[Cite as *In re Ch.B.*, 2012-Ohio-4738.]

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

In re Ch.B., Cr.B., Ci.B., Cy.B., Ro.S., Rob.S.

Court of Appeals No. L-12-1059

Trial Court No. JC 09191371
JC 09194899

DECISION AND JUDGMENT

Decided: October 12, 2012

* * * * *

Shelby J. Cully, for appellee.

Mary C. Clark, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Appellant, T.B. ("mother"), appeals a February 7, 2012 judgment of the Juvenile Division of the Lucas County Court of Common Pleas. The judgment terminated mother's parental rights to five of her six children (Cr. B., Ci. B., Cy. B., Ro. S. and Rob. S.) and awarded permanent custody of those children to Lucas County

Children Services ("L.C.C.S."). With respect to the remaining child (Ch. B.), the judgment awarded legal custody of Ch. B. to a relative.

{¶2} The father of Ch. B., Ci. B. Cr. B, and Cy. B. is deceased. R.S. is the father of Ro. S. and Rob. S.

{¶3} L.C.C.S. became involved with the family in February 2009. On February 20, 2009, at L.C.C.S.'s request, the trial court awarded custody of Ch. B., Cr. B., Ci. B., Cy. B. and Ro. S. on an ex parte emergency basis to L.C.C.S. The agency filed a complaint in dependency and neglect with respect to the children on the following business day. On that date, the trial court conducted emergency shelter care hearing and awarded interim temporary custody of the children to L.C.C.S.

{¶4} The court conducted adjudicatory and dispositional hearings on the dependency and neglect complaint on April 14, 2009. At that time, mother agreed to a finding of neglect. The court found that that the children were neglected children and that it was in the best interests of each child to award temporary custody to L.C.C.S. The court awarded temporary custody of the children to L.C.C.S.

{¶5} Neglect and dependency proceedings remained pending with respect to the other children when Rob. S. was born in June 2009. On June 6, 2009, the trial court issued an ex parte order granting custody of Rob S. to L.C.C.S. L.C.C.S. filed a dependency and neglect complaint with respect to the child on June 8, 2009. On June 9,

2009, the trial court awarded temporary custody of Rob. S. to L.C.C.S. for placement in shelter care.

{¶6} After adjudication and disposition hearings on August 4, 2009, the court found Rob S. to be a dependent child and awarded temporary custody of him to L.C.C.S. The Rob S. case was consolidated with the case involving the other children on May 20, 2011.

{¶7} L.C.C.S. offered case plan service to mother and the children. On December 14, 2010, L.C.C.S. filed a motion in both cases to reunify all the children with mother – with legal custody of the children to be awarded to mother and protective supervision awarded to L.C.C.S. for a period of six months. L.C.C.S later withdrew the requests. The agency filed motions for permanent placement of all children except Ch. B. and Ci. B. in January 2011. The motion was amended to add Ci. B. to the permanent custody request on May 26, 2011.

{¶8} The motions for permanent custody of all children except Ch. B. to L.C.C.S. and the motion to award legal custody of Ch. B to a relative were heard on August 22, 2011, November 1, 2011, November 30, 2011, December 1, 2011, and December 19, 2011. The trial court issued its judgment granting the motions on February 7, 2012.

{¶9} Mother claims trial court error in awarding permanent custody of Cr. B., Ci. B., Cy. B., Ro. S., and Rob. S. to L.C.C.S. Mother asserts one assignment of error on appeal:

Assignment of Error

The trial court's finding that permanent custody should be awarded to Lucas County Children Services pursuant to §2151.414(D) and (E) was not supported by clear and convincing evidence.

{¶10} In order to award permanent custody to a public children's services agency, a court must find under R.C. 2151.414(B)(1)(a), where the child is not orphaned or abandoned, that 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." Alternatively, under R.C. 2151.414(B)(1)(d) the court must find that the child has been in the temporary custody of a public children services agency for "twelve or more months of a consecutive twenty-two-month period * * *." The trial court must also determine that an award of permanent custody to the agency is in the child's best interests. R.C. 2151.414(B)(1).

{¶11} R.C. 2151.414(E)(1)-(16) lists factors setting forth specific parameters under which a trial court may terminate parental rights. *In re William S.*, 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996). Under R.C. 2151.414(E), if the court determines by clear and convincing evidence that one of the 16 factors exists as to both 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." R.C. 2151.414(D) lists relevant factors to be considered by the court in determining whether an award of

permanent custody to a public children's services agency is in the best interests of the child.

{¶12} The trial court based its decision to terminate parental rights on findings, by clear and convincing evidence, of the existence of four factors under R.C. 2151.414(E). The court found the existence of factors R.C. 2151.414(E)(1), (2), (4), and (16). The court also found that an award of permanent custody to L.C.C.S. is in the best interests of the children under R.C. 2151.414(D).

{¶13} In her appeal, mother challenges the trial court judgment on the issue of parental suitability alone. She argues that the record below does not support a finding by clear and convincing evidence under R.C. 2151.414(E) that her children cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Specifically, mother argues that clear and convincing evidence is lacking to support the trial court findings that she is unsuitable as a parent due to the existence of factors under R.C. 2151.414(E)(1), (2), (4), and (16).

{¶14} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). It is "one of the oldest of the fundamental liberty interests recognized in American law." *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 39, *citing Troxel*, 530 U.S. at 65. At least during a child's minority, the permanent termination of parental rights constitutes "the family law equivalent of the death penalty" in its effect on the parent-child

relationship. *See In re DA*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶ 10; *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991).

{¶15} In its judgment, the trial court summarized conditions in the home when L.C.C.S. first became involved with the family in February 2009:

> "[Mother] had unresolved mental health issues, substance abuse, inadequate housing and was using inappropriate caregivers to care for her children. The children's medical needs were not being met. They were not attending school on a regular basis. * * * [Mother] * * * was unable to manage her income such that she had the basic provisions in the home for the children. * * * [Mother] * * * reported she was unable to do these things due to multiple health problems and grief over the loss of her husband."

{¶16} Plan services provided by L.C.C.S. included assessments to determine whether mother needed mental health services and substance abuse treatment. Based upon the assessments, mother was referred for outpatient substance abuse treatment and mental health services including counseling. Plan services also included a parenting class to improve parenting skills and assistance for mother to find affordable, appropriate and stable housing for the family.

{¶17} It is undisputed that mother found affordable, appropriate and stable housing for the family and that she completed a parenting class as requested.

Compliance with plan services for substance abuse and mental health services is disputed.

{¶18} With respect to mental health services, the trial court concluded:

* * * [Mother] * * * initially attended counseling regularly, but stopped attending in October 2010. * * * [Mother] * * * has been diagnosed with several disorders in the past including bipolar disorder, factitious disorder, post traumatic stress disorder and depression. Nonetheless, * * * [Mother] * * * does not comply with mental health treatment long enough to determine her disorders definitively and establish a treatment plan for her. One recent psychiatric consult recommended medication, which * * * [Mother] * * * declined.

{¶19} There is no dispute that mother completed her initial outpatient substance abuse treatment program. After a delay mother also completed the aftercare portion of the program. The ongoing caseworker for the family, Ms. Rebecca Theis, testified that mother tested positive for marijuana in April and June 2010 and admitted to use of the drug two to three times a week. Ms. Theis testified that mother was reassessed for substance abuse and started an intensive outpatient treatment program for substance abuse in August 2010. Mother completed that program in November 2010 and ultimately completed a 12 week aftercare program after sporadic attendance on a delayed basis.

{¶20} The trial court found that at about January 2011, mother disclosed that she had been making frequent trips to emergency room departments in area Toledo area

hospitals and that hospital records showed that all area hospitals had records of emergency room visits by mother. Evidence at trial included patient prescription history reports through the Ohio Automated Prescription Reporting Systems. Mother admits that she informed L.C.C.S. in May 2011 that she had gone to a hospital emergency room at least 50 times in the preceding year.

{¶21} With respect to the ER visits, the trial court found:

> Without exception, every ER visit was for some type of pain such as migraines and chest pain. On all visits * * * mother * * * requested narcotic pain medication including injectable dilaudid. Hospital personnel noted on most occasions that * * * [mother's] * * * behavior and demeanor did not comport with the severity of pain she reported having.

{¶22} The L.C.C.S. caseworker assigned to the family testified that upon the agency's learning of the frequent emergency room visits and associated use of narcotic drugs, mother was repeatedly instructed to manage her care through a primary physician rather than through use of emergency rooms. The court found that L.C.C.S made repeated referrals to several clinics that would treat mother even without insurance. Mother did not pursue the referrals even after she secured medical insurance. The trial court found:

> [S]he failed to contact them. She continued to go to the hospitals nearly weekly seeking pain medication, despite the fact she now had

> insurance. As recently as October of this year, * * * [mother] * * *was at a hospital emergency department and was referred to a primary care physician. The appointment to see the doctor was made from the hospital for October 8, 2011 and given to * * * [mother]. * * *[Mother] failed to attend the appointment and indicated she had to call the office back to reschedule. By November 30, 2011, * * * [mother] * * * admitted she had not made the call the (sic) reschedule the appointment because "she was looking for a different doctor." She had not met the physician.

{¶23} Mother also resumed treatment with a neurologist in July 2011 for migraine headaches. The physician's office records on mother were placed in evidence at trial. The trial court found that treatment with the neurologist provided another source for drugs:

> This medical record reveals that at no time did she see the physician; that no history and physical were in the medical records. The only entries in the records were injections for reported pain. * * * [Mother] * * * was going to the doctor's office solely to receive pain medication, which she obtained by injection, no less than once per week and also was given oral percocet, a narcotic pain medication, as well as valium, all simultaneously.

{¶24} The trial court concluded that the evidence demonstrated that appellant was dependent on pain medication and that the drug dependency coupled with her repeated failure to follow through with her physicians affected her ability to care for her children:

> It is very difficult to ascertain what ailments * * * [mother] * * * suffers from as her reports vary from telling to telling. The Court is not convinced that she suffers from all the ailments and conditions as she reports. * * * [Mother] * * * has been non-compliant with her medical care for a period of almost three years. Her behavior indicates that she is dependent on pain medication and spends most of her time seeking medication. She spends an overwhelmingly large amount of time seeking relief from her self-reported pain, but fails to follow through with physicians and others to determine the source of the pain with missed appointments and such. There was no evidence to demonstrate that she would be able to care for the children given her self-reported pain and frequent trips to the hospital. Although * * * [mother] * * * testified that she has persons who would be able to assist her with the children's care and needs, Donald Darnell, the Guardian ad litem, testified that such is not the case.

{¶25} The factor under R.C. 2151.414(E)(2) establishes parental unsuitability based upon circumstances involving chemical dependency, chronic mental illness, chronic emotional illness, or mental retardation of a parent. The statute provides:

> (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;

{¶26} The trial court findings under R.C. 2151.414(E) as to mother's parental suitability included a R.C. 2151.414(E)(2) finding. The trial court found:

> The Court further finds, pursuant to ORC 2151.414(E)(2) that * * * [mother's] * * * chronic mental or emotional illness, physical disabilities or chemical dependency is so severe that it makes her unable to provide an adequate permanent home for the children 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.

{¶27} Mother argues that she has been diagnosed with congestive heart failure ("CHF"), chronic obstructive pulmonary disease ("COPD"), high blood pressure, and migraine headaches and that she lost medical insurance coverage when her children were

removed from the home and placed with L.C.C.S. in 2009. Mother also argues that her lack of a primary care physician resulted from lack of insurance coverage and a refusal by clinics to accept her as a patient because she had been discharged from another clinic. Mother testified that she had been discharged as a patient with Mercy Family Center because she refused to treat with the physician to whom she was assigned.

{¶28} Toledo Hospital Records of an emergency room visit on September 25, 2011 disclose that the primary physician not only recommended mother treat with a primary care physician, hospital personnel secured an actual appointment for mother to see the physician on October 8, 2011, at 2:30 p.m. at Riverside Clinic in Toledo. Mother testified that she did not attend the appointment. Mother testified on November 30, 2011, that she had not called the physician back to reschedule. She testified she had been looking for another physician.

{¶29} Mother argues that her health problems are not so severe as to make her unable to provide adequate care for her children. L.C.C.S. argues that the children were removed from the home in February 2009 due to an inability of mother to care for the children and that appellant failed to make her health a priority. L.C.C.S. contends that appellant sought pain medication through weekly emergency room visits; and then, once she obtained medical insurance, through bi-weekly injections at a neurologist's office. L.C.C.S. argues that appellant failed to follow instructions to notify treating physicians that she was in recovery for substance abuse when seeking pain medication. L.C.C.S.

also contends mother failed to follow through to seek consistent medical treatment for her ailments, despite multiple referrals to medical clinics and physicians.

{¶30} Under the statute, findings of parental unsuitability based upon the existence of conditions under R.C. 2151.414(E) must be established by clear and convincing evidence. "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts 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 is required beyond a reasonable doubt as in criminal cases." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶31} In civil cases, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 26. As findings of factors under R.C. 2151.414(E) must be made by clear and convincing evidence, judgments based upon such findings will not be disturbed on appeal where they are supported by competent, credible evidence in the record of the type that could have formed a firm belief or conviction of the existence of the statutory element. *See In re*

Daniel D., 6th Dist. No. L-04-1363, 2005-Ohio-5457, ¶ 14; *In re Alexis Kaye K.*, 160 Ohio App.3d 32, 39, 2005-Ohio-1380, 825 N.E.2d 1148, ¶ 26 (6th Dist.).

{¶32} We find such evidence here. The evidence of severe chemical dependency is overwhelming. There is also strong competent credible evidence in the record demonstrating that mother failed to secure necessary medical care to identify and treat her illnesses, conditions, or disabilities, including her drug dependency, and that they are of such severity as to make mother unable to provide an adequate permanent home for the children.

{¶33} We find competent credible evidence exists in the record to support a firm conviction or belief that mother suffers from a chronic mental or emotional illness, physical disabilities or chemical dependency so severe that it makes her unable to provide an adequate permanent home for the children within one year of the trial court hearing as required for a finding under R.C. 2151.414(E)(2). We find that the trial court did not err in its finding of parental unsuitability under R.C. 2151.414(E)(2).

{¶34} R.C. 2151.414(E) directs a trial court to make a finding of parental unsuitability under that subsection of the statute upon proof of the existence of any one of the sixteen listed factors. As we conclude that the trial court did not err in finding existence of the factor under R.C. 2151.414(E)(2), it is unnecessary to consider whether trial court erred in its findings under R.C. 2151.414(E)(1), (4), or (16).

{¶35} The father of Cr. B, Ci. B., and Cy. B. is deceased. The trial court found and the record demonstrates that the father of Ro. S. and Rob. S. did not participate in plan services and had little to no contact with the children. The trial court found that conditions exist under R.C. 2151.414(E)(1), (4), and (16) making the father of Ro. S. and Rob. S. an unsuitable parent and finding that termination of his parental rights and award of permanent custody to L.C.C.S. is in the best interests of the children. The father of the two children has not appealed the trial court judgment. Mother does not dispute the trial court's findings and judgment as to that father.

{¶36} Accordingly, we find mother's assignment of error not well-taken.

{¶37} We find that justice has been afforded the party complaining and affirm the judgment of the Juvenile Division of the Lucas County Court of Common Pleas. 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

Mark L. Pietrykowski, J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J.
CONCURS IN JUDGMENT ONLY. _____
JUDGE

YARBROUGH, J.

{¶38} I concur in judgment only. *See In re R.V.*, 6th Dist. Nos. L-10-1278, L-10-1301, 2011-Ohio-1837, ¶ 57-59 (Yarbrough, J., concurring).