[Cite as *In re J.S.E.*, 2010-Ohio-2412.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN RE:	:	**O P I N I O N**
J.S.E.	:	
J.V.E.		**CASE NOS. 2009-P-0091**
	:	**and 2009-P-0094**
	:	
	:	

Civil Appeals from the Court of Common Pleas, Juvenile Division, Case Nos. 2009 JCF 00768 and 2009 JCF 00769.

Judgment: Affirmed.

James W. Armstrong, Leipply & Armstrong, 101 Riverfront Centre, 2101 Front Street, Cuyahoga Falls, OH 44221 (For Appellant, Sarah A. Ellis).

Victor V. Vigluicci, Portage County Prosecutor and *Charmine T. Ballard,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee, Portage County Department of Job and Family Services).

Joel D. Reed, J. Reed Enterprises, L.L.C., 86 South Cleveland Avenue, Ste. B., Mogadore, OH 44260-1442 (Guardian ad litem).

Shubhra N. Agarwal, 3766 Fishcreek Road, #289, Stow, OH 44224-4379 (For Minor Child, J.S.E.).

Ralph C. Megargel, 231 South Chestnut Street, Ravenna, OH 44266 (For Minor Child, J.V.E.).

MARY JANE TRAPP, P.J.

{¶1} Mrs. Ellis seeks review of the judgment of the Portage County Court of Common Pleas, Probate/Juvenile Division, which terminated her parental rights and granted permanent custody of her two children to the Portage County Department of Job and Family Services (PCDJFS). We affirm the decision of the trial court.

{¶2} **Substantive and Procedural History**

{¶3} On November 28, 2007, Mrs. Ellis' son, J.V.E., d.o.b. August 26, 1998, and daughter, J.S.E., d.o.b. August 15, 2004, were adjudicated dependent. Mrs. Ellis retained custody of the children under a court-order of protective supervision. Accordingly, PCDJFS created a plan for the family to address the safety concerns and living conditions in the home. That same year, Mr. and Mrs. Ellis' divorce was finalized.

{¶4} In June 2008, PCDJFS amended the case plan to reflect changes made for parenting services. The children were placed in the temporary custody of the agency in September of that year, and thus, PCDJFS amended the case plan a second time in December 2008. The plan was also modified to include sexual abuse therapy and counseling for the children and Mrs. Ellis. The children revealed that J.V.E. had attempted to sexually abuse J.S.E. while the children were still residing with Mrs. Ellis. J.V.E. later repeated the behavior with another little girl in their foster home. The children were separated, and J.V.E. was placed with a different foster family, which did not have young children and could offer more therapeutic services.

{¶5} On August 3, 2009, PCDJFS filed a motion for permanent custody pursuant to R.C. 2151.413 and R.C. 2151.414, alleging that reunification with Mrs. Ellis was not possible. While the children were thriving in their new environment, Mrs. Ellis

repeatedly demonstrated that she was unable to properly care for the children and utterly failed to complete any of the case goals.

{¶6} Most fundamentally, she failed to remedy any of the conditions that caused the children to be originally moved from the home. Mrs. Ellis had no job, no housing, and ongoing issues with drug abuse. Despite her repeated attempts, Mrs. Ellis failed to complete any of the assigned parenting classes or counseling sessions. Although she would regularly attend supervised visits with the children, she needed constant redirection and support. Further, of the eleven drug screens PCDJFS requested, Mrs. Ellis completed only two; and, the most recent screen, taken in June of 2009, tested positive for methamphetamines and opiates.

{¶7} A hearing was held on September 25, 2009, during which Mr. Ellis voluntarily and permanently surrendered his parental rights. The court also appointed independent counsel for each child because the children's wishes differed from the recommendation of the guardian ad litem (GAL). Both children expressed their wish was to return to their mother, while the GAL recommended permanent placement with PCDJFS so the children could be adopted.

{¶8} Without dismissing its original motion for permanent custody, PCDJFS filed an amended motion on October 8, 2009, to reflect that the children had been in PCDJFS' custody for 12 out of 22 consecutive months. During the two-day hearing in December 2009, the trial court questioned PCDJFS in order to clarify whether it was proceeding on the original or the amended motion. PCDJFS confirmed it was pursuing the original motion and, accordingly, the court proceeded under a best interest analysis pursuant to R.C. 2151.141(B)(1)(a). The trial court considered the fact that the children

had been placed in the custody of PCDJFS for 12 out of 22 consecutive months as only one of the factors to be considered in determining the children's best interests.

{¶9} The Trial Court's Findings

{¶10} On December 11, 2009, after considering the testimony and evidence presented by PCDJFS, Mrs. Ellis, the GAL's recommendation, and the wishes of the children, the trial court issued its judgment terminating Mrs. Ellis' parental rights.

{¶11} Specifically, the court found that at the time PCDJFS filed its motion for permanent custody, the children had not been in the temporary custody of the agency for 12 or more consecutive months. Notwithstanding the reasonable case planning and diligent efforts of PCDJFS to assist Mr. and Mrs. Ellis in remedying the problems of housing, safety, and employment that caused the children to be placed outside the home, the court found that Mrs. Ellis had continuously and repeatedly failed to remedy any of the conditions or complete her case plan. After engaging in an explicit analysis of the best interest factors, the court concluded it was in both children's best interest to be placed in the permanent custody of PCDJFS for adoption and terminated Mrs. Ellis' parental rights.

{¶12} Mrs. Ellis now raises three assignments of error for our review:

{¶13} "[1.] The trial court erred by not dismissing the Motion for Permanent Custody, when the evidence showed the children had been in the temporary custody of the Portage County Department of Job and Family Services for more than twelve months at the time of the filing of the Amended Motion for Permanent Custody.

{¶14} "[2.] The trial court erred by granting Portage County Department of Job and Family Services' Motion for Permanent Custody without sufficient evidence that the children could not be placed with their Mother within a reasonable period of time.

{¶15} "[3.] The trial court abused its discretion by not permitting Mother's then pending criminal case to be adjudicated prior to conducting a hearing on Portage County Department of Job and Family Services' Motion for Permanent Custody and then granting the Motion for Permanent Custody after Mother's pending indictment was used as evidence against her."

{¶16} **Standard of Review**

{¶17} "It is well established that a parent's right to raise a child is an essential and basic civil right." *In re T.B.*, 11th Dist. No. 2008-L-055, 2008-Ohio-4415, ¶29, quoting *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, ¶22, citing *In re Hayes* (1997), 79 Ohio St.3d 46, 48. "The permanent termination of parental rights has been described as the family law equivalent of the death penalty in a criminal case." Id., quoting *Phillips*, citing *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, ¶14. See, also, *In re Smith* (1991), 77 Ohio App.3d 1, 16. Based upon these principles, the Supreme Court of Ohio has determined that a parent must be afforded every procedural and substantive protection the law allows. (Citations omitted.) Id.

{¶18} "R.C. 2151.414 sets forth the guidelines that a juvenile court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates that the juvenile court must schedule a hearing and, provide notice, upon filing of a motion for permanent custody of a child by a public child services agency or a private child placing

agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶19} "Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (1) the child is not abandoned or orphaned [or has not been in the temporary custody of a public children services agency for 12 out of 22 months], 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; (2) the child is abandoned and the parents cannot be located; (3) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (4) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶20} "Therefore, R.C. 2151.414(B) establishes a two-pronged analysis that the juvenile court must apply when ruling on a motion for permanent custody. In practice, the juvenile court will usually determine whether one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶21} "If the child is not abandoned or orphaned [or has not been in the temporary custody of a public children services agency for 12 of 22 months], then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the

juvenile court must consider all relevant evidence before making this determination. The juvenile court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the conditions are enumerated in R.C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶22} "Assuming the juvenile court ascertains that one of the four circumstances listed in R.C. 2151.414(B)(1)(a) through (d) is present, then the court proceeds to an analysis of the child's best interest. In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates that the juvenile 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 parents and 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, with due regard for the maturity of the child; (3) the custodial history of the child; and (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.

{¶23} "The juvenile court may terminate the rights of a natural parent and grant permanent custody of the child to the moving party only if it determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody to the agency that filed the motion, and that one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present. Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to

be established." Id. at ¶30-35, quoting *In re Lambert*, 11th Dist. No. 2007-G-2751, 2007-Ohio-2857, ¶70-75, quoting *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368.

{¶24} We would be remiss if we did not take this opportunity to clarify the appropriate standard of review. As was evident during oral arguments, recent case law in our district has led to some confusion. See *In re Spicuzza*, 11th Dist. Nos. 2007-L-121, 2007-L-126, 2007-L-145, and 2007-L-146, 2008-Ohio-527 (applying the same criminal manifest weight of the evidence standard of review to both a sufficiency of the evidence and manifest weight of the evidence analysis and an abuse of discretion standard to the termination of parental rights); *In re Snow*, 11th Dist. No. 2003-P-0080, 2004-Ohio-1519, ¶28 (applying an abuse of discretion standard of review).

{¶25} Thus, to clarify, the appropriate standard of review is that "we will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence." *In re T.B.* at ¶36, quoting *In re Lambert* at ¶75, citing *In re Jacobs* (Aug. 25, 2000), 11th Dist. No. 99-G-2231, 2000 Ohio App. LEXIS 3859, 8. "Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." Id. at ¶35. (Citations omitted).

{¶26} **Amended Motion for Permanent Custody**

{¶27} In her first assignment of error, Mrs. Ellis contends the trial court erred in proceeding with its determination of the children's best interests pursuant to R.C. 2151.414. Specifically, she argues that the trial court was required to use the date of

the amended motion, and thus, the motion should have been dismissed because PCDJFS did not establish that the children had not been in the temporary custody of the agency for 12 out of 22 months from the filing of the amended motion for permanent custody.

{¶28} We disagree. At the outset of the hearing, the court clarified the statutory basis upon which PCDJFS was proceeding. PCDJFS never filed a motion to dismiss the original motion. Thus, pursuant to R.C. 2151.414, not R.C. 2151.353, the court went forward and considered the length of time the children were in custody as only one factor to be considered in the best interest analysis.

{¶29} Upon similar facts, the Eighth Appellate District, in *In re C.E.*, 8th Dist. Nos. 5-09-02 and 5-09-03, 2009-Ohio-6027, explained that "[t]he Agency filed an amended motion alleging that the twelve month period had been met ***. Since this motion is an amendment and not a new motion, it relates back in time to the original filing. Civ.R. 15(C). The time between the filing of the motion and the hearing cannot be counted in the time calculation. *In re Arnold*, 3d Dist. No. 1-04-71, 1-04-72, 1-04-73, 2005-Ohio-1418, ¶10. The trial court must thus make additional findings before terminating parental rights to [appellant]." Id. at ¶18.

{¶30} Prior to the hearing, the trial court inquired as to which R.C. 2151.414(B) category PCDJFS was pursuing. PCDJFS informed the court it was proceeding under R.C. 2151.414(B)(1)(a). That is, the children were not abandoned or orphaned, nor in the temporary custody of PCDJFS for 12 out of 22 consecutive months, and they could not be placed with either of the child's parents within a reasonable time.

{¶31} At one point during the hearing J.V.E.'s attorney mistakenly informed the court they were proceeding under the amended motion. The court went forward under the original motion after clarifying the stipulation by J.V.E.'s counsel and PCDJFS, and ensuring that the court was not considering evidence and testimony as to events that occurred after the motion for permanent custody was filed.

{¶32} Later in the proceeding, J.V.E.'s counsel argued the original motion for permanent custody should be dismissed because R.C. 2151.414(B)(1)(a) could not apply due to the evidence that the children had been in the temporary custody of the PCDJFS for 12 out of 22 consecutive months. PCDJFS countered, arguing that the amended motion did not change the original motion because the agency intended to use the "12 out of 22" only as "a best interest factor, not as the basis for our complaint." The court denied the motion to dismiss.

{¶33} It is clear from our review that the court engaged in the proper analysis, and all the parties understood the amended motion related back to the original motion to include the "12 out of 22 months in temporary custody" as merely one determinative factor to be considered. Most fundamentally, PCDJFS was held to a higher evidentiary standard in electing to proceed pursuant to R.C. 2151.414(B)(1)(a). Thus, PCDJFS was required to prove that reunification with Mrs. Ellis was not possible before moving onto a best interest analysis, not merely that the children had been in the temporary custody of PCDJFS for 12 out of 22 consecutive months.

{¶34} Nothing precludes an agency from moving for permanent custody before a child has been in the agency's temporary custody for at least 12 months. "If a ground other than R.C. 2151.414(B)(1)(d) exists to support a grant of permanent custody, the

agency may move for permanent custody on that other ground." *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶27.

{¶35} Mrs. Ellis' first assignment of error is without merit.

{¶36} **Reasonable Efforts at Reunification**

{¶37} In her second assignment of error, Mrs. Ellis intertwines a sufficiency of evidence argument with one of manifest weight. She argues that there is insufficient evidence to support a finding that the children could not be placed with her within a reasonable period time, yet she also presents a manifest weight of the evidence analysis. As we find the manifest weight of the evidence more than supports the trial court's findings, necessarily then, PCDJFS introduced sufficient evidence that the children could not be reunified with Mrs. Ellis within a reasonable period of time. Mrs. Ellis' second assignment of error is without merit.

{¶38} "Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re S.M.*, 11th Dist. No. 2008-G-2858, 2009-Ohio-91, ¶21, citing *In re T.B.* at ¶35. "The standard of review for weight of the evidence issues, even where the burden of proof is 'clear and convincing,' retains its focus upon the existence of some competent, credible evidence. In other words, when reviewing awards of permanent custody to public children services agencies, judgments supported by some competent, credible evidence must be affirmed. If the record shows some competent, credible evidence supporting the trial court's grant of permanent custody to the county, *** we must affirm that court's decision, regardless of the weight we might have chosen to put on the evidence." Id., quoting *In re Kangas*,

11th Dist. No. 2006-A-0084, 2007-Ohio-1921, ¶85. "Every reasonable presumption must be made in favor of the judgment and the findings of fact of the juvenile court." Id., quoting *In re Kangas* at ¶86, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶39} "In determining *** whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence." R.C. 2151.414(E). "If the court determines, by clear and convincing evidence, *** that one or more of the following 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: (1) Following the placement of the child outside the child's 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 to substantially remedy the conditions causing the child to be placed outside the child's home." R.C. 2151.414(E)(1).

{¶40} "The existence of a single factor will support a finding that a child cannot be placed with either parent within reasonable period of time." *In re S.M.* at ¶23, quoting *In re Johnston*, 11th Dist. No. 2008-A-0015, 2008-Ohio-3603, ¶40, citing *In re J.C.*, 4th Dist. No. 07CA834, 2007-Ohio-3783, ¶23; *In re Williams S.* (1996), 75 Ohio St.3d 95, 99 ("R.C. 2151.414(E) requires the trial court to find that the child cannot be placed with either of his or her parents within a reasonable time *** once the court has determined *** that one or more the *** factors exist"); *In re Jason S.*, 6th Dist. No. L-05-1264, 2006-Ohio-726, ¶30 ("because one of the enumerated conditions existed, it was

unnecessary for the juvenile court to address any of the other 15 conditions listed in R.C. 2141.414(E)").

{¶41} Mrs. Ellis argues the trial court lost its way as there is sufficient evidence she was substantially complying with the case plan and that the children could be returned to her within a reasonable period of time.

{¶42} As proof, she first contends that she completed her initial drug assessment and resultant recommendations. It is true that Mrs. Ellis completed the initial drug assessment, but quite untrue that she followed the recommendations. Specifically, she was requested to randomly submit drug screens on 11 occasions. Of those, Mrs. Ellis completed two. She tested positive for methamphetamines and opiates on the most recent screen taken on June 25, 2009, well after the children's removal in September of 2008.

{¶43} Second, Mrs. Ellis contends that although she admittedly did not complete the assigned counseling and therapy programs, the fact that she completed the first ten-week session of one program is sufficient evidence of compliance. The simple fact is, however, that Mrs. Ellis did not complete one of the programs to which she was assigned. She made numerous attempts to complete the programs, yet she was ultimately terminated from them for her excessive absences. In her one-on-one sexual behavior counseling sessions, Mrs. Ellis completely stopped attending even though she had only one or two more sessions to finish. Her therapist opined that she did not believe her children's statements of sexual abuse and refused to acknowledge J.V.E.'s sexualized behavior.

{¶44} Finally, Mrs. Ellis contends that she has been able to maintain employment and was never homeless. But the facts remain that Mrs. Ellis was unemployed at the time of the hearing, was living with her mother, and could not provide adequate housing for the children. Indeed, she lost the housing PCDJFS assisted her in obtaining. Mrs. Ellis' proposal that J.S.E. could sleep with her, while J.V.E. would sleep with her brother, was inappropriate as J.V.E. was dealing with being sexually abused by a male relative and also needed constant supervision and monitoring around J.S.E. Mrs. Ellis argues that she was addressing J.V.E.'s school attendance problems prior to this case being filed, yet she was charged with truancy for his excessive absences after the case plan was implemented.

{¶45} Mrs. Ellis' steps toward compliance, such as completing her initial drug assessment, do not equate to an amelioration of any of the conditions that caused the children's removal. Moreover, after the children were removed, Mrs. Ellis lost her housing, was charged with drug manufacturing, tested positive for illegal narcotics, did not go to counseling, and failed to complete the assigned programs.

{¶46} The evidence reflects that Mrs. Ellis' compliance with the case plan did not increase after the children's removal. In fact, she fell further behind. Attempts at compliance are insufficient grounds upon which to rest a finding that Mrs. Ellis can be reunified with the children within a reasonable period of time. See *In re S.M.* at ¶26, citing *In re Pihlblad*, 5th Dist. Nos. 2008CA0019 and 2008CA0020, 2008-Ohio-2776, ¶32 ("where, despite marginal compliance with some aspects of the case plan, the exact problems which led to the initial removal remained in existence, a court does not

err in finding the child cannot be placed with the parent within a reasonable period of time").

{¶47} Mrs. Ellis' second assignment of error is without merit.

{¶48} **Pending Criminal Charge**

{¶49} In her third assignment of error, Mrs. Ellis contends the court abused its discretion by prejudicially considering her illegal manufacturing of methamphetamines charge as evidence that the children could not be reunified with her in a reasonable period of time. Our review, however, reveals the pending charge was clearly not a dispositive factor in the court's determination as the court was explicit that it did not consider it.

{¶50} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case ***." *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, ¶58. An abuse of discretion connotes more than error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶51} Moreover, "[w]hen a matter is tried before the court in a bench trial, there is a presumption that the trial judge 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *In re Fair* at ¶66, quoting *Jackson v. Herron*, 11th Dist. No. 2003-L-145, 2005-Ohio-4046, ¶28, citing *State v. White* (1968), 15 Ohio St.2d 146, 151, and *Columbus v. Guthmann* (1963), 175 Ohio St. 282, paragraph three of the syllabus; see, also, *In re J.P.*, 8th Dist. No. 81486, 2003-Ohio-3522, ¶29.

{¶52} Mrs. Ellis points to the fact that the court admitted the indictment into evidence and the court's mention of the charge in the judgment entry as evidence that the court prejudicially considered her pending charge.

{¶53} She takes issue with the fact that the court stated in its judgment entry: "Also in June of 2009, Mrs. Ellis was charged with Knowingly Assembling or Possessing one more chemicals that may be used to manufacture a controlled substance of Schedule I or II, to wit; Methamphetamines, in violation of Section 2924.04 of the Ohio Revised Code; said act being Assembly or Possession of Chemicals to Manufacture a Controlled Substance; a Felony of the Third Degree. As of the date of this Hearing, no determination of guilt or innocence has been made in the Portage County Common Pleas Court concerning this charge. These matters are set for Trial on December 8, 2009."

{¶54} From our review of the record, it is clear that the court was merely stating a fact -- the pending charge was not going to be considered. It is apparent that the trial court admitted the indictment for the limited purpose of providing context for Mrs. Ellis' conversation with her caseworker regarding PCDJFS' true motivation in filing the permanent custody motion.

{¶55} "The Court: *** What I'm going to do is I'm going to take the indictment. I'm going to admit the indictment just because there's been testimony. You don't deny that there has been an indictment.

{¶56} "Mrs. Ellis' counsel: No, sir. I did agree to stipulate to that.

{¶57} "The Court: Okay. All the other documents, including the warrant, the plea of not guilty, I'm just going to return those to you to the department.

{¶58} "PCDJFS: Okay.

{¶59} "The Court: So, 'W' is now a state's exhibit that is an indictment that alleges an unproved crime at this point. ***."

{¶60} Thus, as our review indicates, the court ensured that Mrs. Ellis' unadjudicated charge was not erroneously used as the basis of PCDJFS' motion for permanent custody. The court merely acknowledged the fact of the indictment because of the surrounding testimony, and it cannot be said that this was the dispositive factor that led the court to find that Mrs. Ellis could not be reunified with her children in a reasonable period of time.

{¶61} Mrs. Ellis' third assignment of error is without merit.

{¶62} The judgment of the Portage County Court of Common Pleas, Probate/ Juvenile Division, is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.