

[Cite as *In re M.S.*, 2015-Ohio-1028.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101693 and 101694

**IN RE: M.S. and J.S.
Minor Children**

[Appeal By Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 12914289 and AD 14900469

BEFORE: Keough, J., Jones, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 19, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Appellant (“Father”) appeals the juvenile court’s decision granting permanent

custody of his children to the Cuyahoga County Division of Children and Family Services (“CCDCFS”). Father contends that the trial court erred in granting permanent custody because a grant of legal custody to his nieces, rather than a grant of permanent custody to CCDCFS, was in the children’s best interest. Finding no merit to the appeal, we affirm.

I. Background

{¶2} Appellant is the biological father of M.S., born August 26, 2012, and J.S., born November 10, 2013. M.S. was removed from her parents’ custody four days after she was born, and CCDCFS was granted emergency pre-dispositional custody. After a hearing on December 10, 2012, she was found to be a dependent child and temporary custody was granted to CCDCFS. A complaint for permanent custody was filed on June 19, 2013.

{¶3} CCDCFS was also granted emergency pre-dispositional custody of J.S. when he was born, and he was removed from his parents’ custody when he was four days old. On January 17, 2014, CCDCFS refiled a complaint alleging that J.S. was a dependent child and seeking permanent custody. J.S. was adjudicated dependent on March 19, 2014.

{¶4} On January 17, 2014, Father filed a motion requesting that the court grant legal custody of the children to his niece K.G. or other relatives. The trial court held a hearing on CCDCFS’s motions for permanent custody of M.S. and J.S. and Father’s motion for legal custody to his relatives on April 25 and April 28, 2014. After hearing the evidence, the trial court found that the children could not be placed with either parent within a reasonable time, and that an award of permanent custody to CCDCFS was in their best interest. This appeal followed.

II. Analysis

{¶5} In his single assignment of error, Father asserts that the trial court erred in finding that permanent custody was in the children’s best interest.

{¶6} When reviewing a trial court’s judgment in child custody cases, the appropriate standard of review is whether the trial court abused its discretion. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994). An abuse of discretion is more than an error of law or judgment; it implies that the court’s attitude was unreasonable, arbitrary, or unconscionable. *Miller v. Miller*, 37 Ohio St.3d 71, 73, 523 N.E.2d 846 (1988). When reviewing the trial court’s custody decision, an appellate court must make “every reasonable presumption in favor of the lower court’s judgment and finding of facts.” *In re Broadbeck*, 97 Ohio App.3d 652, 659, 647 N.E.2d 240 (3d Dist.1994).

{¶7} Termination of parental rights is an alternative of last resort but is sanctioned when necessary for the welfare of a child. *In re Wise*, 96 Ohio App.3d 619, 624, 645 N.E.2d 812 (9th Dist.1994). Before a juvenile court may terminate parental rights and award permanent custody of a child who is neither abandoned nor orphaned to a proper moving agency, it must find by clear and convincing evidence that (1) the grant of permanent custody to the agency is in the best interest of the child; and (2) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1).

{¶8} “Clear and convincing” evidence is more than a mere “preponderance of the evidence,” but does not rise to the level of certainty required by the “beyond a reasonable doubt” standard in criminal cases. *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987). It produces in the mind of the trier of fact a firm belief or conviction as

to the facts sought to be established. *Id.* Where clear and convincing evidence is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the degree of proof. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24, citing *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, 782 N.E.2d 665, ¶ 16 (7th Dist.).

{¶9} In this case, the juvenile court found, and Father does not dispute, that the children could not be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a). Rather, Father disputes the juvenile court's finding that granting permanent custody of the children to CCDCFS was in their best interest. He contends that the juvenile court should have granted legal custody of the children to his nieces K.G. and C.G., instead of permanent custody to the agency.

{¶10} When considering the best interest of a child in a permanent custody hearing, the juvenile court is required under R.C. 2151.414(D)(1) to consider all relevant factors, including, but not limited to: (a) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-town 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; (c) the custodial history of the child; (d) the child's need for a legally secured permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (e) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply in relation to the parents and child. Although a trial court is required to consider each of the R.C. 2151.414(D)(1) factors in making its permanent custody determination, "[o]nly one of these factors needs to be resolved in favor of the award of

permanent custody.” *In re A.B.*, 8th Dist. Cuyahoga No. 99836, 2013-Ohio-3818, ¶ 17.

{¶11} As an initial matter, we note that if permanent custody to the agency is in the children’s best interest, legal custody to K.G. and C.G. necessarily is not. *In re L.C.*, 9th Dist. Summit No. 26816, 2013-Ohio-2799, ¶ 10. Moreover, a child’s best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). Accordingly, the willingness of a relative to care for a child does not alter what the court must consider in determining permanent custody. *In re A.D.*, 8th Dist. Cuyahoga No. 85648, 2005-Ohio-5441, ¶ 12, citing *In re Benavides*, 8th Dist. Cuyahoga No. 78204, 2001 Ohio App. LEXUS 2002 (May 3, 2001). A court is not required to favor a relative if, after considering all the factors, it is in the child’s best interest for the agency to be granted permanent custody. *In the Matter of B.H.*, 5th Dist. Fairfield No. 14-CA-53, 2014-Ohio-5790, ¶ 72.

{¶12} Here, the evidence before the juvenile court clearly and convincingly demonstrated that upon consideration of the R.C. 2151.414(D)(1) factors, awarding permanent custody to CCDCFS was in the children’s best interest. First, with respect to the children’s relationship with their relatives and foster parents, Brandi Stevens, the CCDCFS social worker assigned to the case, testified that K.G. visited with M.S. two or three times in late 2012, and then did not visit with her again until after CCDCFS filed for permanent custody in June 2013. K.G. disputed Stevens’s testimony and said that she visited regularly, but her testimony was inconsistent. She first said that she visited every Wednesday from November 2012 until Father went to jail, but then admitted she could not remember when Father was incarcerated or for how long she did not visit. K.G. testified that she visited the children when she took their mother

for a visit, but then admitted that she could not remember if she actually visited with the children on these occasions. She also admitted that she was often late for the visits she did attend, including being 45 minutes late for visits that lasted only an hour. C.G. testified that she visited the children only two or three times.

{¶13} In light of this testimony, it is apparent that K.G. and C.G.'s interaction with the children was minimal and that neither of them had a close relationship with the children. The children's interaction and relationship with their foster family, however, was described by the caseworker and their guardian ad litem as very positive. The evidence demonstrated that both children had been in the same "good, loving foster home" since birth and had bonded with the foster parents, as well as with each other and the other two children in the home. The foster parents also indicated they were interested in adopting M.S. and J.S. if the trial court granted permanent custody to CCDCFS. When K.G. was asked about taking custody of the children, however, she testified that she would take "both, if I have to," clearly indicating that she did not have an emotional bond with the children.

{¶14} With respect to the wishes of the children, the guardian ad litem for the children recommended that the court grant permanent custody of both children to CCDCFS. He informed the court that due to the parents' severe issues, they would not be able to parent the children in the foreseeable future, and that even though it seemed the relatives wanted to help out, he had observed serious issues with them such that he could not recommend granting them legal custody.

{¶15} With respect to the custodial history of the children, the evidence demonstrated that as of the hearing, M.S. had been in agency custody for nearly two years and J.S. for over five

months.

{¶16} As to whether the children’s need for a legally secure permanent placement could be achieved without a grant of permanent custody, the evidence demonstrated that neither K.G. nor C.G. completed the requirements for becoming foster parents, despite being informed by CCDCFS that this was a requirement for having legal custody of the children. Stevens testified that she asked C.G. several times for income verification, but that as of the permanent custody hearing, she still had not received all of the information necessary to complete the approval process. Stevens also asked K.G. to provide income verification. Although K.G. once told Stevens that she was a hair stylist and another time that she owned a hair salon, she never provided sufficient written documentation to verify her income. At the hearing, K.G. stated that she could not remember her income for either 2012 or 2013.

{¶17} In addition to failing to complete the approval process, the evidence demonstrated there were significant concerns about what the children’s living conditions would be with either K.G. or C.G. The guardian ad litem reported that when he visited C.G.’s home, there were roaches and ants in the cabinets, as well as “black stuff that stank.” K.G., on the other hand, already had five children living with her.

{¶18} There were also concerns about K.G.’s parenting decisions. Although Stevens observed an unassembled crib in a box when she visited K.G.’s home, K.G. told Stevens that her infant child slept in her bed with her, creating a risk that the child could be harmed if K.G. rolled over on him. CCDCFS also had concerns about how K.G. would care for the children when she was at work. Stevens testified that every time she asked K.G. about child care arrangements, her “story” would change. K.G. first said that she would take the children to work with her and put

them in a carseat on a chair next to her while she worked. She then said that family members would care for the children, and later said that she was going to get a home provider.

{¶19} K.G.'s inability to give a consistent response to Stevens's questions was like her hearing testimony, which was nonresponsive and evasive. During her testimony, K.G. insisted she could not remember such basic details as when she was married, her husband's criminal history, when her house went into foreclosure, whether she still owed back taxes on the property, when she declared bankruptcy, how much she owed when she declared bankruptcy, whether her phone service was cancelled for nonpayment, when the father of her children had last visited, or what sentence she received on a drug abuse conviction.

{¶20} "[I]t is axiomatic that the court and the CCDCFS must be able to repose trust in the individual seeking custody." *In re S.D.*, 8th Dist. Cuyahoga No. 97322, 2012-Ohio-2299, ¶ 44. Here, however, the record contained compelling evidence that K.G. was not trustworthy. Indeed, as the trial court found, K.G.'s testimony "amply demonstrated all the concerns CCDCFS ha[d] in placing the children with her." Although Father argues that the trial court misinterpreted the evidence in the record, issues relating to the credibility of the witnesses and the weight to be given the evidence are primarily for the trier of fact. *In re L.S.*, 8th Dist. Cuyahoga No. 95809, 2011-Ohio-3836, ¶ 19, citing *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). We find nothing in the record to suggest that the juvenile court erred in finding that K.G. was not a credible witness.

{¶21} Finally, we note that if the trial court had granted legal custody of the children to K.G. or C.G., the natural parents would have residual rights to seek a change of custody. *See* R.C. 2151.353(E)(2). The evidence in the record overwhelmingly indicates that this would not

have been in the children's best interest. The children's mother has developmental and psychological issues that make it impossible for her to care for the children. Father has an unresolved substance abuse problem, has been convicted of domestic abuse toward the mother, and at the time of the hearing, had not had stable housing for some time. Additionally, he had visited the children only sporadically and had not developed any relationship with them. Furthermore, Stevens testified that CCDCFS was concerned that Father's family, including K.G. and C.G., did not fully appreciate the extent of Father's problems and would allow him access to the children that could be detrimental to them. On this evidence, it is apparent that the only legally secure placement for the children was permanent custody to CCDCFS.

{¶22} In light of the foregoing, we find that the juvenile court did not abuse its discretion in determining that neither K.G. nor C.G. were suitable custodians for M.S. and J.S., and that permanent custody should be awarded to CCDCFS. The juvenile court's determination that an award of permanent custody to CCDCFS is in the children's best interest is supported by clear and convincing evidence, and therefore, the assignment of error is overruled.

{¶23} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Juvenile Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR