

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

IN THE MATTER OF: :  
 :  
D.M., et al. : CASE NOS. CA2010-04-086  
 : CA2010-04-087  
 : CA2010-04-091  
 :  
 : OPINION  
 : 8/30/2010  
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APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. JN2007-0553

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**BRESSLER, P.J.**

{¶1} Appellants, the parents<sup>1</sup> of D.M. and C.M., appeal a decision of the Butler County Juvenile Court granting permanent custody of the two children to Butler County

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1. According to the record, the named father is the legal, but not biological father of D.M. On March 4, 2008, the court found the alleged biological father in default for failing to appear.

Children Services ("BCCS").

{¶12} D.M. and C.M., along with two younger siblings, were removed from appellants' home in October 2007. The removal occurred after an investigation of a referral to BCCS which revealed that the home was infested with bugs, a substance believed to be feces was smeared on the walls, the children were filthy, the home did not have beds for the children and the food in the home was spoiled. The children were placed with their maternal grandparents in Huber Heights, Ohio. The parents were charged with endangering children as a result of the conditions of the home and as part of a plea bargain, pled guilty to disorderly conduct. A complaint for neglect and dependency of the children was filed on October 9, 2007.

{¶13} At a hearing on the neglect and dependency complaint, the parents agreed to a finding of dependency and the neglect allegation was withdrawn. Temporary custody to the grandparents was continued. A case plan was prepared and eventually D.M. and C.M. began to have weekend visits with their parents. In February 2009, after some progress was made by the parents, D.M. and C.M. were placed in the temporary custody of their parents. The children were again removed from the home in August 2009 after a domestic violence incident between the parents.

{¶14} A motion for permanent custody was filed on August 14, 2009. A hearing was held before a magistrate who found that permanent custody of the two children should be granted to the agency. The parents filed objections to the magistrate's decision which were overruled by the trial court on March 25, 2010.

{¶15} The parents now appeal the trial court's decision to grant permanent custody of the children to BCCS. They raise two assignments of error for our review, challenging the court's decision to grant permanent custody as not being supported by

clear and convincing evidence and as being against the manifest weight of the evidence.<sup>2</sup>

{¶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. A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520.

{¶17} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶18} 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.

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2. Appellants' two assignments of error are identical, both arguing that the court erred to the prejudice of appellants by granting the motion for permanent custody. The issues presented challenge the court's finding that permanent custody is in the children's best interest as not being supported by clear and convincing evidence and challenge the best interest finding as being against the manifest weight of the evidence.

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 where the above do not apply, 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.

{¶9} As mentioned above, appellants challenge the trial court's determination that permanent custody is in the best interest of the children. 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:

{¶10} "(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;

{¶11} "(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;

{¶12} "(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;

{¶13} "(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;

{¶14} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section

apply in relation to the parents and child."

**{¶15}** With respect to R.C. 2151.414 (D)(1)(a), the juvenile court found that the children were removed from their home on October 9, 2007 and were outside of the home until February 25, 2009 when the children were placed in the temporary custody of their parents. The children were again removed from the home on August 13, 2009. The court found that during the six months that the children were returned to the parents' custody, both mother and father struggled with the behaviors of the children, both of whom have been diagnosed as having autism. Testimony at the hearing indicated that the diagnosis of autism requires more supervision on the part of the parents and there were concerns with the safety of the children and the ability of the mother to parent in light of her depression.

**{¶16}** The court further found that mother and father have problems in their own relationship as mother suffers from depression and social anxiety. The record indicates that the mother had a lack of energy, was easily overwhelmed, slept a lot and did not participate in the management of the household or children, requiring father to fill these duties as well as working a full-time, third-shift job. In August 2009, both parents were drinking and fought, resulting in the father filing a domestic violence complaint against the mother. The court further found that the children are now placed in a certified foster home where all of their needs are being met and they are adjusting well to the placement.

**{¶17}** With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that the guardian ad litem for the children recommended that the court grant the motion for permanent custody. The guardian filed a report documenting her involvement in the case and the reasons for her determination.

**{¶18}** With respect to R.C. 2151.414(D)(1)(c), the juvenile court found the children were only in the custody of the agency one day before the motion for permanent custody was filed. However, the court found that the children were placed with their grandparents and, not considering the time the children were back with their parents, they had been outside of their parents' home for 16 months at the time the motion for permanent custody was filed and 19 months at the time of the hearing.

**{¶19}** With respect to R.C. 2151.414(D)(1)(d), the juvenile court found that the evidence made it clear that there was a need for a legally secure placement for the children. The court discussed the conditions that led to the initial removal of the children from the home and that the mother reported at that time that she was "lower functioning, depressed, and that the [children's] father was an alcoholic." The court further found that five case plans were filed during the progress of the case. The initial plans required mother to participate in a psychological assessment and follow all recommendations. Father was required to participate in a psychological assessment/substance abuse assessment and follow all recommendations. Both parents were to participate in an in-home program and the Help Me Grow program and to follow all recommendations.

**{¶20}** The court noted that special emphasis was placed on budgeting and on maintaining a clean and safe environment, along with meeting the needs of the children. Services were also provided for the children in the case plan and the goal was reunification. A later case plan acknowledged that the parents were to receive two hours of unsupervised visitation and reunification remained the goal. A case plan in March 2009 acknowledged that the children were returned to the temporary custody of the parents and the services required of the parents remained the same.

**{¶21}** The trial court found that the mother participated in a psychological

assessment in two sessions which took place in November and December 2007. She was diagnosed with major depressive disorder and personality disorder. The recommendations included a psychiatric evaluation to determine whether medicine would be effective and individual counseling. The mother began individual counseling sessions in April 2008, but was discharged from treatment in May 2009 because she stopped attending sessions in February 2009. The court found that the mother missed several appointments to assess her medical needs. She finally was evaluated for medication and was prescribed Cymbalta. She was scheduled for an updated psychological evaluation on September 26, 2009, but failed to attend the appointment. The court found the mother's depression and social anxiety were significant factors affecting her ability to parent now and within the next year.

**{¶22}** The court found that the father completed his drug/alcohol assessment in November 2008 and acknowledged that he had a problem with alcohol and had three previous convictions for driving under the influence. He was diagnosed with alcohol dependence syndrome and antisocial personality disorder. Outpatient treatment was recommended. The father completed outpatient treatment in June 2008, but in July 2009 acknowledged that he had been drinking with his brother after receiving temporary custody of the children and that he had been intoxicated on earlier visits with the children. In August 2009, while the children were in the home, both parents were intoxicated and involved in a domestic violence incident.

**{¶23}** After his relapse, the father participated in a new drug and alcohol assessment and again outpatient treatment was recommended, along with twice weekly group sessions and an updated psychological evaluation. The court found that at the time of the hearing, the father was engaged in outpatient treatment and no evidence

was presented regarding a new psychological evaluation.

**{¶24}** The trial court further found that the parents completed the core program of Development of Living Skills program as required by the case plan, but were unable to complete individualized parts of the program because they moved out of Butler County. The instructor was not able to observe the children or interaction with the parents due to the fact that the parents were living in a motel at the time.

**{¶25}** The court stated that during the six months the parents had temporary custody of the children, it was observed that they had "extreme difficulty" with D.M. and C.M. The record indicates there were problems with the parents getting the children to school and to bed, behavior and listening problems, and tantrums. The Family Preservation Program provided assistance to the family in the home in order to help the parents maintain custody of the children. The instructor had 11 sessions with the parents regarding ways for the parents to deal with the behavior of their children, the mother's mental health concerns, the father's ability to parent alone, and with budgeting. The instructor indicated the parents did not successfully complete the program, which was terminated when the children were removed and that there had been no progress toward the goals.

**{¶26}** The court found that the parents have been living in the same home since July 2008. The mother has not been employed and the father has worked third shift at FedEx for the past several years. The court stated that although the family budget showed a surplus of approximately \$1,200 after paying bills, the father felt that there was insufficient money to pay their needs, but neither father nor mother pursued food stamps, WIC or other public assistance. D.M. and C.M. are each under an I.E.P. at school and the court found at their last review in September 2009 were making



significant progress toward their goals. The court also found that a child born to the parents in January 2009 was diagnosed with failure to thrive after her removal from the home.

{¶27} After discussing these facts, the trial court stated that several things "came together" which the court found supported the agency's "change of direction" and supported the need for permanent custody to be awarded to the agency. The court stated that the Family Preservation Program had just closed its case with the parents before the children's removal and had seen no progress on the primary goal of teaching the parents skills to deal with autism and special needs of the children. The mother slept through one session and the father cancelled two of the sessions.

{¶28} With regards to the father's alcohol dependence issues, he relapsed twice. The second time ended in an altercation with both parents drinking and a domestic violence incident in which the mother was arrested. Finally, the mother was not following through with making appointments for her mental health medications. The court determined that based on these findings, it was not in the children's best interest to be placed with their mother or father and that no appropriate family members or others had come forward to be considered as alternatives to permanent custody.<sup>3</sup> Therefore, permanent custody was in the children's best interest.

{¶29} Appellants argue that their interaction with the children was good and the court did not address this factor. However, while there was testimony not mentioned by the court that the parents play with the children at visits, the court did address the interaction of the parents with the children when finding that they struggled with the

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3. The record indicates that although the maternal grandparents assumed temporary custody of D.M. and C.M., and continue to have custody of the younger two siblings, they felt they were unable to care for the special needs of the two children in this case on a long-term basis.

behaviors of the children. Appellants further argue that the children were only in the custody of BCCS one day before the motion for permanent custody was filed. While the children were only in agency custody one day before the filing of the motion, the court properly considered the fact that they had been placed out of their parents' home for a considerable amount of time. While the period of time the children were with their grandparents does not count under a "12 of 22 analysis" under R.C. 2151.414(B)(1)(d), the court properly considered this fact as part of the children's custodial history.

{¶30} The parents also argue that they completed the case plan services that they could and that the mother's mental illness is better now that she is on medication. While the record shows that there was some progress toward the case plan, it also shows that much of the progress was minimal and slow to occur. The ability of the parents to safely care for children with special autism needs remained an issue. While the father followed through with treatment for his alcohol abuse, he relapsed and at the hearing stated that he does not believe he is an alcoholic. The mother failed to follow through with an evaluation for medication for her mental issues and only eventually did so after the children were removed from the home a second time. Moreover, the case plan is simply a means to a goal, not a goal in itself, so that even successful completion of a case plan does not preclude a grant of permanent custody. *In re Mraz*, Brown App. No. CA2002-05-011, 2002-Ohio-7278, ¶13. Finally, while the mother claims she is much better now that she is on medication, there was testimony to the contrary. Moreover, mother did not seek this recommended treatment until after her arrest and the permanent custody motion was filed, making the medication a recent event in a case that had been pending for a considerable amount of time.

{¶31} Accordingly, after a thorough review of the record, we find the trial court's

findings are supported by competent credible evidence. We further find that the court's determinations are not against the manifest weight of the evidence.

{¶32} Appellants' assignments of error are overruled.

{¶33} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.