[Cite as *In re P.H.*, 2019-Ohio-418.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
P.H., ABUSED AND DEPENDENT CHILD	:	**CASE NO. 2018-T-0093**
	:	

Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2017 CH 00011.

Judgment: Affirmed.

James Lanzo, 4126 Youngstown-Poland Road, Youngstown, OH 44514 (For Appellant, Richard Garcia).

Susan Porter Collins, Trumbull County Children Services Board, 2282 Reeves Road, N.E., Warren, OH 44483 (For Appellee, Trumbull County Children Services Board).

Joshua R. Staton, 197 North Dunlap Avenue, Youngstown, OH 44509 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Richard Garcia, appeals the decision of the Trumbull County Court of Common Pleas, Juvenile Division, adopting the Magistrate's Decision terminating Mr. Garcia's parental rights to his son, P.H., (D.O.B. December 4, 2016) and granting permanent custody to the Trumbull County Children Services Board ("TCCSB"). For the reasons that follow, we affirm.

{¶2} P.H. was born in December 2016 with cocaine and marijuana in his system. He was placed with his godparents while his birth mother obtained treatment but due to

her continued positive drug tests and the godparents' unwillingness to continue to care for P.H., mother signed a Voluntary Temporary Custody agreement on February 3, 2017 placing him into TCCSB custody. On February 22, 2017, he was adjudicated an abused and dependent child and was placed into the care of the TCCSB. One year later, on February 23, 2018, he was placed into the care of his father, appellant herein. Following a reported domestic-violence incident in violation of Mr. Garcia's Protective Supervision Order, P.H. was returned to the care of the TCCSB on April 20, 2018, where he remained.

{¶3} The TCCSB filed a motion for permanent custody on May 31, 2018. On June 25, 2018, Mr. Garcia appeared for a permanent custody hearing where he requested counsel. The request was granted. The court rescheduled the hearing for August 17, 2018 and ordered Mr. Garcia to appear on July 3, 2018 to meet with court-appointed counsel. The order also notified him that he was not represented by court-appointed counsel until he attended that meeting, and he may lose valuable legal rights if he failed to appear. Mr. Garcia acknowledged the court order by his signature. He later called to reschedule the July 3, 2018 meeting to July 10, 2018. However, without any further contact, he failed to meet with court-appointed counsel on July 10, 2018 and failed to appear at the hearing held August 17, 2018.

{¶4} At the hearing, P.H.'s mother voluntarily relinquished parental rights. TCCSB called one witness: an out-of-home caseworker familiar with P.H. and his family who testified as to how bonded P.H. is to his foster parents. She also testified Mr. Garcia failed to complete Batterer's Intervention and failed to comply with the Drug and Alcohol Assessment by missing thirteen drug screens; the one he did complete in July 2018 was positive for THD and cocaine. At the close of the hearing, the magistrate issued a

decision terminating Mr. Garcia's parental rights and granting TCCSB permanent custody, which was adopted in whole by the Court.

{¶5} Mr. Garcia now appeals, assigning four assignments of error for our review. Initially, we address TCCSB's concerns that at no point did Mr. Garcia raise objections to the magistrate's findings in violation of Juv.R. 40(D)(3)(b), which states, in relevant part: "(i) [a] party may file written objections to a magistrate's decision within fourteen days of the filing of the decision. * * * (iv) Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party has objected to that finding or conclusion as required by Juv.R. 40(D)(3)(b)." While Mr. Garcia has demonstrated that the court's adoption of the magistrate's order was not mailed to his counsel until September 13, 2018, there is ambiguity in the record as to whether the magistrate's August 17, 2018 order was sent to Mr. Garcia within the timeframe required by Juv.R. 40(D)(3)(a). However, even reviewing Mr. Garcia's arguments on the merits, we discern no error, let alone plain error.

{¶6} We address Mr. Garcia's related first and second assignments of error together. The first states:

{¶7} "The Court erred in granting permanent custody at the time of filing the petition for permanent custody the Defendant Appellant Richard Garcia had not been afforded the full 12 month period in which to work toward reunification before moving for permanent custody on R.C. 2151.414(B)(1)(d) grounds thus violating Defendant Appellants [sic] protected procedural and substantive rights."

{¶8} The second states:

{¶9} "The Court erred in granting permanent custody as here [sic] was not an appropriate twelve month period where the subject child was in custody of the Trumbull

County Children Services Board pursuant to R.C. 2151.414(B)(1)(d) and *In re C.W.,* 104 Ohio St.3d 163, 2004-Ohio-6411."

{¶10} As Mr. Garcia correctly notes, "[b]efore a public children-services agency or private child-placing agency can move for permanent custody of a child on R.C. 2151.414(B)(1)(d) grounds, the child must have been in the temporary custody of an agency for at least 12 months of a consecutive 22–month period." *In re C.W.,* 104 Ohio St.3d 163, 2004-Ohio-6411, paragraph one of syllabus. Moreover, "the time that passes between the filing of a motion for permanent custody and the permanent-custody hearing does not count toward the 12–month period set forth in R.C. 2151.414(B)(1)(d)." *C.W., supra,* at ¶26.

{¶11} However, contrary to Mr. Garcia's assertion, the record clearly shows the child was in custody for at least 12 of the 22 consecutive months prior to the filing of the motion for permanent custody on May 31, 2018. At the time the motion for permanent custody was filed, P.H. was not yet 22 months old. Thus, all the time that P.H. spent in custody prior to the filing is properly counted in the 12-month requirement of R.C. 2151.414(B)(1)(d). "For the purposes of this division, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home." R.C. 2151.414(B)(1). P.H. came into the custody of the TCCSB February 22, 2017, and the record reflects he was adjudicated an abused and dependent child on the same day. TCCSB filed their motion for permanent custody on May 31, 2018. Thus, the time in custody may properly be counted from February 22, 2017 to May 31, 2018.

{¶12} Mr. Garcia questions both dates. He asserts he was not served the judgment until March 29, 2017 and that this time requirement should not begin to run until he was served. He provides no basis in law to support this assertion. He also states, "presumably the [TCCSB] asked for permanent custody at some point prior to the May 23, 2018 dispositional hearing." The record, however, clearly reflects a May 31, 2018 filing date. However, even assuming arguendo time runs from March 29, 2017 to May 23, 2018, Mr. Garcia's argument fails.

{¶13} P.H. went in and out of custody at various times for partial months, making a monthly calculation difficult. As such, we will count the number of days P.H. spent in custody and compare to 365 days as 12 months. *See* R.C. 1.45. *See also, In re A.C.,* 9th Dist. Summit No. 23090, 2006-Ohio-3337, ¶15. Between March 29, 2017 and February 22, 2018, P.H. was in custody of TCCSB: 331 days. From February 23, 2018 to April 19, 2018, P.H. was in custody of Mr. Garcia and that time is not counted. On April 20, 2018, P.H. was returned to custody of TCCSB. On May 23, 2018, the Court determined P.H. had been in custody over one year and scheduled a Permanency Hearing. Between April 20, 2018 and May 23, 2018 is 56 days. Adding 331 plus 56 is 387, which is greater than 365. Thus, the court correctly concluded at that time that P.H. had spent 12 months in custody.

{¶14} Thus, even assuming the dates as Mr. Garcia asserts, his first and second assignments of error are without merit.

{¶15} Turning then to Mr. Garcia's third assignment of error, which states:

{¶16} "The court erred in granting the petition for permanent custody as there was not clear and convincing evidence presented to show that the placement was in the child's best interests."

{¶17} R.C. 2151.414(D)(1) sets forth the factors the court must consider when determining the best interests of the child. Namely:

> **{¶18}** (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;
>
> **{¶19}** (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;
>
> **{¶20}** (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, or 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 and, 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;
>
> **{¶21}** (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;
>
> **{¶22}** (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶23} The record shows the court considered all of these factors and they all weighed in favor of TCCSB. We discern no error in the court's evaluation of these factors.

{¶24} First, the testimony showed that P.H. was very bonded to his foster parents and took a while to warm up to Mr. Garcia's company. At only two years old, he has only lived with his father for two months of his life. After being removed from his care, Mr. Garcia has not visited P.H. Second, because P.H. is not old enough to express his wishes, his guardian ad litem spoke for him and asked that TCCSB's motion for permanent custody be granted. Third, as discussed above, P.H. has been in custody of

TCCSB for over 12 months. Fourth, the court stated P.H. has a need for a legally secure, permanent placement and it cannot be achieved without the grant of permanent custody.

{¶25} Finally, in considering whether any factors in R.C. 2151.414(E)(7) to (11) apply, the court found (E)(10) applicable; Mr. Garcia had abandoned P.H. as he did not visit P.H. after he came into foster care on April 20, 2018. R.C. 2151.011(C) states that abandonment is presumed "when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days." *Id.* At the August 17, 2018 hearing, the caseworker, Ashley Wilson, testified that Mr. Garcia had not been in contact with P.H. since he was removed from his custody in April of that year despite being informed of his visitation rights. At the time of the hearing, Mr. Garcia had gone 119 days without contact. As this is beyond the 90-day requirement to presume abandonment, the trial court did not err in finding R.C. 2151.414(E)(10) applicable.

{¶26} Mr. Garcia does not assert any remedial facts that were not considered, nor counter any of the court's findings, but merely questions the sufficiency of one witness testifying. However, in light of the overwhelming evidence against Mr. Garcia and no evidence in his favor, we find the court did not err in adopting the magistrate's decision. Thus, Mr. Garcia's third assignment of error is without merit.

{¶27} Finally, Mr. Garcia's fourth assignment of error states:

{¶28} "The court erred and denied Defendant Appellant his procedural due process rights by denying him counsel for the permeant [sic] custody hearing."

{¶29} Mr. Garcia cites *In re Hoffman,* 97 Ohio St.3d 92, 2002-Ohio-5368 to support that he, as a parent facing a permanent custody action, is entitled to court-appointed counsel. However, this rule is not contested. Indeed, the record clearly reflects

Mr. Garcia's request for court-appointed counsel was granted and he was provided clear, express notice of how to accept court-appointed counsel. It was made expressly clear to Mr. Garcia that representation would not take effect until he attended the meeting with court-appointed counsel. After rescheduling the meeting with court-appointed counsel once, he failed to appear for the rescheduled meeting without notice and then failed to appear for the hearing. Attorney McCollum was present at the Court to meet with Mr. Garcia on the initial meeting date, the rescheduled meeting date, and the hearing date, in case Mr. Garcia appeared. He did not appear or contact the court to explain his absence. In short, the court did not deny Mr. Garcia counsel; Mr. Garcia failed to accept counsel by not complying with the process by which counsel is appointed. Thus, he cannot rely on this rule as a basis for appeal. *In re Williams*, 10th Dist. Franklin No. 03AP-1007, 2004-Ohio-678, ¶13.

{¶30} Mr. Garcia's final assignment of error has no merit.

{¶31} Based on the foregoing, we hold the trial court did not err in terminating Mr. Garcia's parental rights effective August 17, 2018.

{¶32} The judgment of the Trumbull County Court of Common Pleas, Juvenile Division, is affirmed.

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.