

Baldwin, J.

{¶1} Appellant S.P. appeals a judgment of the Tuscarawas County Common Pleas Court, Juvenile Division, awarding permanent custody of her children A.P. and C.P., Jr. to appellee Tuscarawas County Job and Family Services (TCJFS).

STATEMENT OF FACTS AND CASE

{¶2} A.P. (DOB 12-29-08) and C.P., Jr. (DOB 7-25-2011) are the natural children of S.P. and C.P., Sr. C.P., Sr., is incarcerated for a sex offense involving a 13-year-old neighbor, and is not a party to this appeal.

{¶3} During the first year of his life, C.P., Jr. was diagnosed with failure to thrive. Appellee became involved with the family when medical personnel expressed concern with the parents' care and understanding of his condition. Although home conditions and financial issues concerned appellee, appellee primarily worked with the family because of C.P., Jr.'s medical condition and his failure to gain weight. The instant case was filed on October 12, 2012, and the children have been in the custody of appellee since that time.

{¶4} In their first foster home, C.P., Jr. continued to struggle with weight gain, and the foster mother had difficulty getting him to eat. The children were moved to their current foster home on July 13, 2013. Although C.P., Jr. remains small for his age, he has gained weight and his current foster mother has had success in encouraging him to eat.

{¶5} C.P., Jr. has been diagnosed with dysphagia, a condition that causes difficulty swallowing. He has been treated by Dr. Andrew Newburn at Akron Children's Hospital. Dysphagia requires that his liquids be thickened in a specific manner, and that

he be closely monitored while eating to prevent choking. According to Dr. Newburn, this condition is not related to C.P., Jr.'s failure to gain weight as long as the condition is managed, and there has to date been no medical condition identified to explain his failure to thrive. It is possible that the dysphagia will resolve itself in time, but the eating issue might remain. After eliminating any medical condition or illness, the possibility remains that emotional trauma or neglect is the cause of C.P., Jr.'s failure to thrive.

{¶6} While in foster care, C.P., Jr. would begin vomiting as soon as he knew he had to visit with his parents, and would often vomit several times before leaving for the visit and while being transported there. His vomiting decreased when visits decreased, although stressful situations trigger bouts of vomiting for him. He is particularly sensitive to vomiting and diarrhea due to his failure to gain weight.

{¶7} A.P. presents no medical issues, but when she first entered foster care she was reserved and backward, and did not want anyone tucking her into bed or coming into her bedroom at night. A.P. manipulates her mother and controls the relationship, doing as she pleases. While appellant plays well with the children, she has been unable to discipline and control A.P.'s behavior.

{¶8} Appellant put forth an effort to comply with her case plan, and appellee initially allowed extensive visits with the children to enable her to demonstrate an ability to care for them. In addition, the foster parents personally attempted to assist appellant. Despite the efforts of appellee and the foster family, appellant failed to make lasting progress and failed to appreciate the seriousness of her son's eating issues.

{¶9} Appellee moved for permanent custody of the children on February 24, 2014. C.P., Sr. stipulated that the motion was in the best interest of the children. The

case proceeded to a hearing in the Tuscarawas County Common Pleas Court, Juvenile Division concerning S.P. The trial court granted the motion for permanent custody. The court found that the children had been in the temporary custody of appellee for twelve of the last twenty-two months, that the children could not be returned to S.P. within a reasonable time, and that permanent custody was in the best interest of the children.

{¶10} Appellant assigns two errors:

{¶11} “I. THE TRIAL COURT ERRED IN AWARDING PERMANENT CUSTODY TO JOB AND FAMILY SERVICES AS SAID DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

{¶12} “II. THE TRIAL COURT’S REFUSAL TO GRANT A CONTINUANCE OF THE TRIAL; THE TRIAL COURT’S REFUSAL TO ADMIT THE MEDICAL RECORDS INTO EVIDENCE; AND THE TRIAL COURT’S REFUSAL TO ALLOW MOTHER TO FULLY CROSS-EXAMINE DR. NEWBURN RESULTED IN APPELLANT BEING DENIED HER RIGHT TO DUE PROCESS.”

I.

{¶13} 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, 161 Ohio St. 469, 120 N.E.2d 118 (1954); *In re: Adoption of Holcomb*, 18 Ohio St.3d 361, 481 N.E.2d 613 (1985).

{¶14} 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*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60 (1990); See also, *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). 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.

{¶15} 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*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984):

{¶16} “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.”

{¶17} Moreover, 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*, 77 Ohio St.3d

415, 419, 674 N.E.2d 1159 (1997); see, also, *In re: Christian*, 4th Dist. Athens App. No. 04CA10, 2004-Ohio-3146; *In re: C. W.*, 2nd Dist. Montgomery App. No. 20140, 2004-Ohio-2040.

{¶18} Pursuant to 2151.414(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:

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, or 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 if, 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, 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. . .

(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.

{¶19} 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.

{¶20} While appellant argues that the court's finding that the children could not be placed with her within a reasonable time is against the manifest weight of the evidence, she does not challenge the court's finding that the children were in the custody of appellee for twelve or more months of a consecutive twenty-two month period. The record demonstrates that the children were placed in the temporary custody of appellee in October of 2012, and remained in custody as of the date of the

hearing in July and August, 2014. Because the trial court only needs to find one factor under R.C. 2151.414(B)(1), the court's finding that the children could not be placed with appellant within a reasonable time is superfluous, and we need not address appellant's claim that the finding is against the manifest weight of the evidence.

{¶21} Therefore, the only issue remaining is whether the finding of the court that permanent custody was in the best interest of the children is against the manifest weight of the evidence.

{¶22} Appellant argues that the children were wrongly removed from her custody in 2012, under a false assumption that she was not feeding C.P., Jr. She argues that the current foster placement has a total of ten children in the home, and there is no testimony that the foster family intends to adopt the children. She argues that she can devote all of her time and attention to the children unlike the foster mother, who has her hands full, and her grandmother is willing to help her with the children. She argues that A.P. has expressed her desire to be returned to her mother.

{¶23} The caseworker testified that despite training, appellant continued to demonstrate that she could not get C.P., Jr. to eat, and continued to struggle with getting the proper amount of thickener in his drinks. Despite being aware that his drinks all needed to be thickened, appellant attempted to give him drinks without the thickener until the caseworker intervened. Tr. 154-55. She testified that the children were very attached to each other and were doing very well in their foster home. Tr. 164-65. She testified that she believed permanent custody was in the best interest of the children, and that the foster parents were potential adoptive parents. Tr. 167.

{¶24} The foster mother testified that the children fit well into her family. Tr. 328. Although it is challenging to get C.P., Jr. to eat, she has been successful at getting him to eat by sitting next to him and encouraging him to take a certain number of bites of food. Tr. 329-330. She testified that C.P., Jr. would vomit, cry, scream and throw himself on the ground when she told him they were going for a visit with their parents. Tr. 338. A.P. did not respond negatively to visits, but would make sure that the foster mother was coming back to pick her up. Tr. 340. A.P. told the foster mother that she wanted to live on the farm with the foster family, and visit with her mother. Tr. 344.

{¶25} The guardian ad litem filed a report in which she indicated that she believed it to be in the best interest of the children to be placed in the permanent custody of appellee.

{¶26} Based on the evidence presented at the hearing, the trial court's finding that permanent custody is in the best interest of the child is not against the manifest weight of the evidence.

{¶27} The first assignment of error is overruled.

II.

{¶28} In her second assignment of error, appellant argues that the court erred in failing to grant her a continuance because the medical records she received from Dr. Newburn were incomplete.

{¶29} The grant or denial of a continuance is a matter entrusted to the broad, sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981). In order to find an abuse of discretion, we must determine that 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, 219, 450 N.E.2d 1140 (1983).

{¶30} Counsel for appellant subpoenaed medical records from Akron Children's Hospital on March 10, 2014, directing the records to be provided to her office on April 17, 2014. The subpoena was insufficient according to the hospital, and a court order directing the hospital to abide by the subpoena was issued by the court on April 2, 2014. Counsel represented to the court that she did not receive the records until the week before trial, and then discovered that the records stopped with October of 2013. On the morning of trial she requested a continuance to obtain and review the records from October of 2013 through July of 2014. The trial court denied the motion to continue. The court noted that counsel could have resolved the matter earlier, when she did not timely receive the records in April, rather than waiting until the morning of trial. The court further noted that the medical records were not necessary to the issues before the court at the permanent custody stage, and that the doctor testified at trial. The court stated that at the adjudicatory phase of the proceedings where neglect was an issue, the need for the records would have been greater; however, the case had proceeded well beyond that point.

{¶31} The trial court did not abuse its discretion in denying the motion to continue. Appellant did not demonstrate to the court any relevant reason to need the actual medical records in addition to the doctor's testimony concerning C.P., Jr.'s medical condition. As noted by the court, if the hospital failed to comply with the court order to produce the records by April 17, 2014, the issue could have been resolved by counsel prior to the morning of trial. Further, as discussed in the first assignment of

error, the trial court's judgment is supported solely by the finding that the children had been in custody for twelve of the last twenty-two months, and any potential relevance of the records went to the issue of whether the children could be returned to appellant within a reasonable time. The court did not abuse its discretion in overruling appellant's motion to continue.

{¶32} Appellant next argues that the court erred in denying her motion to submit the medical records as a joint exhibit. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 353, 358 (1987). The doctor testified extensively concerning the medical condition of the child, and was questioned by counsel for both parties and by the guardian ad litem. Appellant has not articulated how the actual records would relate to the issue before the court as to whether permanent custody is in the best interest of the children. Rather, she continued to attempt to argue that the children should not have been removed from the home in the first instance, an issue not before the court at the time of the permanent custody hearing. The trial court did not abuse its discretion in excluding the full medical records.

{¶33} Finally, appellant argues that the court erred in limiting the time which she had to cross-examine Dr. Newburn. The right to confront and cross-examine a witness is not unlimited. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993), citing *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

{¶34} During appellant's cross-examination of Dr. Newburn, the court stated that she was not hearing anything she had not already heard, and counsel had ten more minutes before she dismissed the witness. Tr. 264. The court later asked counsel to proffer what she wanted to ask the witness to allow the court to decide whether to keep the witness or end questioning. The questions counsel wished to ask Dr. Newburn were either already in the record or matters to which counsel for appellee would stipulate. Tr. 273-274.

{¶35} The record demonstrates that appellant was continuing to question the doctor regarding material to which the doctor had previously testified, rather than eliciting new and relevant information. The proffer of what counsel was prevented from asking the doctor demonstrates that the material was either already in the record, related to issues not relevant at this stage in the proceedings, or matters to which counsel for appellee would stipulate. Further, the cross-examination of Dr. Newburn consumes approximately 34 pages of the trial transcript, more than either the direct examination by appellee and the questioning by the guardian ad litem; therefore, appellant was not placed at a disadvantage in comparison to the time appellee was given to question Dr. Newburn. The trial court did not abuse its discretion in limiting cross-examination of Dr. Newburn.

{¶36} The second assignment of error is overruled.

{¶37} The judgment of the Tuscarawas County Common Pleas Court, Juvenile Division, is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Farmer, J. concur.