

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: : JUDGES:
 : Julie A. Edwards, P.J.
K.K. : W. Scott Gwin, J.
 : John W. Wise, J.
 :
 : Case No. 10 CA 0009
 :
 :
 : OPINION

CHARACTER OF PROCEEDING: Civil Appeal from Licking County
Court of Common Pleas, Juvenile
Division, Case No. F 2008 0695

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 27, 2010

APPEARANCES:

For Licking County DJFS

For Appellant-Nicosia Bibart

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Edwards, P.J.

{¶1} Appellant, Nicosia Bibart, appeals a judgment of the Licking County Common Pleas Court, Juvenile Division, awarding appellee Licking County Department of Job and Family Services permanent custody of her daughter, K.K.

STATEMENT OF FACTS AND CASE

{¶2} K.K. was born on June 26, 2008. On June 30, 2008, appellee filed a complaint in the Licking County Court of Common Pleas, Juvenile Division, alleging that K.K. was a dependent child and seeking temporary custody. The case was dismissed due to time restraints to allow for the appointment of a guardian ad litem, and re-filed on September 11, 2008. On December 5, 2008, K.K. was found to be a dependent child and temporary custody was granted to appellee.

{¶3} A case plan was developed for appellant to address her mental health issues and her need to increase her parenting knowledge and skills. Appellant has the mental age of a 9-year-old. Accommodations were made by appellee due to appellant's learning disability.

{¶4} K.K. has numerous physical problems. She has an acid reflux condition requiring medication which has changed ten times during the first year of her life. She has silent aspiration, and if she drinks a thin liquid, a portion sprays into her lungs which could cause drowning. Because of this, cereal must be added to her formula. She has restrictive airway disease. She was born with a vaginal skin tag and must be kept very clean to prevent urinary tract infections and yeast infections. K.K. has a herniated belly button and a blind dimple on her back which needs to be medically monitored out of concern for spina bifida. She has a heart murmur which has increased in volume and

also requires monitoring. In April of 2009, she began having seizures, and also has dystonic muscle tone in her arms, legs and face. At the time of the permanent custody hearing, she was scheduled for a neurology appointment and an MRI because of concerns of cerebral palsy. Because she has an underdeveloped tongue, tongue tremors and dystonic muscle tone in her face, she requires occupational therapy 45 minutes a week to address feeding problems, and exercises must be done 3 times a day at home, requiring 15-20 minutes each session. She was to begin physical therapy 45 minutes a week because of the muscle problems noted in her arms and legs when she began to walk. In the year she lived with a foster family prior to trial, K.K. had 53 medical appointments, 10 diagnostic tests, 3 medical specialists, and an occupational and physical therapist.

{¶5} Alma Lease, a homemaker for appellee, supervised appellant's visits with K.K. The foster mother would send formula and medication with K.K., along with written instructions. After 6 months of direction and repetition, appellant learned to tap the scoop when measuring formula to ensure that the scoop was full. After working on medications with appellant for seven months to demonstrate how to get air bubbles out of a syringe, appellant was unable to measure medications independently. Appellant has a difficult time with change and needs repetition to learn how to complete a task such as making a bottle with the proper amount of formula and cereal. On one occasion, appellant measured 7 ml of medication for K.K. rather than the proper dosage of .7 ml.

{¶6} Matt Tracy, an ongoing social worker for appellee, testified that the agency spent more time on appellant's case than any he had worked on in seven years with the

agency, but appellant could not learn to meet the needs of K.K. independently. When asked to measure 1.6 ml of water as if she were measuring medication, appellant measured 16 ml. Appellant was inconsistent in her ability to learn how to prepare food or medication for K.K. She would seem to grasp the instructions, but later would be unable to prepare a bottle or measure medication properly. Appellant chose not to avail herself of services available from MRDD and Woodlands despite Tracy's encouragement that she re-engage with such services. Appellant rarely asked for help in caring for K.K., but relied on others to give her directions.

{¶7} Marshall King is the natural father of K.K. He was incarcerated at the time of K.K.'s birth. King spent four of the last eight years incarcerated on a variety of charges, including a conviction of domestic violence in which appellant was the victim. Both King and appellant deny that domestic violence took place. After his release from prison, he and appellant intended to continue their relationship and eventually get married. He planned to make a living as a rhythm and blues gospel singer, writing song lyrics in a variety of musical genres, or as a cook.

{¶8} Appellant believed she could parent K.K. independently and would not require assistance. She did not believe K.K. had any special needs. She acknowledged K.K. had an acid reflux problem and a heart murmur and had been told she might have cerebral palsy. She had no driver's license but could rely on transit or friends to transport K.K. to medical appointments. She did not believe her learning disability would affect her ability to parent K.K, and believed she knew most things required to parent. She did not have a problem with King moving back into her residence when he was released from incarceration despite his criminal history.

{¶9} Appellee filed a motion for permanent custody on May 27, 2009. A hearing on the motion began on July 20, 2009, and concluded on August 20, 2009. The magistrate filed a decision granting the motion for permanent custody on September 14, 2009. Appellant filed objections to the report on the basis that the magistrate improperly terminated her parental rights based solely on her limited cognitive abilities, in violation of the Ohio Supreme Court's decision in *In re D.A.*, 113 Ohio St. 3d 88, 862 N.E.2d 829, 2007-Ohio-1105. The court overruled the objections, finding that the decision was not based on her limited cognitive functioning alone, but on the evidence that her limited cognitive abilities affected her ability to parent.¹

{¶10} Appellant assigns a single error on appeal:

{¶11} "THE TRIAL COURT'S UPHOLDING OF THE MAGISTRATE'S DECISION, WHICH GRANTED PERMANENT CUSTODY OF THE CHILD TO LICKING COUNTY CHILDREN SERVICES, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} Appellant argues that the judgment is against the manifest weight of the evidence, as there was no evidence to establish that appellant's limited cognitive abilities affected her ability to provide an adequate and safe home for K.K.

{¶13} A trial court's decision to grant permanent custody of a child must be supported by clear and convincing evidence. The Ohio Supreme Court has defined "clear and convincing evidence" as "[T]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty, as required beyond a reasonable doubt, as in criminal

¹ Marshall King did not file objections to the magistrate's decision, nor is he a party to the instant appeal.

cases.” *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118; *In re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613.

{¶14} In reviewing whether the trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60; See also, *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. If the trial court's judgment is “supported by some competent, credible evidence going to all the essential elements of the case,” a reviewing court may not reverse that judgment. *Schiebel*, 55 Ohio St.3d at 74, 564 N.E.2d 54.

{¶15} Moreover, “an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusion of law.” *Id.* Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273:

{¶16} “The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” Moreover, deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260, 674 N.E.2d 1159; see,

also, *In re: Christian*, Athens App. No. 04CA10, 2004-Ohio-3146; *In re: C.W.*, Montgomery App. No. 20140, 2004-Ohio-2040.

{¶17} Pursuant to 2151.414(B)(1), the court may grant permanent custody of a child to the movant if the court determines “that it is in the best interest of the child to grant permanent custody to the agency that filed the motion for permanent custody and that any of the following apply:

{¶18} “(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, 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.”

{¶19} Revised Code 2151.414(E) sets forth the factors a trial court must consider in determining whether a child cannot be placed with a parent within a reasonable time or should not be placed with a parent. If the court finds, by clear and convincing evidence, the existence of any one of the following factors, “the court shall enter a finding that the child cannot be placed with [the] parent within a reasonable time or should not be placed with either parent”:

{¶20} “(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. 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.

{¶21} “(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code ***

{¶22} “(16) Any other factors the court considers relevant.”

{¶23} A trial court may base its decision that a child cannot be placed with a parent within a reasonable time or should not be placed with a parent upon the existence of any one of the R.C. 2151.414(E) factors. The existence of one factor alone will support a finding that the child cannot be placed with the parent within a reasonable time. See *In re: William S.*, 75 Ohio St.3d 95, 1996-Ohio-182, 661 N.E.2d 738; *In re: Hurlow* (Sept. 21, 1998), Gallia App. No. 98 CA 6, 1998 WL 655414; *In re: Butcher* (Apr. 10, 1991), Athens App. No. 1170, 1991 WL 62145.

{¶24} Pursuant to R.C. 2151.414(D), in determining the best interest of a child, the court shall consider all relevant factors, including but not limited to the following:

{¶25} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care givers and out-of-home providers, and any other person who may significantly affect the child;

{¶26} "(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;

{¶27} "(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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶28} "(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..."

{¶29} In *In re: D.A.*, supra, the Ohio Supreme Court held that when determining the best interest of a child under R.C. 2151.414(D) at a permanent custody hearing, a trial court may not base its decision solely on the limited cognitive abilities of the parents. 113 Ohio St.3d at syllabus. However, the court did note that in other cases where the parental rights of mentally retarded persons have been terminated pursuant

to R.C. 2151.414(E)(1) or (2), objective evidence was presented to show that the statute was satisfied. *Id.* at ¶37, citing *In re C.E.*, Butler App. Nos. CA2006-01-015 and CA2006-02-024, 2006-Ohio-4827 (mother needed constant supervision and prompting to meet child's basic needs and had inadequate housing); *In re King*, Fairfield App. No. 05CA77, 2006-Ohio-781 (mother constantly relied on others to meet many of her basic needs and lost her housing).

{¶30} This Court found *In re: D.A.* distinguishable in a case where the trial court recognized mother's limited cognitive ability and set forth its concern as to how her abilities would affect her parenting, but also found that the mother was unable to safely parent the child and was unable to provide an adequate environment for her. *In re: Kinkel*, Stark App. No. 2006CA00358, 2007-Ohio-2322, ¶28. In *Kinkel*, the evidence demonstrated that even if mother were able to retain the information, her ability to apply such information to the child as the child grew and developed was extremely compromised, and absent someone living with her around the clock, she would be unable to regain custody of the child. *Id.* at ¶3.

{¶31} In the instant case, the foster mother testified as to the extensive special needs of K.K. caused by her numerous physical problems. She has an acid reflux condition requiring medication which has changed ten times during the first year of her life. She has silent aspiration, and if she drinks a thin liquid, a portion sprays into her lungs which could cause drowning. Because of this, cereal must be added to her formula. She has restrictive airway disease. She was born with a vaginal skin tag and must be kept very clean to prevent urinary tract infections and yeast infections. K.K. has a herniated belly button and a blind dimple on her lower back which needs to be

medically monitored out of concern for spina bifida. She has a heart murmur which has increased in volume and also requires monitoring. In April of 2009, she began having seizures, and also has dystonic muscle tone in her arms, legs and face. At the time of the permanent custody hearing, she was scheduled for a neurology appointment and MRI due to concerns of the possibility of cerebral palsy. Because she has an underdeveloped tongue, tongue tremors and dystonic muscle tone in her face, she requires occupational therapy 45 minutes a week to address feeding problems, and exercises must be done 3 times a day at home, requiring 15-20 minutes each session. She was to begin physical therapy 45 minutes a week because of the muscle problems noted in her arms and legs when she began to walk. In the year she lived with a foster family prior to trial, K.K. had 53 medical appointments, 10 diagnostic tests, 3 medical specialists and an occupational and physical therapist.

{¶32} Alma Lease, a homemaker for appellee, supervised visits where she worked with appellant to teach her how to prepare formula and administer medication. After 6 months, appellant was able to learn to fill a scoop with formula completely. Appellant had a difficult time learning to measure medication in a dispenser, and learning how to remove the air bubbles to obtain the proper dosage. She testified that appellant has a hard time with change and would have difficulties staying on top of the changes in K.K. Lease testified that appellant loves K.K., but would not be able to put K.K.'s needs before her own or be proactive in parenting. Lease testified that repetition in learning tasks was provided to appellant, but she was unable to consistently implement what she learned. Lease believed appellant would require someone in the

home full-time with her to be able to parent K.K. Lease was further concerned with the return of King to the home, due to past issues of domestic violence.

{¶33} Carla Steiner, a support worker for appellee, testified that appellant could not make a bottle without constant supervision, repetition and direction. Appellant loves K.K. but struggles with keeping her safe and fed. While she behaved in a playful and loving manner toward K.K., appellant was childlike in her interaction with the baby and did not assume a parenting role. She would not adapt successfully to change in K.K.'s routine. Appellant was passive in her parenting, waiting for instruction as to what to do with K.K. She did not believe appellant's passivity was intentional, but rather appellant simply did not know what to do.

{¶34} Matthew Tracy, an ongoing social worker with appellee, was concerned with the problems of domestic violence, as both parties continued to deny it took place despite King's conviction and unsuccessful appeal to this Court. Appellant was inconsistent in her ability to grasp feeding. She was unable to understand from the instructions on the box how to measure and administer Tylenol, and when asked to measure 1.6 ml, she measured 16 ml. She did not ask for help and did not avail herself of community services such as MRDD and other services tailored to her own special needs. He testified that appellant loved K.K. but struggles with her basic care. He testified that the agency gave more time to this case than any he had worked on in his seven years with the agency, but appellant was unable to learn to independently parent K.K. and more time would not solve the problems.

{¶35} Appellant testified that she did not believe she had any problems with K.K.'s care and did not think her ability to parent was affected by her learning disability.

She did not have a driver's license, but believed she could rely on transit or friends to transport K.K. to her medical appointments. Her testimony revealed that she did not understand the extent of K.K's special medical needs. She did not believe she needed any help parenting despite overwhelming evidence to the contrary.

{¶36} There was abundant evidence to support the court's finding that appellant was unable to adequately and safely parent K.K., and would be unable to do so in the foreseeable future. The decision was not based solely on appellant's limited cognitive abilities.

{¶37} The assignment of error is overruled.

{¶38} The judgment of the Licking County Common Pleas Court, Juvenile Division, is affirmed.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/r0401

