[Cite as *In re N.E.*, 2009-Ohio-4625.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE N.E.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
	:	Case No. 2009 AP 05 0022
	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court of Common Pleas, Juvenile Division Case No. 08 JN 00255

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Appellant:

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For Appellee:

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Guardian ad Litem:

KAREN DUMMERMUTH
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Delaney, J.

{¶1} Mother-Appellant, Kimberly Buckohr appeals the April 7, 2009 judgment entry of the Tuscarawas County Court of Common Pleas, Juvenile Division, to grant permanent custody of her child to Appellee, Tuscarawas County Job and Family Services. For the reasons that follow, we affirm.

STATEMENT OF THE CASE AND THE FACTS

{¶2} Appellant, Kimberly Buckohr and Daniel Emery are the biological parents of N.E. (D.O.B. 5/7/2008). On May 9, 2008, Tuscarawas County Job and Family Services ("TCJFS") obtained an ex-parte order for emergency, temporary custody of N.E. based on the agency's previous involvement with Appellant and information that the parents did not have a suitable residence for N.E.

{¶3} A shelter care hearing was held on May 12, 2008, at which the agency's temporary custody was maintained. On that same day, TCJFS filed a complaint alleging N.E. to be a dependent child. The complaint alleged Appellant's first child, S.B. (D.O.B. 8/16/1997), had been found to be neglected and dependent and placed in the legal custody of a relative. The complaint further stated that Appellant could not provide for N.E.'s support or care based upon Appellant's poor living conditions, such as lack of electricity and running water, and her lack of income.

{¶4} The trial court held an adjudicatory hearing on July 8, 2008. At the conclusion of the hearing, the trial court found N.E. to be a dependent child and continued the matter for disposition. The dispositional hearing was held on August 14, 2008 before a magistrate. The magistrate ordered that N.E. remain in the temporary custody of TCJFS and a case plan was adopted for the parents.

{¶5} The trial court reviewed the matter on October 27, 2008 and continued the placement of N.E. with TCJFS. On January 14, 2009, TCJFS filed a motion to modify the trial court's initial disposition of temporary custody to permanent custody. A hearing was held on the motion on April 1, 2009 with all parties present and represented by counsel. At the hearing, Daniel Emery stipulated to TCJFS's request for permanent custody.

{¶6} On April 7, 2009, the trial court issued its judgment entry ordering that N.E. be placed in the permanent custody of TCJFS. It is from this judgment Appellant now appeals.

{¶7} Appellant raises one Assignment of Error:

{¶8} "THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PERMANENT CUSTODY TO JOB AND FAMILY SERVICES AS JOB AND FAMILY SERVICES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CHILDREN COULD NOT BE PLACED WITH MOTHER IN A REASONABLE AMOUNT OF TIME, AND THAT AN AWARD OF PERMANENT CUSTODY WAS IN THE CHILD'S BEST INTEREST."

{¶9} In her sole Assignment of Error, Appellant argues the trial court abused its discretion by finding her child could not be placed with her within a reasonable time and that the grant of permanent custody to TCJFS was in the child's best interest. We disagree.

{¶10} "[T]he right to raise a child is an 'essential' and 'basic' civil right." *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. The permanent termination of a

parent's rights has been described as, "* * * the family law equivalent to the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App. 3d 1, 16, 601 N.E. 2d 45. Therefore, parents "must be afforded every procedural and substantive protection the law allows." Id.

{¶11} An award of permanent custody must be based upon clear and convincing evidence. R.C. 2151.414(B)(1). 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. It does not mean clear and unequivocal." *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-104, 495 N.E.2d 23.

{¶12} Even under the clear and convincing standard, this Court's review is deferential. If some competent, credible evidence going to all the essential elements of the case supports the trial court's judgment, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court. *In re Myers III,* Athens App. No. 03CA23, 2004-Ohio-657, ¶ 7, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. The credibility of witnesses and weight of the evidence are issues primarily for the trial court, as the trier of fact. *In re Ohler,* Hocking App. No. 04CA8, 2005-Ohio-1583, ¶ 15, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶13} 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

must 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.

{¶14} 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:

{¶15} "(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;

{¶16} "(b) the child is abandoned and the parents cannot be located;

{¶17} "(c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or

{¶18} "(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."

{¶19} 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.

{¶20} The trial court must consider all relevant evidence before determining the child cannot be placed with either parent within a reasonable time or should not be

placed with the parents. R.C. 2151.414(E). The statute also indicates that if the court makes a finding under R.C. 2151.414(E)(1)–(15), the court shall determine the children cannot or should not be placed with the parent. A trial court may base its decision that a child cannot be placed with a parent within a reasonable time or should not be placed with a parent 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.*, 75 Ohio St.3d 95, 1996-Ohio-182, 661 N.E.2d 738; *In re: Hurlow* (Sept. 21, 1998), Gallia App. No. 98 CA 6; *In re: Butcher* (Apr. 10, 1991), Athens App. No. 1470.

{¶21} R.C. 2151.414(E) sets forth factors a trial court is to consider 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. Specifically, Section (E) provides, in pertinent part, as follows:

{¶22} "(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code 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, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist 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:

{¶23} “(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 parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those 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 changing parental conduct to allow them to resume and maintain parental duties.

{¶24} "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code.

{¶25} “* * *

{¶26} “(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶27} “* * *

{¶28} “(16) Any other factor the court considers relevant.”

{¶29} R.C. 2151.414(D) requires the trial court to consider all relevant factors in determining whether the child's best interests would be served by granting the permanent custody motion. These factors include but are not limited to:

{¶30} "(1) the interrelationship of the child with others;

{¶31} "(2) the wishes of the child;

{¶32} "(3) the custodial history of the child;

{¶33} "(4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and

{¶34} "(5) whether any of the factors in divisions (E) (7) to (11) apply."

{¶35} Once a child has been placed in the temporary custody of a children's services agency, the agency is required to prepare and maintain a case plan for that child. R.C. 2151.412(A)(2). The ultimate goal is to reunify the parent with child. On August 14, 2008, the trial court approved Appellant's case plan that required Appellant to attend parenting classes, complete psychological evaluations, obtain employment and stable housing. Appellant argues that TCJFS did not make reasonable efforts to reunify Appellant with her child; specifically, Appellant argues that TCJFS did not help Appellant pay an invoice to complete her individual counseling, or help Appellant obtain employment and stable housing that would have allowed her to complete her case plan.

{¶36} Jaime Grunder, Appellant's ongoing case manager with TCJFS, testified at the April 1, 2009 hearing. Ms. Grunder testified that Appellant completed her parenting classes and obtained a psychological evaluation, but had failed to complete her individual counseling sessions, obtain housing or stable employment. (T. 64).

{¶37} As to the individual counseling sessions, Appellant testified that she stopped participating in her individual counseling sessions in December 2008 due to an outstanding $150.00 invoice. (T. 56). Appellant argues that TCJFS did not make reasonable efforts to reunify Appellant with her child based upon TCJFS's refusal to pay the outstanding bill. At the hearing, Ms. Grunder testified that Appellant never told Ms. Grunder that she had stopped her individual counseling and in February 2009, had in fact told Ms. Grunder that she was still going to counseling. (T. 64). Ms. Grunder testified that Appellant never told her that she needed assistance to start her individual counseling. (T. 64). Further, evidence was presented that Appellant had $600.00 in her banking account and she chose not to use it to pay for her counseling invoice. (T. 57-58).

{¶38} Appellant next argues that TCJFS further failed to use diligent efforts to assist Appellant complete her case plan when TCJFS failed to provide Appellant with resources to obtain housing and employment. Appellant argues in her brief that if TCJFS would have assisted her with finding employment and provided her with a first month's rent and a deposit, she could have completed her case plan. Ms. Grunder testified that TCJFS would pay for rent and deposit, but Appellant must have a job so that she could pay the rent from that time forward. (T. 80).

{¶39} Throughout the disposition of the instant case, Appellant did not have stable employment, but for two weeks of employment with Influent. (T. 24). Appellant testified that she was a full time student at Kent State University – Tuscarawas Branch and studying to become a paralegal with the goal of some day attending law school. (T.

37-38). Appellant stated that her current income consisted of food stamps and her student loans. (T. 39, 42).

{¶40} At the time of the hearing, Appellant resided in a local homeless shelter. (T. 22). She had moved to the homeless shelter on the Saturday before the April 1, 2009 hearing. (T. 23). Before her change in residence, Appellant had resided with Dan Embry, the father of N.E. (T. 23). Appellant and Barbara Schwartz, clinical therapist with the Chrysalis Counseling Center, testified as to Appellant's unhealthy relationship with Mr. Embry. (T. 12, 33). Appellant agreed that Mr. Embry was controlling, critical and said hurtful things to Appellant and about Appellant, but she would then tell Ms. Schwartz that they were getting engaged and were spending a lot of time together. (T. 13). Appellant testified that in spite of all the negative aspects of the relationship, she continued to carry on a relationship with Mr. Embry. (T. 34). At the time of the hearing, Appellant was no longer residing with Mr. Embry because he was moving away from the area. Appellant stated that but for the hearing and that Mr. Embry was moving South, she would continue to stay at his home. (T. 34).

{¶41} The trial court partially relied upon Appellant's psychological evaluation by Ms. Schwartz to determine that N.E. could not be placed with Appellant within a reasonable time. We agree with the trial court's findings that Appellant's mental health issues impact her decision-making as it relates to her relationship, employment and housing choices.

{¶42} We find that TCJFS met its statutory obligations in making diligent efforts to assist Appellant to remedy the problems that initially caused the child to be placed outside of the home. Upon our review of the record, we find that clear and convincing

evidence supports the decision of the trial court that N.E. could not or should not be returned to Appellant within a reasonable time.

{¶43} Appellant next argues that the trial court erred in finding that it would be in the best interests of the child to be placed in the permanent custody of TCJFS. 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.

{¶44} Appellant had visitation with N.E. for one hour per week. At the beginning of the case, Appellant and Mr. Embry attended visitation together. The visitations were unsuccessful because Mr. Embry demanded that he videotape the visitation sessions for his records and he would be critical of Appellant's care for N.E. during the sessions. (T. 68-69). Appellant began attending visitations by herself, but Ms. Grunder testified that she was consistently concerned about Appellant's ability to care for N.E. during her visitations. (T. 67). TCJFS would address its care concerns with Appellant and Appellant would acknowledge the issue, but would repeat the issue at the following visitation. (T. 68).

{¶45} Appellant's first child was removed from her home due to dependency and neglect. Appellant was convicted of domestic violence in relation to this child, due to Appellant "smacking" her when the child bit her on the leg. (Psychological Assessment, February 7, 2008).

{¶46} The Guardian ad Litem recommended that N.E. be placed in the permanent custody of TCJFS. (G.A.L. Report, March 2, 2009). Appellant admitted at the hearing that while she loved her child very much and wanted to be with her, she was not in a position to care for N.E. at the present time. (T. 24).

{¶47} We determine upon a thorough review of the record that clear and convincing evidence supports the trial court's finding that the best interests of the child would be served by the grant of permanent custody to TCJFS.

{¶48} For these reasons, we find that the trial court's determination that the child could not be placed with Appellant within a reasonable time or should not be placed with her was not against the manifest weight or sufficiency of the evidence. We further find that the trial court's decision that permanent custody to TCJFS was in the child's best interest was not against the manifest weight or sufficiency of the evidence.

{¶49} Appellant's sole Assignment of Error is overruled.

{¶50} For the foregoing reasons, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed.

By: Delaney, J.
Gwin, P.J. and
Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN RE N.E.	:	
	:	JUDGMENT ENTRY
	:	
	:	Case No. 2009 AP 05 0022

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

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN