

[Cite as *In re M.E.*, 2009-Ohio-3975.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

M.E.

R.V.

MINOR CHILD(REN)

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00070

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Juvenile Division, Case No. 2006
JCV 01096

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 10, 2009

APPEARANCES:

For Appellant Mother

For Appellee SCDJFS

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Wise, J.

{¶1} Appellant Kassandra Elward appeals the decision of the Stark County Court of Common Pleas, Juvenile Division, which granted permanent custody of her minor children to Appellee Stark County Department of Job and Family Services (“SCDJFS”).

{¶2} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶3} “(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶4} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE FACTS AND CASE

{¶5} The relevant procedural facts leading to this appeal are as follows.

{¶6} On June 8, 2006, SCDJFS filed a complaint alleging that M.E., born in November, 2004, and R.V, born in February, 2006, were dependent children under R.C. §2151.04, and neglected children under R.C. §2151.03(A). An emergency shelter care hearing commenced on this date, resulting in a finding of probable cause for SCDJFS to remove the children from the home and the children being placed in the emergency temporary custody of the agency.

{¶17} On August 23, 2006, the trial court found the children to be dependent, proceeded to disposition and placed the children in the temporary custody of the agency. A case plan was also approved at that time.

{¶18} SCDJFS sought to return the children to Appellant's custody. On November 2, 2007, the trial court denied the request and extended temporary custody. The trial court also directed the agency to pursue a permanency plan for the children.

{¶19} On May 1, 2008, the agency filed a motion for permanent custody of both children.

{¶10} Hearings on the motion took place on June 24, 2008, August 18, 2008 and December 22, 2008.

{¶11} The trial court issued an entry adopting the proposed findings of fact and conclusions of law on November 17, 2008, as to the R.C. §2151.414(B)(1) factors.

{¶12} The trial court issued an entry adopting the proposed findings of fact and conclusions of law on February 10, 2009, as to the best interest factors.

{¶13} On February 19, 2009, the trial court issued an entry granting permanent custody to the SCDJFS.

{¶14} Appellant thereafter timely filed a notice of appeal. She herein raises the following three Assignments of Error:

ASSIGNMENTS OF ERROR

{¶15} "I. APPELLANT WAS DENIED HER DUE PROCESS RIGHTS DUE TO THE BIFURCATION OF THE PERMANENT CUSTODY PROCEEDINGS BETWEEN TWO HEARING OFFICERS AND OTHER PROCEDURAL IRREGULARITIES.

{¶16} “II. THE JUDGMENT OF THE TRIAL COURT THAT THE MINOR CHILDREN CANNOT OR SHOULD NOT BE PLACED WITH APPELLANT WITHIN A REASONABLE TIME WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶17} “III. THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE MINOR CHILDREN WOULD BE SERVED BY THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

I.

{¶18} In her First Assignment of Error, Appellant contends the trial court’s bifurcation of the permanent custody hearing violated her due process rights. We disagree.

{¶19} Appellant assigns error to both the three separate hearings which occurred and the fact that Judge James presided over the final hearing but Judge Stucki heard the first two hearings.

{¶20} Initially we note, that Juvenile Rule 34(I), provides as follows:

{¶21} “(I) Bifurcation; Rules of Evidence

{¶22} “Hearings to determine whether temporary orders regarding custody should be modified to orders for permanent custody shall be considered dispositional hearings and need not be bifurcated. The Rules of Evidence shall apply in hearings on motions for permanent custody.”

{¶23} In this case, the Agency’s motion was to convert temporary custody to permanent custody. Bifurcation was therefore not required but was not prohibited

either. We find no due process violation in the trial court holding three hearings to complete the permanent custody proceeding, whether by design or by necessity caused by lack of time.

{¶24} Due process requires that every party to an action must be afforded “a reasonable opportunity to be heard after a reasonable notice of such hearing.” *In re Esper*, Cuyahoga App. No. 81067, 2002-Ohio-4926, citing *Ohio Valley Radiology Assoc. Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 125 and quoting *State, ex rel. Allstate Ins. Co. v. Bowen* (1936), 130 Ohio St. 347.

{¶25} As Appellant not only received notice of each of the three hearings but was in fact presented and represented at each hearing, we do not find that her due process rights were violated.

{¶26} Likewise, we fail to find how Judge James presiding over the final hearing, instead of Judge Stucki who had conducted the first two hearings, resulted in a due process violation. The findings of fact, conclusions of law and resulting judgment entries were based upon testimony and evidence heard by each of these judge’s respectively.

{¶27} Accordingly, Appellant’s First Assignment of Error is overruled.

II., III.

{¶28} In her second Assignment of Error, Appellant contends the trial court’s finding that the minor children could not or should not be placed with her within a reasonable time was against the manifest weight and sufficiency of the evidence. In her third assignment of error, Appellant maintains the trial court’s finding it would be in the minor children’s best interest to grant permanent custody to the Department was against

the manifest weight and sufficiency of the evidence. We shall address these assignments of error together.

{¶29} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App.No. CA5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶30} Revised Code §2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. §2151.414(A)(1) mandates the trial court schedule a hearing, and provide notice, upon filing of a motion for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶31} Following the hearing, R.C. §2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply:

{¶32} “(a) the child is not abandoned or orphaned, 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;

{¶33} “(b) the child is abandoned;

{¶34} “(c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or

{¶35} “(d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.”

{¶36} In determining the best interest of the child at a permanent custody hearing, R.C. §2151.414(D) mandates the trial court must consider all relevant factors, including, but not limited to, the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) 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; (3) the custodial history of the child; and (4) 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.

{¶37} Therefore, R.C. §2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial court will usually determine whether one of the four circumstances delineated in R.C. §2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶38} If the child is not abandoned or orphaned, then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. §2151.414(E), the trial court must consider all relevant evidence before making this determination. The trial court is

required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R.C. §2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶39} In the case sub judice, the trial court found that the minor children had been in the temporary custody of the agency for 12 or more of the past consecutive 22 months, and the children could not be placed with Appellant within a reasonable time. Those findings are alternate findings under R.C. §2151.414(B)(1), R.C. §2151.414(B)(1)(d) and (a), respectively. Either of those findings, if supported by the evidence, would have been sufficient, in and of itself, to base a grant of permanent custody pursuant to R.C. §2151.414(B)(1).

{¶40} Appellant does not appeal the trial court's finding that the children had been in the temporary custody of the Department for 12 or more of the past consecutive 22 months. Again, such a finding is enough to satisfy the requirements of R.C. §2151.414(B)(1). See *In re: Whipple Children*, Stark App.No. 2002CA00406, 2003-Ohio-1101. However, because the trial court made a finding that the children could not be placed with Appellant within a reasonable time, we shall review such finding.

{¶41} In the case sub judice, the trial court had before it evidence that Appellant failed to consistently attend counseling which she needed due to her “past history of bad relationship choices that resulted in her child being hurt”. (August, T. at 6). Appellant was unable to give a satisfactory explanation as to why she managed to attend only 14 sessions over a two-year period. (August, T. at 50). The trial court also heard evidence that Appellant lied about and concealed a long-term relationship from her counselor at RENEW, Kim Friley. (August, T. at 9). She even concealed the fact

that she was once again pregnant. *Id.* Ms. Friley emphasized that Appellant had lost permanent custody of two older daughters and temporary custody of these two children. R.C. 2151.414(E)(11), *supra*. Ms. Friley, in a stipulated exhibit, expressed her opinion that Appellant had been dishonest and is not learning from her past history of abusive and unhealthy relationship patterns.”

{¶42} The trial court also was presented with Appellant’s parenting assessment from Appellant’s therapist expressing concerns that Appellant “appears to be easily taken in by abusive individuals and fails to recognize warning signs of abuse and the potential harm that it may cause to herself and her children.” (Assessment at 9). Said assessment further stated that Appellant’s “unrelenting desire to remain involved in romantic relationships has placed her children in significant peril on occasions that occurred prior to the abuse of her young son.” *Id.*

{¶43} SCDJFS caseworkers, Christina Schrader and Jennifer Hafner both testified at the best interest hearing held on December 22, 2008. Ms. Schrader stated that both minor children had been in the custody of the agency since June, 2006. She further testified that attempts had been made to reunify family, including extended visitations, and that relative placements were also attempted but that these placements were terminated at the requests of the relatives, (Dec. T. at 7-8).

{¶44} Additionally, Ms. Schrader testified that the visitations between Appellant and the children were “mostly chaotic”, that Appellant failed to provide meals or snacks for the children, that she told the children she was broke, and that she mostly focused on the new baby rather than the older children. (Dec. T. at 9). She further stated that “a

lot of intervention by the aide” was required at these visitations and that the children were heard referring to Appellant as their grandmother at times. *Id.*

{¶45} Ms. Schrader requested that permanent custody be granted and that adoptive homes be pursued. *Id.* at 10.

{¶46} It is well-established that “[t]he discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.” *In re Mauzy Children* (Nov. 13, 2000), Stark App.No. 2000CA00244, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316, 642 N.E.2d 424. In the case sub judice, upon review of the record and the findings of fact and conclusions of law therein, we conclude the trial court's grant of permanent custody of the minor children to SCDJFS was made in the consideration of the children's best interests and did not constitute an error or an abuse of discretion. Accordingly, upon full review, we find the trial court's conclusions pursuant to R.C. §2151.414(E) were supported by the weight and sufficiency of the evidence.

{¶47} Appellant's Second and Third Assignments of Error are therefore overruled.

{¶48} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., concurs.

Hoffman, J., concurs separately.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

JUDGES

JWW/d 803

Hoffman, J., concurring

{¶49} I concur in the majority's analysis and disposition of Appellant's Assignments of Error II and III. I further concur in the majority's disposition of Appellant's Assignment of Error I and its discussion regarding the permissible bifurcation of the two-pronged analysis to be applied when ruling on a motion for permanent custody under R.C. 2151.44(B).

{¶50} I write separately only to voice my concern our overruling this assignment of error might be interpreted as endorsing the practice of different judges hearing different parts of the motion for permanent custody. I believe such practice should be discouraged, particularly when the second judge is not provided a transcript of the prior proceedings. However, because Appellant did not object to Judge James' conducting the December 22, 2008 hearing, I do not find plain error exists in this case.

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

M.E.

R.V.

MINOR CHILD(REN)

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JUDGMENT ENTRY

Case No. 2009 CA 00070

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ SHEILA G. FARMER_____

JUDGES