

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE J.H. : JUDGES:
: :
: Hon. Julie A. Edwards, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.
: :
: Case No. 2010 CA 0010
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: :
: OPINION

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas, Juvenile Division, Case
No. 2006-DEP-00020

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 25, 2010

APPEARANCES:

For Father-Appellant:

JOHN C. O'DONNELL
13 Park Ave. West
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Mansfield, OH 44902

For Appellee:

EDITH A. GILLIAND
731 Scholl Road
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Delaney, J.

{¶1} Father-Appellant Verne Harmison appeals the December 16, 2009, judgment entry of the Richland County Court of Common Pleas, Juvenile Division, awarding permanent custody of his child, J.H. to the Richland County Children Services Board. Appellee is the Richland County Children Services Board (“RCCSB”).

STATEMENT OF THE FACTS AND THE CASE

{¶1} Appellant Verne Harmison is the father of T.H. (d.o.b. 2/20/2001) and J.H. (d.o.b. 1/12/2002). The children’s mother is Julee Edwards.¹ The parties are not married.

{¶2} Appellant has not had contact with J.H. or T.H. since 2005. Since that time, Appellant has been consistently incarcerated for various felony offenses. His charges included Breaking and Entering, Burglary, Attempted Theft, Possession of Criminal Tools, and Theft and/or Grand Theft of a Motor Vehicle.

{¶2} Julee Edwards has had custody of the children. RCCSB has been involved with mother and the children since 2006 due to issues with mother’s ability to parent her children and provide a safe and clean living environment. A case plan was established for mother on January 13, 2006 that required mother to participate in case management services at Family Life Counseling; take a Parent Aide or parenting class; participate in mental health counseling; and provide proper supervision of the children and provide for the children’s basic needs, which included stable housing and with working utilities that was maintained in a safe and clean manner. The children were placed with their maternal grandparents while mother complied with her case plan.

¹ Julee Edwards has also filed appeals of the award of permanent custody to RCCSB.

{¶3} In November 2006, the children were returned to mother under RCCSB protective supervision. Mother was ordered that the children have no contact with Christopher Edwards, mother's husband. Christopher Edwards was convicted of two counts of gross sexual imposition in 1998 for his acts against a six-year old girl.

{¶4} On March 22, 2007, RCCSB was granted emergency shelter care of the children and the children were placed in foster care. On June 11, 2007, RCCSB was awarded temporary custody of the children. RCCSB moved for permanent custody on April 30, 2008.

{¶5} The trial court held a hearing on the motion on October 20, 2009. At trial, testimony was elicited regarding Appellant's progress on his case plan. During the pendency of the action, RCCSB was unable to locate Appellant. RCCSB tried to locate Appellant within the state prison system but could not. In January 2009, Appellant contacted RCCSB for information regarding his children. In March 2009, Appellant was released from prison and resided with a friend. RCCSB established a case plan for Appellant and he began visitation with the children.

{¶6} Appellant was only able to complete three visits with his children before Appellant was again convicted for felony offense and returned to prison. Appellant had been out of prison for eight weeks. Because of Appellant's incarceration, he was unable to complete his case plan. Appellant was to be released from prison in March 2010.

{¶7} As a result of the hearing, the trial court determined that permanent custody of the children should be awarded to RCCSB by judgment entry on December 16, 2009. It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶3} Appellant raises two Assignments of Error:

{¶4} “I. TRIAL COURT’S CONCLUSION THAT PERMANENT CUSTODY WAS WARRANTED IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

{¶5} “II. THE TRIAL COURT DENIED APPELLANT APPELLANT/MOTHER [SIC] DUE PROCESS IN THE CONDUCT OF THE TRIAL.”

I.

{¶1} Appellant argues in his first Assignment of Error that the trial court erred in granting permanent custody to RCCSB. We disagree.

{¶2} 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.

{¶3} 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.

{¶4} 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:

{¶5} "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."

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} 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.

{¶10} 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.

{¶11} 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.

{¶12} In the first prong of the hearing, the trial court determined that the evidence demonstrated that J.H. had been in the custody of RCCSB for twelve or more months of a consecutive twenty-two month period. The parties stipulated at the hearing that J.H. had been in the temporary custody of RCCSB since June 28, 2007 and J.H. had been in temporary custody for twelve or more months of a consecutive twenty-two month period. (T. 11, 12). Appellant does not challenge the trial court's finding or the stipulation. 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.

{¶13} There was also sufficient evidence to find that the children could not be placed with Appellant within a reasonable time. Appellant was unable to complete his case plan due to his arrest for a felony offense and return to prison.

{¶14} With regard to the children's best interests, Campbell testified that J.H. had severe developmental delays manifesting in difficult behavioral issues. J.H. and

T.H. reside in the same foster home and have stability in the home, resulting in improvements in J.H.'s behaviors and communication skills. The children both attend school. The children are bonded with their foster parents, who plan to adopt them.

{¶15} Appellant visited with his children, but to the children, Appellant was a stranger. Appellant had no contact with his children for approximately four years due to his repeated incarceration. There was no evidence that Appellant tried to communicate with his children while he was in prison.

{¶16} The guardian ad litem in the case recommended that RCCSB be granted permanent custody of J.H. and T.H.

{¶17} We find based on the above, the trial court's finding that permanent custody was in the best interests of J.H. was not against the manifest weight or sufficiency of the evidence. Appellant's first Assignment of Error is overruled.

II.

{¶18} Appellant argues in his second Assignment of Error that Appellant's due process rights were violated during the hearing because the trial court judge asked questions of the witnesses. We disagree.

{¶19} Evid.R. 614(B) provides that the court "may interrogate witnesses, in an impartial manner, whether called by itself or a party." *Syslo v. Syslo*, Lucas App. No. L-01-1273, 2002-Ohio-5205, ¶83. Unless there is a showing of bias, prejudice, or prodding of a witness to elicit partisan testimony, it is presumed that the trial court acted impartially in questioning a witness as to a material fact or to develop the truth. *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 98, 454 N.E.2d 541. During the course of its examination, the court may, in the interests of justice, ask proper questions of

witnesses, even if these are leading questions. *Id.* at 97, 454 N.E.2d 541, citing *Gilhooley v. Columbus Ry. Power & Light Co.* (1918), 20 Ohio N.P. (N.S.) 545.

{¶20} Upon review of the record, we find the trial court's questions of the witnesses did not go beyond the parameters of Evid.R. 614(B).

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

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

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

PAD:kgb

