[Cite as *In re A.Y.R.*, 2011-Ohio-5708.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN RE: A.Y.R. and D.C.R.	:	**O P I N I O N**
	:	
	:	**CASE NOS. 2011-P-0055 and 2011-P-0056**

Civil Appeals from the Portage County Court of Common Pleas, Juvenile Division, Case Nos. 2011 JCF 00339, and 2011 JCF 00340.

Judgment: Affirmed.

James K. Reed, 333 South Main Street, Suite 401, Akron, OH 44308 (For Appellant, Brianna N. Moore).

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee, Portage County Department of Job & Family Services).

James R. Eskridge, Megargel & Co., L.P.A., 231 South Chestnut Street, Ravenna, OH 44266 (Guardian ad litem).

THOMAS R. WRIGHT, J.

{¶1} These appeals are from two final judgments of the Juvenile Division of the Portage County Court of Common Pleas. In each written judgment, the trial court granted permanent custody of two minor children to appellee, the Portage County Department of Job and Family Services, and divested appellant, Brianna N. Moore, of her parental rights. Appellant's primary challenge is that the trial court erred in failing to

conclude that, rather than total divestiture of her rights, both children should have been placed with their paternal grandmother.

{¶2} Appellant and Joshua C. Roland are the natural parents of the two minor children in question, A.Y.R. and D.C.R. A.Y.R. was born in November 2007, and lived for the most part with appellant in Portage County during the first twenty months of her life. D.C.R. was born in March 2009, but only resided with appellant and his sister for a period of three months.

{¶3} Prior to June 2009, appellant was the sole legal custodian of both children. Despite his status as father, Roland lived at his mother's residence in Portage County, and did not play a significant role in caring for the children. However, Roland's mother, Debbie McPeak, often helped appellant by babysitting the children at her residence. During one thirty-day period in which appellant had sole legal custody, the children stayed continuously at the McPeak residence.

{¶4} On June 25, 2009, appellant and Roland drove D.C.R. to the emergency room of a Portage County hospital. At that time, D.C.R. was ninety-five days old. As part of that child's initial examination, it was discovered that he had a broken right clavicle bone, an injury which typically occurs as a result of a direct blow or hit on the shoulder. After the child was transferred to a regional children's hospital, it was also diagnosed that he had a healing rib fracture, a corner fracture of his right femur, bilateral retinal hemorrhages, and multiple subdural hemorrhages. The latter two injuries were consistent with the improper shaking of the child.

{¶5} Although appellant and Roland tried to provide an explanation regarding how D.C.R. had suffered the broken clavicle, the attending doctor at the local hospital concluded that their version of the underlying events were not consistent with the child's

injury. Consequently, the doctor contacted appellee, the Portage County Department of Job and Family Services. Upon conducting a preliminary investigation into the matter, appellee immediately filed two complaints against appellant and Roland concerning the welfare of both children. Based upon basic allegations in the complaints, appellee was awarded interim pre-dispositional custody of the children within twenty-four hours of the hospital visit.

{¶6} An adjudicatory hearing on the complaints was held approximately three weeks later. At that point, the trial court found that D.C.R. was an abused child under R.C. 2151.031, and that A.Y.R. was a dependent child under R.C. 2151.04. The finding as to A.Y.R. was predicated upon the fact that she had lived in a household containing a second child who had been adjudicated abused.

{¶7} At the same time as the adjudicatory hearing, appellee submitted a case plan pertaining to the reunification of the two children with appellant and Roland. As to appellant, the case plan had three requirements: (1) she had to undergo a drug-alcohol evaluation and follow any treatment recommendations; (2) she also had to undergo a psychological evaluation and follow any treatment recommendations; and (3) she was responsible for scheduling the various medical appointments for D.C.R. The trial court subsequently adopted this case plan at the dispositional hearing on September 3, 2009, and also granted temporary custody of both children to appellee.

{¶8} Over the ensuing nine months, two additional dispositional hearings were held. At these hearings, evidence was presented indicating that appellant and Roland had made "some progress" on their respective requirements for reunification. However, since neither parent had fully complied with the case plan, appellee asserted that there was still an 'active" threat to the safety of the children. Thus, the trial court's temporary

custody order was continued.

{¶9} Regarding appellant, it was shown that, during the nine-month period in question, she attended eighty percent of her planned supervised visits with the children. It was also established that appellant had undergone both required evaluations and had completed the recommended anger management classes. Nevertheless, as to the recommendations resulting from the drug-alcohol evaluation, she failed to satisfy the "drug screening" requirement. Moreover, she did not take any steps to comply with the requirements for individual counseling and continuing care until she was incarcerated in a state penitentiary.

{¶10} On July 16, 2010, appellant entered a plea of guilty to one count of child endangerment, a third-degree felony. This conviction was predicated upon the injuries sustained by D.C.R. which led to the removal of the children one year earlier. After the change of plea, appellant was sentenced to two years in prison, and is not scheduled to be released until July 2012.

{¶11} In the months following appellant's conviction, Roland continued to try to satisfy his requirements under the case plan, but failed to make any sustained progress. During this same time frame, Roland's mother, Debbie McPeak, informed the assigned caseworker that she would be willing to take legal custody of the two children if her son were ultimately deemed unfit to adequately care for them. In response, McPeak was told that, in order to be considered a suitable alternative, it would be necessary for her to satisfy certain requirements. One of those requirements was that she could not allow Roland to continue to live with her. An additional issue was raised concerning whether McPeak's home had sufficient space to accommodate the children.

{¶12} During the entire period in which appellee had temporary custody of both

children, they resided with a single set of foster parents. As a result, the foster parents were able to develop a close relationship with them. In addition, the foster mother was able to learn how to deal with the special medical needs of D.C.R. Consequently, after the children had lived with them for over eighteen months, the foster parents informed appellee that they would be willing to adopt both children.

{¶13} By April 2011, appellee had had temporary custody of the subject children for a period of approximately twenty-two months; accordingly, it submitted motions for permanent custody of both children. Within forty days of the filing of the motions, the trial court conducted a one-day trial on the matter. Although appellant attended the hearing and was represented by counsel, no separate evidence was presented in her behalf. In fact, only two witnesses were called to testify: (1) the assigned caseworker, Shannon Weiss, in behalf of appellee; and (2) Debbie McPeak, in behalf of Roland. In addition, the trial court heard the oral recommendation of the guardian ad litem.

{¶14} Within one week of the hearing, the trial court rendered its judgments granting appellee's motions for permanent custody and divesting appellant and Roland of their parental rights to both children. Regarding appellant, the trial court found that: (1) she did not have a significant bond with the children because she was presently serving a two-year prison term; and (2) despite the fact that the children had a need for a legally secure permanent placement, she could not provide such a home at this time. As to the paternal grandmother, Debbie McPeak, the court concluded that the children could not be placed with her because: (1) she had not shown any ability to choose between her son and the welfare of the children; and (2) her current residence was not large enough to accommodate the two children. Finally, the trial court found that the divestiture of the parental rights was in the best interest of both children because

appellant had not been able to complete all of the objectives of her case plan within two years.

{¶15} In appealing the foregoing judgments, appellant has asserted the following two assignments for our consideration:

{¶16} "[1.] The trial court's decision denying mother's motion for legal custody and granting [appellee's] motion for permanent custody was against the manifest weight of the evidence, contrary to law and/or an abuse of discretion and was not in the minor children's best interest.

{¶17} "[2.] The trial court erred in granting [appellee's] motion for permanent custody when there was a suitable relative who could have provided a legally secure alternative placement option for the minor children."

{¶18} Although restated under two separate assignments of error, appellant has essentially raised one primary argument for review. That is, she maintains that the trial court erred in divesting her of her parental rights because it was established at trial that a legally secure placement for both children could be achieved without the necessity of granting permanent custody to appellee. Specifically, appellant states that the evidence demonstrated that Debbie McPeak, as the children's natural grandmother, constituted a suitable alternative who could provide them with a proper living environment. In other words, she argues that the trial court's factual findings as to McPeak were against the manifest weight of the evidence.

{¶19} A review of the trial record indicates that appellee's motions for permanent custody of A.Y.R. and D.C.R. was brought pursuant to R.C. 2151.413. The next section of the governing statutory scheme, R.C. 2151.414, sets forth the general procedure and standard which a juvenile court must follow in ruling upon such a motion. In relation to

the circumstances under which a motion for permanent custody of a minor child can be granted, R.C. 2151.414(B)(1) delineates a two-prong standard:

{¶20} "Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶21} "***

{¶22} "(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 ***."

{¶23} In applying the provisions of R.C. 2151.414(B)(1) to the facts of this case, it must first be noted that the exception referenced in the first clause of the quote, i.e., R.C. 2151.414(B)(2), is not relevant in this instance. R.C. 2151.414(B)(2) pertains to situations in which the child cannot be placed with a parent within a reasonable time or should never be placed with a parent. In holding that the divestiture of parental rights was warranted in the present matter, the trial court did not make any findings consistent with the foregoing requirement. Hence, the merits of appellee's motions for permanent custody were governed solely by R.C. 2151.414(B)(1).

{¶24} Second, this court would emphasize that, in addition to the "best interest" prong of the standard, R.C. 2151.414(B)(1) mandates that a permanent custody motion should not be granted unless the juvenile court expressly finds that one or more of four possible factual scenarios is applicable to the subject child. In stating its factual findings in this case, the trial court only referred to one of the four possible situations, i.e., R.C.

2151.414(B)(1)(d). As was previously noted, that provision requires that the children services agency must have had temporary custody of the subject child for twelve or more months of a consecutive twenty-two-month period.

{¶25} In her brief before this court, appellant has not challenged the trial court's finding under R.C. 2151.414(B)(1)(d). Moreover, our review of the trial transcript readily confirms that there was no dispute that both A.Y.R. and D.C.R. remained in appellee's temporary custody for the entire period from their initial removal in June 2009 until the submission of the motions for permanent custody in late April 2011. Accordingly, since the "twelve month" requirement of R.C. 2151.414(B)(1)(d) was clearly met, the focus of appellant's argument is limited to the "best interest" prong of the governing standard.

{¶26} As to that remaining prong, R.C. 2151.414(D)(1) sets forth a non-exclusive list of five factors which the juvenile court must consider in determining the best interest of the child:

{¶27} "(a) The interaction and interrelationship of the child with child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶28} "(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;

{¶29} "(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 ***;

{¶30} "(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;

{¶31} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶32} In reviewing the application of the foregoing factors in specific cases, the courts of this state have emphasized that the focal point of a "best interest" analysis is upon the child, not upon the parent. See, e.g., *In re O.W. & L.G.*, 5th Dist. No 2010-CA-00191, 2010-Ohio-5100, at ¶40, citing R.C. 2151.414(C). The Supreme Court of Ohio has indicated that any determination concerning whether an assignment of permanent custody is in the child's best interest must be based on clear and convincing evidence. *In re Schaefer*, 111 Ohio St.3d 498. 2006-Ohio-5513, at ¶56. The *Schaefer* court also stated that all five factors must be considered in a given case, and that each factor must be accorded the same weight in the analysis. Id.

{¶33} In the instant appeals, appellant has focused upon the fourth factor listed in R.C. 2151.414(D)(1), i.e., the children's need for a secure permanent placement. As was noted previously, appellant maintains that such a placement was possible without a grant of permanent custody to appellee because McPeak was willing to take custody of both children.

{¶34} Regarding the "placement" factor, the Fifth Appellate District has held that the "child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security." *In re O.W. & L.G.*, 2010-Ohio-5100, at ¶48. Given this emphasis upon the child's well being, it has further been held that relatives seeking the placement of a child are not entitled to the same presumptive rights which have been afforded the natural parents. *In re P.J. & D.M.*, 11th Dist. Nos. 2008-A-0047 & 2008-A-0053, 2009-Ohio-182, at ¶44.

{¶35} In *Schaefer*, 2006-Ohio-5513, the appellate court concluded that an order

granting permanent custody to the agency should not be rendered until it is established by clear and convincing evidence that there was no relative who could take custody of the child. In rejecting this conclusion, the Supreme Court of Ohio stated:

{¶36} "R.C. 2151.414 requires the [juvenile] court to find the best option for the child once a determination has been made pursuant to R.C. 2151.414(B)(1)(a) through (d). The statute does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors." Id., at ¶63.

{¶37} At the outset of its analysis of the "placement" factor in its final judgment, the trial court found that A.Y.R. and D.C.R. had a definite need for an immediate secure permanent placement. In support of its finding, the court emphasized that appellant still had one year to serve on her prison term, and that Roland was presently homeless, had a legal obligation to register as a prior sex offender, and had recently been charged with a probation violation. As to the grandmother, Debbie McPeak, the court concluded that the subject children could not be placed with her because she was unable to place the welfare of the children above that of her son, and she could not provide a proper home for them.

{¶38} In relation to the first basis for the trial court's conclusion, our review of the trial transcript demonstrates that when McPeak inquired as to whether she could have custody of the two children, the assigned caseworker expressly told her that she would not be considered if she allowed Roland to continue to live with her. In now contending that the trial court should have found that McPeak satisfied this requirement, appellant notes that McPeak testified that she had forced Roland to leave her home a few days before the trial.

{¶39} Concerning this dispute, this court would indicate that the trial testimony of the caseworker readily showed that, despite having approximately two years to do so, Roland did not satisfy many of the conditions in his case plan. For example, he never completed the recommended treatment for his substantial use of marijuana. Moreover, the caseworker's testimony established that, even though Roland did attend a majority of his scheduled supervised visits with the children, the strength of his relationship with them did not improve. Finally, our review of the trial evidence confirms that Roland was a convicted sex offender who had a pending charge of violating his probation terms.

{¶40} In light of the foregoing, it is evident that when the caseworker stated that McPeak could not permit Roland to live at her residence, it was intended that she could not allow her son to have ongoing contact with the children if she was given custody of them. Thus, when McPeak continued to permit Roland to stay with her during the nine months prior to the final hearing, it was an obvious indication that she had no intention of complying with that requirement. In this regard, we would further note that, as part of her trial testimony, McPeak admitted that she intended to periodically permit Roland to stay overnight at her home in the future. Accordingly, the evidence before the trial court supported the finding that McPeak could not choose between her son and the subject children.

{¶41} As to the suitability of McPeak's residence, appellant submits that the trial court's finding should be rejected because it conflicted with a prior ruling made by that same court four years earlier. In that prior case, McPeak had been awarded custody of two minor children, her great niece and nephew. Appellant asserts that, despite the fact that her home had already contained five persons at that time, the juvenile court had still concluded that McPeak could properly provide for the niece and nephew. Based upon

this, appellant further asserts that, since the dimensions of her home have not changed and two persons have subsequently moved out, logic dictates that her residence is still adequate.

{¶42} In relation to the number of persons in the McPeak residence, a review of the trial transcript shows that conflicting statements were presented on this point. While McPeak testified that five persons were living at her house at that time, the guardian ad litem stated to the trial court that he had been told during his interview of the family that McPeak was allowing her adult daughter and another child to reside with her, raising the total number of people in the home to seven. Given McPeak's own admission that she would permit people to stay with her when they had no other place to live, the trial court could have readily concluded that giving her custody of A.Y.R. and D.C.R. would bring the total number of persons in the residence to nine.

{¶43} In addition, the evidence before the trial court established that, of the three bedrooms in the McPeak home, two were in the structure's attic. The evidence showed also that the two "attic" rooms were only separated by a partial wall, thereby limiting the degree of privacy an individual could have in each room. Finally, there was no dispute that two older children were already living in the attic. In light of this, the trial court could have justifiably found that, regardless of the nature of the evidence that had been before the juvenile court in the prior case involving the great niece and nephew, the evidence in the present matter supported the ultimate finding that the McPeak residence was not adequate to provide a proper living environment for the subject children.

{¶44} In regard to McPeak, appellant further notes that even the testimony of the caseworker indicated that McPeak had maintained a good relationship with A.Y.R. and D.C.R. during the entire twenty-two months in which appellee had temporary custody.

As to this point, this court would emphasize that McPeak's general relationship with the two children is not entitled to significant weight when the trial record confirms that she would always have difficulty choosing between her grandchildren and her son.

{¶45} Taken as a whole, the evidence before the trial court clearly showed that, since neither A.Y.R. nor D.C.R. could be reunited with appellant in the immediate future, both had a present need for a secure permanent placement. Moreover, given that there was no relative who was adequately prepared to take legal custody of the children, the permanent placement could not be achieved without granting permanent custody of them to appellee. Therefore, the fourth factor under R.C. 2151.414(D)(1) weighed in favor of the finding that the best interest of the children would be better served by placing them with their foster parents.

{¶46} A review of the trial transcript supports a similar conclusion as to the first three factors listed in R.C. 2151.414(D)(1). Concerning the children's relationship with appellant, the evidence demonstrated that she did visit them on a fairly regular basis for the first eleven months of the temporary custody. However, once she was sentenced to the two-year term for child endangerment, her relationship with both children ended for all practical purposes, and could not feasibly resume until fourteen months after the final hearing on the motion for permanent custody. In addition, it was undisputed that each of the children had developed a strong bond with their foster mother.

{¶47} As to the wishes of the children, there was also no dispute that they were both too young to express their views to the trial court. During his oral statement at trial, the guardian ad litem recommended that the motions for permanent custody be granted. Before this court, appellant has failed to state any justifiable reason to warrant the trial court's rejection of that recommendation.

{¶48} Pertaining to the "custodial history" factor under R.C. 2151.414(D)(1)(c), appellant admits that, given that A.Y.R. was only eighteen months old and D.C.R. was only three months old when they were removed from her home, each child has spent a majority of their respective lives with the foster parents. Despite this, appellant submits that this factor should not be held against her because it has never been shown that the children's father, Roland, was involved in any way in causing the injuries to D.C.R. In light of this, she maintains that, because Roland did not abuse or neglect the children, the trial court should have held that the children's best interest would be better served if legal custody was given to McPeak.

{¶49} As to the foregoing argument, this court would reiterate that, even though Roland was never charged for playing a role in the injuries to D.C.R., he was given two specific goals or requirements under the reunification case plan. The evidence before the trial court readily showed that, although Roland was given nearly two years to do so, he was never able to satisfy either of the goals. This included his failure to obtain total treatment for his serious use of marijuana. Moreover, we would again indicate that the evidence supported the trial court's finding that McPeak could not choose between the welfare of the subject children and that of her son. Therefore, even if Roland was not actually involved in the physical abuse of D.C.R., there was still a justifiable reason for not wanting him to have contact with the children through McPeak.

{¶50} As a final point, this court would indicate that, as part of its "best interest" analysis, the trial court expressly found that appellant had been convicted of felony child endangering under R.C. 2919.22(A). As to this finding, we would emphasize that R.C. 2151.414(D)(1) does not set forth an exclusive list of factors which can be weighed in determining a child's best interest; i.e., the statute allows a juvenile court to consider

any "relevant" factor. Given that the substance of appellant's prior conviction would be pertinent to deciding how to best protect the welfare of the two children, the trial court's reliance upon the conviction was legally appropriate.

{¶51} As was noted previously, R.C. 2151.414(B)(1) provides that both prongs of the "permanent custody" standard must be proven by clear and convincing evidence. To satisfy this burden of proof, the children services agency must present a quantum of evidence that "'will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *In re Johnston*, 11th Dist. No. 2008-A-0015, 2008-Ohio-3603, at ¶36, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. In reviewing whether this burden was carried in relation to the juvenile court's findings of fact, an appellate court is required to follow the basic civil standard for manifest weight of the evidence. Id. at ¶37.

{¶52} "Even under the clear and convincing standard, our review is deferential. If some competent, credible evidence going to all the essential elements of the case supports the trial court's judgment, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court. *** The credibility of witnesses and weight of the evidence are issues primarily for the trial court, as the trier of fact. ***." (Citations omitted.) *In re O.W. & L.G.*, 2010-Ohio-5100, at ¶15.

{¶53} Consistent with the foregoing analysis, this court ultimately concludes that the trial court's findings as to both prongs of the "permanent custody" standard were not against the manifest weight of the evidence. That is, a review of the trial record shows that appellee presented some competent, credible evidence establishing that the two children had remained in its temporary custody for twelve of a consecutive twenty-two-month period, and that the granting of permanent custody would be in the best interest

of the children. Concerning the second prong, the evidence supported the conclusion that each of the first four factors in R.C. 2151.414(D)(1) weighed in favor of terminating appellant's parental rights. This includes the conclusion that the children would not be afforded a secure permanent placement if they were allowed to live with their paternal grandmother, Debbie McPeak.

{¶54} Thus, since the trial court did not err in refusing to grant legal custody of the two children to McPeak, each of appellant's two assignments of error lacks merit. It is the order of this court that the trial court's judgment as to each minor child is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.