[Cite as *In re L.Z.*, 2013-Ohio-2939.]

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

In re L.Z.

Court of Appeals No. F-13-001

Trial Court No. 16655

DECISION AND JUDGMENT

Decided: July 5, 2013

* * * * *

Clayton M. Gerbitz, for appellant.

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, C.Z., appeals the judgment of the Fulton County Court of Common Pleas, Juvenile Division, terminating his parental rights and awarding permanent custody of C.Z.'s son, L.Z., to the Fulton County Department of Job and Family Services (DJFS). For the following reasons, we affirm.

I. Facts and Procedural Background

{¶ 2} This case involves the termination of parental rights. It began on October 30, 2009, when appellee, the state of Ohio, filed a complaint with the trial court, charging L.Z. with public indecency in violation of R.C. 2907.09. Three days later, another complaint was filed, alleging that L.Z. was an unruly child pursuant to R.C. 2151.022, for behaving in a manner as to injure or endanger his own health or morals or the health and morals of others. A guardian ad litem was appointed, and the matter was set for hearing.

{¶ 3} On November 9, 2009, L.Z. admitted to being an unruly child, and the state dismissed the public indecency charge. The court accepted the admission and granted temporary custody of L.Z. to the DJFS. L.Z. has remained in the custody of the DJFS ever since. Following a dispositional hearing, the court adopted the case plan proposed by the state, resulting in L.Z.'s placement at the Richmeier Therapeutic Home, with supervised visitation rights granted to his parents.

{¶ 4} On June 13, 2011, the state filed an amended case plan that sought to move L.Z. to the Harvey Group Home, as well as establish the requirements for reunification of L.Z. with C.Z. The amended case plan was accepted by the court on July 27, 2011, and L.Z. was moved to the Harvey Group Home under a planned permanent living arrangement (PPLA).

{¶ 5} As a result of C.Z.'s failure to comply with the terms of the amended case plan, the state filed a motion for permanent custody on October 5, 2012, citing L.Z.'s

wish to be adopted by his foster parents. The state's motion was opposed by C.Z.[1] The trial court appointed counsel for C.Z. and held a hearing on the motion on January 14, 2013. Following the hearing, the court granted the state's motion for permanent custody, concluding that the award of permanent custody to the DJFS was in L.Z.'s best interests. C.Z. subsequently filed this timely appeal, assigning the following error for our review:

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR PERMANENT CUSTODY WHEN THE EVIDENCE PRESENTED AT THE HEARING WAS INSUFFICIENT AS A MATTER OF LAW.

II. Analysis

{¶ 6} In *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the United States Supreme Court noted that parents' interest in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." The protection of the family unit has always been a vital concern of the courts. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

{¶ 7} Ohio courts have long held that "parents who are 'suitable' persons have a 'paramount' right to the custody of their minor children." *In re Perales*, 52 Ohio St.2d

[1] L.Z.'s mother did not oppose the termination of her parental rights and a grant of permanent custody to the state.

89, 97, 369 N.E.2d 1047 (1977). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991).

{¶ 8} Thus, a finding of inadequate parental care, supported by clear and convincing evidence, is a necessary predicate to terminating parental rights. "Before any court may consider whether a child's best interests may be served by permanent removal from his or her family, there must be first a demonstration that the parents are 'unfit.'" *In re Stacey S.*, 136 Ohio App.3d 503, 516, 737 N.E.2d 92 (6th Dist.1999), citing *Quillon v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). Parental unfitness is demonstrated by evidence sufficient to support findings pursuant to R.C. 2151.414. *See In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996), syllabus.

{¶ 9} In order to terminate parental rights and award permanent custody of a child to a public services agency under R.C. 2151.414, the juvenile court must find, by clear and convincing evidence, two things: (1) that one of the enumerated factors in R.C. 2151.414(B)(1)(a)-(d) apply, and (2) that permanent custody is in the best interests of the child. R.C. 2151.414(B)(1). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is more than a preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 10} "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 A.H.*, 6th Dist. No. L-11-1057, 2011-Ohio-4857, ¶ 11, citing *In re Andy-Jones*, 10th Dist. Nos. 03AP-1167, 03AP-1231, 2004-Ohio-3312, ¶ 28. We recognize that, as the trier of fact, the trial court is in the best position to weigh the evidence and evaluate the testimony. *Id.*, citing *In re Brown*, 98 Ohio App.3d 337, 342, 648 N.E.2d 576 (3d Dist.1994). Thus, "[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.

{¶ 11} In his sole assignment of error, C.Z. argues that the trial court erred in granting the state's motion for permanent custody. Specifically, C.Z. asserts that the trial court's findings were not supported by sufficient competent, credible evidence.

{¶ 12} Following the hearing on the state's motion, the trial court determined that two of the enumerated factors in R.C. 2151.414(B)(1) applied. First, the court concluded that L.Z. was abandoned under R.C. 2151.414(B)(1)(b). Second, the court noted that L.Z. had been in the temporary custody of the DJFS for at least 12 months in a consecutive 22-month period, as set forth in R.C. 2151.414(B)(1)(d). Further, the court concluded that awarding permanent custody to the DJFS was in L.Z.'s best interests. C.Z. challenges each of these findings as being against the manifest weight of the

evidence. After thoroughly reviewing the record, we cannot conclude that the trial court's decision is against the manifest weight of the evidence.

{¶ 13} Concerning the trial court's finding that C.Z. abandoned L.Z., C.Z. acknowledges the fact that he ceased communication with L.Z. as of September 2012, allegedly out of respect for L.Z.'s wishes not to be contacted. For purposes of R.C. 2151.414(B)(1)(b), "abandoned" is defined by R.C. 2151.011(C), which provides that "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days." *In re Donnell F.*, 6th Dist. No. L-04-1308, 2005-Ohio-4175, ¶ 35. Here, as of the date of the hearing on the state's motion for permanent custody (January 14, 2013), C.Z. had failed to maintain contact with L.Z. for a period greater than ninety days. Nonetheless, C.Z. argues that he did not abandon L.Z., and points to his involvement in these court proceedings as support. However, as stated by the Seventh Appellate District, "participation in hearings does not constitute visitation or maintenance of contact." *In re M.B.*, 7th Dist. No. 08 MA 241, 2009-Ohio-2634, ¶ 54. Consequently, we agree with the trial court that clear and convincing evidence demonstrated that C.Z. abandoned L.Z. as defined in R.C. 2151.011(C).

{¶ 14} In addition to its findings concerning abandonment, the trial court found that L.Z. had been in the custody of the DJFS for more than 12 months out of a consecutive 22-month period as set forth in R.C. 2151.414(B)(1)(d). Contrary to the trial

court's finding, C.Z. argues that the DJFS' custody of L.Z. ceased on the date he was placed into a PPLA. C.Z. contends that a PPLA has a "separate and distinct legal status" from that of the DJFS.

{¶ 15} The issue raised by C.Z. has been addressed by at least one other Ohio court. In *In re J.I.*, the Twelfth District Court of Appeals held that a juvenile court may combine the period of time a child is in the temporary custody of the DJFS with the period of time the child is in a PPLA in order to arrive at the 12 month threshold, so long as the two periods run consecutively. *In re J.I.*, 12th Dist. No. CA2005-05-008, 2005-Ohio-4920, ¶ 17. Further, the court held that the "12 of 22" rule can be met by a showing that the child was living in a PPLA for at least 12 months at the time the agency moves for permanent custody. *Id.*

{¶ 16} Here, L.Z. was placed into a PPLA on July 27, 2011. The state filed its motion for permanent custody on October 5, 2012. Since L.Z. was living in a PPLA for at least 12 months, the trial court's application of R.C. 2151.414(B)(1)(d) is supported by clear and convincing evidence.

{¶ 17} Finally, the trial court concluded that the grant of permanent custody to the DJFS was in L.Z.'s best interests. In order to determine the best interests of the child with respect to granting permanent custody to the DJFS, we follow the framework outlined in R.C. 2151.414(D)(1). That section provides:

> (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.

{¶ 18} In its judgment entry granting the state's motion for permanent custody, the trial court analyzed each of the enumerated factors and concluded that the grant of permanent custody was in L.Z.'s best interests. We agree.

{¶ 19} As to the first factor, L.Z.'s "interaction and interrelationship * * * with [his] parents, siblings, relatives, foster caregivers and out-of-home providers," the evidence presented at the hearing demonstrates that L.Z.'s relationship with C.Z. is almost nonexistent at this point. Indeed, over the last several years, C.Z.'s attempts to communicate with L.Z. have been "sporadic" and have recently ceased altogether. On the other hand, L.Z. appears to have developed a strong bond with his foster caregivers at the Harvey Group Home. Additionally, L.Z.'s foster mother, Pauline Harvey, testified that his behavior has shown marked improvement since being moved into the Harvey Group Home. Harvey's testimony concerning L.Z.'s progress was echoed by L.Z.'s behavioral therapist, Karen Willinger.

{¶ 20} Given L.Z.'s age and maturity level, the trial court concluded that the second factor, the wishes of the child, "strongly applies to the case at bar." To that end, L.Z. has clearly expressed his desire to remain at the Harvey Group Home and to be adopted by the Harveys. Further, L.Z. has stated that he does not wish to be placed back with C.Z.

{¶ 21} The third factor, pertaining to the custodial history of the child, has already been discussed above in relation to the application of R.C. 2151.414(B)(1)(d). To reiterate, L.Z. has been in the custody of the state since late 2009. Therefore, L.Z. "has been in the temporary custody of one or more public children services agencies * * * for twelve or more months of a consecutive twenty-two-month period."

{¶ 22} Next, we consider the fourth factor under R.C. 2151.414(D)(1)(d), L.Z.'s need for a secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency. C.Z.'s testimony at the hearing is relevant to our inquiry concerning the fourth factor. Interestingly, C.Z. acknowledged that the Harvey Group Home is the best place for L.Z. at this time, because he cannot currently meet L.Z.'s needs. As a solution, C.Z. recommends that L.Z. be kept on a PPLA indefinitely. However, as noted by the trial court, such an arrangement "puts [L.Z.] in the limbo without a permanent home." Doing so would hinder L.Z.'s sense of security and stability, which is not in his best interests.

{¶ 23} Finally, as to the fifth factor, we find that the only applicable factor is R.C. 2151.414(E)(10), concerning the parents' abandonment of the child. For the reasons already articulated above, we conclude that L.Z. has been abandoned by his parents.

{¶ 24} Having thoroughly reviewed the record before us in light of the factors set forth in R.C. 2151.414(D)(1), we conclude that the trial court's determination of L.Z.'s best interests was supported by competent, credible evidence. Therefore, because we

have also held that the trial court's findings under R.C. 2151.414(B)(1) were supported by competent, credible evidence, the trial court's decision was not against the manifest weight of the evidence.

{¶ 25} Accordingly, C.Z.'s sole assignment of error is not well-taken.

III. Conclusion

{¶ 26} Based on the foregoing, the judgment of the Fulton County Court of Common Pleas, Juvenile Division, is affirmed. Costs are hereby assessed to C.Z. in accordance with 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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE