



**Mock, Judge.**

{¶1} Appellants the Hamilton County Department of Job and Family Services (“HCJFS”) and the Attorney Guardian Ad Litem (“GAL”) for the children appeal the trial court’s judgment, denying HCJFS’s motion for permanent custody and awarding legal custody of the children to the mother with orders of protective supervision. For the following reasons, we strike the orders of protective supervision, but affirm the trial court’s judgment in all other respects.

**The Last Five Years**

{¶2} On January 17, 2010, M.N., an infant and the youngest child, was hospitalized for serious burns covering 16 percent of her body. According to HCJFS’s complaint seeking to adjudicate M.N., K.G. and A.N. (“the children”) abused, neglected and dependent, father<sup>1</sup> had fallen asleep while rocking M.N. to sleep on his side of the bed. When mother awoke in the morning, she found M.N. wedged between the bed and the wall on top of a baseboard heater. As a result, father was charged with child endangerment, a first-degree felony, but he later entered a guilty plea to a reduced charge of attempted child endangerment. Father was sentenced to five years of community control. The parents maintain that the injuries to M.N. were an accident, and there is no evidence in the record to indicate otherwise.

{¶3} HCJFS’s complaint also indicated that both parents had a history of substance abuse, including opiates, and that the parents had no present housing and no income. Thus, in February 2010, the children were removed from the home and placed in the interim custody of HCJFS. One year later, the two older children were

---

<sup>1</sup> Father is the stepfather of K.G., the biological father of A.N., and the alleged father of M.N. But for purposes of our decision, we refer to him as “the father” of all three children.

adjudicated dependent, and M.N. was adjudicated abused, neglected and dependent. HCJFS was then awarded temporary custody of the children, and case-plan services were continued for the children's reunification with mother and father.

{¶4} One of the case-plan goals was for mother to be weaned off Suboxone, a legally prescribed drug that controlled mother's opiate cravings and helped with withdrawal symptoms. As recently as December 2014, mother confirmed that she is still under her doctor's care and taking Suboxone, although she stated that she is taking a lower dosage than she was five years ago. Mother has not tested positive for any drug other than those prescribed by her doctor for the last five years.

{¶5} In January 2012, after being granted two extensions of temporary custody, HCJFS moved for permanent custody of the three children. This motion was pending for a year and a half before evidentiary hearings were conducted. During that time, HCJFS continued the reunification process with the family, and the parents eventually began to have unsupervised visitation with the children. The unsupervised visitation was suspended in March 2013, when father tested positive for benzodiazepines. He was taking the legally prescribed drug Suboxone as well, but had not informed HCJFS of this. HCJFS reinstated mother's unsupervised overnight visitation with the children with the condition that father vacate the home while the children were there.

{¶6} Eventually, in December 2013, the magistrate awarded permanent custody of the children to HCJFS. In the decision, the magistrate acknowledged that mother had substantially complied with the case-plan services, but noted concerns with father's dishonesty with HCJFS and mother's passive support of father. Mother, father and the two older children objected to the magistrate's decision. The

trial court sustained the objections and ordered a transitional return of the children to mother under the direction of the magistrate. HCJFS and the GAL appealed the decision, but we dismissed the appeal for lack of a final appealable order.

{¶7} Next, HCJFS and the GAL moved to set aside the magistrate's transitional plan. After another hearing to determine an appropriate transitional plan, the juvenile court, by entry dated January 6, 2015, modified the transition plan, terminated HCJFS's temporary custody of the children and awarded legal custody of the children to mother effective immediately. The trial court also ordered a six-month term of protective supervision, which is set to expire on July 6, 2015. The trial court stayed its order until January 13, 2015, when the children's current foster home placement was set to end.

{¶8} HCJFS and the GAL now appeal the juvenile court's judgment denying the agency's motion for permanent custody and awarding legal custody to the mother. This court granted HCJFS's motion for an emergency stay pending this appeal.

{¶9} In reviewing a juvenile court's determination on a motion for permanent custody, this court will not substitute its own judgment for that of the juvenile court where some competent, credible evidence supports the juvenile court's determination. *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, ¶ 46.

**The Proper Test**

{¶10} In their first assignments of error, HCJFS and the GAL argue that the trial court erred as a matter of law by failing to apply the proper statutory test for reviewing a motion for permanent custody.

{¶11} R.C. 2151.414(B), the statute governing motions for permanent custody, has been amended recently. Therefore, we will apply the version of the statute that was in effect on January 6, 2012, the date the motion for permanent custody was filed. *See In re C.E.1*, 1st Dist. Hamilton No. C-140674, 2015 Ohio App. LEXIS 1170 (Mar. 20, 2015).

{¶12} Former R.C. 2151.414(B) establishes a two-part test for the juvenile court to apply when ruling on a motion for permanent custody. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 31. A juvenile court may terminate parental rights and grant permanent custody of a child to a public children services agency if it finds by clear and convincing evidence that (1) permanent custody is in the best interest of the child and (2) one of the four conditions in former R.C. 2151.414(B)(1)(a)-(d) applies. *In re W.W.* at ¶ 46.

{¶13} The former R.C. 2151.414(B)(1) conditions are: “(a) \* \* \* 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[;] (b) [t]he child is abandoned[;] (c) [t]he child is orphaned \* \* \* [; or] (d) [t]he child has been in the temporary custody of one or more public children services agencies \* \* \* for twelve or more months of a consecutive twenty-two month period \* \* \*” (“12 of 22”).

{¶14} HCJFS and the GAL argue that because it was clear from the record that the “12-of-22” provision applied here, it was improper for the juvenile court to

engage in an analysis under former R.C. 2151.414(B)(1)(a) as to whether the children could not be placed with either parent within a reasonable time or should not be placed with either parent. But the record does not demonstrate that the trial court engaged in an analysis under former R.C. 2151.414(B)(1)(a). Instead, it appears that the court had begun its best-interest analysis and was discussing former R.C. 2151.414(D)(2), which permits consideration of whether the children cannot or should not be placed with either parent. Thus, we cannot say that the trial court engaged in any unnecessary analysis. Even if it had, we do not see how this resulted in any prejudicial error where the record demonstrates that the “12 of 22” provision was applicable and this finding supported the agency’s motion for permanent custody. The first assignments of error are overruled.

**Best-Interest Analysis**

{¶15} The GAL’s second assignment of error and HCJFS’s second and third assignments of error collectively challenge the court’s decision that it was in the best interest of the children to deny HCJFS’s motion for permanent custody and award custody to mother.

{¶16} In assessing the best interest of a child, the court must consider “all relevant factors,” including (1) the child’s interaction with parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child, (2) the wishes of the child, as expressed by the child or the child’s guardian ad litem, (3) the custodial history of the child, (4) the child’s need for legally secure placement and whether that type of placement can be achieved without a grant of permanent custody, and (5) whether any of the factors

under former R.C. 2151.414(E)(7) through (11) apply. Former R.C. 2151.414(D)(1)(a)-(e).

{¶17} Former R.C. 2151.414(D)(2) required a court to find that permanent custody is in the best interest of a child if (a) the court determines that one or more of the factors in former R.C. 2151.414(E) exists 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 the agency's custody for two years or longer and no longer qualifies for temporary custody; (c) the child does not meet the requirements for a planned permanent living arrangement; and (d) no other relative or interested person has filed a motion for legal custody of the child. R.C. 2151.414(D)(2)(a)-(d).

{¶18} After reviewing the record, we hold that there was competent and credible evidence to support the trial court's decision that it was not in the children's best interest to grant permanent custody to HCJFS.

{¶19} At the permanent custody hearing, the HCJFS caseworker testified that mother had substantially complied with all of the agency's recommendations for case-plan services, including completing substance-abuse treatment and mental-health therapy and securing appropriate housing. The caseworker indicated that the main reason the agency was seeking to terminate mother's parental rights was her failure to completely wean off Suboxone, a legally prescribed drug mother was taking under a doctor's care. But mother had decreased her dosage. And, more importantly, the agency, knowing mother was taking Suboxone, had permitted her to have unsupervised visitation with the children before and during the pendency of the permanent-custody hearing.

{¶20} The record also demonstrates that mother had not once tested positive for any illegal drug over the past five years. Additionally, her diagnostic assessment in October 2012 did not recommend substance-abuse treatment. Finally, and most importantly, the caseworker testified that mother has basic parenting skills and could adequately care for the children.

{¶21} The court also considered the factors set forth in former R.C. 2151.414(D)(1). The record demonstrates that the children have been in the care of the agency for almost five years and thus, that they clearly need a legally secure placement. While the GAL recommended that the children be permanently committed to HCJFS, the two older children have consistently expressed their strong desire, through their attorney, to return to their mother and father. The two older children's therapists believed that permanent separation from mother and father would negatively affect the children's well-being. Next, even though the caseworker testified that for the most part the children enjoyed their foster homes, the record shows that mother and the children have a strong bond and love one another.

{¶22} The GAL argues that the juvenile court gave too much weight to the children's wishes. While this factor was emphasized, it was only done so because there was no evidence demonstrating that mother could not parent appropriately or that she had failed to remedy the situation for which the children had been removed from the home. She had appropriate housing, parenting skills, and a part-time job, and had not tested positive for any illegal drugs.

{¶23} Finally, HCJFS argues that the juvenile court was required to commit the children to the permanent custody of the agency under former R.C. 2151.414(D)(2). We disagree. There was simply no clear and convincing evidence to



demonstrate that the children could not or should not be placed with their mother. HCJFS contends that mother will be coparenting with father and that it is not in the best interests of the children to live with father. The main concern with father was that he was not forthcoming with the HCJFS caseworkers with respect to the prescribed drugs he was taking. But he is using the same prescription drugs as mother and is under the same doctor's care. Given that mother was permitted to participate in unsupervised visitation with the children while taking the same prescription drugs, the fact that the mother is living with father, who is working and contributing financially to the household, is not a clear and convincing reason to terminate mother's parental rights and grant permanent custody to HCJFS.

{¶24} Finally, HCJFS and the GAL argue that the trial court improperly based its decision to deny permanent custody on the fact that HCJFS had not shown that the mother's use of legally prescribed drugs adversely affected her parenting ability.

{¶25} This court has stated that a public children services agency is "not required to show that [a parent's] mental-health and substance-abuse issues during the reunification process adversely affected the children. An agency is only required to demonstrate that a parent's mental condition actually interferes with the parent's ability to provide adequate care for the child in the adjudicatory phase when HCJFS is seeking a finding of dependency under R.C. 2151.04(B)." *In re L.W.J.*, 1st Dist. Hamilton Nos. C-140282 and C-140283, 2014-Ohio-4181, ¶ 35. Thus, while it was error for the juvenile court to discuss whether the use of prescribed drugs would negatively affect mother's parenting ability, it did not amount to prejudicial error as it was not the basis for the trial court's decision. Instead, as set forth in our

discussion of the juvenile court's consideration of the former R.C. 2151.414(D)(1) factors, there was other competent, credible evidence to support the juvenile court's determination that HCJFS had not clearly and convincingly demonstrated that a grant of permanent custody was in the children's best interest.

{¶26} Accordingly, we overrule these assignments of error.

**Protective Supervision**

{¶27} HCJFS argues in its final assignment of error that the trial court, as a matter of law, did not have the authority to order protective supervision. We agree.

{¶28} R.C. 2151.353(H), formerly R.C. 2151.353(G), permits an initial one-year period of protective supervision, which begins upon the date the complaint was filed or the date the child was taken in shelter care, whichever is earlier. R.C. 2151.353(H)(1). Two six-month extensions may be granted, for a total of two years. Should a court grant both six-month extensions, R.C. 2151.353(H)(3) requires the court to terminate protective supervision at the end of the second extension. Because the children entered shelter care on February 8, 2010, the juvenile court was not authorized to order protective supervision after February 8, 2012. *See In re Carroll*, 124 Ohio App.3d 51, 705 N.E.2d (2d Dist.1997); *In re K.H.*, 4th Dist. Washington No. 09CA35, 2009-Ohio-7070; *In re MJ*, 12th Dist. Fayette No. CA2007-07-026, 2008-Ohio-3217; *In re C.M.*, 9th Dist. Wayne Nos. 07CA0039 and 07CA0040, 2007-Ohio-6005.

{¶29} Accordingly, we sustain HCJFS's fourth assignment of error and strike the order of protective supervision from the juvenile court's judgment.

**OHIO FIRST DISTRICT COURT OF APPEALS**

---

{¶30} Finally, because the children have not lived with their mother in almost five years, we are remanding this cause to the juvenile court to set up a plan to transition the children from their foster home to their mother's home.

{¶31} The judgment of the trial court is modified to reflect that the order of protective supervision is stricken, and the judgment is affirmed as modified. This cause is remanded for further proceedings consistent with the law and this opinion.

Judgment affirmed as modified and cause remanded.

**HENDON, P.J., and CUNNINGHAM, J., concur.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.