[Cite as *In re G.J.*, 2009-Ohio-2847.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	
G.J.	:	
D.J.	:	
M.H.	:	
J.T.	:	
(Minor Children)	:	JUDGES:
	:	W. Scott Gwin, P.J.
	:	John W. Wise, J.
	:	Julie A. Edwards, J.
	:	
	:	Case No. 09 CA 22
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Licking County Court Of Common Pleas, Juvenile Division, Case Nos. C2006-0776, C2006-0777, C2006-0778, & C2006-0779
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 12, 2009

APPEARANCES:

For The Children

ERIN WELCH
Assistant Prosecuting Attorney
20 S. Second Street, 4th Floor
Newark, Ohio 43055

For Evie Harper

ROBIN LYN GREEN
33 West Main Street,
Suite 103
Newark, OHio 43055

Guardian Ad Litem for the Children

J. MATTHEW DAWSON
35 S. Park Place, Suite 150
Newark, Ohio 43055

Edwards, J.

{¶1} Appellant, Evie Harper, appeals from the February 4, 2009, Judgment Entry of the Licking County Court of Common Pleas, Juvenile Division, terminating her parental rights and granting permanent custody of her four children to the Licking County Department of Job and Family Services.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Evie Harper is the mother of G.J. (DOB 4/9/00), D.J. (DOB 9/29/03), J.T. (DOB 10/5/04) and M.H. (DOB 9/9/05). The children all have different fathers. Appellant has been married three times and was, at the time of the hearing, married to Cregg Harper, the father of M.H.

{¶3} On September 29, 2006, complaints were filed alleging that the four children were dependent children. On the same date, Licking County Department of Job and Family Services filed a motion for a temporary order granting the agency emergency shelter care and custody of the four children. Pursuant to an order filed the same day, such motion was granted.

{¶4} An adjudicatory hearing before a Magistrate was held on December 19, 2006. As memorialized in a Magistrate's Decision filed on December 29, 2006, the children were found to be dependent children based upon the agreement of the parties, the evidence presented and the recommendation of the Guardian Ad Litem. The children were placed in the temporary custody of the agency.

{¶5} Thereafter, on December 12, 2007, Licking County Department of Job and Family Services filed a Motion for Permanent Custody of the children pursuant to R.C. 2151.415(F). A hearing before a Magistrate was held over three days in 2008.

{¶6} At the hearing, Eric Rini testified that he was a therapist and case manager for The Village Network, a foster care program. He testified that he had been seeing J.T., D.J. and G.J. on a weekly basis for about a year at their foster home. Rini testified that J.T. was very hyperactive and that he had diagnosed J.T. with disruptive behavior. Transcript of February 27, 2008 hearing at 25. Rini testified that he had diagnosed D.J. with attention deficit hyperactivity disorder. G.J., according to Rini, had been diagnosed with attention deficit and hyperactivity disorder, (hereinafter "ADHD") pervasive development disorder and also has cognitive and speech delays. When asked if G.J. was on medications, Rini testified that he was on lithium and risperdal to "help calm down overall behaviors, like violent behavior or aggressive behaviors." Transcript of February 27, 2008, hearing at 52. G.J. was also on medication for ADHD and bedwetting. Testimony was adduced that G.J.'s behavior is difficult to control. Testimony was adduced at the hearing that the children, with the exception of M.H., need to have weekly therapy. Rini also testified that the three brothers hit and bite each other.

{¶7} The children's foster mother testified at the hearing that G.J. did a lot of property damage and also bit and hit himself. She further testified that she observed G.J. sexually acting out and fondling himself. The foster mother testified that she walked in once on D.J. and G.J. and that D.J. had his pants down and G.J. was going to put D.J.'s penis in his mouth. She testified that, when the children came into her home, they "did a lot of hitting, biting, and when they would bite they would draw blood." Transcript of April 30, 2008, hearing at 19.

{¶8} Sarah Ley, a social worker with Licking County Department of Job and Family Services, testified that when she began her contact with appellant in September of 2006, her concerns included mental health and housing issues, appellant's failure to take care of her diabetes and appellant's failure to get her children to physical and occupational therapy and other appointments. According to Ley, the same issues were present when Ley first worked with appellant on a voluntary basis in 2002.

{¶9} Ley testified that appellant chose to be with men who did not treat her well and that these men were often abusive to her children. According to Ley, "[w]hat prompted my first contact with [appellant] in this case was [G.J.] being - an allegation of [G.J.] being physically abused by her husband at the time, Kenneth Perry." Transcript of April 30, 2008, hearing at 86.

{¶10} As part of her case plan, appellant was required to undergo psychological counseling. While appellant, who has been diagnosed with bipolar disorder, ADHD and post-traumatic stress disorder, told Ley that she had attended all of her sessions from October of 2006 to April of 2008, Ley testified that appellant attended only 15 out of 31 individual sessions with her counselor. Ley indicated that she was concerned that appellant "hasn't addressed her mental health issues" Transcript of April 30, 2008, hearing at 111. Appellant was hospitalized twice for nervous breakdowns during the pendency of these cases. Appellant testified that, in March of 2007, she had been admitted to Union County Memorial Hospital for a panic attack and a nervous breakdown. At the time, appellant was thinking of harming herself. In June of 2007, appellant went to the emergency room for anxiety. Testimony also was adduced that, in January of 2008, appellant's counselor took her to emergency services at

Moundbuilders because of depression and anxiety. As of the time of the hearing, appellant was not taking her medication because she was pregnant.

{¶11} At the hearing, Ley testified that she had no verification that appellant was engaged in any counseling services as of the time of the hearing.

{¶12} Ley also testified that appellant was on an "array" of medications for her mental health problems and that she forgot to take her medications. According to Ley, appellant also failed to take care of her diabetes and has been discharged by two doctors because she was not "compliant" with her diabetes treatment. Transcript of April 30, 2008, hearing at 114. Ley also testified that, in January of 2008, she went and picked up appellant's diabetes medications and paid for the same because appellant was out of the same and did not have the ability to pay the $6.00 for the medication. Testimony was adduced that appellant ate sugary foods and that she ended up in the emergency room for her diabetes on multiple occasions.

{¶13} At the hearing, Ley also addressed the housing issue. She testified that she knew of eight different places, including staying with relatives and living in boarding rooms, that appellant had lived throughout the case. At one point, after appellant had moved out of her sister's house, Moundbuilders Guidance Center paid for appellant to stay at the Budget Inn for a couple of weeks.

{¶14} The following testimony was adduced when Ley was asked about appellant's employment history throughout the case:

{¶15} "A. Yes, she has had seven jobs throughout this case. She's worked at Wendy's in Buckeye Lake. I believe it's RRD. I don't even know what that stands for. Is that right? It was something with envelopes, like stuffing junk mail or something I

believe when she did that. She worked at TI Automotive through Kelly Temporary services. She's worked at KFC. She's worked at Automotive. She worked at Chapel Grove for a little bit. She worked at Wendy's for a time being. And now she reports she's working at First Choice up in Mansfield.

{¶16} "Q. Okay.

{¶17} "A. It's kind of like a - - my understanding is it's kind of like a home health aide type job. I've not had any pay verification or anything like that yet, but she does report that she's working there.

{¶18} "Q. The longest I've know her to work a job in this case is about five months, and that was at Wendy's." Transcript of April 30, 2008, hearing at 120.

{¶19} Ley also testified that appellant failed to follow through with services for the children. She testified that Help Me Grow Services was involved with respect to D.J., J.T. and M. H., but that appellant did not follow through with the same. D.J. and J.T., according to Ley, were assessed and determined to be behind in their speech, and G.J. had been seeing a psychiatrist. She also testified that M.H. had severe food allergies.

{¶20} Appellant testified at the hearing that she and her husband were approximately $1,800.00 behind in their rent. She testified that they had moved to their current address in June of 2007 and that the agency paid her rent for July 2007. Appellant admitted that she had not paid a full rent since August of 2007, and that, in early November of 2007, she was facing eviction.

{¶21} Testimony also was adduced at the hearing regarding appellant's romantic involvement with men with criminal records. Appellant testified that she became

involved with David Joseph, the father of D.J., before he got out of jail for felonious assault on a peace officer and that she allowed him to move in with her and her children after his release. She also testified that she began a relationship with William Tolle, who had a criminal history and was David Joseph's cousin, while she was still living with David Joseph. Tolle, according to appellant, was abusive to G.J., causing her to take G.J. to the hospital. After appellant filed a police report, Tolle was convicted of domestic violence and child endangering.

{¶22} At the hearing, appellant testified that Donald Creek, one of her ex-husbands, had been physically abusive to her. She was also questioned about Kenneth Perry who she had married after knowing for only a month. Appellant testified that there were allegations that Perry was observed at the Wendy's across the street abusing the children. She also testified that she was told that there was an incident in September of 2006 involving Perry and G.J. in the shower and that she left Perry the next day. Appellant testified that she got together with David Joseph the next day. She also admitted that she married her current husband, Cregg Harper, 60 days after he was released from prison on October 2, 2007, for a felony five theft. When asked if she was aware that David Joseph was also involved in that crime, appellant responded that she was. She also indicated that she was aware that her husband had an outstanding warrant from Franklin County.

{¶23} Appellant also was questioned about her relationship with Joseph Suber, who had an extensive criminal history including gross sexual imposition. Appellant had a relationship with Suber prior to Harper's release from prison in October of 2007. Appellant testified that, on August 3, 2007, Suber, who slept sometimes at her home,

physically assaulted her. Appellant did not press charges against Suber until Suber made threatening phone calls to her.

{¶24} Melissa Terry, a child abuse and neglect investigator with Licking County Department of Job and Family Services, testified that she had her first initial contact with appellant in 2001 after it was reported that G.J. was neglected. No on-going case was opened at the time and the report of neglect was not substantiated. She further testified that she had another investigation in October of 2001 after concerns were raised that appellant was missing doctors' appointments for G.J. and that G.J. had multiple trips to the emergency room and multiple accidents. According to Terry, in October of 2004, she had contact again with appellant over allegations of physical abuse. Although the abuse was not substantiated, Terry testified that appellant was still missing appointments. According to Terry, G.J. was taken to the emergency room over 50 times in 2004.

{¶25} The Guardian Ad Litem, at the hearing, indicated that he believed that the children should be placed in the permanent custody of the agency. The Guardian Ad Litem noted that the children had special needs and needed structure and stability and appellant and her husband could not provide the same. He further noted that appellant and her husband failed to maintain stable housing.

{¶26} The Magistrate, pursuant to a Decision filed on June 23, 2008, recommended that appellant's parental rights be terminated and that the children be placed in the permanent custody of the agency for purposes of adoptive placement. The Magistrate, in his Decision, stated, in relevant part, as follows:

{¶27} "12. Pursuant to Section 2151.415 of the Ohio Revised Code, the Magistrate finds by clear and convincing evidence that it is in the best interest of [G.J., D.J., M.H., and J.T.] to be hereby placed in the permanent custody of the Agency.

{¶28} "13. The Magistrate has considered the factors enumerated in section 2151.414 of the Ohio Revised Code, and finds by clear and convincing evidence that it is in the best interest of all four children to permanently terminate all parental rights and to place the children in the permanent custody of the Agency. In rendering this Decision, the Magistrate finds by clear and convincing evidence all of the following:

{¶29} "(a.) The children cannot and should not be placed with their mother or any of the fathers within a reasonable period of time.

{¶30} "(b.) The children's need for a permanently secure placement cannot be achieved without granting permanent custody to the Agency.

{¶31} "(c.) The mother and all four fathers failed continuously and repeatedly to remedy the conditions which existed at the time of the children's removal from their home, notwithstanding reasonable case planning and diligent efforts by the Agency. The Magistrate finds that the Agency made reasonable efforts to achieve reunification."

{¶32} The Magistrate also noted that the agency had worked with appellant since 2001 and that a "full litany of services and service providers had not corrected or significantly alleviated the family's chronic problems. Additional services will not fix an unfixable situation. [Appellant] will never be an appropriate parent for her five children."[1]

{¶33} Appellant then filed objections to the Magistrate's Decision. Appellant, in her objections, took issue with the Magistrate's finding that she and her husband could not take care of themselves, nevertheless, taking care of five demanding children.

[1] Appellant was pregnant with her fifth child.

Pursuant to a Judgment Entry filed on February 4, 2009, the trial court denied appellant's objection, terminated appellant's parental rights and granted permanent custody of the children to the agency.

{¶34} Appellant now raises the following assignment of error on appeal:

{¶35} "THE TRIAL COURT'S ENTRY GRANTING PERMANENT CUSTODY TO THE AGENCY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶36} Appellant, in her sole assignment of error, argues that the award of permanent custody to the agency is against the manifest weight of the evidence. We disagree.

{¶37} "Permanent Custody" is defined as "[a] legal status that vests in a public children services agency or private child placing agency, all parental rights, duties and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." R.C. Section 2151 .011.

{¶38} A trial court's decision to grant permanent custody of a child must be supported by clear and convincing evidence. The Ohio Supreme Court has defined "clear and convincing evidence" as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty, as required beyond a reasonable doubt, as in criminal cases." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118; *In re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613.

{¶39} In reviewing whether the trial court based its decision upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60; See also, *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. If the trial court's judgment is "supported by some competent, credible evidence going to all the essential elements of the case," a reviewing court may not reverse that judgment. *Schiebel,* 55 Ohio St.3d at 74, 564 N.E.2d 54.

{¶40} Moreover, "an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusion of law." *Id.* Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273:

{¶41} "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial 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 proffered testimony."

{¶42} Moreover, deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 419, 674 N.E.2d 1159; see, also, *In re: Christian,* Athens App. No. 04CA10, 2004-Ohio-3146; *In re: C. W.,* Montgomery App. No. 20140, 2004-Ohio-2040.

{¶43} Pursuant to 2152.414(B)(1), the court may grant permanent custody of a child to the movant if the court determines "that it is in the best interest of the child to grant permanent custody to the agency that filed the motion for permanent custody and that any of the following apply:

{¶44} "(a) The child is not abandoned or orphaned, has not 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,… and the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with the child's parents.* * *

{¶45} Revised Code 2151.414(E) sets forth the factors a trial court must consider in determining whether a child cannot or should not be placed with a parent within a reasonable time. If the court finds, by clear and convincing evidence, the existence of any one of the following factors, "the court shall enter a finding that the child cannot be placed with [the] parent within a reasonable time or should not be placed with either parent":

{¶46} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parent to remedy the problem that initially caused the child to be placed outside the home, the parents have failed continuously and repeatedly to substantially remedy the conditions that caused the child to be placed outside the child's home. In determining whether the parents have substantially remedied the conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents

for the purpose of changing parental conduct to allow them to resume and maintain parental duties.* * *

{¶47} "(16) Any other factors the court considers relevant."

{¶48} A trial court may base its decision that a child cannot or should not be placed with a parent within a reasonable time upon the existence of any one of the R.C. 2151.414(E) factors. The existence of one factor alone will support a finding that the child cannot be placed with the parent within a reasonable time. See *In re: William S.* (1996), 75 Ohio St.3d 95, 661 N.E.2d 738; *In re: Hurlow* (Sept. 21, 1998), Gallia App. No. 98 CA 6, 1998 WL 655414; *In re: Butcher* (Apr. 10, 1991), Athens App. No. 1470, 1991 WL 62145.

{¶49} In the case sub judice, the trial court found that the children could not and should not be placed with appellant within a reasonable period of time. We find that such finding was not against the manifest weight of the evidence. As is set forth in the statement of facts, the testimony adduced at the hearing shows, as the Magistrate found, that appellant has a "long history of emotional instability, unstable relationships, unstable employment, unstable living arrangements, and poor parental decision-making." The testimony supports the trial court's findings that appellant is unable to care for herself and her own medical and psychological problems and that she, through her relationships with men with criminal histories, has repeatedly exposed her children to dangerous situations. The testimony at the hearing also demonstrated that appellant cannot financially support herself and has had to rely on financial support from others, including the agency. Moreover, as noted by the trial court, appellant has been involved with children's services since 2002 and the agency's concerns have not changed over

the years. The testimony also established that appellant makes inappropriate decisions for both herself and her children.

{¶50} Appellant also argues that the trial court's finding that it was in the children's best interest that permanent custody be granted to the agency was against the manifest weight of the evidence.

{¶51} 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.

{¶52} Appellant's children have been in foster care since September of 2006. Testimony was adduced at the hearing that because of their problems with hyperactivity and ADHD, the children will need intensive supervision. Testimony was adduced at the hearing that the three older boys were all in the same foster home and that the foster mother had bonded with them. Sarah Ley testified at the hearing that she had explored relative placement for the three older children who were in foster care and that there was no appropriate relative placement available. She further testified that the foster mother and her husband met all the needs, both basic and special, of these three children and that the foster mother had skills dealing with special needs children. Ley

also testified that M.H. was in the custody of his paternal grandmother who expressed interest in adopting him if permanent custody were granted to the agency. Ley, when asked for her recommendation as to what was in the best interest of the four children, testified that permanent custody was in their best interest. As is stated above, the Guardian Ad Litem also stated that he believed that permanent custody should be granted to the agency.

{¶53} Based on the foregoing, we find that the trial court's finding that it was in the children's best interest that permanent custody be granted to Licking County Department of Job and Family Services was not against the manifest weight of the evidence.

{¶54} To conclude, we find that the award of permanent custody to the agency was not against the manifest weight of the evidence.

{¶55} Appellant's sole assignment of error is, therefore, overruled.

{¶56} Accordingly, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

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JUDGES

JAE/d0603

[Cite as *In re G.J.*, 2009-Ohio-2847.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
G.J.	:	
D.J.	:	JUDGMENT ENTRY
M.H.	:	
J.T.	:	
(Minor Children)	:	CASE NO. 09 CA 22

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to appellant.

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JUDGES