

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: C.Y.and K.Y., :
DEPENDENT CHILDREN :
: Hon. William B. Hoffman, P.J.
: Hon. W. Scott Gwin, J.
: Hon. John W. Wise, J.
:
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: Case No. 14-CA-7
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: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Juvenile Division, Case Nos. C2012-0365 and C2012-0734

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 12, 2014

APPEARANCES:

For Appellant R.Y.

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For Appellees Foster Parents

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For Appellee LCJFS

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Gwin, J.,

{¶1} Appellant R.Y. (“Father”) appeals the January 6, 2014 judgment entry of the Licking County Common Pleas Court, Juvenile Division, denying appellant’s objection to and approving the magistrate’s decision of December 11, 2013, granting the motions of the foster parents for legal custody of C.Y. and K.Y.

Facts & Procedural History

{¶2} Appellant is the father of C.Y., born October 19, 2009, and K.Y., born on November 1, 2012. On June 1, 2012, the Licking County Department of Job and Family Services (“LCJFS”) filed a dependency complaint with regards to C.Y. The complaint stated, in part, that C.Y.’s mother was abusing drugs, was homeless, has two older children who are in the legal custody of their grandparents, and that Father’s whereabouts were unknown. A similar dependency complaint was filed with regards to K.Y. on November 12, 2012. On July 27, 2012, C.Y. was adjudicated dependent and temporary custody of C.Y. was given to LCJFS. Father did not appear at the hearing. On January 9, 2013, K.Y. was adjudicated dependent and temporary custody of K.Y. was given to LCJFS. Father did not appear at the hearing.

{¶3} In May of 2013, the foster parents of both C.Y. and K.Y. filed motions for legal custody of C.Y. and K.Y. In a June 2013 filing, LCJFS stated they did not oppose the motions for legal custody.

{¶4} In August of 2013, Father was added to the case plan as he was released from jail in July of 2013. Due to the concerns of history of substance abuse and recent criminal history, the case plan ordered Father to: (1) participate in and successfully complete a drug and alcohol program; (2) provide negative drug screens; (3) follow

probation rules and complete probation; (4) comply with all laws and not associate with anyone with a criminal history; (5) complete parenting classes; (6) attend visits with the children; and (7) sign any and all releases of information. On November 18, 2013, Father filed a motion to reunify with C.Y. and K.Y.

{¶5} A trial was held before a magistrate on November 20, 2013 on Father's motion to reunify and the foster parents' motions for legal custody. Father testified that he was incarcerated from January of 2013 to July of 2013. Father further stated that from March 2012 to August of 2012, he had been "floating around." Father pled guilty to possession of drugs in January of 2012 and was placed on probation. However, Father failed to follow the rules of his probation and was an absconder until he was arrested at a hotel where he was staying on January 9, 2013. Father confirmed he had a previous drug conviction in 2000 for trafficking in cocaine and trafficking in ecstasy and was sentenced to two years in prison.

{¶6} Father stated that one year is the longest he has been at one residence for the last five years. Father was not aware K.Y. was born with drugs in her system. Father has an older child who lives with his mother. Father stated he completed an alcohol and drug assessment and he informed the assessor about his prior convictions. Father confirmed he knew the children's mother lost custody of C.Y. sometime in 2012.

{¶7} Father testified that he is currently employed and has lived in a house with a lease since July of 2013. When asked if he had any recent contact with the children's mother, Father stated that since July of 2013, he had three to four conversations with her and she visited him once in jail in February of 2013.

{¶8} Jennifer Masterson (“Masterson”) is a caseworker at LCJFS and has been involved with C.Y. since May of 2012 and with K.Y. since she was born. When Masterson first became involved in the case, the children’s mother reported domestic violence issues between her and Father and stated Father’s whereabouts were unknown. Masterson’s first contact with Father was in April of 2013. Masterson confirmed that Father was added to the case plan in August of 2013 and was ordered to, in part, complete parenting classes, complete a drug and alcohol assessment, maintain stable housing and employment, and not get into trouble.

{¶9} Masterson testified C.Y. was placed with the foster parents on May 31, 2012 and is comfortable and happy with the foster parents. He is involved in many activities that he enjoys. K.Y. was placed with the same foster parents on December 6, 2012 and is bonded to the foster parents. The foster parents got K.Y. extra services at Help Me Grow as she was addicted to drugs when she was born. Masterson does not believe the foster parents are preventing reunification because they had another foster child who was reunified and because they keep pictures of Father and the children’s mother in their home.

{¶10} Masterson testified it is in C.Y. and K.Y.’s best interest for legal custody to be given to the foster parents. While Father has fantastic visits with the children and has substantially complied with his case plan, the foster parents provide the children with stability Father cannot. Masterson stated Father has been stable since he was released from jail, but this is a short period of time. When asked why the children cannot be placed with Father now, Masterson testified that he has only had five visits with the children and he needs more visits with less restrictions and more time to

determine whether or not he is able to maintain a lifestyle without drug or alcohol involvement. Masterson is also concerned about Father's contact with the children's mother, a drug abuser, and his very recent history of drug use. Masterson would want Father to maintain his current lifestyle for at least a year before she would consider placing the children with him on a full-time basis.

{¶11} K.P., the children's foster mother, and A.P., the children's foster father, testified the children are happy and healthy in their home. C.Y. goes to preschool and participates in various activities. While K.Y. was born addicted to opiates, she is doing well and they have sought extra services at Help Me Grow. Also testifying on behalf of the foster parents were two individuals that attended church with the family and stated the children were well-behaved and bonded to the foster parents.

{¶12} Father's mother testified that Father has a good relationship with his older son and that if Father cannot obtain legal custody of the children, she wants legal custody. She testified that she texted Father when C.Y. was removed from his mother's care. However, she did not tell Father his probation officer called her because she was estranged from Father at that point.

{¶13} Elena Tuhy-Walters ("Tuhy-Walters") was appointed the Guardian ad Litem for C.Y. on June 1, 2012 and K.Y. on November 13, 2012. Tuhy-Walters filed an initial report on September 11, 2013. In her report, Tuhy-Walters detailed the criminal history of Father and stated it was in the best interest of C.Y. and K.Y. for legal custody to be given to the foster parents due to Father's history of drug abuse, criminal charges, and history of not caring for his children. Tuhy-Walters filed a supplemental report on November 12, 2013. In this supplement, Tuhy-Walters stated Father had good visits

with the children. However, Father knew about the agency involvement with C.Y. in June of 2012, but did not call the agency because he had a warrant for a probation violation and spent seven months in prison after absconding from his probation. Tuhy-Walters again stated it was in C.Y. and K.Y.'s best interest for legal custody to be granted to the foster parents with parenting time and visitation with Father.

{¶14} Tuhy-Walters also testified at the November 2013 trial. Tuhy-Walters testified her concern with Father is that he absconded from probation, had no contact with the agency during that time, and was not working on a case plan during that time. When asked what Father needs to do to reunify, Tuhy-Walters testified that he needs to show an extended pattern of stability. Tuhy-Walters stated that she stands by the recommendation made in her report.

{¶15} The magistrate issued a decision on December 11, 2013. The magistrate found that Father has a history of involvement with illegal drugs and the criminal justice system from 2000 through 2013, did nothing to protect the children from their mother's chronic substance abuse, and was unaware that his baby, K.Y., was born with drugs in her system. Further, that while Father did put forth the bare minimum efforts to complete his case plan, he did not complete a substance abuse program and only spent ten (10) hours with his daughter, K.Y., in the past year. The magistrate also noted that there is no evidence that Father ever had full custodial responsibility for any of his children. In addition, that Father has a job with irregular hours, lives far away from family support, and has ongoing contact with the children's mother, a drug addict. The magistrate found the children had a strong bond with the foster parents and they provide the children with a safe and stable home. The magistrate thus concluded it is in

the best interest of C.Y. and K.Y. for legal custody to be granted to the foster parents. The magistrate further established an unsupervised visitation schedule for Father.

{¶16} On December 19, 2013, Father filed an objection to the magistrate's decision stating that he "objects to the Magistrate's decision filed December 11, 2013 that will be further supplemented by Court transcript." Also on December 19, 2013, Father filed a motion for extension of time to request the transcript. On January 6, 2014, the trial court denied Father's motion for extension of time to request the transcript, stating that Father failed to file an affidavit of evidence in lieu of a transcript and also failed to request the audio recording of the hearing.

{¶17} Also on January 6, 2014, the trial court issued a judgment entry overruling Father's objections to the magistrate's decision and approving the magistrate's decision placing C.Y. and K.Y. in the legal custody of their foster parents. The trial court stated that it undertook an independent examination of the magistrate's decision and reviewed the audio and written record of the proceeding, including the exhibits submitted. The trial court found it was in the best interest of C.Y. and K.Y. to be placed in the legal custody of the foster parents. The trial court noted the guardian ad litem's report and supplemental report stated it was in the children's best interest to grant the motions for legal custody by the foster parents. Further, that the magistrate's findings were supported by the audio recording of the hearing. Also, that Father failed to state with specificity what he objected to as required by Rule 40(D)(3)(b)(ii). The trial court finally noted that this is not a permanent custody motion and thus Father retains residual rights.

{¶18} Father appeals the January 6, 2014 judgment entry of the Licking County Common Pleas Court, Juvenile Division, and assigns the following as error:

{¶19} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO REUNIFY FATHER-APPELLANT WITH HIS CHILDREN.

{¶20} "II. THE TRIAL COURT ERRED BY AWARDING LEGAL CUSTODY TO THE FOSTER PARENTS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I. & II

{¶21} We initially note that this is not a case involving permanent custody as the trial court granted only legal custody of the children to the foster parents. R.C. 2151.011(B)(19) defines legal custody as "a legal status that vests in the custodian the right to have physical care and control of the child and to determine whether and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." As pointed out by the Ohio Supreme Court, "the important distinction is that an award of legal custody of a child does not divest parents of their residual parental rights, privileges, and responsibilities. In the future, then, in this case, either parent may petition the court for a modification of custody." *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188.

{¶22} R.C. 2151.353(A) states in pertinent part: "If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

* * *

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings * * *.

{¶23} A trial court “must have wide latitude in considering all the evidence” and a custody decision will not be reversed absent an abuse of discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997), citing *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). 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 finder of fact could base its judgment. *Cross Truck Equip. Co. v. The Joseph A. Jeffries Co.*, 5th Dist. Stark No. CA 5758, 1982 WL 2911 (Feb. 10, 1982). 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.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶24} Issues relating to the credibility of witnesses and the weight to be given to the evidence are primarily for the trier of fact. *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evidence in the parties’ demeanor and attitude that does not translate to the record well.” *Davis*, 77 Ohio St.3d at 419.

{¶25} Further, unlike in a permanent custody proceeding where a juvenile court's standard of review is by clear and convincing evidence, the standard of review in legal custody proceedings is a preponderance of the evidence. *In re A.C.*, 12th Dist. Butler No. CA2006-12-105, 2007-Ohio-3350; *In re Nice*, 141 Ohio App.3d 445, 751 N.E.2d 552 (7th Dist. 2001).

{¶26} Appellant argues the trial court abused its discretion and the trial court's decision to grant legal custody to the foster parents was against the manifest weight of the evidence because Father completed the requirements of his case plan and remedied the conditions that led to the removal of the children. Further, that the trial court improperly placed the foster parents on equal footing with Father. We disagree.

{¶27} The statutory scheme regarding an award of legal custody does not include a specific test or set of criteria, and a trial court must base its decision on the best interest of the child. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188; *In re P.S.*, 5th Dist. Stark No. 2012CA00007, 2012-Ohio-3431. Despite the differences between a disposition of permanent custody and legal custody, some Ohio courts have recognized that "the statutory best interest test designed for the permanent custody situation may provide some 'guidance' for trial courts making legal custody decisions." *In re A.F.*, 9th Dist. Summit No. 24317, 2009-Ohio-333, citing *In re T.A.*, 9th Dist. Summit No. 22954, 2006-Ohio-4468.

{¶28} R.C. 2151.414(D) sets forth factors to be considered in making a determination regarding the best interest of the child. These factors include, but are not limited to, the following:

- (1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers, 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, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;
- (4) The child's need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
- (5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶29} In this case, all the parties agree that Father substantially completed his case plan. However, the successful completion of a case plan is not dispositive on the issue of reunification. *In re W.A.J.*, 8th Dist. Cuyahoga No. 99813, 2014-Ohio-604. While it may be in the Father's best interest to complete the case plan, this is only one factor for a trial court to consider what is in the best interest of the children and, "in legal custody cases, trial courts should consider all factors relevant to the best interest of the

child". *In the Matter of D.P. and G.P.*, 5th Dist. Stark No. 2010CA00348, 2011-Ohio-1907.

{¶30} Where a parent has participated in his case plan and completed most or all of the plan requirements, a trial court may still properly determine that such parent has not substantially remedied the problems leading to agency involvement. *In the Matter of A.L. and J.L.*, 5th Dist Guernsey No. 11 CA 23, 2012-Ohio-481. The trial court clearly considered the fact that Father completed the case plan in making a best interest determination as indicated in both the magistrate and the trial court's entries. Further, though Father contends he substantially remedied any problems relating to him leading to agency involvement, the testimony and evidence presented at the hearing do not support this conclusion.

{¶31} Based upon the facts presented at the hearing, we find the trial court did not abuse its discretion in granting legal custody to the foster parents. The foster parents' home is suitable, provides stability, and they are capable of providing a safe and stable home to care for the children on an extended, continuous basis. Conversely, although Father made great strides towards improving his lifestyle and situation, the record at the time of the hearing demonstrates that, prior to his incarceration in January of 2013 for possession of drugs, he was declared an absconder from probation only three months after he was sentenced, he knew C.Y., and subsequently K.Y., had been taken from their mother but failed to contact the agency, he had not maintained a stable home, continually had contact with mother, a drug addict, and had previously been in prison for two years due to drugs conviction in 2000. Further, Father's accomplishments generally had only recently begun prior to the hearing as Father had

been released from prison only four months prior to the hearing. See *In the Matter of W.A., Jr.*, 5th Dist. Muskingum No. CT2013-0002, 2013-Ohio-3444. There is no evidence that Father ever had full-time custodial parenting responsibility of the children prior to his release from prison. Father has a loving relationship with his children at visitation, but has only spent a limited amount of hours with the children since his release from prison. Father has a limited amount of family support and testified he has contact with the children's mother, a drug addict.

{¶32} Furthermore, both the guardian ad litem and the caseworker testified they believe it is in the best interest of C.Y. and K.Y. to grant the foster parents' motions for legal custody. Both the guardian ad litem and the caseworker testified that, while Father completed his case plan, they had concerns about his long-term stability and ability to maintain a drug and alcohol-free lifestyle. Both the guardian ad litem and the caseworker testified Father would need to show an extended period of time of stability, maintaining his current lifestyle, and having less restrictive visitation with the children for them to consider changing their opinions about the best interest of the children.

{¶33} While Father also contends the trial court abused its discretion in placing the foster parents on equal footing with Father, in review of the record, we find the trial court utilized the proper legal standard in determining the motion for legal custody in this case. As noted above, once a child has been adjudicated dependent, the juvenile court's sole determination of whether to place a child in the legal custody of a parent or a non-parent is based solely on the best interest of the child. The trial court properly conducted a review of the best interest of the children and issued specific findings of fact based on the evidence in the record supporting its decision. Further, Masterson

testified that the foster parents did not undermine the reunification process as the foster parents had foster children in their home who were reunified with their parents and kept pictures of Father at the home for the children to look at.

{¶34} Upon review of the record, we find the trial court's grant of legal custody to the foster parents was supported by the evidence presented by a preponderance of the evidence, and was made in consideration of the children's best interest. Accordingly, the trial court's decision did not constitute an abuse of discretion and was not against the manifest weight of the evidence. Father's assignments of error are overruled and the January 6, 2014 judgment entry of the Licking County Common Pleas Court, Juvenile Division, is affirmed.

By Gwin, J.,

Hoffman, P.J., and

Wise, J., concur