

[Cite as *In re M.B.*, 2010-Ohio-1739.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

M.B. AND S.B.

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 2009CA00299;

2009CA00300

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Family Court Division  
Case No's. 2009JCV0764 and  
2008JCV1113

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 19, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Hoffman, J.*

{¶1} In Case No. 2009CA00299, Appellant Lee Wingert (“Father”) appeals the November 23, 2009 Judgment Entry, and Findings of Fact and Conclusions of Law entered by the Stark County Court of Common Pleas, Family Court Division, which terminated his parental rights, responsibilities and privileges upon a finding it was in the best interest of his minor daughter, S.B., to be placed in the permanent custody of Appellee Stark County Department of Job and Family Services (“the Agency”). In Case No. 2009CA00300, Father appeals a second November 23, 2009 Judgment Entry, and Findings of Fact and Conclusions of Law, which terminated his parental rights, responsibilities and privileges upon a finding it was in the best interest of his minor son, M.B., to be placed in the permanent custody of the Agency.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On October 6, 2008, the Agency filed a Complaint in the Stark County Court of Common Pleas, Family Court Division, alleging M.B. (DOB 7/10/07) was a dependent child. The Agency had recently initiated a third investigation of the family. The trial court ordered the Agency to take M.B. into shelter care custody on October 8, 2008. At the adjudicatory hearing on November 5, 2008, Father stipulated to a finding of dependency. The trial court found M.B. to be dependent and continued the child in the temporary custody of the Agency. The Agency filed a Motion for Permanent Custody on March 11, 2009. On May 5, 2009, Father filed a Motion for Change of Legal Custody, moving the trial court to grant legal custody of M.B. to Diana Mammone, NKA Diana Newman, the child’s paternal great aunt. The agency withdrew its permanent custody motion to allow for a home study of the paternal great aunt.

{¶3} On June 18, 2009 the Agency filed a Complaint in the Stark County Court of Common Pleas, Family Court Division, alleging S.B. (DOB 6/15/09), Father's newborn daughter, was a dependent child. Following a shelter care hearing, S.B. was placed in the temporary custody of the Agency. She was placed in the same foster home as M.B. At the adjudicatory hearing on July 15, 2009, Father stipulated to a finding of dependency with respect to S.B. Father also stipulated to the case plan.

{¶4} On August 28, 2009, the Agency filed Motions for Permanent Custody with respect to each child. The Agency based the motions upon the results from Father's parenting evaluation, which indicated he is functioning at a below average range of intellectual ability, suggesting he is likely to encounter difficulty in understanding and retaining parenting instructions. Father's ability to parent and ability to regulate his emotions and control his impulses were impaired as a result of a traumatic brain injury he suffered years earlier. The test results also indicated Father experienced significant emotional disturbances, which are manifested by severe depression, mood swings, and anger management problems. Father had difficulty accurately processing certain information. The evaluator opined Father was not capable of parenting the children. The trial court scheduled a hearing on the motions for November 17, 2009. On the day of the hearing, Father stipulated to the relinquishment of his parental rights, but asked to be heard as it relates to the best interest of the children regarding relative placement. After questioning Father and determining he was relinquishing his parental rights on his own free will, the trial court proceeded to the best interest portion of the hearing.

{¶5} Amy Craig, the ongoing caseworker assigned to the family, testified M.B. is a two year old Caucasian boy, and S.B. is a five month old Caucasian girl. Neither

child has any developmental or medical problems. Craig further stated the children do not have any behavioral problems or special needs. The only behavioral issue was with M.B., who would hit, kick, and bite after visitations. Craig noted M.B. and S.B. are placed together in a foster family, and the family is interested in adopting both children. M.B. is bonded with the foster family, including the eight year old biological son. M.B. is also bonded with the foster family's extended family.

{¶6} When asked if any available or interested relatives had come forward requesting custody, Craig stated the children's paternal great aunt, Diana Newman, and her boyfriend approached the Agency in April, 2009. A home study was conducted and given approval. The individuals and the home were deemed appropriate. The relatives were offered visitation as they had never met the children. Visitation commenced in July, and occurred with no problems. Craig expressed her belief it was in M.B.'s best interest he remain in his foster home. Craig based her position on the fact the child had moved several times prior to the age of two, and he was extremely bonded to the foster family. Craig added the issue of bonding was more important with M.B. given the trauma the child had experienced early in his life. M.B. has a minimal bond with Father. M.B. has a more than minimal bond with his paternal aunt, but it is not a "super-strong bond". The maternal grandparents were found not to be an appropriate placement due to maternal grandfather's prior rape conviction.

{¶7} Dr. Robin Tener, Executive Director of Northeast Ohio Behavioral Health, testified she became familiar with M.B. through a review of his case file from the Agency, including the evaluations of his maternal grandparents, his mother, and Father. Tener was asked to describe the trauma M.B. had experienced and the kind of effect

such trauma would have on the child. Tener explained M.B.'s mother had taken the child to a hotel with the intention of drowning him. The mother had filled the hotel bathtub with water and held M.B. under the water until his face became blue and purple. The mother removed M.B. from the water and decided to revive him. Dr. Tener explained such an experience would have been extremely traumatic for M.B. Tener continued, such a trauma could have long term impact as a child's relationship with his mother sets the stage for everything else that comes thereafter. If the first bond between a child and his primary caregiver is not made, the child has tremendous difficulty with human relationships thereafter. Such difficulties include the ability to trust adults, the basic belief the world is a good place, and the belief adults will take care of you, make good decisions for you, and provide for your needs. Dr. Tener expressed surprise when she heard M.B. had bonded with his foster family. She described such a bond as "remarkable" and expressed her opinion the bond should not be severed. Dr. Tener further opined M.B. and his baby sister should not be separated.

{¶8} Via Judgment Entries filed November 23, 2009, the trial court terminated Father's parental rights and granted permanent custody of the children to the agency. The trial court denied Father's request the children's paternal aunt be granted legal custody of them.

{¶9} It is from these judgment entries Father appeals, raising as error:

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{¶10} "I. THE TRIAL COURT ERRED BY GRANTED [SIC] PERMANENT CUSTODY OF S.B. TO THE STARK COUNTY DEPARTMENT OF JOBS AND FAMILY SERVICES BECAUSE ITS DETERMINATION THAT THE BEST INTERESTS OF THE

MINOR CHILD WOULD BE SERVED BY GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST [SIC] WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

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{¶11} “I. THE TRIAL COURT ERRED BY GRANTED [SIC] PERMANENT CUSTODY OF M.B. TO THE STARK COUNTY DEPARTMENT OF JOBS AND FAMILY SERVICES BECAUSE ITS DETERMINATION THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST [SIC] WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

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

I

{¶13} In his assignments of error, Father maintains the trial court’s finding it was in the children’s best interest to grant permanent custody to the Agency was against the manifest weight and sufficiency of the evidence.

{¶14} 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.

{¶15} Furthermore, it is well-established “[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.

{¶16} 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.

{¶17} In *In re Schaefer*, 111 Ohio St.3d 498, 857 N.E.2d 532, 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.

{¶18} Father concedes the children are in need of a legally secure placement, but adds such can be achieved without the grant of permanent custody to the Agency as an appropriate blood relative is willing and able to take custody of the children. Father adds the grant of permanent custody of S.B. was based upon bootstrapping her best interest with M.B.'s best interest, and should not be allowed.

{¶19} In the instant action, although the relative placement was appropriate and approved, we find the trial court did not abuse its discretion in granting permanent custody of the children to the Agency. Case worker Amy Craig testified the children, especially M.B., were extremely bonded with the foster family and the family was willing to adopt both children. Dr. Tener explained the long term negative impact the trauma suffered by M.B. could have on the child's future relationships, and recommended the bond with the foster family not be severed as such was "remarkable". Although the best interest portion of the hearing focused mainly on M.B., Dr. Tener did state it was important for the children to be placed together as a sibling relationship is an important one. In fact, one of the statutory factors is the child's interaction with siblings.

{¶20} Based upon the foregoing, we find the trial court's finding it was in the best interest of S.B. and M.B. to grant permanent custody to the agency was not against the manifest weight of the evidence.

{¶21} Father's assignments of error in both cases are overruled.

{¶22} The judgments of the Stark County Court of Common Pleas, Family Court Division, are affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

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

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

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



