

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

A.W.

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2015CA00032

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court
of Common Pleas, Family Court
Division, Case No. 2013 JCV 00932

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

June 22, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant B.M.

JERRY A. COLEMAN
Stark County Department of Job &
Family Services Legal Counsel
221 Third St. S.E.
Canton, OH 44702

VERNON M. INFANTINO
Schnars, Baca & Infantino, LLC
610 Market Avenue North
Canton, OH 44702

Baldwin, J.

{¶1} Appellant B.M. appeals from the February 17, 2015 Judgment Entry of the Stark County Court of Common Pleas, Family Court Division, terminating her parental rights and granting permanent custody of A.W. to Stark County Department of Job and Family Services.

STATEMENT OF THE FACTS AND CASE

{¶2} A.W. (DOB 6/10/13) is the biological child of appellant B.M., who is the mother, and J.W. On September 9, 2013, Stark County Department of Job and Family Services (“SCDJFS”) filed a complaint alleging that A.W. was a dependent and/or neglected child and seeking temporary custody of him.¹ Following a shelter care hearing held on September 9, 2013, the trial court ordered A.W. into the temporary custody of SCDJFS.

{¶3} A hearing on the complaint was held on November 20, 2013. At the hearing, appellant B.M. and J.W. stipulated to a finding of dependency and the allegations of neglect were deleted. The trial court found the child to be dependent and placed him in the temporary custody of SCDJFS.

{¶4} Thereafter, on May 28, 2014, SCDJFS filed a Motion for Permanent Custody. On July 18, 2014, J.W. filed a motion to extend temporary custody and appellant B.M. filed a similar motion on July 29, 2014. Pursuant to a Judgment Entry filed on September 24, 2014, the trial court extended temporary custody of A.W. to December 28, 2014 and scheduled a review hearing for November 18, 2014.

¹ The case was a refiled case. The original case (Case No. 2013JCV00655) was filed on June 10, 2013 and was dismissed because a trial date could not be obtained within the 90 day jurisdictional time limit.

{¶5} On November 26, 2014, SCDJFS filed a Motion for Permanent Custody. A hearing on the motion was held on February 9, 2015. Prior to the commencement of the hearing, J.W. stipulated to permanent custody.

{¶6} At the hearing, Sue Snyder, the ongoing caseworker with SCDJFS, testified that she was assigned to the case in the middle of July of 2013. She testified that her initial concerns related to the deplorable home conditions that appellant and J.W. were residing in and their parenting skills. According to Snyder, in a prior case, J.W. had stipulated to permanent custody and in both cases, he had not completed a case plan.

{¶7} Snyder testified that, in the dismissed case, A.W. had been placed in the emergency custody of the agency in late June of 2013 and was placed with his current foster home on July 1, 2013. She testified that he had been placed in the temporary custody of the agency on November 19, 2013 and that the Motion for Permanent Custody was filed on November 28, 2014². Snyder agreed that A.W. was in the temporary custody of the agency in excess of 12 months in a 22 month period. Snyder was questioned about appellant's visits with A.W. She testified that the visitation was addressed at the November 18, 2014 court hearing and that at the hearing, the trial court instructed appellant and J.W. that they must arrive 20 to 25 minutes prior to the scheduled visitation or there would be no visit. She testified that appellant had visited with A.W. four or five times between September of 2014 and the date of the hearing.

{¶8} The following testimony was adduced when Snyder was asked what case plan services appellant was asked to complete:

² The motion actually was filed on November 26, 2014.

A: The Court Ordered services were for Quest for an assessment and evaluation and Mother did do that. Um and there were no concerns of any drug or alcohol issues. Um the second concern and Court Order was the parenting assessment through Northeast Ohio Behavioral Health and Mother did complete that. Ah recommendations included ongoing individual counseling; Renew; Goodwill Parenting; Independent Housing; um Joint Sessions between her and um the Father. But the most important part of that assessment um indicated that if Mother did ...if Father did not complete successfully his case plan then reunification with Mother could not occur. Um Mother did complete Goodwill Parenting. She received the Certificate of Participation.

{¶9} Transcript at 17-18. She testified that appellant only received a Certificate of Participation from Goodwill because of concerns over her “problematic” relationship with J.W. who, according to Snyder, could be “very controlling” and belittled appellant. Transcript at 18. There were concerns that he posed a danger to the child.

{¶10} Snyder also testified that appellant was to have independent housing and did for a short period of time from July of 2014 to November of 2014. Appellant then moved back into J.W.’s house with his parents. Snyder testified that she had been at the house within the last week and that it was filled with garbage and “the smell of all the cats...hit you in the face as you open...go through the door.” Transcript at 19. She

testified that she could barely move through the home, that it was not safe for a child and that J.W.'s brother was a registered sex offender.

{¶11} At the hearing, Snyder testified that appellant started individual counseling with Community Services and Renew, but that since the extension of temporary custody had been filed, she had not been to any individual counseling sessions. Nor had appellant obtained gainful employment as required by her case plan. When asked, Snyder testified that appellant still maintained a relationship with J.W. and that she believed that appellant had not successfully completed her case plan.

{¶12} Snyder also testified that she believed that the agency had made reasonable efforts to reunify A.W. with appellant. The following testimony was adduced when she was asked what those efforts were:

{¶13} Q: And can you tell us what those reasonable efforts were?

{¶14} A: The case plan that was given to her ah that had the Court Orders on it um the options and the encouragement the support from Goodwill staff um the recommendations that were given not only by Northeast but also um through Community Services um through Renew ah Goodwill Parenting. Stark County has a lot to offer and um offer support for individuals. Unfortunately that was not taken full advantage of.

{¶15} And did you try to support Mother and assist her in getting these case plan services done?

{¶16} Yes.

{¶17} And can you tell us what you did?

{¶18} A: The Agency provides financial assistance and pays for the those services. She was offered bus passes but most of the time she had transportation with Jeff. Um I was able to um sign off on SMA housing referral form for her. As well as ah the contact with the various therapist.

{¶19} Q: Um and you went over the case plan services with her?

{¶20} A: Um several times prior to the court hearings as well I read her the recommendations from Northeast Ohio at the time so she was very aware of what was expected of her.

{¶21} Transcript at 21.

{¶22} Snyder testified that she believed permanent custody should be granted because of the living conditions, the parenting concerns and the lack of steady progress.

{¶23} On cross-examination, Snyder testified that she had helped appellant by making a SMHA (Stark Metropolitan Housing Authority) referral for her by filing out an application. When asked if she had followed up on the application, she testified that she did not because appellant had independent housing. After appellant's individual housing fell through, Snyder never revisited SMHA. Snyder further testified that she did not assist appellant with finding employment.

{¶24} During the best interest portion of the hearing, Snyder testified that A.W. was 19 months old and Caucasian. She testified that he had no developmental problems and was developmentally on target. The only medical problem he had was an asthma-like condition. When asked, she testified that he did not have any behavioral problems or special needs and had older and younger sisters, so got lots of attention.

One of his two half siblings was in the same foster home and had been adopted by that family. Snyder testified that the home was “very loving” and “well grounded”. Transcript at 26. The foster family was interested in adoption. Snyder testified that A.W. had been in the same home since he was just under a month old and that, in addition to his half sister, the foster family had a birth child who was just younger than A.W. According to her, the children were bonded and got along well.

{¶25} Snyder testified that appellant was adopted and had found her birth relatives the previous fall. She testified that appellant’s second cousin had contacted her the week before about placement or custody of A.W., but that she could not make a recommendation to move A.W. Snyder believed that appellant had just reconnected with her biological family within the last several months. She stated that the agency would consider the relative for adoption if permanent custody was granted. When asked if she believed that A.W. would benefit from adoption, she testified that she did because he was young and needed permanency. She stated that it was in his best interest for permanent custody to be granted.

{¶26} On cross-examination, Snyder testified that appellant was very loving to A.W. and that he was bonded to her.

{¶27} At the hearing, appellant testified that she had reconnected with her cousin in November of 2014 and that he and his family were willing to take her and A.W. into their home in Niles, Ohio. She testified that she gave Snyder his name, address and phone number and that her cousin had contacted Snyder. On cross-examination, she testified that she had met her cousin around Thanksgiving of 2014 and was not very familiar with him.

{¶28} At the hearing the Guardian ad Litem stated that she believed that it was in A.W.'s best interest for permanent custody to be granted and hoped that he would be adopted by his foster family. She indicated that there was a "significant bond" between A.W. and his sibling in the foster home and also with the other child in the home. Transcript at 38. She also stated that A.W. was bonded with his foster mother.

{¶29} Pursuant to a Judgment Entry filed on February 17, 2015, the trial court terminated appellant's parental rights and granted permanent custody of A.W. to SCDJFS. The trial court found that A.W. had been in the agency's custody for 12 months out of 22 consecutive months and that the agency had made reasonable efforts to prevent the need for placement and/or make it possible for the child to return home and that he could not be placed with either parent within a reasonable time. The trial court also found that it was in A.W.'s best interest that permanent custody be granted. The trial court filed Findings of Fact and Conclusions of Law on the same date.

{¶30} Appellant now raises the following assignments of error on appeal:

{¶31} I. THE TRIAL COURT ERRED IN GRANTING PERMANENT CUSTODY TO THE STARK COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES (SCDJFS) AS SCDJFS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT GROUNDS EXISTED FOR PERMANENT CUSTODY AND SUCH DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶32} II. THE TRIAL COURT ERRED IN GRANTING PERMANENT CUSTODY TO THE STARK COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES (SCDJFS) AS SCDJFS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT IT IS IN THE BEST INTERESTS (SIC) OF THE MINOR CHILD TO

GRANT PERMANENT CUSTODY AND SUCH DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

I, II

{¶33} Appellant, in her first assignment of error, argues that the trial court erred in granting permanent custody to SCDJFS because the agency failed to show by clear and convincing evidence that grounds existed for permanent custody and such decision was against the manifest weight of the evidence. In her second assignment of error, she argues that the agency failed to show by clear and convincing evidence that it was in A.W.'s best interest for permanent custody to be granted and that such decision was against the manifest weight of the evidence.

{¶34} 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, 477, 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).

{¶35} 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, 1997-Ohio-260, 674 N.E.2d 1159.

{¶36} 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 or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

Following the hearing, R.C. 2151.414(B)(1) 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; (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; or (e) the child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶37} 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.

{¶38} 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 (e) is present before proceeding to a determination regarding the best interest of the child.

{¶39} In the case sub judice, the trial court found that A.W. had been in the custody of SCDJFS for 12 out of 22 consecutive months. In her appeal, appellant did not challenge the trial court's finding that A.W. was in the temporary custody of SCDJFS for more than 12 of 22 consecutive months. The trial court's finding, in conjunction with a best interest finding, is sufficient to support the grant of permanent custody. *In re Calhoun*, 5th Dist. Stark No.2008 CA 00118, 2008–Ohio–5458, ¶ 45.

{¶40} The trial court also found that A.W. could not and should not be placed with appellant within a reasonable period of time. R.C. 2151.414(E) sets forth the factors a trial court must consider in determining whether a child could not 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”:

{¶41} (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.

{¶42} ***

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

{¶44} In the case sub judice, there was testimony that appellant had not completed her case plan and had failed to remedy the problems which led to A.W.'s removal from the home. Appellant did not have suitable independent housing and was residing with A.W.'s father at the time of trial in an unsafe home. There was testimony that the home was in a deplorable, unsafe condition and that J.W.s brother, who was a registered sex offender, resided in the home. Appellant did not obtain employment and failed to complete individual counseling. Moreover, appellant remained in a relationship with J.W. who had not completed his case plan.

{¶45} Based on the foregoing, we find that the trial court did not err in determining that there were grounds for permanent custody.

{¶46} Appellant also challenges the trial court's finding that it was in A.W.'s best interest for permanent custody to be granted to the agency.

{¶47} In determining whether permanent custody is in the best interest of the child, R.C. 2151.414(D)(1) directs that the trial court "shall consider all relevant factors," including, but not limited to, the following:

{¶48} (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶49} (b) 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;

{¶50} (c) The custodial history of the child, including whether the child has 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, or the child has 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, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶51} (d) 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 to the agency;

{¶52} (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶53} R.C. 2151.414(D)(1).

{¶54} At the hearing, Sue Snyder testified that A.W. was bonded with his foster family, which included a half-sibling, and was developmentally on target. She testified that he had no physical or social problems, was happy and that he had been in the same foster home since he was approximately a month old. She testified that the foster family was interested in adoption and that A.W. was “so grounded in this home that ... I would not make the recommendation for a move.” Transcript at 28. Snyder testified that she believed it was in his best interest for permanent custody to be granted because A.W. was young and needed permanency. She also testified that the harm in severing his bond with appellant was outweighed by the benefits of permanent custody. The Guardian ad Litem also recommended that permanent custody be granted. She noted the strong bond that A.W. had with his foster mother “who is essentially the only Mom he’s known.” Transcript at 39.

{¶55} We find, based on the foregoing, that the trial court did not err in finding that it was in A.W.’s best interest for permanent custody to be granted.

{¶56} Based on the foregoing, appellant’s two assignments of error are overruled.

{¶57} Accordingly, the judgment of the Stark County Court of Common Pleas, Family Court Division, terminating appellant's parental rights and granting permanent custody of A.W. to Stark County Department of Job and Family Services is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.