[Cite as *In re M.P.*, 2010-Ohio-5877.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
M. & N.P.,	:	No. 10AP-478 (C.P.C. No. 02JU-15242)
(D.P.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on December 2, 2010

Robert J. McClaren, for appellee Franklin County Children Services.

Yeura R. Venters, Public Defender, and *Allen V. Adair,* guardian ad litem.

David A. Sams, for appellant.

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

BRYANT, J.

{¶1} Appellant, D.P, mother of M.P. and N.P., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, granting the permanent custody motion of appellee, Franklin County Children Services ("FCCS"), and terminating appellant's parental rights regarding M.P. and N.P. ("the children"). Appellant assigns a single error:

THE JUVENILE COURT ERRED IN GRANTING PERMANENT CUSTODY TO FRANKLIN COUNTY CHILDREN SERVICES

Because the trial court did not err in granting FCCS' motion for permanent custody and terminating appellant's parental rights, we affirm.

I. Facts and Procedural History

{¶2} On October 18, 2002, FCCS filed a complaint that alleged the children were neglected and dependent children, resulting in the children's removal from appellant's home and FCCS' obtaining temporary custody of the children. In October of 2004, the trial court awarded legal custody of the children to a maternal aunt and uncle who relinquished legal custody in July 2005. FCCS once again obtained temporary custody of the children.

{¶3} FCCS filed a motion for permanent custody on May 18, 2007 but subsequently amended the motion to one requesting a Planned Permanent Living Arrangement ("PPLA") pursuant to R.C. 2151.353(A)(5)(b). The trial court granted the motion for a PPLA. FCCS, however, filed a second motion on May 21, 2009, again seeking permanent custody of the children.

{¶4} The trial court conducted a trial on the motion over the three-day period from March 8 to March 10, 2010 during which the Franklin County Public Defender served as guardian ad litem for the children, while separate counsel represented the children. At the hearing, FCCS presented testimony from Lisa Chakroff, a counselor in the treatment foster care department at Star Commonwealth Hannah Neil Center for Children. The trial court qualified Chakroff as an expert in the field of counseling and child therapy.

{¶5} Chakroff became involved with the children in June 2007 when their mental health and behavioral needs became more pronounced. She treated the children for attention issues, inability to focus, opposition and defiance to authority, unwillingness to follow directions, and verbal and physical aggression toward one another and peers. The diagnosis for both children included oppositional defiance combined with attention deficit hyperactivity disorder, sexual abuse victimization, and parent-child relationship difficulties. Beginning in 2007, the children were placed together in a "treatment foster care home," where the foster parents received additional training in dealing with children with behavioral issues. At the time of the hearing, the children remained in that same foster home.

{¶6} Each child also had an Individualized Education Plan ("IEP") at school. N.P.'s plan focused on his "severe" emotional disturbance and the behavioral issues that accompanied it, while M.P.'s plan focused on his "cognitive delays." (Tr. Vol. I, 32.) Chakroff testified she discussed the children's special needs with appellant but appellant's response was "erratic," so that "sometimes [appellant] would comfort and nurture them" but "other times she would become hostile and volatile, yelling at them, becoming very agitated and anxious and the session had to be ended." (Tr. Vol. I, 33.) Eventually, Chakroff discontinued the counseling sessions with appellant because the children were not benefitting from them.

{¶7} Chakroff testified she saw little progress in the children until the fall of 2009. They then began to respond positively to their foster parents, and their behavior in the home stabilized, even though they continued to act out at school. The children were on "a

significant amount of medication" and required someone to manage and dispense it for them. (Tr. Vol. I, 38.)

{¶8} In Chakroff's opinion, the children had "a connection" to appellant and recognized she is their mother, but they did not have a connection "in terms of day-to-day interactions and in a sense that she can meet their emotional and behavior needs." (Tr. Vol. I, 38-39.) Chakroff did not believe appellant could meet the children's day-to-day needs because appellant was inconsistent with her attendance and "erratic in her ability to understand and hear what they say when they verbalize concerns or when behavioral issues arise." (Tr. Vol. I, 39.) Chakroff recommended permanency for the children and supported FCCS' motion for permanent custody.

{¶9} FCCS also presented the testimony of the various caseworkers assigned to the children's case. Tia Goodlett, the FCCS caseworker between October 27, 2006 and September 11, 2009, testified FCCS provided appellant with a case plan to reunify appellant with her children. Goodlett explained the case plan objectives to appellant on various occasions, including the need to complete random drug screens and maintain sobriety, complete a psychological evaluation and comply with the recommendations, participate in a parenting education program, and maintain housing and income sufficient for the basic needs of her family.

{¶10} According to Goodlett, appellant's compliance with the case plan was lacking. While appellant completed parenting classes in 2008, appellant did not comply with the recommendations from her psychological evaluation, completed only eight of 32 drug screens, did not comply with drug treatment, and failed to complete individual counseling despite Goodlett's referrals to various counseling providers. As late as June 2,

2009, appellant tested positive for marijuana. Goodlett further testified appellant not only missed numerous scheduled visits with her children but did not visit the children at all from July 2005 through July 2006. Nor did appellant attend any meetings regarding the children's medication, their behavioral issues, or the IEP's at the children's school, even though FCCS arranged for transportation for appellant to and from the meetings. Family counseling sessions ended because they were not beneficial to the children.

{¶11} According to Goodlett, she discussed adoption with the children, and they "seem[ed] eager to have permanency." (Tr. Vol. II, 53.) Goodlett did not believe appellant understood the children's problems and needs, and Goodlett supported FCCS' motion for permanent custody.

{¶12} Tuong-Vi Vo is the ongoing caseworker who received the case on August 9, 2009, after FCCS filed its permanent custody motion. Vo discussed the case plan with appellant, but appellant did not complete individual counseling, did not implement what she learned from parenting classes, and was unable to nurture and reassure the children. Vo described an incident in which appellant caused M.P. to cry when she told the children it was not her fault they could not go home. Vo described another incident in which appellant not only told M.P. she did not believe the allegations he made against her but told him he should take a lie detector test, again causing M.P. to cry.

{¶13} According to Vo, appellant continued to miss IEP meetings at the school, despite FCCS' arranging for transportation for her, and in doing so demonstrated a lack of understanding of the children's special needs. Vo did not feel visitation could be increased with appellant or the children could be returned to appellant's care. Ultimately, Vo testified she favors adoption for the children after FCCS obtains permanent custody,

because no relative is available for placement and appellant is not "able to meet their needs." (Tr. Vol. II, 104.)

{¶14} The children's lay guardian ad litem since 2002, Elizabeth Jukubiak, testified that when she first met the children in appellant's home, "they were some of the most out of control kids" she had ever seen. (Tr. Vol. II, 119.) Jukubiak stated she has "seen a remarkable growth in the children" that she attributed to the "enormous structure" provided by their foster home, as well as the consistent medication and counseling provided since FCCS opened their case. (Tr. Vol. III, 9.) Jukubiak also described a visit on October 5, 2009 in which "it was sort of startling" to see "how much the children had gained insight," with M.P. in particular "coming to grips in his own mind with the fact that his mother wasn't able to parent him." (Tr. Vol. II, 123.) During that same visit, appellant demonstrated an inability to understand her son's emotional state.

{¶15} Jukubiak testified the children's wishes have changed over time. Jukubiak testified the children have a bond with their mother but it is a dysfunctional one. While they at first may have wished for reunification, by the time of the hearing they had "finally come to terms with the idea of not being reunified with their mom" and "they are ready to move on" and "very much wish to have a forever family." (Tr. Vol. III, 17.) She stated the children understood the difference between their foster home and a forever family. As a result, Jukubiak supported FCCS' motion for permanent custody.

{¶16} Peter Chimbidis, the attorney guardian ad litem, testified that returning the children to appellant would be "absolutely unacceptable." (Tr. Vol. III, 38.) He stated the children want the motion for permanent custody to be granted so they may be placed for

adoption. Chimbidis recommended the trial court grant FCCS' motion for permanent custody.

{¶17} Appellant also testified at the hearing. Much of her testimony was confusing, was hard to follow, and contained many statements stricken as non-responsive to the question. Appellant, however, testified the children were removed from her care in 2002 when one of her older children brought marijuana to school. At the time of the hearing, appellant was not employed and her only income was Social Security in the amount of $675 per month and an additional $200 per month in food stamps.

{¶18} When asked about her children's special needs, appellant testified that all her children needed to address their special needs was "comfort, love." (Tr. Vol. I, 96.) She testified she understood the children have IEPs to control "their anger and their temper and their emotions." (Tr. Vol. I, 99.) Appellant, however, stated the medication given to her children made them look like zombies, though she did not know what kind of medicine they were taking. She also acknowledged that her children had significant behavioral issues and needs with which she was not familiar. Appellant also repeatedly alleged she had completed various portions of the case plan but that someone lost her paperwork. Appellant nonetheless agreed she did not complete enough of the case plan to allow her children to return home.

{¶19} The trial court conducted separate in camera interviews with the children to ascertain their wishes. The court reported the children wanted to be adopted.

{¶20} Following the hearing, the trial court issued a decision and judgment entry filed on April 19, 2010. The trial court concluded FCCS demonstrated, by clear and convincing evidence, "that granting permanent custody of [the children] to the agency is

warranted." (Decision and Entry, 5.) Further, the trial court determined "it is in the best interest of [the children] to be placed under the care of FCCS permanently, for the purpose of adoption." (Decision and Entry, 5.) The trial court thus granted FCCS' motion for permanent custody and terminated any and all of appellant's parental rights and responsibilities. Appellant timely appeals.

II. Analysis

{¶21} In her sole assignment of error, appellant asserts the trial court erred in granting permanent custody of the children to FCCS. More specifically, appellant asserts the trial court erred in converting a PPLA into permanent custody. Appellant further contends the trial court erred in finding permanent custody to be in the best interest of the children.

A. Permanent Custody after PPLA

{¶22} Appellant first asserts the trial court erred in converting the children's living arrangement from a PPLA to permanent custody with FCCS when the status quo served the goals of R.C. Chapter 2151. Appellant essentially argues the pertinent statutes evidence a statutory preference for a PPLA over permanent custody. To support her argument, appellant points to the language of R.C. 2151.414(D)(2)(c) which provides "permanent custody is in the best interest of the child" if "[t]he child does not meet the requirements for a [PPLA] pursuant to" R.C. 2151.353(A)(5). Based on that language, appellant argues the corollary necessarily must be true: if a child qualifies for a PPLA, then permanent custody is not in the child's best interest.

{¶23} Initially, appellant cites no authority for her contention that a child who qualifies for PPLA cannot eventually qualify for permanent custody. Secondly, clear

statutory language undercuts appellant's argument. R.C. 2151.413(C) expressly provides that "[a] public children services agency or private child placing agency that, pursuant to an order of disposition" under R.C. 2151.353(A)(5), "places a child in a [PPLA] may file a motion in the court that made the disposition of the child requesting permanent custody of the child." The juvenile court further maintains continuing jurisdiction pursuant to R.C. 2151.353(E)(1) over "any child for whom the court issues an order of disposition" under R.C. 2151.353(A) or 2151.414 or 2151.415. Id. Lastly, under R.C. 2151.353(E)(2), "[a]ny public children services agency * * *, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition." Id. The statutory provisions thus establish FCCS could move for permanent custody even after the children were placed in a PPLA.

{¶24} Ohio courts also recognize the evolving nature of such custody cases, granting motions for permanent custody where the children were previously in a PPLA. See, e.g., *In re K.R.*, 5th Dist. No. 2009 CA 00061, 2009-Ohio-4350 (affirming trial court's grant of permanent custody where agency filed motion for permanent custody while child was in a PPLA); *In re Hess*, 5th Dist. No. 2007CA00262, 2008-Ohio-1920 (affirming trial court's grant of permanent custody to agency where child had previously been in a PPLA); *In re J.I.*, 12th Dist. No. CA2005-05-008, 2005-Ohio-4920, ¶15 (affirming trial court's grant of permanent custody to agency where child was in a PPLA at time of motion for permanent custody, and noting "[w]hether a child is in a PPLA or in an agency's temporary custody, the agency can institute a permanent-custody action under R.C. 2151.413"). Thus, appellant's argument that the trial court acted improperly in converting the children's PPLA status to permanent custody is without merit.

B. Weight of the Evidence

{¶25} Appellant next argues the trial court erred in granting FFCS' motion for permanent custody because "FCCS did not use [its] best efforts to maintain the status quo." (Appellant's brief, 5.) Appellant essentially challenges the manifest weight of the evidence.

{¶26} In order to terminate appellant's rights, FCCS was required to demonstrate by clear and convincing evidence that (1) one of the four factors enumerated in R.C. 2151.414(B)(1) applies and (2) termination of parental rights is in the children's best interests. *In re Gomer*, 3d Dist. No. 16-03-19, 2004-Ohio-1723, ¶11. Clear and convincing evidence is the 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. *In re Abram*, 10th Dist. No. 04AP-220, 2004-Ohio-5435, ¶14. It does not mean that the evidence must be clear and unequivocal and does not require proof beyond a reasonable doubt. Id.

{¶27} On appellate review, permanent custody motions supported by the requisite evidence going to all the essential elements of the case will not be reversed as against the manifest weight of the evidence. *In re Brown*, 10th Dist. No. 03AP-969, 2004-Ohio-3314, ¶11, citing *In re Brofford* (1992), 83 Ohio App.3d 869, 876-77; *Abram* at ¶9. Further, in determining whether a judgment is against the manifest weight of the evidence, the reviewing court is guided by the presumption that the findings of the trial court are correct. *Brofford* at 876, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "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." *Seasons Coal Co.* at 80; *Abram* at ¶9.

{¶28} R.C. 2151.414(B) provides that a court may grant permanent custody of a child to the movant if, as relevant here, one of two circumstances exists. Initially, under R.C. 2151.414(B)(1)(b), FCCS must demonstrate the children are abandoned. Pursuant to R.C. 2151.011(C), a child is presumed abandoned if the parents "failed to visit or maintain contact with the child for more than ninety days, regardless of whether [they] resume contact with the child after the period of ninety days." Alternatively, under R.C. 2151.414(B)(1)(d), the agency may prove "[t]he child[ren] ha[ve] 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."

{¶29} Here, the trial court found the children had been abandoned within the meaning of R.C. 2151.011(C). Evidence at the hearing demonstrated appellant failed to visit with her children between July 2005 and July 2006. None of the putative fathers had contact with the children since July 2005. The evidence thus supports a conclusion the children were abandoned under R.C. 2151.414(B)(1)(b).

{¶30} The trial court also found FCCS retained temporary custody of the children for a continuous period of greater than 22 months. The evidence at the hearing established that, following termination of the relative placement in 2005, the children were with their then current foster family for almost three consecutive years. No relatives were able to take permanent custody of the children. The evidence at the hearing thus supported the necessary finding under R.C. 2151.414(B)(1)(d).

{¶31} Because one or more of the provisions of R.C. 2151.414(B)(1) apply to the children, the trial court was required to determine whether termination of parental rights was in the best interests of the children. In determining the best interest of a child at a permanent custody hearing, R.C. 2151.414(D)(1) mandates the trial court to "consider all relevant factors," including, but not limited to: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents, 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 guardian ad litem, with due regard for the child's maturity; (3) the custodial history of the child; (4) the child's need for legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; and (5) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply in relation to the parents and child. See R.C. 2151.414(D)(1)(a) through (e).

{¶32} The trial court specifically addressed each of the factors set forth in R.C. 2151.414(D)(1)(a) through (e) in concluding permanent custody to FCCS was in the best interest of the children. The trial court concluded that, despite the diligent efforts of FCCS to assist in reuniting the children with appellant, appellant "is still unable to successfully parent the children and provide a safe and healthy living environment." (Decision and Entry, 4-5.) The record supports that conclusion.

{¶33} Evidence at the hearing established the children are extremely bonded to one another and, although they also have a bond with their mother, they recognize she is unable to care for them on a day-to-day basis. They also are bonded with their foster family, expressed their wishes to be adopted, and demonstrated an understanding of the significance of the decision. The trial court also noted the children, ages 10 and 12 at the

hearing, had not lived with appellant since 2002, or most of their lives. Ample evidence in the record indicates the children's need for permanency.

{¶34} Appellant nonetheless suggests the trial court employed the incorrect statute in assessing the children's best interests. Appellant asserts the trial court should have conducted the best interest analysis under R.C. 2151.414(D)(2). Appellant, however, points to no statutory language or cases that require the trial court to do so.

{¶35} R.C. 2151.414(D)(2) sets forth the circumstances under which a trial court is required to grant permanent custody, while the court employing the factors in R.C. 2151.414(D)(1) considers them to determine whether the best interests of the children are served in granting the permanent custody motion. FCCS did not contend the trial court was required to grant FCCS permanent custody of the children; instead, it asserted that, when the factors enumerated under R.C. 2151.414(D)(1) are properly weighed, permanent custody was in the children's best interest. The trial court's analysis under R.C. 2151.414(D)(1) is appropriate and sufficient to support the trial court's conclusion that granting FCCS' motion for permanent custody was in the best interest of the children.

{¶36} Based on the foregoing, we overrule appellant's single assignment of error.

III. Disposition

{¶37} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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