**[Cite as *In re B.W.*, 2016-Ohio-7662.]**

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| IN THE MATTER OF: | : | JUDGES: |
| | : | Hon. Sheila G. Farmer, P.J. |
| B. W. | : | Hon. Patricia A. Delaney, J. |
| | : | Hon. Craig R. Baldwin, J. |
| DEPENDENT CHILD | : | |
| | : | |
| | : | Case No. 2016 AP 06 0033 |
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| | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Juvenile Division, Case No. 14JN00072 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT: | November 4, 2016 |

APPEARANCES:

For Appellee

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Guardian ad Litem

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*Farmer, P.J.*

{¶1} On March 5, 2014, appellee, Tuscarawas County Job and Family Services, filed a complaint alleging B.W., born March 3, 2014, to be a dependent child. Parents of the child are appellants, Rayann and Matthew Wyatt. Appellant mother had previously lost custody of nine children between 2004 and 2012.

{¶2} Following a shelter care hearing, B.W. was placed in appellee's temporary custody.

{¶3} An adjudicatory hearing was held on April 2, 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 January 9, 2015, the trial court permitted appellants to have supervised visitations with the child in their home.

{¶5} On December 17, 2015, appellants were informed that a motion for permanent custody would be filed and visitations would be moved back to the agency. The next day, a visitation was held and due to appellant father's behavior, he was asked to leave the visitation.

{¶6} On January 14, 2016, appellee filed a motion for permanent custody. Hearings were held on March 16, and April 7, and 27, 2016. By judgment entry filed May 16, 2016, the trial court terminated appellants' parental rights and granted appellee permanent custody of the child.

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

I

{¶8} "THE JUDGMENT OF THE TRIAL COURT THAT THE CHILD CANNOT AND SHOULD NOT BE PLACED WITH EITHER PARENT WITHIN A REASONABLE TIME AND THAT THE PARENTS HAVE FAILED TO PROVIDE AN ADEQUATE HOME FOR THE CHILD, WAS AGAINST THE MANIFEST WEIGHT OF THE RELEVANT ADMISSIBLE EVIDENCE."

II

{¶9} "THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE CHILD WOULD BE SERVED BY THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE RELEVANT ADMISSIBLE EVIDENCE."

I, II

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

{¶11} 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.

{¶12} R.C. 2151.419(A) provides in determining "reasonable efforts" by a public children services agency, "the child's health and safety shall be paramount." Subsection (A)(2)(e) states:

> (2) If any of the following apply, the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home:
>
> (e) The parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code or under

an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections.

{¶13} 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.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(16) Any other factor the court considers relevant.

{¶14} R.C. 2151.414(B)(1) 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:

(a) The child is not abandoned or orphaned***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.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(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***.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶15} 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.

{¶16} 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.

{¶17} Appellants claim the trial court erred in finding the child could not be placed with them within a reasonable amount of time as they fulfilled all the requirements of the case plan and they have adequate housing and a household income.

{¶18} In its judgment entry filed May 16, 2016, the trial court found the following in pertinent part:

> 24. It was clear from the testimony of the parties that although they demonstrate various levels of effort, understanding, and love for this child, the psychological evaluations done for these parties were very accurate and the parental deficits of these parties have not been rectified nor will they be in the near future.
>
> ***
>
> Based upon the facts presented and the recommendation of the Guardian ad Litem, the Court finds that [B.W.] cannot and should not be placed with either parent within a reasonable time. This evidence supports a finding that despite diligent, reasonable efforts and planning by the Tuscarawas County Job and Family Services to remedy the problems which caused removal of the child, both parents have failed continually and repeatedly to substantially remedy the conditions causing removal.
>
> The Case Plan proposed by the Tuscarawas County Job and Family Services addressed the concerns which resulted in the removal of the child. Each element of the Case Plan had supportive services offered

> by the Tuscarawas County Job and Family Services to help in the completion of the Case Plan. These parents have demonstrated a lack of commitment toward their child and have failed to provide an adequate home for the child at this time and cannot do so within a year of this litigation.

{¶19} The trial court heard testimony from several family counselors and mental health experts including Dr. Anita Exley (for appellants) and Dr. Steve Dean (for appellee), both of whom conducted psychological testing on each parent. In its judgment entry filed May 16, 2016, the trial court stated the following regarding their credibility and reliability:

> 6. Psychological testing was completed for each party by two different psychologists. One set was done in 2014 by Dr. Anita Exley. The second set was completed by Dr. Steve Dean in 2015. There are differences in the interpretation of these testing results. The Court is aware that although this testing is administered and scored in a uniform manner, other collateral information, knowledge of the test taker, and the experience and skill of the test administrator all factor into the final conclusions.
>
> 7. Dr. Exley indicates that Matthew has average intelligence and is capable of applying his reasoning skills to childcare. After actual testing by Dr. Dean, using the Wechsler Adult Intelligent Scale, Dr. Dean reported

that Matthew's overall reasoning abilities are somewhere between the extremely-low range to the low end of the borderline range with a probable IQ between 66 to 73. Dr. Exley also indicated that Rayann has the ability to apply direction given to her concerning parenting. Dr. Dean's further testing indicates that Rayann's IQ is between 85-92. He puts her reasoning abilities between the mid-range of the low-average range to the low-end of the average range. Dr. Exley also agrees that Rayann's cognitive functioning is in the low to below average range.

8. After hearing testimony from both doctors, the Court finds that the reports are not necessarily contradictory, but the Court does find that the assessments were approached a little differently by each tester. Overall, Dr. Exley stated that it was not impossible for these parties to learn and improve. She clearly did recognize the parental deficits that exists, but did not draw further conclusions as Dr. Dean offered. Concerning Rayann, Dr. Exley stated that she has very immature thinking and a simplistic world view. She indicated that Rayann lacks understanding of situations, and blames TCJFS and her ex-husband for the removal of all her children.

9. Dr. Dean has analyzed the intellectual and emotional make up of these parties in much more detail and made a detailed application of his findings to their realistic ability to parent. The Court has a long history with both Rayann and Matthew. Rayann's previous 9 children were removed by this Court, with those cases dating back to 2004. The Court also has a

less extensive, but long history with Matthew concerning his older son. The Court finds the conclusions drawn by Dr. Dean to be very accurate considering the Court's history with these parties.

10. Concerning Rayann, Dr. Dean finds that her working short term memory is impaired and she struggles with auditory learning. She has trouble understanding words and her common sense is impaired. She has difficulties in relationships, lacks accountability, and blames others for her struggles. She is very quick to blame her previous husband for the loss of her other children. She is verbally abusive and has low stress tolerance. She is impulsive, impatient and struggles to manage her anger. She fails to consider consequences and mismanages her anger. She is very critical and avoids healthy self disclosure. Her lack of self awareness combined with these other characteristics will be serious roadblocks to successful therapy.

{¶20} As explained by our brethren from the Second District in *In re A.J.S.,* 2nd Dist. Miami No. 2007-CA-2, 2007-Ohio-3433, ¶ 22:

Accordingly, issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. In this regard, "[t]he 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." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶21} Appellant mother has previously had nine children removed from her custody. T. at 230, 429-431; State's Exhibits J1-J7; R.C. 2151.414(E)(11).

{¶22} The child has been in appellee's temporary custody for over twenty-one consecutive months. R.C. 2151.414(B)(1)(d).

{¶23} Appellee presented the testimony of eight professionals.

{¶24} Dr. Dean, a psychologist with Melymbrosia Associates, evaluated appellants in 2015. T. at 8, 10; State's Exhibit A. He opined appellant mother's "reasoning ability would be labeled as being in the low average range," "she was likely to be overwhelmed quickly," blamed others for her problems, struggled to complete goals, mismanaged her anger, was impulsive, had a limited frustration tolerance, and had problems with personal relationships. T. at 10, 12, 13, 15, 17-18. He opined appellant father scored in the "extremely low range" for cognitive ability, "he would be overwhelmed very quickly," had "some difficulty with concentration and attention, so some trouble focusing," lacked "insight into his psychological difficulties," was anxious, insecure, and dependent, and tended to struggle with personal relationships. T. at 22, 23, 26, 27-29. Dr. Dean stated appellant father could not parent independently. T. at 31. He opined appellants' plan of appellant mother working and appellant father staying home to take care of the child would not be successful. T. at 21-22.

{¶25} Steven Cekanski, a licensed professional clinical counselor for Community Mental Healthcare who counseled appellants from approximately 2014 to 2016, opined appellant father could succeed with a "support system" of family, friends, and community resources, and appellant mother wanted to change and "put one hundred percent of her effort into parenting." T. at 67, 69-70, 82, 87, 95-96, 102, 105, 107; State's Exhibits E1 and E2. He concluded appellants were able to parent a child "under certain circumstances." T. at 108. Appellants would need "strict, stringent rules" and a "specific plan" in place. *Id.*

{¶26} Amy Humrighouse, a parenting instructor case manager with Goodwill Industries, observed appellant mother in parenting classes in 2015. T. at 129-131; State's Exhibit D. She stated appellant mother had a "very flat affect," was "vacuous," incessantly talked or would fall asleep at times, and did well on the comprehensive post-test, but had trouble engaging with the child during visitations. T. at 132, 133, 134-135, 136, 138. Appellant mother did not pick up on clues from the child as to what the child needed, and "appeared detached and unmotivated to nurture her baby, stifling his milestones and developmental skills." T. at 142, 144-145. Ms. Humrighouse opined appellant mother was unable "to apply the things that she should have learned in the class work and implement it" and that was an ongoing concern. T. at 148-149.

{¶27} Sarah Szoke, a counselor providing parenting support and developmental screenings with Help Me Grow, observed appellants in 2015. T. at 166-167. She stated appellants had trouble picking up on the child's cues, tended to talk down to each other, and needed prompting at times on how to care for the child. T. at 169, 171, 173; State's Exhibit C.

{¶28} Geoffrey Geers, the ongoing case manager for appellants, stated he worked with appellants for eighteen months and he did not see enough progress for unsupervised visitation. T. at 317-318, 327. He had "pretty big concerns" after he received the Goodwill Parenting report. T. at 327; State's Exhibit D. Appellant mother did not understand the child's developmental stages, and appellant father was unable to nurture the child and did not know a lot of the basics of child care. T. at 320-321. Mr. Geers admitted he "never had one single problem with them complying with the, doing services, whatsoever, that's correct." T. at 329.

{¶29} Elizabeth Benedetto, a former caseworker for appellant mother, testified to appellant mother losing custody of her nine children with different fathers involved. T. at 429-431, 592-593; State's Exhibits J1-J7.

{¶30} Wendy Azzardi, a social service worker with appellee who observed supervised visitations with the child, stated appellant mother was not nurturing, had feeding issues, was not empathetic to the child's emotions, and was insulting and condescending to appellant father. T. at 339-443, 447. Appellant father had difficulty retaining information, could get frustrated, was unstable on his feet, needed a lot of guidance, needed support people to help him care for the child, and overstimulated the child at times. T. at 443-445, 451. Appellants' home was clean, safe, and prepared for the child. T. at 457-458.

{¶31} Rebecca Teague, a family service aide with appellee who observed supervised visitations with the child, stated appellants argued and appellant mother was critical of appellant father. T. at 550, 552-553, 555-556. Appellant father played rough with the child, used inappropriate words around the child, and during one visit (October

5, 2015), was very agitated and "blew-up" at the caseworkers. T. at 552-554, 557-559. The visitations improved after appellant father stopped visiting. T. at 560, 563.

{¶32} Appellants presented the testimony of four witnesses.

{¶33} Bobbi Jo Irwin, appellant mother's sister, stated she attended some of the visitations with her child and B.W. appeared comfortable around his cousin and his paternal grandparents, and the child was bonded to appellants. T. at 202, 206-208, 210. She did not have any concerns with how appellants cared for the child. T. at 212.

{¶34} Dr. Exley, a psychologist with Chrysalis Counseling Center, evaluated appellants in 2014. T. at 217, 218; Parents' Exhibits 1 and 2. She opined appellant father was "highly motivated to comply with what's needed to regain custody" of the child and had "a lot of parenting information to learn," but was capable of learning and applying the information to raising the child. T. at 224-225. She also noted appellant father lacked proper hygiene, had poor boundaries with others, was "at war" with appellee (holding on to conspiracy theories), and was evasive about the truth. T. at 239-240. Dr. Exley opined appellant mother "would benefit from training and guidance from others, as far as parenting is concerned," and she could become an appropriate parent. T. at 233. She also noted appellant mother lacked proper hygiene, had an odd demeanor about "these highly emotional situations that had occurred," had immature thinking, had a simplistic world view, "blamed the system and her ex-spouse" for her prior problems, and had boundary issues. T. at 246.

{¶35} Barbara Hunter, a former visitation supervisor with appellee, worked with appellant mother in 2004 and then again in 2015. T. at 260-261, 264. She stated she thought appellant mother had reached "a turning point" and had changed her attitude

which was "surprising." T. at 270, 271. She opined appellant mother was different, as far as her "overall demeanor, her overall willingness to learn, her overall attitude." T. at 305. She also opined appellants were working very hard to parent the child, and she expected them to continue to improve. T. at 301. She stated they needed to continue mental health treatment. T. at 304. Appellants' continued improvement was noted in appellee's Activity Log Report, Plaintiffs' Exhibit 3.

{¶36} Jacquelyn Wyatt, appellant father's mother, stated she attended many of the visitations and the child was comfortable with her and her husband, and appellants interacted with the child and worked together. T. at 357-358, 360-361, 363-364, 366-367. She did not have any concerns about appellants' ability to parent the child. T. at 371-372, 379-380.

{¶37} This case is a tale of two cities: one side representing a good case for permanent custody given the child's time in appellee's temporary custody, and the other side portraying appellants as cooperative and able to succeed. There is no doubt that appellant mother did everything required of her to complete her case plan. Appellant mother testified when the child was taken at birth, she immediately began counseling on the trial court's advice at the shelter care hearing. T. at 624-625. She explained a previous caseworker had told her, prior to giving birth to the child sub judice, that appellee "probably would not get involved" because her previous cases wherein she had lost custody of her nine children involved a former abusive spouse who was no longer in her life. T. at 622.

{¶38} With these facts, prior history, and amount of elapsed time that the child has been in appellee's temporary custody, it is impossible for this court to second guess

the trial court. We could have supported an opposite conclusion by the trial court. As stated above, credibility, reliability, and forthrightness are within the province of the trier of fact.

{¶39} Based upon the foregoing, we find sufficient competent evidence to support the trial court's conclusion, "despite diligent, reasonable efforts and planning" by appellee, the child "should not be placed with either parent within a reasonable time." May 16, 2016 Judgment Entry.

{¶40} As for best interests, Jacquelyn Wyatt, the paternal grandmother, requested custody of the child. In its judgment entry filed May 16, 2016, the trial court denied this request, stating the following:

> 25. Matthew's mother, Jackie Wyatt, also recently requested custody of [B.]. She reacts to this entire situation very emotionally and without much common sense. She is very ill-informed concerning Rayann and demonstrates much immaturity. She was very defensive and blamed TCJFS for the placement of [B.] in foster care. She had trouble understanding some of the questions she was asked. She recognizes no serious parental deficits in these parents.
>
> 26. Jackie Wyatt is a classic enabler which is clearly illustrated by her testimony concerning her adult granddaughter. This granddaughter, [S.F.], is 18 and has lived with Jackie Wyatt and her husband for the last 2 years. She lives with the Wyatts based upon ongoing conflict with her divorced parents. This girl quit high school 3 weeks before she would

> have graduated. She does not work, and Jackie Wyatt supports her financially. She has told this girl she does not have to work for a year. Jackie excuses this lazy behavior by claiming her granddaughter has emotional issues. Yet this girl has never had any counseling or mental health care. It is clear that Jackie Wyatt had no influence over this girl, accepted whatever this girl wanted to do, and responded by continuing to financially support her without requiring anything of [S.]. When the Court and counsel questioned her about this behavior, she was completely oblivious as to why we would be concerned.
>
> 27. Jackie Wyatt clearly would be a poor custodian for [B.W.] and her motion for custody is overruled.

{¶41} In State's Exhibit F, the guardian ad litem report, the guardian ad litem acknowledged the child was bonded to appellants and his paternal grandparents, but stated the following:

> Jacki and Rick Wyatt were considered early on as possible care givers for [B.]. They are very decent, loving grandparents but the undersigned had grave concerns about their ability to provide long term care for this child due to their health issues. This placement was initially recommended by the agency but [B.] was not placed in their custody.

{¶42} The guardian ad litem concluded it was in the child's best interests to be placed in appellee's permanent custody.

{¶43} 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.

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

{¶45} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, P.J.

Delaney, J. and

Baldwin, J. concur.

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