[Cite as *In re D.C.*, 2012-Ohio-3517.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF: D.C. AND H.C.	:	**O P I N I O N**
	:	**CASE NO. 2012-T-0017**
	:	

Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2009 CH 37.

Judgment: Affirmed.

Carlo A. Ciccone, Ciccone Law Office, L.L.C., Reisman's Theater Building, Suite 1000, 42 South Main Street, Niles, OH 44446 (For Appellant-David A. Cormany).

Susan Porter Collins, 2282 Reeves Road, N.E., Warren, OH 44483 (For Appellee-Trumbull County Children Services Board).

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Appellant, David A. Cormany, Sr., appeals the Judgment Entry of the Court of Common Pleas of Trumbull County, Division of Domestic Relations and Juvenile Department, overruling objections to the June 28, 2011 Magistrate's Decision and approving the award of permanent custody of the minor children, D.C. and H.C., to appellee, Trumbull County Children Services Board. The issues before this court are whether the testimony of a single Children Services Board caseworker satisfied the requirements of R.C. 2151.414(E) for terminating Cormany's parental rights and

whether the conclusion to do so was supported by the weight of the evidence. For the following reasons, we affirm the decision of the court below.

{¶2} On December 10, 2009, the Trumbull County Children Services Board filed a Complaint, alleging the dependency of D.C. (dob 06/02/03) and H.C. (dob 06/22/05). David Cormany, of Elizabeth City, North Carolina, was identified as the children's father. Shannon Demar, then residing at the Emmanuel Care Center in Girard, Ohio, was identified as the children's mother. On the same date, the juvenile court awarded the Children Services Board emergency temporary custody of the children and appointed Attorney Elise Burkey as guardian ad litem.

{¶3} On December 11, 2009, a shelter care hearing was held before a magistrate of the court. The magistrate found probable cause to commit the children to the interim pre-dispositional custody of the Children Services Board, based on the following information: "(a) Father has a No Contact Order with mother and no visitation from Mahoning County as a result of Domestic Violence. There is an expired Order out of North Carolina. (b) Mahoning County was working with the family, and [Demar] moved to Trumbull County. * * * (c) Mother has a drug-alcohol problem. Mother taken to hospital for suicidal ideation. She admitted using heroin. (d) The police report indicates the apartment was in disarray." The Magistrate's Order further noted that Cormany's paternity was "in dispute."

{¶4} On January 6, 2010, the adjudicatory hearing was held before a magistrate of the court. The parties stipulated to a finding of dependency.

{¶5} On February 26, 2010, a dispositional hearing was held before a magistrate of the court, at which the Children Services Board was awarded temporary

custody, with the goal of restoring custody to the family. The magistrate directed genetic tests to determine parentage, as "the parties have raised issues at the last hearing." The magistrate further noted that the alleged father has moved from North Carolina to New York. As part of the findings that the parents were currently unfit/unsuitable, the magistrate noted: "[Cormany] lacks independent housing. He needs to establish income and housing. He needs to address D[omestic] V[iolence] issues."

{¶6} On May 26, 2010, the juvenile court issued a Judgment Order, determining Cormany to be the biological father of the children as a result of DNA testing. Cormany was ordered to pay $100 per month in child support ($50 per child). It was further noted that the "Father cannot visit until he has the Mahoning County DV Order amended to permit supervised visits."

{¶7} On October 28, 2010, the Children Services Board filed a Motion to Modify Current Dispositional Orders. Based on Demar's completion of a residential detox program and acquisition of housing through Meridian Community Care, the Children Services Board requested that Demar be granted temporary custody of the children subject to a dispositional order of protective supervision.

{¶8} On November 10, 2010, a dispositional review hearing was held before a magistrate of the court. At the hearing, the Children Services Board withdrew its Motion to Modify Current Dispositional Orders as Demar had recently tested positive for cocaine and lost her housing. Accordingly, the magistrate continued the current disposition order of temporary custody to the Children Services Board. The magistrate

noted that "[n]either parent is current with support," and that the "Father is dealing with his own dual diagnosis treatment."

{¶9} On March 9, 2011, the Children Services Board filed a Motion for Permanent Custody.

{¶10} On June 23, 2011, Demar executed Permanent Surrender of Child forms, requesting the Children Services Board to take permanent custody and control of D.C. and H.C.

{¶11} On June 28, 2011, the permanent custody hearing was held before a magistrate of the court. The following persons testified at the hearing: Calliope DeVengencie, a caseworker with the Children Services Board; David Cormany; and Elise Burkey, guardian ad litem for the children. Burkey testified that a grant of permanent custody to the agency for the purposes of adoption was in the children's best interest. The magistrate recommended that permanent custody of the minor children be granted to the Children Services Board.

{¶12} On June 30, 2011, Cormany filed Objections to Magistrate's Decision.

{¶13} On January 25, 2012, the juvenile court overruled Cormany's Objections.

{¶14} On February 22, 2012, the juvenile court approved the Magistrate's Decision and ordered the permanent custody of D.C. and H.C. be granted to the Children Services Board. The court made the following findings regarding the termination of David Cormany's parental rights.

{¶15} With respect to Cormany's continuous and repeated failure to substantially remedy the conditions causing the children to be placed outside of the home (R.C. 2151.414(E)(1)), the court found:

{¶16} Specifically, the father has not:

(a) Obtained a favorable home study. Father lives in New York State. He lives with his sister, who refused to participate in the home study through the interstate [sic]. She says she cannot take care of herself.

(b) Addressed the DV issues that caused Mahoning County to issue a domestic violence, NO CONTACT ORDER, between the father and the children, as well as the mother. It has been in effect for five years. Father promised to resolve these matters. Mother expressed her continued fear of him and on cross, the caseworker indicated [the mother] was going to have it extended.

(c) Resolved his drug-alcohol issues and mental health issues. They are still being addressed in continuing monthly visits to a psychologist and psychiatrist. NO REPORTS WERE ADMITTED BY HIM.

(d) Resolved his housing - If he lacks independent housing, he needs to have the adults participate in an interstate home study.

{¶17} With respect to Cormany's demonstrated lack of commitment toward the children (R.C. 2151.414(E)(4)), the court found:

> He had a job in 2010 and paid no child support. He worked up to August, 2010 full time. Support was set in May, 2010 because the parties wanted DNA. In 2011, he paid $120 in child support. Since December, 2009, he paid a total of $120 child support. He only paid $120 because New York intercepted a refund from car tags.

> Father promised he would resolve the DV issues at the Mahoning County Court House.

{¶18} With respect to other relevant factors (R.C. 2151.414(E)(16)), the court found: "no relative has come forward to take the children and pursue a home study."

{¶19} With respect to factors affecting the children's best interests (R.C. 2151.414(D)), the court found:

> The boy is age 8 and the girl is age 6. They have no bond to their father because he has been barred by a DV from seeing them for five years. [D.C.] was present for the DV. The assault was against [H.C.] and the mother.
>
> [D.C.] wants no contact with his father and refused to use the name DAVID. He calls himself DJ. When asked, he refused to see his father. [H.C.] has no memory of her father.
>
> The only strong bond is between the children.
>
> Mother's parental rights were earlier revoked and terminated.
>
> Both children are in counseling.

{¶20} On February 23, 2012, Cormany filed his Notice of Appeal. On appeal, he raises the following assignments of error:

{¶21} "[1.] The Trial Court's award of permanent custody to Trumbull County Children Services is not supported by sufficient credible evidence meeting the burden of clear and convincing evidence that permanent custody of the minor child[ren] should not have been placed with the child[ren]'s biological father."

{¶22} "[2.] The Magistrate's Decision granting permanent custody to Trumbull County Children Services is based on suppositions and conclusions contradictory to the manifest weight of the evidence."

{¶23} The merits of Cormany's two assignments of error are intertwined and will be addressed jointly.

{¶24} In order to grant permanent custody of a child to a children services agency when the child has not been in the temporary custody of such an agency for twelve or more months of a consecutive twenty-two-month period, the juvenile court must determine, "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", and that "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." R.C. 2151.414(B)(1)(a); *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 42.

{¶25} "In determining at a [permanent custody] hearing * * * whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence." R.C. 2151.414(E). "[T]he court shall enter a finding that the child cannot be placed with either parent within a reasonable time," if it determines by "clear and convincing evidence," any of the following: "[f]ollowing the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home"; "[t]he

parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child"; and/or "[a]ny other factor the court considers relevant." R.C. 2151.414(E)(1), (4), and (16).

{¶26} In general, "[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. Stated otherwise, "evidence must * * * exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)." *Eastley v. Volkman*, __ Ohio St.3d __, 2012-Ohio-2179, __ N.E.2d __, ¶ 19.

{¶27} "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). Clear and convincing evidence has also been described as "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." *Id.* at paragraph three of the syllabus.

{¶28} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be

entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990); *Eastley* at ¶ 17-23 (explaining and affirming the applicability of *Thompkins* in civil cases).

{¶29} On appeal, Cormany contends that "there was little to no effort [on the part of the Children Services Board] to determine whether [he] was fit as a parent, and whether the best interests of the children were better served by placing them with [him]." More specifically, Cormany notes that the juvenile court did not recognize his voluntary efforts to address his anger, substance abuse, and psychological issues. Likewise, the Children Services Board did not observe his living arrangements in New York or assist in having the terms of the Order of Protection modified to allow visitation. Without such evidence, there could be no determination by clear and convincing evidence that Cormany would be unfit as a parent.

{¶30} The Children Services Board's position during the course of these proceedings that Cormany was not a viable placement option is supported by the record. From the time of the children's initial removal in December 2009, until the permanent custody hearing in June 2011, Cormany was barred by the Order of Protection from having contact with his children, resided outside the state of Ohio, and did not have independent housing. On February 26, 2010, the magistrate advised Cormany that he needed to establish "income and housing" and to address the

domestic violence issue, i.e., the Order of Protection. No support was ordered at this time, as Cormany's paternity was being disputed.

{¶31} In May 2010, Cormany's paternity was established and a support order was issued. Cormany never voluntarily paid anything toward the support of his children. At this time, Cormany was further advised that he needed to address the Mahoning County Order of Protection in order to have visitation with his children. There is no evidence that Cormany tried to have the condition of the Order modified to allow for supervised visitation. At the permanent custody hearing, Cormany testified that he tried to convince Demar to voluntarily suspend the order, but that nothing was done about it. Caseworker DeVengencie testified that she advised Cormany of the necessity of addressing the Order of Protection in every conversation she had with him. She further testified that it was Demar's intention to have the Order extended after its expiration on July 17, 2011, as she was still afraid of Cormany.

{¶32} Regarding housing, it was established at the permanent custody hearing that Cormany was residing with his sister, who was suffering from terminal illness, in a house owned by his brother-in-law's sister. Cormany failed to initiate an interstate home study, which was necessary to establish the suitability of his housing, and, as noted by the magistrate, the sister with whom he resided refused to participate in such a study.

{¶33} Given Cormany's inability to have contact with the children and lack of demonstrably suitable housing, there was no error in the juvenile court's finding that the children could not be placed with Cormany within a reasonable time.

{¶34} We further note that the alleged deficiency of evidence regarding Cormany's fitness as a parent does not bar the granting of permanent custody to the Children Services Board. The Ohio Supreme Court has explained: "[T]he *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit. The mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not *automatically* entitle the natural parent to custody of his child since the best interests and welfare of that child are of paramount importance." *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979).

{¶35} Cormany's two assignments of error are without merit.

{¶36} For the foregoing reasons, the Judgment Entry of the Court of Common Pleas of Trumbull County, Division of Domestic Relations and Juvenile Department, granting permanent custody of the minor children to the Trumbull County Children Services Board, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.