[Cite as *In re D.S.*, 2012-Ohio-3326.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re D.S.

Court of Appeals No. L-12-1026

Trial Court No. JC 10202576

DECISION AND JUDGMENT

Decided: July 23, 2012

* * * * *

Tim A. Dugan, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

SINGER, P.J.

{¶1} This is an appeal from a judgment issued by the Lucas County Court of Court of Common Pleas, Juvenile Division, terminating appellan's parental rights and granting permanent custody of the minor child, D.S., to appellee. Because we conclude that the trial court's findings were not against the manifest weight of the evidence, we affirm.

{¶2} Appellant, R.S., is the biological mother of D.S, born in 2009. In March 2010, appellee, Lucas County Children Services ("LCCS"), filed a complaint against appellant alleging dependency and neglect and seeking protective supervision of D.S. A guardian ad litem was appointed shortly thereafter.

{¶3} An adjudication hearing was held on May 4, 2010. At that hearing, R.S. consented to an adjudicatory finding of dependency. On August 31, 2010, the court adopted the magistrate's decision finding D.S. dependent and awarding protective supervision to LCCS. Custody of D.S. went to his biological father.

{¶4} On November 4, 2010, D.S.'s biological father was arrested and detained on nine federal counts of promoting prostitution. Consequently, LCCS was granted custody of D.S. through an ex parte order. On November 8, 2010, LCCS filed a "motion to change disposition and for shelter care hearing." As grounds for this motion, LCCS cited R.S's failure to address her substance abuse problems, her mental health issues and her failure to obtain stable housing as well as D.S.'s biological father's recent arrest. At the shelter care hearing, a magistrate found probable cause to award LCCS temporary custody of D.S.

{¶5} On January 4, 2011, following an evidentiary hearing, a magistrate found that it was in the best interest of D.S. to award temporary custody to his paternal grandmother. The trial court adopted the decision. However, on May 6, 2011, LCCS filed a "motion to change disposition and for shelter care hearing." As grounds for this motion, LCCS cited

paternal grandmother's recent arrest by the F.B.I. on two counts of conspiracy regarding drug trafficking. At the shelter care hearing, a magistrate found probable cause to award LCCS temporary custody of D.S.

{¶6} On August 24, 2011, LCCS filed a motion for permanent custody. A hearing commenced on December 5, 2011. Lloyd Letterman, a licensed social worker and expert in chemical dependency and mental health diagnosis and treatment, testified that he is employed by Rescue, Inc. and contracted through the Lucas County Mental Health Board. He provides diagnostic assessments for LCCS and he conducted an assessment for R.S. who was referred to him after she and D.S. tested positive for marijuana after D.S.'s birth. He diagnosed her with bipolar disorder, depression, cannabis dependency and alcohol dependency. He recommended intensive outpatient treatment at Unison, which provides a dual diagnosis program to deal with both her substance abuse and mental health issues.

{¶7} Dawn Kluck testified that she is a drug and alcohol therapist at Unison. R.S. was her client. On October 6, 2011, R.S. completed intensive outpatient treatment for her substance abuse issues. She then went into aftercare which requires the patient to attend regular sober support meetings and to submit to urine drug screens. Kluck testified that R.S. did not successfully meet the requirements of aftercare as she failed to attend the meetings and she twice tested positive for marijuana.

{¶8} Case manager, Heather Mossing, testified that she attempted to obtain government housing for R.S. after she was asked to leave a shelter because she continually tested positive for marijuana. To qualify for housing, appellant had to enter a drug treatment program. R.S., however, was dropped from the program due to her lack of progress and her lack of attendance.

{¶9} Curtis Smith, a vocational specialist at Harbor Behavioral Health, testified that he tried to help R.S. get a job. In his program, R.S. was counseled on coping and communication skills in the workplace. Smith testified that through his program, R.S. is working temporarily at a store for approximately 20 hours a week. At the time of trial, R.S. was into her second week of employment.

{¶10} Julie Miller testified she was R.S.'s LCCS caseworker. She became involved with R.S. when R.S. and D.S. both tested positive for marijuana at D.S.'s birth. In addition, LCCS received later reports that R.S. was not feeding D.S. and that she sometimes gave him sugar water when she ran out of baby formula. LCCS was told that R.S. leaves D.S. with her alcoholic mother who had passed out while watching D.S.

{¶11} Miller testified that R.S. has not completed her case plan. Specifically, she has not attended parenting classes, she has not obtained housing, living mostly with her mother, and she has not followed up on her mental health treatment or taken her prescribed medications. She also has failed to successfully complete drug treatment. Miller testified that she is concerned about R.S.'s propensity for violence which is

reflected in police reports that were admitted into evidence. R.S.'s records from Harbor show that R.S. threatened to kill Miller if LCCS took permanent custody of her son. Currently, R.S. is in a foster home. Friends of the foster family have expressed interest in adopting him. In sum, Miller concluded that she believed it was in D.S.'s best interest for LCCS to take permanent custody of R.S.

{¶12} R.S. took the stand and testified that she does not smoke marijuana and she does not understand how she tested positive for the substance. She testified that she is continuing her substance abuse treatment and that she has not obtained housing yet because she lacks the money. She acknowledged that she stopped participating in the services that were offered to her through her case plan because she was selfish but she insisted that she is ready to participate now.

{¶13} The guardian ad litem ("GAL") testified that it is her recommendation that LCCS take permanent custody of D.S. She initially planned to recommend that R.S. receive an extension of time to complete her case plan. The GAL testified that she changed her mind when R.S. tested positive for marijuana in the last month. "It solidified in my mind the fact that we're in a pattern of relapse and minimal compliance with case plan services." She further testified that given the fact that the LCCS has been involved with D.S. since he was born and he is now over two years old, it is time for permanency.

{¶14} On December 29, 2011, the court ruled that sufficient clear and convincing evidence had been presented that it is in D.S.' s best interest to award permanent custody

of D.S. to LCCS. The court found that, pursuant to R.C. 2151.414(B)(1)(a), D.S. cannot be placed with either parent within a reasonable period of time or should not be placed with either of his parents within such a time. The court found that, pursuant to R.C. 2151.414(E)(1), notwithstanding reasonable case planning and diligent efforts by LCCS to assist R.S. to remedy the problems that initially caused D.S. to be placed outside the home, R.S. has failed continuously and repeatedly to substantially remedy the conditions causing D.S. to be placed outside his home. The court found that, pursuant to R.C. 2151.414(E)(2), R.S. suffers from chronic mental illness and chemical dependency so severe that it makes her unable to provide an adequate permanent home for D.S. at the present time, and, as anticipated, within one year after the court held its hearing. The court found, pursuant to R.C. 2151.414(E)(4), that R.S. has demonstrated a lack of commitment toward the child by showing an unwillingness to provide an adequate permanent home for the child. Finally, the court noted it had considered all the factors under R.C. 2151.414(D)(1)-(5), in finding that D.S. is in need of a legally secure placement and, further, that an award of permanent custody is in his best interest.

{¶15} R.S. now appeals setting forth the following assignment of error:

I. The Juvenile Court's decision terminating appellant's parental rights fell against the manifest weight of the evidence.

{¶16} A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy–*

Jones, 10th Dist. No. 03AP–1167, 2004–Ohio–3312, ¶ 28. The factual findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *In re Brown*, 98 Ohio App.3d 337, 648 N.E.2d 576 (3d Dist.1994). Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]." *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350, (1988). Thus, judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. Id.*; C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶17} A juvenile court may grant permanent custody of a child to a public services agency if the court finds, by clear and convincing evidence, two statutory prongs: (1) the existence of at least one of the four factors enumerated in R.C. 2151.414(B)(1) and (2) that the child's best interest is served by a grant of permanent custody to the children's services agency. *In re M.B.*, 10th Dist. No. 04AP755, 2005–Ohio–986, ¶ 6. Clear and convincing evidence requires that the proof "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In the Matter of Coffman*, 10th Dist. No. 99AP–1376, 2000 WL 1262637 (Sept. 7, 2000), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶18} Under the first prong, the four factors under R.C. 2151.414(B)(1) are, in pertinent part, as follows:

(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 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 * * *.

{¶19} In making a finding under R.C. 2151.414(B)(1)(a), that the child cannot be placed with his parents within a reasonable time or should not be placed with his parents, the court need find, by clear and convincing evidence, that only one of the eight factors enumerated in R.C. 2151.414(E) exists. For purposes of this case, two pertinent factors under that section state that:

(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.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code; * * *.

{¶20} Once a finding is made by the court satisfying one of the factors enumerated in R.C. 2151.414(B)(1), its analysis turns to the second prong, the best interest of the child. In making this determination, R.C. 2151.414(D)(1) provides that 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 ending on or after March 18, 1999;

(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;

Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶21} The factors set forth in R.C. 2151.414(E)(7) through (11) include (1) whether the parents have been convicted of or pled guilty to various crimes, (2) whether medical treatment or food has been withheld from the child, (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse, and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code

requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent, (4) whether the parent has abandoned the child, and (5) whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶22} Given the testimony in this case, the trial court could reasonably determine by clear and convincing evidence that LCCS had proven that R.S. had not completed or even made substantial progress on her case plan. R.C. 2151.414(E)(1). LCCS provided numerous services for R.S. While she seemed to start in the right direction, she clearly lacked the commitment to follow through, testing positive for marijuana while in treatment. The court considered D.S.'s custodial history of failed placements with family members which included placement with his father. The court considered the fact that D.S.'s father was incarcerated at the time the permanent custody motion was filed and the fact that D.S.'s father has not communicated with LCCS. Based on the record in this matter, we find that the trial court correctly determined that D.S. could not be placed with R.S. within a reasonable time and that it was in the best interest of D.S. to terminate R.S.'s parental rights. Appellant's sole assignment of error is found not well-taken.

{¶23} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE