

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: :
[C.N.], : No. 15AP-67
(C.P.C. No. 11JU-05-06891)
: (REGULAR CALENDAR)
([L.N.A.], :
Appellant). :

D E C I S I O N

Rendered on June 25, 2015

Robert J. McClaren, for Franklin County Children Services.

Paul Giorgianni, for appellant.

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

BROWN, P.J.

{¶ 1} L.N.A. ("father"), appellant, appeals a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court granted the motion of Franklin County Children Services ("FCCS"), appellee, for permanent custody with regard to C.N., father's biological daughter.

{¶ 2} In 2005, father and C.N.'s mother, S.A. ("mother"), began dating. S.A. discovered she was pregnant after the couple ended their relationship, and C.N. was born September 22, 2006. Father married another woman in 2007. When C.N. was approximately four years old, mother began allowing men to sexually abuse her in exchange for alcohol and drugs.

{¶ 3} On May 18, 2011, FCCS filed a complaint alleging that C.N. was neglected and dependent, and the court adjudicated her as such in August 2011. Mother made no

efforts to complete the case plan put in place by FCCS. Father has made at least some efforts, which we will detail in our discussion of his assignment of error.

{¶ 4} On May 16, 2013, FCCS filed a motion for permanent custody. The court held a permanent custody hearing and conducted an in camera interview of C.N. in November 2014.

{¶ 5} On January 22, 2015, the court issued a judgment entry granting FCCS's motion for permanent custody. Father appeals the judgment of the trial court, asserting the following assignment of error:

With respect to both sufficiency of the evidence and the manifest weight of the evidence, FCCS failed to prove that terminating Appellant's parental rights is in C.N.'s best interest.

{¶ 6} Father argues in his assignment of error that the trial court's decision regarding the best interest factors in R.C. 2151.414(D) was not supported by sufficient evidence and was against the manifest weight of the evidence. R.C. 2151.414 governs the procedure for granting permanent custody of a child to an agency such as FCCS. Under R.C. 2151.414(B)(1), a trial court may grant permanent custody to an agency if the court determines, by clear and convincing evidence, that: (1) it is in the best interest of the child, and (2) one of the situations set forth in R.C. 2151.414(B)(1)(a) through (d) applies. Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 42, citing *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 7} In determining whether the trial court's ruling on the permanent custody motion is against the manifest weight of the evidence, we must consider whether the evidence on each element of the agency's case satisfied or failed to satisfy the burden of persuasion, i.e., whether clear and convincing evidence supports each element. *See Sparre v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-381, 2013-Ohio-4153, ¶ 11, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 19. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not

be reversed by a reviewing court as being against the manifest weight of the evidence. *Id.* at ¶ 10, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. "The phrase "some competent, credible evidence" * * * presupposes evidentiary weighing by an appellate court to determine whether the evidence *is* competent and credible." (Emphasis sic.) *Id.*, quoting *Eastley* at ¶ 15, quoting *C.E. Morris Co.* at 279.

{¶ 8} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on [the evidence's] effect in inducing belief.' " (Emphasis deleted.) *Eastley* at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), citing Black's Law Dictionary 1594 (6th Ed.1990). "Thus, in reviewing a judgment under the manifest-weight standard, a court of appeals weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way." *Sparre* at ¶ 10, citing *Eastley* at ¶ 20.

{¶ 9} "In undertaking this limited reweighing of the evidence, however, we are guided by the presumption that the factual findings of the trial court were correct." *Id.* at ¶ 12. "Accordingly, the weight to be given the evidence and the credibility of the witnesses are primarily questions to be answered by the trier of fact." *Id.*, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The rationale for this deference is the trier of fact is in the best position to view witnesses and observe their demeanor, voice inflections, and gestures. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Moreover, though sufficiency and manifest weight are different legal concepts, a finding that a judgment is supported by the manifest weight of the evidence necessarily includes a finding that sufficient evidence supports the judgment. *See State v. Howze*, 10th Dist. No. 13AP-386, 2013-Ohio-4800, ¶ 10.

{¶ 10} In the present case, father does not dispute that the trial court correctly found clear and convincing evidence establishes the situation described in R.C. 2151.414(B)(1)(d) supports the permanent custody award. In other words, the evidence shows the child was in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(d).

{¶ 11} Once the trial court finds that one of the circumstances in R.C. 2151.414(B)(1)(a) through (d) applies, the trial court then must determine whether a grant of permanent custody is in the best interest of the child. Here, father contests only the trial court's findings regarding the best interest factors. R.C. 2151.414(D) provides that, in determining the best interest of the child, the 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 caregivers, 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 ("GAL"), with due regard for the maturity of the child, (3) 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 12 or more months of a consecutive 22-month period ending on or after March 18, 1999, (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 to the agency, and (5) whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child. 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.

{¶ 12} In his brief, father does not specifically identify which factors he contests but presents several arguments regarding the trial court's findings on certain issues. However, father's arguments generally relate to only two of the best interest factors, R.C. 2151.414(D)(1)(a) and (b). With regard to R.C. 2151.414(D)(1)(a), which looks at the child's interaction and interrelationship with others, the trial court found that the child had no bond with father and was very bonded with her foster parents. Father argues that the trial court's conclusion that he was unlikely to make future attempts to bond with C.N. was pure speculation. He also contends that the reason he has been unable to attend more visitations with C.N. and attend more counseling sessions with Molly May, a mental health therapist at Nationwide Children's Hospital, is that he has a full-time job and

parental responsibilities with regard to his current family. Father also argues that May never saw him and C.N. together so she should not be able to comment on their relationship.

{¶ 13} At the hearing, May testified regarding father's failure to attend counseling and his lack of bonding with C.N. When May first met father in November 2012, father did not believe C.N. had been abused. May told him that if he would like to reconsider his position, she would like to meet with him to discuss it, but he never contacted her. May met with father again in August 2013, and they agreed to continue the meeting, but he missed two appointments that month. May also testified that father lied to her about coming to her office and sitting in her waiting room in August 2013 when surveillance video showed he was never there. They met twice in September 2013 but then father missed his next three appointments. Father told May in September 2013 that he had gotten fired from his job because he had missed too much work due to visitations and counseling and that was why he had missed the counseling sessions. She also said father claimed he was calling her to schedule appointments, but she never discovered any voicemails or missed calls from him. They had no other appointments scheduled thereafter, and she did not hear from father until he showed up unexpectedly at her office in July 2014, two days before a court hearing. She scheduled an appointment with father for August 2014, and father attended five counseling sessions with her thereafter, missing one appointment due to a work conflict. May testified that, in fall 2014, father acknowledged that C.N. had been sexually abused. May said she would like to conduct family counseling with father and C.N. but cannot due to father's inconsistent contact and lack of bonding. Although May admitted that she has never seen C.N. and father together, she opined that she does not think father and C.N. are attached based upon C.N.'s comments to her. C.N. expresses anger toward her father and does not express feeling safe with him. C.N.'s discussions about father have become more negative since visitations became less frequent. May has also conducted therapy with C.N. and the foster family. May believed the foster family was supportive and understanding.

{¶ 14} Jourdan Bush, the family's caseworker, also testified as to the relationship between C.N. and father and father's failure to attend visitations. Bush stated that the only two items on father's case plan were counseling and visitation. Bush said father was very sporadic in his contacts with the agency. Father participated in 23 out of 168 possible

visits with C.N. and went several 90-day periods without visiting C.N. Bush's hope was to place C.N. with father but, after one home visit with father, C.N. refused to return because father's other kids were mean to her and the house was boring. Since July 2014, after a prior hearing was continued, father had attended 8 out of 16 visitations. At one point after July 2014, when C.N. said she did not want to visit father, father ceased visitations. This concerned Bush because it showed father was not willing to work through problems. Bush said that during visits, C.N. generally sat on father's lap and played games on his phone. The two are not bonded, and C.N. has said she does not want to visit father. Bush testified that father blames his work situation or Bush when he misses visits. However, the agency has visitations available after 5:00 p.m., the agency would have been willing to work with father if he told them he had a work conflict, and the agency has never failed to accommodate any of his conflicts. She is also still concerned that neither father nor his family members have taken the sexual abuse allegations seriously. Bush had no concerns with father's housing, employment, or finances. Bush testified that C.N. is very comfortable in the foster home. She is affectionate toward the foster parents, and they are loving toward each other. She is bonded with the foster family, and they are willing to adopt her.

{¶ 15} Jay Moreland, the GAL, testified that C.N. is bonded with her foster parents. She looks to them for support and help, and C.N. listens to them. He said he observed C.N. and father at two visitations, and they did not have a lot of interaction. Moreland's main concern in the case was father's failure to show any long-term interest in C.N. He does not think father is taking the sexual abuse allegations seriously, and he is not supporting C.N. in her treatments.

{¶ 16} Father also testified at the hearing. He said that he was at the hospital when C.N. was born and stayed at the hospital with her for three days. He cared for C.N. every weekend until she was four years old. Father testified that his contact with C.N. diminished when he got married because mother became jealous of his new wife, and mother quit letting him see C.N. in 2007. With regard to his visitations after the current case commenced, father did not agree that he had only visited C.N. 23 out of 186 scheduled visits, but he did not explain why he disagreed. He said he moved to Columbus to be closer to C.N. and was fired from two jobs because he needed to attend visitations. He testified that the visits conflicted with his work schedule, but he admitted Bush

worked with him to accommodate his schedule. His reasons for missing 8 out of 16 visitations since July 2014 were not clear. He said he loved C.N. and wanted to bond with her, but he is doing the best he can given he is trying to support his three other kids and help his pregnant wife. He initially testified that he did not have a significant bond with C.N. because she was not living with him, but later said he thought he did have a bond with her. Father said that, during visitations, C.N. is interested in playing games on his phone and not talking because she is a child and does not want to talk the whole time. Father also claimed C.N.'s desires as to custody were equivocal in that she will say to him that she loves him and wants to come home with him, but then she will say she does not want to go to his house because it is boring and there are no toys. He said C.N. has gotten mad at him for not visiting her, but he explains to her that he is busy and has responsibilities. When asked, father did not know where C.N. went to school, her teacher's name, or her doctor's name. Father said that he finally believed C.N. had been abused in 2013, yet he admitted to attending only 5 out of 79 counseling sessions after October 2013.

{¶ 17} The foregoing testimony provides clear and convincing evidence that there is little bonding between father and C.N. May, Moreland, and Bush all testified that there was little or no bonding between C.N. and father, and we have no reason to doubt their testimonies. Father provided the only evidence to support any bonding, rendering his manifest weight argument weak. Furthermore, father's opinion on bonding was equivocal, as he first testified that there was no bonding but later said that there was bonding. May, Moreland, and Bush were also concerned about father's past and future commitment to C.N. and, although father contends the trial court's conclusion that he was unlikely to make future attempts to bond with C.N. was pure speculation, his history of counseling attendance and visitations provided the trial court with support well beyond mere speculation. His abysmal visitation and counseling attendance record, as set forth by May, Moreland, and Bush, speaks to father's severe lack of commitment to C.N. As he did at trial, father asserts here that he was unable to attend more visitations and attend more counseling because he had a full-time job and parental responsibilities with regard to his current family. However, these reasons provide insufficient excuses for his patent lack of involvement and commitment. Father also admitted that FCCS was flexible in his scheduling of visitations, and Bush testified that the agency has always accommodated

father and his work schedule when father has requested a change. Although we do not necessarily question the veracity of father's claims that he was very busy with his job and family, father was aware of the importance of visitations and counseling to his bonding with and desire to gain custody of C.N., as Bush testified that the only two items on father's case plan were counseling and visitation. His infrequent and inconsistent visitations, combined with his long spans of no contact, can support no other conclusion than father was unwilling to make the sacrifices necessary to establish a meaningful relationship with C.N. Therefore, the evidence weighs more strongly in favor of granting permanent custody to FCCS with regard to R.C. 2151.414(D)(1)(a).

{¶ 18} Father's remaining arguments fall under R.C. 2151.414(D)(1)(b), which requires the court to look at the wishes of the child as expressed by the child to the court and the GAL. The trial court found that the child wished to be adopted by the foster parents. Father argues that C.N. is equivocal and has told him that she wants to live with him but then says she does not want to visit him. Father believes that C.N. is too young to make her own decision, as evidenced by her expressing differing desires.

{¶ 19} C.N. stated during her in camera interview, at which time she was eight years old, that she wanted to stay with her foster family forever because they love her, she loves them, and they take good care of her. She said she did not want to live with her father, and it was okay if she never saw him again. Moreland testified that he has discussed C.N.'s desires with her four or five times, and she has consistently told him she wants to be adopted by her foster parents. Moreland said in his report and recommendation that C.N. does not even want to visit father at the end of the case. Father testified that he did not believe C.N.'s opinion should be considered because of her indecisiveness and young age. Father testified that C.N. has told him that she loves him and wants to come home with him, but then she has also said that she does not want to go to his house because it is boring and there are no toys.

{¶ 20} R.C. 2151.414(D)(1)(b) provides that, in determining the best interest of the child, the court must consider all relevant factors, including "[t]he 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." Here, the trial court apparently believed the child was mature enough and competent to express her wishes. There is nothing in the record to refute such a conclusion. Initially, age alone is not the determining factor when deciding

whether a child is capable of expressing his or her desires pursuant to R.C. 2151.414(D)(1)(b). *See In re J.B.*, 10th Dist. No. 11AP-63, 2011-Ohio-3658, ¶ 17 (rejecting the notion that age alone is the determining factor in deciding whether a child is capable of expressing his or her desires, pursuant to R.C. 2151.414(D)(1)(b), because maturity, comprehension, and competency vary widely among those of tender years). Thus, father's unsupported contention that the court should discount C.N.'s opinion merely because she is a "child" is insufficient. The record here does not indicate that C.N. lacked an understanding of the proceedings or the ramifications of permanent custody. In the in camera interview, C.N. did not reveal any affirmative indicia of being too immature to express her desires. Moreland indicated in his report that he had spoken at length with C.N. about what permanent custody entails, and he and C.N. were in complete agreement that it was in her best interest that she be adopted by her foster family. C.N. was able to express her wishes, understood the concept of permanent custody, and demonstrated no learning or communication disabilities. *See id.* at ¶ 16 (evidence supported trial court's conclusion that child was unable to express his desires regarding custody due to his inability to understand the concept of permanent custody and inability to communicate his desires based on several learning disabilities, mental health disorders, and language delays). Therefore, we believe there was competent and credible evidence to support the trial court's conclusion that C.N. desired that permanent custody be granted and she be adopted by her foster family and that she was mature enough to express such a desire. For all the foregoing reasons, we find father's arguments without merit and overrule his assignment of error.

{¶ 21} Accordingly, father's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

KLATT and HORTON, JJ., concur.
