorder. Tr. at 40-41. Mitchell summarized her view that permanent custody would be in the children's best interest by noting the following:

{¶19} "I do believe that mom, that Madeline loves her children, and I do believe that she has made efforts to get them returned to her care, however, her mental health has prevented her from being able to successfully rectify and reduce risk, so at this point we have been doing this for three years and we can't continue to halt permanency for these children as we have in my opinion gone above and beyond reasonable efforts and the fact that we even gave an extension with the PPLA status, gave new service providers, and even with that, with as intensive services as we were giving, we still were unable to reduce the risk to reunify these children." Tr. at 24.

{¶20} SCDJFS also presented the testimony of Dr. Robin Tener, who stated, inter alia, that she had been "very concerned that [mother] was underreporting the degree of dysfunctionality that [mother] was actually demonstrating." Tr. at 48. Psychotherapist Tiffany Anton, who had been conducting intensive parent child intervention therapy ("IPCI") with appellant and the children, also took the stand. Tr. at 64. Anton eventually stopped the therapy due to Madeline's cocaine use, lack of

compliance with mental health treatment, and the risks to the children outweighing the benefits of the therapy. Tr. at 65-73. Counselor Donald Kissinger added that Madeline's inconsistency with her mental health medication could negatively impact Carlos and Marcella, who he described as emotionally fragile and in need of stability and routine. Tr. at 92-93.

{¶21} The court conducted an in camera interview with the children shortly after the evidentiary hearing. The children's guardian ad litem further recommended that permanent custody should be granted to the agency. Additionally, it is presently undisputed that the children had been in the temporary custody of SCDJFS for more than twelve of the prior twenty-two months at the time of the filing of the permanent custody motion. See R.C. 2151.414(D)(3), *supra*.

{¶22} It is well-established that "[t]he discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *In re Mauzy Children* (Nov. 13, 2000), Stark App.No.2000CA00244, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316, 642 N.E.2d 424. In the case sub judice, upon review of the record and the findings of fact and conclusions of law therein, we conclude the trial court's grant of permanent custody of Marcella, Gabriella, and Carlos to SCDJFS was made in the consideration of the children's best interests and did not constitute an error or an abuse of discretion.

{¶23} Appellants' Second Assignment of Error is overruled.

{¶24} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is hereby affirmed.

By: Wise, P. J.

Edwards, J., and

Boggins, J., concur.

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

HON. JOHN F. BOGGINS

JWW/d 1117

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

IN THE MATTER OF:	:	
	:	
MORALES/MENDEZ CHILDREN	:	JUDGMENT ENTRY
	:	
MINOR CHILDREN	:	Case No. 2006 CA 00251

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 waived.

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

HON. JOHN F. BOGGINS