[Cite as *In re B.B.*, 2010-Ohio-4618.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
IN THE MATTER OF:	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
B.B.	:	John W. Wise, J.
(Minor Child)	:	
	:	Case No. 2010 CA 00151
	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas, Juvenile Division, Case No. 2006 CR 1503
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
LISA A. LOUY Stark County Department Of Job and Family Services 110 Central Plaza, South Suite 400 Canton, Ohio 44702	CHRISTOPHER DIONISIO 4883 Dressler Road, N.W. Canton, Ohio 44719

Edwards, P.J.

{¶1} Appellant, Melinda Griffith, appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, awarding permanent custody of her son B.B. (d.o.b. 06/01/1997) to appellee Stark County Department of Job and Family Services (SCDJFS).

STATEMENT OF FACTS AND CASE

{¶2} Appellant is the natural mother of B.B., an autistic child who receives special education services.[1] Due to his autism, B.B. has developmental issues and is unable to care for his own basic needs.

{¶3} On December 18, 2008, appellee filed a complaint alleging the neglect and/or dependency of B.B. and seeking temporary custody. The initial concerns of the case included substance abuse by appellant, lack of parental supervision, domestic violence in the home and lack of employment. On February 18, 2009, appellant stipulated to a finding of neglect, and B.B. was placed into the temporary custody of appellee. Appellant's case plan included obtaining employment and independent housing, participating in substance abuse treatment, and attending Renew to address domestic violence issues.

{¶4} Appellant completed an assessment with Quest and was to continue individual sessions twice a month. Appellant failed to do so and was transferred to the Intensive Outpatient Group program. Appellant failed to complete this program as well, and Quest closed appellant's case in October of 2009. Appellant returned to Quest on January 22, 2010, but did not complete drug or alcohol services prior to trial. Appellant

[1] The alleged natural father of B.B. has not established paternity or participated in case plan services, and is not a party to this appeal.

tested positive for cocaine in May, 2009, and had a diluted urine screen in July, 2009. She refused to comply with requests for urine screens in October and December, 2009, and requests for a hair follicle test in August and October, 2009.

{¶5} Appellant attended Renew for domestic violence victim's counseling but her attendance was not good, and she made minimal progress. Appellant was to see her counselor bi-weekly, but only attended monthly. Appellant attended one intake appointment and seven individual sessions, but was not receptive to treatment and was not open and forthcoming in counseling.

{¶6} Appellant resided with her boyfriend, Brett Bolon. Appellee had ongoing concerns about domestic violence in the home. Bolon told the caseworker assigned to appellant's case that he had previously been mandated to complete anger management as part of a criminal case but got nothing out of the program. Drug and alcohol concerns were also raised concerning Bolon.

{¶7} During appellant's parenting assessment, appellant was highly defensive, to the extent that it negated the results of two tests. According to Dr. Aimee Thomas, who conducted the assessment, appellant has a dependent personality disorder that has left her highly invested in and unwilling to end her relationship with Bolon, even in the face of losing her children. Even when it became apparent that Bolon was unwilling to participate in case planning services, appellant was not willing to leave him to gain independent housing or income to provide for her children. Appellant tended to involve herself in highly dysfunctional relationships with men who abuse drugs and alcohol. Appellant was lax in her discipline practices, deferring to Bolon. When Bolon became verbally aggressive or abusive with her children, appellant would not intervene.

{¶8} Dr. Thomas diagnosed appellant with alcohol and cocaine dependence, and failed to see any genuine relationship between appellant and B.B. Dr. Thomas had concerns not only with continuing substance abuse, but also the potential for domestic violence in the home.

{¶9} On December 11, 2009, appellee filed a motion seeking permanent custody of B.B. A hearing was held on February 1, 2010. On May 18, 2010, the court granted permanent custody to appellee. Appellant assigns three errors on appeal:

{¶10} "I. THE TRIAL COURT'S DECISION THAT B.B. COULD NOT BE PLACED WITH HIS MOTHER WITHIN A REASONABLE TIME WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

{¶11} "II. THE TRIAL COURT'S DECISION THAT IT WAS IN B.B.'S BEST INTEREST TO TERMINATE HIS MOTHER'S PARENTAL RIGHTS WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

{¶12} "III. THE TRIAL COURT ERRED IN DENYING THE MOTHER'S REQUEST TO CONTINUE THE TRIAL."

I

{¶13} In her first assignment of error, appellant argues that the court's finding that B.B. could not be placed with her in a reasonable time is against the manifest weight of the evidence. She argues that she followed up with most of Quest's recommendations, completed her psychological evaluation, was making some progress in counseling, and testified that she would take full advantage of the services available to her to allow B.B. to come home.

{¶14} 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.

{¶15} 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.

{¶16} 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:

{¶17} "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."

{¶18} 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.

{¶19} 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:

{¶20} "(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.* * *"

{¶21} 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":

{¶22} "(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.* * *

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

{¶24} 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.

{¶25} Appellant completed an assessment with Quest and was to continue individual sessions twice a month. Appellant failed to do so, and was transferred to the Intensive Outpatient Group program. Appellant failed to complete this program as well,

and Quest closed appellant's case in October of 2009. Appellant returned to Quest on January 22, 2010, but did not complete drug or alcohol services prior to trial. Appellant tested positive for cocaine in May, 2009, and had a diluted urine screen in July, 2009. She refused to comply with requests for urine screens in October and December, 2009, and requests for a hair follicle test in August and October, 2009.

{¶26} Appellant attended Renew for domestic violence victim's counseling but her attendance was not good and she made minimal progress. Appellant was to see her counselor bi-weekly, but only attended monthly. Appellant attended one intake appointment and seven individual sessions, but was not receptive to treatment and was not open and forthcoming in counseling. Appellant's counselor testified that appellant was in need of long-term counseling, but the length of time needed would be largely dependent on her ability to open up in her counseling sessions.

{¶27} Appellant resided with her boyfriend, Brett Bolon. Appellee had ongoing concerns about domestic violence in the home. Bolon told the caseworker assigned to appellant's case that he had previously been mandated to complete anger management as part of a criminal case but got nothing out of the program. Drug and alcohol concerns were also raised concerning Bolon.

{¶28} During appellant's parenting assessment, appellant was highly defensive, to the extent that it negated the results of two tests. According to Dr. Aimee Thomas, who conducted the assessment, appellant has a dependent personality disorder that has left her highly invested in and unwilling to end her relationship with Bolon, even in the face of losing her children. Even when it became apparent that Bolon was unwilling to participate in case planning services, appellant was not willing to leave him to gain

independent housing or income to provide for her children. Appellant tended to involve herself in highly dysfunctional relationships with men who abuse drugs and alcohol. Appellant was lax in her discipline practices, deferring to Bolon. When Bolon became verbally aggressive or abusive with her children, appellant would not intervene.

{¶29} Dr. Thomas diagnosed appellant with alcohol and cocaine dependence, and failed to see any genuine relationship between appellant and B.B. Dr. Thomas had concerns not only with continuing substance abuse, but also the potential for domestic violence in the home.

{¶30} Appellant admitted on cross-examination that she could not at this point in time provide a safe and sober environment for B.B., needed more treatment for drug and alcohol abuse, did not go for the requested hair follicle test because she knew it would not be clean, and her children were hanging in limbo waiting for her to get started on her treatment program.

{¶31} The court's finding that appellant had not remedied the conditions that led to B.B.'s removal from the home and that B.B. could not be placed with appellant in a reasonable time is not against the manifest weight of the evidence. The first assignment of error is overruled.

II

{¶32} In the second assignment of error, appellant argues that the judgment finding permanent custody to be in the best interest of B.B. is against the manifest weight of the evidence.

{¶33} 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.

{¶34} B.B. is autistic and receives special education services. He has limited comprehension abilities. He had been placed in the same foster home for fourteen months at the time of trial and the foster family, who has adopted other special needs children, was interested in adopting B.B. While the caseworker testified that there is a bond between B.B. and appellant and they visited every other week, permanent custody was in B.B.'s best interests because appellant was unable to provide a safe and stable environment for him. The guardian ad litem recommended that permanent custody be granted to appellee so B.B. could be placed for adoption. The trial court found that B.B. deserved to be in a "stable, loving environment where he can thrive and have needs met on an ongoing, daily basis." The court's finding that permanent custody was in B.B.'s best interest is not against the manifest weight of the evidence.

III

{¶35} In her third assignment of error, appellant argues that the court abused its discretion in overruling her motion to continue, made orally on the morning of trial, for purposes of securing another attorney.

{¶36} The decision to grant or deny a motion to continue is a matter entrusted to the broad discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, 615 N.E.2d 617. Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921; *State v. Wheat,* Licking App. No.2003-CA-00057, 2004-Ohio-2088. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. An abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶37} In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test that takes into account a variety of competing considerations:

{¶38} "A court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.

{¶39} Counsel for appellant represented to the court that appellant wanted to employ private counsel and no longer wanted to retain current counsel, and while

appellant had contacted several attorneys, she had been advised that in order for an attorney to appear in court with her, appellant would have to go to the attorney's office to sign a retainer agreement, which she had failed to do. Appellant then addressed the court personally on the issue:

{¶40} "I'd just like to say that I really didn't know that a decision was going to be made today. I thought there was gonna be another hearing date and I want my son back and I admit that I need help and I just want some more time to get the help that I need so that I can get him back." Tr. 4.

{¶41} The court overruled the motion, finding that appellant's concern was more about getting more time to work on the case plan than it was about concerns with her attorney's representation, and she was not going to get more time by saying she wants to change lawyers at the eleventh hour. Tr. 5.

{¶42} The court did not abuse its discretion in overruling the motion to continue. The case had been pending for fourteen months. Appellant had been in court the previous week to stipulate to a change of custody of her daughter H.B. to her adult son, and counsel for appellee represented to the court that appellant was reminded of the permanent custody hearing for B.B. at that time, giving her time to retain new counsel if she so chose. Appellant raised no specific concerns to the court regarding counsel's representation or her relationship with counsel, and represented to the court that she wanted more time because she recognized that she needed help.

{¶43} The third assignment of error is overruled.

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

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/r0824

[Cite as *In re B.B.*, 2010-Ohio-4618.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF: B.B. (Minor Child)	:	JUDGMENT ENTRY
	:	CASE NO. 2010 CA 00151

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

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES