

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

In the Matter of: D.H. and S.H. : Case Nos. 23CA1
23CA5
:
Adjudicated Dependent Children. : DECISION AND
JUDGMENT ENTRY

RELEASED 7/11/2023

APPEARANCES:

Benjamin E. Fickel, Logan, Ohio, for appellant.

Ryan R. Black, Hocking County Prosecutor, and Alisa Turner, Assistant Prosecuting Attorney, Logan, Ohio, for appellee.

Hess, J.

{¶1} The father of D.H. and S.H. appeals the judgment of the Hocking County Court of Common Pleas, Juvenile Division, granting permanent custody of his children to South Central Ohio Job and Family Services. He contends that (1) the juvenile court abused its discretion when it denied his request for a continuance of the permanent custody hearing and (2) that the permanent custody award is against the manifest weight of the evidence. We find that the juvenile court did not abuse its discretion when it denied the requested continuance. And, after weighing the evidence and all reasonable inferences, considering the credibility of the witnesses after according the requisite deference to the juvenile court's determinations, we conclude that in resolving evidentiary conflicts, the court did not clearly lose its way or create a manifest miscarriage of justice so that we must reverse its permanent custody award. We overrule father's assignments of error and affirm the juvenile court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In March 2021, South Central Ohio Job and Family Services filed a complaint alleging that D.H. and S.H. were dependent and neglected children because they had not attended school, had not logged into online schooling, and multiple attempts to reach their parents had been unsuccessful. At a hearing in June 2021, the children were found dependent. The mother did not attend the June hearing. The children were placed under the protective supervision of the agency, but remained in their father's custody and he was ordered to engage in case planning, enroll the children in school and ensure their attendance, stay clean and sober, submit to drug and mental health testing, and cooperate with the agency and the court appointed guardian ad litem. The agency provided discovery responses to father's counsel in May 2021 and continued to supplement its responses periodically throughout the case.

{¶3} At a shelter hearing in August 2021, the children were placed in the agency's custody because the father had failed to send the children to school and failed to obtain important medical treatment for the children, including lice treatment. The father also failed several drug tests. The mother did not attend the shelter hearing and her whereabouts were unknown. Six weeks later in October 2021, the father filed a motion to regain custody of the children on the grounds that he had cleaned much of the debris from his home and continued to make safety improvements to it and would work diligently on the case plan and cooperate with the guardian ad litem and the agency. The juvenile court denied the request and noted that the father had not started a drug treatment program as ordered. In February 2022, the court granted father custody of the children. But, in March 2022 they were placed back into the agency's custody because the father

had missed school meetings and medical appointments for the children and allowed the mother to have contact with the children in violation of the court order. The court had ordered that the mother have no contact with the children because she had tested positive for heroin and methamphetamine. The agency filed for permanent custody of the children in October 2022, a hearing on it was held in January 2023, and the juvenile court awarded the agency permanent custody in February 2023.

{¶4} At the permanent custody hearing, the father made an oral request for a continuance because his attorney, who was appointed in April 2022 and replaced his prior appointed counsel, did not realize she had not received any discovery in the case until four days before the hearing. The father also wanted a continuance to work on the reunification plan with his children. The agency opposed the continuance. The juvenile court asked father's counsel whether there were any specific discovery responses that she thought needed further investigation, but counsel was unable to identify anything specific that she believed needed further investigation. Thus, the court denied father's request for a continuance.

{¶5} The agency presented the following evidence. A caseworker who had been assigned to the case since June 2022 testified that the agency's initial concerns were that the children were not enrolled in school and S.H., who had a rare medical condition that caused fibrous tumors in her brain, was not receiving required medical treatment. The caseworker testified that she has had no contact with the children's mother or father even though she tried to make contact by telephone and by home visits. Neither the mother nor the father had had any contact with the children from June 2022 up through the hearing date of January 24, 2023 and had abandoned them. The caseworker testified

that the children were both doing well in foster care and S.H.'s medical needs were being addressed properly.

{¶6} The guardian ad litem, who had been assigned to the case since May 2021, testified that the father was given custody of the children in March 2022, but after approximately five weeks it was discovered that the father allowed the mother access to the children. The mother had previously been ordered not to have any contact with the children due to her drug use and positive drug tests. The children were removed from father's custody and returned to the agency's custody. The guardian ad litem did not have any contact with the father after the March 2022 hearing because both the mother and father were arrested later that evening and were evicted from their residence in April 2022. Both parents dropped all contact with the children at that point. The guardian ad litem testified that the children were 12 and 10 years old and had discussed their wishes and both want to be with their father. However, both children have intellectual deficiencies and their I.Q.s are in the low 50s. As a result, the guardian ad litem did not believe they understood the situation. The guardian ad litem testified that S.H. is doing very well medically because the foster parent ensures that she has medication for her seizures and receives treatment for her tumors. Both children are doing well in school and enjoy it. The guardian ad litem recommended that the children remain in the agency's custody.

{¶7} Father testified that he was currently renting a place in Athens, Ohio, but that he pays rent in cash and does not have a lease. He said that the children could not live with him there. Father testified that he cares for and loves his children deeply and the agency acknowledged this. Father testified that he never gave the agency the names of any relatives to explore for possible family placement.

{¶8} The juvenile court awarded the agency permanent custody of the children.

The father appealed.

II. ASSIGNMENTS OF ERROR

{¶9} Father presents two assignments of error:

- I. The trial court's ruling, granting appellee's motion for permanent custody, was against the manifest weight of the evidence.
- II. The trial court abused its discretion by denying father's oral request for continuance of the final hearing.

We address the second assignment of error first.

III. LEGAL ANALYSIS

A. Request for Continuance

{¶10} Father contends that the juvenile court abused its discretion when it denied his request for a continuance of the permanent custody hearing. Father's counsel asked for a continuance a few minutes before the hearing began and explained that (1) counsel had just received discovery a few days before the hearing and (2) father wanted more time to work on reunification efforts with his children. Father argues that without additional time to review discovery, his attorney was unprepared to call additional witnesses or properly question the agency's witnesses. He also claims that he was prejudiced when he was not given additional time to work on the reunification plan. He argues that he had previously shown the court that he could provide for his children because he initially had custody and had custody returned to him for a month during the pendency of the case.

{¶11} A trial court has broad discretion to determine whether to grant a continuance. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 147, citing *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. We

reverse a trial court's decision denying a continuance only if the trial court abused its discretion. *State v. Jones*, 91 Ohio St.3d 335, 342, 744 N.E.2d 1163 (2001). An abuse of discretion is an "unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶12} An appellate court employs a balancing approach to determine whether the trial court abused its discretion when it denied a continuance. *In re Ca.S.*, 4th Dist. Pickaway Nos. 21CA9, 21CA10, 2021-Ohio-3874, ¶ 33. In exercising discretion, a trial court should weigh any prejudice suffered by the party seeking the continuance against the court's right to control its docket and provide prompt, efficient justice to the public. *Id.*

A court should also consider: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique circumstances of the case.

(Citation omitted.) *Id.* The balancing test is applied on a case-by-case basis and the appellant must show how the denial of the continuance resulted in prejudice. *Id.* at ¶ 34. Juv.R. 23 allows for continuances, "only when imperative to secure fair treatment for the parties."

{¶13} We find that the juvenile court's decision to deny Father's motion for a continuance was not unreasonable, arbitrary, or unconscionable. Father sought an indefinite continuance to work on reunification efforts. Although Father wanted more time to work on his case plan, he had already had nearly two years to work on it. As of the date of the permanent custody hearing, father continued to lack safe, clean housing for

the children and had not had any contact with them for over ten months. Additionally, even though father's counsel stated that she needed additional time to review discovery, when asked by the juvenile court, she failed to identify any discovery issue that she believed needed further investigation. Father did not explain in his appellate brief what witnesses or evidence father could have presented if granted a continuance. A continuance would have inconvenienced the court, the agency, and its witnesses as they were present in the courtroom and prepared to proceed that day. We find that the juvenile court did not err when it denied Father's motion for a continuance. We overrule the second assignment of error.

B. Permanent Custody Award

{¶14} In the first assignment of error, Father contends that the permanent custody award is against the manifest weight of the evidence.

1. Standard of Review

{¶15} "A reviewing court will not reverse a trial court's judgment in a permanent custody case unless it is against the manifest weight of the evidence." *In re C.S.*, 4th Dist. Pike No. 19CA899, 2019-Ohio-5109, ¶ 21.

"To determine whether a permanent custody decision is against the manifest weight of the evidence, an appellate court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving evidentiary conflicts, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. In reviewing evidence under this standard, we defer to the trial court's determinations of matters of credibility, which are crucial in these cases, where demeanor and attitude are not reflected well by the written record.

In a permanent custody case the dispositive issue on appeal is "whether the trial court's findings * * * were supported by clear and convincing evidence." "Clear and convincing evidence" is "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent

of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” “[I]f the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court’s decision is not against the manifest weight of the evidence.”

(Citations omitted.) *Id.* at ¶ 21-22.

2. Statutory Framework & Analysis

{¶16} A juvenile court may grant permanent custody to the agency if it determines by clear and convincing evidence that (1) it is in the best interest of the child and (2) any of the circumstances in R.C. 2151.414(B)(1)(a) through (e) apply. R.C. 2151.414(B)(1); *In re G.H.*, 10th Dist. Franklin No. 15AP-752, 2016-Ohio-1188, ¶ 16. The circumstances in R.C. 2151.414(B)(1)(a) through (e) are:

(a) The child is not abandoned or orphaned, has not 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 has not 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 if, 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, 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.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) The child 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 * * *.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶17} The juvenile court determines the best interest of the child by considering 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-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 * * * for twelve or more months of a consecutive twenty-two-month period * * *;

(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.

* * *

R.C. 2151.414(D)(1)(a)-(e). Relevant here, R.C. 2151.414(E)(10) states, “The parent has abandoned the child.”

{¶18} The juvenile court should consider the totality of the circumstances when determining the best interests of the child; no single factor has “greater weight or heightened significance.” *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 57; *In re Z.M.*, 4th Dist. Scioto No. 18CA3856, 2019-Ohio-2564, ¶ 24.

{¶19} The father does not challenge any of the circumstances listed in R.C. 2151.414(B)(1)(a)-(e). He does not contest the juvenile court’s findings that the children were in the agency’s custody for 12 of the prior consecutive 22 months or that the children had been abandoned. Rather, he raises three issues, the latter two of which challenge

the juvenile court's best interest determination. For his first issue, father appears to be challenging the veracity of the caseworker's testimony. He argues that the children initially remained in his custody when the case was first filed, "However, SOCJF case worker testified that she had no contact with father the entire time she had the case (approximately seven months)." The father's challenge to the caseworker's testimony appears to go to the credibility of the witness. However, we note that the caseworker testified that she was first assigned to the case in June 2022, after the case had been pending for over a year. Thus, she would not have been involved during the period father retained custody. Additionally, we defer to the juvenile court's determinations of matters of credibility, which are crucial in these cases, where demeanor and attitude are not reflected well by the written record.

{¶20} For his second and third issues, father contends that the agency made little or no efforts to place the children with relatives since the inception of the case and that the children both expressed a desire to reside with him, which are best interest factors R.C. 2151.414(D)(1)(a) and (b), respectively. Father does not identify which, if any, relatives he believes would be appropriate possible placements and he testified that he did not provide the agency with names of possible relative placements. The children do not have a relationship with mother, who has not had contact with the children since March 2022 and whose whereabouts were unknown throughout most of the proceedings. Although the children were in the father's custody for a month during the pendency of the case and father clearly loves his children, he had no contact with them from March 2022 through January 2023. There was no other evidence that the children had strong ties to, or relationships with, any other relatives. Evidence supports the juvenile court's finding

that the mother's relationship with the children was "nonexistent," that the father "has repeatedly failed to demonstrate the capability of caring for [D.H. and S.H.]," and that "there are no other interrelationships between [the children] and relatives * * * ."

{¶21} As for the best interest factor R.C. 2151.414(D)(1)(b) (the child's wishes), the juvenile court considered the children's wishes and noted that the children expressed a desire to live with their father. But the trial court found that the children, who were ten and twelve at the time of the permanent custody hearing, lacked maturity or intellectual capabilities to make that decision. We find that the guardian ad litem's testimony supported the juvenile court's finding on this factor and that there was no other evidence presented that contradicted or refuted this testimony.

{¶22} Based on the foregoing, we conclude the juvenile court's best interest finding is not against the manifest weight of the evidence. The agency presented competent and credible evidence upon which the court reasonably could have formed a firm belief that a grant of permanent custody to the agency was in the best interest of the child. Accordingly, we conclude that the permanent custody award is not against the manifest weight of the evidence and overrule father's first assignment of error.

IV. CONCLUSION

{¶23} Having overruled the assignments of error, we affirm the juvenile court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.