

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:
K.S.

: JUDGES:
:
: Hon. Sheila G. Farmer, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.
:
: Case No. 2009CA00254
:
:
:
:
: OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Family Court Division,
Case No. 2007JCV00983

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: March 1, 2010

APPEARANCES:

For Mother/Appellant:

KELLY S. MURRAY
116 Cleveland Ave., NW
Suite 303
Canton, OH 44702

For Stark County Department of Job
and Family Services/Appellee:

LISA A. LOUY
221 – 3rd St. SE
Canton, OH 44702

Delaney, J.

{¶1} Appellant, Lillian Sholes, appeals the judgment of the Stark County Court of Common Pleas, Family Court Division, awarding permanent custody of her son, K.S. to Appellee, Stark County Department of Jobs and Family Services (“SCDJFS”).

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant is the mother of K.S., born on January 26, 2006. The father of K.S. is Tyrone Sholes.¹

{¶3} In August 2007, SCDJFS became involved in this case after concerns of domestic violence between the parents and allegations of drug abuse by the parents. (Tr. 7).² After a shelter care hearing on August 14, 2007, it was determined that K.S. would remain with Appellant and SCDJFS would maintain protective supervision. (Tr. 8). On August 30, 2007, however, the trial court awarded temporary custody of K.S. to SCDJFS after Appellant tested positive for marijuana. *Id.* On October 20, 2007, both parents stipulated to a finding of dependency for K.S. and temporary custody to SCDJFS. *Id.*

{¶4} A case plan was prepared and Appellant was to complete a psychological evaluation and parenting assessment through Northeast Ohio Behavioral Health. (Tr. 10). She was to attend Quest and Renew for domestic violence. *Id.* Appellant began to comply with her case plan objectives including the psychological evaluation, substance abuse treatment, and domestic violence treatment. *Id.* Her participation in her case plan was interrupted by her arrest and conviction for three counts of drug

¹ Tyrone Sholes has not filed an appeal of this matter.

² The trial court held two evidentiary hearings in this case, one on August 20, 2009 and the second on August 27, 2009. “Tr.” refers to transcript of the August 20, 2009 hearing and “Tr.2” refers to the transcript for the hearing held on August 27, 2009.

trafficking, three counts of drug possession, intimidation of a witness and retaliation after the police conducted a drug raid on Appellant's home. (Tr. 10-11). Appellant was sentenced to two years in prison and her expected release date is March 2010. (Tr. 11).

{¶5} In May 2008, SCDJFS filed a motion for permanent custody of K.S. and a trial was scheduled for July 15, 2008. On that date, the parties agreed to an amendment of the permanent custody motion to an extension of temporary custody to SCDJFS.

{¶6} On May 11, 2009, the SCDJFS filed a motion for permanent custody of K.S. An evidentiary hearing was held on the motion on August 20, 2009 and August 27, 2009. The following evidence was adduced at trial.

{¶7} Sue Snyder, the SCDJFS ongoing worker, testified that at the time of the hearing, K.S. was three and a half years old. (Tr. 54). K.S. has a half-sister, S.J., who was seven years old at the time of the hearing.³ Tyrone Sholes is the father of S.J. Initially, S.J. and K.S. were placed in the same foster home. S.J. was transferred to a therapeutic foster home after S.J. exhibited behavioral issues that were affecting K.S. (Tr. 58).

{¶8} Appellant participated in supervised visitation with K.S., but stopped visiting in March 2008 prior to Appellant being sentenced. (Tr. 13). Tyrone Sholes also participated in supervised visitation with K.S., but on the recommendation of the psychologist for both S.J. and K.S., the visitation with Tyrone Sholes was terminated in

³ SCDJFS also filed a motion for permanent custody of S.J. and the August 20, 2009 and August 27, 2009 hearings also concerned S.J. S.J. is not the subject of the current appeal.

January 2008 because the children exhibited increased behavioral problems after the visits. (Tr. 12).

{¶9} Appellant testified at the hearing. She testified that she was currently incarcerated at the Trumbull Correctional Camp, an honor camp, based on her conviction and sentence on drug charges. (Tr. 47). She had also been incarcerated in 2004 for drug possession. (Tr. 50). While she was currently in prison, Appellant was utilizing the services available to her such as victim's awareness, coping and recovery programs, and she tutored others to help them get their G.E.D. (Tr. 47-48).

{¶10} Appellant has had prior involvement with Children's Services. (Tr. 52). Appellant relinquished custody of her four children in 2002 or 2003 due to her addiction to cocaine. Id.

{¶11} When asked about her relationship with the father of K.S., Appellant stated that she had been granted a civil protection order against Tyrone Sholes due to domestic violence. (Tr. 53). In December of that same year, she had the CPO dismissed because she and Tyrone Sholes were moving in together. (Tr. 53).

{¶12} Snyder testified on direct examination that K.S. has been in his present foster home since August 2007. (Tr. 58). He is bonded with his foster mother and the foster mother is interested in adopting K.S. Id.

{¶13} Snyder testified that K.S. does not have any medical problems and has not exhibited any developmental issues. (Tr. 55). Snyder described K.S. as a very energetic and compassionate little boy. Id.

{¶14} The guardian ad litem testified that there were no potential relative placements for K.S. (Tr. 65). In her report, the guardian ad litem recommended that SCDJFS be granted permanent custody of K.S.

{¶15} The trial court filed its judgment entry on September 8, 2009 and granted permanent custody of K.S. to SCDJFS. It is from this decision that Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶16} Appellant raises two Assignments of Error:

{¶17} “I. THE JUDGMENT OF THE TRIAL COURT THAT THE MINOR CHILD 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 CHILD WOULD BE SERVED BY GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

I., II.

{¶19} We will address Appellant’s Assignments of Error together. Appellant argues in her first Assignment of Error that the trial court’s finding that K.S. cannot be placed with her within a reasonable time is against the manifest weight and sufficiency of the evidence. Appellant argues that she completed a portion of her case plan before her incarceration and has utilized the opportunities available to her in prison to continue her efforts at reunification with K.S.

{¶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} R.C. 2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates the trial court schedule a hearing, and provide notice, upon filing of a motion for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶26} Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (a) the child is not abandoned or orphaned, 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; (b) the child is abandoned; (c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for

twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶27} 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.

{¶28} Therefore, R.C. 2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial court will usually determine whether one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶29} If the child is not abandoned or orphaned, then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the trial court must consider all relevant evidence before making this determination. The trial court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R.C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶30} The trial court found that K.S. could not be placed with Appellant within a reasonable time and despite the diligent efforts by SCDJFS, Appellant had failed to remedy the conditions that caused K.S. to be placed in SCDJFS custody. We agree.

{¶31} The evidence shows that while Appellant was working to complete her case plan objectives, she was clearly not remedying the conditions that led to the placement of K.S. with SCDJFS. SCDJFS became involved with K.S. because of allegations domestic violence and drug abuse by his parents. SCDJFS was awarded temporary custody because Appellant tested positive for marijuana while K.S. was in Appellant's care and under SCDFJS's protective supervision.

{¶32} During the time that Appellant was to be working towards reunification with her son, Appellant's home was raided by the police and Appellant was convicted of three counts of drug trafficking, three counts of drug possession, intimidation of a witness, and retaliation. As a result of her choice to continue her involvement with drug-related activity, Appellant was not able to complete her case plan. This is Appellant's second incarceration due to drugs. Further, Appellant admitted that she relinquished custody of her four older children due to her drug use.

{¶33} Based on the evidence presented at the hearing, the trial court's finding that K.S. could not be placed with Appellant within a reasonable amount of time was not against the manifest weight and sufficiency of the evidence. Appellant's first Assignment of Error is overruled.

{¶34} In her second Assignment of Error, Appellant argues that the trial court's finding that it was in the child's best interest that permanent custody be granted to the agency was against the manifest weight and sufficiency of the evidence.

{¶35} 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.

{¶36} K.S. has been in the custody of SCDJFS and placed with his current foster parent since August 2007, when he was one and a half years old. Snyder testified that K.S. was now an energetic and compassionate three and a half-year old boy. He was doing well in preschool and did not exhibit any medical or behavioral issues. He was bonded with his foster mother and the foster mother wished to adopt him. There is no evidence in the record as to how Appellant interacted with K.S. during her visitation with him.

{¶37} It was the recommendation of the guardian ad litem that the trial court award permanent custody of K.S. to SCDJFS.

{¶38} We find based on the above, the trial court's finding that permanent custody was in the best interests of K.S. was not against the manifest weight or sufficiency of the evidence. Appellant's second Assignment of Error is overruled.

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

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

