[Cite as *In re J.B.*, 2018-Ohio-1201.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106045

IN RE: J.B., ET AL.
Minor Children

[Appeal by Father, J.B.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 15911454 and AD 16903039

BEFORE: Kilbane, J., E.A. Gallagher, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 29, 2018

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MARY EILEEN KILBANE, J.:

{¶1} Appellant, J.B. ("Father"), appeals from the juvenile court's order granting permanent custody of his children, two sons _ J.B. and M.B., to the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "the agency"). For the reasons set forth below, we affirm.

{¶2} In August 2015, the CCDCFS filed a complaint alleging that 18-month-old J.B. was a neglected child and requesting emergency temporary custody. In the complaint, the CCDCFS alleged that Mother and Father left J.B. "in the care of inappropriate care givers." Specifically, Cleveland police found J.B. in the care of two unrelated adults who were "nonresponsive due to using the illegal drug K2." The agency's complaint also alleged that both Mother and Father have substance abuse problems and lack stable housing.

{¶3} At the emergency temporary custody hearing in August 2015, the magistrate asked the CCDCFS social worker (the "social worker") about the possibility of J.B. having Native American ancestry in order to determine whether the Indian Child Welfare Act applied. Mother and Father were both present at the hearing. The magistrate questioned:

> THE COURT: Do you know if the [child has] any Native American ancestry at this time?
>
> [THE SOCIAL WORKER]: At this time, no, I don't know.

The record reflects that neither parent objected to the social worker's negative response regarding the possibility that their child had Native American ancestry.

{¶4} At the conclusion of the hearing, the trial court found that J.B. had no Native American ancestry and granted temporary emergency custody of J.B. to the agency.

{¶5} In November 2015, the agency amended its complaint for neglect and temporary custody. At a hearing later that same month, Mother and Father both admitted they left J.B. in the care of "two non-relatives who were under the influence of the illegal drug K2." Mother and Father also admitted that they each had substance abuse issues and were currently unable to provide stable housing for J.B. Father also admitted that he had been convicted of both domestic violence and unlawful sexual conduct with a minor.

{¶6} In February 2016, M.B. was born. The agency took custody of M.B. at the time of his birth because the issues that led to the removal of his older sibling, J.B., were unresolved; specifically, Mother and Father's ongoing substance abuse and mental health issues and their continued inability to care for and to provide a suitable home for both children. At the emergency temporary custody hearing for M.B., at which neither Mother nor Father were present, the magistrate asked the social worker:

> THE COURT: And do you know if there's any Native American ancestry with the child?
>
> [THE SOCIAL WORKER]: There is not.

{¶7} The trial court found that M.B. had "no Native American ancestry," and further found probable cause justifying removal of M.B. from the home. The trial court granted temporary custody of M.B. to the agency.

{¶8} In January 2017, the agency moved for permanent custody of both children. After conducting multiple hearings, the trial court scheduled the matter for a bench trial on the motion for permanent custody in May 2017. On the day of trial, neither Mother nor Father appeared. Father's trial counsel moved the court for a continuance since Father "couldn't be [present] because of work." The trial court denied this request, noting that Mother and Father had failed to appear for previous hearings, including a previously scheduled trial date. The trial court also found the reason for Father's request did not justify a continuance under the juvenile court's local rules.

{¶9} Father's counsel also moved the trial court to extend temporary custody rather than modifying temporary custody to permanent custody, explaining that Father had been incarcerated for a period of time and, as a result, had been unable to work on case plan services. Counsel further explained that Father was now employed and was beginning to work on his case plan services.

{¶10} At the permanent custody trial, the social worker testified that both Mother and Father had been referred to various case planning services in an effort to assist them in addressing the issues that led to the removal of J.B. and M.B.; specifically, their substance abuse and mental health issues as well as their lack of stable housing. The social worker further testified that Father did not substantially complete his case plan, noting that, although he completed parenting classes, he had not obtained housing appropriate for the children. The social worker further noted that Father only partially

completed a mental health assessment and failed to participate in a substance abuse assessment.

{¶11} The social worker explained that Father, a registered sex offender, was incarcerated from June 2016 to December 2016, related to a domestic violence conviction. She further explained that "since December, since dad got out of jail he has visited the children twice in the community setting," and, at the time of trial in May 2017, Father had last visited the children in early February 2017. The social worker noted that at that time, Father lived out of town in a nearby county and she had offered to take J.B. and M.B. there to visit him once a month. She testified that when she called him to confirm this visit he made threats to her "that bad things were going to happen, that this was all the agency's fault." She felt it was not safe to take the children or herself for the visit, but that Father's weekly visits in Cleveland remained scheduled. The social worker further testified that she felt it was in the children's best interest to be placed in the permanent custody of the CCDCFS.

{¶12} At the conclusion of the agency's case in chief, the trial court noted that the children's guardian ad litem had written a report recommending it was in the children's best interest to award permanent custody to the agency. The guardian ad litem was then subject to a brief cross-examination by Father's trial counsel.

{¶13} In June 2017, the trial court journalized its findings that permanent custody to the agency was in the best interest of the children, terminating all parental rights of Father and Mother as to J.B. and M.B.

{¶14} Father now appeals, raising the following three assignments of error for our review:

Assignment of Error One

> The trial court erred when it held a permanent custody hearing without complying with [the Indian Child Welfare Act,] 25 U.S.C. 1912.

Assignment of Error Two

> The trial court denied [Father] due process of law when it proceed without his presence at the permanent custody hearing.

Assignment of Error Three

> The trial court's decision to award permanent custody to CCDCFS was against the manifest weight of the evidence as it was not supported by clear and convincing evidence.

The Indian Children Welfare Act, 25 U.S.C. 1901, et seq.

{¶15} In the first assignment of error, Father asserts that the trial court erred in holding the permanent custody hearing without complying with the Indian Children Welfare Act ("the ICWA" or "the act") and this court's decision in *In re R.G.*, 8th Dist. Cuyahoga No. 104434, 2016-Ohio-7897. Specifically, he argues that the trial court failed to directly question him and Mother regarding the children's ancestry and the applicability of the ICWA.

{¶16} In 1978, Congress enacted the ICWA because of the concern

> that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such

> children are placed in non-Indian foster and adoptive homes and institutions.

25 U.S.C. 1901(4).

{¶17} The ICWA provides exclusive jurisdiction to an Indian tribe over child custody proceedings in situations where the Native American child resides or is domiciled within its reservation. 25 U.S.C. 1911(a). Under the act, when an Indian child does not reside on a reservation, child custody proceedings may be initiated in a state court. 25 U.S.C. 1911(b). The act gives the subject Indian child's tribe the right to intervene in any state court proceeding involving foster care placement or the termination of parental rights. 25 U.S.C. 1911(c). The act imposes a duty on state courts in involuntary custody proceedings "where the court knows or has reason to know that an Indian child is involved," to have the applicable children's services agency notify the Indian child's tribe of the proceedings and its right to intervene. 25 U.S.C. 1912.

{¶18} In order for the provisions of the ICWA to apply to a child custody proceeding in state court, there must be a preliminary showing that the proceeding involves an "Indian child." *In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 4 (8th Dist.), citing *In re Williams*, 9th Dist. Summit Nos. 20773 and 20786, 2002-Ohio-321. An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. 1903(4).

{¶19} This court has held that the party asserting the applicability of the ICWA bears the burden of proving that a child meets the statutory definition of an "Indian child." *In re C.C.* at ¶ 4. In order to meet this burden, the party asserting the applicability of the ICWA must do more than raise the possibility that a child has native American ancestry. *Id.*, citing *In re B.S.*, 8th Dist. Cuyahoga Nos. 92868, 92870, 92871, 92872, and 92880, 2009-Ohio-5497, at ¶ 63. *Accord* Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016), https://perma.cc/3TCH-8HQM ("The [notice provision of 25 U.S.C. 1912] reflects the statutory definition of 'Indian child,' which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. [The] ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe."); 25 C.F.R. 23.107(a), 81 Fed.Reg. 96476.

{¶20} This court has also held that the trial court has a duty under the ICWA to make an inquiry to the participating putative parents. *In re R.G.*, 8th Dist. Cuyahoga No. 104434, 2016-Ohio-7897, _ 18; *See also* Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016), https://perma.cc/3TCH-8HQM ("State courts must ask each participant in an emergency or voluntary or involuntary child custody proceeding whether the participant knows or has reason to know that the child is an Indian child."); 25 C.F.R. 23.107(a), 81 Fed.Reg. 96476.

{¶21} Prior to oral argument, we sua sponte remanded this matter to the trial court for compliance with our holding *In re R.G.*, to inquire of Mother and Father as to whether the ICWA applies to J.B. and M.B. Pursuant to our limited remand, the trial court issued a journal entry finding that neither J.B. nor M.B. met the definition of an "Indian child" under the act. We note that the trial court conducted two hearings, because, despite its diligent efforts and regular mail notice to each parent, neither parent appeared at the first hearing.

{¶22} At a second hearing, Mother appeared by phone to testify. The trial court summarized Mother's testimony as follows:

> [Mother] was sworn in and testified that she was Cherokee. She further testified that her mother had told her she was Cherokee, but she did not know what tribe. She further testified that she did not have a card or any information that she was a member of an Indian tribe or that her mother was a member of an Indian tribe.

{¶23} As discussed above, Mother's testimony that she has Cherokee ancestry alone is not enough to prove that either J.B. and M.B. meet the statutory definition of an "Indian child." In order to meet the definition of an "Indian child," a child must be a tribe member himself or herself or the biological child of a tribe member. *See* 25 U.S.C. 1903(4). Mother specifically testified that she is not a member of any tribe. Thus, neither J.B. or M.B. meet the definition of an "Indian child" through Mother's ancestry.

{¶24} The supplemental record reflects that Father did not appear at either hearing. The trial court aptly noted that "[Father] has failed to appear for ten * * * consecutive hearings in this matter." However, Father's counsel advised the trial court that Father

does not have any Native American ancestry. We note that Father has never alleged that J.B. and M.B. meet the definition of "Indian children" on the basis of his ancestry even though he raises this issue on appeal. *See In re A.G.*, 8th Dist. Cuyahoga No. 105254, 2017-Ohio-6892, _ 31; *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, _ 43.

{¶25} Therefore, we find that the trial court correctly determined that the ICWA does not apply to J.B. and M.B. because there was no evidence presented that gave the trial court reason to know that either child met the definition of an "Indian child." We further find that, upon limited remand, the trial court remedied its failure to direct an inquiry under the ICWA to the parents as required by our holding in *In re R.G.*, 8th Dist. Cuyahoga No. 104434, 2016-Ohio-7897. Accordingly, the first assignment of error is overruled.

Due Process

{¶26} In the second assignment of error, Father asserts that his right to due process was violated when the trial court denied his trial counsel's request for a continuance of the permanent custody hearing and proceeded with the hearing in his absence.

{¶27} It is well established that the "'right to parent one's children is a fundamental right.'" *In re B.W.*, 8th Dist. Cuyahoga No. 102475, 2015-Ohio-2768, ¶ 21, quoting *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28. "This fundamental right is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution." *In*

re B.W. "A fundamental requirement of due process is the 'opportunity to be heard' at a 'meaningful time and in a meaningful manner.'" *Id.*, quoting *In re L.F.*, 9th Dist. Summit Nos. 27218 and 27228, 2014-Ohio-3800, ¶ 39.

{¶28} This court has noted, however, that "a parent's right to be present at the permanent custody hearing is not absolute." *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 11, citing *In re C.G.*, 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 19. In *In re M.W.*, we held that the decision whether to grant a continuance of a permanent custody hearing is within the "broad, sound discretion" of the trial court and will not be reversed absent an abuse of discretion. *Id.* at ¶ 13.

{¶29} In *In re M.W.*, we explained:

> In cases where the parent has communicated with the trial court or with counsel to explain a problem with attending the scheduled hearing date, Ohio courts have recognized that the failure of a trial court to take extra care to ensure the parent could be present is an abuse of discretion. *In re Trevor W.*, 6th Dist. Lucas No. L-01-1371, 2001 Ohio App. LEXIS 5307 (Nov. 30, 2001).
>
> Conversely, however, even when termination of parental rights is at stake, parents "must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed" if the court proceeds with a hearing in their absence. *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.).

Id. at ¶ 10-11.

{¶30} In *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), the Ohio Supreme Court identified certain factors courts should consider in determining whether a

continuance is appropriate, including:

> the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67-68.

{¶31} Here, the trial court referenced former Loc.R. 49(C) of the Cuyahoga County Court of Common Pleas, Juvenile Division, which was in effect at the time of the permanent custody hearing in this matter, in denying Father's request for a continuance. Former Loc.R. 49(C) stated in pertinent part:

> No case will be continued on the day of trial or hearing except for good cause shown, which cause was not known to the party or counsel prior to the date of trial or hearing, and provided that the party and/or counsel have used diligence to be ready for trial and have notified or made diligent efforts to notify the opposing party or counsel as soon as he/she became aware of the necessity to request a postponement.[1]

{¶32} The record in the present matter reflects that trial counsel moved for a continuance on Father's behalf on the day of trial.

> [FATHER'S COUNSEL]: Your Honor, just briefly. I would request a continuance. I heard from my client yesterday who said he couldn't be here due to work. So I would request a continuance on that basis to allow him to be present.
>
> * * *

[1] Loc.R. 49(C) of the Cuyahoga County Court of Common Pleas, Juvenile Division, has since been renumbered as Loc.R. 35(C). We note that the language of Loc.R. 35(C) is identical to the former Loc.R. 49(C).

> THE COURT: Yeah. Okay. So the Court notes looking through the file that the parents were not present on [February 21, 2017], [and] when this matter was set for trial the first time on [April 18, 2017] at 9:00 a.m.
>
> And then missing court because of work the day before is not the kind of basis for a continuance under Local Juvenile Rule 49(C) that would justify a continuance. The father chose to go to work, rather than coming to the trial where the permanent custody of his children would be decided. That is not a basis for continuance and your continuance will be denied.

{¶33} The record further reflects that Father had failed to appear for three hearings directly proceeding the trial date, and that the trial date on the motion for permanent custody had been once continued. Father does not dispute that he received notices of all court dates. The docket reflects that Father received notice of the May 2017 trial date in March 2017. Notably, at a hearing in February 2017, the trial court advised Father's counsel "if [Father] is serious about his case, he needs to show up at the next court date."

{¶34} Based on the foregoing, we find that the trial court did not abuse its discretion, nor did it violate Father's right to due process by denying his day-of-trial request for a continuance and proceeding with the scheduled trial on the agency's motion for permanent custody in his absence.

{¶35} Accordingly, the second assignment of error is overruled.

Termination of Parental Rights

{¶36} In his third assignment of error, Father argues that the trial court's decision to award permanent custody of J.B. and M.B. to CCDCFS was against the manifest weight of the evidence. He asserts that the agency failed to meet its burden to prove the statutory requirements for permanent custody by clear and convincing evidence.

{¶37} This court has stated:

> Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. [*Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.] A determination of whether something has been proven by clear and convincing evidence will not be disturbed on appeal unless such determination is against the manifest weight of the evidence. If a burden of proof must be met with clear and convincing evidence, a reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy that burden of proof.

In re E.M., 8th Dist. Cuyahoga No. 79249, 2001 Ohio App. LEXIS 5011, *28-29 (Nov. 8, 2001), citing *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985).

{¶38} The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, _ 22. In accordance with R.C. 2151.414(B), the juvenile court is required to grant permanent custody of a child to the agency if it determines, by clear and convincing evidence, that: (1) granting of permanent custody to the agency is in the best interest of the child, by considering all relevant factors, including those factors enumerated in R.C. 2151.414(D); and (2) the child cannot be placed with either parent within a reasonable time period or should not be placed with either parent if any one of the factors listed in R.C. 2151.414(E) are present. *In re C.B.*, 8th Dist. Cuyahoga No. 105027, 2017-Ohio-4303, ¶ 9.

{¶39} Here, the trial court, under R.C. 2151.414(B)(1)(a), specifically found "by clear and convincing evidence that it is in the best interest of [J.B. and M.B.] to grant permanent custody to the agency * * * and that * * * [both J.B. and M.B.] cannot be

placed with either of the parents within a reasonable time or should not be placed with his parents" due to the presence of the factors listed at R.C. 2151.414(E)(1) and (4). Specifically, the trial court found under R.C. 2151.414(E)(1):

> Following placement of [J.B. and M.B. outside the home] and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the [J.B. and M.B.] to be placed outside the home, [both Mother and Father have] failed continuously and repeatedly to substantially remedy the conditions causing the child[ren] to be placed outside the child[ren]'s home.

{¶40} The trial court also found under R.C. 2151.414(E)(4), that Mother and Father have "demonstrated a lack of commitment toward the child[ren] by failing to regularly support, visit, or communicate with the child[ren] when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[ren.]"

Best Interest Determination

{¶41} Father argues that the record lacks sufficient competent, credible evidence to support the trial court's determination that it is in the children's best interest to be placed in the permanent custody of the agency. R.C. 2151.414(D)(1) requires that the court must consider "all relevant factors, including, but not limited to" those factors found in (D)(1)(a)-(e) in determining the best interest of a child. We note that "[t]here is not one element that is given greater weight than others pursuant to the statute." *In re S.C.*, 8th Dist. Cuyahoga No. 102350, 2015-Ohio-2410, ¶ 30, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. This court has held that only one of these enumerated factors need be resolved in favor of the award of permanent custody.

Id., citing *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000).

{¶42} Here, the trial court stated that, after having considered all of the factors listed under R.C. 2151.414(D)(1), it found that the factors weigh in favor of granting permanent custody of both children to the CCDCFS.

{¶43} Under R.C. 2151.414(D)(1)(a), a trial court shall consider "the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care givers and out-of-home providers, and any other person who may significantly affect the child[.]" The trial court heard testimony from the social worker that J.B. and M.B. were doing well in a foster home together. The social worker explained that Mother had stopped attending visits two months prior to trial, and during Mother's most recent contact with the agency, she did not inquire as to the children's well-being. She further explained that Father had visited the children twice since he was released from jail in December 2016, and at the time of the May 2017 trial, he had last visited the children in February 2017.

{¶44} Under R.C. 2151.414(D)(1)(b), the trial court is also required to consider, [t]he 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[.]" At the time of trial, three-year-old J.B. and one-year-old M.B. were too young to express their wishes. The children's guardian ad litem recommended that they be placed in the permanent custody of the agency. Father's trial counsel questioned the guardian ad litem on

cross-examination as to Father's ability to complete his case plan services if temporary custody were extended. The guardian ad litem replied that he "[did not] believe [Father] would follow through and complete [the case plan]."

{¶45} R.C. 2151.414(D)(1)(c) requires that the trial court must also consider "[t]he custodial history of the child, including whether the child has been in the temporary custody of [the agency] for twelve or more months of a consecutive twenty-two-month period[.]" The parties do not dispute that J.B. has been in the agency's custody without interruption since August 2015 and that M.B. has been in the agency's custody since his birth in February 2016. Accordingly, at the time of the May 2017 trial, each of the children had been in temporary custody 12 or more months of a consecutive 22-month period.

{¶46} With regard to R.C. 2151.414(D)(1)(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[,]" the trial court heard the social worker's testimony that Father's current housing situation was not suitable for the children. The social worker explained that Father lived at his friend's mother's home that was "dirty" and "cluttered." The owner of the home, Father's friend's mother, was an alleged heroin user whose alleged alcoholic boyfriend also lived in the home. The social worker testified that Father "had one room that he was trying to get set up for the children," and that "the room itself was okay * * * [b]ut the rest of the house was not appropriate nor were the individuals living in it." Additionally, the social worker testified that Mother

lacked a stable place to live and that possible relative placements were explored but, ultimately, none of these relatives were viable placements.

{¶47} Under R.C. 2151.414(D)(1)(e), the trial court is also to consider "[w]hether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child." Although the trial court did not so specifically find, CCDCFS argues that the record supports a finding that, under R.C. 2151.414(E)(10), Father "abandoned the child[ren]." The agency cites to R.C. 2151.011(C), which states:

> For the purposes of this chapter, a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days.

{¶48} Based on the foregoing, we find that the record contains sufficient clear and convincing evidence to support the trial court's finding that the "[R.C. 2151.414](D)(1) factors weigh in favor of granting permanent custody to CCDCFS" and that a disposition of permanent custody is in the best interest of both J.B. and M.B.

Placement with Either Parent

{¶49} The trial court's determination of whether a child cannot or should not be placed with either parent within a reasonable time is guided by R.C. 2151.414(E). *In re P.C.*, 8th Dist. Cuyahoga Nos. 94540 and 90541, 2008-Ohio-3458, ¶ 19. That section sets forth 16 factors for the court's determination and provides that if the trial court finds the existence of any of the 16 factors by clear and convincing evidence, the court must enter a finding that the child cannot or should not be placed with either parent within a

reasonable period of time. *Id*. As discussed above, the trial court found that two of the factors detailed in R.C. 2151.414(E) applied _ factors (1) and (4).

{¶50} Specifically, as to the first factor, the court found that Mother and Father "failed continuously and repeatedly to substantially remedy the conditions causing [the children] to be placed outside [their] home." At trial, the social worker testified that neither parent completed his or her case plan. She noted that, although Father completed a parenting class, he only completed half of a mental health assessment, failed to complete a substance abuse assessment, and did not comply with the agency's request to complete monthly drug screens.

{¶51} The trial court also found the existence of the fourth factor. The court stated Mother and Father "demonstrated a lack of commitment toward the child[ren] by failing to regularly support, visit, or communicate with the child[ren] when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[ren.]" Father was incarcerated from June 2016 to December 2016. The record reflects that after he was released from jail, he visited the children twice. The record further reflects that at the time of trial in May 2017, Father had last visited the children in early February.

{¶52} Based on the foregoing, our review of the record in this case demonstrates that the trial court's decision to award permanent custody of J.B. and M.B. to the agency was supported by clear and convincing evidence. Accordingly, the third assignment of error is overruled.

{¶53} Judgment is affirmed.

It is ordered that appellee recover of 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 common pleas court, 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.

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, A.J., and
SEAN C. GALLAGHER, J., CONCUR