

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN RE A.P. & J.T.

: JUDGES:  
:  
: Hon. Scott W. Gwin, P.J.  
: Hon. William B. Hoffman, J.  
: Hon. Patricia A. Delaney, J.  
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: Case No. 2010CA00018  
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: OPINION

CHARACTER OF PROCEEDING: Appeal from the Stark County County Court  
of Common Pleas, Juvenile Division Case  
No. 2008JCV00280

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 28, 2010

APPEARANCES:

For Mother-Appellant:

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For Appellee:

QUAY COMPTON  
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*Delaney, J.*

{¶1} Mother-Appellant, Tabitha Powell, appeals the December 30, 2009 judgment of the Stark County Court of Common Pleas, Juvenile Division, to grant permanent custody of her children, A.P. and J.T. to the Appellee, Stark County Department of Job and Family Services.

#### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} Appellant is the mother of A.P. (d.o.b. November 3, 2003) and J.T. (d.o.b. November 8, 2007). Father of A.P. is Terry Nicholson. Father of J.T. is Joseph Thornton. At the time of the initiation of this case, Appellant and Joseph Thornton were living together.

{¶3} On March 17, 2008, Appellant and Joseph Thornton took J.T. to Akron Children's Hospital for examination due to swelling in the child's left leg. An x-ray of the six-month-old revealed 11 spiral fractures consisting of both knees, both ankles, both humerus bones, the left hip, and four ribs. The parents could not explain how J.T.'s injuries occurred. The parents thought that perhaps A.P. caused the injuries. Akron Children's Hospital ruled out brittle bone disease and diagnosed the injuries as being caused by physical abuse. The Canton Police Department placed A.P. and J.T. in the emergency temporary custody of SCDFJS pursuant to Juv.R. 6.

{¶4} On March 18, 2008, SCDJFS filed a complaint alleging neglect and/or dependency, seeking emergency temporary custody of the children. The trial court held an emergency shelter care hearing and both children were committed to the temporary custody of SCDJFS on March 18, 2008.

{¶5} The trial court held an evidentiary hearing on June 10, 2008 to determine if the children were dependent, neglected, or abused. Based on the evidence presented, the trial court found the children to be abused and the children were placed in the temporary custody of SCDJFS. A case plan was established for Appellant that included parenting evaluations through Northeast Ohio Behavioral Health, parenting classes with Goodwill Parenting, and an intensive anger management program through Melymbrosia.

{¶6} On August 10, 2009, Appellant was indicted by the Stark County Grand Jury for a violation of R.C. 2919.22(B)(1)(E)(2)(d), Endangering Children, a felony of the second degree. Appellant pleaded not guilty; but on January 7, 2010, the State amended the indictment to a charge of Obstructing Official Business, in violation of R.C. 2921.31 (M2) and Appellant changed her plea to no contest. The trial court sentenced Appellant to 90 days in jail, suspended on the condition of two years of good behavior. See *State v. Tabitha Powell*, Stark County Court of Common Pleas Case No. 2009CR1213(A).

{¶7} On January 21, 2009, SCDJFS filed a motion for a six-month extension of temporary custody. On March 13, 2009, Appellant stipulated that a six-month extension of temporary custody was in the children's best interest.

{¶8} SCDJFS filed a motion for permanent custody on August 18, 2009. The trial court held a hearing on the motion on October 27, 2009. On that date, Terry Nicholson, father of A.P., made his first appearance in the case. The trial court appointed counsel for Nicholson and the trial court continued the trial as to his interest in the case. Joseph Thornton did not appear at the hearing but was represented by

counsel. Because of an indictment for Child Endangering arising out of the alleged physical abuse of J.T., there was a warrant for Thornton's arrest and Thornton knew that he would be picked up that day. (T. 3).<sup>1</sup>

{¶9} The trial went forward as to Appellant's interest.

{¶10} Sarah Goins, the SCDJFS ongoing family social worker assigned to the case, testified at the hearing. Goins testified that Appellant partially completed her case plan. While Appellant had completed the other required elements of her case plan, Appellant had completed only six months of her 10-month anger management course. (T. 18-19). Goins was aware that the courses conflicted with Appellant's work schedule and Goins discussed with Appellant contacting Melymbrosia to attend different classes or rearranging Appellant's work schedule. (T. 20). Goins knew that Appellant stopped attending anger management in February 2009 and Goins was not aware if Appellant tried to restart the anger management program in October 2009. Id.

{¶11} Appellant regularly attended weekly visitations with the children. Id. Appellant participated in supervised therapeutic visitation with A.P. Id. At one visit, Appellant was observed twisting A.P.'s arm in a manner consistent with a motion that could have caused J.T.'s spiral fractures. Id. Subsequent visitations were conducted under supervision where Appellant would visit with both A.P. and J.T. (T. 21). It was observed during those visits that Appellant would focus more on J.T. than on A.P., upsetting A.P. Id. The matter was addressed with Appellant and Appellant improved her interactions to include both children. Id.

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<sup>1</sup> In Stark County Common Pleas Case No. 2009CR1213(B), Thornton pleaded guilty to and was convicted of Child Endangering, a second-degree felony in violation of R.C. 2919.22(B)(1)(E)(2)(d) on April 9, 2010. The trial court sentenced Thornton to three years of community control sanctions.

{¶12} During parenting evaluations, Appellant's parenting style was described as punitive with low frustration levels and an inability to appropriately control her anger. (T. 23).

{¶13} J.T. has no medical problems, other than recovering from his injuries. (T. 9).

{¶14} Dr. Kathy Hornbeck, a clinical psychologist with Community Services of Stark County, diagnosed A.P. with post traumatic stress disorder with psychotic features. (T. 15). During counseling sessions with A.P., Dr. Hornbeck testified that A.P. reported witnessing domestic violence between Appellant and Joseph Thornton. (T. 17). A.P. stated she witnessed Joseph Thornton physically abuse J.T. and that was how J.T. was injured. Id. A.P. is physically aggressive towards J.T. and her foster parents. (T. 17-18). She has injured herself and once ran into traffic trying to kill herself. Id. She reports hearing a voice in her head of a "bad man" telling her to hurt herself and other people. (T. 18). A.P. stated that she loved her mother, but she did not feel safe living with her and did not want to go back there. (T. 19). A.P. is taking medication and undergoing counseling. Id.

{¶15} The children are currently residing in the same foster-to-adopt home and are bonded with the foster parents. (T. 14). One of A.P.'s counselors recommended that the children be placed in separate foster homes due to A.P.'s anger issues, which she manifests against J.T.

{¶16} Appellant and Joseph Thornton are no longer together. (T. 21).

{¶17} The Guardian ad Litem recommended the trial court grant custody of the children to SCDJFS.

{¶18} On December 30, 2009, the trial court granted permanent custody of J.T. and A.P. to SCDJFS.

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

### **ASSIGNMENTS OF ERROR**

{¶20} Appellant raises three Assignments of Error:

{¶21} “I. THE TRIAL COURT ERRED BY GRANTING PERMANENT CUSTODY OF A.P. & J.T. TO THE STARK COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES BECAUSE ITS DETERMINATION THAT REASONABLE EFFORTS TO ASSIST THE PARENT TO COMPLETE THE CASE PLAN AND THE DEPARTMENT USED REASONABLE EFFORTS TO PREVENT THE REMOVAL OF THE CHILD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶22} “II. THE TRIAL COURT ERRED BY GRANTING PERMANENT CUSTODY OF A.P. & J.T. TO THE STARK COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES BECAUSE ITS DETERMINATION THAT THE MINOR CHILDREN CANNOT OR SHOULD NOT BE PLACED WITH APPELLANT WITHIN A REASONABLE TIME WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶23} “III. THE TRIAL COURT ERRED BY GRANTING PERMANENT CUSTODY OF A.P. & J.T. TO THE STARK COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES BECAUSE ITS DETERMINATION THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

**I., II., & III.**

{¶24} We will consider Appellant's Assignments of Error together as they are interrelated. Appellant argues that the trial court erred in granting permanent custody of A.P. and J.T. to SCDJFS. We disagree.

{¶25} 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.

{¶26} 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.

{¶27} 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:

{¶28} “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.”

{¶29} 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.

{¶30} 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.

{¶31} 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.

{¶32} 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.

{¶33} 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.

{¶34} 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.

{¶35} In the first prong of the hearing, the trial court found that the evidence demonstrated that A.P. and J.T. had been in the custody of SCDJFS for twelve or more months of a consecutive twenty-two month period. Evidence was presented at the hearing that the children had been in the temporary custody of SCDJFS since June 10, 2008 and the children had been in temporary custody for twelve or more months of a consecutive twenty-two month period. (T. 13). Appellant does not challenge the trial court's finding. This finding alone in conjunction with a best interest finding is sufficient to support the grant of permanent custody. *In re Calhoun*, Stark App. No. 2008CA00118, 2008-Ohio-5458, ¶45.

{¶36} In addition, the evidence supported the trial court's finding that A.P. and J.T. could not be placed with Appellant within a reasonable time, despite the reasonable efforts of SCDJFS to reunify the family. J.T.'s severe injuries as the result of physical abuse instigated this matter. Appellant has not completed her anger management course as part of her case plan. While Appellant's work schedule perhaps interfered with the course schedule, evidence was shown that Appellant's social worker recommended that Appellant work with Melymbrosia to coordinate her schedule and Appellant chose to do otherwise.

{¶37} The second prong of the analysis is whether an award of permanent custody is in the children's best interests. We find the trial court's decision that it is in the children's best interests that permanent custody be awarded to SCDJFS is

supported by clear and convincing evidence. As stated above, the children have been in the temporary custody of SCDJFS for twelve or more of a 22 consecutive month period.

{¶38} The record shows there has never been an explanation for the injuries J.T. suffered while in Appellant's custody. A.P. has been diagnosed with post traumatic stress disorder with psychotic features and requires mental health counseling to combat the voice that tells this six-year-old child to hurt herself and others. A.P. expressed to her counselor that she witnessed domestic violence between Appellant and Thornton and may have witnessed her younger sibling's physical abuse. A.P. expressed that she loved her mother, but she did not feel her mother could keep her safe. A.P.'s counselor and the children's Guardian ad Litem recommended that permanent custody be granted to SCDJFS.

{¶39} We find based on the above, the trial court's finding that permanent custody was in the best interests of J.T. and A.P. was not against the manifest weight or sufficiency of the evidence.

{¶40} Accordingly, Appellant's three Assignments of Error are overruled.

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

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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