

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

In Re: R.B.	:	
	:	No. 107709
A Minor Child	:	
	:	
[Appeal by D.B., Father]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 2, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-17910908

Appearances:

Kelly Zacharias, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecutor,
Michelle A. Myers and Cheryl Rice, Assistant County
Prosecutors, *for appellee.*

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, D.B. (“appellant”), brings the instant appeal challenging the trial court’s judgment granting legal custody of his minor child, R.B., to the child’s maternal grandparents. Specifically, appellant argues that the trial court’s decision to grant legal custody to the maternal grandparents was against the manifest weight

of the evidence and that the investigation and report of the child's guardian ad litem were inadequate. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} The instant appeal pertains to the trial court's custody determination with respect to appellant's child, R.B.¹ Appellant is the child's father. The child's mother, C.M., was also a party in the custody proceedings. The child has resided with the maternal grandparents since her birth in 2017.

{¶ 3} The Cuyahoga County Department of Children and Family Services (hereinafter "CCDCFS" or "agency") became involved with the family in 2017 when the child tested positive for marijuana at birth. The agency was concerned about appellant's and mother's substance abuse issues. On July 21, 2017, CCDCFS filed a complaint alleging that the child was abused and requested that the child be placed in the predispositional emergency custody of the maternal grandparents. The trial court placed the child in the predispositional temporary custody of the maternal grandparents on September 5, 2017.

{¶ 4} On October 10, 2017, the trial court held a hearing on the agency's complaint. Neither appellant nor the child's mother appeared at this hearing. The trial court adjudicated the child as abused and placed the child in the temporary custody of the maternal grandparents on October 30, 2017.

¹ R.B. was born in May 2017.

{¶ 5} The agency developed a case plan for the child’s parents. Appellant’s case plan included objectives for substance abuse treatment and stable housing.

{¶ 6} CCDCFS filed a motion to modify temporary custody to legal custody to the maternal grandparents on April 25, 2018. The motion to modify was filed “due to lack of sufficient progress towards remedying the conditions that caused removal.” Appellee’s brief at 2. Prior to the hearing on the agency’s motion to modify, the child’s guardian ad litem (hereinafter “GAL”), filed a report.

{¶ 7} A magistrate held a hearing on the agency’s motion to modify on August 2, 2018. The following parties testified: (1) CCDCFS case worker Jeffrey Williams; (2) the child’s maternal grandmother J.M.; and (3) the child’s GAL, who supplemented her written report with an oral recommendation. During the hearing on CCDCFS’s motion to modify, both appellant and counsel for the child’s mother requested a six-month extension of temporary custody. The agency and GAL opposed these requests, arguing that permanent placement was in the child’s best interest.

{¶ 8} On August 7, 2018, the magistrate issued a decision granting legal custody of the child to the maternal grandparents. Appellant filed objections to the magistrate’s decision on August 21, 2018.

{¶ 9} On August 24, 2018, the trial court issued a judgment entry approving and adopting the magistrate’s decision. Subsequently, in a September 6, 2018 judgment entry, the trial court overruled appellant’s objections to the magistrate’s

decision and confirmed the adoption of the magistrate's decision granting legal custody of the child to the maternal grandparents.

{¶ 10} On September 17, 2018, appellant filed the instant appeal challenging the trial court's judgment. Appellant assigns two errors for review:

I. The trial court erred to the prejudice of appellant in granting legal custody when the guardian ad litem's investigation and report were inadequate and fell below the minimum standard required.

II. The [t]rial [c]ourt committed error to the prejudice of Appellant in granting legal custody contrary to the sufficiency and manifest weight of the evidence by determining legal custody was in the child's best interest.

II. Law and Analysis

A. Guardian Ad Litem's Investigation/Report

{¶ 11} In the first assignment of error, appellant argues that the trial court erred by granting legal custody of the child to the maternal grandparents because the GAL's investigation and report were inadequate and insufficient, and that the GAL failed to make reasonable efforts to become informed of the facts of the case.

{¶ 12} As an initial matter, none of the parties objected to the GAL's written reports or the GAL's supplemental oral recommendation during the legal custody hearing. Furthermore, although appellant filed objections to the magistrate's decision on August 21, 2018, he did not raise any objections pertaining to the GAL's investigation, written reports, or oral recommendation. Accordingly, appellant forfeited any issues pertaining to the GAL's investigation or reports, absent plain error. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 152; *see In re A.D.*, 8th Dist. Cuyahoga No. 85648, 2005-Ohio-5441, ¶ 7 (father never

objected to the submission of the GAL's report or to the trial court's reliance on the report), citing *In re S.B.*, 8th Dist. Cuyahoga No. 85560, 2005-Ohio-3163, ¶ 18 (because mother failed to object to the trial court's use of or reliance on the GAL's report, she waived all but plain error on appeal).

{¶ 13} Plain error exists when the error is plain or obvious and when the error affects a party's substantial rights. Crim.R. 52(B) provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Plain error does not exist unless, but for the error, the outcome at trial would have been different." *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990). "A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings." *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982).

{¶ 14} As this court recently recognized,

[t]he role of a guardian ad litem in a permanent custody proceeding is to protect the child's interest, to ensure that the child's interests are represented throughout the proceedings and to assist the trial court in its determination of what is in the child's best interest. *See, e.g., In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, 951 N.E.2d 398, ¶ 14, citing R.C. 2151.281(B) and Sup.R. 48(B)(1). This is accomplished by the guardian ad litem conducting an investigation of the child's situation and then making recommendations to the court as to what the guardian ad litem believes would be in the child's best interest. *In re J.C.*, 4th Dist. Adams No. 07CA833, 2007-Ohio-3781, ¶ 13.

In re K.Z., 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, ¶ 67.

{¶ 15} In support of his argument that the GAL's investigation and report were inadequate and insufficient, and that the GAL failed to make reasonable efforts to become informed of the facts of the case, appellant directs this court to Sup.R. 48(D), governing a GAL's duties and responsibilities. Sup.R. 48(D), provides, in relevant part:

In order to provide the court with relevant information and an informed recommendation regarding the child's best interest, a guardian ad litem shall perform, at a minimum, the responsibilities stated in this division, unless impracticable or inadvisable to do so.

* * *

(13) A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest, a guardian ad litem shall, at a minimum, do the following, unless impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case:

(a) Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present;

(b) Visit the child at his or her residence in accordance with any standards established by the court in which the guardian ad litem is appointed;

* * *

(d) Meet with and interview the parties, foster parents and other significant individuals who may have relevant knowledge regarding the issues of the case;

* * *

(g) Interview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records;

* * *

(i) Perform any other investigation necessary to make an informed recommendation regarding the best interest of the child.

{¶ 16} In the instant matter, appellant identifies the following purported deficiencies regarding the GAL's investigation: (1) the GAL did not speak with or interview appellant; (2) the GAL did not conduct a home visit, (3) the GAL did not attend or observe a visitation session between appellant and the child; and (4) the GAL did not obtain any records pertaining to appellant's substance abuse treatment or speak with any of the treatment providers.

{¶ 17} Appellant recognizes, however, that a GAL is "not required to perform all the tasks specified under Sup.R. 48(D)(13)[.]" Appellant's brief at 11. Ohio appellate courts, including the Eighth District, have recognized,

"Sup.R. 48 provides * * * good guidelines for the conduct of a guardian ad litem in meeting his or her responsibilities in representing the best interest of a child in order to provide the court with relevant information and an informed recommendation." *In re C.O.*, 8th Dist. Cuyahoga Nos. 99334 and 99335, 2013-Ohio-5239, ¶ 14, quoting *In re K.G.*, 9th Dist. Wayne No. 10CA16, 2010-Ohio-4399, ¶ 12. However, the Rules of Superintendence are only "general guidelines for the conduct of the courts" and "do not create substantive rights in individuals or procedural law." *In re C.O.* at ¶ 14, quoting *In re K.G.* at ¶ 11. As such, it has been generally held that a guardian ad litem's failure to comply with Sup.R. 48 is not, in and of itself, grounds for reversal of a custody determination. *See, e.g., In re C.O.* at ¶ 14; *In re N.B.*, 8th Dist. Cuyahoga No. 105028, 2017-Ohio-1376, ¶ 26; *Miller v. Miller*, 4th Dist. Athens No. 14CA6, 2014-Ohio-5127, ¶ 14-18.

In re K.Z., 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, at ¶ 72.

{¶ 18} In the instant matter, the child's GAL filed two reports. The GAL's first report was filed on October 3, 2017, prior to the hearing on CCDCFS's complaint. The second report was filed on June 6, 2018, prior to the hearing on CCDCFS's motion to modify temporary custody to legal custody.

{¶ 19} First, in the October 3, 2017 report, the GAL indicated that she had performed the following activities:

The [GAL] attended an emergency custody hearing on September 5, 2017. The [GAL] has spoken to the social workers assigned to the case, as well as the parents. The [GAL] conducted a home visit with [mother], the maternal grandparents, and the child on October 7, 2017. The [GAL] has reviewed the Complaint, Mother's criminal case dockets, and other documents.

{¶ 20} The GAL provided the following recommendation in her first report:

Based upon the [GAL's] investigation, the [GAL] finds that it is in the best interests of R.B. that she be placed in the temporary custody of her maternal grandparents[.] [The maternal grandparents] are meeting the daily needs of R.B., and she is doing well with them. In addition, the grandparents are ensuring R.B.'s safety by establishing appropriate boundaries and visitation times for the parents.

{¶ 21} Second, in the June 6, 2018 report, the GAL indicated that she had performed the following activities:

Since the filing of her last Report and Recommendation, the [GAL] has spoken to the maternal grandmother, [J.M.], and the [GAL] has reviewed an amended Case Plan and the pending Motion filed by CCDCFS. The [GAL] had a home visit scheduled for June 5, 2018[,] with the maternal grandparents and the child, but the maternal grandmother had to cancel the visit. The visit has been rescheduled for June 6, 2018.

{¶ 22} The GAL provided the following recommendation in her second report:

Based upon the [GAL's] investigation, the [GAL] finds that it is in the best interests of R.B. that she be placed in the legal custody of the maternal grandparents[.] R.B. is doing well with her grandparents. The parents have not completed Case Plan services, and they have not alleviated the risks that caused R.B.'s removal. Presently, the parents' whereabouts are unknown.

{¶ 23} During the hearing on the agency's legal custody motion, after the parties rested, the GAL confirmed that she was recommending legal custody to the maternal grandparents:

I do believe [legal custody is] in [the child's] best interests. That has been her home since May [2017] since she was born. She's doing very well there. They're meeting her needs. That's the only home she's known.

I know that [appellant] has made some progress recently. I had some concerns about the missed aftercare considering his history of drug abuse.

I think that the grandparents would allow the parents to visit whenever, just as the grandmother testified, so that relationship can be maintained for the parents.

I just think that at this time, it is in [the child's] best interest that the grandparents be granted legal custody.

(Tr. 73-74.)

{¶ 24} After reviewing the record, we find no basis upon which to fault the GAL for not speaking with or interviewing appellant, not visiting appellant's house, or not observing a visitation session.

{¶ 25} As an initial matter, we note that although CCDCFS became involved with the family in July 2017, the record reflects that the agency was not able to contact appellant until June 13, 2018. Appellant acknowledges that he was "out of contact" with CCDCFS and the GAL prior to the June 2018 hearing. See appellant's

brief at 9. However, he contends that the GAL could easily have contacted him during this period of time, through the maternal grandmother, in order to arrange an interview and observe a visitation session.

{¶ 26} Appellant suggests that he was “out of contact” with CCDCFS and the GAL because he was “in rehab.” It is undisputed that appellant completed an IOP — intensive *outpatient* program — treatment program. However, unlike the child’s mother, there is no indication in the record before this court that appellant participated in or completed an *inpatient* treatment program.

{¶ 27} During the September 5, 2017 hearing on CCDCFS’s motion for predispositional temporary custody, appellant’s attorney asserted that appellant “is engaged in treatment,” and that appellant’s case plan recommended an outpatient treatment program. Appellant’s counsel confirmed that appellant had re-engaged in treatment on or around August 28, 2017.

{¶ 28} During the legal custody hearing, although it was undisputed that appellant completed a treatment program, there appeared to be some confusion as to whether the program was inpatient or outpatient. Appellant’s attorney appeared to suggest that appellant and CCDCFS were not in contact with one another because appellant was in an inpatient treatment program.

{¶ 29} The family’s CCDCFS case worker, Jeffrey Williams, testified that the records he obtained from appellant’s treatment provider, Glenbeigh, confirmed that appellant completed an outpatient treatment program. Williams asserted that he did not know what appellant was doing between December 2017, when he was

assigned to the family's case, and June 13, 2018, the first time he spoke with appellant.

{¶ 30} Regardless of whether appellant was completing an inpatient or an outpatient treatment program, he could have, and should have, stayed in contact with CCDCFS and the GAL. We further note that the GAL filed her reports on October 3, 2017 and June 6, 2018 — before appellant got in contact with CCDCFS on June 13, 2018.

{¶ 31} Appellant's communication issues were not limited to CCDCFS and the child's GAL. During the October 10, 2017 hearing on the agency's complaint, appellant's counsel requested a continuance based on the fact that appellant did not attend the hearing. The trial court asked counsel where appellant was, and appellant's counsel explained that she "[had] not been able to get in contact with him," and that the last time she spoke with appellant was at the September 5, 2017 hearing.

{¶ 32} As noted above, Williams explained during the legal custody hearing that he met appellant for the first time during the trial court's June 13, 2018 hearing. Regarding his ability to contact appellant prior to June 2018, Williams asserted, "I had some numbers I tried calling, but I was not able to contact [appellant], though." (Tr. 70.) There is no indication that appellant made any attempt to contact CCDCFS or the GAL between the time that the agency became involved with the family and the June 13, 2018 hearing.

{¶ 33} Finally, even after appellant got in contact with the agency in June 2018, Williams testified during the legal custody hearing, “contact with [appellant] is still kind of fluctuating in terms of getting in contact with sometimes. I’ve called him many times and haven’t been able to contact him. * * * But contact is kind of iffy, I would say.” (Tr. 51.)

{¶ 34} For all of these reasons, we cannot fault the GAL for failing to interview appellant. Nor can we fault the GAL for not observing a visit between appellant and the child.

{¶ 35} The maternal grandmother testified that appellant did not consistently visit the child. She explained,

there were times where, you know, [appellant] said he would show up and he never showed up. There were times that he would say he was coming and then, you know, he texted that he was going to be late. There were times when, you know, he would text that morning ten minutes out, I can’t make it, something’s come up.

You know, we seemed to be putting our life on hold at that time when it was kind of up in the air. Is he coming? Is he not coming? What’s going on?

(Tr. 18.) The grandmother asserted that there were times when appellant would show up for a visit and stay at the grandparents’ house for “only a few minutes.”

{¶ 36} As a result of appellant’s inconsistent visitations, the maternal grandparents and appellant had to establish a set visitation schedule in July 2018, two weeks before the legal custody hearing, under which appellant would visit the child Wednesday evenings and Saturday mornings. At the time of the legal custody hearing, there had been four scheduled visits under the set visitation schedule, three

of which appellant attended. Appellant missed one of the four visits, and did not inform the maternal grandparents why he was unable to attend.

{¶ 37} Williams testified that at the time of the legal custody hearing, he had not observed a visit between appellant and the child. Williams tried to schedule a visit the week before the legal custody hearing, but appellant did not show up.

{¶ 38} As a result of the inconsistent nature of appellant's visits with the child, we are unable to conclude that the GAL's performance or investigation were deficient based on the GAL's failure to attend a visit between appellant and the child. *See In re K.Z.*, 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, at ¶ 76 (this court was concerned about the GAL's investigation because although the mother had regular, weekly visits with the child, the GAL did not attend any of the visits and did not offer any explanation for failing to do so). Furthermore, the communication issues and the parties' inability to contact appellant may have impeded the GAL's ability to contact appellant and make arrangements to attend a visit.

{¶ 39} Finally, we cannot fault the GAL for failing to conduct a home visit. In *In re K.Z.*, this court expressed concern about the fact that the GAL did not conduct a home visit of the mother until nearly one and one-half years after the child was placed into the agency's custody because the mother had appeared to live at the same location throughout the duration of the custody proceedings. *Id.* at ¶ 76.

{¶ 40} In this case, unlike *In re K.Z.*, appellant did not live at the same location between July 2017, when CCDCFS became involved with the family, and

the legal custody hearing in August 2018. Furthermore, during this time period, there were times when appellant's whereabouts were unknown.

{¶ 41} Appellant was living with the maternal grandparents for a period of time. At one point, in September 2017, when appellant was living with the grandparents, appellant left the grandparents' house and convened with the child's mother after she left her detox program, against medical advice. At the time of CCDCFS's staffing meeting in April 2018, appellant's whereabouts were unknown to the agency.

{¶ 42} The record reflects that appellant established housing shortly before the legal custody hearing in August 2018. During the June 13, 2018 hearing, appellant's counsel provided the court with a new address for appellant.

{¶ 43} Although the GAL may not have conducted a home visit at this new location, the agency confirmed that the house in which appellant was living with his girlfriend was appropriate. At some point between the June 13, 2018 hearing and the legal custody hearing on August 2, 2018, Williams visited the home in which appellant was living with his girlfriend and determined that it was appropriate.

{¶ 44} For all of the foregoing reasons, we are unable to conclude that the trial court committed plain error in considering and/or relying upon the GAL's report and recommendation.

[T]he guardian ad litem's report and recommendation was just one of the factors the juvenile court considered in determining whether granting permanent custody to CCDCFS was in the best interest of [the child]. Although a trial court is generally obliged to consider the recommendation of a child's guardian ad litem, it is "not bound to

adopt” it. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 152. The “ultimate decision” is for the trial judge who “must act upon a consideration of all evidence presented.” *Id.*, citing *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 34.

In re K.Z., 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, at ¶ 78.

{¶ 45} We recognize that the GAL’s report and investigation could have been more detailed and thorough. Furthermore, it is undoubtedly a better practice for a GAL to interview all parties involved, particularly the biological parents, and observe visits and interactions between the parties and the child. Nevertheless, in this case, we cannot fault the GAL for failing to interview appellant, attend a visit and observe appellant interact with the child, or conduct a home visit based on (1) the fact that appellant got in contact with CCDCFS less than two months before the legal custody hearing, and after the GAL submitted her two written reports; (2) the fact that appellant did not consistently stay in contact with his own attorney throughout the proceedings or with CCDCFS after the June 13, 2018 hearing; (3) the inconsistent nature of appellant’s visits with the child, and (4) the fact that appellant lived at multiple locations during the custody proceedings and moved into a house with his girlfriend less than two months before the legal custody hearing. Accordingly, we do not find plain error in this case regarding the GAL’s performance or report, or the trial court’s reliance thereon.

{¶ 46} Appellant’s first assignment of error is overruled.

B. Legal Custody

{¶ 47} In his second assignment of error, appellant argues that the trial court's judgment granting legal custody to the maternal grandparents and determination that legal custody was in the child's best interest are against the manifest weight of the evidence. Furthermore, appellant contends that the trial court erred by denying his request for a six-month extension of temporary custody.

1. Standard of Review

{¶ 48} R.C. 2151.353(A) provides that after a child has been adjudicated abused, neglected, or dependent, the trial court may “[a]ward legal custody of the child 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.” R.C. 2151.353(A)(3). Unlike an award of permanent custody, an award of legal custody does not divest parents of residual parental rights and responsibilities, nor does an award of legal custody permanently foreclose the right of either parent to regain custody in accordance with the law. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, ¶ 23; *see also* R.C. 2151.42.

The court must determine the appropriateness of legal custody in accordance with the best interest of the child as supported by a preponderance of the evidence presented at the dispositional hearing. *See In re T.R.*, 8th Dist. Cuyahoga No. 102071, 2015-Ohio-4177, ¶ 44. A “preponderance of the evidence” is “evidence that is more probable, more persuasive, or of greater probative value.” *Id.*, quoting *In re C.V.M.*, 8th Dist. Cuyahoga No. 98340, 2012-Ohio-5514, ¶ 7. The factors listed under R.C. 2151.414(D) may be instructive in determining what is in a child's best interest in a legal custody case. *In re T.R.* at ¶ 48. Those factors include: the interaction of the child with the child's parents, relatives, and caregivers; the wishes of the child, as expressed

directly by the child or through the child's guardian ad litem; the custodial history of the child; and the child's need for a legally secure permanent placement. R.C. 2151.414(D).

In re D.S., 8th Dist. Cuyahoga No. 106557, 2018-Ohio-3794, ¶ 20.

{¶ 49} The determination of to whom legal custody should be awarded is within the sound discretion of the juvenile court. *In re D.S.* at ¶ 20, citing *In re T.R.* at ¶ 45. Absent an abuse of that discretion, this court will not reverse a trial court's award of legal custody on appeal. *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 8.

2. Best Interests of the Child

{¶ 50} In the instant matter, appellant argues that the trial court's decision to award legal custody to the maternal grandparents and deny appellant's request for an extension of temporary custody was against the manifest weight of the evidence. Appellant also appears to argue that the trial court generally concluded that legal custody was in the child's best interest, without any analysis of or reference to the best interest factors set forth in R.C. 2151.414(D). *See* appellant's brief at 13. Appellant suggests that a six-month extension of temporary custody, rather than an award of legal custody, was in the child's best interest.

{¶ 51} As an initial matter, appellant argues that the trial court's judgment entry granting legal custody to the maternal grandparents failed to make the requisite best interest determination, and that there is no evidence that the trial court weighed or considered the requisite factors set forth in R.C. 2151.414(D). Appellant's arguments are misplaced.

{¶ 52} As noted above, in legal custody proceedings, the R.C. 2151.414(D) factors are *instructive* and provide *guidance* to the juvenile court. Unlike permanent custody hearings, during which it is mandatory for a juvenile court to consider the R.C. 2151.414(D)(1) factors in making its best interest determination, a juvenile court is not mandated to consider or make specific findings with respect to these factors in a legal custody hearing.

{¶ 53} In its judgment entry granting legal custody to the maternal grandparents, the trial court concluded, in relevant part, that modifying the order of temporary custody to legal custody to the maternal grandparents was “necessary to serve the best interests of the child” and that “the continued [t]emporary [c]ustody of the child is not necessary and not in the child’s best interest.” Based on the record before this court, we find that the trial court’s best interest determination is supported by a preponderance of the evidence and is not against the manifest weight of the evidence.

{¶ 54} In support of his challenge to the trial court’s judgment, appellant argues that he remedied the conditions that led to the child’s removal and complied with the objectives set forth in his case plan. Specifically, appellant maintains that (1) he complied with his case plan, (2) he enrolled in and completed a substance abuse treatment program, (3) he had been sober for approximately four and one-half months at the time of the legal custody hearing, and (4) he obtained appropriate housing.

{¶ 55} Initially, we note that the trial court acknowledged that progress had, in fact, been made in alleviating the cause based upon which the child was removed from the home. The trial court’s judgment entry granting legal custody to the maternal grandparents provides, in relevant part, “progress has been made in alleviating the cause for the removal of the child from the home.”¹ Nevertheless, we find no basis upon which to conclude that the trial court abused its discretion in awarding legal custody to the maternal grandparents.

{¶ 56} Regarding the cause for which the child was removed from the home, CCDCFS intake worker Sherri Alvis testified during the hearing on the agency’s complaint that CCDCFS became involved with the family based on concerns about the parents’ “substance abuse issues.” In its appellate brief, CCDCFS confirms that “[t]he [a]gency requested the child’s removal from the [a]ppellant and mother due to concerns of their ongoing substance use.” Appellee’s brief at 1.

{¶ 57} Williams testified that he began working with the family in December 2017. A case plan was established for appellant. Appellant’s case plan included objectives for substance abuse and housing.

{¶ 58} Williams confirmed that appellant had been sober since mid-April 2018. Williams asserted that appellant participated in and graduated from an intensive outpatient treatment program. At the time of the legal custody hearing, appellant was completing the aftercare phase of the treatment program. In order to

¹ The trial court did not specify whether this finding pertained to appellant, the child’s mother, or both.

complete the aftercare program, appellant is required to attend 12 sessions, one session per week. As of August 2, 2018, appellant had attended five aftercare sessions.

{¶ 59} However, in July 2018, appellant missed two aftercare sessions. Williams asked appellant about the two missed sessions and appellant stated that “he didn’t feel like going.” (Tr. 69.) Williams was concerned about appellant’s attitude regarding the missed aftercare sessions: “it was kind of concerning because like I — it’s important that people go [to] their sessions and to say that you don’t feel like going is kind of like, [w]ell, is the program working for you? Do you feel the program is important to you?” (Tr. 70.)

{¶ 60} On cross-examination, Williams testified that appellant is complying with the substance abuse objective of his case plan. Williams confirmed that appellant successfully completed the outpatient treatment program and was currently in aftercare. Other than the two aftercare absences, appellant has complied with the aftercare program and attendance at AA meetings. Williams obtained records from appellant’s treatment provider, Glenbeigh, that indicated that appellant was complying with attendance at AA meetings.

{¶ 61} Williams testified that appellant complied with the agency’s requests for drug screening. Williams explained, however, that he had only asked appellant to complete one drug test because he had only been able to get in contact with appellant one time. (Tr. 58.) As noted above, Williams was unable to contact appellant between December 2017 and June 13, 2018.

{¶ 62} Williams did, in fact, confirm that appellant is making progress. However, Williams explained that appellant had not made enough progress in order for Williams or CCDCFS to recommend that the child be placed in appellant's custody. Prior to the legal custody hearing, CCDCFS held a staffing meeting in April 2018 after which they determined to request legal custody to the maternal grandparents. Williams asserted that at the time of the staff meeting, appellant's whereabouts were unknown to the agency, the agency had no contact with appellant, the agency did not know what was going on in appellant's life, and the last information they had regarding appellant was that he was still using.

{¶ 63} Williams testified that after he got in contact with appellant in June 2018, appellant had not made enough progress in order for CCDCFS to hold another staff meeting or to reconsider its recommendation for legal custody. Williams explained, "contact with [appellant] is still kind of fluctuating in terms of getting in contact with [him] sometimes. I've called him many times and haven't been able to contact him. * * * But contact is kind of iffy, I would say." (Tr. 51.)

{¶ 64} CCDCFS's original case plan was filed on July 27, 2017. Appellant did not get in contact with CCDCFS or Williams until June 13, 2018 — nearly one year after the original case plan was implemented. Accordingly, at the time of the legal custody hearing, appellant had only been in contact with CCDCFS for less than two months and had not established a long period of sobriety.

{¶ 65} As noted above, it is undisputed that appellant had been sober since mid-April 2018. At the time of the legal custody hearing, appellant had

approximately four and one-half months of sobriety. Williams testified that in custody cases involving parents with substance abuse problems, CCDCFS *considers* increasing visitation time and/or transitioning from supervised visitation to unsupervised visitation once a parent has maintained sobriety for a period of six months. Appellant had not reached the requisite six-month sobriety mark to be considered for more visitation time or unsupervised visitation — much less established enough sobriety to be considered as a legal custodian for the child.

{¶ 66} The child's GAL also acknowledged the progress that appellant had recently made regarding the substance abuse issue. Nevertheless, the GAL, like Williams, was also concerned about the two aftercare sessions that appellant missed based on his history of drug abuse. As noted above, the GAL confirmed that she was recommending legal custody to the maternal grandparents and that legal custody was in the child's best interest.

{¶ 67} In addition to the substance abuse concerns, there were concerns regarding appellant's visitation with the child. Williams testified that appellant was not visiting the child as often as Williams would have liked.

{¶ 68} As noted above, the maternal grandmother testified that appellant did not consistently visit the child. She explained, however, that since April 2018, appellant had been reaching out to the maternal grandparents, trying to maintain contact with the child, and she observed improvements in appellant and his bond with the child.

{¶ 69} Notwithstanding this progress, the maternal grandmother asserted that the child is still “uncomfortable” with appellant, explaining,

[the child] cries when she sees him. I don’t know that it’s necessar[ily] specific to [appellant], but it’s — she’s just not comfortable with him at this time. She — she does cry. I think she’s somehow fearful that he’s coming to take her, which sounds ridiculous. I know it sounds ridiculous, but she’s — she’s just not comfortable with him yet.

(Tr. 29-30.) The maternal grandmother continued, “I’m being honest here that it’s — it has been she’s uncomfortable around him. She does cry when he comes over.”

(Tr. 30.)

{¶ 70} Finally, CCDCFS was concerned about appellant’s housing. CCDCFS filed an amended case plan on March 1, 2018, in which the agency added a housing objective for appellant. The amended case plan provided, “[appellant] is reportedly homeless. Child does not have a *stable home*[.]” and “[p]rogress will be measured through [appellant’s] ability to show *consistent residence of [his] own*[.]” (Emphasis added.)

{¶ 71} As noted above, the record reflects that appellant obtained housing in or around June 2018. Williams testified that appellant was residing with his girlfriend. At some point between the June 13, 2018 hearing and the legal custody hearing on August 2, 2018, Williams visited the home in which appellant was living with his girlfriend and determined that it was appropriate. However, Williams had not seen the lease for the residence, and did not know whether appellant’s name was on the lease.

{¶ 72} The trial court’s judgment entry granting legal custody to the maternal grandparents provides, in relevant part, “[a]ppellant is residing with his paramour.” Based on the fact that appellant obtained housing less than two months before the legal custody hearing, and the fact that he was living with his girlfriend, we find that a reasonable concern existed regarding the stability of appellant’s housing and whether appellant had, in fact, obtained independent housing of his own.

{¶ 73} After reviewing the record, and based on the foregoing analysis, we find that the preponderance of the evidence supports the trial court’s determination that legal custody to the maternal grandparents, rather than an extension of temporary custody, was in the child’s best interest. Although appellant completed a treatment program and obtained housing, concerns remained regarding appellant’s ability to maintain sobriety, visitation with the child, and appellant’s housing situation. The record reflects that the child is in need of a legally secure placement. The maternal grandparents are able to provide a safe and stable home for the child, and they are facilitating visitation between the child and her parents. Therefore, we find no basis upon which to conclude that the trial court’s decision placing the child in the maternal grandparents’ legal custody and denying appellant’s request for an extension of temporary custody was unreasonable, arbitrary, or unconscionable.

{¶ 74} It is undisputed that appellant made progress in this case, and we are compelled to compliment appellant for the progress that he has made. We encourage appellant to continue on a positive course.

{¶ 75} As noted above, an award of legal custody does not divest parents of their residual parental rights, privileges, and responsibilities. *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188, at ¶ 17. In this case, because the trial court awarded legal custody to the grandparents, rather than permanent custody to CCDCFS, appellant’s and the mother’s parental rights have not been terminated — they retain residual parental rights and responsibilities and their right to regain custody in the future has not been permanently foreclosed. *See In re D.S.*, 8th Dist. Cuyahoga No. 106557, 2018-Ohio-3794, at ¶ 19.

{¶ 76} In the event that appellant continues on a positive course, he will have the ability, at some time in the future, to seek a custody modification. *See In re L.D.*, 10th Dist. Franklin No. 12AP 985, 2013-Ohio-3214, ¶ 7; *In re J.R.P.*, 7th Dist. Mahoning No. 17 MA 0169, 2018-Ohio-3938, ¶ 55 (because the mother retained her parental status and her ability to seek custody of her children, reunification is not precluded).

{¶ 77} During the legal custody hearing, the trial court explained to the maternal grandmother that an order of legal custody is a “permanent disposition” and that in order to change the custody order, a motion has to be filed with the court. The court further explained that it cannot modify the legal custody order unless there has been — since the order was issued — a change in the circumstances of the child or the child’s legal custodian, and that modification or termination of the legal custody order is necessary to serve the child’s best interest. The maternal grandmother confirmed that she understood the court’s advisements.

{¶ 78} The maternal grandmother also confirmed that she did not see an order of legal custody as a way of cutting appellant and mother out of the child's life. She explained that if the parents maintain sobriety, the maternal grandparents have had and will have an open door policy for visitation. Finally, the maternal grandmother testified that her goal/hope for appellant and the child's mother is that "they would both get sober and have custody of [the child] together and be able to live on their own and raise her." (Tr. 38.)

{¶ 79} For all of these reasons, if appellant is able to maintain sobriety, consistently visit with the child, and continue to strengthen the bond between him and the child, he can seek a modification of the legal custody order in the future.

{¶ 80} Appellant's second assignment of error is overruled.

III. Conclusion

{¶ 81} After thoroughly reviewing the record, we affirm the trial court's judgment granting legal custody of the child to the maternal grandparents. The trial court did not commit plain error in considering or relying upon the GAL's report and recommendation. The trial court's judgment awarding legal custody to the maternal grandparents is supported by a preponderance of the evidence and is not against the manifest weight of the evidence. The trial court did not abuse its discretion in granting legal custody to the maternal grandparents and denying appellant's request for a six-month extension of temporary custody.

{¶ 82} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

**SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR**