

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

D.H., JR.

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JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2015CA00180

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Family Court Division, Case
No. 2013JCV01139B

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

January 19, 2016

APPEARANCES:

For Appellant

AARON KOVALCHIK
116 Cleveland Avenue, NW
Suite 808
Canton, OH 44702

For Appellee

JAMES B. PHILLIPS
300 Market Avenue North
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Farmer, J.

{¶1} On November 7, 2013, appellee, Stark County Department of Job and Family Services, filed a complaint alleging D.H., Jr., born July 4, 2011, to be a neglected and/or dependent child. Father of the child is appellant, Dante Hill, Sr.; mother is appellant, Teria Thomas.¹

{¶2} Following an emergency shelter care hearing, the child was placed in appellee's emergency temporary custody.

{¶3} An adjudicatory hearing was held on January 30, 2014, wherein both parents stipulated to dependency. The dispositional hearing followed and the trial court placed the child in appellee's temporary custody and a case plan was approved and adopted.

{¶4} On October 8, 2014, appellee filed a motion for permanent custody. A hearing was held on December 2, 2014. By judgment entry filed same date, the trial court denied the motion and extended temporary custody, finding appellant was participating in the case plan services designed to assist him with his anger management issues.

{¶5} On June 30, 2015, appellee filed a second motion for permanent custody. A hearing was held on August 27, 2015. By judgment entry filed August 31, 2015, the trial court terminated parental rights and granted appellee permanent custody of the child. Findings of fact and conclusions of law were filed contemporaneously with the judgment entry.

¹Mother was a part of the underlying case and is the subject of her own appeal in Case No. 2015CA00178.

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

I

{¶7} "THE JUDGMENT OF THE TRIAL COURT THAT THE MINOR CHILD CANNOT OR SHOULD NOT BE PLACED WITH APPELLANT WITHIN A REASONABLE TIME WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶8} "THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I, II

{¶9} Appellant claims the trial court's decision to grant permanent custody of the child to appellee was against the manifest weight and sufficiency of the evidence. Appellant claims the trial court erred in finding the child could not be placed with him within a reasonable period of time and the best interest of the child was best served by granting appellee permanent custody. We disagree.

{¶10} 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. Stark No. CA-5758, 1982 WL 2911 (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). On review for manifest weight, the standard in a civil case is identical to the standard in a criminal case: a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury [or finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction [decision] must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52; *Eastley v. Volkman*, 132 Ohio St .3d 328, 2012-Ohio-2179. In weighing the evidence, however, we are always mindful of the presumption in favor of the trial court's factual findings. *Eastley* at ¶ 21.

{¶11} 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.

(16) Any other factor the court considers relevant.

{¶12} 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.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

{¶13} 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.

{¶14} R.C. 2151.414(D)(1) sets forth the factors a trial court shall consider in determining the best interest of a child:

(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.

{¶15} The child was placed in appellee's temporary custody on November 8, 2013, adjudicated on January 30, 2014, and the hearing was held on August 27, 2015. T. at 4-5. The child had been in appellee's custody for over twelve months. R.C. 2151.414(B)(1)(d).

{¶16} In its findings of fact and conclusions of law filed August 31, 2015, the trial court determined R.C. 2151.414(B)(1)(d) applied, appellant was terminated from his anger management counseling after his counselors concluded he was not progressing and was receiving no benefit from attending the program, failed to complete Quest services, and lived with his mother when in Canton, but traveled back and forth to Columbus.

{¶17} Appellant argues "he completed the aspects of the case plan that specifically applied to him." Appellant's Brief at 8.

{¶18} The ongoing caseworker, Wanda Pounds, testified appellant's case plan required him to undergo anger management counseling and substance abuse treatment through Quest. T. at 12. Appellant started anger management counseling, but was discharged "due to not receiving any benefit of the program." *Id.* He did not successfully complete an anger management program. *Id.* Appellant only attended three sessions at Quest and never returned for treatment. *Id.* Appellant resided with his mother when in Canton, but traveled to Columbus to look for work. *Id.* In Columbus, he resided in a shelter at one point. *Id.* Appellant had not been engaged in

any services after April 2015. T. at 13. He did visit with the child when in Canton. T. at 12. Appellant's sobriety issues were uncertain, and there were concerns whether or not he would remain in Canton. T. at 13.

{¶19} The child has cerebral palsy, aphasia seizures, sclerosis, GERD, and dysphasia, and is wheelchair bound and nonverbal. T. at 10-11. The child needs special services and care and stability. T. at 11.

{¶20} Appellant testified he attended Quest, but stopped because "[t]here is nothing I did for me to go to Quest" and "[b]ecause I don't have no problem." T. at 47, 54. He stated he was actively trying to find a job in Columbus because Canton "is the fastest dying city in America according to Forbes magazine on the top 10 list." T. at 49. He stated he did not have a substance abuse problem as he just enjoyed beers while watching football, and did not have an anger management problem, although he admitted to telling a caseworker "fuck you bitch" because he was angry about the case plan and having his child taken away from him. T. at 47-48, 52. Appellant admitted at the time of the hearing he did not have employment or stable housing, "[t]hat's why I went to Columbus so I can get a job and get my own place." T. at 55.

{¶21} As for best interest, the child is "totally dependent on people." T. at 57. The child and appellant have bonded. T. at 59. However, Ms. Pounds opined the granting of permanent custody would outweigh any harm by breaking the bond because the child needed stability. *Id.* The child was residing in a special needs foster home and was adoptable. T. at 60-61. Appellant testified his child's best interest would best be served by being returned to the mother, despite her ongoing issues with alcohol abuse. T. at 70. He wanted to stay involved in the child's life. T. at 70-71.

{¶22} The guardian ad litem testified "the benefit of permanent custody outweighs the burden to the child" because the child "has a high level of care because of his disabilities." T. at 73-74. The parents are "borderline functioning and you have substance abuse issues that have gone on for a long period [of] time." T. at 72.

{¶23} "When granting permanent custody under R.C. 2151.414(B)(1)(d), the trial court need not find that the child cannot or should not be placed with either parent within a reasonable time since such a finding is implicit in the time frame provided in the statute." *In re Myers Children* 4th Dist. Athens No. 03CA23, 2004-Ohio-657, ¶ 10. We note "only one of the factors set forth in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to terminate parental rights." *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827, ¶ 56.

{¶24} Upon review, we find sufficient clear and convincing evidence to support the trial court's decision on best interest and the granting of permanent custody of the child to appellee.

{¶25} Assignments of Error I and II are denied.

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

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

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