

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: : JUDGES:
: Julie A. Edwards, P.J.
: W. Scott Gwin, J.
B. CHILDREN : John W. Wise, J.
: :
: Case No. 2009 CA 00238
: :
: :
: OPINION

CHARACTER OF PROCEEDING: Civil Appeal from Stark County
Court of Common Pleas, Juvenile
Division, Case No. 2008 JCV 01132

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 25, 2010

APPEARANCES:

For Appellant-Mother

For the Children

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Edwards, P.J.

{¶1} Appellant, Darlene Zurfley, appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, awarding permanent custody of her daughter H.C.B. and her son H.A.B. to appellee Stark County Department of Jobs and Family Services (hereinafter “SCDJFS”).

STATEMENT OF FACTS AND CASE

{¶2} H.C.B. and H.A.B. are twins, born September 23, 2008. H.C.B. exhibits physical and developmental delays with her eyes, speech and use of upper extremities. H.A.B. has been diagnosed with Spina Bifida, a spinal deformity where his spine stopped developing in the first trimester of appellant’s pregnancy. H.A.B. has no anus and his rectum is deformed. As a result, he is required to use a colostomy bag. He was also born with his genitals upside down, has only one kidney and requires a urostomy bag because his urethra does not run through his penis. H.A.B. also has a hyperactive palate which affects his swallowing and gag reflexes. He has delays in communicative and cognitive skills, as well as delays in fine and visual motor skills.

{¶3} While Robert Bennett, appellant’s paramour, signed the birth certificate, he knew at the time that he was not the biological father of the children. The biological father of the children has not been involved in the children’s lives.

{¶4} SCDJFS received a call reporting that appellant used illegal drugs while pregnant and her housing was in jeopardy. Appellant had a long prior history with SCDJFS dating back to 1999. Four of her five previous children had been placed in the permanent custody of SCDJFS. These children experienced environmental neglect

while in appellant's care, resulting in developmental delays which disappeared after the children were placed in adoptive homes.

{¶5} On October 9, 2008, SCDJFS filed a complaint alleging that the children were dependent and requesting that both children be placed in the temporary emergency custody of SCDJFS. At the emergency shelter care hearing conducted the same day, appellant stipulated to probable cause and the children were placed in the emergency temporary custody of SCDJFS. Following an adjudicatory hearing on January 5, 2009, the children remained in the temporary custody of SCDJFS.

{¶6} The case plan required appellant to maintain housing for 6-8 months, maintain stable employment, work with Help Me Grow and Akron Children's Hospital staff and resources to educate herself on how to care for H.A.B., continue substance abuse treatment through the SAMI program in which she was already involved, complete a parenting evaluation at Northeast Ohio Behavioral Health (NEOBH), take mental health medications as prescribed, and participate in supervised visitation.

{¶7} SCDJFS filed a motion seeking permanent custody of the children on March 30, 2009. The case proceeded to an evidentiary hearing.

{¶8} Sarah Goins, a caseworker for SCDJFS, testified at the hearing that appellant was compliant with her current case plan objectives. Appellant had stable housing and was employed at Family Dollar. Her random urine screens had come back negative for the presence of drugs and she continued to participate in the SAMI program. Appellant regularly attended her one hour weekly supervised visitation.

{¶9} Appellant participated in a parenting evaluation at NEOBH, conducted by Dr. Aimee Thomas. Dr. Thomas had previously conducted a parenting evaluation of

appellant in 2005. Dr. Thomas testified that appellant tested in the lower portion of the average range of intellectual ability with an IQ of 85. While this IQ does not preclude appellant's ability to parent, it does impact her ability to integrate information, particularly dealing with a child with complicated medical needs such as H.A.B.

{¶10} Appellant has been diagnosed with Bipolar Disorder, Borderline Personality Disorder and Dependent Personality Disorder. Her mental illness is chronic and ongoing, and requires diligent medical management. However, appellant disputes the diagnoses and believes counseling alone can address her issues. She was taken off medication while pregnant, but after the twins were born she was placed on Eflexor. Appellant took herself off of this medication because she did not like the side effects, and believes her mental health is no longer an issue because of counseling she received regarding issues with her mother. Dr. Thomas testified that management of appellant's mental illness was critical to her emotional stability and her ability to parent.

{¶11} Dr. Thomas further questioned appellant's judgment and decision-making regarding romantic relationships. Appellant allowed Robert Bennett to sign the birth certificate despite her knowledge of his circumspect past regarding allegations of sexual abuse of his own child in another county. Appellant believed he would adopt the children. Dr. Thomas conducted a parenting evaluation of Robert Bennett and found him to be a hindrance rather than a supportive influence in helping appellant parent the twins. Dr. Thomas further noted appellant's apparent lack of realization of the extent of H.A.B.'s medical problems.

{¶12} Dr. Thomas found no significant change in appellant's level of insight or functioning between her 2005 evaluation and her 2008 evaluation. Dr. Thomas's

parenting evaluation report stated, “In the opinion of this examiner, Ms. Zurfley continues to present with compromised functioning and a lack of appropriate external support. This examiner cannot overemphasize the fact that she is at greater risk to neglect the needs of her children and will likely continue to display a rather self-absorbed nature.”

{¶13} Eleanor DuFont, a service coordinator at Help Me Grow, had worked with appellant starting in July of 2008. She testified that she did not believe SCDJFS prepared appellant properly for reunification and she believed appellant needs more services for possible reunification. Appellant testified that she only wants a chance to show that she can parent the twins. However, she admitted on cross-examination that she had failed in the past when she asked the court for another chance to parent her older children. She also testified that she did not suffer from Bipolar Disorder but only from Borderline Personality Disorder. She testified that she had ended her relationship with Robert Bennett based on his past, but admitted to inviting him to visit the children with her in May, 2009.

{¶14} After the hearing, the court found that appellant failed to continuously and repeatedly remedy the conditions which caused the children to be placed outside the home despite reasonable case planning and diligent efforts by the agency to assist her in reunification. The court also found that the severe and chronic mental and emotional illnesses suffered by appellant make her unable to provide an adequate home for the children at the present time and in the foreseeable future. The court found that the biological father had abandoned the children by failing to visit or maintain contact for more than ninety days.

{¶15} The case proceeded to a best interests hearing. At the hearing, Ms. Goins testified that the foster parents have experience caring for children with disabilities and are willing to adopt the children. She testified that the children have a bond with appellant, but the benefit of permanency in their lives outweighs the detriment of severing the bond with appellant. The guardian ad litem testified that she did not believe appellant is capable of handling the children's medical issues and it would not be in the children's best interests to be returned to appellant. The court granted permanent custody to SCDJFS.

{¶16} Appellant assigns two errors on appeal:

{¶17} "I. 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.

{¶18} "II. 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

{¶19} Appellant argues that the court's finding that the children cannot be placed with her within a reasonable time is against the manifest weight of the evidence. She argues that she completed her case plan and that SCDJFS did not provide specialized services to help her learn to care for H.A.B.

{¶20} A trial court's decision to grant permanent custody of a child must be supported by clear and convincing evidence. The Ohio Supreme Court has defined “clear and convincing evidence” as “[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty, as required beyond a reasonable doubt, as in criminal cases.” *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118; *In re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613.

{¶21} In reviewing whether the trial court based its decision upon clear and convincing evidence, “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.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60; See also, *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. If the trial court's judgment is “supported by some competent, credible evidence going to all the essential elements of the case,” a reviewing court may not reverse that judgment. *Schiebel*, 55 Ohio St.3d at 74, 564 N.E.2d 54.

{¶22} Moreover, “an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusion of law.” *Id.* Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273:

{¶23} “The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.”

{¶24} Moreover, deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.” *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 419, 674 N.E.2d 1159; see, also, *In re: Christian*, Athens App. No. 04CA10, 2004-Ohio-3146; *In re: C. W.*, Montgomery App. No. 20140, 2004-Ohio-2040.

{¶25} Pursuant to 2152.414(B)(1), the court may grant permanent custody of a child to the movant if the court determines “that it is in the best interest of the child to grant permanent custody to the agency that filed the motion for permanent custody and that any of the following apply:

{¶26} “(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,... and the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with the child's parents.* * *”

{¶27} Revised Code 2151.414(E) sets forth the factors a trial court must consider in determining whether a child cannot or should not be placed with a parent within a reasonable time. If the court finds, by clear and convincing evidence, the existence of any one of the following factors, “the court shall enter a finding that the

child cannot be placed with [the] parent within a reasonable time or should not be placed with either parent”:

{¶28} “(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parent to remedy the problem that initially caused the child to be placed outside the home, the parents have failed continuously and repeatedly to substantially remedy the conditions that caused the child to be placed outside the child's home. In determining whether the parents have substantially remedied the conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶29} “(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code ***

{¶30} “(16) Any other factors the court considers relevant.”

{¶31} A trial court may base its decision that a child cannot or should not be placed with a parent within a reasonable time upon the existence of any one of the R.C. 2151.414(E) factors. The existence of one factor alone will support a finding that the child cannot be placed with the parent within a reasonable time. See *In re: William S.*

(1996), 75 Ohio St.3d 95, 661 N.E.2d 738; *In re: Hurlow* (Sept. 21, 1998), Gallia App. No. 98 CA 6, 1998 WL 655414; *In re: Butcher* (Apr. 10, 1991), Athens App. No. 1470, 1991 WL 62145.

{¶32} The trial court found that the children could not be placed with either parent within a reasonable time, and that despite diligent, reasonable efforts and planning by appellee to remedy the problems which caused removal of the children, both parents have failed to substantially remedy the conditions causing removal. The court also found that the severe and chronic mental and emotional illnesses of appellant make her unable to provide an adequate permanent home for the children at the present time and in the foreseeable future. The trial court's findings are not against the manifest weight of the evidence.

{¶33} While appellant completed portions of her case plan regarding housing, substance abuse treatment, employment and visitation, appellant failed to comply with the portion of her case plan requiring her to take mental health medication as prescribed. Appellant took herself off her prescription medication and did not accept the diagnosis of Bipolar Disorder. The evidence presented demonstrated that appellant incorrectly believed that because she received counseling, Bipolar Disorder was no longer an issue, when in fact she would require lifelong management of the disorder.

{¶34} Dr. Aimee Thomas, who conducted parenting evaluations of appellant in 2005 and again in 2008, testified that appellant tested in the lower portion of the average range of intellectual ability with an IQ of 85. While this IQ does not preclude appellant's ability to parent, it does impact her ability to integrate information, particularly dealing with a child with complicated medical needs such as H.A.B. Dr.

Thomas also testified that management of appellant's mental illness was critical to her emotional stability and her ability to parent.

{¶35} Dr. Thomas further questioned appellant's judgment and decision-making regarding romantic relationships. Appellant allowed Robert Bennett to sign the birth certificate despite her knowledge of his circumspect past regarding allegations of sexual abuse of his own child in another county. Appellant believed he would adopt the children. Dr. Thomas conducted a parenting evaluation of Robert Bennett and found him to be a hindrance rather than a supportive influence in helping her parent the twins. Dr. Thomas further noted appellant's apparent lack of realization of the extent of H.A.B.'s medical problems.

{¶36} Dr. Thomas found no significant changes in appellant's level of insight or functioning between her 2005 evaluation and her 2008 evaluation. Dr. Thomas's parenting evaluation report stated, "In the opinion of this examiner, Ms. Zurfley continues to present with compromised functioning and a lack of appropriate external support. This examiner cannot overemphasize the fact that she is at greater risk to neglect the needs of her children and will likely continue to display a rather self-absorbed nature."

{¶37} Based on the evidence presented at the hearing, the court's finding that appellant's severe and chronic mental and emotional illnesses make her unable to provide an adequate permanent home for the children at the present time and in the foreseeable future is not against the manifest weight of the evidence. The court could make a finding that the children could not be placed with appellant within a reasonable

time based on this factor alone. *In re: William S.*, supra; *In re: Hurlow* supra; *In re: Butcher*, supra.

{¶38} The first assignment of error is overruled.

II

{¶39} In her second assignment of error, appellant argues that the trial court's finding that it was in the children's best interest that permanent custody be granted to the agency was against the manifest weight of the evidence.

{¶40} 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.

{¶41} While there was evidence that the children had a bond with appellant, the caseworker, Sarah Goins, testified that the foster parents have experience caring for children with disabilities and are willing to adopt the children. The children had been in foster care since October, 2008. Ms. Goins testified that the children have a bond with appellant, but the benefit of permanency in their lives outweighs the detriment of severing the bond with appellant. The guardian ad litem testified that she did not believe appellant is capable of handling the children's medical issues and it would not

be in the children's best interests to be returned to mother. The court's finding that permanent custody was in the best interests of the children is not against the manifest weight of the evidence.

{¶42} The second assignment of error is overruled.

{¶43} The judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/r0111

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

IN THE MATTER OF:

B. CHILDREN

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JUDGMENT ENTRY

CASE NO. 2009 CA 00238

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES