

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: S & W CHILDREN : APPEAL NOS. C-230110
C-230122
: TRIAL NO. F09-1799Z
:
: *OPINION.*

Appeals From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 30, 2023

Alana Van Gundy, for Appellant Mother,

Jeffrey J. Cutcher, for Appellant Father,

Jon R. Sinclair, for Appellee S & W Children,

ProKids and *Jeffrey McCormick*, for Appellee Guardian ad Litem for the Children,

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Patsy Bradbury*, Assistant Prosecuting Attorney, for Appellee Hamilton County Department of Job and Family Services.

ZAYAS, Judge.

{¶1} In these consolidated appeals, appellants mother and father appeal the judgment of the Hamilton County Juvenile Court granting permanent custody of their children—A.W., E.S., and K.S.—to the Hamilton County Department of Job and Family Services (“HCJFS”). For the following reasons, we affirm the judgment of the trial court.

I. Factual and Procedural History

{¶2} This case began in 2009 when HCJFS filed a complaint seeking temporary custody of mother’s two oldest children—J.S. and D.S.—based on allegations that mother physically abused D.S. and had untreated mental-health concerns. The children were ultimately adjudicated and placed in the legal custody of a family member after the juvenile court found that mother had failed to complete case-plan services and failed to remedy the conditions which caused the children’s removal. One of the bases for the juvenile court’s decision was the ongoing violence in and around mother’s home.

{¶3} In 2010, mere months after her birth, A.W. was placed in the temporary custody of HCJFS after being adjudicated dependent based on mother’s association with father, who had an “extensive criminal history” and had allegedly perpetrated acts of violence against mother, which mother failed to disclose to HCJFS and minimized as a threat when confronted by the court.

{¶4} In 2012, upon his discharge from the hospital at birth, HCJFS received interim custody of E.S. by agreement of the parties based on mother’s history with father and her refusal to identify who E.S.’s father was. E.S. was ultimately adjudicated dependent and placed back into mother’s care under orders of protective supervision. Shortly thereafter, A.W. was placed back in mother’s care under orders

of protective supervision after the juvenile court found that mother had maintained a protective order against father, completed case-plan services, was prepared to parent the children, and had the skills and resources to care for the children adequately and appropriately.

{¶5} The protective-supervision orders continued for both children into 2014 due to mother's continued contact with father. The juvenile court ordered several times that father not be allowed in the home or have access to mother or the children. The protective-supervision orders were ultimately terminated by agreement of the parties in July 2014.

{¶6} In September 2019, an ex parte emergency order was entered regarding A.W., E.S. and K.S.—born in 2015—after mother and father engaged in a physical confrontation in front of the children—which resulted in father being charged with domestic violence—and mother failed to follow the safety plan that was then implemented. When mother was informed of the emergency order, she allegedly drove off with the children in a car with the HCJFS caseworker inside, resulting in police involvement. Interim custody of the children was subsequently granted to HCJFS by agreement of the parties on September 10, 2019. The children were adjudicated dependent and placed in the temporary custody of HCJFS on October 2, 2019. Visitation with the children was suspended for both parents on December 13, 2019, and both parties were ordered to have no contact with the children based on a recommendation from the children's therapist. The case plans adopted by the juvenile court detailed the ongoing allegations from the children about the abuse and violence that occurred in the home.

{¶7} Ultimately, HCJFS moved for permanent custody of the children on February 17, 2021, asserting that the children had been in the custody of the agency

for more than 12 months of a consecutive 22-month period and permanent custody to the agency was in the best interest of the children. Mother thereafter filed a motion to reinstate visitation on February 22, 2021, which father joined, although never filing a written motion himself. The juvenile court denied both requests after hearing evidence from all parties and finding that the parents had made only limited progress and the children were not ready to have contact with their parents.

{¶8} Several hearings were held on HCJFS’s motion for permanent custody. Testimony was presented from mother, father, a kinship care coordinator for HCJFS, a school-based therapist who worked independently with K.S., another therapist who worked independently with K.S., a clinical supervisor who worked with all the children providing sibling therapy and individually with A.W. and E.S., two caseworkers from HCJFS, a court-appointed special advocate (“CASA”) for the children, and the guardian ad litem (“GAL”) for the children. After hearing all the evidence, the magistrate granted permanent custody of the children to HCJFS on August 19, 2022, finding that the children had been in the temporary custody of the agency for more than 12 months of a consecutive 22-month period and permanent custody to the agency was in the best interest of the children.

{¶9} Mother and father each objected to the magistrate’s decision, arguing that the decision was against the manifest weight of the evidence and not supported by the evidence. After holding a hearing, the juvenile court overruled the objections on February 24, 2023. The juvenile court first found that the magistrate properly determined the factual issues and adopted the magistrate’s statement of facts as written. The juvenile court then found that the magistrate’s 12-of-22 determination was supported by the record and that permanent custody to HCJFS was in the best interest of the children.

{¶10} Mother and father now appeal.

II. Law and Analysis

A. Standard of Review

{¶11} When reviewing a decision of the juvenile court involving the termination of parental rights, we look to the record and determine whether the court's decision was supported by clear and convincing evidence. *In re A.W.*, 1st Dist. Hamilton No. C-220248, 2022-Ohio-3715, ¶ 19, citing *In re P. & H.*, 1st Dist. Hamilton Nos. C-190309 and C-190310, 2019-Ohio-3637, ¶ 6. “Clear and convincing evidence is evidence sufficient to “produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.”’” *Id.*, citing *In re P. & H.* Where some competent and credible evidence exists to support the juvenile court's judgment, this court will not substitute its judgment for that of the juvenile court. *Id.*, citing *In re P. & H.*

{¶12} When examining the sufficiency of the evidence, we look to the adequacy of the evidence and determine whether some evidence exists on each element. *Id.* at ¶ 20, citing *In re P. & H.* at ¶ 7. When examining the weight of the evidence, we look to the inclination of the evidence and determine whether the greater amount of credible evidence supports one side rather than the other. *Id.*, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12. In doing so, we must “weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether—in resolving the conflicts in the evidence—the juvenile court ‘clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.’”’” *Id.*, citing *In re P. & H.* at ¶ 7. We must also “be mindful of the presumption in favor of the finder of fact.” *Id.*,

citing *In re A.B.*, 1st Dist. Hamilton Nos. C-150307 and C-150310, 2015-Ohio-3247, ¶ 15.

B. Permanent-Custody Determination

{¶13} In mother's first assignment of error and father's sole assignment of error, each party challenges the decision of the juvenile court to grant permanent custody of the children to HCJFS. A juvenile court may grant permanent custody of a child to the agency if, after holding an R.C. 2151.414(A) hearing, the court finds—by clear and convincing evidence—that (1) it is in the best of the child to grant permanent custody to the agency, and (2) the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(d). Neither party here disputes that the children in this case were in the temporary custody of HCJFS for more than 12 months of a consecutive 22-month period. Therefore, this court must only determine whether the juvenile court's best-interest determination is supported by the record.

{¶14} In making a best-interest determination, the juvenile court must consider all relevant factors, including, but not limited to (1) the interaction and interrelationship of the child and the child's parents, siblings, relatives, foster caregivers, out-of-home providers, and any other person who may significantly affect the child, (2) the wishes of the child, as expressed by the child or the guardian ad litem, with due regard for the maturity of the child, (3) the custodial history of the child, (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, and (5) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply in relation to the parents and child. R.C. 2151.414(D)(1).

{¶15} The juvenile court found that permanent custody to HCJFS was in the best interest of the children because the children have been steadfast in their refusal to see their parents, have not seen their parents in approximately three years, have been in the custody of the agency since October 2, 2019, and are in need of a legally secure placement that cannot be achieved without a grant of permanent custody to the agency. When considering a legally secure placement, the court recognized that the children have been in the care of a maternal aunt, V.B., throughout the duration of their placement with the agency and V.B. has provided for the needs of the children in a consistent manner. On the other hand, the court found no reliable evidence to indicate that mother could protect herself and the children and provide the children with the security and structure that they desperately need. The court further found that father’s “virtually complete failure” to participate in case-plan services established that he was incapable of providing the children with the security and structure essential to their safety and well-being.

{¶16} The juvenile court’s findings are supported by the record. The children have been in the temporary care of the agency since October 2, 2019. The testimony of the kinship coordinator, all three therapists who provided care to the children, the CASA, and the GAL support the court’s finding that the children have been steadfast in their refusal to interact with their parents. All the children have been diagnosed with PTSD and have ongoing trauma they are working through due to the abuse and violence they were subjected to and/or witnessed while in the care of their parents, which neither parent meaningfully disputes. The GAL testified that the children do not wish to return home to their parents. The record demonstrates that the court provided the appropriate weight to the children’s wishes based on their ages, while also taking into consideration the behavior of the children surrounding any discussion

of their parents or returning to their parents' care when considering the children's wishes.

{¶17} Father does not dispute the juvenile court's finding that he failed to complete case-plan services. Instead, he argues that the court failed to consider that he was providing full-time care to the children in the home prior to their removal and has maintained stable housing and income. However, this evidence is not relevant to the conditions which caused the children's removal. The children were removed due to concerns of violence and abuse, and father failed to complete any services to address these issues. Additionally, father failed to take any accountability for the conditions that led to the children's removal. Further, he failed to demonstrate any understanding of the children's diagnoses and how he could help the children heal if they were returned to his care.

{¶18} Mother argues that she complied with case-plan services and HCJFS failed to put forth any evidence that she was unable to care for the children. The record reflects that mother made substantial progress in her case-plan services and was working hard to overcome the effects of the intimate-partner violence that she suffered. The juvenile court recognized mother's progress in this regard, noting that mother engaged with multiple mental-health and domestic-violence professionals and obtained a protection order against father. However, HCJFS put forth evidence demonstrating that, despite completion of her case-plan services, concerns remained regarding mother's ability to safely care for the children. A caseworker from HCJFS testified that mother was always more fixated on herself and her own trauma to the point that it impacted her ability to understand what her children were going through and impeded any ability to progress or move forward. The caseworker also said that mother continued to engage with father over Facebook and never demonstrated any

understanding of the situation she was placing herself into by doing so. Another caseworker from HCJFS testified that, although mother does express regret for a lot of what the children went through, she does not acknowledge the abuse that happened towards the children and does not take accountability for protecting the children, being able to meet their basic needs, or providing for the children. Mother did not put forth any evidence to dispute any of these assertions.

{¶19} On the other hand, the record shows that the children are doing well in their current placement. Testimony established that the children are thriving in their aunt's care and receiving the structure, guidance, and appropriate discipline that they need. The children are happy, comfortable, and bonded with their aunt. Lastly, the record reflects that all home studies failed for any other family member willing to provide care for the children. Based on the foregoing, we hold that the record supports the juvenile court's determination that permanent custody to HCJFS was in the best interest of the children. Therefore, mother's first assignment of error and father's sole assignment of error are overruled.

D. Americans with Disabilities Act

{¶20} In mother's second assignment of error, she argues that the juvenile court's grant of permanent custody to HCJFS was in violation of the Americans with Disabilities Act ("ADA") as mother made it clear that she was on disability due to suffering a traumatic brain injury from the ongoing domestic violence and yet mother was not provided with any additional resources to work toward reunification. This argument is unpersuasive for several reasons. First, mother points to no authority for her argument nor does she actually specify any additional resources that she should have been provided. Second, mother failed to raise this argument, or any argument concerning the ADA, below and has therefore waived this argument on appeal. *See,*

e.g., *In re B.A.*, 2016-Ohio-7786, 73 N.E.3d 1156, ¶ 10-11 (8th Dist.) (“Mother did not raise a violation of the ADA below as a defense. Therefore, she has waived the argument on appeal absent a showing of plain error, which does not exist here.”); *In re L.M.*, 2018-Ohio-3712, 111 N.E.3d 1242, ¶ 36 (3d Dist.); *In re J.C.*, 2d Dist. Montgomery No. 25608, 2013-Ohio-3937, ¶ 8.

{¶21} Third, as pointed out by the GAL, this court has held that “an alleged violation of the ADA by a public children-services agency may not be asserted as a defense in a permanent custody action brought by that agency.” See *In re C.W.*, 1st Dist. Hamilton No. C-110342, 2011-Ohio-4756; ¶ 41; *accord, e.g., In re B.A.* at ¶ 7 (“Ohio courts of appeals are generally in agreement that an alleged violation of the ADA does not provide a defense in an action brought to terminate parental rights.”); *In re L.B.J.*, 4th Dist. Lawrence Nos. 17CA2 and 17CA3, 2017-Ohio-4416, ¶ 2; *In re L.M.* at ¶ 37; *In re J.C.* at ¶ 7. Fourth, mother was asked at trial if her disability in any way hindered her ability to care for the children and she said no. Last, there is no evidence in the record that mother was discriminated against based on her disability or was unable to utilize the services provided to her in the case plan, which she substantially complied with. Therefore, we overrule mother’s second assignment of error.

III. Conclusion

{¶22} Having overruled each assignment of error, we affirm the judgment of the juvenile court.

Judgment affirmed.

CROUSE, P.J., and **KINSLEY, J.**, concur.

Please note:

The court has recorded its own entry this date.