

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE DA.R.

: JUDGES:
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:
: Hon. W. Scott Gwin, P.J.
: Hon. William B. Hoffman, J.
: Hon. Patricia A. Delaney, J.
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: Case No. 14-COA-023
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: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court
of Common Pleas, Juvenile Division,
Case No. 20143020

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

December 18, 2014

APPEARANCES:

For Appellant-Mother:

JOSEPH P. KEARNS, JR.
MASON, MASON & KEARNS
P.O. Box 345
153 West Main Street
Ashland, OH 44805

For Appellee-ACDJFS:

AMANDA M. HALL
ASHLAND COUNTY DJFS
15 West 4th Street
Ashland, OH 44805

Delaney, J.

{¶1} Appellant-Mother appeals the August 15, 2014 judgment entry of the Ashland County Court of Common Pleas, Juvenile Division, which granted permanent custody of her four children to Appellee-Ashland County Department of Job and Family Services.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant-Mother is the mother of D.R., born March 9, 1999; H.R., born August 18, 2000; Da.R., born December 7, 2001; and M.R., born April 28, 2003.

{¶3} D.R. is the father of D.R., Da.R., and M.R. He is currently incarcerated due to his convictions for rape and gross sexual imposition. G.P. is the father of H.R. He has recently been released from prison. Both fathers were made aware of the permanent custody proceedings and expressed that they did not wish to be involved in the process. They did not appeal the August 15, 2014 judgment entry.

{¶4} Appellee-Ashland County Department of Job and Family Services ("ACDJFS") has been involved with Mother and her four children. The children were removed from Mother's home on or about March 6, 2010 and placed in the temporary custody of ACDJFS. The children were under the temporary custody of ACDJFS until June 2011. Mother was under a case plan and working on her case plan until she was arrested on or about January 15, 2013. When Mother was arrested, the children were placed in the custody of ACDJFS pursuant to Juv.R. 6. There was no family to place the children.

{¶5} A shelter care hearing was held and the children were placed in the temporary custody of ACDJFS. An evidentiary hearing was held pursuant to a motion to

modify dispositional orders. The children were ordered to be placed in the temporary custody of ACDJFS via judgment entry on March 28, 2013.

{¶6} On March 7, 2014, Mother was convicted by a jury on federal charges of conspiracy to commit offense or to defraud the United States, forced labor, and acquiring a controlled substance by deception. The evidence at trial demonstrated that 2011 to 2012, Mother and her boyfriend kept a woman and her child against their will in a locked basement. Mother and her boyfriend forced the woman to engage in sexual acts, do household chores, and obtain prescription drugs. Mother and the boyfriend controlled the woman's behavior by threatening to harm her and her child. On July 24, 2014, Mother was sentenced to 32 years in federal prison. Mother's boyfriend was sentenced to 30 years in prison.

{¶7} Mother is appealing her conviction and sentence to the U.S. Court of Appeals for the Sixth Circuit.

{¶8} ACDJFS filed a Motion for Permanent Custody on June 3, 2014. An evidentiary hearing was held on July 29, 2014.

{¶9} Nicole Brown, an ongoing caseworker with ACDJFS, testified at the hearing. She became the ongoing caseworker in this case in April 2013.

{¶10} Brown testified that in January 2013 when the four children were removed from Mother's home, they were placed with one foster family. ACDJFS could not place the children with a biological relative.

{¶11} H.R. and Da.R. are the two younger children. They are well acclimated to their foster home. They are doing well in school and are participating in sports. The

foster family intends on adopting H.R. and Da.R. H.R. and Da.R. only require mental health counseling when they request it.

{¶12} The older children, D.R. and M.R., have had more difficulties with their adjustment to their removal from Mother's home. D.R. was removed from the original foster home with his siblings and placed in a foster home by himself after M.R. alleged D.R. inappropriately touched him in a sexual manner. D.R. also spent 25 days in the Erie County Detention Center. D.R. continues to have behavioral issues at school and difficulty following rules. He continues to adjust to his current foster home placement.

{¶13} M.R. was originally placed in the foster home with his siblings, but the foster family requested that M.R. be removed due to his behavioral issues. M.R.'s allegation that D.R. inappropriately touched him caused M.R. to regress in his behaviors. He exhibited behaviors of lying, stealing, and he may have engaged in inappropriate sexual behavior with another foster home resident. He has been placed in a respite foster home.

{¶14} Mother writes letters to the children. Brown testified that when the children read Mother's letters (which do not contain any inappropriate language or messages), the children's behaviors regress. The children's mental health counselor recommended that the children not be permitted to read Mother's letters.

{¶15} The children expressed a desire to have contact with Mother, but understood they will not be able to be with her.

{¶16} The Guardian ad Litem appointed to the case recommended the trial court award ACDJFS permanent custody of the children.

{¶17} On August 15, 2014, the trial court awarded permanent custody of the children to ACDJFS. The trial court found by clear and convincing evidence the children were in the temporary custody of ACDJFS for 12 or more consecutive months of a consecutive 22-month period pursuant to R.C. 2151.414(B)(1)(d). The trial court also found that pursuant to R.C. 2151.414(E), the children could not be placed with Mother within a reasonable period of time and should not be placed with Mother under the parameters of R.C. 2151.414(E). The trial court next determined the clear and convincing evidence demonstrated it was in the best interests of the children that permanent custody be granted to ACDJFS.

{¶18} It is from this decision Mother now appeals.

ASSIGNMENT OF ERROR

{¶19} Mother raises one Assignment of Error:

{¶20} "DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT GRANTED PERMANENT CUSTODY OF THE CHILD TO THE ASHLAND COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES?"

{¶21} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.2(C).

ANALYSIS

{¶22} "[T]he right to raise a child is an 'essential' and 'basic' civil right." *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), quoting *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). An award of permanent custody must be based on clear and convincing evidence. R.C. 2151.414(B)(1).

{¶23} Clear and convincing evidence is that evidence “which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954). “Where the degree of proof required to sustain an issue must be clear and convincing, 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.” *Id.* at 477, 120 N.E.2d 118. 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. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶24} Issues relating to the credibility of witnesses and the weight to be given to the evidence are primarily for the trier of fact. *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evidence in the parties' demeanor and attitude that does not translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997).

{¶25} 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 schedule a hearing and provide notice upon the filing of a motion for permanent custody of a child by a public children services agency.

{¶26} 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; (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.

{¶27} 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, a 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.

{¶28} In the present case, the trial court determined, pursuant to R.C. 2151.414(B)(1)(d), the children were in the temporary custody of ACDJFS for a period of time in excess of 12 of the prior 22 consecutive months. The evidence showed the children were removed from Mother's home on January 15, 2013. The motions for permanent custody were filed on June 3, 2014. The children were continuously in the custody of ACDJFS for 16 months and 19 days before the motions for permanent custody were filed. The children were also in the temporary custody of ACDJFS from March 2010 to June 2011. In her appeal, Mother did not challenge the trial court's finding that the children were in the temporary custody of ACDJFS for more than 12 of 22 consecutive months. The trial court's finding, in conjunction with a best interests

finding, is sufficient to support the grant of permanent custody. *In re Calhoun*, 5th Dist. Stark No. 2008 CA 00118, 2008-Ohio-5458, ¶ 45.

{¶29} Mother argues the decision of the trial court to grant permanent custody was premature. Mother states that while she was convicted and sentenced to 32 years in prison, she has an appeal of her conviction and sentence pending in the Sixth Circuit. If her conviction and sentence are reversed on appeal, she may be released from prison and able to reunite with her children. She argues ACDJFS should have moved for a less restrictive modification under R.C. 2151.353 for legal custody of the two younger children, as opposed to permanent custody.

{¶30} As stated above, the children have been in the temporary custody of ACDJFS for 12 out of 22 consecutive months. This finding alone is sufficient to affirm the grant of permanent custody to ACDJFS.

{¶31} The trial court further found the children could not be placed with Mother within a reasonable period of time and should not be placed with Mother pursuant to R.C. 2151.414(E). R.C. 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”:

- (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.

* * *

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

* * *

(16) Any other factors the court considers relevant.

{¶32} The motions for permanent custody were filed on June 3, 2014. Mother was held in custody during her federal proceedings and Mother was sentenced to 32 years in prison on July 24, 2014. 18 months from June 3, 2014 is December 3, 2015. There was no evidence presented as to the status of Mother's appeal. 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. *In re Calhoun, supra*, at ¶ 38.

{¶33} Mother does not challenge the trial court's finding that it was in the best interests of the children to be placed in the permanent custody of ACDJFS. We find the trial court made the requisite considerations of the best interest factors under R.C. 2151.414(D). The evidence showed the younger children were succeeding in their foster home. They bonded with their foster family, whom intended to adopt them. The two older children were having more difficulty adjusting to their situation, but ACDJFS was providing for their specialized behavioral needs.

{¶34} For these reasons, we find that the trial court's determination that the children were in the custody of the agency for 12 out of 22 consecutive months and the children could not or should not be placed with Mother within a reasonable time was not against the manifest weight of the evidence. We further find that the trial court's decision that permanent custody to ACDJFS was in the children's best interest was not against the manifest weight or sufficiency of the evidence.

{¶35} Accordingly, Mother's sole Assignment of Error is overruled.

CONCLUSION

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

By: Delaney, J.,

Gwin, P.J. and.

Hoffman, J., concur.