[Cite as *In re S.F.T.*, 2010-Ohio-3706.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN RE:	:	
		CASE NOS. CA2010-02-043
S.F.T., et al.	:	CA2010-02-044
		CA2010-02-045
	:	CA2010-02-046
	:	O P I N I O N
		8/11/2010
	:	
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. JN2007-0009, JN2007-0010, JN2007-0011, and JN2007-0012

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Traci Combs-Valerio, 240 East State Street, Trenton, Ohio 45067, for S.T.

BRESSLER, J.

{¶1} Appellant, the biological mother of C.T., G.T., S.F.T., and W.T.,[1] appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, granting

1. The children's father has not appealed the juvenile court's decision.

permanent custody of the children to the Butler County Department of Job and Family Services ("BCDJFS").

{¶2} In January 2007, the children were removed from appellant's custody and placed in the temporary custody of BCDJFS after the agency received a referral that the children were living in a home without utilities, there was very little food in the home for the children, and that appellant had a history of domestic violence and mental health issues. A case plan for reunification was implemented, which required appellant to undergo a psychiatric and psychological evaluation and follow all recommendations, participate in domestic violence classes, complete an in-home parenting program, and maintain safe and stable housing and income. Appellant completed the psychiatric and psychological evaluation, the domestic violence course, and the parenting program. Despite appellant's failure to maintain stable housing and consistently pay utility bills, the children were returned to her custody in June 2007. However, the children were again removed from her custody in February 2008 after appellant was charged with three misdemeanor counts of educational neglect of a minor and incarcerated.

{¶3} On February 19, 2008, appellant was convicted on the misdemeanor charges and sentenced to serve three consecutive six-month terms in the Butler County Jail. Following her sentencing hearing, appellant attempted to remove two of her children from school and was later charged with and convicted on one count of felony escape. Appellant was then sentenced to serve a nine-month prison term, to be served consecutively to her previous jail sentences.

{¶4} BCDJFS moved for permanent custody of the children on December 4, 2009. A series of permanent custody hearings began on August 10, 2009 and

continued on August 14, 2009 and again on October 12, 2009. Appellant appeared at the August 10 and August 14 hearing. Appellant began serving her prison term before the October 12 hearing, and filed a motion to be transported to the October hearing or in the alternative, to have her deposition taken at the expense of the state. The trial court magistrate denied appellant's motions as untimely filed and found the cost and inconvenience to the state was prohibitive. The permanent custody hearing continued with appellant's counsel present, and the trial court magistrate granted BCDJFS's motion for permanent custody. Appellant objected to the magistrate's decision and the trial court overruled the objections and adopted the magistrate's decision as its final appealable order. Appellant appeals the trial court's decision and raises two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED WHEN IT DENIED MOTHER'S MOTION TO TRANSPORT OR FOR DEPOSITION EXPENSES."

{¶7} In her first assignment of error, appellant argues the trial court erred in denying her request to be transported from prison in Marysville, Ohio to the permanent custody hearing. Further, appellant argues that the trial court erred in failing to allow her testimony to be taken by deposition.

{¶8} Initially, we note that "[t]here is no support in the Constitution or in judicial precedent for the proposition that a prisoner has an absolute due process right to attend the trial of a civil action to which he is a party. Any such right must be balanced against the state's interest in avoiding the risks and expenses of transportation." *Abuhilwa v. Board*, Pickaway App. No. 08CA3, 2008-Ohio-5326, ¶7, quoting *Mancino v. City of*

Lakewood (1987), 36 Ohio App.3d 219, 221. Moreover, "a trial court does not abuse its discretion when proceeding with a permanent custody hearing although the mother of the child is not present at the hearing because she is incarcerated." *In re Frasher* (Aug. 20, 1997), Summit App. No. 18100. See, also, *In re Smith* (Mar. 1, 1995), Summit App. No. 16778, (a parent's due process rights are not violated by the trial court's failure to have a parent returned from prison to attend a permanent custody hearing).

{¶9} "[I]n evaluating the due process right of an incarcerated parent to be present at a permanent custody hearing, Ohio courts have looked to the test established by the United States Supreme Court in *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893." *In re M.M.*, Wood App. No. WD-09-014, 2009-Ohio-3400, ¶27, citing *In re C.M.*, Summit App. Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶14. "In *Mathews*, the court recognized that '[D]ue process is flexible and calls for such procedural protections as the particular situation demands,' and established a three-part test by which to determine what process may be due in a particular case. * * * Pursuant to *Mathews*, the [parent's] due process right to be present at a permanent custody hearing is determined by balancing: (1) the private interest affected; (2) the risk of erroneous deprivation and the probable value of additional safeguards; and (3) the governmental burden of additional procedural requirements. * * * " (Internal citations omitted.) Id. Further, a parent's fundamental liberty interest in the care, custody, and maintenance of her children "does not evaporate simply because [she] has not been a model parent or lost temporary custody of the [children] to a children's services agency." *In re C.M.* at ¶15.

{¶10} As to the first criteria set forth in *Mathews*, "[i]t is well established that a

parent's right to raise a child is an essential and basic civil right." *In re Phillips*, Astabula App. No. 2005-A-0020, 2005-Ohio-3774, at ¶22, citing *In re Hayes* (1997), 79 Ohio St.3d 46, 48. A parent's right to the custody of her child has been deemed paramount, and the permanent termination of parental rights has been described as the family law equivalent of the death penalty in a criminal case. *In re G.N.*, 170 Ohio App.3d 76, 2007-Ohio-126, ¶43, citing *Hayes* at 48; and *In re Smith* (1991), 77 Ohio App.3d 1, 16.

{¶11} Next, we analyze the second factor in the *Mathews* test to determine the risk of an erroneous deprivation of appellant's private interest by her absence at the final hearing. According to the record, appellant was present at previous hearings on BCDJFS's permanent custody motion, testified at the hearing on August 10, 2009, and was represented by counsel at the hearings on October 12, 2009 and November 20, 2009. "An incarcerated parent's right to due process is not violated when the parent is represented by counsel at the hearing, a full record of the proceedings is made, and any testimony that the parent may wish to present could be offered by way of deposition." *In re P.J.*, Ashtabula App. Nos. 2008-A-0047, 2008-A-0053, 2009-Ohio-182, ¶66. While the juvenile court denied appellant's motion for the state to pay deposition expenses, appellant was not denied the opportunity to present deposition testimony, nor was her counsel denied the opportunity to proffer testimony on appellant's behalf. See, e.g., *In re Hitchcock* (June 22, 2000), Cuyahoga App. No. 76432. Further, appellant has failed to explain how she was prejudiced by her absence from these hearings. Id.

{¶12} Finally, we consider the third factor in the *Mathews* test to determine the governmental burden of additional procedural requirements. In denying appellant's motions, the juvenile court found that the burden on the state to transport appellant from

the prison in Marysville to the hearing or for a deposition is prohibitive. It is important to note that appellant did not timely file her motion in compliance with Juv.R. 18(D), which requires written motions to be served "not later than seven days before the time specified for the hearing unless a different period is fixed by rule or order of the court." While appellant filed her motion 10 days before the date of the October 12, 2009 hearing, the October hearing was merely a continuance of one of several hearings on BCDJFS's permanent custody motion, which began on August 10, 2009. Appellant's prison sentence was imposed on October 22, 2008, and was ordered to be served consecutively to her jail sentence for her misdemeanor convictions. Accordingly, appellant had notice that she would be serving a nine-month prison sentence well before the permanent custody hearings began on August 10, 2009. The government has an interest in resolving this matter in an expedited manner, as the children had been in the temporary custody of BCDJFS for a lengthy period of time. Further delay in deciding BCDJFS's permanent custody motion would not be in the best interests of these children who had already been in the temporary custody of BCDJFS for a total of approximately 26 months. See, e.g., *In re C.M.*, 2007-Ohio-3999, ¶20.

{¶13} After considering the juvenile court's analysis in view of the *Mathews* standards, we find that appellant was not deprived of any right to due process in this matter. Appellant's first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED WHEN IT GRANTED THE PERMANENT CUSTODY MOTION FILED BY THE STATE, AS IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. As an appellate court reviewing a decision granting permanent custody, we neither weigh the evidence nor assess the credibility of the witnesses, but instead determine whether there is sufficient clear and convincing evidence to support the juvenile court's decision. See *In re Dunn*, Tuscarawas App. No.2008AP030018, 2008-Ohio-3785.

{¶17} R.C. 2151.414(B)(1) requires the juvenile court to apply a two-part test when terminating parental rights and awarding permanent custody to a children services agency. Specifically, the court must find that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and, (2) any of the following apply: the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; the child is abandoned; the child is orphaned; or the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶31-36; *In re Ebenschweiger*, Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶9.

{¶18} R.C. 2151.414(D)(1) provides that in considering the best interest of a

child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶19} "(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;

{¶20} "(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;

{¶21} "(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 ending on or after March 18, 1999;

{¶22} "(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;

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

{¶24} With respect to R.C. 2151.414(D)(1)(a), the juvenile court found that the children have resided in foster care from January 10, 2007 until June 19, 2007 and again from February 19, 2008 until the date of the magistrate's decision on January 13, 2010. The court found that while the children previously lived in separate foster homes, they were moved to the same foster home on February 20, 2009. The court also found that according to Scott Halcomb, the BCDJFS caseworker, the children were happy when living with appellant during the 8-month period when they were returned to her

care, but that appellant has had no contact with the children since February 20, 2008. The court noted that the children's guardian ad litem reported that the older children have expressed a desire to remain in the custody of their foster mother and that the youngest child does not appear to remember that appellant is his mother. The court also found that appellant has other children who have also been removed from her custody and that the children subject to this appeal have had no contact with appellant's other children. In addition, the court found that the children's father has failed to appear at any of the permanent custody hearings and has had no contact with the children while they've been in foster care. Further, the court noted that no other relative has requested involvement in this case.

{¶25} With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that the guardian ad litem reported that S.F.T. wished to remain in the custody of the foster mother. In addition, the guardian ad litem recommended that the court grant BCDJFS's motion for permanent custody and on appeal joins BCDJFS in arguing that this court should affirm the trial court's decision. Additionally, we note that on appeal, the attorney for the children disagrees with the guardian ad litem, and argues that the children wish to be returned to appellant.

{¶26} With respect to R.C. 2151.414(D)(1)(c), the juvenile court found that the children have been in the temporary custody of BDCJFS from January 10, 2007 until June 19, 2007 and again from February 19, 2008 until the date of the magistrate's decision on January 13, 2010. Further, the court found that the children have been in the temporary custody of BCDJFS for 13 months of a consecutive 22-month period prior to the date BCDJFS moved for permanent custody.

{¶27} With respect to R.C. 2151.414(D)(1)(d), the juvenile court found that the children are in need of a legally secure placement as they have been in foster care for 26 months while this case has been pending. The court found that appellant has served three consecutive 180-day sentences in the Butler County Jail beginning in February 2008 and now is serving a prison sentence for a felony escape conviction and is scheduled to be released in May 2010.

{¶28} Further, the court found that prior to being incarcerated, appellant did participate in some case plan services but ultimately failed to demonstrate implementation of those services to obtain and maintain stability in her life. The court found that appellant was unable to obtain and maintain a stable residence and income and was unable to pay her utility bills. The court also noted its concern that appellant stated during her psychological evaluation that she planned to reunite with a man who allegedly physically abused her and sold drugs, although appellant disputed this statement at the hearing.

{¶29} With respect to R.C. 2151.414(D)(1)(e), the juvenile court found that pursuant to R.C. 2151.414(E)(10), both appellant and the children's father abandoned the children as both failed to have contact with the children for more than 90 days while the children were in the temporary custody of BCDJFS.

{¶30} Based on consideration of these factors, the juvenile court determined that it is in the children's best interest to grant permanent custody to the agency. Based on our review of the record, we find the court's conclusions on this finding are supported by the evidence.

{¶31} In addition to finding permanent custody was in the child's best interest,

the juvenile court examined the factors in R.C. 2151.414(E) to determine if the child "cannot be placed with either parent within a reasonable time or should not be placed with either parent." R.C. 2151.414(E) states that if the court determines, by clear and convincing evidence, one or more of the factors listed 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.

{¶32} Pursuant to R.C. 2151.414(B)(1)(b), the juvenile court found the children were abandoned. R.C. 2151.011(C) provides that a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after that period of 90 days. As discussed above, the court found both parents failed to contact the children for more than 90 days during the time the children were in the temporary custody of BCDJFS.

{¶33} Pursuant to R.C. 2151.414(B)(1)(d), the juvenile court found that the children have been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period preceding BCDJFS's motion for permanent custody. In addition, the juvenile court noted that the children have resided in the temporary custody of BCDJFS for approximately 26 months as of the date of the magistrate's opinion.

{¶34} Next, the juvenile court considered the factors in R.C. 2151.414(E), and found R.C. 2151.414(E)(1), (4) (10), and (13) applicable. R.C. 2151.414(E)(1), provides:

{¶35} "Following the placement of the child outside his 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 for a period of six months or more to substantially remedy the conditions causing the child to be placed outside his 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."

{¶36} In considering R.C. 2151.414(E)(1), the juvenile court discussed appellant's case plan requirements in participation. The court found that appellant was ordered to participate in a psychological evaluation to follow the recommendations, participate in an in-home parenting program, participate in domestic violence classes, and to maintain safe and stable housing and income. The court noted that while appellant completed two psychological evaluations and a psychological evaluation, she voluntarily discontinued the recommended counseling and prescribed medication. The court found that Dr. Bobbie Hopes, the psychologist who evaluated appellant, diagnosed appellant with antisocial personality disorder and explained that although people who suffer with this disorder can sometimes modify problematic behavior through counseling and learning new skills, their underlying values and attitudes are unlikely to change in response to counseling or punishment. The court was particularly troubled that in appellant's second psychological evaluation, she "continued to blame others for the problems that she herself caused [and that she] demonstrated no insight into her pattern of involvement with abusive men." Further, the court found that appellant's "failure to demonstrate utilization of lessons learned in case plan services does directly impact the

issue of reunification, as the risk of [appellant's] recidivism is a plausible concern considering her criminal history, her history with abusive men, and her history of unstable residences." The court did note that appellant completed a Development of Living Skills program, but failed to demonstrate that she could consistently maintain a stable residence and pay utility bills, which were some of the primary reasons BCDJFS became involved in this matter. Again, the court noted that the children's father has had no involvement in this case and has not participated in any case plan services. Based on the above findings, the court concluded that despite reasonable case planning and diligent efforts by BCDJFS, the parents have failed continuously and repeatedly to substantially remedy the conditions causing the children to be placed outside the home.

{¶37} Next, the trial court considered R.C. 2151.414(E)(4), which provides, "[t]he parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[.]" Again, the trial court then again found that the children's father failed to visit the children while they were in the temporary custody of BCDJFS.

{¶38} The trial court then considered R.C. 2151.414(E)(10), which provides, "[t]he parent has abandoned the child." As discussed above, the trial court found that both parents abandoned the children by failing to visit or maintain contact with the children for a period of 90 days.

{¶39} Also, the trial court considered R.C. 2151.414(E)(13), which provides, "[t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the

parent from providing care for the child." In considering this factor, the trial court discussed appellant's history of being incarcerated for various offenses. When the case first began, appellant was arrested on an outstanding warrant issued by a Montgomery County court and appellant served a 21-day jail term. In February 2008, appellant was sentenced to serve three 180-day jail terms for educational neglect. In August 2009, appellant began a nine-month prison sentence for a felony escape conviction. When appellant is released from prison she must address an outstanding warrant in Hamilton County. Based on this evidence, the court found that appellant's multiple and repeated incarcerations prevent her from providing care for the children.

{¶40} After reviewing the record, and considering appellant's arguments on appeal, we find that the trial court's findings are supported by clear and convincing evidence and are not against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.