

[Cite as *In re B.B.*, 2020-Ohio-1619.]

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE B.B., ET AL.	:	
	:	No. 108743
Minor Children	:	
	:	
[Appeal by the Agency]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 23, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD16901975 and AD18902715

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Laura Brewster, Assistant County Prosecutor, *for appellant.*

Carolyn Kay Ranke, *for appellee.*

LARRY A. JONES, SR., J.:

{¶ 1} In this appeal, the Cuyahoga County Division of Children and Family Services (“CCDCFS” or “the Agency”) challenges the juvenile court’s judgment denying its request for permanent custody of the subject children – B.B. and G.B. — and instead ordering legal custody of them to their paternal grandfather, appellee J.B. For the reasons that follow, we affirm.

Background

{¶ 2} The two children at issue here are B.B., who was born in January 2015, and G.B., who was born in December 2016. They are the children of A.B., Mother, and T.B., Father. J.B. is the children's paternal grandfather.

{¶ 3} In February 2016, when B.B. was just a little over one year old, she was removed from her parents' care and placed in the Agency's emergency custody. At that time, the Agency also filed a complaint requesting a disposition of temporary custody of the child. The Agency alleged that Mother and Father had substance abuse issues and were not meeting B.B.'s basic needs. The trial court granted CCDCFS's motion for temporary custody of B.B.; the order was extended in May 2017. Since B.B.'s removal from her parents' care in February 2016, she remained in the Agency's custody. In August 2017, CCDCFS filed a motion seeking permanent custody of B.B.

{¶ 4} Meanwhile, when G.B. was born in December 2016, she was removed from her parents' care and placed in the legal custody of her paternal grandmother. However, the Agency alleged that the grandmother was allowing G.B. to be in the unsupervised care of her parents, who still had substance abuse issues and, therefore, CCDCFS filed a motion for emergency custody and a new complaint for temporary custody of G.B. In February 2018, CCDCFS filed a motion for permanent custody of G.B. G.B. remained in the Agency's custody since her removal from the care of her grandmother in September 2017.

{¶ 5} The parents filed a motion seeking legal custody of the children or, alternatively, legal custody to paternal grandfather. The trial court consolidated the Agency’s motion for permanent custody of B.B. and the complaint for permanent custody of G.B., and the matter, along with the parents’ motion for legal custody, proceeded to trial in May 2019. The trial court denied CCDCFS’s request for permanent custody of the children and the parents’ request for legal custody; instead, it committed the children to the legal custody of paternal grandfather. The Agency now appeals and presents the following sole assignment of error for our review:

The Trial Court’s order denying the Agency’s request for permanent custody and awarding legal custody of the children to their paternal grandfather is against the manifest weight of the evidence and an abuse of discretion, and is not in the children’s best interests.

Procedural and Factual History

{¶ 6} The record demonstrates that when B.B. was removed from her parents’ care she was placed in a foster home with L.Q. (“foster mother”). After G.B. was removed from the care of her grandmother, she was also placed with the foster mother. Both children remained in the care of the foster mother during the pendency of these proceedings. Our review of the record demonstrates that the adults involved in this case — Mother, Father, paternal grandfather, and foster mother — love the children and are bonded to them and, likewise, the children love the adults and are bonded to them.

{¶ 7} Mother and Father appeared to have addressed the concerns CCDCFS had with them meeting the basic needs of the children, and at the time of trial in May 2019, had been making progress with their substance abuse issues. However, the Agency believed they had not been “clean” long enough for it to be able to recommend that the children be reunited with them. As mentioned, Mother and Father sought legal custody of their children, or alternatively, legal custody to grandfather.

{¶ 8} Grandfather became involved in the case in March 2016, approximately one month after the proceedings began relative to B.B., when, pro se, he filed a motion to intervene and modify visitation regarding B.B. (G.B. was not yet born). Later in March 2016, grandfather filed an amended motion to intervene and for visitation with B.B.

{¶ 9} In August 2017, grandfather filed, pro se, a motion to intervene and a motion to modify custody in B.B.’s case. Grandfather acknowledged that foster mother provided a “good home” for B.B., and he stated that he was “grateful for that,” but he told the court that foster mother favored having B.B. spend time with her own family, including taking her out of the state on holidays, rather than allowing B.B. to spend time with her biological family. He requested that he be allowed to have visitation with B.B. on some holidays.

{¶ 10} The within case relative to G.B. began in February 2018, when the Agency filed a request for permanent custody of her.¹ It is true, as the Agency points out, that grandfather did not file any motions in G.B.'s case.

{¶ 11} Foster mother sought to adopt the children. According to the case worker, there were instances of foster mother "overstepping" her boundaries and having to be reminded of her role as foster mother. As alluded to above, foster mother's relationship with grandfather became problematic because grandfather felt she was not allowing the children to spend enough time with him and other members of their biological family.

{¶ 12} The children were appointed a guardian ad litem ("GAL"). In her final report to the court, the GAL opined that granting CCDCFS permanent custody of the children was not in the children's best interest. The GAL also believed that granting legal custody of the children to the foster mother was "no longer appropriate."

{¶ 13} The GAL noted that Mother and Father had made significant progress in addressing their substance abuse issues and it was her belief that they were committed to "living a sober life." She recognized that the parents did not have six months of sobriety, but believed it would be in the children's best interest to reunify with their parents if the parents maintained their sobriety. The GAL recommended that the court allow Mother and Father additional time to reach six

¹There was a prior case relative to G.B., dating back to when she was first born and placed in the legal custody of her grandmother. See case No. AD17902130.

months of sobriety. She suggested that the Agency retain temporary custody of the children and explore family members, including grandfather, for placement until they could be reunited with Mother and Father.

Law and Analysis

{¶ 14} As mentioned, in its sole assignment of error, CCDCFS challenges the trial court’s decision to deny its request for permanent custody of the children and, instead, grant the parents’ alternative request for legal custody to grandfather.

Permanent Custody

{¶ 15} In considering the trial court’s decision whether to grant permanent custody to the Agency, this court must determine from the record whether the trial court had sufficient evidence before it. In doing so, “every reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court].” *In re Brooks*, 10th Dist. Franklin No. 04AP-164, 2004-Ohio-3887, ¶ 59, quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). Further, “if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court’s verdict and judgment.” *In re Brooks at id.*, quoting *Karches at id.*

{¶ 16} In short, the “discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court’s determination will have on the lives of the parties

concerned.” *In re Awkal*, 95 Ohio App.3d 309, 316, 642 N.E.2d 424 (8th Dist.1994).

{¶ 17} It is also “well recognized that the right to raise a child is an ‘essential’ and ‘basic’ civil right.” *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), citing *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990). “Permanent termination of parental rights has been described as ‘the family law equivalent of the death penalty in a criminal case.’” *In re Hayes* at *id.*, quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist.1991). Accordingly, parents must receive every procedural and substantive protection the law permits. *Id.* “Because an award of permanent custody is the most drastic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children.” *In re Swisher*, 10th Dist. Franklin No. 02AP-1408, 2003-Ohio- 5446, ¶ 26, citing *In re Cunningham*, 59 Ohio St.2d 100, 105, 391 N.E.2d 1034 (1979).

{¶ 18} In order to grant permanent custody to CCDCFS, a court must make two determinations. First, the court must determine whether one of the following four factors set forth in R.C. 2151.414(B)(1) applies:

(a) The child is not abandoned or orphaned or has not 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 the child cannot be placed with either of the child’s parents within a reasonable time or should not be placed with the child’s parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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 * * * .

{¶ 19} Secondly, if one of the four factors in R.C. 2151.414(B)(1)(a) through (d) applies, the court must determine by clear and convincing evidence whether it is in the child's best interest to grant permanent custody to the agency.

{¶ 20} R.C. 2151.414(D) requires that, in determining the best interest of a child, the court must consider all relevant factors, including, but 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 permanent 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.

Legal Custody

{¶ 21} Under R.C. 2151.353(A)(3), the court may award legal custody of a child who has been adjudicated abused, neglected, or dependent, to any person who filed a motion requesting legal custody of the child prior to the dispositional hearing. Assuming the person seeking legal custody has complied with any statutory requirements, the court's authority to award legal custody under this statute "is limited only by the best interest of the child." *Id.*; *In re W.A.J.*, 8th Dist. Cuyahoga No. 99813, 2014-Ohio-604, ¶ 3. The best interest of the child is "of paramount concern" when making custody determinations. *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 14.

{¶ 22} Unlike permanent custody cases in which the trial court is guided by the factors outlined in R.C. 2151.414(D) before terminating parental rights and granting permanent custody, R.C. 2151.353(A)(3) does not provide factors the court should consider in determining the child's best interest in a motion for legal custody. *In re G.M.*, 8th Dist. Cuyahoga No. 95410, 2011-Ohio-4090, ¶ 15. We must presume that, in the absence of best interest factors in a legal custody case, "the legislature did not intend to require the consideration of certain factors as a predicate for granting legal custody." *Id.* at ¶ 16. Such factors, however, are instructive when making a determination as to the child's best interest. *In re E.A.*, 8th Dist. Cuyahoga No. 99065, 2013-Ohio-1193, ¶ 13. Our review of a trial court's decision regarding legal custody is for an abuse of discretion. *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001).

{¶ 23} CCDCFS contends that the children had been in its temporary custody for 12 or more months of a consecutive 22-month period as set forth under R.C. 2151.414(B)(1)(d) and therefore the trial court should have proceeded to a best interest determination under R.C. 2151.414(D). The Agency contends that, under that section, the children’s positive bond with the foster mother, custodial history, and need for a legally secure permanent placement, weighed in favor of permanent custody to CCDCFS.

{¶ 24} According to the Agency, the trial court’s decision to grant legal custody to grandfather was against the manifest weight of the evidence. CCDCFS contends that grandfather has only been marginally involved in the case, he failed to consistently visit the children for a period of time, and it was the parents’, not his, request for legal custody. The Agency compares grandfather to foster mother, with whom the children have done “fantastically well.”

{¶ 25} Our review of the record does not bear out the Agency’s contention. For much of the trial court’s proceedings grandfather proceeded pro se; he only obtained counsel ahead of the May 2019 trial. Acting pro se, grandfather filed three motions; he participated in staff meetings at the Agency; and he fairly regularly maintained contact with the children. From April 2016 through December 2017, he had the children for overnight visits and was the only family member in contact with them. It is true that at times grandfather’s contact with the children waned, but the record demonstrates that at those times he had conflicts with foster mother. For example, in February 2018, at foster mother’s

behest, the trial court summarily reduced grandfather's visits to four hours a month.

{¶ 26} Moreover, even though the request for legal custody was made by the parents, grandfather showed an ability and willingness to accept custody of the children. He told the GAL that he wanted the children to move in with him until Mother and Father were able to take care of them. He also signed a "statement of understanding for legal custody" as required under R.C. 2151.353(A), attesting to his ability and willingness to become the children's legal custodian, as well as the responsibilities and obligations of becoming a legal custodian.

{¶ 27} Further, in her final report to the court, the GAL opined that granting the Agency permanent custody of the children was not in their best interest. The GAL's role here, as it is in all custody proceedings, was to protect the children's interest, to ensure that their interest was represented throughout the proceedings, and to assist the trial court in its determination of what is in the children's best interest. *See In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, 951 N.E.2d 398, ¶ 14.

{¶ 28} Finally, in affirming the trial court's decision, we are mindful that "[b]ecause an award of permanent custody is the most dramatic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children." *In re Swisher*, 10th Dist. Franklin No. 02AP-1408, 2003-Ohio-5446 at ¶ 26, citing *In re Cunningham*, 59 Ohio St.2d at 105, 391 N.E.2d 1034.

{¶ 29} In light of the above, the trial court's award of legal custody of the children to grandfather was neither against the manifest weight of the evidence nor an abuse of discretion. The Agency's sole assignment of error is overruled.

{¶ 30} 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 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.

LARRY A. JONES, SR., JUDGE

MICHELLE J. SHEEHAN, J., CONCURS;
SEAN C. GALLAGHER, P.J., DISSENTS
WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶ 31} I respectively dissent from the majority opinion and would reverse the decision of the trial court that denied the motion for permanent custody of CCDCFS and granted legal custody of the children to their paternal grandfather.

{¶ 32} A review of the record in this case reflects that the trial court's decision to deny the motion for permanent custody was against the manifest weight of the evidence, that the trial court's decision was not in the best interest of

the children, and that the trial court abused its discretion in granting legal custody to the paternal grandfather. I firmly believe that an award of permanent custody to the agency is warranted in this case. After spending the majority of their young lives in a foster home, the children in this case require permanency and a safe and secure environment.

{¶ 33} The record reflects that clear and convincing evidence was presented to support an award of permanent custody to CCDCFS. At the time of the permanent custody hearing, B.B. and G.B. had been residing in the same foster home for a significant period of time, the children were bonded with their foster mother, who was the primary figure in their young lives, and the children were well cared for in the foster home. The foster mother is willing to adopt the children and should be commended for providing the children with a safe and stable environment.

{¶ 34} The parents were noncompliant with their case plans for much of the case. There is no doubt that they love their children and made strides in the months leading up to the permanent custody hearing. However, they had not demonstrated sobriety for a sufficient period of time and concerns remained given their lengthy history of substance abuse.

{¶ 35} Even though the paternal grandfather had filed some motions in B.B.'s case, there was a noted concern of the child's guardian ad litem that placement of B.B. with the grandfather could interfere with the goal of reunification with the parents. The paternal grandfather was provided visitation

with the children and had a relationship with them. However, in 2018, pursuant to a court order, his visitation was reduced to four hours per month. Although conflicts arose between some of the parties, and the foster mother was accused of overstepping because of her desire to adopt the children, it was ultimately the trial court that made the decision to order the paternal grandfather's visitation be reduced. Despite having court-ordered visitation, paternal grandfather failed to visit with the children at all from April through October 2018, visited only twice in November 2018 during the parents' scheduled visitation, and then failed to visit with the children in the months preceding the permanent custody hearing.

{¶ 36} The record simply does not support the trial court's finding that the paternal grandfather had been "consistent and committed" when after February 2018, he failed to maintain regular visitation, he filed no new motions in B.B.'s case, he did not file any motions in G.B.'s case, and he did not express any interest in custody with the social worker of record. The social worker testified that the paternal grandfather's involvement was sporadic and that she had concern with the paternal grandfather's level of commitment and actual desire for legal custody.

{¶ 37} The guardian ad litem, who recommended legal custody to the paternal grandfather, testified that she had not had the opportunity to see the paternal grandfather visit with the children, but nonetheless expressed that "he's biological family. He has a history of visiting with [B.B.]." Further, her recommendation was that placement with the paternal grandfather should "be explored [to allow] mother and father the extra month to meet that six-month

mark of sobriety.” However, the court was without authority to extend temporary custody beyond two years and the parents had yet to establish their sobriety.

{¶ 38} It is apparent that the trial court’s decision to award legal custody to the paternal grandfather was well intended. Nonetheless, in doing so, the trial court abused its discretion by placing the parents’ interests and the availability of legal custody with a family member ahead of the best interest of the children.

{¶ 39} When conducting a best-interest analysis, “[t]he court must consider *all* of the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others pursuant to the statute.” (Emphasis added.) *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. Although family unity is an important factor to consider, the paramount consideration is the best interest of the child. *In re J.S.*, 8th Dist. Cuyahoga No. 108406, 2019-Ohio-4467, ¶ 14, citing *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 163. Likewise, the statute “does not make the availability of a placement that would not require a termination of parenting rights an all-controlling factor [and] does not even require the court to weigh that factor more heavily than other factors.” *In re Schaeffer* at ¶ 64. Rather, the court is required to “find the best option for the child[.]” *Id.*; *In re A.R.*, 8th Dist. Cuyahoga No. 103450, 2016-Ohio-1229, ¶ 22 (upholding denial of legal custody to a paternal grandmother in favor of an award of permanent custody to the agency). As this court has repeatedly emphasized, the child’s best interest requires “permanency and a safe and secure environment.” *In re A.R.* at ¶ 22; *In*

re C.B., 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, ¶ 40 (reversing grant of legal custody and issuing an award of permanent custody); *In re Holyak*, 8th Dist. Cuyahoga No. 78890, 2001 Ohio App. LEXIS 3105 (July 12, 2001).

{¶ 40} A consideration of all the factors in this matter reflects that the best option for the children is an award of permanent custody to CCDCFS. The children have been well cared for in their foster-to-adopt home, and placing them into the legal custody of the paternal grandfather is not in their best interest.

{¶ 41} Accordingly, I respectfully dissent in this matter. I would reverse the trial court's decision granting legal custody to the paternal grandfather and denying the motion for permanent custody of the children to CCDCFS. I believe this court should award permanent custody of the children to CCDCFS and terminate the parental rights of mother and father.