

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE E.M.B.T., ET AL. :
Minor Children : No. 109479
[Appeal by Mother, K.T.] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 3, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 18908172, AD 18908173, and AD 18908174

Appearances:

Wargo Law, L.L.C., and Leslie E. Wargo, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Rachel Eisenberg, Assistant Prosecuting Attorney, *for appellee CCDCFS.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant Mother, K.T., appeals from the three underlying decisions of the Cuyahoga County Court of Common Pleas, Juvenile Division (“juvenile court”), which granted permanent custody of each of her three children, E.T., E.B.,

and M.B., to the Cuyahoga County Department of Children and Family Services (“CCDCFS”) and terminated her parental rights.¹ Upon review, we affirm.

Background

{¶ 2} On June 28, 2018, CCDCFS filed a complaint alleging the children to be abused (E.T. and E.B.) and neglected (E.T., E.B., and M.B.) and sought temporary custody to CCDCFS. Mother is the biological mother of all three children. S.B. is the biological father of two of the children, E.B. and M.B., and is the “alleged father” of E.T.² The complaint contained allegations of sexual abuse and rape by S.B., Mother’s failure to protect the children from S.B., Mother’s mental health and substance abuse issues, and domestic violence between Mother and S.B.

{¶ 3} The children were committed to the emergency custody of CCDCFS. E.T. had been placed with his maternal great uncle, J.T. E.B. and M.B. were placed together in a therapeutic foster home.

{¶ 4} Mother and S.B. stipulated to an amended complaint, and the magistrate issued a decision that adjudicated the children abused (E.T. and E.B.) and neglected (E.T., E.B., and M.B.). The juvenile court adopted the magistrate’s decision on October 12, 2018, and committed the children to the temporary custody

¹ We note that the captions on the juvenile court’s journal entries attached to the notice of appeal redacted the children’s names to E.M.B.T., E.B., and M.B. We shall refer to each of the three children by first/last initials herein – E.T., E.B., and M.B.

² This case involves Mother’s appeal from the grant of permanent custody to CCDCFS in the case of each of the three children. S.B. appealed the juvenile court’s decision to grant permanent custody in the cases of both E.B. and M.B. and challenged the denial of his motion for legal custody of E.B. and M.B. to an interested individual (K.G.). The companion case is separately before this court in *In re E.B.*, 8th Dist. Cuyahoga No. 109477.

of CCDCFs. Both Mother and S.B. were incarcerated for offenses involving the children as victims.

{¶ 5} During the proceedings in this matter, the maternal great uncle filed a motion for party status, a motion for legal custody of E.T., and motions for visitation with E.B. and M.B. The juvenile court denied the great uncle's motions.

{¶ 6} On April 26, 2019, CCDCFs filed a motion to modify temporary custody to permanent custody. Thereafter, Mother filed a motion for legal custody to the great uncle for all three children. S.B. filed a motion for legal custody of E.B. and M.B. to an "interested individual" (K.G.), who is not a blood relative of the children. S.B. also filed a motion for extension of temporary custody for E.B. and M.B.

{¶ 7} A permanent-custody hearing was held on January 17, 2020. At that time, the children were 11 (E.T.), 9 (E.B.), and 7 (M.B.) years old. The three case workers/child protection specialists involved in the matter and the guardian ad litem ("the GAL") all testified in support of permanent custody to CCDCFs.

{¶ 8} The testimony revealed that the three children witnessed domestic violence involving S.B. and Mother. E.T. was the victim of rape and sexual abuse from S.B. It was disclosed that Mother was present when E.T. was sexually assaulted by S.B., though she was asleep or passed out, and E.T. told Mother what happened. E.T. was removed from the home and was placed in the temporary care of his maternal great uncle.

{¶ 9} E.B. and M.B. were later removed from the home based on reports of unsanitary conditions within the home, and concerns about Mother, including excessive drinking. E.B. and M.B. were placed together in a specialized foster home. E.B. eventually disclosed that she too had been sexually abused by S.B. The evidence also indicated E.B. was sexually victimized by E.T.

{¶ 10} S.B. was convicted of sex offenses involving E.T. and E.B. as the victims. S.B. was designated a Tier III sex offender and sentenced to life in prison. Mother was charged with child endangerment and was sentenced to three years in prison.

{¶ 11} The testimony showed that E.B. and M.B. are in a stable, nurturing, therapeutic foster home. They are doing very well in their foster home, and they are receiving services to address their special needs.

{¶ 12} CCDCFS had concerns about the great uncle, who minimized E.T.'s aggressive and sexualized behaviors. The great uncle failed to disclose instances when E.T. was sexually aggressive with other children. There also was testimony reflecting that the great uncle minimized E.T.'s behavioral concerns and the victimization of E.B. and M.B. The great uncle repeatedly requested sibling visitations, even though they were not recommended. Concerns arose as to whether the great uncle lacked appropriate decision-making skills.

{¶ 13} Despite concerns, CCDCFS did not remove E.T. from the great uncle's care because at the time, it was believed best for E.T., who was considered emotionally fragile, to remain with family. There were supports in place, and the

great uncle was involved with the services that E.T. was receiving. The great uncle went through foster-parent training during the pendency of the case and became a certified foster parent.

{¶ 14} The great uncle has had appropriate visits of his own with E.B. and M.B., which progressed to unsupervised biweekly visitation, and he has a good relationship with them. There was testimony about the specialized emotional and behavioral needs of the children and the care they are receiving in their foster home.

{¶ 15} The great uncle testified that he has appropriate housing for all three children and that he works part time and could be given more hours. He further testified that E.T.'s negative behaviors had improved. The great uncle also did not see any potential harm by having E.B. in the same household with E.T. However, there was testimony that this was "not deemed appropriate at this time therapeutically." The great uncle had a difficult time answering what he thought of Mother's parenting and the allegations against her, responding "I don't know."

{¶ 16} An ex-girlfriend of S.B.'s father, K.G., whom S.B. refers to as his "step-mother," was also investigated for placement of E.B. and M.B. CCDCFS expressed concerns relating to this "interested individual" who had no contact with any of the three children in the past three years, was not a blood relative, and lacked specialized training for children with emotional and behavioral issues.

{¶ 17} The GAL recommended an award of permanent custody to CCDCFS as being in the best interest of the children. The GAL had concerns about the great uncle, but also acknowledged that E.T. "is clearly bonded" with him and wants "to

be with his family.” Further, the GAL did not believe all three children should be with the great uncle. In support of his recommendation, the GAL stated in part:

I’ve spent a number of years doing this work and I could tell you that E.T. is the most troubled individual that I’ve come across in such a circumstance. He has needs that are going to be acute and that need to be dealt with in a very intensive nature for him to have any hope of moving forward * * * it is clear that these children are nowhere close to a position to * * * consider any kind of reunification together or even beginning that family counseling.

The GAL also indicated concerns with the interested individual and recognized that E.B. and M.B. were well adjusted to their therapeutic foster family.

{¶ 18} In the case of each child, the juvenile court granted permanent custody to CCDCFS, terminated the parental rights of Mother and S.B., and denied Mother’s motion for legal custody to the great uncle. The juvenile court also denied all other pending motions. In each child’s case, the juvenile court issued a journal entry and findings of fact on the permanent custody motion that included detailed findings addressing the statutory considerations for awarding permanent custody.

{¶ 19} Mother timely filed this appeal.

Law and Analysis

{¶ 20} Under her first assignment of error, Mother claims the juvenile court’s decision to grant permanent custody to CCDCFS and deny legal custody to the maternal great uncle was an abuse of discretion, against the manifest weight of the evidence, and not in the best interest of the children. A juvenile court’s decision to grant permanent custody will not be reversed as being against the manifest weight of the evidence when the record contains competent, credible evidence by which the

court could have found that the essential statutory elements for an award of permanent custody have been established. *In re B.P.*, 8th Dist. Cuyahoga Nos. 107732 and 107735, 2019-Ohio-2919, ¶ 22, citing *In re K.Z.*, 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, ¶ 82.

{¶ 21} R.C. 2151.414(B) provides that permanent custody of a child may be awarded to a children services agency if the court finds, by clear and convincing evidence, that (1) it is in the best interest of the child to grant permanent custody of the child to the agency, and (2) that any of the conditions listed in R.C. 2151.414(B)(1)(a)-(e) apply. In this matter, in the case of each child, the juvenile court found by clear and convincing evidence that the child cannot be placed with Mother or their father, or alleged father in the case of E.T., within a reasonable time or should not be placed with them. The parties do not dispute that the condition under R.C. 2151.414(B)(1)(a) applies. The dispute herein centers on whether the grant of permanent custody to CCDCFS is in the best interest of the children.

{¶ 22} In determining the best interest of a child in a permanent-custody hearing, the juvenile court is required under R.C. 2151.414(D)(1) to 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 parents, 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; (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; and (5) whether any of the factors set forth in R.C. 2151.414(E)(7) to (11) apply. R.C. 2151.414(D)(1)(a)-(e).

{¶ 23} In conducting a best-interest analysis under R.C. 2151.414(D), “[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.” *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. As determined by the Supreme Court of Ohio, there is no heightened importance to the R.C. 2151.414(D)(1)(d) factor and the trial court’s statutory duty does not include a requirement that the juvenile court find by clear and convincing evidence that no suitable relative is available for placement. *Id.* at ¶ 56 and 64. However, “[t]he possibility that a relative could provide a permanent placement for a child by assuming legal custody is relevant to the consideration of the R.C. 2151.414(D)(1)(d) best-interest factor.” *In re J.P.*, 10th Dist. Franklin No. 18AP-834, 2019-Ohio-1619, ¶ 27. “Consequently, a parent has standing to raise arguments regarding the possibility of a relative assuming legal custody of a child, but only to the extent those arguments challenge the decision to terminate the parent’s rights.” *Id.*, citing *In re S.C.*, 2018-Ohio-2523, 115 N.E.3d 813, ¶ 16 (8th Dist.).

{¶ 24} Unlike permanent custody that divests the natural parents of all parental rights, legal custody vests in the custodian the physical care and control of the child while the natural parents retain residual parental rights, privileges, and

responsibilities. See R.C. 2151.011(B)(31); R.C. 2151.011(B)(21); R.C. 2151.353(A)(3)(c). Moreover, “[u]nlike permanent custody, granting legal custody does not terminate the parent-child relationship.” *In re M.M.*, 12th Dist. Fayette No. CA2010-12-034, 2011-Ohio-3913, ¶ 7.

{¶ 25} Here, in determining the best interest of each child, the juvenile court’s decision demonstrates that it considered all relevant factors pursuant to R.C. 2151.414(D)(1). There were significant relevant factors that supported the trial court’s award of permanent custody and termination of all parental rights.

{¶ 26} In the case of each child, the juvenile court considered that both Mother and S.B. were incarcerated for offenses committed against the child or a sibling of the child. S.B. was found guilty of multiple counts of rape, gross sexual imposition, and endangering children and was sentenced to life in prison without the possibility of parole. Mother was incarcerated for three years on a charge of endangering children. The juvenile court also considered that Mother has a chronic mental illness and issues with chemical dependency, she demonstrated a lack of commitment toward the children, and she had shown an unwillingness to provide an adequate permanent home for the children. The record reflects that while with Mother and S.B., the children lived in deplorable conditions and lacked a safe, stable, and secure environment. In the case of each child, the juvenile court found that “Mother and [S.B.] have committed abuse or neglect to the child and the likelihood of recurrence of the abuse or neglect makes the child’s placement with the

parent a threat to the child's safety." Additionally, the GAL recommended that permanent custody be granted to CCDCFs.

{¶ 27} We recognize that the great uncle is committed to these children and is bonded with them. The record reflects that E.T. had been placed in the care of the great uncle, the great uncle was engaged with the services provided to E.T., E.T. was clearly bonded with the great uncle, and E.T. wanted to remain with his family. The great uncle also had appropriate visits with E.B. and M.B., and he has a good relationship with them. Additionally, the great uncle became a certified foster parent. However, there was evidence that called into question the great uncle's decision-making skills. The record reflects that the great uncle did not fully appreciate the detrimental harm Mother had caused to the children. He also did not appreciate the risk of having all three children together, despite being deemed not appropriate for them therapeutically. Additionally, the children had specialized emotional and behavioral needs and it was not in their best interest for all three to be placed together. As expressed by the GAL, "these children are nowhere close to a position to * * * consider any kind of reunification together * * *."

{¶ 28} The "interested individual" had no contact with the children for three years prior to the custody trial and had no specialized training. The testimony revealed that E.B. and M.B. are well cared for in their therapeutic foster home and the caseworker felt it was in their best interest to remain with the therapeutic foster family.

{¶ 29} As the Supreme Court of Ohio has explained, “[R.C. 2151.414(D)] requires a weighing of all the relevant factors * * * [and] requires the court to find the best option for the child * * *.” *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, at ¶ 64. Furthermore, “[t]he statute does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors.” *Id.*

{¶ 30} This case is readily distinguishable from *In re B.B.*, 8th Dist. Cuyahoga No. 108743, 2020-Ohio-1619, which is relied upon by Mother. In that case, an award of legal custody to the children’s grandfather was upheld under circumstances where the parents appeared to have addressed the concerns with meeting the basic needs of the children, they had been making progress with their substance abuse issues, and the GAL recommended additional time for the parents to maintain sobriety and believed it would be in the children’s best interest to be reunified with their parents. *Id.* at ¶ 13. In this matter, Mother and S.B. were in prison for offenses involving abuse or neglect of the children, the safety and welfare of the children was the paramount concern, and the record reflects that an award of legal custody, which would allow the natural parents to retain residual parental rights and responsibilities, would not have been in the best interest of the children.

{¶ 31} Although the trial court did not expressly state any findings with regard to the denial of legal custody, and simply denied legal custody to the great uncle, “[t]he trial court is not required to consider placing the children with a relative

prior to granting permanent custody to CCDCCFS” and “the willingness of a relative to care for a child does not alter what the court must consider in determining permanent custody.” *In re A.D.*, 8th Dist. Cuyahoga No. 85648, 2005-Ohio-5441, ¶ 12, citing *In re Benavides*, 8th Dist. Cuyahoga No. 78204, 2001 Ohio App. LEXIS 2002, 12 (May 3, 2001). As this court has previously recognized, “if permanent custody to the agency is in the children’s best interest, legal custody [to a relative] necessarily is not.” *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 11, citing *In re L.C.*, 9th Dist. Summit No. 26816, 2013-Ohio-2799, ¶ 10. Moreover, “[a] court is not required to favor a relative if, after considering all the factors, it is in the child’s best interest for the agency to be granted permanent custody.” *Id.*, citing *In the Matter of B.H.*, 5th Dist. Fairfield No. 14-CA-53, 2014-Ohio-5790, ¶ 72; *see also In re K.R.*, 8th Dist. Cuyahoga Nos. 103438, 103439, 103745, and 103746, 2016-Ohio-1228, ¶ 22, 36-37 (where a grant of permanent custody was in the best interest of the children and the trial court clearly intended to terminate parental rights, the trial court did not err in denying an award of legal custody to the maternal grandmother, who was a special-education teacher and had a genuine desire for legal custody).

{¶ 32} The record reflects that the award of permanent custody to CCDCCFS is supported by competent, credible evidence in the record and is not against the manifest weight of the evidence. 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 (upholding the grant of

permanent custody to CCDCFS and denial of legal custody to maternal relatives), citing *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 163. As this court has repeatedly recognized, “[a] child’s best interests require permanency and a safe and secure environment.” *In re A.R.*, 8th Dist. Cuyahoga No. 103450, 2016-Ohio-1229, ¶ 22 (upholding trial court’s award of permanent custody to the agency and the denial of legal custody to a paternal grandmother when the trial court considered all relevant factors and found it was necessary to avoid any future contact with, or retraumatization caused by either parent), quoting *In re Holyak*, 8th Dist. Cuyahoga No. 78890, 2001 Ohio App. LEXIS 3105 (July 12, 2001). Mother’s first assignment of error is overruled.

{¶ 33} Under her second assignment of error, Mother claims the juvenile court abused its discretion in denying the great uncle’s motion for party status for all three children. Even if we assume, for the sake of argument, that Mother has standing to challenge the denial of the great uncle’s motion, Mother has not demonstrated that any prejudicial error occurred. *See In re C.M.*, 4th Dist. Athens Nos. 17CA16 and 17CA17, 2017-Ohio-9037, ¶ 65, citing R.C. 2501.02; Civ.R. 61; App.R. 12(B); *see also In re D.T.*, 10th Dist. Franklin No. 07AP-853, 2008-Ohio-2287, ¶ 16. Mother filed her own motion for legal custody to the great uncle, and the great uncle testified in the proceedings and expressed his desire for legal custody of the children. The trial court ultimately concluded that granting permanent custody to CCDCFS and terminating all parental rights was in the best interest of all three children. As discussed under our review of the first assignment of error, there was

competent, credible evidence supporting the trial court's decision in the case of each child.

{¶ 34} The record demonstrates the outcome would not have been any different if the great uncle had been permitted to intervene. Accordingly, the second assignment of error is overruled.

Conclusion

{¶ 35} Our review reflects that in the case of each child, the juvenile court appropriately considered all the relevant statutory factors in determining the best interest of the child pursuant to R.C. 2151.414 and did not abuse its discretion. We further find the juvenile court's decision to grant permanent custody of each child to CCDCFS and terminate parental rights is supported by competent, credible evidence in the record and is not against the manifest weight of the evidence. No prejudicial error occurred with the denial of the great uncle's motion for party status.

{¶ 36} 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
RAYMOND C. HEADEN, J., CONCUR