[Cite as *In re R.F.*, 2021-Ohio-675.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: F/R/B CHILDREN	:	APPEAL NOS. C-190138 C-190177
	:	TRIAL NO. F-15-1306Z
	:	*O P I N I O N.*

Appeals From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 31, 2019

John D. Treleven, for Appellant Mother,

Anzelmo Law and *James A. Anzelmo,* for Appellant Father,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Nick Gramke*, Assistant Prosecuting Attorney, for Appellee Hamilton County Department of Job and Family Services,

Raymond T. Faller, Hamilton County Public Defender, and *Belinda Gullette*, Assistant Public Defender, Appellee Guardian ad Litem for the F/R/B Children,

Cynthia S. Daugherty, In re Williams Attorney for the F/R/B Children.

MYERS, Presiding Judge.

{¶1} Mother and father each appeal from a judgment of the Hamilton County Juvenile Court that terminated their parental rights and placed R.F.1, R.F.2, and D.B. (the "F/R/B children") in the permanent custody of the Hamilton County Department of Job and Family Services ("HCJFS").

I. Factual and Procedural Background

{¶2} As relevant to this appeal, mother is the natural mother of R.F.1, R.F.2, and D.B. Father is the natural father of R.F.1 and R.F.2. Mother and father are not married to each other and do not live together.

{¶3} HCJFS opened a case against mother in January 2015 after receiving allegations that her oldest children were not regularly attending school. In May 2015, when mother's youngest child, D.B., was born, he tested positive for marijuana and cocaine. HCJFS sought and received interim custody of D.B. directly from the hospital. HCJFS received interim custody of the older children one week later.

{¶4} In October 2015, the juvenile court adjudicated D.B. abused and the older children dependent and neglected. All parties involved agreed to place the F/R/B children in the temporary custody of HCJFS that same day. On September 29, 2016, HCJFS filed a motion for permanent custody. After a hearing on the motion, the magistrate issued a decision, granting permanent custody to HCJFS. Mother and father filed objections to the magistrate's decision. On February 6, 2019, the juvenile court overruled the objections, adopted the magistrate's decision, and granted permanent custody of the children to HCJFS.

{¶5} On appeal, mother and father each raise a single assignment of error, arguing that the evidence failed to support the juvenile court's judgment.

II. Standard of Review

{¶6} A juvenile court's determination on a motion for permanent custody must be supported by clear and convincing evidence. *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, ¶ 46. Clear and convincing evidence has been defined as evidence sufficient to "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *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. In reviewing a juvenile court's determination of a permanent-custody motion, we must examine the record and determine if the juvenile court had sufficient evidence before it to satisfy the clear-and-convincing standard. *In re W.W.* at ¶ 46.

{¶7} In the context of a motion for permanent custody under R.C. 2151.413, a juvenile court's decision will not be reversed on appeal where the court "correctly applied the best-interests test and where its custody decision was amply supported by competent evidence in the record." *In re Allah*, 1st Dist. Hamilton No. C-040239, 2005-Ohio-1182, ¶ 11.

III. Motion for Permanent Custody

{¶8} R.C. 2151.414 governs the findings the juvenile court must make before granting permanent custody of a child to a children services agency. Under R.C. 2151.414(B), the juvenile court may grant a motion for permanent custody if the court determines, by clear and convincing evidence, that permanent custody is in the best interest of the child and that any of the five conditions set forth in R.C. 2151.414(B)(1) applies.

A. R.C. 2151.414(B)(1) Conditions

{¶9} In this case, the record establishes that the F/R/B children had been in the temporary custody of HCJFS for 12 or more months of a consecutive 22-month period, which would satisfy the R.C. 2151.414(B)(1)(d) condition.[1] However, the juvenile court instead elected to analyze the case under R.C. 2151.414(B)(1)(a), which provides in relevant part that "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," based on an analysis provided under R.C. 2151.414(E).

{¶10} Under R.C. 2151.414(E), the juvenile court must enter a finding that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent, if the court determines by clear and convincing evidence that at least one of the factors listed in R.C. 2151.414(E)(1) through (16) exists as to each of the child's parents. In this case, the juvenile court found that father demonstrated a lack of commitment toward reunification under R.C. 2151.414(E)(4), and that mother failed to remedy the conditions causing the children to be removed from her home under R.C. 2151.414(E)(1). We will address each in turn.

{¶11} R.C. 2151.414(E)(4) provides as follows:

> The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.

{¶12} With regard to father's lack of commitment, the juvenile court found,

[1] R.C. 2151.414(B)(1)(d) provides: "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."

> [Father] had little involvement with the [c]hildren prior to initiation of this case. Once the case began, [father] failed to work with HCJFS to participate in an assessment and receive recommended services. [Father] was participating in visitation until the visits switched to [m]other's home, where [the father of D.B.] was present. Even when offered separate visitations, [father] did not attend.

{¶13} We hold that the trial court's finding under R.C. 2151.414(E)(4) as to father was supported by clear and convincing evidence. HCJFS caseworker Anthony Niederhelman testified that father failed to complete an updated diagnostic assessment in 2018, the last assessment having been done three years earlier.

{¶14} Niederhelman also testified that father had not visited his children for about a year. He indicated that father's visits with the children had been occurring at mother's home. But when D.B.'s father was released from prison and his visits with D.B. at mother's home coincided with father's visits, father stopped seeing his children. Even though Niederhelman referred father to the Family Nurturing Center ("FNC") for separate visitation, father failed to initiate the referral, and visits did not continue. According to Niederhelman, R.F.2 reported that she spoke to her father on the phone during her visits at her mother's home.

{¶15} As to mother, the juvenile court found the factor in R.C. 2151.414(E)(1), which provides as follows:

> 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.

{¶16} The juvenile court found that the F/R/B children were originally removed due to mother's illicit drug use, economic shortages, and medical and educational neglect. To assist mother in remedying these problems, HCJFS offered toxicology screens, substance-abuse and mental-health treatment, and visitation. However, the juvenile court found that mother did not complete any of the seven toxicology screens, failed to acquire sufficient utilities and housing for the children, and requested that visitation be reduced from four hours to two hours. The juvenile court also found that mother was terminated from mental-health treatment at Talbert House due to nonattendance.

{¶17} The juvenile court again relied on the testimony of Niederhelman in reaching its conclusion. Niederhelman testified that HCJFS offered mother six to seven urine screens within the year prior to the permanent-custody hearing. However, mother consistently told Niederhelman she would not be attending due to health-related issues and/or transportation barriers. The only other evidence regarding mother's substance-abuse treatment was her testimony that she stopped using drugs on her own.

{¶18} Niederhelman testified that when he visited mother's apartment, he found it to be sparsely furnished with only an air mattress and a night stand, and with open prescription bottles next to the air mattress. The juvenile court noted that, despite evidence that the furnishings and overall safety of mother's home had improved after Niederhelman's visit, the fact remained that mother was about to be evicted from her home. Mother did not dispute her then-pending eviction, but

instead testified that she intended to find new housing. However, she did not have a housing plan in place at the date of the hearing.

{¶19} With respect to the change in visitation, the juvenile court relied on the report of the guardian ad litem (the "GAL"). It is undisputed that mother requested a reduction in her once-weekly visitation from four hours to two hours. The juvenile court noted that the children's GAL attributed mother's request for a reduction in visitation time to mother's emotional issues, whereas mother attributed it to issues with her own physical health.

{¶20} The juvenile court found that mother was terminated from mental-health treatment at Talbert House in 2017 due to nonattendance. Mother does not dispute this finding. The record demonstrates that mother reengaged with Talbert House in May 2018 and was progressing in her treatment.

{¶21} Following our review of the record, we find that the evidence, taken as a whole, supports the juvenile court's finding under R.C. 2151.414(E)(1) as to mother.

{¶22} Accordingly, we hold that the juvenile court's finding under R.C. 2151.414(B)(1)(a) that the children could not or should not be placed with either parent was supported by clear and convincing evidence. We must next determine whether the court correctly applied the best-interest test.

B. Best-Interest Factors

{¶23} The juvenile court determined that it was in the children's best interests to be placed in the permanent custody of HCJFS. In determining the best interest of a child, the juvenile court must consider all relevant factors, including, but not limited to, those expressly set forth in R.C. 2151.414(D)(1).

{¶24} The R.C. 2151.414(D)(1) factors include (a) "[t]he interaction and interrelationship of the child with the child's parents, siblings, relatives, foster

caregivers and out-of-home providers"; (b) "[t]he wishes of the child"; (c) "[t]he custodial history of the child"; (d) "[t]he 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) "[w]hether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶25} In considering the best-interest factors, the juvenile court found that the F/R/B children appeared bonded to mother and desired to return to mother. However, the juvenile court also found that the children feared returning to the home with the father of D.B. present, and that they were thriving in their out-of-home placements. The court further noted that the children had been out of mother's care since May 2015, with the youngest of the children being out of mother's care since birth. Finally, the court determined that the children needed a legally secure placement free of drugs and violence, and that they needed support that would ensure their attendance at school and consistent visits to the doctor and dentist and would provide them a path to become productive members of society. The court concluded that this type of placement could only be achieved through a grant of permanent custody to HCJFS.

{¶26} With respect to mother, the evidence supports the court's finding that it is in the children's best interests to be placed in the permanent custody of HCJFS. Although all parties agreed that the F/R/B children appeared to be bonded with each other and were bonded with mother and desired to return to her, the GAL for the children advocated for permanent custody because the children's need were being met only in their out-of-home placements. Notwithstanding evidence that R.F.1 and R.F.2 were looking up inappropriate materials online, the F/R/B children's interrelationship with the foster care providers is positive. The oldest children were

placed in the same foster home, where their educational needs were being met, and they planned to remain in their out-of-home placement upon a grant of permanent custody. The youngest child remained in the same foster home since birth, where his special needs due to mother's prenatal drug use were being satisfied.

{¶27} Of significance is the fact that the children were uncomfortable with the father of D.B. in mother's home. The record suggests that mother and the father of D.B. were co-occupants of the home. The unrebutted testimony showed that the father of D.B., following his release from incarceration for drug-related issues, declined to participate in requested toxicology screens. Additionally, the father of D.B. gave no assurances that he ceased using intoxicants. Based on the foregoing, the juvenile court correctly applied the best-interests test as it relates to mother. Therefore, we overrule mother's sole assignment of error.

{¶28} As to father, the testimony presented by HCJFS focused on his failure to complete a second diagnostic assessment and his failure to continue any visitation. In addition, the court noted that father had little contact with the children prior to the commencement of the permanent-custody action. There is no evidence that the children had ever been in his custody. And neither child expressed a desire to live with him. While father attended regular once-weekly visitation for a time, the visitation ceased a year before the permanent-custody hearing in June 2018.

{¶29} We find that the juvenile court correctly applied the best-interests test as it applied to father. Therefore, we overrule father's sole assignment of error.

IV. Conclusion

{¶30} With regard to mother and father, there is ample competent evidence in the record to support the juvenile court's decision to grant permanent custody to

HCJFS. Therefore, we overrule mother's and father's assignments of error and affirm the judgment of the juvenile court.

Judgment affirmed.

WINKLER, J., concurs.
CROUSE, J., concurs in part and dissents in part.

CROUSE, J., concurring in part and dissenting in part.

{¶31} I concur that there is clear and convincing evidence in the record to support the juvenile court's decision to terminate mother's parental rights and grant permanent custody to HCJFS. However, because there is not clear and convincing evidence in the record to support the juvenile court's decision to terminate father's parental rights, I respectfully dissent from that portion of the majority's opinion.

{¶32} It is well-established that termination of parental rights is "the family law equivalent of the death penalty in a criminal case" and should be used as an alternative of last resort. *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. The Supreme Court of the United States has held that "the fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Thus, the Court has held that "due process requires that the State support its allegations by at least clear and convincing evidence." *Id*. at 748.

{¶33} But what does "clear and convincing" mean? Clear and convincing evidence is more than a mere preponderance of the evidence, but it does not require clear and unequivocal evidence. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954). "Where the degree of proof required to sustain an issue must be clear and

convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Id*. at 477.

{¶34} Furthermore, the burden of proof is on the movant, i.e., HCJFS, to show by clear and convincing evidence that permanent custody is in the best interest of the child. *Matter of B.T.H*., 2017-Ohio-8358, 100 N.E.3d 40, ¶ 34 (12th Dist.), citing *Santosky* at 769 ("Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met."); *see In re Gordon*, 3d Dist. Hancock Nos. 5-04-22 and 5-04-23, 2004-Ohio-5889, ¶ 10 ("The language of [R.C. 2151.414(B)(1)] clearly puts the burden of proof on the movant to show by clear and convincing evidence that permanent custody is in the best interest of the child * * * .").

{¶35} My examination of the record in this case leads me to conclude that the juvenile court's decision was not supported by clear and convincing evidence with regard to father. Specifically, I conclude that the juvenile court did not have sufficient evidence before it to determine whether it was in the best interests of the children to terminate father's parental rights.

{¶36} In determining the best interests of the children, the juvenile court must consider all relevant factors, including, but not limited to, those expressly set forth in R.C. 2151.414(D)(1). The R.C. 2151.414(D)(1) factors include (a) "[t]he interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers"; (b) "[t]he wishes of the child"; (c) "[t]he custodial history of the child"; (d) "[t]he 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) "[w]hether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶37} Although the record supports the juvenile court's finding that permanent custody is in the best interests of the children as it relates to mother, HCJFS was required to establish that permanent custody is in the best interests of the children as it pertains to each parent individually. However, a review of the permanent-custody hearing reveals that HCJFS focused most of its case on mother and presented very little evidence to establish that each of the factors in R.C. 2151.414(D)(1) weighed against father.

{¶38} The testimony that HCJFS did present pertaining to father focused on his failure to complete a second diagnostic assessment and his failure to continue visitation. However, these factors are not dispositive of the juvenile court's best-interest determination. Rather, HCJFS was required to establish that permanent custody was in the best interests of the children based on the specific factors listed in R.C. 2151.414(D)(1).

{¶39} The evidence presented at the hearing regarding the interaction and interrelationship of R.F.1 and R.F.2 with father is minimal. Most of the evidence about the children's interaction with father comes from a review of HCJFS's case plans. The case plans indicate that father had attended visits regularly, had had a strong bond with the children, and had helped mother get to appointments as necessary. These observations were consistent until the father of D.B. returned home from incarceration. While I agree that father's failure to follow through with the HCJFS caseworker to schedule separate visits weighs against him, there was also

evidence that he had continued to stay in contact with at least one of the children by phone.

{¶40} The next best-interest factor is the custodial history of the children. I agree with the majority that there is no evidence that the children had ever been in father's custody. However, this is but one factor in the best-interest analysis. Significantly, there is not much evidence in the record as to what transpired after the children were taken into the temporary custody of HCJFS. It is undisputed that father visited the children regularly until the father of D.B. returned home from prison. There was brief testimony that father had obtained employment and housing, but there was no explanation of how that impacted the children. In her report, the GAL alluded to the fact that the housing had been recently obtained and, therefore, was not stable. However, HCJFS acknowledged that it had never conducted a home visit to confirm the GAL's assertion, despite knowing father's address.

{¶41} The next factor that the juvenile court was required to consider was the children's need for legally secure permanent placement. Although the GAL wrote in her report that permanent custody was in the best interests of the children, she did not adequately explain why a legally secure placement could not be achieved with father. While the majority states that neither child expressed a desire to live with father, a review of the GAL's reports reveals that she did not investigate the children's wishes as they relate to father, and she admitted as much at oral argument. There is nothing in the record to indicate that the GAL considered the bond between father and the children, nor is there anything in the record to indicate that she ever spent time with father or observed father and the children together.

{¶42} The final factor required by R.C. 2151.414 (D) is "[w]hether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child." These factors concern criminal convictions, withholding of medical treatment, substantial risk of harm due to alcohol or drug abuse, abandonment of the child, and termination of parental rights with respect to siblings. The record does not show that any of these factors was present with respect to father. In fact, the record reveals that caseworker Niederhelman filed a case plan in March 2018 that stated that father had previously taken a diagnostic assessment and had received no service recommendations. Niederhelman also filed a semi-annual review that stated that father had previously taken a diagnostic assessment. Although Niederhelman acknowledged these inclusions in his reports when asked during cross-examination, the diagnostic assessment itself was never admitted into evidence, and Niederhelman had no independent recollection that father had previously been assessed.

{¶43} Much like the juvenile court, the GAL simply relied on evidence that went toward father's lack of commitment under R.C. 2151.414(E)(4). However, this alone does not constitute clear and convincing evidence that a legally secure placement could not have been accomplished without terminating parental rights. After the state took temporary custody of the children, father came forward and expressed an interest in parenting the children. The record indicates that father appeared at every court hearing, submitted to a diagnostic assessment, created a bond with the children during supervised visitation, obtained employment and housing, and maintained phone contact with at least one of the children after the father of D.B. was released from prison and started living with mother.

{¶44} A review of the record indicates that the juvenile court and the parties seemingly forgot about father in this case. The juvenile court did not have sufficient evidence before it to determine whether it was in the best interests of the children to terminate father's parental rights.

{¶45} It is important to note that I offer no opinion as to whether father's parental rights should be preserved, for that is not the focus of this appeal. I only state that there is not ample competent evidence in the record to support the juvenile court's decision to grant permanent custody to HCJFS.

{¶46} Based on the evidence before the juvenile court, I must conclude that HCJFS did not prove, by clear and convincing evidence, that termination of father's parental rights was in the best interests of the children. Therefore, I would sustain father's sole assignment of error, reverse the judgment of the juvenile court as to father, and remand for further proceedings.[2]

Please note:

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

[2] The juvenile court maintains the jurisdiction to make any order permitted by R.C. 2151.415. *See In re J.G.S.*, 1st Dist. Hamilton Nos. C-180611 and C-180619, 2019-Ohio-802, ¶ 26 (holding that the juvenile court is vested with continuing jurisdiction).