[Cite as *In re N.M.*, 2018-Ohio-1099.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106130

IN RE: N.M., ET AL.
Minor Children

[Appeal by J.H.M., Paternal Grandfather]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 14915620 and AD 14915621

BEFORE: Celebrezze, J., McCormack, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 22, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, J.H.M. ("appellant), brings the instant appeal challenging the trial court's judgment granting permanent custody of minor children, N.M. and R.M., to appellee, Cuyahoga County Department of Children and Family Services ("CCDCFS" or the "agency"). Specifically, appellant argues that the trial court's judgment is against the manifest weight of the evidence because CCDCFS failed to demonstrate that permanent custody was in the children's best interest. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Appellant is the children's paternal grandfather. The children's father, J.A.M. ("Father") filed an appeal in a companion case challenging the trial court's custody determination. Father argued that the trial court erred in awarding permanent custody to CCDCFS and abused its discretion in denying appellant's motion for legal custody. *In re N.M.*, 8th Dist. Cuyahoga No. 106131. For a full recitation of the factual and procedural history of the custody proceedings, including the testimony adduced during the permanent custody hearing, see this court's opinion in the companion case released this same date.

{¶3} On December 16, 2014, CCDCFS filed a complaint for dependency and emergency temporary custody regarding N.M. and R.M. The court held a hearing on the motion on January 9, 2015. At the hearing, the social worker, Ian Sewolich, testified that N.M. and R.M. had a history with the agency dating back to when each child tested positive for drugs at birth; the children's mother was arrested in August 2014 for child endangerment for leaving the children "unsupervised out in the street for a lengthy period of time, and mother was asleep in the basement"; the children's mother tested positive for drugs at the time; and the children's mother and father have substance abuse problems and had not complied with the agency's drug screen

requests. After the hearing, the court granted emergency temporary custody of the two minor children to the agency.

{¶4} Thereafter, appellant filed a motion to intervene and a motion to set emergency hearing, seeking custody of the children. The trial court denied appellant's motions.

{¶5} On March 3, 2015, the parents stipulated to an adjudication of dependency regarding N.M. and R.M., and the court held a dispositional hearing on March 5, 2015. At this hearing, Sewolich, the prosecutor, and the children's guardian ad litem, Susan Jankite, recommended that temporary custody with the agency was in the best interest of the children, due to concerns with the parents' substance abuse. The court granted CCDCFS's motion for temporary custody and placed the children in foster care. Approximately two months later, appellant filed another motion to intervene, which the trial court again denied.

{¶6} On November 16, 2015, the agency filed a motion to modify temporary custody to permanent custody. Thereafter, Father filed a motion for legal custody to appellant. Appellant also filed a third motion to intervene and his own motion for legal custody. On April 27, 2016, the trial court summarily denied appellant's motion to intervene, which appellant appealed to this court. On appeal, we reversed the trial court, finding the trial court erred in denying appellant's motion without a hearing. *See In re N.M.*, 2016-Ohio-7967, 74 N.E.3d 852 (8th Dist.). On remand, the trial court granted appellant's motion to intervene.

{¶7} On July 14, 2017, Jankite filed an updated guardian ad litem report. Relating to appellant, Jankite reported as follows:

> The paternal grandfather is interested, but his behaviors at the in camera interview, the recent pretrial, and during the pendency of this case are disturbing. The guardian preemptively contacted counsel for the grandfather and requested the civil protection order is observed when the children were brought for the in camera interview, but the grandfather placed himself in front of the judge's door

> and then confronted the guardian ad litem, demanding to know why he can't have his grandchildren. This is his pattern of demanding answers, then refusing to listen to them. He displays no empathy for these children and their losses but processes the events of the last two years in terms of how they affected him. If these children were placed with him, the guardian has no confidence any of the services they are receiving would continue or their previous connections with others be encouraged to continue. He will take no direction as demonstrated by his uninvited appearances at the foster care placement despite being told not to. The guardian ad litem wrote to the grandfather's counsel on or about June 19, 2017, offering to make a home visit but requested the attorney attend also. Despite his attorney's diligent efforts to make arrangements, the grandfather has not responded as of this writing. Thus, the guardian had no opportunity to see the grandfather's home or the father's current residence. She is without direct knowledge either has appropriate accommodations and is reluctant to accept their assurances due to their past conduct.

Jankite concluded in her report that she continues to opine that permanent custody is in the children's best interest.

{¶8} On July 20, 2017, the court held a dispositional hearing on the agency's motion for permanent custody. At the hearing, Sewolich, Jankite, and appellant testified.

{¶9} Sewolich testified that the agency had established a case plan for the parents with the ultimate goal of reunification. He asserted that the agency has investigated different placement options for the children, including maternal and paternal relatives. The children were initially placed with a family that was close to Father and appellant for an extended visit, or a "brief stay," to which the agency was not opposed.[1] Although this family considered legal custody of the children, due to arguments between Father and appellant during visits, the family decided that they could not "handle all the family interference when they were just trying to take care of the kids." Placement was no longer an option with that family. Sewolich further testified that although the children had visitations and an ongoing relationship with certain

[1] Although at trial, the social worker refers to this family as "paternal relatives," this family was not related by blood or marriage to Father or appellant. Rather, appellant testified that he raised the patriarch of this family "like my son" from aged four or five years.

maternal relatives in Streetsboro, the relatives were not found to be an appropriate placement.

{¶10} At the time of the removal of the children, the agency considered appellant for placement. The agency determined, however, that placement with appellant was not appropriate. Sewolich testified that appellant demonstrated inappropriate behavior concerning the children and the court process. Appellant initially refused to produce the children after the trial court had ordered the children to be placed in the agency's temporary custody, and he was once physically escorted out of the building where the agency held family visitation with the children, following appellant's volatile outburst. He also testified that the children's foster mother had obtained a civil protection order against appellant, which is in effect until October 2021, prohibiting him from having contact with the children. Finally, despite appellant's assurances that he "was getting [his] house ready," Jankite testified that appellant has not permitted her to visit his home.

{¶11} At the time of the trial, N.M. and R.M. were staying with their foster mother, with whom they had been living since April 2015. Sewolich testified that the children were doing well with the foster mother, and the agency has never had any concerns with the foster mother. He also testified that the children have a very good relationship with paternal relatives in Michigan. These relatives live approximately three hours from Cleveland, they visit family in the Cleveland area, they have been approved by the agency, and they wish to adopt the children. Sewolich stated that the children enjoy spending time with their Michigan relatives, they listen to both parents, and they are sad when they have to leave.

{¶12} Jankite testified that permanent custody is in the children's best interest. She does not believe Father or appellant would meet the children's needs. She stated that Father failed to complete his case plan services and she believed that appellant would cooperate with the agency

for only as long as he wished to, citing to examples where appellant did exactly what he was told not to do, such as going to the foster mother's home after she advised appellant not to go.

{¶13} Appellant testified that he was close with N.M. and R.M. and he helped care for the children when they were younger. He stated that he would cooperate with the agency if granted legal custody. However, on cross-examination, appellant admitted that on two occasions, he had to be physically escorted out of a building and away from the children, explaining that he was escorted out "probably because I didn't agree with what they were doing, and I voiced my concern." He conceded that he should have handled matters differently. Additionally, appellant testified that he was aware that Jankite had requested a home visit through appellant's attorney, and he "was getting [the] house ready so [Jankite] could come and see it." But when asked why Jankite did not get a visit, appellant replied that he was "waiting for an appointment with [Jankite]."

{¶14} Following the hearing, the trial court granted the agency's motion for permanent custody. The court found clear and convincing evidence that the children cannot be placed with Father within a reasonable time or should not be placed with Father, citing numerous reasons under R.C. 2151.414(E) in support. The court further found, based upon the evidence presented and Jankite's recommendation, and after considering all relevant factors, including those factors enumerated in R.C. 2151.414(D), that permanent custody is in the children's best interest. In its order, the court also denied appellant's motion for legal custody.

{¶15} On August 14, 2017, appellant filed the instant appeal challenging the trial court's judgment. He assigns one error for review:

> I. The judgment of the trial court is against the manifest weight of the evidence because [CCDCFS] failed to prove that the best interest of the children requires an award of permanent custody where a suitable family member is ready, willing, and

able to accept legal custody of the children.

II. Law and Analysis

A. Permanent Custody

{¶16} In his sole assignment of error, appellant argues that the trial court's judgment granting permanent custody to CCDCFS and determination that permanent custody was in the children's best interest are against the manifest weight of the evidence.

{¶17} Initially, we note that it is well established that other than parents, no preference exists for family members in custody awards. *In re M.W.*, 8th Dist. Cuyahoga No. 96817, 2011-Ohio-6444, ¶ 27. This court has stated that "a child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security." *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 11, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). The willingness of a relative to care for a child does not alter what a court considers in determining whether to grant permanent custody. *Id.*, citing *In re A.D.*, 8th Dist. Cuyahoga No. 85648, 2005-Ohio-5441, ¶ 12. And the court is not required to favor a relative if, after considering all of the statutory factors outlined in R.C. 2151.414(D), the court finds it is in the child's best interest for the agency to be granted permanent custody. *Id.*, citing *In re B.H.*, 5th Dist. Fairfield No. 14-CA-53, 2014-Ohio-5790, ¶ 72. As the Ohio Supreme Court has instructed, in deciding what is in a child's best interests, R.C. 2151.414 does not make the availability of a relative placement an all-controlling factor; the statute does not even require the court to weigh that factor more heavily than other factors. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 63.

{¶18} Appellant emphasizes that he has been persistent in trying to get custody of the children. He contends that the family will be able to "rebuild" if he is awarded legal custody of

the children and that the children would be able to interact with their half-sister. Finally, appellant argues that the trial court failed to adequately consider granting him legal custody of the children as an alternative to granting permanent custody to CCDCFS.

1. Standard of Review

{¶19} Parents have a constitutionally protected interest in raising their children. *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 15, citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). That interest, however, is "'always subject to the ultimate welfare of the child.'" *Id.*, quoting *In re B.L.*, 10th Dist. Franklin No. 04AP-1108, 2005-Ohio-1151, ¶ 7.

{¶20} A juvenile court's termination of parental rights and award of permanent custody to an agency is not reversed unless the judgment is unsupported by clear and convincing evidence. *In re Dylan C.*, 121 Ohio App.3d 115, 121, 699 N.E.2d 107 (6th Dist.1997); *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48. "'Clear and convincing evidence' is evidence that 'will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *In re T.B.*, 8th Dist. Cuyahoga No. 99931, 2014-Ohio-2051, ¶ 28, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). The evidence must be more than a preponderance, but it does not rise to the level of certainty that is required beyond a reasonable doubt in criminal cases. *Cross*.

{¶21} R.C. 2151.414 sets forth a two-prong analysis to be applied by a juvenile court in adjudicating a motion for permanent custody. R.C. 2151.414(B). First, it authorizes the juvenile court to grant permanent custody of a child to the public agency if, after a hearing, the court determines, by clear and convincing evidence, that any of the factors apply: (a) the child is not abandoned or orphaned, but the child cannot be placed with either parent 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 12 or more months of a consecutive 22-month period; or (e) the child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state. R.C. 2151.414(B)(1)(a)-(e). *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, ¶ 41. Only one of the factors must be present for the first prong of the permanent custody analysis to be satisfied. *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 28.

{¶22} Second, when any one of the above factors exists, the trial court must analyze whether, by clear and convincing evidence, it is in the best interest of the children to grant permanent custody to the agency pursuant to R.C. 2151.414(D). *Id.*

2. R.C. 2151.414(B) Factors

{¶23} In the instant matter, appellant does not challenge the trial court's finding under the first prong. The record reflects that the trial court determined that the condition set forth in R.C. 2151.414(B)(1)(a) was satisfied. Regarding both minor children, the court found that "the child cannot be placed with the father * * * within a reasonable time or should not be placed with the parent" in accordance with the reasons outlined in R.C. 2151.414(E).[2] The record clearly and convincingly supports the trial court's determination.

{¶24} The trial court also considered factors that pertained to appellant in its analysis

[2] Placement with the mother was not considered at the time of the court's decision because she had passed away prior to the court's hearing.

under the first prong. In determining whether a child cannot be placed with his or her parents within a reasonable period of time or should not be placed with his or her parents, courts look to R.C. 2151.414(E) for guidance. Under R.C. 2151.414(E), if the trial court determines, by clear and convincing evidence, that one or more of the factors specified in R.C. 2151.414(E)(1) through (16) exists as to the child's parents, then the trial court "shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent." *In re V.C.*, 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, ¶ 42. R.C. 2151.414(E)(16) provides that the trial court, in determining whether a child cannot be placed with his or her parents within a reasonable period of time or should not be placed with his or her parents, may consider "[a]ny other factor the court considers relevant."

{¶25} In this case, the trial court determined that the following factors were relevant: (1) appellant has a protection order against him that include the names of his minor grandchildren, N.M. and R.M., as protected persons, which remains in effect until October 13, 2021; and (2) appellant has failed to allow the guardian ad litem to inspect his home, "thus failing to present sufficient evidence that paternal grandfather's home is an adequate permanent home for the child."

{¶26} Based on the foregoing analysis, we find that the first prong of the permanent custody analysis has been satisfied.

3. Best Interest of the Children

{¶27} Appellant's challenge to the trial court's judgment pertains to the second R.C. 2151.414 prong. Specifically, he contends that the trial court abused its discretion in determining that granting permanent custody to CCDCFS was in the children's best interest.

{¶28} Once the juvenile court determines that one of the factors listed in R.C. 2151.414(B)(1) applies, then the court must determine, by clear and convincing evidence, whether permanent custody is in the best interest of the child. *In re E.C.*, 8th Dist. Cuyahoga No. 103968, 2016-Ohio-4870, ¶ 29.

{¶29} We review a trial court's determination of a child's best interest under R.C. 2151.414(D) for an abuse of discretion. *In re J.F.*, 8th Dist. Cuyahoga No. 105504, 2018-Ohio-96, ¶ 55, citing *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. "'A trial court's failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion.'" *In re J.F.*, quoting *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, at ¶ 60.

{¶30} In determining the best interest of a child at a permanent custody hearing, R.C. 2151.414(D)(1) mandates that the juvenile court consider all relevant factors, including the following:

> (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;
>
> (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;
>
> (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 * * *;
>
> (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 * * *.
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶31} While the trial court must consider all best-interest factors, only one of the factors enumerated in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to terminate parental rights. *In re N.B.* at ¶ 53; *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827, ¶ 56.

{¶32} In the instant matter, we find that the trial court considered the relevant statutory factors. The court's journal entries granting permanent custody of N.M. and R.M. to CCDCFS provide:

> The court finds that the continued residence of [N.M. and R.M.] in the home will be contrary to the child[ren]'s best interest and welfare.
>
> The court further finds, based upon evidence presented and the recommendation of the guardian ad litem for the child[ren], and after considering all relevant factors * * * listed at R.C. 2151.414(D)(a)-(e), that an order of permanent custody is in the child[ren's] best interest.
>
> The court further finds that reasonable efforts were made to prevent the removal of the child[ren] from the father's home or return the child[ren] to the home and to finalize the permanency plan, to wit: reunification. Relevant services provided to the family were: drug and alcohol assessment, substance abuse treatment, anger management, housing, [and] random drug screens. The reason the services were not successful: Father failed to submit to random drug screens and provide stable housing.
>
> Upon considering the interaction and interrelationship of the child[ren] with the child[ren's] parent(s), and foster parents; the custodial history of the child[ren], including whether the child[ren] ha[ve] been in temporary custody of a public children services agency or private child placing agency under one or more months of a consecutive twenty-two (22) month period; the child[ren']s need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; and the report of the Guardian ad Litem, the court finds by clear and convincing evidence that a grant of permanent custody is in the best interest of the child[ren] * * *.

{¶33} We also find that the evidence supports the trial court's reliance upon the factors outlined in R.C. 2151.414(D) and the court's determination that permanent custody with CCDCFS is in the best interest of the children.

{¶34} We find no merit to appellant's assertions that CCDCFS and the trial court did not consider him for placement. The record reflects that at the time of the children's removal, CCDCFS considered appellant for placement. CCDCFS determined, however, that placement with appellant was not appropriate. As noted above, social worker Sewolich explained that appellant demonstrated inappropriate behavior concerning the children and the court process and that the children's foster mother had obtained a civil protection order against Grandfather, effective until October 2021, prohibiting him from having contact with the children. Furthermore, despite appellant's assurances that he "was getting [his] house ready," the children's GAL testified that appellant has not permitted her to visit his home.

{¶35} The record reflects that the trial court considered appellant for placement. The trial court determined, however, that appellant would not be a suitable legal custodian for the children. The trial court noted that appellant has an order of protection against him that names N.M. and R.M. as the protected persons. The order, effective until October 2021, requires that appellant have no contact with the children. Father argues that the protection order was issued due to appellant's alleged "misstep" in going to the foster mother's home and the juvenile court could have terminated this protection order. However, the protection order against appellant was issued by the Cuyahoga County Court of Common Pleas, General Division, and Father has failed to show that the juvenile court had the authority to modify or terminate a civil protection order issued by another judge in another division of the Cuyahoga County Common Pleas Court. *See In re J.H.*, 9th Dist. Wayne No. 07CA0018, 2007-Ohio-4214, ¶ 16.

{¶36} The court also noted that appellant has failed to present sufficient evidence that his home is an adequate permanent home for the children. Appellant testified that he had been working on getting his home ready for a home visit. However, the GAL never received such a

visit. When asked why the GAL did not get a visit, appellant replied that he was "waiting for an appointment with [the GAL]."

{¶37} We recognize that appellant demonstrated a willingness and genuine desire to have legal custody of his two minor grandchildren. However, we must reiterate that a child's best interest is served by being placed in "a permanent situation that fosters growth, stability, and security." *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, at ¶ 11, citing *In re Adoption of Ridenour*, 61 Ohio St.3d at 324, 574 N.E.2d 1055. "The willingness of a relative to care for a child does not alter what a court considers in determining whether to grant permanent custody." *In re V.C.*, 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, at ¶ 61, citing *In re M.S.* at *id.* "If permanent custody to CCDCFS is in [a child's] best interest, legal custody to [a relative] necessarily is not." *In re V.C.* at *id*., citing *In re M.S.* at *id*.

{¶38} In this case, the trial court considered all relevant statutory factors, and despite appellant's willingness and desire to assume legal custody of the children, clear and convincing evidence supports the trial court's determination that permanent custody is in the children's best interest. Because permanent custody to CCDCFS is in the children's best interests, legal custody to appellant necessarily is not.

{¶39} For all of the foregoing reasons, appellant's sole assignment of error is overruled. The trial court's judgment granting permanent custody of the children to CCDCFS is affirmed.

{¶40} Judgment affirmed.

It is ordered that appellee recover of said 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 Cuyahoga County 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.

FRANK D. CELEBREZZE, JR., JUDGE

TIM McCORMACK, P.J., and
LARRY A. JONES, SR., J., CONCUR