

[Cite as *In re J.G.*, 2020-Ohio-4304.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE J.G., ET AL., :
Minor Children : No. 109357
:
[Appeal by Mother, T.G.] :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 3, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD-18910052, AD-18910053, AD-18910054, and AD-108910055

Appearances:

Valore & Gordillo L.L.P., and Matthew O. Williams, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Ben Eilers, Assistant Prosecuting Attorney, *for appellee.*

ANITA LASTER MAYS, P.J.:

{¶ 1} Appellant T.G. (“Mother”) appeals the juvenile court’s termination of her parental rights to her minor children J.G., J.L., N.G., and H.B. (the “children”) and the award of permanent custody to the Cuyahoga County Department of

Children and Family Services (“CCDCFS”). We reverse the judgment of the trial court and vacate its order of permanent custody.

I. Procedural History

{¶ 2} In 2017, while pregnant with N.G., and again in 2018, while pregnant with H.B., Mother tested positive for marijuana. Mother was referred for services to assist with her marijuana use and mental health concerns. In August 2018, CCDCFS filed a complaint for dependency¹ with a dispositional request for protective supervision. The trial court granted emergency predispositional temporary custody of the children to CCDCFS on October 31, 2018. On November 7, 2018, the trial court placed N.G. and H.B. with their paternal grandmother and J.G. and J.L. in foster care, because their fathers are deceased.

{¶ 3} At an adjudicatory hearing in March 2019 on CCDCFS’s complaint, Mother admitted to using marijuana, failing to treat her mental health issues, and continuing to have a relationship with her domestic abuser H.B. (“Father”), the father of N.G. and H.B. As a result, CCDCFS was awarded temporary custody of the children. Mother was placed on a case plan to reunify her with the children. In August 2019, CCDCFS filed a motion to modify temporary custody to permanent custody. A trial was held in November 2019, and the trial court terminated Mother’s parental rights to all four children awarding permanent custody to CCDCFS. Mother filed this timely appeal assigning one error for our review:

¹ CCDCFS filed a case for each of the four children, which were combined into one case for the purpose of this appeal.

- I. The trial court's award of permanent custody and termination of the appellant's parental rights is against the manifest weight of the evidence.

II. Standard of Review

{¶ 4} To terminate parental rights and grant permanent custody to a county agency, the record must demonstrate by clear and convincing evidence the following: (1) the existence of one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (e); and (2) permanent custody is in the best interest of the child. *In re S.H.*, 8th Dist. Cuyahoga Nos. 97992, 97993, and 97994, 2012-Ohio-4064, ¶ 27. "Clear and convincing evidence" is that quantum of evidence that instills in the trier of fact a firm belief or conviction as to the allegations sought to be established. *In re Y.V.*, 8th Dist. Cuyahoga No. 96061, 2011-Ohio-2409, ¶ 13, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶ 5} When determining the child's best interest pursuant to R.C. 2151.414(D)(1), courts analyze the following factors: (1) the interaction and interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions R.C. 2151.414(E)(7) to (11) apply.

{¶ 6} Also,

[a] juvenile court's decision to grant permanent custody will not be reversed as being against the manifest weight of the evidence "if the record contains some competent, credible evidence from which the

court could have found that the essential statutory elements for permanent custody had been established by clear and convincing evidence.”

In re G.W., 8th Dist. Cuyahoga No. 107512, 2019-Ohio-1533, ¶ 62, quoting *In re A.P.*, 8th Dist. Cuyahoga No. 104130, 2016-Ohio-5849, ¶ 16.

{¶ 7} The “best interest determination” focuses on the child, not the parent. R.C. 2151.414(C); *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994). The discretion that the juvenile court enjoys in deciding 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 decision will have on the lives of the parties concerned. *Id.* at 316.

{¶ 8} Thus, we review “a trial court’s determination of a child’s best interest under R.C. 2151.414(D) for abuse of discretion.” *In re V.C.*, 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, ¶ 52, citing *In re L.O.*, 8th Dist. Cuyahoga No. 101805, 2015-Ohio-1458, ¶ 22. “An abuse of discretion implies that the court’s decision was unreasonable, arbitrary or unconscionable.” *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

III. Permanency Trial and Judgment

{¶ 9} During opening statements, counsel for CCDCFS argued that despite case planning efforts we believe the children cannot, should not be returned to mother’s care. Unfortunately, there’s been very little case plan progress on this case.

And as the Agency will show we will see that mother’s oftentimes minimizing the issues involving this case. So the Agency would hope

that at the end of the evidence that the Court would grant their motion for permanent custody.

(Tr. 7.)

{¶ 10} Mother's counsel responded, stating,

[t]he Agency may, in fact, prove that there has been some accomplishment on the case plan, but, in fact, in recent months there's been a great deal more and basically the Agency's motion for permanent custody is premature.

The evidence will show that mother has been working her case plan. There was a period where she was working and did not, but she is currently. She's due to finish her services in the next month and therefore, this motion is premature and should not be granted.

(Tr. 7-8)

{¶ 11} Counsel for CCDCFS called Melanie Green ("Green"), the CCDCFS social worker assigned to Mother's case in August 2019, to testify.

A. Social Worker's Testimony

{¶ 12} Green testified that the case was brought to the attention of CCDCFS when Mother tested positive for marijuana while pregnant with N.G. Mother was placed on a case plan to help her with her substance abuse, mental health issues, domestic violence, and housing. Green testified that although Mother had some difficulty completing portions of the case plan in the past, Mother was now compliant to date. (Tr. 14.) The trial court questioned Green's testimony with regard to Mother's compliance, and Green stated,

in regards to Stella Maris treatment she's compliant with her attendance, she's compliant with her engagement, drug screens are clean for both Stella Maris as well as the Agency. She has [begun] complying with random drug screens for our Agency as well. So she

is actively engaged and successfully in treatment at this time and this is since July of 2019.

(Tr. 15-16.)

{¶ 13} Green also testified that Mother was inconsistent with her mental health services through Bellefaire, but since discharging herself, Mother has been compliant with her services through Stella Maris. Green stated that Mother, through random drug screens, has continued to test negative for drugs, although Mother, before October 2019, was inconsistent in taking drug screens in a timely manner. Green went on to state that she did not have any current concerns with Mother's drug use.

{¶ 14} Next, Green testified as to Mother's mental health services. Bellefaire was Mother's previous mental health provider along with working with her on substance abuse issues. Because of Mother's lack of compliance, Ohio Guidestone took over her case plan, and Mother had been working with them since August 2019. At the time of trial, the results of Mother's psychiatric evaluation were not available. Green testified that Mother had been prescribed medication previously for her mental health issues, but was not consistent with following through with treatment.

{¶ 15} Green then testified about the domestic violence issues between Mother and Father. Father was incarcerated for domestic violence while Mother was pregnant. Father had been incarcerated for domestic violence on three separate occasions. Green testified that there was a no-contact order between

Mother and Father, and this issue was the most concerning for the agency because there was another domestic violence incident as recent as September 2019.

{¶ 16} Green testified that Mother had made no attempts to rectify the domestic violence issue until recently, when Mother got involved with the Domestic Violence Advocacy Center. CCDCFS stated at trial that Mother had not completed the domestic violence objective of her case plan. In addition, Green testified that Father was placed on a case plan to address the issues of stable housing, domestic violence, and resource management. Father had not completed any part of his case plan at the time of the trial.

{¶ 17} Green's next testimony was regarding the children. The children were placed on a case plan to address some of their issues as well. The agency was concerned that one of the children (J.G.) still had some significant toileting issues at the age of six, and Mother continued to minimize the issues, placing blame on the current caregivers of the children. J.G. receives services for this behavioral issue from Ohio Guidestone. Another child, H.B., receives services from Help Me Grow for a speech delay and motor skills development issue.

{¶ 18} Green testified that Mother has supervised visits with the children, and that, although she has not observed these visits, she has communicated with the case workers that do supervise them. Green testified,

[t]hey go fairly well. There have been issues with the adults involved. So I've tried to eliminate communication and, you know, focus the visit on the actual children. In regards to mom's interaction with the children, it's been reported that she has been very appropriate with

the kids and that she is working very hard, you know, to have a good bond and a good visit with her children.

In regards to dad's visits, it has been reported that [N.G.] is a little resistant or hesitant towards dad. I guess the word that everybody has used is skittish towards him, but that she has become a little more comfortable with him given these last visits that he was visiting.

His attendance at visitation is poor I would say. It's inconsistent. I don't find out until actually after the visit has occurred whether he has attended or not and he does not contact the Agency to say, hey, I'm not going to be there or hey, I didn't make it because of this reason or that. So that's problematic. Aside from that, the visits have gone fairly well.

(Tr. 28-29.)

{¶ 19} As it relates to Father, Green testified that the agency's greatest concern at the time of trial and the permanent custody hearing is that Father lacks stable housing. Father has admitted to bouncing between relative's homes. Green also expressed that the agency is very concerned about the domestic violence between Mother and Father. Green testified,

[f]or both parents between the two of them still maintaining contact and having some type of unhealthy communication between the two. Both of them have admitted to the communication. We have discussed with mom the concerns the Agency has with the communication and it just does not appear that she understands the impact.

(Tr. 32-33.)

{¶ 20} However, despite those concerns, Green testified that she applauds Mother's efforts and treatment success as it related to drugs and alcohol. Green also testified that she would like to see "more longevity with that before I can, you know, say that this could be successful or not successful. In regards to mental

health it's very early on in that treatment progress so that's still a concern.” (Tr. 33.) Green then testified that she wanted the agency to be granted permanent custody for the best interest of the children to provide them with some permanency.

{¶ 21} On cross-examination, Green testified that Mother always had stable housing, and that the basic needs of the children were met. Green also testified that once she was assigned to Mother's case in August 2019, Mother no longer had issues with marijuana, and that Green was not aware that Mother was in aftercare. Green went on to state that some of the visits between Mother and the children were cancelled because of the caregiver's cancellation, and not Mother. She also testified that Mother has a good relationship with the children and that Mother is eager to work on her case plan.

{¶ 22} Mother's counsel asked Green if she thought pursuing permanent custody of the children was premature given that CCDCFS filed for permanent custody only nine months after the children went into custody. Green stated that CCDCFS filed for permanent custody because the original case worker felt as if Mother had not made significant progress on her case plan. (Tr. 48.)

{¶ 23} The GAL then cross-examined Green, and Green testified that the older two children, J.G. and J.L., were present in the home when a previous boyfriend of Mother and J.L.'s father was murdered. The GAL elicited testimony from Green to show a pattern of domestic violence in the home of Mother.

{¶ 24} On re-direct, CCDCFS' counsel asked Green about her conversations with both Father and Mother regarding their domestic violence issues. Green

stated that she spoke with both, and advised Mother and Father to stop having contact with each other. (Tr. 69.) Green testified that she was in support of the court awarding permanent custody to CCDCFS. When probed as to why she felt this way, she stated,

[s]o as has been stated, this case has been open since 2017. The case plan has not really changed much. Mental health, substance use, domestic violence has been on the case plan since 2/15/17. So we had two years now to address this and, again, another child was born into this open case, the same concerns were made prevalent.

We're now seeing progress in 2019 after PC was filed and made mention to mom, permanent custody is being filed and after that date that is when this case plan progress started and the case plan progress is in a premature state.

(Tr. 71-72.)

{¶ 25} The court then questioned Green about the state of the children. Green testified that although the eldest two children have not stated they did not want to live with Mother, they have expressed that they are comfortable in their grandmother's home. (Tr. 72.) Green also testified that the visits between Mother and children were appropriate since Green took over the case. Green also reiterated to the court that there was a concern about the domestic violence that occurred in Mother's home.

{¶ 26} Counsel for J.G. questioned Green regarding an incident that occurred at one of the visits between Mother and the children. One of the caregivers falsely reported that Mother hit one of the children. Upon investigation, Green discovered that the caregiver was not truthful about the incident. In her

previous testimony, Green testified that the caregivers, which included the grandmother of the eldest two children and the foster parent of the youngest two children, communicated with each other about the case and would agitate Mother by cancelling visitations. (Tr. 78-79.)

{¶ 27} Mother decided not to testify. (Tr. 81.) There were no other witnesses called to testify. At the close of trial, Mother's counsel requested a second extension of temporary custody believing that permanent custody was premature. (Tr. 83-84.) Father's counsel was in agreement with Mother's counsel.² (Tr. 87.)

{¶ 28} The GAL for Mother was given a chance to advocate on Mother's behalf and stated that Mother never displayed an inability to care for her children, and that Mother had made progress on her case plan, but CCDCFS's motion for permanent custody was premature, and that Mother should be given an opportunity to complete the case plan. J.G.'s counsel also stated that J.G. told her GAL that she wanted to return to live with Mother. In addition, J.G.'s counsel stated that if Mother was given an extension of temporary custody, J.G. would be in agreement with that decision. (Tr. 90.)

{¶ 29} The children were placed with their caregivers just nine months before CCDCFS filed for permanent custody. However, at the conclusion of the trial, the court issued journal entries granting permanent custody of the children to CCDCFS. The court cited domestic violence between Mother and Father as the most serious concern of the case. The court found by clear and convincing evidence

² Father did not appeal the trial court's decision, and is not a party to this case.

that it is in the best interest of the children to grant permanent custody to CCDCFS pursuant to R.C. 2151.414(B).

IV. Legal Analysis

{¶ 30} The trial court has authority to grant permanent custody to CCDCFS where, as in this case, a child has been adjudicated as neglected, dependent, or abused.

When an agency files a permanent custody motion under R.C. 2151.413 after obtaining temporary custody, the guidelines and procedure set forth under R.C. 2151.414 apply. Division (B) of R.C. 2151.414 sets forth a two-prong analysis to be applied by a juvenile court. Pursuant to this division, before a trial court can terminate parental rights and grant permanent custody to a county agency, the court must find by clear and convincing evidence (1) the existence of any one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (e), and (2) that granting permanent custody to the agency is in the best interest of the child.

In re J.F., 2018-Ohio-96, 102 N.E.3d 1264, ¶ 45 (8th Dist.).

{¶ 31} “Only one of the four factors must be present for the first prong of the permanent custody analysis to be satisfied. Once the juvenile court ascertains that one of the four factors listed in R.C. 2151.414(B)(1) is present, then the court proceeds to an analysis of the child’s best interest.” *In re J.B.*, 8th Dist. Cuyahoga No. 98565, 2013-Ohio-1705, ¶ 80–81. Regarding the first prong of the analysis, the trial court stated in its journal entries,

Pursuant to R.C. 2151.414(B), the Court finds that by clear and convincing evidence that it is in the best interest of the [children] to grant permanent custody to the agency that filed the motion for Permanent Custody and that the following apply: The children cannot be placed with either parent within a reasonable time or should not be placed with either parent. This factor is discussed as part of the (E)

factors of R.C. 2151.414 below.

Journal entry Nos. 0913031178, 0913024552, 0913024062, and 0913031177
(December 20, 2019).

{¶ 32} R.C. 2151.414(B)(1)(a) states, in part,

The child is not abandoned or orphaned, 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, 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 if, 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, 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.

{¶ 33} The trial court determined that the children could not be placed within a reasonable time or should not be placed with either parent for two reasons:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.

(2) The parent has committed abuse as described in section 2151.031 of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

Journal entry Nos. 0913031178, 0913024552, 0913024062, and 0913031177
(Dec. 20, 2019).

{¶ 34} R.C. 2151.031 defines an abused child as:

As used in this chapter, an “abused child” includes any child who:

(A) Is the victim of “sexual activity” as defined under Chapter 2907 of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child;

(B) Is endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;

(C) Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code.

(D) Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare.

(E) Is subjected to out-of-home care child abuse.

{¶ 35} R.C. 2151.03 defines a neglected child as:

(A) As used in this chapter, “neglected child” includes any child:

(1) Who is abandoned by the child’s parents, guardian, or custodian;

(2) Who lacks adequate parental care because of the faults or habits of the child’s parents, guardian, or custodian;

(3) Whose parents, guardian, or custodian neglects the child or refuses to provide proper or necessary subsistence, education,

medical or surgical care or treatment, or other care necessary for the child's health, morals, or well being;

(4) Whose parents, guardian, or custodian neglects the child or refuses to provide the special care made necessary by the child's mental condition;

(5) Whose parents, legal guardian, or custodian have placed or attempted to place the child in violation of sections 5103.16 and 5103.17 of the Revised Code;

(6) Who, because of the omission of the child's parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare;

(7) Who is subjected to out-of-home care child neglect.

{¶ 36} The trial court, in its journal entries, states that Mother has not established a sobriety date, Mother's mental health has not been updated or diagnosed, and the domestic violence issue between Father and Mother are still a concern. However, Green testified that Mother was sober, and had not tested positive for marijuana since she took over the case in August 2019. Green also testified that a mental health assessment was conducted on Mother, but the results were not ready when trial commenced. Green testified that Mother was consistent with her visits with the children, and that Mother was appropriate during the visitations. Green's testimony demonstrated that Mother was making progress with her case plan. The record also demonstrated that Mother has adequate housing, and that she is able to provide for her children. The trial court's determination is not consistent with the testimony presented at trial.

{¶ 37} Mother’s attorney, J.G.’s attorney, and Father’s attorney all agreed that Mother was making progress, and that more time would be sufficient to see if she could complete her case plan. They all agree that the filing for permanent custody by CCDCFS was premature. The children were placed in the temporary custody of CCDCFS on March 29, 2019. A motion to modify temporary custody to permanent custody was filed on August 20, 2019. The children were in the custody of CCDCFS for five months before the agency decided to file for permanent custody.

{¶ 38} We recognize that “a parent’s 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). And the permanent termination of parental rights has been described as “the family law equivalent of the death penalty in a criminal case.” *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. Also, “termination of the rights of a birth parent is an alternative of last resort.” *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, quoting *In re Wise, supra*, citing *In re Cunningham*, 59 Ohio St.2d 100, 105, 391 N.E.2d 1034 (1979).

{¶ 39} We agree with Mother that the trial court’s determination to award permanent custody to CCDCFS is premature. However, we also recognize that a trial court’s decision to grant permanent custody will not be reversed as being against the manifest weight of the evidence “if the record contains some competent, credible evidence from which the court could have found that the essential statutory elements for permanent custody had been established by clear and convincing evidence.” *In re A.P.*, 8th Dist. Cuyahoga No. 104130, 2016-Ohio-5849, ¶ 16.

{¶ 40} In its journal entries, the trial court stated that Mother failed continuously and repeatedly remedy the conditions causing the children to be placed outside of the home. However, the record demonstrates that the children were removed because Mother testified positive for marijuana, had mental health issues, and was engaged in domestic violence. In the five months since the removal, Mother has been consistent with her drug screenings and received a mental health assessment. (Tr. 17.) Green also testified that Mother was eager to work and to engage in her case plan since Green has had the case. (Tr. 55.)

{¶ 41} Additionally, in its journal entries, the trial court stated that Mother committed abuse or caused the children to suffer neglect that is a threat to the children's safety. However, the record does not demonstrate that the children suffered any abuse or neglect, in accordance with the statutes, at the hands of the mother. The record does not demonstrate that Mother sexually abused, endangered, as defined by R.C. 2919.22, or physically or mentally harmed the children. The record also does not demonstrate that Mother neglected the children by abandoning them or failing to provide adequate care for them. In fact, during Green's testimony, she testified that Mother has always had stable housing and is employed. (Tr. 37.) Green also testified that the older two children did not have any medical needs and there were no other issues mentioned with the two children when the agency received Mother's case. (Tr. 56.) We find the trial court's finding that the children were abused or neglected by Mother is not supported by competent, credible evidence in the record.

{¶ 42} We find that there is no competent, credible evidence in the record supporting the trial court's finding under the first prong of the permanent custody analysis and R.C. 2151.414(B). We reverse the trial court's decision to award permanent custody to CCDCFS and find that the trial court's decision is against the weight of the evidence. We remand the matter to the trial court to reinstate the order of temporary custody. On remand, the trial court shall hold a hearing to determine an appropriate length of time to extend temporary custody and enable Mother to complete her case plan in furtherance of reunification with the children.

{¶ 43} As to the second prong of the analysis, we find that granting permanent custody to the agency is not in the best interest of the children because as discussed in the analysis above, the record does not contain competent credible evidence demonstrating the existence of any one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (e). *See, e.g., In re S.D.*, 1st Dist. Hamilton Nos. C-200045 and C-200084, 2020-Ohio-3379, ¶ 73 (the court need not consider the second prong of the analysis if the first prong is not satisfied).

{¶ 44} We reverse the judgment of the trial court, vacate its order of permanent custody, and remand the matter for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

ANITA LASTER MAYS, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY