[Cite as *In re Z.D.*, 2019-Ohio-2337.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE Z.D.	:	
	:	No. 107878
A Minor Child	:	
	:	
[Appeal by A.R., Mother]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 13, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 17 902707

Appearances:

Scalise Legal Services, L.L.C., and Stephanie B. Scalise, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Cheryl Rice and Warren W. Griffin, Assistant Prosecuting Attorneys, *for appellee*.

LARRY A. JONES, SR., P.J.:

{¶ 1} In this appeal, A.R., Mother ("Mother"), challenges the trial court's October 2018 judgment granting the motion of appellee Cuyahoga County Department of Children and Family Services ("CCDCFS" or "Agency") for permanent custody of her child, Z.D. For the reasons that follow, we affirm.

Procedural History

{¶ 2} The child at issue, Z.D., was born in Ohio in November 2016, to Mother and alleged Father, P.D.[1] Three days after the child was born, the Agency filed a complaint alleging that the child was dependent and requesting a disposition of temporary custody. The Agency also filed a motion for emergency pre-dispositional temporary custody, which was granted the same day.

{¶ 3} The complaint was unable to be resolved within the statutory 90-day timeframe, so CCDCFS filed a new complaint for dependency and temporary custody, as well as a motion for emergency custody in February 2017; the motion for emergency custody was immediately granted.

{¶ 4} After a hearing in May 2017, Z.D. was adjudicated a dependent child. A dispositional hearing was also held in May 2017, after which the child was committed to the Agency's temporary custody. The matter was set for review to take place in November 2017. Prior to the set November date, however, the Agency filed a motion for an extension of temporary custody in order to allow Mother additional time to work on her case-plan objectives. CCDCFS's motion was granted and temporary custody was extended until May 2018.

{¶ 5} At the end of April 2018, the Agency filed a motion to modify temporary custody. Three pretrials were held on the motion, and the trial on the motion took place in October 2018. At the start of the hearing, Mother's attorney

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[1]The alleged Father is not a party to this appeal and, therefore, we limit our discussion of him.

requested a continuance because Mother was not present and counsel sought the continuance so that she could attend; the trial court denied the request. At the conclusion of the trial, the court granted the Agency's motion for permanent custody; it thereafter memorialized its findings in a judgment entry. Mother now appeals, asserting the following sole assignment of error: "The trial court committed plain error by relying almost exclusively on cumulative hearsay evidence to support granting a motion for permanent custody to CCDCFS."

Facts

{¶ 6} The sole witness at the trial was the social worker assigned to the case, Nicole Fougerousse ("Fougerousse"). The child's guardian ad litem ("GAL"), who had previously submitted her report to the court, gave a narrative summation of the report and was subject to cross-examination by the parties.

{¶ 7} The testimony and record established the following facts. At the time of trial, Z.D. was 23 months old, and since birth, had been living continuously in Ohio with maternal grandfather and his girlfriend. Mother had not seen the child in person since the child was six weeks old, when Mother left for Florida and had not since returned to Ohio. Thus, Mother did not attend any of the proceedings relative to this appeal, including, as mentioned, the trial. Mother went to Florida to live with Z.D.'s alleged Father, who had never seen Z.D. in person. Mother and alleged Father had a domestically violent relationship.

{¶ 8} The record demonstrates that Z.D. is Mother's fifth child. The four other children were not in Mother's care. Three of them were in the care of maternal

grandfather and his girlfriend (since April 2017); and the other child was in the care of paternal relatives.

{¶ 9} Social worker Fougerousse, who was involved in the case nearly from its inception, testified that a case plan was developed for Mother and the goal was reunification. The objectives of the plan included Mother completing a psychological evaluation, addressing mental health issues, securing a stable source of income, obtaining appropriate housing, and addressing domestic violence issues with alleged Father.

{¶ 10} The social worker testified that shortly after the initial complaint was filed, Mother told her of her plan to move to Florida. She talked to Mother about starting with the objectives of the case plan in Ohio, but Mother stated that she was already involved in domestic violence support groups in Florida. The Agency then began looking for mental health providers in Florida with which Mother could work.

{¶ 11} Fougerousse testified that Mother's visits with Z.D. prior to her leaving for Florida were "inconsistent." Once in Florida, Mother would "FaceTime" over a cell phone with Z.D., but that was "inconsistent" as well. The GAL did not believe that the FaceTime sessions were meaningful to Z.D. in the sense of bonding with Mother because of Z.D.'s young age.

{¶ 12} The social worker testified that Mother's other three children who, as mentioned, were also eventually placed with maternal grandfather and his girlfriend, had been in the temporary custody of a Florida children services agency, and that CCDCFS had been working with the Florida agency under the Interstate

Compact on the Placement of Children ("ICPC") relative to those children. Relative to this case, in October 2017, CCDCFS submitted a request under the ICPC to the Florida agency to investigate Mother's home. The Florida agency denied the request for the home investigation, citing Mother and alleged Father's lack of progress on their Florida case plans as the reason.

{¶ 13} Mother did complete a psychological evaluation in July 2017 that was facilitated by her Florida caseworker. But, according to Fougerousse, Mother had not made progress with the recommendations that came about as a result of the evaluation. Further, Fougerousse testified that Mother never submitted information from her domestic violence support groups that she said she attended in Florida, and thus, CCDCFS was never able to determine whether those services satisfied the domestic-violence objective of Mother's Ohio case plan. The social worker testified that she mailed releases for Mother to execute and return, but Mother never did and therefore the social worker was not able to directly contact the service providers. Fougerousse testified that although she had never personally visited Mother's Florida home, the home was deemed inappropriate because the alleged Father resided there and the domestic violence concerns the Agency had were unresolved.

{¶ 14} According to the social worker, Z.D. is bonded with maternal grandfather and his girlfriend, as well as with the three siblings who reside in the home. She testified that she believed the three siblings would remain in that home,

and that maternal grandfather and his girlfriend had completed the pre-service for adoption of Z.D.

{¶ 15} The GAL recommended that the Agency be granted permanent custody of Z.D. She described Z.D. as "blissfully unaware of any of this. She's been living with [maternal grandfather and his girlfriend] and is very, very bonded to [the girlfriend.]" In regard to Mother, the GAL stated that regardless of "what's going on in Florida, she hasn't done anything up here. She doesn't visit [Z.D.] Nothing is going on in this state except for [grandfather's girlfriend] taking care of her and her grandfather [taking care of the child] as well."

Trial Court's Judgment

{¶ 16} The trial court found that Z.D. could not or should not be placed with Mother within a reasonable time based on the following relevant findings: (1) the child has been in the Agency's temporary custody for 12 or more months of a consecutive 22-month period; (2) Mother has failed to substantially remedy the conditions that caused Z.D.'s removal; (3) Mother has a chronic mental illness that would prevent her from presently and, as anticipated within one year, parenting the child; (4) Mother has neglected the child by failing to regularly visit, communicate, or support the child; (5) Mother has demonstrated a lack of commitment toward the child; and (6) Mother has been unwilling to provide food, clothing, or shelter for the child.

{¶ 17} Further, the trial court found that, based on the interaction and interrelationship of Z.D. with her parents, siblings, relatives, and foster parents, the

wishes of the child, the child's custodial history and need for a legally secure permanent placement, and the GAL's report, it was in Z.D.'s best interest that permanent custody be granted to the Agency.

Law and Analysis

{¶ 18} A trial court must make two determinations before granting permanent custody. First, it must find that one of the factors listed in R.C. 2151.414(B)(1) exists. If it finds one of those factors exists, then, second, it must find that permanent custody is in the child's best interest under R.C. 2151.414(D)(1). Mother does not contend that the trial court failed to make the statutorily required findings; rather, she challenges that the court made the findings based on some of the social worker's hearsay testimony.

> Initially we note, as conceded by Mother, that our review here is for plain error because the issue was not preserved during the trial court proceedings. In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶ 19} The standard of proof to be used by the trial court in deciding a permanent custody case is clear and convincing evidence. The Supreme Court of Ohio has defined clear and convincing evidence as,

> the 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. It does not mean clear and unequivocal.

In re Estate of Haynes, 25 Ohio St.3d 101, 104, 495 N.E.2d 23 (1986).

{¶ 20} We will not reverse the judgment of the trial court when some competent, credible evidence supports its findings. *In re Marano*, 4th Dist. Athens No. 04CA30, 2004-Ohio-6826, ¶ 12. Accordingly, we must determine if competent, credible evidence supports the trial court's findings regarding both the best interest of the child and the requirements of R.C. 2151.414(B)(1)(a)-(d). *See In re P.R.*, 8th Dist. Cuyahoga No. 76909, 2002-Ohio-2029, ¶ 15.

{¶ 21} As mentioned, only one of the factors under R.C. 2151.414(B)(1) must exist to satisfy the first step in a permanent custody proceeding. One of the factors is that the child has been in the temporary custody of the Agency for 12 or more months of a consecutive 22-month period. The trial court here made that finding; Mother does not challenge it, and the record, on its face, clearly and convincingly supports the finding. Thus, the trial court then had to consider whether permanent custody was in Z.D.'s best interest. In making that determination, the trial court was required to "consider all relevant factors," including the following:

> (a) 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;
>
> (b) 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;
>
> (c) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
>
> (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D)(1).

{¶ 22} Mother's challenge in this appeal is to social worker Fougerousse's testimony about Mother's progress in Florida when Fougerousse admitted that she had never been to Florida to visit Mother and her home, and she (Fougerousse) was relying on information relayed to her by the agency in Florida. Assuming for the sake of argument that some of the social worker's testimony was inadmissible hearsay, we also have to consider that only one of the best-interest-of-the-child factors needs to be present to grant an award of permanent custody. *In re S.C.*, 8th Dist. Cuyahoga No. 102350, 2015-Ohio-2410, ¶ 30, citing *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (3d Dist.1993). Thus, the custodial history of Z.D. alone could have satisfied a finding that it was in the best interest of the child for an award of permanent custody.

{¶ 23} Moreover, there was other evidence aside from the evidence that Mother challenges that supported the trial court's best-interest determination. Specifically, Z.D. had been in the care of her maternal grandfather and his girlfriend

since birth, and according to the GAL, she was "blissfully unaware of any of this * * * and is very, very bonded" with them as well as with the three other siblings.

{¶ 24} This record supported a finding that Z.D. needed a legally secure placement and that type of placement could not be achieved without a grant of permanent custody to CCDCFS. As summarized by the GAL, removing from the equation whatever Mother was or was not doing in Florida, Mother "hasn't done anything up here. She doesn't visit [Z.D.]. Nothing is going on this state except for [maternal relatives] taking care of [Z.D.]."

{¶ 25} We are fully cognizant that "a termination of parental rights" has been described as "the family law equivalent of the death penalty in a criminal case." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.*; *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 26} The fundamental interest of parents is not absolute, however. Once the case reaches the disposition phase, the best interest of the child controls. *In re Cunningham*, 59 Ohio St.2d 100, 105, 391 N.E.2d 1034 (1979). This record supports the trial court's determination that it was in Z.D.'s best interest that the Agency be awarded permanent custody. In sum, Mother left Ohio when Z.D. was six weeks old. Prior to Mother leaving, her visitation with the child had been inconsistent and Z.D. had been living with the same maternal relatives since birth and was very bonded to them; she was almost two years old at the time of trial and essentially did not have a relationship with Mother.

{¶ 27} In light of the above, the sole assignment of error is overruled.

{¶ 28} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue 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.

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR