

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF M.G.

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Craig R. Baldwin, J.

Case No. 16CA18

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County  
Court of Common Pleas, Juvenile  
Division, Case No. 2013 DEP 00098

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

August 1, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant N.G.

EDITH A. GILLILAND  
Richland County Children Services  
731 Scholl Road  
Mansfield, Ohio 44907

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*Baldwin, J.*

{¶1} Appellant N.G. appeals a judgment of the Richland County Common Pleas Court, Juvenile Division, awarding permanent custody of her son M.G. to appellee Richland County Children Services.

STATEMENT OF FACTS AND CASE

{¶2} M.G. was born on October 24, 2007. When he was about six weeks old, he was severely physically abused by his natural father, causing permanent injuries. Appellant was seventeen years old at the time. M.G.'s father was convicted of endangering children and sentenced to four years in prison. He has had no contact with M.G. and did not participate in the instant case.

{¶3} M.G. was initially diagnosed with traumatic brain injury, retinal and subdural hemorrhage, cerebral palsy, spasticity, and seizures. He has substantial impairment of motor function in both legs and in his right arm and hand. He needs leg braces to assist in ambulation. He also has substantial cognitive limitations as a result of his injuries. He has speech difficulties and ranks below average in all academic areas. It is unlikely that he will be able to live independent of supervision or to obtain employment other than in a sheltered workshop.

{¶4} M.G. was placed in a foster home in Crawford County on December 14, 2007, where he lived with N.G. After reaching the age of eighteen, appellant continued to reside with the foster family and M.G. During this time, she graduated from high school, obtained employment, and learned how to care for the special needs of M.G. as a result of his injuries.

{¶5} Appellant and M.G. left the foster home in 2011, and legal custody was returned to appellant. Appellant lost her employment of two and a half years, failed to maintain stable housing, and failed to follow through with routine and specialized medical care for M.G. Appellant became involved with J.C. Sexton, who had been reported to both Crawford and Richland Counties for inappropriate sexual conduct with minor children and physically abusing children. While appellant was with Sexton, unusual bruising was noted on M.G.'s face. Appellant further had another male friend with whom she would use crack cocaine. Appellant and her friend would take turns using crack while the other stayed in a separate room with M.G.

{¶6} Appellant was arrested on July 10, 2013. M.G. was placed in a foster home pursuant to a direct parental placement. M.G. was filthy and had no shoes or underwear. He was wearing a pair of jeans several sizes too large, which he struggled to hold up with his able hand. He was placed in the temporary custody of appellee on September 5, 2013. The case plan included requirements that appellant address her substance abuse issues and mental health concerns, obtain and maintain housing and employment, and provide for the child's basic needs, including educational and medical needs.

{¶7} Appellant completed her case plan objective concerning substance abuse treatment. She did not engage in services to address her diagnosis of ADHD, and had at least seven employers during the pendency of the case. After her release from jail for her probation violation, she lived in a tent at the Richland County Fairgrounds where she was doing her community service hours. The fairground event coordinator and his wife offered appellant a room in their home at no cost to appellant. They supplied appellant with free room and board, took her to meetings at Children Services, took her to visits

with M.G., supervised her visits with M.G., assisted her in completing job applications, and introduced her to people in their church who also helped appellant financially. However, she continued to pursue a relationship with Sexton, and was asked to leave their residence as a result.

{¶8} Appellant then moved in with Sexton, until her probation officer required her to find new housing. She then moved in with family friends, who had an open case with appellee. Shortly thereafter, she obtained an apartment, and permitted others to live there who had ongoing involvement with appellee. In April of 2014, she moved to Morrow County to live with Jessica Campbell. Derek Gangluff, who had been convicted of unlawful sexual conduct with a minor as a result of a sexual relationship with appellant when she was thirteen years old, was also living in this home. After appellant's caseworker and Gangluff's parole officer learned of the living arrangement, she vacated the residence and moved in with her brother and his family. Her housing situation after this living arrangement terminated is unclear.

{¶9} Appellant was often late for visits with the child, or departed early. When she did visit consistently, the child demonstrated aggression with his peers and the foster family's dog. The foster parents would offer to meet appellant at community events, restaurants, movies, or the library, with the foster parents paying for appellant's meals and participation. She once departed a visit at the foster home without telling anyone, leaving M.G. and other children unsupervised on a trampoline. Appellant demonstrated little understanding of M.G.'s medical or educational needs, leaving one of his annual IEP meetings at the school so that she could purchase a fish for his birthday.

{¶10} A motion for permanent custody was filed December 9, 2014. Following a two day hearing held on April 15 and April 20, 2015, the motion for permanent custody was granted. Appellant assigns three errors:

{¶11} “I. THE TRIAL COURT’S DECISION PLACING M.G. IN THE PERMANENT CUSTODY OF RICHLAND COUNTY CHILDREN SERVICES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT THE HEARING.

{¶12} “II. MOTHER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

{¶13} “III. THE TRIAL COURT ERRED BY FINDING THAT RCCSB HAD MADE REASONABLE EFFORTS TO REUNIFY M.G. WITH APPELLANT/MOTHER PURSUANT TO R.C. 2151.419.”

I.

{¶14} Appellant argues that the court’s finding that M.G. could not be placed with her within a reasonable period of time was against the manifest weight of the evidence.

{¶15} } 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).

{¶16} 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.

{¶17} 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):

{¶18} “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.”

{¶19} 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.

{¶20} 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. \*\*\*

(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.

{¶21} 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.

{¶22} Although the court did not specifically make a finding that M.G. 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.

{¶23} Further, the trial court's finding that the child could not be placed with appellant within a reasonable period of time was not against the manifest weight of the evidence. Appellant's housing situation was consistently changing, and she continued to engage in relationships with inappropriate men. She was unable to support herself, and did not maintain stable employment. The evidence presented at the hearing demonstrated that she was incapable of meeting her own needs for housing and transportation, let alone those of a child with special needs. At the time of trial she did



not understand M.G.'s medical or educational needs, which she failed to meet during the time in which he was in her legal custody. Although she did successfully complete substance abuse treatment, she did not remedy any of the other conditions that caused the child to be removed from the home.

{¶24} Appellant also argues that the finding that permanent custody was in M.G.'s best interest was against the manifest weight of the evidence.

{¶25} 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.

{¶26} The court found that appellant and M.G. loved each other, but her longstanding inability or unwillingness to meet her own basic needs and the needs of the child threatened his continued growth and development. The evidence established that he was bonded to the foster parents and other members of the household. He thrived in all aspects of his life during the time he has spent in the foster home. He had been in his current foster placement for twenty-five months at the time of the permanent custody hearing, and considering his earlier foster placement in Crawford County, had lived the majority of his life in the primary care of persons other than appellant. Because of his

severe and permanent injuries suffered due to abuse by his natural father, his need for a secure placement was great, and during the time he was with appellant, she failed to avail herself of services for his disabilities. The court's finding that permanent custody was in M.G.'s best interest was not against the manifest weight of the evidence.

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

## II.

{¶28} Appellant argues that trial counsel was ineffective for failing to object to the trial court's finding that appellee made reasonable efforts to reunify pursuant to R.C. 2151.419 prior to the motion for permanent custody, and for failing to file a writ of procedendo based on the court's failure to comply with the time deadlines found in R.C. 2151.414(A)(2).

{¶29} "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, \* \* \* the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." *In re Wingo*, 143 Ohio App.3d 652, 666, 758 N.E.2d 780 (2001), quoting *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1993). This Court has recognized "ineffective assistance" claims in permanent custody appeals. See, e.g., *In re Utt Children*, 5th Dist. Stark App.No.2003CA00196, 2003–Ohio–4576.

{¶30} Our standard of review for an ineffective assistance claim is thus set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). These cases require a two-pronged analysis in reviewing a claim for ineffective

assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different. *Id.* Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142, 538 N.E.2d 373.

{¶31} Appellant first argues that her trial counsel should have objected earlier to appellee's failure to follow through with the diagnosis made by Dr. Aaron Becker of mild mental retardation and ADHD. Dr. Becker evaluated appellant pursuant to a referral from Pathways. Appellant argues that appellee did not provide her with services to enable her to obtain suitable employment based on her cognitive difficulties, and because she was unable to maintain employment, she could not complete the case plan.

{¶32} R.C. 2151.419 does not apply in a hearing on a motion for permanent custody filed pursuant to R.C. 2151.413 and R.C. 2151.414. *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N .E.2d 816. Therefore, the trial court was not required to make a specific finding that appellee had made reasonable efforts to reunify the family. *Id.* However, in *In re C.F.*, the Ohio Supreme Court stated that this does not mean the agency is relieved of the duty to make reasonable efforts:

At various stages of the child-custody proceeding, the agency may be required under other statutes to prove that it has made reasonable efforts toward family reunification. To the extent that the trial court relies on R.C. 2151.414(E)(1) at a permanent custody hearing, the court must examine the reasonable case planning and diligent efforts by the agency to assist the parents when considering whether the child cannot and should not be placed with the parent within a reasonable time. *Id.*

{¶33} The Ohio Supreme Court concluded that a 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 reasonable efforts have been made prior to that hearing. *Id.* 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.” *Id.*

{¶34} Prior to the permanent custody hearing, the court made findings of reasonable efforts to reunify on November 5, 2013; December 17, 2013; June 19, 2014; July 2, 2014; December 11, 2014; and May 11, 2015. Appellant failed to object to any of these findings. However, based on the evidence presented at the permanent custody hearing, appellant has not demonstrated a reasonable probability of a change in the outcome had counsel objected. Jason Kline, the ongoing caseworker assigned to the case, testified that after completing the Pathways program through which she had been evaluated by Dr. Becker, she was referred to Goodwill, but failed to follow through

because she moved to Morrow County. He further testified that Pathways found appropriate work for her, and the parent aide had worked with her on resumes and job interviews. He testified that he believed most of the referrals made for her were appropriate considering her limitations, and they were aware of her cognitive limitations throughout the case planning process, they simply did not have a formal number from testing to put with that information prior to Dr. Becker's evaluation. She had worked for a hospital for two and a half years during her time in Crawford County, thus demonstrating an ability in the past to maintain stable employment. Further, while appellant underwent a psychological evaluation in December of 2013 at the urging of a church friend which indicated that she was in need of services to address ADHD, she did not disclose this information to her caseworker.

{¶35} In addition, her lack of stable employment was not, as argued by appellant, the lynchpin to all other objectives of the case plan which she failed to meet. She had not sought medical treatment for M.G. while he was in her care, nor had she enrolled him in school. The evidence presented at the hearing demonstrated that she failed to understand or appreciate the seriousness of his problems and his need for continued treatment and education. Therefore, she has not demonstrated a reasonable probability of a change in the outcome had counsel earlier objected to the case planning efforts of appellee.

{¶36} Appellant further argues that counsel was ineffective for failing to file a writ of procedendo to force the court to comply with the time limits set forth in R.C. 2151.414(A)(2), which provides:

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion. \*\*\*

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

{¶37} Because the time provisions of R.C. 2151.414(A)(2) are directory and not mandatory, the Ohio Supreme Court has held that a litigant must seek a writ of procedendo against the juvenile court if it does not comply with these time limits. *In re Davis*, 84 Ohio St.3d 520, 523–524, 1999–Ohio–0419. If a party does not seek such a writ, he is stopped from arguing on appeal that delay by the juvenile court violated his due process rights. *Id.* at 524, 705 N.E.2d 1219. Appellant argues that in the instant case the hearing was held 126 days after the motion for permanent custody was filed, and the order disposing of the motion was journalized by the magistrate 315 days after the motion was filed and five months later by the trial court.

{¶38} Appellant has not demonstrated prejudice from the failure of counsel to file a writ of procedendo. The hearing in the instant case took place over a two day period

and produced a voluminous transcript. The additional time involved in the instant case allowed for a full consideration of all the evidence presented, and appellant has not demonstrated that the result of the proceeding would have been different had trial counsel filed a writ to force an earlier hearing and decision.

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

### III.

{¶40} Appellant argues that the court's finding that appellee made reasonable efforts to reunify her with M.G. is against the weight of the evidence.

{¶41} As discussed in the second assignment of error, the trial court is not required to make a finding of reasonable efforts to reunify at the permanent custody hearing. *In re J.J.F.*, 5th Dist. Stark No.2009–CA–00133, 2009–Ohio–4736, ¶24. However, R.C. 2151.414(E)(I) does require the court to examine the “reasonable case planning and diligent efforts by the agency to assist the parents” when determining whether a child should not or could not be returned to a parent within a reasonable time. *Id.* at ¶27. “This requirement and examination should not be confused with the reasonable efforts requirement as set forth by R.C. 2151.419 as requiring the trial court to determine reasonable efforts at every permanent custody motion brought under R .C. 2151.413 or 2151.414.” *Id.*

{¶42} Appellant again argues that appellee did not provide her with services to aid her in obtaining suitable employment, given her cognitive limitations and diagnosis of ADHD. Jason Kline, the ongoing caseworker assigned to the case, testified that after completing the Pathways program through which she had been evaluated by Dr. Becker, she was referred to Goodwill, but failed to follow through because she moved to Morrow

County. He further testified that Pathways found appropriate work for her, and the parent aide had worked with her on resumes and job interviews. He testified that he believed most of the referrals made for her were appropriate considering her limitations, and they were aware of her cognitive limitations throughout the case planning process, they simply did not have a formal number from testing to put with that information prior to Dr. Becker's evaluation. She had worked for a hospital for two and a half years during her time in Crawford County, demonstrating an ability to maintain stable employment. Further, while appellant underwent a psychological evaluation in December of 2013 at the urging of a church friend which indicated that she was in need of services to address ADHD, she did not disclose this information to her caseworker. The court's finding that appellee had made reasonable efforts to reunify M.G. with appellant was not against the manifest weight of the evidence.

{¶43} The third assignment of error is overruled.



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

By: Baldwin, J.

Farmer, P.J. and

Gwin, J. concur.