

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF J.H.

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 2015CA00229

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court  
of Common Pleas, Juvenile Division,  
Case No. 2015JCV00217A

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

March 28, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant M.B.

STARK COUNTY JOB AND FAMILY  
SERVICES

BRANDON J. WALTENBAUGH

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Canton, Ohio 44702

DAVID L. SMITH

P.O. Box 20407

Canton, Ohio 44701

*Baldwin, J.*

{¶1} Appellant M.B. appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, awarding permanent custody of her son J.H. (DOB 12/23/2013) to appellee Stark County Job and Family Services (SCJFS).

#### STATEMENT OF FACTS AND CASE

{¶2} Appellee initially became involved with appellant when she came to the agency office seeking help because she was homeless. She refused to go to a shelter. She later came back to the agency and said that she was still homeless. She also reported that she had made several attempts to kill herself, and spent time in the psychiatric ward of a hospital for mental health concerns. Appellee discovered that appellant left J.H. with a friend and had not seen him for several weeks. Appellee picked up J.H. because of appellant's lack of housing and mental health concerns.

{¶3} Appellee filed a complaint on December 9, 2014, which was dismissed because service was not perfected on all parties. Appellee re-filed the complaint alleging that J.H. was dependent and/or neglected on March 4, 2015. He was placed in the emergency shelter care of appellee on March 5, 2015, and on March 7, 2015, J.H. was found to be dependent and placed in the temporary custody of appellee.

{¶4} Pursuant to her case plan, appellant was to complete a parenting evaluation. She attended the first session, but did not complete the three-session evaluation. Appellant tested positive in January of 2015 for cocaine and marijuana, and again in March of 2015 for marijuana. She completed an initial assessment with Quest, which recommended that she complete a treatment program. She was terminated on June 24, 2015 from the treatment program for not attending the sessions she was

assigned to attend. Appellant was to obtain housing and employment. She was employed a few hours each night cleaning a movie theater, but lost her job. In August, 2015, appellant told her caseworker that she had an apartment available to her, but did not know how she could pay for the apartment. The caseworker attempted to conduct a home visit of the place where appellant was staying, but could not get inside of the residence because no one answered the door.

{¶15} Weekly visits were set up between appellant and J.H. Appellant stopped appearing for visits in mid-May of 2015. When she visited J.H. initially, she interacted with him, but he had no observable bond to appellant. J.H. was severely delayed in motor skills and had difficulty swallowing. He made good progress in foster care.

{¶16} On October 19, 2015, appellee filed a motion seeking permanent custody of J.H. The case proceeded to a hearing on November 23, 2015. Appellant did not appear for the hearing. Counsel for appellant asked for a continuance of the hearing because appellant was in Georgia, and had just given birth to another child. Counsel for appellant represented to the court that she was planning to stipulate to the permanent custody motion at the hearing, and asked the court to accept her stipulation even though she was not present. Counsel for appellee represented to the court that he had reason to believe she went to Georgia so that appellee would be unable to pick up the new baby, and he opposed both the continuance and the stipulation in her absence. The court overruled the motion to continue. Following the presentation of evidence, the court found that the child was abandoned because appellant had not visited or maintained contact with J.H. for more than ninety days, and because he could not be placed with her within

a reasonable period of time. The court found that permanent custody was in the best interest of J.H. and granted the motion for permanent custody.

{¶7} Appellant assigns two errors:

{¶8} “I. THE TRIAL COURT ERRED IN DENYING APPELLANT’S REQUEST TO CONTINUE THE PERMANENT CUSTODY TRIAL.

{¶9} “II. THE COURT’S ORDER STATING THAT THE CHILDREN COULD NOT BE PLACED WITH ANY BIOLOGICAL PARENT AT THE TIME OF TRIAL OR WITHIN A REASONABLE PERIOD OF TIME WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I.

{¶10} In her first assignment of error, appellant argues that the court erred in denying her request to continue the permanent custody trial because she was in Georgia giving birth to another child and could not be present.

{¶11} The decision to grant or deny a motion to continue is entrusted to the broad discretion of the trial court. *Hartt v. Munobe*, 67 Ohio St.3d 3, 9, 615 N.E.2d 617 (1993). Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Wheat*, 5th Dist. Licking App. No.2003–CA–00057, 2004–Ohio–2088. An abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶12} In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test that takes into account a variety of

competing considerations, including the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; and whether the defendant contributed to the circumstance which gives rise to the request for a continuance. *State v. Unger*, 67 Ohio St.2d 65, 67–68, 423 N.E.2d 1078 (1981).

{¶13} Counsel for appellant indicated to the court that appellant was in Georgia and had just given birth, and that she planned to stipulate to the permanent custody motion. The caseworker represented to the court that she called appellant’s doctor, who confirmed that appellant intended to move to Georgia to give birth. The caseworker further stated that she told appellant that appellee would seek custody of the new child when it was born. Nothing in the record indicates that appellant intended to appear and challenge the motion at a later date if in fact the hearing was continued. The court did not abuse its discretion in denying the motion to continue the hearing.

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

## II.

{¶15} In her second assignment of error, appellant argues that the court’s finding that the child could not be placed with her within a reasonable period of time is against the manifest weight of the evidence.

{¶16} 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).

{¶17} 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.

{¶18} 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):

{¶19} “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.”

{¶20} 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).

**{¶21}** 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, ... and the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with the child's parents.

(b) The child is abandoned.

**{¶22}** Revised Code 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.\* \* \*

(10) The parent has abandoned the child. \*\*\*

(16) Any other factors the court considers relevant.

**{¶23}** 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. See *In re: William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996).

**{¶24}** Appellant has not challenged the finding that she abandoned J.H. Abandonment is presumed when the parent has failed to visit or maintain contact with the child for more than ninety days. R.C. 2151.011(C). The evidence is undisputed that appellant did not have contact with the child from the middle of May until the time of the hearing in November of 2015, a period of more than ninety days. The court's finding of abandonment is sufficient standing alone both to support the award of permanent custody pursuant to 2151.414(B)(1), and to support the court's finding pursuant to R.C. 2151.414(E) that the child could not be placed with appellant within a reasonable period of time.



**{¶25}** Further, the evidence demonstrated that appellant did not complete a parenting evaluation as required by her case plan. She attended the first session, but did not complete the three-session evaluation. Appellant tested positive in January of 2015 for cocaine and marijuana, and again in March of 2015 for marijuana. She completed an initial assessment with Quest, which recommended that she complete a treatment program. She was terminated from the treatment program on June 24, 2015, for not attending the sessions she was assigned to attend. Appellant was to obtain housing and employment. She was employed a few hours each night cleaning a movie theater, but lost her job. In August, 2015, appellant told her caseworker that she had an apartment available to her, but did not know how she could pay for the apartment. The caseworker attempted to conduct a home visit of the place appellant was staying, but could not get inside of the residence because no one answered the door.

**{¶26}** The court's finding that J.H. could not be placed with appellant within a reasonable period of time is not against the manifest weight of the evidence. The second assignment of error is overruled.

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

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.