[Cite as *In re F.C. and G.C.*, 2009-Ohio-2402.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

F.C. AND G.C., III

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 09AP010004
09AP010005

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court of Common Pleas, Juvenile Division, Case No. 08JN00047

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 20, 2009

APPEARANCES:

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Hoffman, P.J.

{¶1} In Case No. 2009AP010004, Appellant Amy Baker ("Mother") appeals the December 17, 2008 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, Juvenile Division, which terminated her parental rights, privileges and responsibilities with respect to her two minor children, and granted permanent custody of the children to Appellee Tuscarawas County Department of Job and Family Services ("the Department"). In Case No. 2009AP010005, Appellant Gregory E. Cottrell, II, ("Father") appeals the same relative to his parental rights, privileges and responsibilities.

STATEMENT OF THE FACTS AND CASE

{¶2} Mother and Father are the biological parents of F.C. (D.O.B. 9/24/02) and G.C. (D.O.B. 8/26/04). Parents never married and were not living together at any time during the pendency of this matter. On January 23, 2008, following a shelter care hearing, the trial court placed the children in the temporary custody of the Department. The Department sought temporary custody after being contacted by Mother because she was about to commence a three day jail sentence and did not have anyone available to watch the children. On January 24, 2008, the Department filed a complaint alleging the children to be neglected and dependent. The complaint was based upon Mother's failure to make arrangements for the care of the children during her jail sentence despite the fact she was sentenced in October, 2007, and Father's felony record and intermittent contact with the children. The Department also had had previous involvement with the family on two prior occasions during which the children were removed from Mother's home under similar circumstances.

{¶3} The trial court conducted an adjudicatory hearing on February 20, 2008, at which time Mother and Father admitted the children were dependent. The trial court scheduled a dispositional hearing and ordered the status quo be maintained. The trial court approved and adopted the case plans for Mother and Father. Mother's case plan required her to attend parent education classes at the Department; complete a psychological evaluation and follow all recommendations; complete an alcohol assessment; obtain stable housing; obtain a verifiable source of income; and visit with her children. Father's case plan required him to complete a drug and alcohol assessment; complete parent education classes; complete a psychological assessment; maintain stable housing and employment; and visit with the children as ordered.

{¶4} The Department filed a Motion to Modify Previous Dispositions to Permanent Custody on June 23, 2008, as the parents had failed to make any progress on their case plans or improve their ability to parent the children. The trial court conducted a hearing on the motion on December 15, 2008.

{¶5} At the hearing, Betsy Wanocik, an ongoing caseworker with the Department, testified regarding the case plans for Mother and Father and the progress each had made. Wanocik stated Mother had made no progress on her case plan until June or July, 2008, after the Department filed its motion for permanent custody. Mother was scheduled to begin parenting classes on March 4, 2008. Mother did not attend the first class. Wanocik sent Mother a letter on March 7, 2008, advising her she had missed the first class. Mother advised the case worker she could participate in the class and would make-up the class she missed. Mother did not attend the classes on March 11, and March 18, 2008. Mother was subsequently advised she could not participate in the

class, but would be referred for a class starting in May. Mother did not attend the first class on May 27, 2008. She was twenty minutes late for the second class with the excuse she had overslept. The Department again advised mother she could not participate in that particular class, but would make a third and final referral for a class beginning in August. Mother attended the first class on August 12, 2008. She signed paperwork stating she understood the requirements of the class; specifically, she was not to be late or miss any classes, and if she was going to be late, she needed to telephone. Mother, nonetheless, missed the second class on August 19, 2008. The Department made an exception and allowed Mother to remain in the class. Mother attended the class on August 26, 2008, and made up the class she had missed. However, Mother did not attend class on September 2, 2008, and was terminated from the class.

{¶6} Mother scheduled but no showed for two appointments for her psychological evaluation. Mother did not undergo the evaluation until July, 2008. Mother also began individual counseling in July. Regarding visitation with the children, Wanocik stated nothing significant occurred during the visits and the children loved to see Mother. However, Mother's attendance at visits was problematic. Mother cancelled a visit on February 29, 2008, and missed a visit the following week. The Department advised Mother if she cancelled or missed one more visit with the children, her visits could be suspended. After mother arrived over twenty minutes late on April 25, 2008, her visits were suspended. Her visits were reinstated in July, after she began working on her case plan. As part of the reinstatement of the visits, Mother was required to call

one hour prior to the visit time, and if she missed even one visit, the visits again would be suspended. Mother's visits were suspended on September 19, 2008, after she failed to telephone the Department one hour before the visit was to commence.

{¶7} At the time of the hearing, Mother was pregnant, and dating an individual by the name of Brian Richmond. Richmond had been released form Noble Correctional Institution in January, 2008, after serving a four year sentence for intimidation. Mother has a criminal history, including a number of DUI's which resulted in jail time and community service. In May, 2008, Mother worked one day at Ameridial. She began employment with Express Packaging on September 2, 2008, but was laid off on October 14, 2008. Mother began working part-time at a Wendy's restaurant in November, 2008. At all other times during the pendency of the matter, Mother was unemployed. Mother lived back and forth between her parents' home and Richmond's parents' home.

{¶8} Wanocik also testified regarding Father's progress on his case plan. Although his case plan required him not to involve himself in behaviors which could result in criminal charges or additional jail time, Father served a jail sentence in January, 2008, for unauthorized use of a motor vehicle. Father was charged with assault in May, 2008; charged with disorderly conduct and assault in October, 2008; and a warrant for Father's arrest had been issued on November 3, 2008. When Wanocik met with Father on December 8, 2008, he was incarcerated. Father advised Wanocik he was employed with Dakota Tree Services for approximately six and a half years, and was paid under the table. Father did not provide verification of his employment or income. Father did

not complete parenting classes, a drug and alcohol assessment, and a psychological evaluation, and he did not obtain and maintain stable housing.

{¶9} Wanocik testified the children are doing well in foster care and their foster parents are interested in adopting them. Wanocik detailed her attempts to find a placement option other than permanent custody. She conducted a home study on Father's mother, but that placement proved unsuitable. Father suggested a family friend, but Mother was not supportive of this individual; therefore, the option proved to be unsuccessful. Although Mother's parents indicated they wanted legal custody of the children, only Richard Baker, Mother's father had been fingerprinted, one of the requirements for the commencement of a home study.

{¶10} Dr. Ragendra Misra, a consulting psychologist at Community Mental HealthCare in Dover, Ohio, completed two psychological assessments of Mother. The original assessment was completed on July 9, 2008, with a follow-up on December 1, 2008. During the initial assessment, Dr. Misra learned Mother had called the Department to care for her children because she was scheduled to serve a jail sentence, and the children had not been returned to her after she had completed it. Dr. Misra found it unusual that Mother would contact the Department instead of contacting a relative or friend to take care of the children for the couple of days. Mother admitted a history of alcohol and marijuana use, starting at the age of sixteen. Dr. Misra placed Mother in a high risk category for parenting, based upon her admission of being impulsive, feeling horrible and wanting to be alone, as well as her being on medication but, nonetheless, abusing marijuana and alcohol. Dr. Misra indicated Mother showed many symptoms of borderline personality disorder, which he described as a very

challenging mental and emotional condition. Dr. Misra added borderline personality disorder would significantly affect Mother's ability to adequately parent the children. After the initial evaluation, Dr. Misra recommended Mother engage in therapy and be re-evaluated after four to six months.

{¶11} Mother scheduled a follow-up appointment in December, 2008. The doctor found Mother's initiative in doing so "shockingly pleasant". At that time, Dr. Misra learned Mother had not seen a psychiatrist regarding medication because she was pregnant. Mother did, however, follow through with individual therapy, attending approximately thirty times. Mother indicated she was not as depressed as she had been and was able to better express herself. Mother advised Dr. Misra she lived back and forth between her boyfriend's parents' home and her parents' home. During the morning of the re-evaluation, Mother had had an argument with her boyfriend's mother and she planned on moving back with her parents. The results of Mother's personality testing conducted in December, 2008, showed her to be more defensive and more cautious than she had been during the original assessment. Dr. Misra stated Mother appeared to have misrepresented the nature and extent of her emotional distress. The doctor testified Mother continued to show limitations and he strongly recommended she continue in therapy. When asked how an individual with borderline personality would react to the demands and behaviors of children, Dr. Misra stated such individuals have very low frustration tolerance and have a need for instant gratification. Dr. Misra explained, clinically speaking, Mother may be loving with the children at one point, but at the next point, find them burdensome.

{¶12} Andrea Dominick, a licensed practicing counselor, testified she began counseling Mother in July, 2008. Dominick stated she met with Mother approximately fifteen times over a five to six month period. Dominick and Mother addressed Mother's major issues of trust, impulse control, and poor decision making. Dominick added Mother also had a problem with her anger which was tied to her impulse control issues. When asked her position on the children being in Mother's home, Dominick stated, "I would like to see Amy be more committed to all the many things that she has to do in her life before I could give a, a for real honest answer." Tr. at 80. Dominick noted she suspended drug and alcohol counseling until Mother could work through some of her more severe issues. According to Dominick, Mother described her parents as having an unstable relationship, and having been absent much of her life. At the present time, Mother's relationship with her parents appeared to be poor. Dominick testified she would be concerned for young children being placed in the kind of environment Mother described she grew up in.

{¶13} Upon completion of the evidence, the trial court took the matter under advisement. Via Judgment Entry filed December 17, 2008, the trial court awarded permanent custody of the children to the Department.

{¶14} It is from this judgment entry Mother appeals, raising the following assignments of error:

{¶15} "I. THE TRIAL COURT ERRED IN AWARDING PERMANENT CUSTODY OF THE CHILDREN TO JOB AND FAMILY SERVICES AS JOB AND FAMILY SERVICES FAILED TO EXPEND REASONABLE EFFORTS TO REUNITE THE CHILDREN WITH APPELLANT/MOTHER.

{¶16} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT AN AWARD OF PERMANENT CUSTODY TO JOB AND FAMILY SERVICES IS IN THE BEST INTERESTS OF THE CHILDREN WHEN THERE ARE SUITABLE GRANDPARENTS TO ACCEPT LEGAL CUSTODY OF THE CHILDREN. THE TRIAL COURT'S DECISION WAS NOT SUPPORTED BY COMPETENT AND CREDIBLE EVIDENCE.

{¶17} "III. THE TRIAL COURT DENIED MOTHER DUE PROCESS OF LAW IN GRANTING PERMANENT CUSTODY TO JOB AND FAMILY SERVICES AND ISSUING AN ORDER TERMINATING VISITATION BETWEEN MOTHER AND HER CHILDREN WITHOUT A HEARING WHEN MOTHER FAILED TO CALL JOB AND FAMILY SERVICES 1 HOUR PRIOR TO THE VISIT TO CONFIRM SHE WOULD BE PRESENT FOR THE VISIT, BUT PERSONALLY APPEARED FOR THE VISIT 40 MINUTES EARLY."

{¶18} Father appeals the same, assigning as error:

{¶19} "I. THE TRIAL COURT'S DECISION AWARDING PERMANENT CUSTODY TO TUSCARAWAS COUNTY JOB AND FAMILY SERVICES AND TERMINATING APPELLANT'S PARENTAL RIGHTS IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE PURSUANT TO R.C. 2151.414."

{¶20} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.1(C).

MOTHER

I

{¶21} In her first assignment of error, Mother maintains the trial court erred in granting permanent custody of her children to the Department because the Department failed to expend reasonable efforts to reunite the children with her.

{¶22} Pursuant to R.C. 2151.419, the agency which removed the child from the home must have made reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the home, or make it possible for the child to return home safely. The statute assigns the burden of proof to the agency to demonstrate it has made reasonable efforts. R.C. 2151.419 is generally not applicable to permanent custody proceedings. *In re C.F.,* 113 Ohio St.3d 73, 81, 862 N.E.2d 816, 2007-Ohio-1104 (Citation omitted). Nonetheless, we find the Department did make reasonable efforts.

{¶23} The Department implemented a comprehensive reunification plan to assist Mother in remedying the problems which caused the children to be removed. The case plan required Mother to attend parenting education classes at the Department; undergo a psychological evaluation and follow all recommendations; complete an alcohol assessment; obtain stable housing; obtain a verifiable source of income; and visit the children as ordered. Mother was given three opportunities to attend parenting classes at the Department. Each time, she missed classes and was late for those classes she did attend. Although given information about Goodwill Parenting, Mother did not follow through on this option. Mother did not schedule or complete the psychological evaluation until after the Department filed its motion for permanent custody. Although

Mother did attend counseling, her counselor expressed concerns about Mother's ability to parent the children at that time. Mother did not have stable housing or employment. She lived back and forth between her parents' home and the home of the parents of her boyfriend. The trial court found the Department had made all reasonable, diligent efforts and had worked with Mother with no significant improvement.

{¶24} Although the trial court was not required to make a reasonable effort determination, based upon our review of the record, we find substantial evidence to establish the Department used reasonable efforts to reunify the family, but Mother made no significant progress toward alleviating the Department's core concerns for the children.

{¶25} Mother's first assignment of error is overruled.

MOTHER

II

{¶26} In her second assignment of error, Mother contends the trial court abused its discretion in finding an award of permanent custody to the Department was in the best interest of the children because suitable relative placement was available with the maternal grandparents. Mother also challenges the manifest weight of the evidence as to this decision.

{¶27} In *In re Schaefer,* 111 Ohio St.3d 498, 2006-Ohio-5513, the Ohio Supreme Court clearly found a trial court's statutory duty in determining whether it is in the best interest of a child to grant permanent custody to an agency does not include finding, by clear and convincing evidence, no suitable relative is available for placement. The statute requires the trial court to weigh all relevant factors. R.C. 2151.414 requires

the court to find the best option for the child once a determination has been made pursuant to R.C. 2151.414(B)(1)(a) through (d). The statute does not make the availability of a placement which would not require a termination of parental rights an all-controlling factor nor require the court to weigh that factor more heavily than other factors. *Schaeffer* at ¶ 64.

{¶28} In the instant action, Molly and Richard Baker, Mother's parents, requested the children be placed in their legal custody. The Department instructed the Bakers on how to proceed with the home study, including fingerprinting. At the time of the hearing, only Richard Baker had been fingerprinted. Molly Baker could not recall why she had not yet done so. Molly Baker also testified as to her heart condition and its effects on her daily life. Mother had described her own dysfunctional childhood to her counselor. The counselor described Mother's relationship with her parents as "pretty poor".

{¶29} We find the trial court did not abuse its discretion in not awarding legal custody of the children to their grandparents. We also find the trial court's finding it was in the children's best interest to grant permanent custody to the Department was not against the manifest weight of the evidence.

{¶30} Mother's second assignment of error is overruled.

MOTHER

III

{¶31} In her third assignment of error, Mother asserts her due process rights were violated because the trial court terminated her visits with the children without conducting a hearing. We disagree.

{¶32} Mother lost her visitation with the children on April 25, 2008, after she arrived late or no-showed without notice for the third time. After Mother began to make some progress on her case plan, the Department believed she should have some supervised visitation with the children. Via Judgment Entry filed July 21, 2008, the trial court reinstated the visitation with two conditions. The first condition required Mother to call the Department one hour prior to a scheduled visit to confirm her attendance. The second condition provided if Mother missed one scheduled visit, all future visits would be suspended. Mother failed to call the Department one hour prior to her scheduled visit on September 19, 2008. As a result, the Department again suspended her visits. The Department notified the trial court and parents of this decision. Mother requested a hearing. The trial court conducted a hearing on October 28, 2008. Following the hearing, the trial court found it was not in the best interest of the children to resume visitation.

{¶33} Mother has failed to provide this Court with a transcript of the October 28, 2008 hearing as required by App. R. 9(B). Mother has also failed to file a statement of evidence pursuant to App. R. 9(C). When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d 197, 400 N.E .2d 384. Because Mother has failed to provide this Court with those portions of the transcript necessary for resolution of the assigned error, i.e. the transcript of the October 28, 2008 hearing, we must presume the regularity of the proceedings below and affirm. It is the duty of the appellant to ensure the record,

or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 564. See also: *State v. Render* (1975), 43 Ohio St.2d 17, 330 N.E.2d 690; *State v. Bell* (1992), 78 Ohio App.3d 781, 605 N.E.2d 1335.

{¶34} Mother's third assignment of error is overruled.

FATHER

I

{¶35} In his sole assignment of error, Father challenges, as against the manifest weight of the evidence, the trial court's termination of his parental rights and award of permanent custody of the children to the Department. Specifically, Father asserts the Department failed to prove the children could not or should not be placed with either parent.

{¶36} 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* (Feb. 10, 1982), Stark App. No. CA5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶37} R.C. 2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates the trial court schedule a hearing, and provide notice, upon filing of a motion for permanent custody of

a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶38} Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (a) the child is not abandoned or orphaned, 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; (b) the child is abandoned; (c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶39} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates the trial court must consider all relevant factors, including, but not limited to, the following: (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; (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; (3) the custodial history of the child; and (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.

{¶40} Therefore, R.C. 2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial court will usually determine whether one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶41} If the child is not abandoned or orphaned, then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the trial court must consider all relevant evidence before making this determination. The trial court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R .C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶42} Father's case plan required him to complete a drug and alcohol assessment; complete parent education classes; complete a psychological assessment; maintain stable housing and income; and visit with the children as ordered. Father did not comply with any aspect of his case plan. First, throughout much of the matter, Father was incarcerated. Father lost his visitation rights after missing three visits with the children. Father did not complete either a drug and alcohol assessment or a psychological assessment. Father advised the Department he worked for a tree-trimming service, but did not provide any documentation verifying the employment or the income he receives. The Department was unaware of Father's housing situation.

{¶43} We find the trial court's finding the children could not or should not be placed with Father within a reasonable time was not against the manifest weight of the

evidence.[1] We further find the trial court's award of permanent custody to the Department was not against the manifest weight of the evidence.

{¶44} Father's sole assignment of error is overruled.

{¶45} The judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

[1] Father spends much of his Brief describing the efforts made by Mother to accomplish her case plan objectives. However, the trial court's termination of Father's parental rights is based upon his compliance with his own case plan. Mother did not appeal the could not/should not finding relative to the termination of her own parental rights.

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

IN THE MATTER OF:	:	
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F.C. AND G.C., III	:	
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	:	JUDGMENT ENTRY
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	:	Case No. 09AP010004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellants.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellants.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS