[Cite as *In re N.M.*, 2016-Ohio-3412.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
N.M.	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
MINOR CHILD	:	
	:	
	:	Case No. 2016CA00033
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Family Court Division, Case No. 2014JCV01251
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 6, 2016

APPEARANCES:

For Appellant	For Appellee
MANDY REBECCA deLEEUW 201 Cleveland Avenue, SW Suite 104 Canton, OH 44702	JAMES B. PHILLIPS 300 Market Avenue North Canton, OH 44702

Farmer, P.J.

{¶1} On December 11, 2014, appellee, Stark County Department of Job and Family Services, filed a complaint alleging N.M., born September 30, 2014, to be a neglected and/or dependent child. Father of the child is appellant, John Myers; mother is Jodi Myers.[1]

{¶2} Following an emergency shelter care hearing, the child was placed in appellee's emergency temporary custody.

{¶3} An adjudicatory hearing was held on January 30, 2015, wherein both parents stipulated to dependency. The dispositional hearing followed and the trial court placed the child in appellee's temporary custody and a case plan was approved and adopted.

{¶4} On November 9, 2015, appellee filed a motion for permanent custody. On January 11, 2016, appellant filed a motion to extend temporary custody and a motion for change of legal custody to the parental grandmother. A hearing on the permanent custody motion and appellant's motions was held on January 12, 2016. By judgment entry filed January 19, 2016, the trial court denied appellant's motions, terminated parental rights, and granted appellee permanent custody of the child. Findings of fact and conclusions of law were filed contemporaneously with the judgment entry.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

[1]Mother participated in the underlying case, but is not included in this appeal.

I

{¶6} "THE TRIAL COURT'S JUDGMENT THAT THE MINOR CHILD CANNOT AND SHOULD NOT BE PLACED WITH APPELLANT WITHIN A REASONABLE PERIOD OF TIME WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶7} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXTEND TEMPORARY CUSTODY FOR SIX (6) MONTHS."

III

{¶8} "THE TRIAL COURT'S JUDGMENT THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY GRANTING PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I, III

{¶9} Appellant claims the trial court's decision to grant permanent custody of the child to appellee was against the manifest weight and sufficiency of the evidence. Appellant claims the trial court erred in finding the child could not be placed with him within a reasonable period of time and the best interest of the child was best served by granting appellee permanent custody. We disagree.

{¶10} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries,* 5th Dist. Stark No. CA-5758, 1982 WL 2911 (February 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential

elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction,* 54 Ohio St.2d 279 (1978). On review for manifest weight, the standard in a civil case is identical to the standard in a criminal case: a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury [or finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction [decision] must be reversed and a new trial ordered." *State v. Martin,* 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52; *Eastley v. Volkman,* 132 Ohio St .3d 328, 2012-Ohio-2179. In weighing the evidence, however, we are always mindful of the presumption in favor of the trial court's factual findings. *Eastley* at ¶ 21.

{¶11} R.C.2151.419(A) provides in determining "reasonable efforts" by a public children services agency, "the child's health and safety shall be paramount." Subsection (A)(2)(e) states:

> (2) If any of the following apply, the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home:
>
> (e) The parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code or under

an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections.

{¶12} R.C. 2151.414(E) sets out the factors relevant to determining permanent custody. Said section states the following in pertinent part:

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code 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. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(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.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(16) Any other factor the court considers relevant.

{¶13} R.C. 2151.414(B)(1) specifically states permanent custody may be granted if the trial court determines, by clear and convincing evidence, that it is in the best interest of the child and:

(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.

(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***.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶14} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469 (1954), paragraph three of the syllabus. See also, *In re Adoption of Holcomb,* 18 Ohio St.3d 361 (1985). "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* at 477.

{¶15} R.C. 2151.414(D)(1) sets forth the factors a trial court shall consider in determining the best interest of a child:

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised

Code, the court shall consider all relevant factors, including, but not limited to, the following:

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

(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;

(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;

(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;

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

{¶16} The trial court heard testimony from the family's ongoing family service worker, Vicki Mitchell, the psychologist from Northeast Ohio Behavioral Health who evaluated both parents, Dr. Aimee Thomas, and each parent.

{¶17} In 1999, appellant was convicted of raping a nine year old child. T. at 6, 16. He served three years in prison, and completed a sex offender program in 2002. T. at 16. He involuntarily lost permanent custody of three other children in 2007/2008. T. at 6-7, 16-17. Appellant's current case plan required him to submit to "an evaluation at Northeast Ohio Behavioral Health. Substance abuse assessment. For him to complete a sex offender risk assessment and for him to complete Goodwill Parenting classes." T. at 8.

{¶18} Appellant completed an evaluation at Northeast Ohio Behavioral Health. T. at 12. He was diagnosed with antisocial personality disorder, narcissistic personality disorder, and cannabis, alcohol, and opiate abuse disorders. T. at 13, 40. He is "a person who is inclined to engage in criminal or asocial behaviors." T. at 40. Antisocial people "wouldn't really feel a conscience or feel remorse if they should harm a child or neglect a child's needs." T. at 41. He had a lack of empathy for his nine year old rape victim. T. at 13, 37. Appellant received a poor prognosis for successfully completing the case plan and posing "no further risk to a child." T. at 42.

{¶19} Appellant completed a Quest assessment, but treatment was not recommended "based upon his self-report." T. at 13. Although he submitted to drug testing on three occasions (three positives for marijuana), he refused further testing. T. at 14-15. Appellant could not participate in the Goodwill Parenting program because the

Director determined he was a safety threat to others "based on his behaviors" during the intake process. T. at 15.

{¶20} Appellant underwent risk assessment at Summit Psychological. T. at 17. He was diagnosed with anti-social personality disorder, pedophilia disorder, and multiple substance abuse disorders. *Id.* He was "deemed at high risk for future offending behavior." *Id.* It was recommended that appellant have no contact with children, complete sex offender treatment, attend individual mental health counseling, attend substance abuse treatment, and maintain abstinence. T. at 18. At the time of the hearing, appellant was attending sex offender treatment. T. at 19. His level of progress was low because of multiple missed appointments and his attitude. *Id.*

{¶21} Ms. Mitchell testified to her observations of appellant. T. at 20. Every time she had contact with appellant, he was "very easily hostile," "very easily angered," "very emotionally reactive," he'd start yelling, twitching his eyes, ringing his hands, stand up and down, and pace around the room. *Id.* Appellant has not successfully completed his case plan objectives, and Ms. Mitchell opined that he would not be compliant within six months, as he has not successfully completed treatment programs dating back to 2007. T. at 21. Appellant has not visited with the child in over a year per court order because of the recommendations of the treatment centers. T. at 21-22.

{¶22} Coupled with appellant's dismal compliance with the case plan is the fact that mother does not appreciate the potential harm that could be caused by appellant, a sex offender with diagnosed anti-social personality disorder, pedophilia disorder, and multiple substance abuse disorders, in raising the child, and will not bar him from the home. T. at 6, 8, 11-12, 36-37, 59-60.

{¶23} Appellee has encouraged appellant to attend the case plan services, has provided bus passes to attend those services, and has paid for those services. T. at 22. Review hearings and family team meetings were regularly scheduled to review progress, compliance, and concerns. *Id.*

{¶24} Based upon the foregoing, we agree with the trial court's conclusion "notwithstanding reasonable case planning and diligent efforts" by appellee, the child "cannot be placed with either parent within a reasonable time nor should she be placed with either parent." *See* Findings of Fact and Conclusions of Law filed January 19, 2016.

{¶25} As for best interests, N.M. is a healthy, beautiful child, "a happy little girl" who has a very strong bond in her foster-to-adopt home. T. at 63-64. Two relative placement options were explored, but denied. T. at 64-66. One was mother's mother who resided in Florida and was denied based on her use of marijuana, and the other was appellant's mother who was denied based on concerns of family history, her overall ability to protect the child and meet the child's needs, and her relationship with appellant i.e., she felt he was not a risk to the child. T. at 64, 66-69. Appellant's sister was also considered, but was not pursued because of "risk of harm" concerns. T. at 70-71.

{¶26} Ms. Mitchell opined permanent custody was in the best interest of the child because the child had been in appellee's custody for over a year, the parents "have not made significant progress in their case plan services," the child is thriving in her foster-to-adopt home, and the child "deserves safety and stability." T. at 71-72. The guardian ad litem concurred with Ms. Mitchell's opinion on best interests. *See* Report filed January 5, 2016.

{¶27} Upon review, we find sufficient clear and convincing evidence to support the trial court's decision on best interest and the granting of permanent custody of the child to appellee.

{¶28} Assignments of Error I and III are denied.

II

{¶29} Appellant claims the trial court erred in denying his request to continue the permanent custody hearing for six months, as he should have been given an additional six months to fulfill the requirements of the case plan. We disagree.

{¶30} A trial court's decision to grant or deny an extension of temporary custody is a discretionary one. R.C. 2151.415(D). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶31} Pursuant to R.C. 2151.415(D)(1), if an agency requests an extension of temporary custody for a period of up to six months, a trial court may grant an extension "if it determines at the hearing, by clear and convincing evidence, that the extension is in the best interest of the child, there has been significant progress on the case plan of the child, and there is reasonable cause to believe that the child will be reunified with one of the parents or otherwise permanently placed within the period of extension." We note in the case sub judice, the extension request was made by appellant, not appellee.

{¶32} In its Findings of Fact and Conclusions of Law filed January 19, 2016, the trial court addressed this issue in Finding of Fact Nos. 7, 9, and 10:

7. Father has not participated in Goodwill due to his lack of progress with sex offender treatment and because he behaved so badly at the intake meeting that they determined he was a risk to staff and other participants. The worker testified that Father has become angry and hostile every time she has met with him. After Father's conviction of raping a 9-year old girl, he was ordered to participate in treatment through Melymbrosia in 2002. He did so. However, when the agency became involved in 2007 and 2010, he was asked to submit to sex offender risk assessments again. He completed those evaluations in 2007 and again in 2010. Both recommended additional treatment for Father. Because Father felt Melymbrosia was biased, he was allowed to complete his evaluation in this case at Summit Psychological. They found that Father was a high risk to reoffend. They also diagnosed him with Antisocial Personality Disorder as well as Pedophilia. They recommended no contact with **any** children. (emphasis added) Father is currently involved in counseling at Summit Psychological, but has missed many appointments and is unable to advance from Level 1 because he shows no understanding of what trauma he caused his child victim. While Father's conviction for raping a 9-year-old was in 1999, Dr. Thomas' concern was that he currently shows little empathy and understanding of what his victim experienced. Melymbrosia agreed in 2007 and 2010, and Summit Psychological agrees now as demonstrated by their diagnosis and unwillingness to promote Father to the next level of treatment.

9. Given that Father has lost three other children in a contested permanent custody trial, this Court is required to find that [N.] cannot and should not be placed with him. Mother has made it clear that she is committed to Father and they intend to remain together. Thus precludes the Court from placing the child with Mother.

10. Father request an extension of temporary custody to allow more time for the parents to work their case plans. Father's motion to extend temporary custody can only be granted by the Court "if it determines at the hearing, by clear and convincing evidence, that the extension is in the best interest of the child, there has been significant progress on the case plan of the child, and there reasonable cause to believe that the child will be reunified with one of the parents or otherwise permanently placed within the period of extension". R.C. 2151.415(D)(1). Based on the evidence presented, the Court cannot make such a finding; and, therefore, denied Father's motion to extend.

{¶33} Appellant argues he should have been granted a six month extension because it was necessary for him to complete his sex offender treatment before engaging in the other aspects of his case plan.

{¶34} Despite appellant's participation in treatment, Dr. Thomas opined appellant demonstrated a lack of insight into the seriousness of his problem and the impact of the sexual offense on his nine year old victim. T. at 37-38. Appellant's sexual offender evaluation was very poor and he was directed to have no contact with any children which

impacted his ability to visit his child. T. at 21-22, 39. Appellant displayed no remorse and demonstrated a callous disregard for the "rights and safety of others or their feelings." T. at 40. Dr. Thomas was not optimistic that appellant would successfully complete the case plan and "be in a position where he would pose no further risk to a child." T. at 42.

{¶35} Given this dismal prognosis, we find the trial court did not abuse its discretion in denying appellant a six month extension to complete the case plan.

{¶36} Assignment of Error II is denied.

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

By Farmer, P.J.

Delaney, J. and

Baldwin, J. concur.

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