

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE V.S., ET AL. :
 : No. 109966
Minor Children :
 :
[Appeal by R.S., Father] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 27, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD-17909849 and AD-17909851

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Joseph C. Young, Assistant Prosecuting Attorneys, *for appellee* Cuyahoga County Division of Children and Family Services.

Christopher R. Fortunato, *for appellant*.

MARY EILEEN KILBANE, J.:

{¶ 1} Defendant-appellant R.S. (“Father”) appeals from the juvenile court’s decision awarding permanent custody of his minor children to the Cuyahoga County Division of Children and Family Services (“CCDCFS” or “the agency”). For the following reasons, we affirm the decision of the trial court.

Factual and Procedural History

{¶ 2} On June 27, 2017, CCDCFS filed a complaint alleging that minor children J.S. and V.S. — Father’s two children with D.M. (“Mother”), aged one and three respectively — were neglected and required protective supervision.¹ The complaint alleged that Father had engaged in an act of domestic violence in the children’s presence and had prior convictions for attempted domestic violence and child endangering. The complaint also alleged that Father had left the children unsupervised when they were supposed to be in his care, and that Father had a substance abuse problem.

{¶ 3} On July 19, 2017, following a telephonic hearing, the magistrate issued an ex parte order committing the children to the emergency custody of CCDCFS. On July 20, 2017, CCDCFS filed a motion for predispositional temporary custody. On July 21, 2017, the court granted this motion.

{¶ 4} On August 23, 2017, CCDCFS filed an amended complaint for neglect and temporary custody. The agency also developed a case plan to address Mother and Father’s respective needs. Specifically, the case plan required Father to establish paternity of J.S., complete a mental health assessment specific to domestic violence concerns, complete domestic violence education, complete an alcohol and drug assessment, and follow other recommendations. The case plan also required Mother to engage in services to address her parenting skills, obtain and maintain

¹ The complaint also addressed a third minor child, A.M., but because A.M. is not a biological child of R.S., she is not involved in this appeal.

appropriate and safe housing for the children, and demonstrate an ability to provide for the children's basic needs.

{¶ 5} On December 3, 2017, the children were adjudicated to be neglected. On January 9, 2018, the children were committed to the temporary custody of the agency. On June 26, 2018, the agency filed a motion for first extension of temporary custody. On July 16, 2018, the magistrate ordered that the parents could begin having overnight visitation with the children. During an overnight visit that took place between July 27 and 29, 2018, Father threatened to harm V.S. and A.M. and police were called to the home. As a result of this incident, on August 3, 2018, the agency filed a motion to terminate unsupervised visitation. The magistrate suspended overnight visitation pending a hearing on the agency's motion.

{¶ 6} On November 8, 2018, the court extended temporary custody to December 28, 2018. At that time, the court found that Mother and Father had made significant progress on their case plan goals and that the permanency plan was reunification.

{¶ 7} Despite making progress on his case plan goals, Father failed to complete drug screens on a consistent basis and continued to test positive for drugs when he did complete screens. Further, Father completed a psychological evaluation, but the results of the evaluation were inconclusive because Father was defensive and uncooperative during the evaluation. When the agency instructed Father to complete another evaluation, he refused to do so.

{¶ 8} On December 20, 2018, the agency filed a motion to modify temporary custody to permanent custody. According to a Semi-Annual Review (“SAR”) filed on December 21, 2018, Mother and Father had secured housing and had not been involved in additional domestic violence incidents. The SAR also stated that Father had tested positive for marijuana and cocaine in September 2018, and although he had engaged in parenting and anger management courses, he had not engaged in domestic violence courses.

{¶ 9} On September 6, 2019, the guardian ad litem (“GAL”) filed a report and recommendation. The GAL reported that J.S. is “medically fragile” and his serious medical needs, relating to significant physical and intellectual disabilities, will likely require permanent care. The GAL reported that both A.M. and V.S. had reported they had been inappropriately touched by Father in the past, and both expressed fear of him. The GAL recommended that the children be placed in permanent custody of CCDCFS.

{¶ 10} On August 21, 2020, the court conducted a trial on the agency’s motion to modify temporary custody to permanent custody. The agency called Jennifer Kovi (“Kovi”), who worked as the CCDCFS supervisor on the case from late 2017 until February 2020. Kovi testified that the family first came to the attention of the agency following reports of domestic violence between Mother and Father. In addition to the domestic violence, the agency was also concerned about Father’s substance abuse and the family’s housing situation. Kovi testified that at the outset of the case, Mother was living in a domestic violence shelter and did not have stable

housing. Kovi went on to testify that Mother had addressed her case plan concerns by completing a domestic violence program for victims, renting a home together with Father, and remaining engaged in the process of ensuring that J.S.'s special medical needs were met.

{¶ 11} Kovi testified that Father had addressed some of his case plan concerns; specifically, he had established paternity for J.S. and rented a home with Mother. Kovi went on to testify that although Father had previously completed a domestic violence program through Cleveland Municipal Court, he did not complete the other domestic violence programs to which the agency referred him. Further, the agency recommended that Father complete a psychological assessment, but this was never completed. Kovi also testified that visitation was suspended following reports of sexual abuse against Father by V.S. and A.M. With respect to substance abuse concerns, Kovi testified that Father was a “no show” at numerous assessments and appointments at different locations. Upon completion of one assessment, Father was referred for intensive outpatient treatment, but he did not complete that program while Kovi was assigned to the case. Finally, Kovi testified that Father repeatedly tested positive for cocaine and alcohol. The agency introduced multiple positive drug screens to corroborate this testimony.

{¶ 12} The agency also called Ramonia Jenkins (“Jenkins”), the social worker who was assigned to the case from December 2019 to February 2020. Jenkins testified that Father had completed an intensive outpatient program to address his substance abuse, but had tested positive for cocaine since completion of

the program. According to Jenkins, Father was “very lackadaisical” about his substance use. Jenkins testified that as a result of this relapse, she informed him that he would need to complete another assessment, and Father refused, telling her that he was not going to do anything else. Jenkins also explained that one of the agency’s primary concerns with the family was that because Mother worked outside the home, Father would assume the role of primary caregiver for the children.

{¶ 13} Next, the agency called Catherine Borden (“Borden”), a social worker who worked on the case beginning in February 2020. Borden testified that in late April 2020, Father completed a substance abuse assessment and was diagnosed with moderate cocaine use disorder and mild alcohol use disorder and it was again recommended that he receive intensive outpatient treatment. Borden also testified that Father completed a psychological assessment and as a result of that, he was referred to anger management counseling. Father did not complete anger management counseling. Borden testified regarding her impression of the children’s visits with Mother and Father and stated that the children were happy to see their parents and the family was bonded. Finally, Borden testified that she believed that it was in the best interest of the children for the agency to have permanent custody.

{¶ 14} Neither parent called any witnesses. The GAL addressed the court as to his recommendation. The GAL stated that he continued to recommend permanent custody for J.S. He also stated that he recommended that V.S. return home under protective supervision.

{¶ 15} On September 8, 2020, the court granted the agency's motion for permanent custody for V.S. and J.S. The court made the following findings:

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 parents have failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. Mother has continuously completed case plan objectives and services to remedy the conditions causing the child to be placed outside the child's home; however, she and father are married and continue to reside in the same home; and that mother is the primary wage earner, and father would continue in his role as the primary caretaker for the child in the home when mother is working.

The chronic chemical dependency of the father that is significant that it makes the parent unable to maintain sobriety at the present time and, as anticipated, within one year.

* * *

The father has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

{¶ 16} Father appeals, presenting the following three assignments of error for our review:

I. The trial court erred and abused its discretion when it made findings that the [parents'] intention to remain married places the children at a disadvantage resulting in granting permanent custody to the CCDCFS and violates the substantive due process clause of the Fourteenth Amendment to the United [States] Constitution.

II. The trial court's decision to grant permanent custody to the CCDCFS was against the manifest weight of the evidence.

III. The trial court erred and abused its discretion by failing to swear in the Guardian ad Litem before he testified in violation of Evid.R. 603.

Law and Analysis

{¶ 17} We recognize that a parent has a “fundamental liberty interest in the care, custody and management” of his or her child. *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990), quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). We also recognize that the right to raise one’s own child is “an essential and basic civil right.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67. Though this right is essential, it is not absolute. It is “always subject to the ultimate welfare of the child, which is the pole star or controlling principle to be observed.” *In re L.D.*, 2017-Ohio-1037, 86 N.E.3d 1012, ¶ 29 (8th Dist.), quoting *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979).

{¶ 18} Because termination of parental rights is “the family law equivalent of the death penalty in a criminal case,” it is “an alternative [of] last resort.” *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14 and *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21. It is, however, “sanctioned when necessary for the welfare of a child.” *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 7, citing *In re Wise*, 96 Ohio App.3d 619, 624, 645 N.E.2d 812 (9th Dist.1994). Where parental rights are terminated, the goal is to

create “a more stable life” for dependent children and to “facilitate adoption to foster permanency for children.” *In re N.B.* at ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, 5 (Aug. 1, 1986).

I. Father and Mother’s Marriage

{¶ 19} In his first assignment of error, Father argues that the trial court erred and abused its discretion by finding that Mother and Father’s intention to remain married disadvantaged the children, and that this finding was an improper basis upon which to grant permanent custody to the agency. Specifically, Father argues that the trial court inappropriately considered his and Mother’s marital status in making its custody determination. We disagree.

{¶ 20} In adjudicating a motion for permanent custody, a trial court is required to focus on the needs and interests of the children and “shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child.” R.C. 2151.414(C). While we recognize that marriage is a fundamental right, we reiterate that in the unique context of permanent custody cases, parental rights are not absolute and are always subject to the ultimate welfare of the child. *In re L.D.*, 2017-Ohio-1037, 86 N.E.3d 1012, ¶ 29 (8th Dist.), quoting *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979). Likewise, the Ohio Supreme Court has held that a parent’s constitutional right to remain married to someone who presents a safety or health hazard to their children “does not ensure that [the parent’s] right to custody of [their] children is absolute.” *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 54, citing *In re Cunningham*

at 106 and *In re L.S.*, 9th Dist. Summit No. 23523, 2007-Ohio-1583, ¶ 19-20 (mother's fundamental rights to have custody of child and to marry are not absolute, but must yield when outweighed by the interests of the state in protecting the child).

{¶ 21} Additionally, our review of the record shows no interference with Father's fundamental right to marry. The case plan did not require the parents to divorce. The record is devoid of any reference to the agency or its employees encouraging the parties to divorce. While a parent "[has] the right to associate freely with whom they choose," this right "must become subordinate to the best interests of the children" in the context of permanent custody determinations. *In re Holyak*, 8th Dist. Cuyahoga No. 78890, 2001 Ohio App. LEXIS 3105, 11 (July 12, 2001). Where, as here, Father had engaged in domestic violence against Mother, the danger that this created for the children is an appropriate fact for the court to consider in adjudicating a permanent custody motion. Indeed, nothing in the record indicates that the parties' marriage itself was a barrier to either parent maintaining custody of their children. Instead, the fact that Father had created a safety hazard for his children was a factor the court considered in its permanent custody determination.

{¶ 22} Further, our review of the record shows to whatever degree the parents' relationship impacted the court's custody determination, this impact would have been limited to Mother. At trial, there was testimony and argument from the agency and its witnesses implying that if it were not for Mother's ongoing relationship with Father, there would be nothing preventing her from regaining custody of the children. For Father, however, the record reflects that there were

numerous significant obstacles to his retaining custody of his children — specifically, his ongoing substance abuse and unaddressed domestic violence issues. Both of these issues exist independent of Father’s marriage to Mother. For these reasons, Father’s first assignment of error is overruled.

II. Best Interest Determination

{¶ 23} In his second assignment of error, Father argues that the trial court’s decision to grant permanent custody of V.S. and J.S. to the agency was against the manifest weight of the evidence.

{¶ 24} CCDCFS may obtain permanent custody of a child by first obtaining temporary custody of the child and then filing a motion for permanent custody under R.C. 2151.413. *See In re M.E.*, 8th Dist. Cuyahoga No. 86274, 2006-Ohio-1837. That process occurred here. When CCDCFS files a motion for permanent custody under R.C. 2151.413 after obtaining temporary custody, the proceedings are governed by the guidelines and procedures set forth in R.C. 2151.414.

{¶ 25} R.C. 2151.414(B) sets forth a two-prong analysis to be applied by a juvenile court in permanent custody proceedings. Pursuant to this division, before a trial court can terminate parental rights and grant permanent custody to CCDCFS, the court must find by clear and convincing evidence that: 1) the existence of any one of the five conditions set forth in R.C. 2151.414(B)(1)(a) through (e), and 2) that granting permanent custody to CCDCFS is in the best interest of the child.

{¶ 26} Clear and convincing evidence is “that measure or degree of proof which is more than a mere ‘preponderance of the evidence’ but not to the extent of

such certainty required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987).

{¶ 27} Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24, citing *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *Id.* Furthermore, a juvenile court has considerable discretion in determining whether an order of permanent custody is in the best interest of the child, and reviewing courts therefore accord this discretion “the utmost respect, given the nature of the proceedings 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).

{¶ 28} With these standards in mind, we turn to the two-pronged analysis required by R.C. 2151.414(B) before a court can terminate parental rights. The first prong requires the court, after a hearing, to determine whether, by clear and convincing evidence, any of the following factors apply:

(a) the child is not abandoned or orphaned, but the child cannot be placed with either parent 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 12 or more months of a consecutive 22-month period; or (e) the child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

R.C. 2151.414(B)(1)(a)-(e).

{¶ 29} *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, ¶ 41.

Only one of these factors must be present for the first prong of the analysis to be satisfied. *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 28. Here, the court found that the children had been in agency custody for 12 or more months of a consecutive 22-month period, satisfying R.C. 2151.414(B)(1)(d) and therefore satisfying the first prong. Father does not dispute this.

{¶ 30} The second prong of R.C. 2151.414(B) involves the best interest determination. We now turn to the trial court's conclusion that permanent custody for the agency was in the children's best interest. We review a trial court's determination of a child's best interests under R.C. 2151.414(D) for abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 31} In determining the best interests of a child at a hearing held pursuant to R.C. 2151.414, the juvenile court must consider all relevant factors, including, but not limited to, 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 * * *;

(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).

{¶ 32} Although a trial court is required to consider each relevant factor under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, "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. We have previously stated that only one of these enumerated factors needs to be resolved in favor of the award of permanent custody. *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000), citing *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (3d Dist.1993).

{¶ 33} Here, Father argues that the trial court failed to consider the wishes of the children, the bond between the parents and children, and the availability of relatives with whom the children could be placed. Contrary to Father's assertion, the trial court considered all relevant factors, including additional factors listed in R.C. 2151.414(E):

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in the temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; 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, the report of the Guardian ad Litem, the Court finds by clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

{¶ 34} A child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). While the court did not specifically enumerate each statutory factor in the analysis in its journal entry, the journal entry is nevertheless comprehensive.

{¶ 35} The record reflects that the court considered the children's wishes and their bond with Father and Mother, through testimony from various agency employees and the GAL. With respect to V.S., who was six years old at the time of the trial, agency employees and the GAL testified that she had expressed a desire to return home. With respect to J.S., who was four years old at the time of the trial, he

was nonverbal and had significant disabilities that prevented him from understanding the proceedings, let alone articulating his wishes as to custody. The trial court heard testimony that J.S. always appeared happy to see Father and Mother during their visits. The court also heard testimony that the children were bonded to their parents and each other.

{¶ 36} The record also reflects that the court considered the children's relationship and potential placement with relatives. The court heard testimony that two paternal aunts were at one point interested in being caregivers for the children, but ultimately decided that they just wanted to facilitate visits with them.

{¶ 37} Beyond these factors, the court considered the children's custodial history pursuant to R.C. 2151.414(D)(1)(c). The children were in agency custody, at various placements, for almost three years at the time of the trial in this case. The court considered the children's need for a legally secure placement pursuant to R.C. 2151.414(D)(1)(d). Finally, the court considered the additional factors in R.C. 2151.414(E). Specifically, the court considered Father's failure to remedy the conditions causing the children to be removed from the home, Father's chemical dependency, and Father's lack of commitment toward the children. Finally, the court also considered Father's placing the children at substantial risk of harm and his refusal to participate in treatment. R.C. 2151.414(E)(1), (2), (4), and (9).

{¶ 38} Following a thorough review of the record, we find that the trial court's findings were supported by competent and credible evidence, and the court

did not abuse its discretion in determining that permanent custody was in the children's best interest. Therefore, Father's second assignment of error is overruled.

III. The GAL's Testimony

{¶ 39} In his third and final assignment of error, Father argues that the trial court erred and abused its discretion by failing to swear in the GAL before his testimony in violation of Evid.R. 603.

{¶ 40} Because Father did not object to this alleged failure, or to any part of the GAL's testimony at trial, we review this claim for plain error. In civil cases, plain error review is conducted "with the utmost caution." *In re J.H.*, 8th Dist. Cuyahoga No. 108565, 2020-Ohio-576, ¶ 10, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Plain error is limited to those "extremely rare cases" in which "exceptional circumstances require its application to prevent a miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings." *Id.*, quoting *id.*

{¶ 41} Father has not demonstrated plain error here. R.C. 2151.414(C) provides, in relevant part, that a "written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath." Here, the court stated that the GAL had filed his report pursuant to R.C. 2151.414(C) and asked him to provide the court with his "final summation and recommendation" at trial. Following this summation by the GAL,

the parties were permitted to cross-examine him. Father did not cross-examine the GAL.

{¶ 42} Father has not made any argument as to how this alleged error might have had a “material adverse effect” on his rights or on the character of the proceedings. Therefore, we decline to find plain error here. Father’s third assignment of error is overruled.

{¶ 43} 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.

MARY EILEEN KILBANE, JUDGE

SEAN GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR