[Cite as *In re R.H.*, 2010-Ohio-3293.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
IN THE MATTER OF:	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
R.H.	:	John W. Wise, J.
	:	
	:	Case No. 10 CA 9
	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from Perry County Court of Common Pleas, Juvenile Division, Case No. 2008 F 127
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 7, 2010

APPEARANCES:

For Appellee Perry County Children Services

EMILY STRANG TARBERT
825 Adair Avenue
Zanesville, Ohio 43701

For Appellant Terrie Yocum

JESSICA L. MONGOLD
123 South Broad Street, Suite 227
Lancaster, Ohio 43130

Edwards, P.J.

{¶1} Appellant, Terry Yocum, appeals a judgment of the Perry County Common Pleas Court, Juvenile Division, awarding appellee Perry County Children Services permanent custody of her son, R.H.

STATEMENT OF FACTS AND CASE

{¶2} R.H. was born on August 11, 2007. Appellant is the natural mother of R.H. Gary Elkins was determined to be the natural father of R.H. through paternity testing and voluntarily surrendered his rights to the child on October 14, 2009.

{¶3} In 2008, appellee became concerned with appellant's ability to provide basic care for R.H. Terra Folk, a service coordinator with Help Me Grow noted that appellant did not have food for R.H., other than a bottle, when he was 7-8 months old, resulting in malnourishment. He was left to lay on his back frequently, resulting in plagiocephaly, or a misshapen head. The child was "vacant" in his appearance and small for his age.

{¶4} The same coordinator met appellant and R.H. at the hospital for a scheduled evaluation. Appellant arrived with no food for R.H., and had not changed his diaper that morning because she overslept, her transportation had arrived, and she did not have time. R.H. was wearing a saturated diaper.

{¶5} On June 6, 2008, appellee was granted ex parte custody of R.H. On October 29, 2008, the trial court found R.H. to be neglected and awarded appellee temporary custody.

{¶6} Appellant cannot drive and has no method of transportation other than friends and family. She does not have employment or stable housing. She lives with

family or friends, at times moving every two weeks because HUD regulations only allow visitors for a two-week period of time. At times she and R.H. slept on the floor because there was no bed available where they were staying.

{¶7} R.H. was evaluated at Nationwide Children's Hospital. He was diagnosed with severe developmental delays, plagiocephaly and scoliosis. He measurably improved in the care of the foster family who took him to numerous doctor appointments and therapy appointments to treat his developmental delays. The foster mother attempted to help appellant work toward reunification. She described herself as appellant's "biggest cheerleader." She offered to take appellant places to help her become more involved in R.H.'s life and to help her bond with the child. When appellant did not have a suitable residence to visit with R.H., the foster mother transported appellant to her own home to allow appellant to visit R.H.

{¶8} On one occasion, when R.H. was on an overnight visit with appellant, he developed a high fever. Appellant called the foster mother, who recommended giving him Tylenol. Appellant told the foster mother that she would try to get the medication. Appellant called again the next day and said the fever had not come down. Appellant had not given him Tylenol because no one at the residence where she was staying would take her to get the medication. After taking the child to urgent care, where he was diagnosed with strep throat, appellant still had not given him medication for the fever, and did not fill the prescription she was given. At this point the foster mother picked up the child and took him with her, although the visitation period had not ended. When she picked up R.H., she noted several cars and other adults present at the residence, yet appellant was unable to get anyone to take her to a store for medication.

Despite her efforts to foster reunification, she did not believe the child should return to appellant's care and believed appellant had been given every opportunity to get her life together.

{¶9} Dr. Gary Wolfgang evaluated appellant and prepared a psychological report. He found that appellant suffered from depression and anxiety. She had no ability to go out in public to shop because she suffered anxiety from being around other people, and she was afraid to drive. Appellant minimized R.H.'s developmental delays and believed appellee was blowing things out of proportion. Appellant had a limited understanding of what to do to fix R.H.'s issues. Appellant lacked initiative and was passive, relying on others to meet her needs. In his opinion, "It's not so much the bad [appellant] does as it is the good she doesn't." Tr. 25. He believed her prognosis for change in her dependent behavior is poor, and as a result the child would continue to suffer from neglect.

{¶10} Appellee moved for permanent custody on August 26, 2009. The case proceeded to trial on January 20, 2010. Following trial, the court granted appellee permanent custody of R.H. Appellant assigns a single error on appeal:

{¶11} "THE DECISION OF THE TRIAL COURT GRANTING PERMANENT CUSTODY OF APPELLANT'S CHILD TO PERRY COUNTY CHILDREN'S SERVICES WAS NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE, AS THE RECORD DOES NOT CONTAIN CLEAR AND CONVINCING EVIDENCE THAT PERMANENT CUSTODY WAS IN THE CHILD'S BEST INTEREST AND THAT THE CHILD CANNOT BE PLACED WITH EITHER PARENT WITHIN A REASONABLE TIME."

{¶12} Appellant first argues that the court erred in failing to cite to the statute in rendering its opinion. The trial court found in pertinent part:

{¶13} "The Court finds that the agency has offered to the mother an opportunity to correct her problems and follow a case plan that would possibly allow reunification of the mother and the child, but she was unable to do so. The Court also finds that the agency had made reasonable efforts in every aspect, but with the mother's current living situation, her depression and anxiety disorders and the fact that medical professional testimony has been presented that the mother, Terry Yocum, is unable to prevent serious risk and harm to this child. The Court finds that from the evidence presented that it is in the best interest of this child to be placed in the permanent custody of Perry County Children Services. Therefore based upon the evidence presented permanent custody is hereby granted to Perry County Children Services. This child has been in temporary custody of the agency for approximately nineteen months and it is the opinion of this Court that in the best interest of this child that permanent custody be granted to Perry County Children Services. The Court hereby ORDERS that permanent custody of [R.H.], shall be granted to Perry County Children Services. This is a Final Appealable Order."

{¶14} A trial court is not required to specifically enumerate each factor under R.C. 2151.414(D) in its decision. *In re Dyal*, Hocking App. No. 01CA12, 2001-Ohio-2542, citing *In re Heyman* (Aug. 13, 1996), Franklin App. No. 96APF02-194. Further, R.C. 2151.414(D) does not require that the trial court set forth the specific factual findings that correlate to the factors set forth in the statute unless a party requests findings of fact and conclusions of law. *In re Covin* (1982), 8 Ohio App.3d 139, 141, 456

N.E.2d 520, *In re Day* (Feb. 15, 2001), Franklin App. No. 00AP-1191, unreported; see, also, *In re Templeton* (Mar. 5, 2001), Brown App. Nos. CA2000-07-019 and CA2000-07-020, unreported. Appellant did not request findings of fact and conclusions of law in the instant case. Although the trial court did not cite the specific portions of the statute on which it relied in terminating appellant's parental rights and in finding permanent custody to be in the child's best interest, the judgment entry as a whole reflects that the trial court applied the appropriate statute, R.C. 2151.414, and that the trial court made a specific finding that the grant of permanent custody serves R.H.'s best interest.

{¶15} Appellant next argues that the judgment is not supported by clear and convincing evidence. She first argues that the judgment finding permanent custody to be in the child's best interests is not supported by the evidence.

{¶16} 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, 477, 120 N.E.2d 118; *In re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613.

{¶17} 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.

{¶18} 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, "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." 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*, 77 Ohio St.3d 415, 419, 1997-Ohio-260, 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.

{¶19} Pursuant to R.C. 2151.414(D), in determining the best interest of a child, the court shall consider all relevant factors, including but not limited to the following:

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

{¶21} "(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;

{¶22} "(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;

{¶23} "(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…"

{¶24} At the time of the hearing, R.H. had been in the custody of appellee for nineteen months, which is the majority of his life. Caseworker Amy Frame, an employee of appellee, testified that she did not believe he could be placed with his mother in a reasonable time, and due to his age he needed a permanent placement. R.H. suffered from developmental delays caused by neglect he experienced when living with appellant and had improved noticeably while in foster care. At the time of the hearing, appellant had not consistently maintained medication and treatment for anxiety and depression, she did not have stable housing, she had no source of income other than food stamps and she did not have transportation. The foster mother testified that when she facilitated visitation, she did not notice a bond between appellant and R.H.

There was sufficient evidence presented at the hearing to support the court's finding that permanent custody was in R.H.'s best interest.

{¶25} Appellant also argues that the court erred in failing to find any of the statutory factors in R.C. 2151.414(E) in determining that the child could not be placed with appellant within a reasonable time.

{¶26} R.C. 2151.414(B) provides in pertinent part:

{¶27} "(B)(1) 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:

{¶28} "(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. . . .

{¶29} "(d) 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.

{¶30} "For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home."

{¶31} When a child has been in the temporary custody of the agency for more than twelve out of the last twenty-two months, the court is not required to make a finding that the child cannot be returned to the parents within a reasonable time. *In re Whipple Children*, Stark App. No. 2002CA00406, 2003-Ohio-1101, ¶26. In the instant case, the permanent custody motion alleged that R.H. had been in the custody of the agency for twelve or more months of a consecutive twenty-two month period. The court found that R.H. had been in the custody of the agency for 19 months. The record reflects that R.H. was adjudicated pursuant to R.C. 2151.28 (shelter care placement) on June 6, 2008, and had been in the custody of the agency continuously to the date of trial on January 10, 2010. Appellant does not challenge this finding, and in fact concedes at page 10 of her brief that the child had been in the custody of appellee for the time frame set forth by law. The court was, therefore, not required to make any findings pursuant to R.C. 2151.414(E), and appellant has not demonstrated error in the court's failure to make such findings.

{¶32} Further, the court's judgment as recited above does impliedly make a finding pursuant to R.C.2151.414(E)(1). Revised Code 2151.414(E) sets forth the factors a trial court must consider in determining whether a child cannot be placed with a parent within a reasonable time or should not be placed with a parent. 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":

{¶33} "(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 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. In determining whether the parents have substantially remedied those 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."

{¶34} The court's finding is supported by the evidence. While appellant made some progress when she was treated for anxiety and depression, she did not maintain consistent treatment. She did not have stable housing and was wholly dependent on family members and friends to meet her own basic needs. The foster mother facilitated interaction between appellant and R.H., yet appellant did not form a bond with R.H. Appellant lacked a basic understanding of R.H.'s developmental delays and how to

provide for his needs, and continued to believe appellee blew the child's problems out of proportion.

{¶35} The assignment of error is overruled.

{¶36} The judgment of the Perry County Common Pleas Court, 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/r0611

[Cite as *In re R.H.*, 2010-Ohio-3293.]

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	
R.H.	:	
	:	
	:	
	:	JUDGMENT ENTRY
	:	
	:	
	:	
	:	CASE NO. 10 CA 9

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Perry 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