

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: R.S. AND A.S.,	:	JUDGES:
DEPENDENT CHILDREN	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Julie A. Edwards, J.
	:	Hon: Patricia A. Delaney, J.
	:	
	:	
	:	Case No. 09-CA-14
	:	
	:	
	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Civil appeal from the Guernsey County Court of Common Pleas, Juvenile Division, Case No. 08JC00345
--------------------------	--

JUDGMENT:	Affirmed
-----------	----------

DATE OF JUDGMENT ENTRY:	November 4, 2009
-------------------------	------------------

APPEARANCES:

For Mother-Appellant	For Guernsey County Children Services Board-Appellee
----------------------	---

JOSEPH H. BROCKWELL
311 Scammel Street, Ste. 201
Marietta, OH 45750

AMBER D. WOOTTON
139 West Eighth Street
Box 640
Cambridge, OH 43725-0640

GUARDIAN AD LITEM
MELISSA M. WILSON
213 North Eighth Street
Cambridge, OH 43725

Gwin, P.J.

{¶1} Appellant-mother Donna S.¹ appeals the May 14, 2009, judgment entry of the Guernsey County Court of Common Pleas, Juvenile Division, which terminated her parental rights with respect to her minor children, R.S. and A.S.² and granted permanent custody of the child to appellee, the Guernsey County Children’s Services Board (hereinafter “GCCSB”).

I. Procedural History

{¶2} Appellant, Donna S. is the biological mother of R. S. and A. S. On November 6, 2007, GCCSB received a report that R.S.’s maternal uncle had thrown him onto his bed, leaving a large bruise. GCCSB made a home visit and instituted a safety plan stating that the uncle was not to reside in the same home as the children. On November 14, 2007, GCCSB received additional reports regarding scratches on R.S.’s neck and A. S.’s face being rubbed in feces. These reports led to GCCSB receiving temporary custody of the children.

{¶3} The children were later returned to the custody of their mother. In February, April, and May 2008, GCCSB received various reports regarding the living conditions of the children and several reports of physical abuse. Following these reports, GCCSB again received temporary custody of the children on May 21, 2008. The children were placed in a foster home, as no suitable family placements were available.

¹ For purposes of anonymity, initials designate appellant’s name only. See, e.g., *In re C.C.*, Franklin App. No. 07-AP-993, 2008-Ohio-2803 at ¶ 1, n.1. .

² Counsel should adhere to Rule 45(D) of the Rules of Supt. for Courts of Ohio concerning disclosure of personal identifiers.

{¶4} On July 22, 2008, the children were adjudicated Dependent pursuant to RC 2151.04(b) and (c), Neglected pursuant to RC 2151.03(b) and (c), and Abused pursuant to RC 2151.031(d). On August 18, 2008, this matter was before the court for Dispositional Hearing. The court continued custody of R. S. and A. S.

{¶5} On February 27, 2009, GCCSB filed a motion for permanent custody. On May 4, 2009, a permanent custody hearing was held. On May 14, 2009, the Court journalized the finding of facts and conclusions of law that granted permanent custody of the children to the GCCSB.

{¶6} It is from this entry that the appellant-mother has appealed.

II. Assignments of Error

{¶7} On appeal, mother asserts the following assignment of error:

{¶8} "I. THE JUVENILE COURT ABUSED ITS DISCRETION, AND ITS JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE, WHEN IT FOUND THAT IT WAS IN THE BEST INTEREST OF THE DAUGHTER TO PERMANENTLY TERMINATE THE PARENTAL RIGHTS OF THE MOTHER AND THAT CUSTODY COULD NOT BE PLACED WITH THE MOTHER WITHIN A REASONABLE TIME."

{¶9} Based upon the appellant-mother's concession that she does not seek to regain custody of her son, R.S. we will limit our review of this assignment of error to the daughter, A.S. (T. at 92-94).

A. Burden Of Proof

{¶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. A parent's interest in the care,

custody and management of his or her child is “fundamental.” *Id.*; *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. 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.

B. Standard of Review

{¶12} Even under the clear and convincing standard, our 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.

III. Requirements for Permanent Custody Awards

{¶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: (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 and the parents cannot be located; (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.

{¶15} 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.

A. Parental Placement within a Reasonable Time-

R.C. 2151.414(B) (1) (a).

{¶16} The 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, 1997 WL 701328; *In re: Butcher* (Apr. 10, 1991), Athens App. No. 1470, 1991 WL 62145.

{¶17} 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:

{¶18} “(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:

{¶19} “(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.

{¶20} “***

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

{¶22} 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: (1) the interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions (E) (7) to (11) apply.

{¶23} In this case, the trial court made its permanent custody findings pursuant to R.C. 2151.414(B) (1) (a). The trial court found that the evidence established that A.S. could not be placed with appellant-mother within a reasonable period and should not be placed with her.

{¶24} Jennifer Moore, a case manager at Thompkins Child & Adolescent Services, testified that she worked with appellant on ways that she could address the negative behavior of the children. (T. 12). Appellant was at first receptive to ideas such as sticker charts, rewards systems, and redirecting negative behaviors, but had difficulty implementing the suggestions with her children and quickly became frustrated when she believed they were not working. (T. 12-13). Even after these efforts, Ms. Moore stated that appellant has difficulty handling negative behavior. (T. 13).

{¶25} Dr. Gary Wolfgang, a licensed psychologist, performed a psychological evaluation of appellant in August of 2008. (T. 16). Dr. Wolfgang diagnosed appellant with adjustment disorder, and stated that it is a disorder that manifests itself through symptoms, in appellant's case, mainly angry and sad feelings. (T. 17). He testified that he believed appellant would have difficulty living independently and that she would have an "awful lot of trouble" parenting her children. (T. 21). He testified that, by appellant's own report, both of her children were difficult to parent. (T. 21).

{¶26} Yvonne Miller, A. S.'s foster mother and a licensed treatment foster parent who has received specific training to deal with difficult children, testified that her training had helped her deal with A.S. (T. 26-27). Ms. Miller testified that although A.S. was chronologically 10 years old at the time of the hearing, she operated more on the level of a 5 year old. (T. 28). Further, A.S. has persistent problems with understanding

appropriate boundaries with strangers. (T. 29). Ms. Miller stated that since coming to live with her, A.S. had made some progress on the boundary issue. (T. 29-30). When A.S. came to live with Ms. Miller, she also had problems understanding proper hygiene and was wetting the bed and soiling herself throughout the day. (T. 29-30). However, at the time of the hearing, A.S. was able to brush her teeth and bathe herself. (T. 29-30). In addition, A.S. was exhibiting progress with bedwetting and no longer soiled herself during the day. (T. 29-30). Finally, Ms. Miller testified that A.S. had made some progress at school, but still required a significant amount of one-on-one attention and constant reminders at school as well as at home. (T. 31).

{¶27} Terri Mackie, R.S.'s foster mother, is also a licensed treatment foster parent. (T. 34). She testified that she had received 60 hours of training per year for the past 20 years. (T. 34). When R.S. came to live with her, there were specific concerns with his behaviors, his difficulty with comprehension, and some aggressive social behaviors. (T. 35). Ms. Mackie testified that she believes R.S. functions more like a 3 year-old than a 13 year-old. (T. 35). She further stated that R. S. continues to need constant supervision and that his behavioral progress was "minimal and sporadic." (T. 36).

{¶28} Roy Higgins, an intake caseworker for GCCSB testified that he received a report of A. S. having a notable bruise on May 5, 2008. (T. 48). Upon this report, he advised appellant to have A.S. checked out at the emergency room, and testified that appellant had not taken the initiative to do so until advised by GCCSB. (T. 49).

{¶29} Maria Neiswonger, another intake caseworker for GCCSB, testified that at one point, she was transporting appellant to a doctor's appointment and at that time,

appellant disclosed that her mother was allowing men to enter their home for the purpose of having intercourse with appellant and that appellant did not feel safe in the home. (T. 55).

{¶30} Kody Gasser, a family support specialist at GCCSB, had supervised numerous visits between appellant and her children. He testified that appellant recently had seemed disengaged from the children. (T. 65). He testified that he had witnessed A.S. crossing boundary lines, and that appellant's presence was not enough to stop her from doing so. (T. 66).

{¶31} GCCSB Caseworker, Elissa Mallett, testified that appellant had largely complied with her case plan, aside from obtaining safe and stable housing for her children. (T. 73). The Caseworker testified that appellant was residing at a group home at the time of the hearing and children were not permitted to reside there. (T. 74). The Caseworker further stated that appellant had lived alone in an apartment for four months, but she became lonely, had problems with her neighbors, and reported being scared to live alone. (T. 76). In addition, appellant reported hearing voices while she lived independently and ended up in a crisis center. (T. 77).

{¶32} With regard to the children, the Caseworker reported that R.S. has made minimal progress since being placed in foster care and that he was doing well in his current placement. (T. 78). R.S.'s foster family was willing to provide care for him indefinitely. (T. 79). The Caseworker testified that A.S. initially would soil her pants during visits with appellant, but since being in placement, this behavior had stopped. (T. 80). A.S. was doing well in her current placement, and one of her previous foster families had expressed a desire for long-term placement of her. (T. 81-82).

{¶33} The Caseworker also testified that appellant still expressed a desire to live with her mother, despite all prior incidents while living in her home. (T. 82). The Caseworker expressed concern for the safety of the children if appellant were to reside with or continue to have contact with her mother and her brother. (T. 83). The Caseworker conveyed that she has ongoing concerns regarding the behavior of both children and appellant's ability to handle said behaviors. (T. 85). Finally, the Caseworker testified that she was also concerned with appellant's inability to recognize potentially dangerous situations on her own and was concerned with the impact such inability would have on R.S. and A.S. (T. 85).

{¶34} Appellant agreed with the testimony that had been presented that A.S. continues to have behavior problems; however, appellant testified that, despite her history, she believes she can handle these "fits." (T. 92). Appellant admitted that she would be unable to locate an apartment on her own and expressed that she would rely on GCCSB to locate appropriate housing for her. (T. 94). Appellant further stated that even though she wanted custody of her children, she had not been proactive in attempting to locate housing that would be appropriate for her children. (T. 95). Appellant testified that she remained scared to live independently. (T. 95). Finally, appellant testified that despite GCCSB's concerns with appellant's mother and her history of abuse, appellant did not see why she could not maintain custody of her children *and* live with her mother. (T. 95).

{¶35} Both the Guardian ad Litem and the CASA volunteer stated that they believed that granting GCCSB's Motion for Permanent Custody was in the best interest of the children. (T. 99, 101). The CASA volunteer further stated that, in her opinion,

she had not observed appellant demonstrating the ability to parent either of her children. (T. 102).

{¶36} The children love their mother and the mother loves her children and attends visitation. The evidence demonstrated the successful efforts appellant-mother had made in the case to regain custody of the child. On that point, the evidence demonstrates that any improvement the appellant-mother has made in her life is tentative and, perhaps, temporary, and that she is at risk of relapse. The trial court found that, regardless of appellant's compliance with aspects of her case plan, she was still not able to be a successful parent to her daughter.

{¶37} In the case of *In re: Summerfield*, Stark App. No. 2005CA00139, 2005-Ohio-5523, this court found where, despite marginal compliance with some aspects of the case plan, the exact problems that led to the initial removal remained in existence, a court does not err in finding the child cannot be placed with the parent within a reasonable time.

{¶38} Based upon the foregoing, as well as the entire record in this case, the Court properly found the child could not or should not be returned to the appellant-mother within a reasonable time. Despite offering numerous services, the appellant-mother was unable to mitigate the concerns that led to the child's removal.

B. The Best Interest of the Child.

{¶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} The focus of the “best interest” determination is upon the child, not the parent, as R.C. 2151.414(C) specifically prohibits the court from considering the effect a grant of permanent custody would have upon the parents. *In re: Awkal* (1994), 95 Ohio App.3d 309, 315. A finding that it is in the best interest of a child to terminate the parental rights of one parent is not dependent upon the court making a similar finding with respect to the other parent. The trial court would necessarily make a separate determination concerning the best interest of the child with respect to the rights of the mother and the rights of the father.

{¶41} The trial court made findings of fact regarding the child's best interest. 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.

{¶42} As an appellate court, we neither weigh the evidence nor judge the credibility of 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. “A fundamental premise of our criminal trial system is that ‘the *jury* is the lie detector.’ *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’ *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)”. *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267. Reviewing courts should accord deference to the trial court’s decision because the trial court has had the opportunity to observe the witnesses’ demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71.

{¶43} In the case at bar, there was testimony that appellant had recently seemed detached from her children. (T. 65). There was also testimony that appellant had difficulty addressing the negative behaviors of her children. (T. 13, 21, 65, 85, 92). Further, there was testimony that both children were doing well in their respective foster homes. (T. 29-31, 38, 78, 81). Neither child is capable of expressing their wishes, however the Guardian ad Litem expressed her opinion that it was in the best interest of both of the children for permanent custody to be granted to GCCSB. (T. 99).

{¶44} Based on the evidence submitted at trial, the court properly determined the best interest of the child would be served by the grant of permanent custody to GCCSB.

III. Conclusion

{¶45} For these reasons, we find that the trial court's determination that appellant-mother had failed to remedy the issues that caused the initial removal and therefore the child could not be placed with her 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 GCCSB was in the child's best interest was not against the manifest weight or sufficiency of the evidence.

{¶46} Appellant's sole assignment of error is overruled.

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

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF: R.S. AND A.S.,
DEPENDENT CHILDREN

.....

JUDGMENT ENTRY

CASE NO. 09-CA-14

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

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY