[Cite as *In re S.V.*, 2014-Ohio-422.]

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

In re S.V.

Court of Appeals No. WD-13-060

Trial Court No. 2011 JC 1182

DECISION AND JUDGMENT

Decided: February 7, 2014

* * * * *

Mollie B. Hojnicki, for appellant T.F.

Paul A. Dobson, Wood County Prosecuting Attorney, and
Charles S. Bergman, Assistant Prosecuting Attorney, for appellee.

* * * * *

YARBROUGH, P.J.

{¶ 1} Appellant, T.F., appeals the judgment of the Wood County Court of Common Pleas, Juvenile Division, terminating his parental rights and awarding permanent custody of his daughter, S.V., to the Wood 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 June 29, 2011, when S.V. was removed from the family home in Michigan due to complaints that she was not being cared for properly. Upon investigation, S.V. was found to be dirty and malnourished. It was also discovered that S.V. was left lying on her side for a prolonged period of time, resulting in "a flat spot on the side of her head."

{¶ 3} By agreement of the parties, the case was transferred to Wood County in November 2011. Thereafter, appellee, the state of Ohio, filed a complaint with the trial court, alleging that S.V. was a dependent child. At that time, S.V.'s mother, M.V., and her husband, J.V., were listed as S.V.'s parents. J.V. was presumed to be the father since he was legally married to M.V. at the time S.V. was born.

{¶ 4} A guardian ad litem was subsequently appointed and temporary custody was awarded to DJFS. Ultimately, M.V. and J.V. stipulated that S.V. was dependent. A case plan was developed. However, appellant was not made a party to the case plan since he was not known to be the father at the time the plan was instituted.

{¶ 5} After several orders continuing temporary custody, the trial court eventually conducted a review hearing on June 19, 2012. Following the hearing, the court ordered J.V. to submit to genetic testing to determine whether he was, in fact, S.V.'s biological father. On November 20, 2012, the court conducted another review hearing and reviewed the results of the genetic testing. The results revealed that J.V. was not S.V.'s biological

father. Consequently, on November 27, 2012, the trial court issued its judgment entry removing J.V. as a party to the proceedings.

{¶ 6} Three months later, the state filed a motion for permanent custody, attaching a praecipe requesting service of the motion on two newly named putative fathers, appellant and his brother, D.F. On May 16, 2013, a hearing was held. At the hearing, M.V. signed a "Permanent Surrender of Child Form." The court accepted M.V.'s surrender of parental rights, and ordered genetic testing to be performed in order to determine whether one of the putative fathers was S.V.'s biological father. Genetic testing confirmed that appellant is S.V.'s biological father.

{¶ 7} On August 22, 2013, after learning of appellant's paternity, the trial court held a permanent custody hearing, where appellant opposed the termination of his parental rights and the granting of permanent custody to DJFS. At the hearing, appellant testified on his own behalf and also presented the testimony of his girlfriend, H.M. In support of its motion, the state presented the testimony of S.V.'s guardian ad litem. Upon conclusion of the hearing, the court granted permanent custody of S.V. to DJFS and terminated appellant's parental rights, concluding that the award of permanent custody to DJFS was in S.V.'s best interests. Appellant subsequently filed this timely appeal, assigning the following error for our review:

> A. The trial court abused its discretion in awarding permanent custody of S.V. to the Wood County Department of Job and Family Services in that the State of Ohio failed to prove by clear and convincing

evidence that the child could not be placed with Father in a reasonable period of time, and that the award of permanent custody was in the child's best interest.

II. Analysis

{¶ 8} 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).

{¶ 9} 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 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).

{¶ 10} 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 *Quilloin 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.

{¶ 11} 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.*

{¶ 12} "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. Lucas No. L-11-1057, 2011-Ohio-4857, ¶ 11, citing *In re Andy-Jones*, 10th Dist. Franklin 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.

{¶ 13} In his sole assignment of error, appellant argues that the trial court abused its discretion in granting the state's motion for permanent custody. Specifically, appellant contends that the state failed to produce clear and convincing evidence that S.V. could not be placed with him in a reasonable time. Further, appellant asserts that the trial court erroneously concluded that a grant of permanent custody to DJFS was in S.V.'s best interests.

{¶ 14} 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 S.V. had been in the temporary custody of DJFS for at least 12 months in a consecutive 22-month period, as set forth in R.C. 2151.414(B)(1)(d). In the alternative, the court concluded that S.V. could not be placed with appellant within a reasonable time or should not be placed with him under R.C. 2151.414(B)(1)(a). Further, the court found that awarding permanent custody to the DJFS was in S.V.'s best interests. After thoroughly reviewing the record, we cannot conclude that the trial court's decision is against the manifest weight of the evidence.

{¶ 15} R.C. 2151.414(B)(1)(d) provides that a trial court may grant permanent custody of a child to the state where:

> 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.

{¶ 16} Notably, appellant does not refute the trial court's determination that S.V. has been in the temporary custody of two public children services agencies for twelve or more months of a consecutive twenty-two month period. In its judgment entry, the court recognized that "[S.V.] has been in the temporary custody of the Jackson County, Michigan Children's Services Unit and the Wood County Department of Job and Family Services collectively since she was seven weeks old." S.V. was born on May 2, 2011. Thus, at the time of the hearing, S.V. had been in the temporary custody of a public children services agency for over two years. Therefore, we conclude that the trial court's application of R.C. 2151.414(B)(1)(d) was supported by clear and convincing evidence.

{¶ 17} Next, we turn to the trial court's conclusion that granting permanent custody to DJFS was in S.V.'s best interests. Appellant argues that he should not be penalized for failing to form a bond with S.V. because he was only recently found to be her biological father. Further, he argues that he is capable of providing a secure home for S.V.

{¶ 18} In order to determine the best interests of the child, 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.

{¶ 19} 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 S.V.'s best interests. We agree.

{¶ 20} As to the first factor, it is clear that S.V. has no "interaction and interrelationship" with appellant. Indeed, she has been in foster care since she was seven weeks old. Although the record is somewhat unclear, it appears that S.V. has never even met appellant. Further, appellant made no attempt to visit S.V. between the time he was found to be her biological father and the date of the hearing on the state's motion for permanent custody. On the other hand, S.V. appears to have "excelled with her long term foster family."

{¶ 21} Regarding the second factor, S.V.'s guardian ad litem prepared a report recommending the granting of permanent custody and concluding that termination of parental rights is in S.V.'s best interests.

{¶ 22} 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, S.V. has been in foster care since she was seven weeks old. Therefore, S.V.

"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."

{¶ 23} Turning to the fourth factor, S.V.'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, we find appellant's testimony at the hearing particularly relevant. On direct examination, appellant was asked whether there was any violence in the home. He responded that "there [were] a couple of occasions that there was some violence." Further, appellant acknowledged that his parental rights were terminated on six prior occasions. Finally, appellant failed to produce any evidence of income despite claiming to possess tax records to substantiate his claims that he earned approximately $30,000 per year.

{¶ 24} Finally, as to the fifth factor, we find that the only applicable factor is R.C. 2151.414(E)(11), concerning prior termination of parental rights. As articulated above, appellant's parental rights have been terminated on six prior occasions. Thus, we agree with the trial court that "[t]here is no clear and convincing evidence before the Court to suggest that, given the current circumstances, [appellant] could truly provide a legally secure placement and provide adequate care for the health, welfare, and safety of [S.V.] in this matter."

{¶ 25} 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 S.V.'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.

{¶ 26} Accordingly, S.V.'s sole assignment of error is not well-taken.

III. Conclusion

{¶ 27} Based on the foregoing, the judgment of the Wood County Court of Common Pleas, Juvenile Division, is affirmed. Costs are hereby assessed to appellant 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.

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE

Arlene Singer, J. _____
CONCURS AND JUDGE
WRITES SEPARATELY.

SINGER, J.

{¶ 28} I concur in Judge Yarbrough's judgment but write to emphasize my long held concerns about possible due process problems when courts rely only on R.C. 2151.414(B)(1)(d) before proceeding to make findings of the child's best interest under R.C. 2151.414(B)(1). Here, the trial court also concluded that S.V. could not be placed with appellant within a reasonable time or should not be placed with him, pursuant to R.C. 2151.41(B)(1)(a).

{¶ 29} I first expressed my concerns in *In re Delfino M.*, 6th Dist. Nos. L-04-1010, L-04-1009, 2005-Ohio-320, ¶ 24:

> As for R.C. 2151.414(B)(1), as appellee argues, this recently added provision to the statute appears to circumvent the question of parental fitness entirely and to permit termination of parental rights for a child in the temporary custody of a children services agency for 12 or more months out of a consecutive 22 months on a best interests finding only. Since temporary custody is largely a matter of the recommendations and requests of the children services agency itself, this provision appears to circumvent any judicial determination of parental fitness. This might raise substantial due process questions were this deemed the sole reason for a termination of

parental rights. See *Quilloin v. Walcott* (1977), 434 U.S. 246, 255; *Smith v. Organization of Foster Families*(1977), 431 U.S. 816, 862-863.

{¶ 30} I do not believe that making alternative findings under R.C. 2151.414(B)(1) to address this issue has placed an undue burden on the trial courts or counsel, especially in light of the serious consequences to the parties. I think this is the better course and commend the trial courts in this district for not relying solely on R.C. 2151.414(B)(1).