

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: N.S.

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 2016CA00044

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court
of Common Pleas, Juvenile Division,
Case No. 2014JCV00288

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

June 20, 2016

APPEARANCES:

For Plaintiff-Appellee Stark County JFS

For Defendant-Appellant A.L.

BRANDON J. WALTENBAUGH
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Baldwin, J.

{¶1} Appellant A.L. appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, awarding permanent custody of his daughter N.S. to appellee Stark County Job & Family Services (SCJFS).

STATEMENT OF THE FACTS AND CASE

{¶2} N.S. was born on February 12, 2014. On March 21, 2014, appellee filed a complaint seeking temporary custody of the child on the basis that she was neglected and dependent. N.S. was placed in the temporary custody of appellee on April 16, 2014. Appellee filed a motion seeking permanent custody of the child on December 7, 2015.

{¶3} A.L. is the natural father of N.S. His case plan required him to complete a psychological evaluation and follow its recommendations, obtain stable and appropriate housing and employment, complete Goodwill parenting classes, submit to a substance abuse evaluation at Quest Recovery Services, and establish paternity.

{¶4} The evidence presented at the permanent custody hearing established that appellant did not complete a psychological evaluation. Although he testified that he had worked at Sterlite for a period of time, the caseworker could not confirm his employment, and he was unemployed on the date of the hearing. He was living in Section 8 housing. He routinely tested positive for marijuana during the pendency of the case. He was terminated from Goodwill parenting classes in June of 2015 for behavior violations. He did establish paternity, but had not visited N.S. since June of 2015. Although he scheduled visits in August and September of 2015, he did not appear for either visit.

{¶5} N.S. had been placed in the same foster home throughout the pendency of the case, and the foster parents wished to adopt her. Other than a recessive sickle cell

trait, she is a healthy child and developmentally on target. She was bonded to the foster family.

{¶6} Appellant and his sister both testified at the hearing. They testified that during the pendency of the case, appellant was caring for their mother, who died of cancer in November of 2015. Appellant asked for a chance to demonstrate that he could be more consistent in doing the things he needed to do in order to parent N.S.

{¶7} The trial court terminated appellant's parental rights, finding that N.S. could not be placed with him in a reasonable period of time, and that he had abandoned the child. The court found that permanent custody was in the best interest of N.S. and awarded permanent custody to appellee.

{¶8} Appellant assigns two errors:

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

{¶10} "II. 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.

{¶11} In his first assignment of error, appellant argues that the court's finding that the child could not be placed with him at this time or within a reasonable period of time was against the manifest weight and sufficiency of the evidence. He argues that the

record demonstrates that appellee did not put forth a good faith effort to reunite him with N.S., as appellee did not take into consideration the stress he was under caring for his mother at the age of nineteen years old.

{¶12} 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).

{¶13} 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.

{¶14} 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):

{¶15} “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.”

{¶16} 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.

{¶17} 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.* * *

(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.

{¶18} 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.* * *

(16) Any other factors the court considers relevant.

{¶19} A child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days. R.C. 2151.011(C).

{¶20} The trial court made a finding that N.S. had been abandoned because appellant had not visited or maintained contact with her for more than ninety days. Appellant does not challenge this finding, which is sufficient along with the best interest finding to support the award of permanent custody, independent of the finding that the child could not be placed with appellant within a reasonable period of time. Further, although the court did not specifically make a finding that N.S. had been in the custody of appellee for twelve months of a twenty-two month consecutive period, the record undisputedly establishes this factor which would support the grant of permanent custody when coupled with the best interest finding.

{¶21} Further, although appellant argues that the agency did not make reasonable efforts in their case planning to reunite him with N.S. because they failed to consider the stress he was under caring for his mother at a young age, the caseworker testified that he did not discuss his problems or concerns with her, and if he had come to her for help they could have tried to figure out a different plan. Tr. 23.

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

II.

{¶23} In his second assignment of error, appellant argues that the finding that permanent custody was in N.S.'s best interest is against the manifest weight and sufficiency of the evidence. He argues that the evidence demonstrates that he made attempts to visit his daughter, and showed his willingness to be a father to N.S., but he was not given an opportunity because appellee never did a home study and his caseworker did not return his phone calls.

{¶24} 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.

{¶25} Amy Craig, the caseworker assigned to this case, testified that N.S. is healthy other than a recessive trait for sickle-cell anemia, and she is developmentally on track. She was placed in her current foster home at the beginning of the case and had remained there for almost two years. She was bonded and attached to her foster parents and another child in the home, and the family wanted to adopt N.S. Because she had been in the home since she was one month old, N.S. knew no other home. Although visits with appellant generally went well, he had not seen the child for eight months at the

time of trial. The caseworker testified that the bond was not strong between appellant and N.S., and that the benefit of permanent custody outweighed any harm caused by severing the bond.

{¶26} The court's finding that permanent custody was in the best interest of N.S. was not against the manifest weight or sufficiency of the evidence.

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