

[Cite as *In re T.S.*, 2010-Ohio-17.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: T.S.

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 2009 AP 09 0046

OPINION

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court
of Common Pleas, Juvenile Division, Case
No. 08 JN 00491

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 5, 2010

APPEARANCES:

For Appellant Christopher Smith Guardian ad Litem

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{¶1} Appellant Christopher Smith (“Father”) appeals the August 21, 2009 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, Juvenile Division, which terminated his parental rights, responsibilities and privileges with respect to his minor son, and granted permanent custody of the child to Appellee Tuscarawas County Job and Family Services (“TCJFS”).

STATEMENT OF THE CASE AND FACTS

{¶2} Father and Shanna Zobel (“Mother”) are the biological parents of T.S. (D.O.B. 9/9/08). TCJFS filed a Complaint on September 9, 2008, alleging T.S. to be a neglected and dependent child, after Mother tested positive for cocaine at the time of his birth. The trial court awarded temporary custody of T.S. to TCJFS.¹ On October 23, 2008, Mother and Father stipulated to a finding T.S. was a neglected and dependent child. The trial court ordered T.S. remain in the temporary custody of the TCJFS. The trial court granted both parents supervised visitation with T.S.

{¶3} The trial court conducted a dispositional hearing on November 20, 2008, at which time Mother and Father agreed to comply with the terms of their case plan. The trial court heard evidence regarding placement of T.S. with Susan Jones-Gray, Father’s mother. Both TCJFS and the guardian ad litem opposed placement with Jones-Gray. After hearing the evidence, the trial court ordered temporary custody remain with TCJFS, however, the trial court expanded visitation between Jones-Gray and T.S. to include overnight and weekend visitation. The trial court scheduled a hearing for January 7, 2009, to further review placement with Jones-Gray. At TCJFS’s

¹ Mother is not a party to this appeal.

request, the trial court continued the hearing until February 9, 2009. Father filed a motion requesting additional visitation with T.S. The trial court scheduled the motion to be heard in conjunction with the review hearing scheduled for February 9, 2009.

{¶4} At the review hearing, Father voluntarily withdrew his motion for expanded visitation. The trial court denied placement of T.S. with Jones-Gray. The trial court also ordered both parents submit to drug tests. Father tested positive for opiates.

{¶5} On March 25, 2009, TCJFS filed a motion to modify prior dispositions, requesting an order of permanent custody. TCJFS cited numerous concerns, including the fact both Mother and Father were incarcerated at the time; Mother's continued drug use; Father's positive drug test; and Mother and Father's continued relationship with one another.

{¶6} On May 15, 2009, after Mother missed two scheduled visits with T.S. and had a recent positive drug screen, TCJFS filed a motion to terminate her visitation. The trial court conducted a hearing on that motion on May 18, 2009, at which time the trial court terminated Mother's visitation.

{¶7} The trial court conducted a hearing on TCJFS's motion to modify prior disposition on August 13, 2009. The following evidence was adduced at the hearing.

{¶8} Mother, who was pregnant with her fourth child, was currently residing at the Harbor House, a drug and alcohol treatment facility. She testified she thought it was best for T.S. to be placed with his foster family.

{¶9} Jaime Grunder, an ongoing case manager with TCJFS, testified T.S. is doing very well in foster care, and his foster parents are willing to adopt him. Grunder testified Father's case plan required him to undergo a drug and alcohol assessment, to

complete a psychological evaluation and follow all recommendations, to attend parenting classes, and to obtain stable housing and employment. Father advised Grunder he did not need to work as he receives approximately \$700.00/month in social security disability. Father completed a domestic violence assessment in conjunction with his psychological assessment. However, during the course of the proceedings, Father and Mother were involved in a domestic violence incident and Father was ordered to undergo additional assessment and/or counseling. Father last saw T.S. on June 16, 2009. He did not appear for his June 18, 2009 visit. On June 28, 2009, Father entered the Stark County Regional Community Corrections Center. Prior to entering the correctional facility, Father was living with his mother, Susan Jones-Gray. Grunder's major concerns with Father was his drug use and the incident of domestic violence against Mother. Grunder stated Father had tested positive for an opiate. Father explained to Grunder the positive screen was the result of his taking a prescription medication which was actually an opiate. However, Father did not provide proof of the prescription, so his drug screen was considered positive.

{¶10} Barbara Schwartz, a clinical therapist with Chrysalis Counseling Center, conducted a psychological assessment on Father in October/November, 2008. As a result of the assessment, Schwartz gave Father an Axis I diagnosis of unknown substance abuse, and an Axis II diagnosis of antisocial personality disorder and narcissistic personality traits. Schwartz noted Father's diagnosis mirrored the diagnosis given to Mother. Schwartz explained an individual with this profile disregarded rules, laws, and conventional behavioral norms. Such an individual also exhibited a lack of empathy and tended to be self-absorbed. Schwartz noted it was not uncommon for two

individuals with such profiles to gravitate toward one another, and explained when two such personalities were together the dynamics of their disorder worsened. The prognosis for long term change with such mental disorders was poor and limited. Schwartz added individuals with this personality type were prone to hostility, anger, and explosive outbursts.

{¶11} Father testified he was formerly a firefighter and an EMT, but was no longer working due to a back injury he sustained while on the job in 2002. Father currently receives social security disability in the amount of \$701.00/month. For approximately three years, Father worked for a friend as an automotive mechanic. Father was paid under the table. Father noted, when he is released from SRCCC, he could return to work for this individual. Father has never been married and has two children, T.S., and an eleven year old daughter, C.S. Father completed a six week parenting program while at SRCCC. Father acknowledged he had tested positive for opiates one time during the course of these proceedings, but added he had submitted to approximately ten drug screens during the case and this was the only positive. Father explained he had been prescribed Percoset, Vicodin, and Flexeril for his back problems, and these medications would result in a positive drug screen. Father testified he underwent a psychological evaluation and a domestic violence evaluation. Father explained his case plan never required him to go to individual counseling, but added, if it was recommended or required, he would do so.

{¶12} On cross-examination, Father acknowledged he had testified on direct he had undergone intensive drug and alcohol treatment at SRCCC, but denied having or

ever having a drug problem. Father conceded he had a domestic violence conviction against his daughter's mother.

{¶13} Beth Zimmerman, a case manager with Stark Regional Community Corrections Facility, testified regarding Father's treatment plan. Zimmerman explained Father is enrolled in the intensive chemical dependency class based upon SRCCC's assessment of him. Zimmerman added if Father was assigned to an intensive class, it is because a need for the class had been identified.

{¶14} Via Judgment Entry filed August 21, 2009, the trial court granted permanent custody of T.S. to TCJFS, finding the child cannot and should not be placed with either parent within a reasonable time, and despite diligent reasonable efforts and planning by TCJFS, the parents failed to remedy the problems which caused the child's removal. The trial court also found it was in T.S. best interest to be placed in the permanent custody of TCJFS.

{¶15} It is from this judgment entry Father appeals, raising as his sole assignment of error:

{¶16} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PERMANENT CUSTODY TO JOB AND FAMILY SERVICES AS JOB AND FAMILY SERVICES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CHILD COULD NOT BE PLACED WITH FATHER IN A REASONABLE AMOUNT OF TIME, AND THAT AN AWARD OF PERMANENT CUSTODY WAS IN THE CHILD'S BEST INTEREST."

{¶17} This case comes to us on the expedited calendar and shall be considered in compliance with App. R. 11.1(C).

{¶18} Herein, Father maintains the trial court abused its discretion in awarding permanent custody of T.S. to TCJFS as the agency failed to present clear and convincing evidence T.S. could not be placed with Father within a reasonable amount of time, and that an award of permanent custody was in the child's best interest.

{¶19} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA5758. 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.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶20} R.C. 2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates the trial court schedule a hearing, and provide notice, upon filing of a motion for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶21} 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, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (a) the child is not abandoned or orphaned, 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; (b) the

child is abandoned; (c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (d) 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.

{¶22} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates the trial 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} Therefore, R.C. 2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial 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.

{¶24} If the child is not abandoned or orphaned, 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 trial court must consider all relevant evidence before making this determination. The trial court is

required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R .C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶25} Father argues the trial court's findings were unsupported by the evidence presented at the hearing. Father had completed parenting classes, an anger management assessment, and a psychological assessment. Father missed only two of the scheduled visits with his son. Father ended his relationship with Mother, knowing he would not be awarded custody of T.S. while they continued to live together. Father acknowledged his current situation in SRCCC made immediate custody impossible, but set forth his intentions following his release in mid-October, 2009, which included residing with his mother, Susan Jones-Gray. Father requested a six-month extension prior to the trial court making a permanent custody finding.

{¶26} Although there was testimony Father made some progress on his case plan, there was evidence to support the trial court's decision. One of the major contested issues throughout this matter was Father's drug use. Throughout the course of the proceedings, Father denied ever using drugs. In early February, 2009, Mother advised the case worker Father was using heroine. Days later, Father tested positive for opiates. Father explained he had a prescription for pain medication and such would have resulted in a positive drug screen. However, Father never provided verification of this fact. Beth Zimmerman, a case manager at the Stark Regional Community Corrections Facility, testified Father was in SRCCC on a parole violation. Father had been placed on parole after being convicted of trafficking in cocaine. Father acknowledged trafficking in drugs, explaining he did not use drugs, but sold drugs to

make money. While at SRCCC, Father was required to participate in the intensive chemical dependency class. Zimmerman testified not all residents were required to attend this class, but only those who demonstrated a chemical dependency problem.

{¶27} Father also complained TCJFS did not provide him with sufficient visitation with T.S. However, Father withdrew a petition seeking extended visitation. Furthermore, although Father testified his positive drug screen in February, 2009, was the result of his taking prescription medication, at the time of his psychological assessment, Father told Barbara Schwartz, the evaluator, he had not seen a medical doctor since 2006, and was not taking any prescription medication.

{¶28} Based upon the foregoing and the entire record in this matter, we find the trial court's decision to terminate Father's parental rights, privileges, and responsibilities and grant permanent custody of T.S. to TCJFS was not against the manifest weight of the evidence, and, a fortiori, does not evince an abuse of discretion.

{¶29} Father's sole assignment of error is overruled.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF: T.S.

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JUDGMENT ENTRY

Case No. 2009 AP 09 0046

For the reasons stated in our accompanying Opinion, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS