

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: C.L.V.

: JUDGES:
:
: Hon. W. Scott Gwin, P.J.
: Hon. William B. Hoffman, J.
: Hon. Patricia A. Delaney, J.
:
: Case No. 2010 CA 0087
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: OPINION

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas, Juvenile Division, Case
No. 2009-DEP-169

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: November 18, 2010

APPEARANCES:

For Mother-Appellant:

JEFFEREY R. STIFFLER
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Mansfield, OH 44902

For Appellee:

EDITH A. GILLILAND
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Delaney, J.

{¶1} Mother-Appellant, Leona Vasquez, appeals the March 19, 2010 judgment entry of the Richland County Court of Common Pleas, Juvenile Division, granting permanent custody of her infant child, C.L.V., to Appellee, Richland County Children Services Board (“RCCSB”).

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant is the mother of C.L.V., born on April 20, 2009. C.L.V.’s father is Brian Lacey. On April 23, 2009, RCCSB filed a complaint alleging C.L.V. was a dependent, abused, or neglected child. RCCSB also filed an ex parte motion for temporary custody of C.L.V. The trial court granted RCCSB’s ex parte motion and the child was taken into RCCSB’s custody. On July 17, 2009, RCCSB dismissed their original complaint and refiled the complaint alleging C.L.V. was a dependent, abused, or neglected child. RCCSB requested permanent custody and also filed a Motion for Reasonable Efforts Bypass because of a prior involuntary termination of Appellant’s parental rights.

{¶3} The previous termination of parental rights involved Appellant’s child, R.L. R.L. was born on February 18, 2006 to Appellant and Brian Lacey. R.L. was born with serious heart defects. Due to Appellant’s drug addiction and inability to care for the special needs child, the trial court granted permanent custody of R.L. to RCCSB on January 12, 2009. Brian Lacey voluntarily relinquished his parent rights to R.L. and agreed that R.L. should be placed in the permanent custody of RCCSB.

{¶4} On August 17, 2009, Brian Lacey was personally served with the complaint for permanent custody of C.L.V. while Lacey was incarcerated at Belmont

Correctional Facility. He did not respond to the complaint or otherwise appear in this action..

{¶5} Evidentiary hearings were held before the magistrate on September 11, 2009 and October 12, 2009 on the issue of dependency. Testimony was heard about Appellant's struggles with drug addiction to morphine, cocaine, and intravenous heroin. Her drug use resulted in the loss of custody of R.L. In March 2009, while pregnant with C.L.V., Appellant tested positive for morphine. On September 8, 2009, however, Appellant had a clean drug screen.

{¶6} As part of Appellant's case plan, she was to address her substance abuse, improve her parenting skills, receive mental health counseling, and achieve financial stability. Appellant contacted Parent Aide herself to assist her with parent education and was working with the program, but in August 2009, she stopped making progress. She attended Family Life Counseling for drug, alcohol, and mental health counseling. She did not comply with the recommendations of her mental health counseling assessment. Appellant completed her drug and alcohol assessment. Appellant is currently unemployed. She does not have a stable living environment or familial assistance.

{¶7} When C.L.V. was born, he weighed four pounds and eleven ounces. He showed signs of irritability, jitteriness, and low blood sugar, raising concerns that C.L.V. was born drug-dependant. Appellant suffered complications during her pregnancy such as low amniotic fluid, yet left the hospital against medical advice.

{¶8} After C.L.V.'s birth, C.L.V. suffered from a bowel obstruction. He requires extra nutrition and regular feedings because of his low birth weight. He takes Zantac for

stomach issues. He requires breathing treatments. C.L.V. also wears a helmet 22 hours a day to address a developmental defect. He is currently placed with a foster-to-adopt family who is addressing C.L.V.'s health needs. He is bonded with the foster family.

{¶9} Appellant had visitation with C.L.V. and was attending visitations twice a week, but from July 31, 2009 to October 2009, she stopped visiting. Appellant explained that she missed visits because she was concerned about a warrant for her arrest. During the visits, Appellant acted appropriately but no bond was demonstrated between Appellant and C.L.V.

{¶10} On December 21, 2009, the magistrate announced in open court its finding that C.L.V. was a dependent child and granted RCCSB's motion for reasonable efforts bypass.

{¶11} Dispositional hearings were held on January 29 and February 12, 2010. Thereafter, at a hearing on March 1, 2010, the magistrate orally announced its decision to grant RCCSB's motion for permanent custody. On March 15, 2010, the magistrate issued an Amended Magistrate's Decision finding C.L.V. was a dependent child and granted permanent custody of C.L.V. to RCCSB.

{¶12} Appellant filed objections to the Magistrate's Decision. On March 19, 2010, the trial court overruled Appellant's objections and adopted the Magistrate's Decision.

{¶13} It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶14} Appellant raises three Assignments of Error:

{¶15} “I. THE TRIAL COURT DENIED C.L.V.’S FATHER DUE PROCESS RIGHTS BY NEITHER ASSURING THAT HE WAS PRESENT DURING THE DEPENDENCY/CUSTODY ACTION NOR AFFORDING HIM COUNSEL TO REPRESENT HIS INTERESTS.

{¶16} “II. THE TRIAL COURT’S DECISION FINDING C.L.V. A DEPENDENT CHILD AND GRANTING RCCSB’S MOTION FOR PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶17} “III. APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT FAILED TO BIFURCATE THE ADJUDICATORY AND DISPOSITIONAL PHASES OF THE PROCEEDING.”

I.

{¶18} Appellant argues in her first Assignment of Error that the due process rights of Brian Lacey, C.L.V.’s father, were violated because he did not participate in the proceedings.

{¶19} The record shows Brian Lacey was personally served with the complaint on August 17, 2009. Brian Lacey, while incarcerated, did not respond to the complaint, either to the trial court or to RCCSB. He participated in the prior custody proceedings involving his son, R.L., where he voluntarily relinquished his parental rights to R.L.

{¶20} Appellant did not raise this issue at the trial court level. Nor has Brian Lacey appealed the decision to grant permanent custody of C.L.V. to RCCSB. In addition, Appellant has not demonstrated any specific prejudice to her rights due to the failure of Brian Lacey to appear at hearing.

{¶21} Accordingly, we overrule Appellant’s first Assignment of Error.

II.

{¶22} Appellant argues in her second Assignment of Error that the decision of the trial court that C.L.V. was a dependent child and that permanent custody should be awarded to RCCSB was against the manifest weight of the evidence.

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

{¶24} 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.

{¶25} 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:

{¶26} “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.”

{¶27} 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* (1997), 77 Ohio St.3d 415, 419, 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.

{¶28} 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.

{¶29} 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.

{¶30} 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.

{¶31} 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.

{¶32} 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.

{¶33} In this case, the evidence supports the finding that C.L.V. cannot be placed with Appellant within a reasonable time. The testimony demonstrated that Appellant began her case plan, but stopped making progress in the areas that she most needed assistance with, such as mental health counseling. Due to her concerns about her legal issues resulting from her drug usage, she stopped visiting with C.L.V.

{¶34} With regard to the children's best interests, C.L.V. requires a regimen of care that Appellant has failed to demonstrate she is capable of. While pregnant with C.L.V., Appellant did not care for herself and her child, resulting in C.L.V.'s low birth weight. She does not have family support to assist her with C.L.V.'s care. C.L.V. is currently placed with a foster-to-adopt-family that is meeting his health needs.

{¶35} The guardian ad litem in the case recommended that RCCSB be granted permanent custody of C.L.V.

{¶36} We find based on the above, the trial court's finding that permanent custody was in the best interests of C.L.V. was not against the manifest weight of the evidence.

{¶37} Appellant's second Assignment of Error is overruled.

III.

{¶38} Appellant argues in her third Assignment of Error that the trial court erred when it failed to bifurcate the adjudicatory and dispositional phases of the proceeding.

{¶39} Upon review of the record, we find that this was not raised as an objection to the Magistrate's Decision at the trial court level. When a party fails to file objections to a magistrate's decision Civ.R. 53(D)(3)(b)(iv) provides that "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." *Postel v. Koksai*, 5th Dist. No. 08-COA-0002, 2009-Ohio-252, ¶ 25.

{¶40} However, we note that authority exists in Ohio law for the proposition that Appellant's failure to object to the Magistrate's Decision on this issue does not bar appellate review of "plain error." *In re Lemon*, 5th Dist. No. 2002 CA 00098, 2002-Ohio-6263. The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, "rises to the level of challenging the legitimacy of the underlying judicial process itself." See *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997-Ohio-401, 679 N.E.2d 1099.

{¶41} Appellant contends that although the magistrate's held separate hearings on the adjudication of C.L.V. as dependent and the disposition of the child, only one written decision was issued regarding both proceedings. Appellant also argues that the trial court improperly considered dispositional issues while it determined dependency.

{¶42} "A finding of dependency under R.C. 2151.04 must be grounded on whether the children are receiving proper care and support." *In re Bibb* (1980), 70 Ohio App.2d 117, 435 N.E.2d 96. R.C. 2151.04 defines dependency and states:

{¶43} " '[D]ependent child' means any child

{¶44} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶45} “(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶46} “(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship.”

{¶47} R.C. 2151.28(L) further provides:

{¶48} “If the court, at an adjudicatory hearing held pursuant to division (A) of this section upon a complaint alleging that a child is an abused, neglected, dependent, delinquent, or unruly child or a juvenile traffic offender, determines that the child is a dependent child, the court shall incorporate that determination into written findings of fact and conclusions of law and enter those findings of fact and conclusions of law in the record of the case. The court shall include in those findings of fact and conclusions of law specific findings as to the existence of any danger to the child and any underlying family problems that are the basis for the court’s determination that the child is a dependent child.”

{¶49} R.C. 2151.35 (A)(1) also provides in relevant part:

{¶50} “ * * * If the court at the adjudicatory hearing finds from clear and convincing evidence that the child is an abused, neglected, or dependent child, the court shall proceed, in accordance with division (B) of this section, to hold a dispositional hearing and hear the evidence as to the proper disposition to be made under section 2151.354 or Chapter 2152. of the Revised Code.

{¶51} “ * * * (B)(1) If the court at an adjudicatory hearing determines that a child is an abused, neglected, or dependent child, the court shall not issue a dispositional order until after the court holds a separate dispositional hearing. * * * “.

{¶52} Upon review of the record, we find no plain error. The trial court was aware of the requirement for bifurcation and did in fact conducted separate hearings. The magistrate made lengthy findings of fact that described Appellant's inability to provide adequate care to C.L.V. due to her mental and substance abuse issues, prior to birth and after delivery, as well as Appellant's lack of stable and suitable housing and unemployment issues. The trial court was further allowed to consider the Appellant's conduct in that it formed part of C.L.V.'s environment. As the court in *In re Bibb*, (1980) 70 Ohio App. 2d 117, 119, cited:

{¶53} "Using the language of *In re Feiler* (Hamilton Co. Ct. of Appeals No. C-780549, October 17, 1979), unreported, the record fails to show ' * * * that the premature receipt of matters relating more properly to dispositional issues so bewitched the mind of the * * * (court) that the fundamental determination of dependency was cast in doubt. * * * "'

{¶54} Furthermore, Appellant does not cite any requirement that a trial court issue separate decisions on the issue of dependency and disposition.

{¶55} Appellant's third Assignment of Error is overruled.

{¶56} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

