

[Cite as *In re D.G.*, 2010-Ohio-2370.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: D.G. :  
(Franklin County Children Services, : No. 09AP-1122  
Appellant.) : (C.P.C. No. 04JU-06-8715)  
: (REGULAR CALENDAR)

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D E C I S I O N

Rendered on May 27, 2010

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*Robert J. McClaren*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations, Juvenile Branch.

FRENCH, J.

{¶1} Appellant, Franklin County Children Services ("FCCS"), appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, denying FCCS's motion for permanent custody of D.G., a minor child. For the following reasons, we affirm.

{¶2} On June 18, 2004, FCCS filed a complaint for temporary custody of D.G., a six-year-old girl, alleging that D.G. was an abused, neglected, and dependent child. The complaint alleged that D.G. was the victim of sexual abuse while living with her aunt. The complaint also alleged, in part, that: D.G.'s mother ("mother") and father have a history of domestic violence; mother admitted to drinking and smoking marijuana;

mother is depressed and has a history of mental illness, but is not on medication; mother has no money for utility bills, diapers, and transportation, but does not wish to acquire a job; mother was pregnant, but had no medical card; mother would not complete a drug and alcohol assessment; and drugs were sold out of mother's home. On September 23, 2004, the trial court approved and adopted a magistrate's decision dismissing the abuse and neglect causes of action at FCCS's request, finding D.G. to be a dependent child under R.C. 2151.04(C), granting temporary custody of D.G. to FCCS, and approving and adopting a case plan.

{¶3} On May 17, 2006, FCCS moved for permanent custody of D.G. and mother's three other children: J.G., a son born in 2003; P.S., a daughter born in 2004; and C.T., a daughter born in 2006.<sup>1</sup> See *In the Matter of D.G.* (Mar. 5, 2009), 10th Dist. No. 08AP-667. In June and July 2008, the trial court held a hearing regarding permanent custody of the children, each of whom had previously been found to be dependent children and had been placed in the temporary custody of FCCS. Prior to the hearing, D.G. and J.G. were placed in the same foster home, and P.S. and C.T. were placed together in a different foster home. On July 31, 2008, the trial court issued a Permanent Custody Judgment Entry, granting FCCS's motions for permanent custody of J.G., P.S., and C.T. The trial court denied FCCS's motion for permanent custody of D.G. and ordered that the wardship over D.G. be terminated and that D.G. be returned to her mother's custody. The trial court stayed its July 31, 2008 order pending appeal.

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<sup>1</sup> Separate cases were pending in the trial court with respect to each of mother's children. (See June 2008 Tr. 4.)

{¶4} Mother appealed the July 31, 2008 judgment with respect to J.G., and FCCS appealed that judgment with respect to D.G. On March 5, 2009, this court affirmed the trial court's judgment granting FCCS permanent custody of J.G., but reversed the trial court's judgment denying FCCS's motion for permanent custody of D.G. This court addressed D.G.'s best interest only with respect to D.G.'s interaction and interrelationship with her parents, siblings, relatives, and foster caregivers, a single factor that a trial court must consider in determining whether permanent custody is in the child's best interest. See R.C. 2151.414(D)(1). We stated: "Given the serious nature of separating two siblings, particularly when the record demonstrates that the siblings have exhibited a strong bond and have lived together their entire lives, we are compelled to remand the matter to the trial court to consider whether it is in D.G.'s best interest to be permanently separated from J.G." *In the Matter of D.G.* at ¶45. In light of that determination, we did not address the remaining best-interest factors.

{¶5} On remand, the trial court heard arguments from counsel and, on November 16, 2009, issued a judgment entry, again denying FCCS's motion for permanent custody of D.G., but also vacating that portion of its July 31, 2008 judgment entry ordering that D.G. be returned to mother.

{¶6} In its November 16, 2009 judgment entry, the trial court noted that both mother and the guardian ad litem ("GAL") desired that D.G. and J.G. be placed together. Mother stated that she wanted the siblings placed together even if her rights must be terminated to accomplish that result. Nevertheless, the court concluded that FCCS failed to meet its burden of proving by clear and convincing evidence that a grant of permanent custody to FCCS was in D.G.'s best interest. The court stressed that its

denial of FCCS's motion for permanent custody would not require returning D.G. to her mother and repeatedly suggested that a planned permanent living arrangement ("PPLA"), authorized by R.C. 2151.353(A)(5), might meet the best interests of D.G. by potentially permitting her to maintain her relationship with J.G., her mother, and her foster family.<sup>2</sup>

{¶7} FCCS appealed and raises the following assignments of error:

**ASSIGNMENT OF ERROR NUMBER ONE**

THE TRIAL COURT ERRED BY FAILING TO MAKE ANY R.C. 2151.414(B) FINDINGS.

**ASSIGNMENT OF ERROR NUMBER TWO**

THE TRIAL COURT ERRED BY FAILING TO ISSUE THE LEGALLY REQUIRED FINDINGS DEMONSTRATING THAT THE COURT CONSIDERED ALL OF THE BEST INTERESTS FACTORS OF R.C. 2151.414(D)(1)(a) to (e).

**ASSIGNMENT OF ERROR NUMBER THREE**

FCCS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT PERMANENT CUSTODY IS IN THE BEST INTERESTS OF THE CHILD. THE TRIAL COURT'S JUDGMENT DENYING THE MOTION FOR PERMANENT CUSTODY IS NOT SUPPORTED BY COMPETENT AND CREDIBLE EVIDENCE. THEREFORE, THE DECISION OF THE TRIAL COURT DENYING FCCS'S MOTION FOR PERMANENT CUSTODY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} In considering the trial court's decision whether to grant permanent custody to FCCS, this court must determine from the record whether the trial court had sufficient evidence before it. " [E]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]. " *In re Brooks*, 10th Dist.

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<sup>2</sup> A PPLA is an order by which the court grants legal custody of a child to an agency without terminating parental rights. R.C. 2151.011(B)(37). A juvenile court lacks authority to place a child in a PPLA when the agency does not request this disposition. *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, syllabus.

No. 04AP-164, 2004-Ohio-3887, at ¶59, quoting *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Further, " 'if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment.' " *In re Brooks* at ¶59. In short, " '[t]he discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316.

{¶9} It is also "well recognized that the right to raise a child is an 'essential' and 'basic' civil right." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' " *In re Hayes* at 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Accordingly, parents must receive every procedural and substantive protection the law permits. *Id.* "Because an award of permanent custody is the most drastic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children." *In re Swisher*, 10th Dist. No. 02AP-1408, 2003-Ohio-5446, at ¶26, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 105.

{¶10} A court must make two determinations in order to grant permanent custody to FCCS. First, the court must determine whether one of the following four factors, set forth in R.C. 2151.414(B)(1), applies:

(a) The child is not abandoned or orphaned or has not 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 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) 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 twelve or more months of a consecutive twenty-two month period \* \* \*.

Secondly, if one of the four factors in R.C. 2151.414(B)(1)(a) through (d) applies, the court must determine by clear and convincing evidence whether it is in the child's best interest to grant permanent custody to the agency.

{¶11} When a child has been in the temporary custody of FCCS for 12 or more months in a consecutive 22-month period, the court need not find that the child cannot or should not be placed with either parent within a reasonable time. *In re Williams*, 10th Dist. No. 02AP-924, 2002-Ohio-7205, ¶46. Thus, when considering an award of permanent custody, pursuant to R.C. 2151.414(B)(1)(d), "the only other consideration becomes the best interests of the child." *Id.* at ¶47. The question of whether the child cannot or should not be placed with either parent within a reasonable time under R.C. 2151.414(B)(1)(a) becomes relevant only where the child has not been in agency custody for the requisite time under subsection (d). Subsections (a) and (d) of R.C. 2151.414(B)(1) are, accordingly, mutually exclusive.

{¶12} By its first assignment of error, FCCS contends that the trial court erred by failing to make a finding in its November 16, 2009 judgment entry as to one of the factors listed in R.C. 2151.414(B)(1)(a) through (d). In its motion for permanent custody, FCCS argued that it could establish eligibility for permanent custody based on R.C. 2151.414(B)(1)(a), (b), and (d) because D.G. had been in the temporary custody of FCCS for 24 months, could not or should not be placed with her parents within a reasonable time, and was abandoned by her father. While the November 16, 2009 judgment entry does not contain a finding under R.C. 2151.414(B)(1)(a) through (d), the absence of such a finding does not warrant reversal in this case.

{¶13} In its July 31, 2008 judgment entry, the trial court expressly found that D.G. had been in temporary FCCS custody for 12 or more months of a consecutive 22-month period, a fact that is supported by the record and has never been disputed. In this court's previous opinion, we approved the trial court's finding that D.G. had been in temporary FCCS custody for the requisite time, stating that, "because the time requirements under R.C. 2151.414(B)(1)(d) were satisfied, it was unnecessary for the trial court to determine whether the children could or should be placed with either parent within a reasonable time under R.C. 2151.414(B)(1)(a)." *In the Matter of D.G.* at ¶39. Furthermore, our remand order only instructed the trial court to reconsider the best-interest requirement for an award of permanent custody. Accordingly, the trial court's failure to reiterate its finding that D.G. had been in the temporary custody of FCCS for more than 12 months in a consecutive 22-month period does not amount to reversible error, especially where that fact is undisputed. Therefore, we overrule FCCS's first assignment of error.

{¶14} Because D.G. had been in temporary FCCS custody for 12 or more months of a consecutive 22-month period, the sole remaining issue before the trial court was whether permanent FCCS custody was in D.G.'s best interest. See *In re Williams* at ¶47. FCCS's remaining assignments of error concern the trial court's best-interest analysis. By its second assignment of error, FCCS contends that the trial court erred by failing to make adequate findings under R.C. 2151.414(D) regarding D.G.'s best interest. By its third assignment of error, FCCS contends that the trial court's conclusion that permanent custody was not in D.G.'s best interest was against the manifest weight of the evidence. For ease of analysis, we consider FCCS's second and third assignments of error together.

{¶15} R.C. 2151.414(D) requires that, in determining the best interest of a child, the court must consider all relevant factors, including, but not limited to the following:

- (1) 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;
- (2) 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;
- (3) 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 ending on or after March 18, 1999;
- (4) 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;

(5) whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

The factors stated in R.C. 2151.414(E)(7) through (11) include whether the parents have been convicted of or pleaded guilty to various crimes; whether medical treatment or food has been repeatedly withheld from the child; whether the parent has repeatedly placed the child at a substantial risk of harm due to alcohol or drug abuse; whether the parent has abandoned the child; and whether the parent has had parental rights involuntarily terminated with respect to a sibling of the child.

{¶16} A court need not specifically enumerate each best-interest factor in its decision and entry, but it must state sufficient findings on the record to make it clear to the parties that the decision is supported by the facts. *In re Brooks* at ¶22, citing *In re Strong*, 10th Dist. No. 01AP-1418, 2002-Ohio-2247, and *In re Heyman* (Aug. 13, 1996), 10th Dist. No. 96APF02-194. Thus, the court must analyze the best-interest factors and state findings to indicate that it conducted the required analysis. *In re Brooks* at ¶23.

{¶17} FCCS has the burden of proving D.G.'s best interest by clear and convincing evidence. See *In re T.V.*, 10th Dist. No. 04AP-1159, 2005-Ohio-4280, ¶50. "Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104. The clear and convincing standard is more than a mere preponderance of the evidence, but does not rise to the level of certainty required by the criminal standard of beyond a reasonable doubt. *Id.* Here, the trial court determined that FCCS did not prove by clear and convincing evidence that permanent custody is in D.G.'s best interest.

{¶18} The November 16, 2009 judgment entry, standing alone, does not demonstrate that the trial court analyzed all of the required factors to determine whether an award of permanent custody is in D.G.'s best interest. Indeed, in that entry, the court neither states the relevant standard for determining the best interest of a child nor cites a single statutory factor that the court is required to consider in making that determination. Nevertheless, we consider that entry in concert with the court's July 31, 2008 judgment entry, in which the court stated that it determined by clear and convincing evidence that it was not in D.G.'s best interest to grant permanent custody upon consideration of "all relevant factors" pursuant to R.C. 2151.414(D).<sup>3</sup> While the court specifically enumerated only those factors involving the child's interaction and interrelationship with her family and others, the child's wishes, and the child's custodial history, review of the trial court's analysis and findings of fact in both judgment entries reveals that the court, in fact, considered each of the statutory factors listed in R.C. 2151.414(D)(1), and the evidence relating to those factors, in its consideration of D.G.'s best interest.

{¶19} The first factor the court was required to consider is D.G.'s interaction and interrelationship with her parents, siblings, other relatives, and foster caregivers. In its July 31, 2008 judgment entry, the court found that D.G. is "very bonded" with her mother and is "bonded" with her foster parents, siblings, and other relatives. On remand, the court found that D.G. is "very bonded" to her mother, foster parents, and

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<sup>3</sup> In the November 16, 2009 judgment entry, the trial court vacated its prior order to reinstate mother's custody of D.G., but it did not indicate an intention to vacate the findings of fact and conclusions of law in the July 31, 2008 judgment entry relating to the court's best-interest analysis.

J.G. D.G. testified that she loves her foster parents "very dearly" and that she feels safe in her foster home. (June 2008 Tr. 23.) The GAL described D.G.'s interaction with her foster family as "comfortable, relaxed." (July 2008 Tr. 172.) Moreover, in our previous opinion, we stated that "there was clear evidence that D.G. was bonded with her mother." *In the Matter of D.G.* at ¶43. The record, including the in-camera testimony of D.G. and the testimony of the GAL, support the trial court's findings regarding D.G.'s interactions and interrelationships with her biological and foster families.

{¶20} The court specifically, albeit briefly, addressed the relationship between D.G. and J.G., in compliance with this court's remand order. The court first found that D.G. is "very bonded" to J.G., "although he exasperates her." Subsequently, however, the trial court noted D.G.'s testimony that J.G. dislikes and frustrates her, stating that the testimony suggests that the siblings are "not bonded." Nevertheless, the court acknowledged the arguments of "Counsel, the Guardian Ad Litem, and the mother, \* \* \* [that D.G. and J.G.] should be placed together" and referred to the goal of keeping D.G. and J.G. together in its discussion regarding the possibility of a PPLA.

{¶21} FCCS argues that the first statutory factor, regarding D.G.'s interactions and interrelationships with others, weighs in favor of an award of permanent custody. The record contains undisputed, competent, credible evidence of both D.G.'s loving relationship with her foster family and D.G.'s bond with her mother and other family members, including J.G. The trial court emphasized that D.G. is very bonded with her mother, whom she wants to always be able to see, and also noted D.G.'s testimony that she would like to live with her paternal grandmother if she "were to go home and [mother] couldn't have [her]." (June 2008 Tr. 31.) The trial court would not have been

remiss in discounting D.G.'s bond with her foster family in light of the foster family's determination, between the issuance of the first and second judgment entries, that it would be unable to adopt D.G. and J.G., as originally anticipated. Upon review, we reject FCCS's suggestion that the evidence with respect to this factor necessarily weighs in favor of permanent custody. Where evidence is susceptible of more than one construction, we must give it the interpretation that is consistent with the trial court's judgment. See *In re Brooks* at ¶59.

{¶22} The trial court's judgment entries also reveal the court's consideration of the second required best-interest factor, D.G.'s wishes. In its November 16, 2009 judgment entry, the court simply alluded to D.G.'s "wish not to lose her relationship with her mother," whereas, in the July 31, 2008 judgment entry, the court specifically identified this factor and repeatedly stated D.G.'s wish to live with her mother, or at least "to always be able to see her mother." The GAL also testified that D.G. had expressed a desire to live with her mother. In her in-camera testimony, D.G. indicated that, although she feels safe in her foster home, loves her foster family, and wants her foster family to be her "forever family" if the judge determined that she could not live with her mother, she also wanted the ability to continue seeing her mother. (June 2008 Tr. 23-24.) D.G. acknowledged that the ultimate choice of her custody was up to the judge, but she was adamant that she wants continuing relationships with both her mother and her foster family. Because consideration of a child's wishes requires due regard for the child's maturity, the trial court described D.G. as confident, capable, and mature beyond her years, based on her in-camera interview with the trial judge and counsel.

{¶23} FCCS also argues that the evidence of D.G.'s wishes supports an award of permanent custody. FCCS makes much of D.G.'s statements during the in-camera hearing that she did not know where she wanted to live and that it was up to the judge. Regardless of any ambiguity in D.G.'s testimony regarding where she wanted to live, D.G. clearly and unambiguously communicated her adamant opposition to any outcome, including a grant of permanent custody to FCCS, that would preclude her from maintaining a relationship with her mother. D.G. succinctly expressed her desire to maintain ongoing relationships with both her mother and her foster family, a desire that would be denied upon an award of permanent custody. Although FCCS states that an award of permanent custody is more likely to keep D.G. and J.G. together, D.G.'s testimony indicated far more concern with maintaining her relationship with her mother than with J.G. Furthermore, by denying permanent custody and suggesting that FCCS may file for a PPLA, the trial court clearly considered the possibility that D.G. may be able to maintain her relationships with both her mother and J.G. Accordingly, we reject FCCS's argument that D.G.'s wishes weigh in favor of permanent custody.

{¶24} The third factor the trial court is required to consider is the child's custodial history, including whether the child has been in temporary agency custody for more than 12 months in a consecutive 22-month period. As with the previous factors, FCCS argues that D.G.'s custodial history weighs in favor of permanent custody. The trial court noted in its July 31, 2008 judgment entry that D.G. had been in FCCS custody since June 22, 2004, but had, prior to that date, been in her mother's custody since birth. Elsewhere in its judgment entry, the court found that D.G. had been in FCCS custody for more than 12 months of a consecutive 22-month period. Nevertheless, the

court also found that D.G. had lived with her mother for the first six years of her life and that D.G. was unlike her siblings, who only knew their foster parents as caregivers. The evidence of D.G.'s custodial history does not unambiguously weigh in favor of permanent custody, despite the length of time she has spent in the temporary custody of FCCS.

{¶25} The fourth best-interest factor in R.C. 2151.414(D) is 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 FCCS. Without doubt, every child, including D.G., needs a legally secure placement. See *In re E.G.*, 10th Dist. No. 07AP-26, 2007-Ohio-3658, ¶26. While the trial court, in its July 31, 2008 judgment entry, concluded that a legally secure permanent placement could be achieved by returning D.G. to her mother's custody, the court vacated that portion of its prior judgment entry on remand. The court, instead, addressed PPLA as another option for achieving a legally secure permanent placement for D.G. Specifically, the court stated that a PPLA, rather than permanent custody, would be in D.G.'s best interest and could potentially allow D.G. to maintain relationships with J.G., her mother, and her current foster family. FCCS admits that the trial court arguably addressed this factor in its November 16, 2009 judgment entry. At a November 5, 2009 hearing, FCCS's counsel acknowledged that a PPLA could potentially allow D.G. to remain with J.G. and also to maintain her relationship with her mother, but qualified that acknowledgment by noting that FCCS would have to choose to file a motion for PPLA, and the trial court would have to grant that motion. D.G.'s attorney also advocated in favor of a PPLA as being in D.G.'s best interest. We discern no error in the trial court's consideration of a PPLA as a means of

obtaining a legally secure permanent placement for D.G. without terminating mother's parental rights and granting permanent custody to FCCS.

{¶26} The fifth and final factor to be considered is whether any of the factors set forth in R.C. 2151.414(E)(7) through (11) apply in relation to D.G. and mother. While neither judgment entry contains an express citation to this factor, it is clear that the trial court was cognizant of the one arguably applicable factor listed therein. R.C. 2151.414(E)(11) states that "[t]he parent has had parental rights involuntarily terminated \* \* \* with respect to a sibling of the child." Here, the trial court was well aware of the termination of mother's parental rights with respect to D.G.'s siblings and also noted that it was unusual for circumstances to warrant permanent custody being granted to FCCS with respect to one sibling, but being denied with respect to another sibling. Nevertheless, the court went on to address factors, including D.G.'s age, maturity, and stronger bond with her mother, distinguishing D.G.'s situation from those of her younger siblings. We cannot conclude that the trial court failed to consider this factor in its determination of D.G.'s best interest, and FCCS does not argue any error under its third assignment of error with respect to this factor.

{¶27} Reading the trial court's July 31, 2008 and November 16, 2009 judgment entries together, we conclude that the court considered and applied the required factors listed in R.C. 2151.414(D) in its determination of whether an award of permanent custody to FCCS is in D.G.'s best interest. Although it did not expressly state each of the statutory factors, it is evident from the trial court's findings of fact and conclusions of law that the court did, indeed, analyze the statutory best-interest factors in R.C. 2151.414(D). Moreover, upon review of the trial court's judgment entries and the record

evidence, we conclude that the trial court's judgment denying FCCS's motion for permanent custody of D.G. is not against the manifest weight of the evidence. Accordingly, we overrule FCCS's second and third assignments of error.

{¶28} Having overruled each of FCCS's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

*Judgment affirmed.*

TYACK, P.J., and BRYANT, J., concur.

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