

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE R.H.	:	
A Minor Child	:	No. 111505
[Appeal by A.H., Father]	:	
	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 20, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 20901255

Appearances:

Christina M. Joliat, *for appellant.*

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

CORNELIUS J. O'SULLIVAN, JR., J.:

{¶ 1} Appellant A.H. is the father of the subject minor child, R.H., and appeals from the juvenile court's April 4, 2022 judgment granting the motion of the Cuyahoga County Division of Children and Family Services ("CCDCFS" or "the

Agency”) for permanent custody of the child. After careful review of the facts and pertinent law, we affirm.

Procedural and Factual History

{¶ 2} In January 2020, CCDCFS filed a complaint alleging that R.H. was abused and dependent and requesting a disposition of temporary custody. In February 2020, R.H. was placed in the emergency care and custody of CCDCFS. CCDCFS subsequently filed a motion for predispositional temporary custody of the child. The court held a hearing on February 10, 2020, after which the trial court granted CCDCFS’ request for predispositional temporary custody. In September 2020, R.H. was adjudged to be abused and dependent and was to be placed in the temporary custody of CCDCFS. The temporary custody order was twice extended. In October 2021, the Agency filed a motion to modify temporary custody to permanent custody, and trial on the motion was held in March 2022.

{¶ 3} The following facts were adduced at trial. CCDCFS became involved with the child after the child was born in December 2019 exposed to drugs and suffering withdrawal symptoms due to mother, K.V.’s (“Mother”), use of fentanyl.¹ Appellant also suffered from substance-abuse issues. Once the child was placed in agency custody, a case plan was developed to assist the parties in addressing their substance abuse and mental health issues in an effort to promote the permanency plan of reunification. Throughout the pendency of the proceedings, Mother failed

¹ Mother has not appealed and therefore will only be minimally discussed.

to submit to substance abuse treatment, urine screens, mental health assessment, or treatment as referred.

{¶ 4} Appellant, who was in his early 30's during the relevant timeframe, was convicted in 2020 of two counts of drug possession; one count was for heroin, and the other count was for a fentanyl-related compound. He was ordered to intervention in lieu of conviction and received inpatient treatment at a social services agency to address his issues of substance abuse, mental health, and anger management. Appellant did achieve a period of sobriety for approximately six months in 2021 but failed to maintain that sobriety and tested positive for cocaine twice in July 2021 and positive for fentanyl in August, October, and December 2021.

{¶ 5} At the time of trial, appellant was not engaged in any services for substance abuse or mental health, despite having been referred for further services in October 2021 and January 2022. Appellant also failed to engage in anger management services, which were referred after a domestically violent incident between appellant and Mother, as well as an incident at an agency staffing in December 2021. In regard to the incident with Mother, appellant was charged with domestic violence, aggravated menacing, unlawful restraint, and endangering children. The domestic violence was amended to a misdemeanor assault, appellant was found guilty, and the remaining charges were dismissed.

{¶ 6} The trial testimony demonstrated that when R.H. was removed in February 2020, the Agency placed the child with relatives — first with a maternal cousin and second with the paternal grandmother — but those placements ended

because concerns arose regarding the relatives allowing appellant and Mother to have unsupervised access to the child. It was during one of the unsupervised visits that the domestically violent incident between appellant and Mother occurred, at which time Mother was holding R.H., who was approximately one year old. After the incident, R.H. was placed with a foster family where she remained at the time of trial. The record demonstrates that the child was bonded with her foster family and was thriving.

{¶ 7} The trial testimony demonstrates that CCDCFS initially pursued the possibility of placing R.H. with a relative — a paternal aunt. However, because appellant had a period of sobriety, during which time the goal was reunification, the agency did not place R.H. with the aunt.

{¶ 8} After appellant relapsed, the Agency had further discussions with the aunt about caregiving for R.H. The Agency informed her about various options, including legal custody and adoption. The aunt indicated that she was satisfied with the child's current foster placement because the child was safe in a loving and stable home. The aunt also indicated that she was not interested in becoming R.H.'s legal custodian but instead preferred to be considered for adoption if the child were placed in permanent custody. However, the record indicates that the aunt had never even met R.H. The testimony demonstrated that the foster parents were also interested in adopting R.H.

{¶ 9} At the time of trial, appellant was incarcerated on a fleeing charge. Prior to his incarceration, appellant was consistent with his visitations with R.H. and was engaged and bonded with the child.

{¶ 10} The Agency's case worker testified that CCDCFS was seeking permanent custody of R.H. because appellant was still abusing drugs and not following his case plan. Further, the case worker testified that she had concerns about appellant's housing because it was her understanding that after his release from custody, he would be returning to his mother's house, where the child had once been but was removed. Appellant also did not have employment.

{¶ 11} R.H.'s guardian ad litem ("GAL") submitted a report to the trial court in January 2022, wherein she recommended that permanent custody to CCDCFS would be in R.H.'s best interest. She maintained her recommendation at trial. The GAL noted in her report that appellant "still appears to be unstable, making unwise/unsafe decisions, using drugs, and [is] in a relationship with Mother, who is also actively using drugs."

{¶ 12} The GAL further noted that she had investigated the paternal aunt, who had never met R.H., and found that the aunt was living in a crowded home that lacked appropriate space for R.H., and was "a single mother taking care of her teenage daughter and elderly mother alone." The GAL was of the opinion that the aunt was "overwhelmed with her current situation, both physically and financially, and probably not in the best or appropriate place in her life to take on custody of another child, especially this two-year-old child."

{¶ 13} On this evidence, the trial court entered its April 4, 2022 judgment granting CCDCFS' motion for permanent custody of R.H. Appellant raises the following two assignments of error for our review:

- I. The trial court's order granting permanent custody to the Agency was not based upon sufficient clear and convincing evidence, was against the manifest weight of the evidence and it erred in finding permanent custody to be in the best interest of the [child].
- II. The trial court's order failing to grant legal custody to the paternal aunt was not based upon sufficient evidence, was against the manifest of the evidence and it erred in finding permanent rather than legal custody to be in the best interest of the child.

Law and Analysis

{¶ 14} Appellant's two assignments of error are interrelated, and we consider them together.

{¶ 15} The United States Supreme Court has recognized that a parent's liberty interest in the care, custody, and control of their children "is perhaps the oldest of the fundamental interests recognized by this court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Fourteenth Amendment to the United States Constitution and Article I, Section 16, of the Ohio Constitution require that termination of parental rights proceedings is fundamentally fair and that parents are "afforded every procedural and substantive protection the law allows." *In re A.N.*, 8th Dist. Cuyahoga No. 110608, 2021-Ohio-4214, ¶ 26, quoting *In re Smith*, 77 Ohio App.3d 1, 16, 60 N.E.2d 45 (6th

Dist.1992), quoting *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). We fully understand these admonitions.

{¶ 16} While a parent’s interest is paramount, it is not absolute and is “always subject to the ultimate welfare of the child, which is the polestar 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).

{¶ 17} A trial court must make two determinations before granting permanent custody. First, R.C. 2151.414 provides that a trial court may grant permanent custody of a child to an agency if, after a hearing, the court determines by clear and convincing evidence that one of the factors enumerated in R.C. 2151.414(B)(1)(a) through (e) applies. Second, after 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.

{¶ 18} “An appellate court will not reverse a juvenile court’s decision awarding permanent custody to an agency if the judgment is supported by clear and convincing evidence.” *In re Ka.R.*, 8th Dist. Cuyahoga No. 110504, 2021-Ohio-4125, ¶ 29, quoting *In re A.R.S.*, 2021-Ohio-1958, 174 N.E.3d 28, ¶ 28 (8th Dist.), citing *In re J.M.-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 28.

{¶ 19} Clear and convincing evidence is defined as “that measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is 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 A.N.*, 8th Dist. Cuyahoga No. 110608, 2021-Ohio-4214, at ¶ 29, quoting *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 42, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 20} Likewise, we “will not reverse a juvenile court’s award of permanent custody 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 any award of permanent custody have been established.” *In re A.N.* at *id.*, citing *In re B.P.*, 8th Dist. Cuyahoga Nos. 107732 and 107735, 2019-Ohio-2919, ¶ 22.

First Prong: R.C. 2151.414(B)(1) Factors

{¶ 21} R.C. 2151.414(B)(1), which governs the first step in an agency’s motion for permanent custody, contains five factors. Relative to this case, “[w]hen the child is neither abandoned nor orphaned, the court considers the possibility of reunification (‘whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents’), or whether the child has been in an agency’s temporary custody for 12 out of 22 consecutive months.” *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 69, quoting the first factor under R.C. 2151.414(B)(1)(a), and citing the fourth factor under R.C. 2151.414(B)(1)(d).

{¶ 22} The trial court made a finding under subsection (a) of R.C. 2151.414(B)(1) — that R.H. was not abandoned or orphaned, but cannot be placed with either parent within a reasonable time period or should not be placed with the parents. In making its finding, the trial court was guided by the reunification factors set forth in R.C. 2151.414(E). There are 16 factors under R.C. 2151.414(E) for the trial court to consider as to whether the child should be placed with either parent. The trial court here found the first two applied, which are:

(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. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(2) Chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code[.]

Trial court's April 4, 2022 judgment, quoting R.C. 2151.414(E)(1) and (2).

{¶ 23} Competent, credible evidence supports the trial court's findings. In regard to appellant, the record demonstrates that his case plan required him to successfully complete substance abuse treatment and provide weekly urine screens

to establish and verify sobriety. Initially, appellant complied with the requirements and so CCDCFS extended temporary custody twice, with the goal of reunification. However, appellant testified positive for fentanyl in August 2021. In October 2021, the Agency referred appellant for further substance abuse treatment and mental health services, but he was not compliant. Appellant had no sobriety date, and the last urine screen he did (December 2021) was positive for fentanyl. Further, at the time of trial, appellant was incarcerated in the county jail and upon his release intended to return to his mother's house, where R.H. had been during these proceedings but was removed. Appellant was also unemployed.

{¶ 24} Once a trial court finds by clear and convincing evidence that one or more factors under R.C. 2151.414(E) applies, it is mandated to find that the child cannot or should not be returned to the parents within a reasonable time. *See In re Glenn*, 139 Ohio App.3d 105, 113, 742 N.E.2d 1210 (8th Dist.2000). Because the trial court's findings under R.C. 2151.414(E) are supported by competent, credible evidence, the court was required to make a "cannot or should not" finding under R.C. 2151.414(B)(1)(a), which satisfies the first requirement of the permanent custody statute.

Second Prong: Best Interest Factors under R.C. 2151.414(D)(1)

{¶ 25} R.C. 2151.414(D)(1)(a) through (e) set forth the relevant factors that a court should consider in determining the best interest of the child. The satisfaction of one of these enumerated factors permits an award of permanent custody. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 46; *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).

{¶ 26} When considering the best interest of a child, R.C. 2151.414(D)(1) directs the court to consider all relevant factors, including, but not limited to: (a) the interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers; (b) the wishes of the child, as expressed directly by the child or through the child’s guardian ad litem; (c) the custodial history of the child; (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; and (e) whether any of the factors set forth in R.C. 2151.414(E)(7) through (11) apply. While a trial court is required to consider each of the R.C. 2151.414(D)(1) factors in making its permanent custody determination, “there is not one element that is given more weight than the others pursuant to the statute.” *In re Schaefer*, 11 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

{¶ 27} This court reviews a trial court’s best-interest determination under R.C. 2151.414(D) for an abuse of discretion. *In re J.F.*, 2018-Ohio-96, 102 N.E.3d 1264, ¶ 55 (8th Dist.), citing *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, at ¶ 47. We note that “the best interest determination focuses on the child, not the parent.” *In re K.Z.*, 8th Dist. Cuyahoga No. 107269, 2019-Ohio-707, ¶ 85, citing *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 59.

{¶ 28} In considering the best interest factors, the trial court here found that R.H. has lived in the same foster home since her removal from the parents’ home 24

months prior, and that although the child was too young to verbally express her wishes, the child was well bonded and thriving with her foster family.

{¶ 29} The court further found that R.H. had been in the temporary custody of the Agency for 12 or more months out of a consecutive 22-month period and was in need of a permanent placement. The court noted that there had been two extensions of temporary custody and no further extensions would be permitted under law. *See* R.C. 2151.415(D). The court also noted that R.H. did not qualify for a planned permanent living arrangement and no one had filed a motion for legal custody or been identified in a motion as a candidate for legal custodian of R.H.

{¶ 30} The court also found that two of the factors under R.C. 2151.414(E) applied; those being (1) appellant's failure to remedy the problems that initially caused R.H. to be removed (R.C. 2151.414(E)(1)), and (2) appellant's chronic chemical dependency (R.C. 2151.414(E)(2)). Upon review, clear and convincing evidence supports those findings.

{¶ 31} Moreover, the trial court's findings met all of the factors under R.C. 2151.414(D)(2), which are:

(a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist 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.

(b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.

(c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.

(d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

R.C. 2151.414(D)(2)(a)-(d).

{¶ 32} “If all of the [above] apply, permanent custody is in the best interest of the child, and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency[.]”

R.C. 2151.414(D)(2).

{¶ 33} As discussed, clear and convincing evidence supports the trial court’s findings under R.C. 2151.414(E), which were appellant’s failure to remedy the conditions that resulted in R.H.’s removal and his chronic chemical dependency; thus, the trial court properly made a finding under R.C. 2151.414(D)(2)(a).

{¶ 34} Clear and convincing evidence also supports that the trial court’s finding that R.H. had been in the Agency’s custody for two years — she was removed from her parents’ care in February 2020, where she remained throughout the pendency of the case, which concluded with trial in March 2022. Two extensions of temporary custody had been granted and no further extensions were permitted; the finding under R.C. 2151.414(D)(2)(b) was proper.

{¶ 35} R.H. did not meet the requirements for a planned permanent living arrangement, one of which is that the child is 16 years of age or older. *See* R.C. 2151.353(A)(5). Thus, the trial court’s finding under R.C. 2151.414(D)(2)(c) was proper.

{¶ 36} The final finding under R.C. 2151.414(D)(2) — that no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child — relates to appellant’s second assignment of error. Appellant contends that there was an “approved relative” — the paternal aunt — who had been identified as a potential legal custodian, but CCDCFS encouraged her to “step down.” That contention is belied by the record.

{¶ 37} Initially we note that, although it is true that there were discussions about the possibility of the paternal aunt assuming legal custody of R.H., no motion for legal custody was ever filed. This court has held that, in order for legal custody to be granted to a relative or interested person, it is “mandatory” that a motion for legal custody, along with a signed statement of understanding, be filed. *In re R.S.*, 8th Dist. Cuyahoga No. 110210, 2021-Ohio-2271, ¶ 41, quoting *In re G.P.*, 6th Dist. Lucas Nos. L-18-1126, L-18-1130, and L-18-1132, 2018-Ohio-4584, ¶ 73, citing *In re J.G.*, 6th Dist. Lucas No. L-17-1311, 2018-Ohio-3981, ¶ 43, 44.

{¶ 38} Further, the CCDCFS case worker testified at trial that the aunt was initially considered as a possibility for legal custody, but the Agency stopped pursuing her because appellant was achieving his case plan requirements and the goal was reunification. However, when appellant relapsed, the agency spoke with the aunt and explained to her the various options, including legal custody and adoption. At that time, the aunt indicated that she was not interested in becoming R.H.’s legal custodian but wanted to be considered for adoption if R.H. was placed in the Agency’s permanent custody. The case worker testified that the aunt was

satisfied that, at that time, R.H. was safe and thriving in the placement with her foster family.

{¶ 39} The GAL's report also provided insight into the possibility of the aunt obtaining legal custody of R.H. The GAL noted that the aunt had never met R.H., and found that the aunt was living in a crowded home that lacked appropriate space for R.H. The aunt was "a single mother taking care of her teenage daughter and elderly mother alone." The GAL was of the opinion that the aunt was "overwhelmed with her current situation, both physically and financially, and probably not in the best or appropriate place in her life to take on custody of another child, especially this two-year-old child."

{¶ 40} On this record, there was no error in not awarding legal custody of R.H. to the aunt.

{¶ 41} Clear and convincing evidence supports the trial court's best interest determination. The trial court did not abuse its discretion by finding permanent custody would be in R.H.'s best interest.

Conclusion

{¶ 42} There is competent, credible evidence in the record to support the trial court's judgment granting CCDCFS permanent custody of R.H. No error was committed by the trial court in not awarding the paternal aunt legal custody of R.H. Appellant's two assignments of error are therefore 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.

CORNELIUS J. O'SULLIVAN, JR., JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR