

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: T. R.
 J. R.
 W. R.
 K. R.
 L. F.
 A. F.

C.A. Nos. 25179 and 25213

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 07 11 1071
 DN 07 11 1072
 DN 07 11 1073
 DN 07 11 1074
 DN 07 11 1075
 DN 09 01 0056

DECISION AND JOURNAL ENTRY

Dated: June 2, 2010

BELFANCE, Presiding Judge.

{¶1} Appellants, Christian R. (“Mother”) and her four oldest children, appeal from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated Mother’s parental rights to all six of her minor children. This Court reverses and remands.

FACTS

{¶2} Mother is the natural mother of T.R., born May 25, 1995; J.R., born April 3, 1996; W.R., born April 22, 1999; K.R., born September 30, 2000; L.F., born August 29, 2006, and A.F., born November 12, 2008. The fathers of the children are not parties to this appeal, although the father of the four oldest children (“Father”) participated in the proceedings below.

{¶3} On November 14, 2007, prior to the birth of A.F., CSB filed complaints alleging that the five oldest children were neglected and dependent. Although Mother and Father had been married and lived together with the four oldest children at one time, at the time this case began, they were divorced and living separately. The children were removed from Mother's home because Mother had difficulty keeping her home clean and keeping up with all of the demands of caring for her children. At the time this case began, the children, all boys, were ages one, seven, eight, eleven, and twelve years old and most of them had medical and/or behavioral issues. One of the children had cystic fibrosis and Asperger's Syndrome, the four oldest children had all been diagnosed with attention deficit hyperactivity disorder, and most have behavioral problems. The children's counselor testified that all of the older boys are physically aggressive and that behavior persisted after they were removed from the home. The four oldest children were also very thin, but the evidence was disputed as to whether they had been underfed or were simply naturally thin children.

{¶4} Mother's family had been involved with other children services agencies before they moved to Summit County. The family's involvement with other agencies also involved concerns that Mother did not keep a clean home, did not adequately supervise her children, and did not otherwise provide for their basic needs. The children were removed from the home while Mother and Father were living together in Pennsylvania, but were later returned to their care.

{¶5} The reunification goals in this case required Mother to get regular counseling and to improve her housekeeping and parenting skills. Mother apparently had no criminal history, no substance abuse problem, nor had she ever abused her children, so none of those issues was addressed by the case plan. Although CSB was concerned that Mother had mental health issues, her mental health diagnosis was adjustment disorder, primarily due to the removal of her

children from the home. The counselor agreed that Mother had difficulty handling stress and providing structure and consistency in her home and worked with her to improve those skills. Although others had suggested that Mother had ADHD and/or a personality disorder, Mother's counselor opined that those were not proper diagnoses for her.

{¶6} A.F. was born while this case was pending and was removed from Mother's custody shortly after his birth because his five older siblings were in the custody of CSB. He was later adjudicated a dependent child. CSB was also concerned about reports from Mother that the father of A.F. and L.F., who was still living in the home, had been violent with her. He later moved out of the home and voluntarily surrendered his parental rights to A.F. and L.F.

{¶7} Throughout this case, the four oldest children expressed their desire to be returned to the home of one of their parents. Although the case plans indicated that the goal was reunification with both parents, the parents were living separately and it is apparent throughout the record that CSB was working to reunify the four oldest children with Father because, according to CSB, he was making progress on the reunification goals of the case plan and Mother was not. The children's visits with Father expanded in time and frequency and eventually evolved to unsupervised visits in his home. CSB moved for legal custody of the four oldest children to Father, but withdrew the motion after Father informed CSB that he did not think he could handle all four boys in his home due to their many problems.

{¶8} Shortly after CSB learned that Father was not able to reunify with the four oldest children, it moved for permanent custody of the children. Following a hearing on the motion, the trial court found that the five oldest children had been in the temporary custody of CSB for more than 12 of the prior 22 months, that the youngest child, A.F., could not be returned to Mother within a reasonable time or should not be returned to her, and that permanent custody was in the

best interests of all six children. Mother and the four oldest children separately appealed and their appeals were later consolidated. They raise similar assignments of error that will be consolidated and rearranged for ease of discussion.

BEST INTERESTS OF THE CHILDREN

{¶9} Mother and the children challenge the trial court's conclusion that permanent custody was in the best interests of the children. They maintain that the trial court's decision was not supported by the weight of the evidence presented at the hearing. Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99.

{¶10} The trial court found that the first prong of the test was satisfied because the five oldest children had been in the temporary custody of CSB for more than 12 of the prior 22 months and because the youngest child, A.F., could not be returned to Mother within a reasonable time or should not be returned to her. Mother and the children do not challenge the trial court's findings on the first prong of the permanent custody test, but instead maintain that the trial court's finding that permanent custody was in the best interest of these six children was not supported by clear and convincing evidence. This Court agrees.

{¶11} To satisfy the best interest prong of the permanent custody test, CSB was required to establish, by clear and convincing evidence, that the grant of permanent custody to the agency is in the best interest of the children, based on an analysis under R.C. 2151.414(D). Clear and convincing evidence is that which will “produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶12} When evaluating whether a judgment is against the manifest weight of the evidence in a permanent custody case, this Court reviews the entire record and

“weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the [judgment].” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Accordingly, before reversing a judgment as being against the manifest weight of the evidence in this context, the court must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice. See *In re M.C.*, 9th Dist. No. 24797, 2009-Ohio-5544, at ¶8 and ¶17.

{¶13} When determining whether a grant of permanent custody is in the children’s best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children’s need for permanence in their lives. See *In re R.G.*, 9th Dist. Nos. 24834 and 24850, 2009-Ohio-6284, at ¶11. “Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires

the court to consider all of the enumerated factors.” *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711, at *3. See, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, at ¶24.

{¶14} Rather than focusing on the best interest factors, most of CSB’s evidence at the hearing pertained to the condition of Mother’s home more than two years earlier, prior to the removal of the children. In fact, some of CSB’s most detailed evidence about Mother’s parenting ability and the condition of her home came from a witness who admitted on cross-examination that she has had no contact with this family for more than two years. The trial court had already determined at adjudication that CSB was justified in removing the children from Mother’s home and the purpose of this hearing was not to re-litigate that issue. See R.C. 2151.414(A)(1). The condition of Mother’s home prior to removal was relevant only to demonstrate the problems that she needed to remedy before the children would be returned to her home. The primary focus at the permanent custody hearing should have been Mother’s current parenting ability and whether it was in the best interest of these children to terminate their relationship with Mother and each other.

{¶15} The first best interest factor involves the interaction and interrelationship of the children with their parents, siblings, and other relatives and significant people in their lives. This Court has repeatedly stressed that the first best interest factor is “‘highly significant’” and “‘focuses on a critical component of the permanent custody test: whether there is a family relationship that should be preserved.’” *In re A.W.*, 9th Dist. No. 09CA009631, 2010-Ohio-817, at ¶14, quoting *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶11, citing *In re Smith*, *supra*. Most of the evidence before the trial court on this factor tended to weigh in favor of preserving the family relationship.

{¶16} Throughout this case, Mother's interaction with her children was limited to weekly, supervised visits, although it is not clear why CSB never expanded her visits or decreased the level of supervision. Mother attended visits regularly and always brought food and age-appropriate activities for her children. Although CSB's witness testified that Mother did not show much affection to her children and did not effectively discipline them, her testimony was disputed by two other CSB visitation supervisors who testified for the defense. Moreover, CSB's witness was a new employee at CSB who had observed only six visits between Mother and the children. The other visitation witnesses included a 20-year veteran of CSB and a social work assistant who was also a licensed social worker. Between the two witnesses, they had observed Mother's weekly visits with her children for more than one year.

{¶17} Both witnesses testified that Mother interacted well with her children, that her ability to control her children and redirect their inappropriate behavior had improved over time, and that they had no concerns about the children's safety or Mother's behavior during the two-hour visits. One of these witnesses had supervised all thirteen of Mother's visits with the children when they went off-site to the zoo. Mother and the children enjoyed them, and the supervisor was never concerned about Mother's behavior or her ability to control the children and keep them safe. Other than the start of the school year interfering with these visits, it is not clear why CSB discontinued Mother's off-site visits with her children.

{¶18} Mother's counselor further explained that the zoo visits were a good way for Mother to manage several boys of different ages. The counselor testified that Mother had gained a lot of insight into her parenting problems and had made significant progress working to gain more structure and consistency in her life. The counselor opined that Mother could implement the parenting skills that she had learned and that she could parent her children with a support

system in place. Several witnesses, including the CSB caseworker, testified that Mother cared about her children and that the four oldest boys were bonded to Mother.

{¶19} The trial court also heard testimony about the close relationship between the four oldest children. Although there was evidence that the older boys bickered, according to a 20-year CSB veteran, their bickering was just normal sibling bickering. Witness after witness testified that the four oldest boys were closely bonded and looked out for each other. Given that termination of Mother's parental rights also terminated the sibling relationship among the six brothers, "the strength of bond and the relationship between these siblings certainly should have entered into the best interest equation." *In re A.W.*, at ¶19, quoting *In re A.D.*, 9th Dist. No. 02CA008090, 2002-Ohio-6032, at ¶22.

{¶20} Moreover, CSB presented no evidence about whether a termination of their family relationships would have a positive or negative emotional impact on these children. As this Court emphasized in *In re A.W.*, supra, where the agency had moved to terminate parental rights to a 12-year-old child who clearly loved her mother and was already emotionally fragile, the trial court should have had before it evidence to demonstrate how terminating the parent-child relationship would impact that child. *Id.* at ¶18. In this case, the children's counselor testified that they were initially distraught about their removal from Mother's home, but there was no testimony about the potential emotional impact on each of them of a permanent termination of their family relationships.

{¶21} Instead, CSB presented evidence through the testimony of several witnesses about the emotional impact on the four oldest children of learning that Father was no longer seeking legal custody of all four of them because he did not think he could handle them all. The agency's purpose in presenting this testimony is not clear, but it raises unanswered questions

about how these children would be impacted by the court's decision that their family relationship with both parents and each other would be forever terminated. The focus of the hearing was what was best for them. Termination of the long-term family relationship between these boys and their Mother would potentially be devastating to them and that is a critical piece of information that should have factored into the trial court's best interest determination. See *id.*

{¶22} The four oldest boys personally expressed their own wishes throughout this case. They consistently told others and the court that they wanted to go home to live with one of their parents. At the trial court's in camera interview with three of them, they all expressed their wishes to live with one of their parents. J.R. further expressed to the court that it was important that he and his brothers stay together. The youngest two children were too young to express their wishes, so the guardian ad litem spoke on their behalf. She opined that permanent custody was in their best interests.

{¶23} The custodial history of the five oldest children included almost two years in the temporary custody of CSB, where they had lived away from their mother and had been placed in several different foster homes. Prior to their removal in this case, with the exception of a few months that they were removed from the home in another case, the children had lived in the custody of Mother and had lived together as brothers.

{¶24} The trial court was also required to consider the children's need for a legally secure permanent placement and whether such a placement could be achieved without granting permanent custody to CSB. "[I]mplicit in this factor is the need for the agency to prove that a legally secure permanent placement for [them] would likely be achieved through a grant of permanent custody to the agency." *Id.* at ¶24. There was evidence that CSB had been unable to find suitable relative placements for the children. Although there was evidence that two different

foster families were interested in adopting the two youngest children, CSB had found no potential adoptive placements for the four oldest children. They ranged in age at that point from nine to 14 years, they all had special needs and were not likely to ever be adopted together, if at all. These children might be “better off with some parent-child [and sibling] relationship than with none at all.” *In the Matter of Stewart* (Feb. 27, 1985), 5th Dist. No. CA-3075, at *6. The permanent custody statutes focus on what is best for the children and were never intended to “penalize a child *** by taking away the parent-child relationship he presently enjoys, however unsatisfactory it might be.” *Id.* at *7.

{¶25} Again, this Court must emphasize that it makes no comment on whether Mother has the ability to provide a suitable home for these children. The issue before this Court is whether CSB met its burden to prove, by clear and convincing evidence, that permanently terminating this family relationship was in the best interest of these six children. Termination of parental rights is an alternative of last resort and should be done only for “grave and compelling reasons.” See *id.* at *4. This Court does not doubt that CSB, and perhaps the trial court, knew much more about this family than is included in the record before us. As we have repeatedly emphasized, however, our review is limited to the appellate record. See, e.g., *In re J.C.*, 9th Dist. No. 25006, 2010-Ohio-637, at ¶16. The agency has an obligation to establish its case on the record and to demonstrate clearly and convincingly that ending this family relationship is what is best for all six of these children. It failed to meet that burden in this case.

{¶26} This Court cannot conclude that the weight of the evidence established that permanent custody was in the best interests of these six children. Mother’s first and second assignments of error and the children’s second and third assignments of error are sustained to the extent that they challenge the evidence supporting the trial court’s decision.

{¶27} Mother also maintains that the trial court erred in denying her motion for legal custody and the four oldest children argue that the trial court erred by denying Father's motion for legal custody of K.R. only. Because Mother and Father were the parties seeking legal custody, they had the burden to prove that it was in the best interests of the children to be placed in their legal custody. See *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23; *In re Sitra/Steiner Children* (July 19, 1999), 5th Dist. No. 1998CA00341. Although the evidence demonstrated that the parents had made progress on the reunification goals of the case plan, the case plan was not expanded to permit further evaluation of the parents and children. For example, although the supervised visits were appropriate and went well, CSB did not permit the children to visit with Mother in her home. Further, any progress on the case plan and reunification efforts were essentially abandoned once Father indicated that he could not take custody of all of his children. Given the limited evidence before the trial court at the time of the hearing, Mother and the children have failed to demonstrate that the trial court abused its discretion by failing to find that it was in the children's best interests to be placed in the legal custody of Mother or for K.R. to be placed in the legal custody of Father. Therefore, to the extent that the assignments of error challenge the trial court's failure to make specific alternative placements, they are overruled.

GUARDIAN AD LITEM

{¶28} Mother and the children also argue that the trial court should not have considered the report of the guardian ad litem because she failed to fulfill her obligations as set forth in Sup.R. 48. Because these assignments of error have been rendered moot by this Court's determination that permanent custody was improperly granted, they will not be addressed. See App.R. 12(A)(1)(c).

CONCLUSION

{¶29} Mother's first and second assignments of error and the children's second and third assignments of error are sustained to the extent that they challenge the trial court's decision to place the children in the permanent custody of CSB. Their remaining assignments of error were not addressed because they are moot. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is reversed and remanded.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

{¶30} I cannot concur in the majority’s conclusion that CSB failed to present clear and convincing evidence that permanent custody was in the best interests of these children. Notwithstanding the evidence that Mother had been working on the reunification goals of the case plan and had made progress in some areas, the evidence further demonstrated that she had failed to remedy the primary problems that brought her children into agency care. Mother has required intervention by several children services agencies over the years because she has been unable to provide a safe and sanitary home for her children. Throughout the two-year period of this case, Mother was unable to maintain a sanitary home, even without the children living with her. Mother also had a history of using poor judgment that had placed her children’s health and safety at risk. This problem likewise persisted during this case because Mother repeatedly associated with people who would pose a risk to her children.

{¶31} Because the record demonstrates “grave and compelling reasons” for terminating Mother’s parental rights, I respectfully dissent. I would overrule Mother’s assignment of error and affirm the judgment of the trial court.

APPEARANCES:

MADELINE LEPIDI-CARINO, Attorney at Law, for Appellant.

DENISE E. FERGUSON, Attorney at Law, for Appellants.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.