

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: : JUDGES:
 : Julie A. Edwards, P.J.
 : John W. Wise, J.
 C.W. & I.O. : Patricia A. Delaney, J.
 :
 : Case No. CT 2010-0002
 :
 :
 :
 : OPINION

CHARACTER OF PROCEEDING: Civil Appeal from Muskingum County
Court of Common, Juvenile Division,
Pleas Case Nos. 20930094 &
20930095

JUDGMENT: Affirmed In Part and Reversed In Part

DATE OF JUDGMENT ENTRY: September 23, 2010

APPEARANCES:

For Appellant Timothy Wagner

For Melinda Overly

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Edwards, P.J.

{¶1} Appellant, Timothy Wagner, appeals a judgment of the Muskingum County Juvenile Court finding his children C.W. and I.O. to be neglected and dependent and awarding temporary custody of the children to Beth Postel, with protective supervision to Muskingum County Children's Services (MCCS). MCCS is the appellee.

STATEMENT OF FACTS AND CASE

{¶2} On July 31, 2009, appellee filed a complaint in the Muskingum County Juvenile Court alleging that C.W. and I.O. were neglected and dependent. The complaint also alleged that C.C., another child living in the home, was neglected and dependent. The children resided at the time with appellant and his girlfriend, Melinda Overly. Melinda is the biological mother of C.C. and I.O. Appellant is the natural father of C.W. and I.O. At the time the complaint was filed, C.W. was 7 ½ years old, C.C. was 2 ½ years old, and I.O. was 4 months old.

{¶3} On July 11, 2009, MCCS received a report concerning domestic violence and drug use in the home. An investigation did not materialize due to the failure of appellant and Melinda Overly to cooperate with MCCS.

{¶4} Appellant and Melinda Overly brought C.C. to the emergency room on July 29, 2009, but he was not admitted. They brought C.C. to the emergency room again on July 30, 2009. He had poor muscle tone, could not put weight on his legs, could not move his arms without difficulty and was difficult to awaken. C.C. only roused during blood tests and was very sleepy. Drug testing revealed the presence of the drug benzodiazepine in his system. Benzodiazepine is an opiate, which is found in appellant's prescription drug, Klonopin.

{¶5} Because appellant and Melinda appeared to be under the influence at the hospital, both parents were tested for drugs and both tested positive for marijuana. Appellant and Melinda provided conflicting reports as to how C.C. might have ingested the drug. Melinda suggested he had eaten bad yogurt. Appellant admitted that possibly C.C. got into his prescription medication, or he might have picked drugs up off the sidewalk because the family lived in a bad neighborhood. The parents also suggested that possibly someone who came to the door had dropped medication.

{¶6} Appellant and Melinda were both arrested at the hospital and charged with child endangerment. The children were placed in foster care due to the arrest of the parents. Appellant ultimately pleaded guilty to disorderly conduct.

{¶7} Due to the inability to complete adjudication and disposition within the ninety-day statutory time limitation, the complaints filed on July 31, 2009, were dismissed, and new complaints were filed on October 7, 2009.

{¶8} The case proceeded to hearing on December 21, 2009. During the adjudication portion of the hearing, evidence was presented concerning what occurred at the hospital regarding C.C. The court thereafter found all three children to be dependent and neglected.

{¶9} The case proceeded immediately to disposition. At disposition, evidence was presented that appellant had successfully completed the parenting program which was part of his case plan and was working on a drug treatment program, but had not yet finished the drug treatment program. Appellant did not have a job. He had a trailer to live in, but did not stay there often and issues had arisen regarding his ability to pay the rent. Appellant had demonstrated anger issues throughout the pendency of the case.

He exploded during a family team meeting because certain family members were included that he did not want involved in the case, and police were called in to settle him down. He had been kicked out of Six County when he threw a chair at a counselor, and at one point threatened to knock someone's windows in at Juvenile Court. He had an anger incident with the guardian ad litem. As the case proceeded he began to control his anger better, and would get up and leave when he became upset instead of exploding. Appellant had a new girlfriend at the time of the hearing, and while concerns had been reported to appellee about this girlfriend, nothing had been verified.

{¶10} At the time of the hearing, Melinda Overly was unable to assume custody and agreed to temporary disposition with Beth Postel, who is Melinda's aunt. MCCS had approved Ms. Postel's home study, and all three children were placed in her home together. The natural mother of C.W. did not have housing and had not participated in her case plan.

{¶11} The court placed the children in the temporary custody of Beth Postel with protective supervision to appellee. Appellant assigns four errors on appeal:

{¶12} "I. IT WAS PREJUDICIAL ERROR AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO FIND THE CHILDREN I.O. AND C.W. NEGLECTED AND DEPENDENT CHILDREN.

{¶13} "II. IT WAS PREJUDICIAL ERROR AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO GRANT TEMPORARY CUSTODY OF THE TWO MINOR CHILDREN TO BETH POSTAL (SIC).

{¶14} “III. IT WAS PREJUDICIAL ERROR AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO GRANT TEMPORARY CUSTODY TO A NON PARENT.

{¶15} “IV. IT WAS PREJUDICIAL ERROR AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO PLACE THE CHILDREN IN THE TEMPORARY CUSTODY OF MUSKINGUM COUNTY CHILDREN SERVICES.”

I

{¶16} In his first assignment of error, appellant argues that the findings of neglect and dependency are not supported by clear and convincing evidence.

{¶17} 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, 477, 120 N.E.2d 118; *In re: Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 481 N.E.2d 613.

{¶18} 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.

{¶19} 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:

{¶20} “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.

{¶21} Dependency is defined by R.C. 2151.04, which provides in pertinent part:

{¶22} “As used in this chapter, ‘dependent child’ means any child:

{¶23} “(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child’s guardianship;

{¶24} “(D) To whom both of the following apply:

{¶25} “(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

{¶26} “(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household.”

{¶27} Neglect is defined by R.C. 2151.03, which provides in pertinent part:

{¶28} “As used in this chapter, ‘neglected child’ includes any child:

{¶29} “(2) Who lacks adequate parental care because of the faults or habits of the child’s parents, guardian, or custodian;”

{¶30} The focus of a charge that a child is dependent under R.C. 2151.04(C) is on the child and his condition and not on the faults of the parents.” *In Re Bishop* (1987), 36 Ohio App.3d 123, 521 N.E.2d 838; *In re: Bibb* (1980), 70 Ohio App.2d 117, 435 N.E.2d 96; *In re: Riddle* (1977), 79 Ohio St.3d 259, 680 N.E.2d 1227.

{¶31} The judgment finding I.O. and C.W. to be dependent is not against the manifest weight of the evidence. The evidence demonstrated that appellant and Melinda brought C.C., Melinda’s child living in the same home with I.O. and C.W., to the hospital suffering from the effects of ingestion of an opiate drug found in appellant’s prescription medication. While it is not clear how the child came to ingest the medication, the court could infer that the medication was not placed in a secure location where a 2 ½ year old child could not access it, and/or C.C. was not adequately

supervised. Appellant tested positive for marijuana at the hospital. While the parents acted appropriately in taking C.C. to the hospital when they noticed the physical problems that resulted from ingestion of the drug, the court could conclude from this evidence that all three children were dependent because the condition of C.C. and the environment in which they were living, in which a small child had somehow accessed a dangerous opiate drug, warranted the state, in the interests of I.O. and C.W., to assume guardianship.

{¶32} However, there is no evidence in the record of the adjudicatory portion of the hearing to prove that C.W. and I.O. were neglected. Nothing in the evidence presented concerning C.C. demonstrates that I.O. and C.W. lacked adequate parental care because of the faults or habits of appellant and Melinda Overly.

{¶33} The first assignment of error is sustained as to the finding of neglect and overruled as to the finding of dependency.

II, III, IV

{¶34} Although not separately argued by brief as required by App. R. 16(A)(7), appellant argues in his second, third and fourth assignments of error that the court erred in awarding temporary custody to Beth Postel.

{¶35} R.C. 2151.353(A)(2) allows the court to award temporary custody to a relative or any other home approved by the court.

{¶36} At the time of the hearing, Beth Postel's home study had been approved, and all three children were living with her. Appellant had a trailer but did not stay there often, and there were issues with his ability to pay the rent due to his lack of employment. He had completed the portion of the case plan requiring him to complete

parenting training, and he had started to make progress on controlling his anger. However, he had not yet completed his drug treatment program and the agency had concerns about his new girlfriend based on reports which had not yet been verified. The caseworker testified that the ultimate goal remained reunification. While appellant is to be commended for working on his case plan, the court did not err in concluding that he was not yet prepared to assume custody of the children.

{¶37} The second, third and fourth assignments of error are overruled.

{¶38} The judgment of the Muskingum County Juvenile Court is reversed as to the finding of neglect. The judgment is affirmed as to the finding of dependency and the award of temporary custody to Beth Postel with protective supervision to Muskingum County Children's Services.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

JUDGES

JAE/r0617

