[Cite as *In re W.D.*, 2009-Ohio-6903.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
W.D.,	:	No. 09AP-589 (C.P.C. No. 04JU-03-3055)
(K.D.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
A.D.,	:	No. 09AP-590 (C.P.C. No. 04JU-03-3056)
(K.D.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on December 29, 2009

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

Giorgianni Law LLC, and *Paul Giorgianni*, for appellees W.D. and A.D.

Robert J. McClaren and *Monica E. Hawkins*, for appellee Franklin County Children Services.

Stephanie Mingo-Miles, Guardian ad Litem.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

McGRATH, J.

{¶1} Appellant, K.D., appeals from the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating her parental rights and awarding permanent custody of her two children, W.D. and A.D., to Franklin County Children Services ("FCCS").

{¶2} On March 3, 2004, FCCS filed a complaint alleging that W.D., date of birth December 30, 1998, and A.D., date of birth December 19, 1997, were neglected and dependent children. On April 30, 2004, a magistrate filed a decision dismissing the neglect action at the request of the state, finding W.D. and A.D. to be dependent minors, making them wards of the court, and placing them under court-ordered protective supervision through FCCS. The magistrate's decision was adopted by the trial court.

{¶3} The wardship and court-ordered supervision by FCCS continued, and on April 4, 2005, FCCS filed a motion to modify custody. As a result of the motion, the children were placed in the temporary custody of FCCS on April 8, 2005. Custody reverted back to the parents in August 2005. However, shortly thereafter, on September 13, 2005, FCCS again filed a motion to modify custody. The motion was withdrawn on October 14, 2005, because the parties were complying with the case plan. On November 21, 2005, however, the children were again removed from the home, but then returned two days later.

{¶4} After receiving a physical-abuse referral, the children were once again removed from the home on January 6, 2006, and have remained in the custody of FCCS since that time. On March 24, 2008, FCCS filed motions for permanent custody of the children alleging the children could not or should not be placed with appellant and that the

children have been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. The guardian ad litem, Stephanie Mingo-Miles ("GAL"), filed her report on April 2, 2008, recommending that the motion for permanent custody be granted or in the alternative that continued temporary custody be granted to FCCS. Hearings on the motions for permanent custody began on April 8, 2009. On May 29, 2009, the trial court granted FCCS's motion for permanent custody of W.D. and A.D. This appeal followed, and appellant brings the following three assignments of error for our review:

> First Assignment of Error: The judgment of the trial court must be reversed as the record does not include a finding that Franklin County Children Services, as the agency seeking permanent custody, made reasonable efforts to reunify the family as required by In re C.F., 113 Ohio St.3d 73, 2007-Ohio-1104.
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> Second Assignment of Error: Ordering termination of parental rights on the sole basis that children have been in temporary custody "twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999" creates an unconstitutional presumption of parental unfitness.
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> Third Assignment of Error: The trial court erroneously granted Franklin County Children Services' motion for permanent custody of A.M.D. and W.D.

{¶5} In her first assignment of error, appellant argues the trial court's judgment must be reversed because the record does not contain a finding that FCCS made reasonable efforts to reunify the family as required by *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104. Because the record is allegedly devoid of such a finding, appellant contends the trial court was required to make such a determination in its judgment entry.

{¶6} The Supreme Court of Ohio held in *In re C.F.* that "except for a few narrowly defined exceptions, the state must have made reasonable efforts to reunify the family prior to the termination of parental rights." Id. at ¶21. Given that holding, the court went on to frame the issue before it as "whether, pursuant to R.C. 2151.419, the court must make a determination that such reasonable efforts have been made at the time it decides a motion for permanent custody filed pursuant to R.C. 2151.413." Id. The Supreme Court answered this question in the negative, stating that the statutes "do not mandate that the court make a determination whether reasonable efforts have been made in every R.C. 2151.413 motion for permanent custody." Id. at ¶42. Thus, appellant's argument, that the trial court's decision must be reversed because it failed to make a formal declaration on the issue of reunification efforts in the judgment entry, is not well-taken.

{¶7} The Supreme Court in *In re C.F.* did require, however, that "[i]f the agency has not established that reasonable efforts have been made prior to the hearing on a motion for permanent custody, then it must demonstrate such efforts at that time." Id. at ¶43. In the case sub judice, the record reflects the trial court made a reasonable-efforts finding when the children were committed to the temporary custody of FCCS in April 2005 and in January 2006. The trial court again made a reasonable-efforts finding in June 2006, March 2007, November 2007, and February 2008, when it extended temporary custody to FCCS.

{¶8} Further, at the permanent custody hearing, Carron Johnson, the current FCCS caseworker who was assigned this case on July 19, 2007, when A.D. and W.D were in foster care, testified that when she received the case, the goal was reunification

of the family, and case plans were developed accordingly. The goal of family reunification remained until a background check of appellant's current 67-year-old boyfriend, John Wilburn, raised concerns. According to Ms. Johnson, appellant did not believe the information from the background check. Ms. Johnson instructed appellant numerous times that Mr. Wilburn would need to complete a sexual offender evaluation before the children would be able to be returned home; however, appellant did not give Ms. Johnson any information regarding Mr. Wilburn, and an assessment was never completed.

{¶9} Thus, the agency established reasonable efforts of reunification had been made, and the matter before us does not run afoul of the principles set forth in *In re C.F.* Accordingly, appellant's first assignment of error is overruled.

{¶10} In her second assignment of error, appellant contends that ordering a termination of parental rights on the basis of R.C. 2151.414(B)(1)(d) creates an unconstitutional presumption of parental unfitness.

{¶11} Initially, we note that appellant failed to raise this argument in the trial court. The failure to raise at the trial court level the constitutionality of a statute or its application, when the issue is apparent at the time of trial, waives the issue and deviates from this state's orderly procedure. The issue therefore need not be heard for the first time on appeal. *In re D.T.* (May 6, 2008), 10th Dist. No. 07AP-853, ¶19, citing *In re N.W.,* 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. This court has specifically applied this waiver doctrine to the same argument appellant raises here. Id.

{¶12} However, as this court also stated in *In re D.T.*, "[n]otwithstanding waiver, this court also addressed the issue: whether R.C. 2151.414(B)(1)(d) is unconstitutional by

creating an irrebuttable presumption of parental unfitness. On each occasion, our review found the argument to lack merit." Id. at ¶20. See also *In re N.W.* at ¶38, and the cases cited therein.

{¶13} Accordingly, appellant's second assignment of error is overruled.

{¶14} In her final assignment of error, appellant contends the trial court erroneously granted permanent custody to FCCS. Appellant proposes under this assigned error that we apply the standard of review used in criminal cases. We decline, as will be established infra, the standard of review for permanent custody cases is well-established in this jurisdiction.

{¶15} Parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, 2060. The Supreme Court of Ohio has recognized the essential and basic rights of a parent to raise his or her child. *In re Murray* (1990), 52 Ohio St.3d 155, 157; *In re Hayes* (1997), 79 Ohio St.3d 46. However, such right is not absolute, and the government has broad authority to intervene to protect children from abuse and neglect. *In re C.F.* at ¶28, citing R.C. 2151.01.

{¶16} In order to terminate parental rights, the movant must prove, by clear and convincing evidence, one of the four factors enumerated in R.C. 2151.414(B)(1) and that the child's best interest is served by a grant of permanent custody to FCCS. *In re M.E.V.*, 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶9, citing *In re M.B*., 10th Dist. No. 04AP-755, 2005-Ohio-986. Clear and convincing evidence requires that the proof " 'produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *In re Estep* (Feb. 8, 2001), 10th Dist. No. 00AP-623, quoting *In the Matter*

of Coffman (Sept. 7, 2000), 10th Dist. No. 99AP-1376, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶28, discretionary appeal not allowed, 103 Ohio St.3d 1429, 2004-Ohio-4524. Judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. Id.; *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, paragraph one of the syllabus.

{¶17} The findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *In re Brown* (1994), 98 Ohio App.3d 337, 342; *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944. Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. "[I]f the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment." Id.

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

> (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:
>
> (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 [2151.41.3] 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.
>
> (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 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 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

{¶19} Here it is undisputed the elements of R.C. 2151.414(B)(1)(d) have been met as the children had been in the temporary custody of FCCS for the requisite time period. Thus, the court's analysis does not focus upon whether the children can or should be placed with either parent within a reasonable time but, rather, whether permanent placement was in the children's best interest. *In re M.E.V.* at ¶12, citing *In re A.L.*, 10th Dist. No. 07AP-638, 2008-Ohio-800; *In re Brown*, 10th Dist. No. 04AP-169, 2004-Ohio-4044.

{¶20} To determine whether an award of permanent custody is in the child's best interest, the trial court is required to 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 [2151.41.3] 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.

R.C. 2151.414(D)(1).

{¶21} As to the fifth factor listed above, the factors set forth in R.C. 2151.414(E)(7) through (11) include: (1) whether the parents have been convicted of or pled guilty to various crimes; (2) whether medical treatment or food has been withheld from the child; (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse; (4) whether the parent has abandoned the child; and (5)

whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶22} At the time of the hearing, A.D. was eleven years old and W.D. was ten years old. The trial court interviewed each child individually in chambers to ascertain the children's wishes. A.D. was adamant that she wanted to live with her foster parents. When asked if she understood that if that happened she may never see her biological parents again, A.D. responded, "that's fine with me." (Apr. 8, 2009 Tr. 43.) A.D. explained she felt safe and protected with her foster parents and that she always had plenty to eat unlike when she was with her mother who would not protect her and not provide her with food.

{¶23} W.D. was less strong in his responses to the trial court. W.D. testified that he liked "pretty much everything" about living with his foster parents and that he does not remember living with appellant. W.D. explained he wanted to live with his foster parents because they fed him and gave him something to drink. However, though he did not want to live with her, W.D. stated he did want to continue to visit appellant.

{¶24} Though FCCS's involvement with W.D. and A.D. began in 2004, appellant and her other children were the subjects of cases with FCCS beginning in 1998. When this case began in 2004, A.D. was missing school and reported as exhibiting strange behavior in school. W.D. was five years old at that time and delayed, as he was not potty trained and could not recognize shapes, colors, or words. Though there were continued reports of the father continuing to drink alcohol and on occasion be physically abusive to A.D., the children remained in the home under the protective supervision of FCCS. However, after A.D. alleged sexual abuse by her father and a physical examination at

Children's Hospital determined A.D.'s physical condition was consistent with repeated sexual abuse, temporary custody was granted to FCCS in January 2006, and appellant was granted only supervised visitation.

{¶25} Shayla Cogswell, appellant's daughter, testified she was removed from appellant's home in 2005 with A.D. and W.D. because "it was dangerous to live in that home and [they] were being neglected." (Apr. 9, 2009 Tr. 99.) According to Shayla, A.D. and W.D.'s father would get drunk and start fights with Shayla on a daily basis. Though appellant asked the father to stop, Shayla described that he would not, and appellant did nothing additional to try and protect the children. Shayla testified she has no relationship with appellant and refers to her foster parents as "mom" and "dad" and goes to them for emotional support.

{¶26} Karen McDowell is the foster mother for A.D. and W.D., as well as four other foster children. When Ms. McDowell first received W.D., he was five years old, not potty trained, had lice, was hungry, could not catch a ball or say his ABC's, recognize colors, or perform basic personal hygiene such as brushing his teeth, combing his hair, dressing or bathing himself. A.D. was six years old at the time and, like W.D., had head lice, ill-fitting clothes, and was hungry. Though A.D. could dress herself, she did not bathe herself, nor was she able to properly brush her teeth. A.D. knew her alphabet, numbers from one to ten, and primary colors, but was unable to speak in complete sentences. Both children were behind on their immunizations and both were underweight.

{¶27} Now, however, after having been with her for approximately five years, Ms. McDowell described A.D. as acting "like an 11 year old" who is happy and doing very well in school. According to Ms. McDowell, W.D. "has come a great, great distance" as he

takes part in conversations, plays football, rides a bike and is a very happy child. (Apr. 9, 2009 Tr. 65.) Ms. McDowell testified that appellant had been "pretty consistent" with her weekly visits with the children until a few weeks prior to trial. However, at a number of these visits appellant was not teaching the children appropriate behaviors or interacting with them and instead was playing music or playing on her cell phone.

{¶28} Stacey Jordan, the FCCS caseworker assigned to this case from 2003 until 2006, stated the referral came for physical abuse, child endangerment, and for A.D. not being enrolled in school. A case plan was developed to engage the family in the services of FCCS. During the time she had the case, Ms. Jordan described appellant as "able but not willing" to protect the children. (Apr. 9, 2009 Tr. 190.)

{¶29} Emily Joseph, counselor with Mid-Ohio Psychological Services, has been counseling A.D. on a weekly basis since March 2008 when A.D. appeared with a history of physical and sexual abuse. According to Ms. Joseph, A.D. described both physical and sexual abuse by her father. A.D. has also expressed a fear of not being protected if she returned home, but has expressed no fears with respect to her foster home. A.D. has expressed that she loves appellant very much and has vacillated at times about her desire to return home, but she has and continues to express concern that she would not be kept safe if she returned home.

{¶30} Carron Johnson, the current FCCS caseworker who was assigned this case on July 19, 2007 testified as well. According to Ms. Johnson, appellant has been consistent with her weekly visits, as she attended 84 out of 104 visits. Appellant did complete parenting classes in April 2007 and domestic violence classes in May 2007. Appellant failed, however, to maintain communication with school personnel and has

never inquired of Ms. Johnson about the children's school performance. Appellant also failed to attend Al-Anon meetings and failed to engage in family counseling. According to Ms. Johnson, there is a bond between appellant and the children as they recognize appellant as their mother, love her, and seem to enjoy visits with her. In Ms. Johnson's opinion though, W.D. is also "very bonded" to his foster dad, and A.D. is very close and has a "pretty good" bond with her foster mom. Despite the efforts appellant has made by attending visitation and completing several aspects of the case plan, Ms. Johnson still recommended that FCCS's motion for permanent custody be granted. Ms. Johnson's explanation for her concerns were explained on cross-examination as follows:

> I don't think that it's the fact that it's not completed. I think that she's not demonstrating some of the programs that she did complete. Some of those – she's not demonstrating some of those skills and that's where the concern lies. And actually when we filed our extension, it wasn't – it was the fact of Mr. Wilburn's G.S.I. coming back from the background check, and then also, addition to, the family counseling not being in place.

(May 6, 2009 Tr. 92.)

{¶31} The GAL, appointed to this case in June 2007, testified that A.D. and W.D. appear "to be very comfortable in that home in their current foster placement." (May 10, 2009 Tr. 10.) The children appear very happy and very well-adjusted. Further, the GAL testified both children have expressed their desire to remain in the current placement, and they feel very cared for and loved. According to the GAL, in only one out of 15 to 18 conversations about their wishes did either A.D. or W.D. indicate a desire to return to appellant. The GAL testified she has not observed anything to indicate the children are bonded to appellant. Specifically, the GAL stated:

> Well, I would certainly be concerned whether as to their security and whether or not they would be protected. I'm certainly clear that the wishes of the children are to remain in their current placement and so I would be concerned about their emotional well being. [A.D.] has been very vocal and very, very emphatic that she wishes to be heard on this matter and she wishes for her desires to be considered. So I would be concerned whether or not they are secure in [appellant's] care and in her home and certainly would be concerned just the long term affect on [A.D. and W.D.] if they are returned to that home.

(May 7, 2009 Tr. 21.)

{¶32} Thus, the GAL recommended that FCCS's motion for permanent custody be granted and the children be allowed to stay in their current placement.

{¶33} As for appellant, she was unemployed at the time of trial. Appellant testified she pays her financial responsibilities through assistance programs and Mr. Wilburn who works part time. According to appellant, Mr. Wilburn is her "main support." (Apr. 9, 2009 Tr. 90.)

{¶34} After considering the relevant factors of R.C. 2151.414, the trial court found that it was in the children's best interest to permanently commit them to FCCS's custody. The record, including the testimony of the caseworkers and the GAL, supports the trial court's determination. The trial court also concluded the children's need for legally secure placement could not be achieved without awarding custody to FCCS. The trial court further found that the bond A.D. and W.D. have with their foster parents is stronger than that with appellant. Further, the children have expressed their preference to stay with their foster parents and not return to appellant. The record makes clear that appellant failed to fully complete the case plan provided by FCCS and failed to meet the children's basic needs. Further, " 'The discretion which the juvenile court enjoys in determining

whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceedings and the impact the court's determination will have on the lives of the parties concerned.' " *In re A.D.*, 10th Dist. No. 08AP-238, 2008-0hio-3626, ¶8, quoting *In re Hogle*, supra. Here, we conclude that the manifest weight of the evidence justifies the trial court's best-interest determination.

{¶35} In sum, the trial court concluded that FCCS proved by clear and convincing evidence that A.D. and W.D. have been in FCCS's custody for over 12 months of a consecutive 22-month period, and it is in the children's best interest to grant FCCS permanent custody. Because competent, credible evidence supports this determination, we conclude that the trial court did not err in granting FCCS's motion for permanent custody. Accordingly, we overrule appellant's third assignment of error.

{¶36} For the forgoing reasons, appellant's three assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch are hereby affirmed.

Judgments affirmed.

KLATT and CONNOR, JJ., concur.

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