[Cite as *In re M.E.*, 2017-Ohio-2841.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: M.E.,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
A Dependent/Neglected Child	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
	:	
	:	
	:	Case No. 16-COA-041
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Juvenile Division, Case No. 20163027
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 15, 2017

APPEARANCES:

For Plaintiff-Appellant P.E.	For Defendant-Appellee
JOSEPH P. KEARNS, JR. Mason, Mason & Kearns P.O. Box 345 153 West Main Street Ashland, Ohio 44805	CHRISTOPHER R. TUNNELL Ashland County Prosecutor By: J. PETER STEFANIUK Assistant County Prosecutor 110 Cottage Street, Third Floor

Ashland, Ohio 44805

Baldwin, J.

{¶1} Appellant P.E. appeals from the July 20, 2016 and September 27, 2016 Opinions and Judgment Entries of the Ashland County Court of Common Pleas, Juvenile Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant is the biological father of M.E. (DOB 3/10/2010). On April 27, 2016, after M.E. fell out of her third floor bedroom window and broke both of her wrists, her arm and her elbow, she was removed from her home by the Ashland Police Department. On April 28, 2016, a complaint was filed by Ashland County Department of Job and Family Services alleging that M.E. was a neglected and dependent child and seeking temporary custody of her. As memorialized in Judgment Entry filed on May 6, 2016, M.E. was placed in the temporary custody of the Ashland County Department of Job and Family Services. The trial court, in a Judgment Entry filed on May 9, 2016, ordered that appellant have no contact with the child. Appellant, through his attorney, objected to the no contact order.

{¶3} An adjudicatory hearing was held on July 14, 2016. At the hearing, Tyiaces Jackson testified that she lived in the same apartment building as appellant and that prior to the day of the fall, she saw M.E. once about a year before in the third story window. According to Jackson. M.E. got in trouble and knew that she was not supposed to be in the window. Jackson testified that she spoke with appellant a couple of months before M.E. fell and that he told her that he had taken away M.E.'s bike and tablet as punishment for being near the window. Nicole Krause testified that she also lived in the same building

and that, prior to the day of the fall, she had seen M.E. up in the third floor window a couple of times and told her to get out of the window. According to Krause, appellant heard her and came into the bedroom and shut and locked the window. She was unable to recall the last time that she saw M.E. in the window prior to her fall but testified that "it was a long period of time." Transcript at 27. She further testified that while she told appellant once about M.E. being in the window and he immediately took care of it, she could not recall when the conversation occurred. Krause testified on cross-examination that M.E. was a "very stubborn child" who, in the beginning, would not listen when told to get out of the window. Transcript at 29. She also testified that the window screens in the apartment complex were not safe and easily came out and that she spoke with appellant about the problem.

{¶4} Sergeant John Simmons of the Ashland Police Department testified that he responded to a call about a child falling from a window. He observed appellant's apartment to be unclean and testified that there was "overflowing trash of (sic) some of the walls and floors as well." Transcript at 51. He further testified that items were strewn on the floor. Photos of the apartment were admitted as exhibits. According to Sergeant Simmons, he took the pictures after speaking with Children's Services earlier and learning that both children[1] who resided with appellant were sent home from school on that particular day with head lice.

{¶5} Sergeant Simmons testified that he spoke with appellant and that appellant stated that he had intentionally left the window open to air the room out as part of spring cleaning. The Sergeant further testified that appellant indicated that he knew that M.E.,

[1] M.E.'s sister, who is not appellant's biological child, also resided with appellant.

her sister and a third child were playing in the bedroom and that the children had been playing in the window in the past. When he asked appellant what steps he had taken to prevent the children from falling out of the window, appellant "indicated to me that he had not taken any steps." Transcript at 58. Appellant told the Sergeant that he was on the couch on the living room when M.E. fell and told him that he had not contacted management about the window or attempted to secure the windows with screws, although he tried to keep the window locked. Sergeant Simmons further testified that Tyiaces Jackson told him that she had seen M.E. in the window earlier that day and yelled at the child and that it was not the first time. According to the Sergeant, Nicole Krause told him that she saw the children in the window that particular day and had seen them two or three weeks earlier and notified appellant.

{¶6} Sergeant Simmons also testified that from speaking with the Children's Services worker, he learned that the children had been sent home from school for lice before and that, while appellant said that he had the window open for spring cleaning, there did not appear to be any cleaning going on. The following testimony was adduced when he was asked if the conditions of the home concerned him in terms of it being a residence for the children:

A: Absolutely.

Q: Why?

A: Based on the uncleanliness, the fact that the children had to be sent home from for lice multiple times, based on the fact that one of the children just fell out of the house, fell out of the window, and it just did not appear to be safe, but the living, the beds were not kept.

Q: Was there sheets and blankets for the children?

A: Not on the bed.

Q: Okay. Where were they?

A: I don't know.

Q: I mean, did you see them there like was it just that they were - -

A: I don't know if there were sheets. I just didn't see them, put it that way.

Q: Okay.

{¶7} Transcript at 70. He further testified that there was insufficient food in the house and that the other bedroom in the apartment had a screen on the window.

{¶8} At the hearing, appellant testified that because the window was part of a fire escape, he could not bolt it shut permanently. He further testified that the rental agreement prevented him from modifying the window. Appellant admitted to catching M.E. in the window numerous times and testified that he would spank and threaten her and take away her privileges. According to appellant, on one occasion, he stuck a board in the window track to keep the window from being opened, but M.E. removed the board and started hitting her sister with it.

{¶9} With respect to the day in question, appellant testified that he spoke with the school nurse and asked her how to get rid of the lice because the lice kept coming back. After being informed that he needed to clean the toys and bedding also, appellant opened up the window and started cleaning. Appellant testified that he had been dealing with the lice issue for at least three weeks. He further testified that, while cleaning, he found trash, including bottles and food wrappers, in the closet of M.E.'s bedroom.

{¶10} On cross-examination, appellant admitted that playing in the window was a safety concern and that he had renewed the lease in September or October of 2015. He further testified that while M.E. and her sister moved in with him in May of 2015, playing in the window became an issue within a month. He admitted extending his lease after he became aware that the girls were playing in the window and testified that he did not have money at the time to move to a different apartment. Appellant testified on cross-examination that the bedroom in his window also did not have a screen and that he had contacted management about replacing or repairing the screen a couple of times, although he could not recall who he spoke to or when the conversations occurred. Appellant, when asked what repairs had been done to the window that M.E. fell out of, indicated that no repairs had been done. When asked why he did not switch bedrooms with the children, appellant testified that his bedroom was too small for both beds. Appellant also testified that while felony charges had been filed against him as a result of the incident, the charges had been dismissed. He indicated that the no contact order that was part of such case also was dismissed.

{¶11} The trial court, in an Opinion and Judgment Entry filed on July 20, 2016, found M.E. to be a neglected/dependent child and scheduled an adjudicatory hearing for August 2, 2016.

{¶12} Pursuant to an Opinion and Judgment Entry filed on September 27, 2016, the trial court placed M.E. in the temporary custody of Ashland County Department of Job and Family Services. The trial court also ordered that that no contact order remain in effect.

{¶13} Appellant now raises the following assignments of error on appeal:

{¶14} THE TRAIL (SIC) COURT ERRED WHEN IT FOUND THAT THE CHILD WAS ABUSED AND/OR NEGLECTED.

{¶15} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE FATHER OF THE CHILD COULD NOT HAVE ANY CONTACT WITH THE CHILD.

I

{¶16} Appellant, in his first assignment of error, argues that the trial court erred in finding M.E. to be abused and/or neglected. We note that the trial court did not find M.E. to be abused, but rather neglected and dependent.

{¶17} Pursuant to R.C. 2151.35(A), a trial court must find that a child is an abused, neglected, or dependent child by clear and convincing evidence. *In the Matter of F.M. and M.M.,* 5th Dist. Tuscarawas No. 2011 AP 07 0029, 2012–Ohio–1082. 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, 477, 120 N.E.2d 118 (1954). "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." *Id.* at 477. If some competent, credible evidence going to all the essential elements of the case supports the trial court's judgment, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court. *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). Issues relating to the credibility of witnesses and the weight to be given to the evidence are primarily for the trier of fact. *Seasons Coal v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Deferring to the trial court on matters of credibility is "crucial in a child custody case, where

there may be much evidence 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.

{¶18} The trial court found M.E. to be dependent under R.C. 2151.04(C) and neglected under R.C. 2151.03(A)(6). R.C. 2151.04 (C) states as follows: As used in this chapter, "dependent child" means any child:….(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship." The focus of a charge that a child is dependent under R.C. 2151.04(C) is on the child and his condition and not on the faults of the parents." *In re: Bibb,* 70 Ohio App.2d 117, 120, 435 N.E.2d 96 (1st Dist.1980). 2151.03(A)(6) defines a neglected child as one "[w]ho, because of the omission of the child's parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare."

{¶19} We find that the trial court's decision that M.E. was a neglected and dependent child was supported by clear and convincing evidence. As is set forth above, there was testimony that the apartment where M.E. lived was not clean and that were was not a sufficient food supply for appellant and two children. In addition, lice were a recurring problem and M.E. and her sister had been sent home from school on a number of occasions. With respect to neglect, as noted by the trial court, M.E. suffered physical injury that harmed her health or welfare after she fell out of the third story window. Appellant did not adequately supervise M.E., although he knew that she played in the window often and was in her bedroom unsupervised with her sister and another child with the window opened. Appellant did not take steps to protect M.E., who appellant knew was

not an obedient child, from the danger posed by the window. There was testimony that the windows in the apartments in appellant's complex were, in general, known to be unsafe and that appellant knew that M.E. had recently been playing in the window.

{¶20} Appellant's first assignment of error is, therefore, overruled.

II

{¶21} Appellant, in his second assignment of error, argues that the trial court erred when it ruled that appellant could not have contact with M.E.

{¶22} Upon review, an appellate court will not reverse the trial court's determinations as to visitation issues absent an abuse of discretion. *In re Whaley,* 86 Ohio App.3d 304, 317, 620 N.E.2d 954 (4th Dist.1993), citing *Booth v. Booth,* 44 Ohio St.3d 142, 541 N.E.2d 1028 (1989). An abuse of discretion implies that the court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Moreover, an appellate court will defer to a trial court's factual resolutions of conflicting opinions and testimony, as the trial court is in the best position to observe the witnesses' voice inflections, demeanor, and gestures, to assess credibility. *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶23} At the time the trial court originally entered the no contact order in this case, there was a no contact order in the criminal case that had been filed against appellant as a result of the April 27, 2016 incident. The criminal case was dismissed and appellant sought to have the no contact order in this case lifted. The trial court declined to do so.

{¶24} M.E. and her sister, who is not appellant's biological child, previously had been removed from appellant's home in 2014 after appellant was charged in Richland

County with rape of the children, a felony of the first degree. After the charges were dismissed, the children were returned to appellant's home in 2015. The trial court, in its September 27, 2016 Opinion and Judgment Entry, noted that M.E.'s seven year old sister had recently made allegations of a sexual nature against appellant and that the CASA (Court Appointed Special Advocate), Barbara Arnold, was concerned about sexual abuse. At the dispositional hearing, Arnold testified that she had lately heard that M.E.'s sister "had come forward and said that daddy [appellant] has touched her privates." Transcript of August 2, 2016 hearing at 74. Arnold also testified that both M.E. and her sister told Arnold privately at different times that appellant told them not to talk to her and that they told her that appellant "whoops them and hits them on the head with a pop bottle, and he hit them with a broom." Transcript of August 2, 2016 hearing at 71.

{¶25} As noted by the trial court in its September 27, 2016 Opinion and Judgment Entry, it had prohibited contact between appellant and M.E. based, in part, based on the report of the Guardian Ad Litem. The Guardian Ad Litem, in a supplemental report filed on August 4, 2016, also voiced concerns over sexual conduct or contact and noted that M.E. engaged in sexualized behavior. The Guardian Ad Litem's report also stated that earlier on the same day as the fall, Ashland County Department of Job and Family Services had received a report that Shaina, who is M.E.'s cousin, reported that appellant hit her in the head, almost hit M.E. with a broom, and had hit her with a belt, toy and his hands. The Guardian Ad Litem, in her supplemental report, indicated that she did not believe that M.E. or her sister could physically be safe in appellant's home and/or under his supervision or care due to his use of physical discipline and threats against the

children and others in his home. Moreover, there was testimony at the hearing that neither M.E. nor her sister asked to visit appellant or when they were going to see him.

{¶26} Based on the foregoing, we find that the trial court did not abuse its discretion in maintaining the no contact order between M.E. and appellant. The trial court's order was not unreasonable, arbitrary or unconscionable.

{¶27} Appellant's second assignment of error is, therefore, overruled.

{¶28} Accordingly, the judgment of the Ashland County Court of Common Pleas, Juvenile Division, is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Earle Wise, J. concur.