[Cite as *In re H./PO. Children,* 2015-Ohio-3860.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
H./PO. CHILDREN	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
AND	:	
	:	Case Nos. 2015CA00095
PE. CHILDREN	:	2015CA00096
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case Nos. 2013JCV00949 and 2014JCV00412
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 14, 2015

APPEARANCES:

For Appellant	For Appellee
ANTHONY J. WISE 201 Cleveland Avenue, SW Suite 104 Canton, OH 44702	JAMES B. PHILLIPS 300 Market Avenue North Canton, OH 44702

Farmer, J.

{¶1} On September 11, 2013, appellee, Stark County Job and Family Services, filed a complaint alleging two children, M.PE. born May 1, 1998, and J.PE. born August 8, 1999, to be abused, neglected, and/or dependent children (Case No. 2013JCV00949). Mother of the children is appellant, Tiffany Powell; father is Jermaine Pegram.

{¶2} On April 28, 2014, appellee filed a complaint alleging five more children, J.H. born August 15, 2010, J.H. born December 11, 2008, J.PO. born November 2, 2007, N.H. born May 10, 2006, and J.H. born January 17, 2002, and to be dependent children (Case No. 2014JCV00412). Appellant is the mother of these children; father, James Harris, is deceased.

{¶3} On September 12, 2013 and April 28, 2014 in each respective case, the children were placed in appellee's emergency temporary custody.

{¶4} On October 10, 2013 and July 14, 2014 in each respective case, the children were found to be dependent and were placed in appellee's temporary custody.

{¶5} On February 9, 2015, appellee filed a motion for permanent custody of the two children in Case No. 2013JCV00949. On March 24, 2015, appellee filed a motion to change legal custody of the five children in Case No. 2014JCV00412 to three separate relatives. A hearing was held on April 21, 2015. By judgment entry filed April 22, 2015, the trial court granted the motion for legal custody in Case No. 2014JCV00412 in part and placed the three oldest children from the group with Sheila and Gary Harris. The two younger children remained in appellee's temporary custody. By judgment entry filed April 28, 2015, the trial court granted the motion for permanent

custody in Case No. 2013JCV00949 and terminated parental rights as to those two children.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT'S JUDGMENT THAT THE [PE.] CHILDREN CANNOT BE PLACED WITH APPELLANT WITHIN A REASONABLE PERIOD OF TIME WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶8} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXTEND TEMPORARY CUSTODY FOR SIX (6) MONTHS."

III

{¶9} "THE TRIAL COURT'S JUDGMENT THAT THE BEST INTERESTS OF THE MINOR CHILDREN WOULD BE SERVED BY GRANTING PERMANENT CUSTODY AND A CHANGE OF LEGAL CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶10} This matter came before this court on consolidated appeals. Case No. 2013JCV00949 involved the motion for permanent custody of two children and Case No. 2014JCV00412 involved the motion for change of legal custody of five children, only three of which were placed in legal custody. The remaining two children are not a part of this appeal. At the time of the hearing on April 21, 2015, appellant was in the Summit County Jail awaiting trial on an aggravated murder charge in the death of the father of

the five children in Case No. 2014JCV00412. Also at the time of the hearing, the two children in Case No. 2013JCV00949 had been in appellee's temporary custody for more than twelve months of a consecutive twenty-two month period.

I

{¶11} Appellant claims the trial court's decision that her two children in Case No. 2013JCV00949 could not be placed with her within a reasonable period of time was against the manifest weight and sufficiency of the evidence. Appellant also claims the trial court erred in finding appellee had made reasonable efforts to prevent placement of the two children into permanent custody, as she attempted to and did complete much of her case plan, and the trial court erred in finding R.C. 2151.414(B)(1) applied. We disagree.

{¶12} 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,* 5th Dist. No. CA-5758, (February 10, 1982). 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 Construction,* 54 Ohio St.2d 279 (1978).

{¶13} R.C. 2151.414(E) sets out the factors relevant to determining permanent custody. Said section states in pertinent part the following:

> (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:

(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 the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child

> when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;
>
> (16) Any other factor the court considers relevant.

{¶14} R.C. 2151.414(B)(1)(d) specifically states permanent custody may be granted if the trial court determines, by clear and convincing evidence, that it is in the best interest of the child and:

> (d) 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.

{¶15} 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 (1954), paragraph three of the syllabus. See also, *In re Adoption of Holcomb,* 18 Ohio St.3d 361 (1985). "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." *Cross* at 477.

{¶16} R.C. 2151.419(A)(1) governs reasonable efforts by a public children services agency "to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home. The agency shall have the burden of proving that it has made those reasonable efforts."

{¶17} However, as explained by our brethren from the Ninth District in *In re H.H. & L.H.,* 9th Dist. Summit No. 25463, 2010-Ohio-5992, ¶ 12:

> [T]he Ohio Supreme Court has held that the trial court is not obligated by R.C. 2151.419 to make a determination that the agency used reasonable efforts to reunify the family at the time of the permanent custody hearing unless the agency has not established that reasonable efforts have been made prior to that hearing. See *In re C.F.,* 2007–Ohio–1104, at ¶ 41 and ¶ 43, 113 Ohio St.3d 73, 862 N.E.2d 816. See, also, R.C. 2151.419. The trial court is only obligated to make a determination that the agency has made reasonable efforts to reunify the family at "adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children, all of which occur prior to a decision transferring permanent custody to the state." *In re C.F.,* 2007-Ohio-1104, at ¶ 41, 113 Ohio St.3d 73, 862 N.E.2d 816; R.C. 2151.419.

{¶18} The record establishes that the trial court made a finding on numerous occasions that reasonable efforts were made by appellee. T. at 28.

{¶19} The record also establishes that as of the date of the hearing, April 21, 2015, the two children had been in appellee's custody since September 12, 2013, thereby fulfilling the requirements of R.C. 2151.414(B)(1). T. at 7-8, 14, 17.

{¶20} Appellee has been involved with appellant and her children since 2004. T. at 6. The guardian ad litem has been involved since 2006. T. at 37. The major concerns were a lack of stability and home conditions, as well as emotional and physical neglect and abuse. *Id*. During the course of appellee's involvement with appellant, the two children were not placed in school or otherwise educated, and were not provided medical or dental care. T. at 7, 13, 40. Appellant refused to seek public assistance because she did not want to provide an address, was uncooperative with her caseworker and would not provide an address, and failed to complete the objectives of the case plan. T. at 11-14, 17, 25, 30, 40. Appellant was often times homeless, living in cars, and stealing to get by. T. at 13, 40. Father Jermaine Pegram has not had any involvement with the case. T. at 8, 13, 17.

{¶21} Appellant now argues she cooperated with the case plan and although there is some truth to that, she was uncooperative with her caseworker. T. at 9-10, 12-14, 23-25, 30. Appellant did not want to participate in the Goodwill Parenting Program, so she sought parenting classes through Catholic Charities in Summit County; however, she did not complete the program because of her arrest for aggravated murder and obstruction of justice. T. at 13, 24, 29-30, 37, 39. Appellant has been accused of

plotting, together with her current boyfriend, the death of James Harris, the father of the five children in Case No. 2014JCV00412. T. at 29-30, 36-37. The boyfriend was convicted and sentenced and appellant was awaiting trial at the time of the hearing. T. at 11, 29-30, 36. Appellant was offered the opportunity to attend the permanent custody hearing, but she declined. T. at 41.

{¶22} Upon review, we find sufficient competent, credible evidence to support the trial court's determination that the two children in Case No. 2013JCV00949 could not be placed with appellant within a reasonable period of time. We also concur with the trial court's decision that R.C. 2151.414(B)(1) applies sub judice, and appellee has made reasonable efforts to assist appellant in reunification.

{¶23} Assignment of Error I is denied.

II

{¶24} Appellant claims the trial court erred in denying her motion to extend temporary custody for six months for the five children because she could be released from jail and therefore be able to complete her case plan. We disagree.

{¶25} Pursuant to R.C. 2151.415(D)(1), if an agency requests an extension of temporary custody for a period of up to six months, a trial court may grant an extension "if it determines at the hearing, by clear and convincing evidence, that the extension is in the best interest of the child, there has been significant progress on the case plan of the child, and there is reasonable cause to believe that the child will be reunified with one of the parents or otherwise permanently placed within the period of extension." In order to find an abuse of discretion, we must determine the trial court's decision was

unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶26} The case plans in each case are identical. The first case plan was in place in October 2013, and as set forth above, appellant failed to meet the objectives of the case plan. Appellant was incarcerated on the aggravated murder charge in April 2014, and at the time of the hearing, appellant was in jail awaiting trial. There was no reasonable cause to believe that the children could be reunified with appellant within the next six months. As set forth below, permanent custody and legal custody were in the best interest of the respective children.

{¶27} Upon review, we find the trial court did not abuse its discretion in denying appellant's motion to extend temporary custody for six months for the five children.

{¶28} Assignment of Error II is denied.

III

{¶29} Appellant claims the trial court's decisions that the best interest of the two children in Case No. 2013JCV00949 would best be served by granting permanent custody to appellee and the three children in Case No. 2014JCV00412 would best be served by granting legal custody to Sheila and Gary Harris were against the manifest weight and sufficiency of the evidence. We disagree.

{¶30} In determining best interest of a child in the context of a motion for permanent custody, R.C. 2151.414(D)(1) sets forth the factors a trial court shall consider:

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

(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;

(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;

(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;

(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;

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

{¶31} As for legal custody, R.C. 2151.353(A)(3) states the following in pertinent part:

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings.

{¶32} We agree with the analysis set forth by our brethren from the Eighth District in *In re D.T.,* 8th Dist. Cuyahoga Nos. 100970 and 100971, 2014-Ohio-4818, ¶ 19-22:

Legal custody is significantly different than the termination of parental rights in that, despite losing legal custody of a child, the parent of the child retains residual parental rights, privileges, and responsibilities. *In re G.M.,* 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, ¶ 14, citing R.C. 2151.353(A)(3)(c). In such a case, a parent's right to regain custody is not

permanently foreclosed. *In re M.J.M.* [8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674] at ¶ 12. For this reason, the standard the trial court uses in making its determination is the less restrictive "preponderance of the evidence." *Id.* at ¶ 9, citing *In re Nice,* 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001). "Preponderance of the evidence" means evidence that is more probable, more persuasive, or of greater probative value. *In re C.V.M.,* 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7.

Unlike permanent custody cases in which the trial court is guided by the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court should consider in determining the child's best interest in a motion for legal custody. *In re G.M.* at ¶ 15. We must presume that, in the absence of best interest factors in a legal custody case, "the legislature did not intend to require the consideration of certain factors as a predicate for granting legal custody." *Id.* at ¶ 16. Such factors, however, are instructive when making a determination as to the child's best interest. *In re E.A.* [8th Dist. Cuyahoga No. 99065, 2013-Ohio-1193] at ¶ 13.

The best interest factors include, for example, the interaction of the child with the child's parents, relatives, and caregivers; the custodial history of the child; the child's need for a legally secure permanent placement; and whether a parent has continuously and repeatedly failed

> to substantially remedy the conditions causing the child to be placed outside the child's home. R.C. 2151.414(D).
>
> Because custody determinations " 'are some of the most difficult and agonizing decisions a trial judge must make,' " a trial judge must have broad discretion in considering all of the evidence. *In re E.A.* at ¶ 10, quoting *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). We therefore review a trial court's determination of legal custody for an abuse of discretion. *Miller v. Miller,* 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Accord, In re L.D., 10th Dist. Franklin No. 12AP-985, 2013-Ohio-3214; *Stull v. Richland County Children Services,* 5th Dist. Richland Nos. 11CA47 and 11CA48, 2012-Ohio-738.

{¶33} Both M.PE. who was sixteen, and J.PE who was fifteen, requested permanent custody and adoption. T. at 57-58, 66-67. When the two children were placed in appellee's temporary custody in September 2013, they were suffering from emotional and developmental delays, but they have come a long way. T. at 43-45, 47. Their bond with appellant is either strained or non-existent. T. at 49. The two children do not have a bond with their father, and have not seen him in over six years. T. at 50. Although the two children are in separate foster placement, they have sibling visitation

and contact, and are both adoptable, well-adjusted, and receiving stability in home, education, and health care. T. at 46-47, 49.

{¶34} The three children in the legal custody case were neglected by appellant as far as their educational and medical needs. T. at 50. They have been placed with Sheila and Gary Harris, relatives of their deceased father. Mr. and Mrs. Harris are providing them with a happy and stable home, educational needs, medical and dental care, and ongoing social interactions with their siblings. T. at 50-51. They are very supportive and dedicated to the three children. T. at 58.

{¶35} Appellant suggested a non-relative placement for all eight of her children (the five herein plus the two that are not a part of this appeal and a new baby), but a case study was not done on the possibility as the children in this case were currently placed with relatives, and the individual did not make an appearance in the case. T. at 52-55, 62-64, 71.

{¶36} Based upon all of the foregoing, we find the trial court's decision on best interest of the children to be supported by sufficient credible, competent evidence, and the trial court's award of permanent custody to appellee was not against the manifest weight and sufficiency of the evidence and the award of legal custody to Mr. and Mrs. Harris was not an abuse of discretion.

{¶37} Assignment of Error III is denied.

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

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

SGF/sg 8/19