

[Cite as *In re L.M.*, 2018-Ohio-963.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106072

**IN RE: L.M.
Minor Child**

[Appeal by Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 14912735

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: March 15, 2018

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ANITA LASTER MAYS, J.:

{¶1} The appellant, the father of L.M., appeals the juvenile court’s decision that it is in the best interest of his child, L.M., to be placed in the permanent custody of the Cuyahoga County Department of Children and Family Services (“CCDCFS”). He asks that this court reverse the juvenile court’s decision and remand for further proceedings. As required by App.R. 11.1(D), this court has expedited the hearing and disposition of this appeal. We affirm.

{¶2} L.M., a three-year-old girl, was removed from her mother’s care shortly after her birth and placed in the temporary custody of CCDCFS. L.M.’s mother tested positive for illegal substances at the time of her birth. In September 2015, CCDCFS filed a motion to modify temporary custody to permanent custody. After a number of pretrial hearings, and a trial in 2017, the juvenile court granted permanent custody to CCDCFS.

I. Facts

{¶3} During the permanent custody trial, several witnesses testified as to the fitness of L.M.’s father. Dr. Randall Baenen (“Dr. Baenen”), a psychologist at the juvenile court diagnostic clinic, testified that he found the father has psychological traits consistent with anxiety, and had been diagnosed with depression and post-traumatic stress disorder (“PTSD”). Specifically, Dr. Baenen testified that, in his opinion and independent assessment, the father is:

[W]ell-intentioned when it comes to his wish to have his daughter in his life, but that there are significant problems in his organizational abilities and his capacity to sustain the kind of day-in/day-out commitment that would be necessary to raise a child. These are based on his not having established sobriety in his life for any particular period of time, his inconsistent and lack of focused urgency in his response to the case plan despite his express wish to have this child in his life, the co-dependent relationship he appeared to have with the mother of his child, and some potential comprehension issues as well.

(Tr. 47-48.)

{¶4} The child's foster mother, Gloria Cloud ("Cloud"), testified that L.M. has health issues and participates in occupational and physical therapy. Cloud stated that L.M. has a speech impairment, stiffness in her upper extremities, and excessively drools. (Tr. 108-109.) She also testified that L.M.'s father does not show up consistently for L.M.'s therapy sessions, and when he does, he does not seem interested in how the therapist is working with L.M. Cloud also testified that she smelled alcohol on the father. (Tr. 111-112.)

{¶5} Addolorata Scarpitti ("Scarpitti"), the caseworker for both the parents, testified that she helped the father obtain housing. (Tr. 140.) She also testified that she was trying to help the father connect with services to support him in his sobriety and employment services. The father declined her help and stated that he could do it on his own. (Tr. 141-143.) However, the father never found full-time employment, and Scarpitti had concerns that the father's income is not consistent. (Tr. 144-145.) Although Scarpitti testified that the father interacts well with L.M., she was concerned about his sobriety. She testified that she smelled alcohol on the father's breath at a

recent visit with L.M. The father denied he had any alcohol. Scarpitti observed that his pupils were shiny and he was acting nervous. (Tr. 149-150.) The father, eventually admitted to drinking alcohol and tested positive twice for the usage of alcohol. (Tr. 157, 160.)

{¶6} Scarpitti also testified to several examples of the father lacking appropriate decision-making skills. The father requested money for bus passes because he used his money to purchase new flooring that he wanted to install in his apartment, even though the flooring in his apartment was in usable condition. He also did not always have a working phone. The father did not regularly attend counseling for his mental health, sobriety, or complete his substance abuse case plan objectives. (Tr. 166.)

{¶7} Kelly Williams (“Williams”), a child protection specialist for CCDCFS, testified that the father was scheduled for a psychological evaluation, but after arriving to the appointment, the father left and did not return. (Tr. 208.) Finally, after a year, he returned to have an evaluation done where he was diagnosed with PTSD. The father was also recommended to go to treatment to aid in his sobriety, and he failed to attend. He was referred to another substance abuse treatment facility, and was unsuccessfully discharged from the program after a number of positive screens for alcohol. The program recommended inpatient treatment, and the father stated that he was not interested and was not going to participate. (Tr. 220-221.) Williams testified that she went to his house to try and convince him to participate and comply with the recommendation. He

refused. Williams then suggested that he contact a counselor so they could work out another plan. The father did not contact the counselor.

{¶8} Williams also testified that the father eventually decided to participate in a sobriety program at Catholic Charities in 2016. After successful completion of that program in February 2017, the father again tested positive for alcohol in March 2017. Williams, testified that she was concerned with the father's decision-making skills. She testified that the father used money from a settlement to buy stereo equipment and a flat-screen television, but then asked if money could be provided for a stroller for L.M. (Tr. 228 - 229.) When Williams questioned his decision about purchasing the large ticket items, the father got upset with her.

{¶9} Williams told the court that the father was inconsistent with his visitation of L.M. She stated that he would not show up or call to state that he was not coming. (Tr. 230.) Williams also stated that she is concerned the father is not equipped to handle L.M.'s medical needs. She testified that the father does not believe that he has a substance abuse problem, and is not consistent with attending L.M.'s medical appointments. When the father does arrive, he arrives late and leaves early. Williams stated that because the father is struggling to maintain his own medical appointments, she believes it would be difficult for him to maintain L.M.'s. (Tr. 237.)

{¶10} Heather McCullough ("McCullough"), the guardian ad litem ("GAL") for L.M., acknowledged the previous testimony, and admitted that the father was not consistent with attending appointments or participating in treatment that would aid in his

recovery. (Tr. 395.) She also stated to the court that she was trying to work with the father because she also had concerns about his decision-making. McCullough stated that it was difficult for the father to prioritize all of his responsibilities. (Tr. 396.) For example, the father missed his treatment appointments because he said he was trying to get furniture. McCullough also stated that there was a concern that the father would be unable to get L.M. to all of her medical appointments because he has missed so many in the past. However, McCullough recommended that the court “give him a try.” (Tr. 404.) She stated that if it does not work out, then CCDCFS should be granted permanent custody.

{¶11} The juvenile court stated in its journal entry that it considered the factors listed in R.C. 2151.414(B)(1), 2151.414(D)(1), and 2151.414(C). The juvenile court further stated that,

[b]ased upon the testimony and evidence submitted, the court finds by clear and convincing evidence that a grant of permanent custody is in the best interest of the child, and the child cannot be placed with one of the child’s parents within a reasonable time or should not be placed with either parent.

The court further finds that the Cuyahoga County Division of Children and Family Services has made reasonable efforts to prevent the removal of the child, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home. Relevant services provided to the family and the reasons those services were not successful: substance abuse, mental health, and housing. Neither parent has completed the case plan services.

{¶12} The juvenile court ordered that the parental rights of L.M.’s father and mother be terminated. As a result, the father filed this appeal assigning three errors for our review:

- I. The Juvenile Court erred to the prejudice of the appellant in finding that the child cannot or should not be placed with a parent within a reasonable time pursuant to R.C. 2151.414(B)(1);
- II. The Juvenile Court erred to the prejudice of the appellant in finding the award of permanent custody was in the best interests of the child; and
- III. The Juvenile Court erred in failing to follow the recommendation of the guardian ad litem, who recommended legal custody to the father with protective supervision.

We will address all three assignment of errors together, because they pertain to the same issue.

II. Permanency Placement

A. Standard of Review

{¶13} Now,

“‘[t]he discretion that the juvenile court enjoys in deciding 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 decision will have on the lives of the parties concerned.’” *In re L.O.*, 8th Dist. Cuyahoga No. 101805, 2015-Ohio-1458, ¶ 22, quoting *In re Awkal*, 95 Ohio App.3d at 316, 642 N.E.2d 424. We, therefore, review a trial court’s determination of a child’s best interest under R.C. 2151.414(D) for abuse of discretion. *In re L.O.* at ¶ 22. An abuse of discretion implies that the court’s decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

In re V.C., 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, ¶ 52.

B. Law and Analysis

{¶14} In the father’s first and second assignments of error, he argues that the juvenile court erred in its decision to grant permanent custody to CCDCFS. In accordance with R.C. 2151.414(B), a trial court may grant permanent custody of a child to a county children’s services agency if the

court determines, by clear and convincing evidence, (1) the existence of at least one of the four conditions enumerated in R.C. 2151.414(B)(1)(a) through (d) and (2) that granting permanent custody to the agency is in the child's best interest. "Clear and convincing evidence" is that measure or degree of proof that is more than a "preponderance of the evidence" but does not rise to the level of certainty required by the "beyond a reasonable doubt" standard in criminal cases. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 8, citing *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994). It "produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re M.S.* at ¶ 8.

Id. at ¶ 36.

{¶15} The court stated in its journal entry that it considered the factors in R.C. 2151.414(B)(1), which states,

(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

(a) The child is not abandoned or orphaned, 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, 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 if, 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, 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, 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.

(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.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

{¶16} It is always difficult to make a decision to terminate parental rights.

It is well established that a parent has a fundamental right to raise and care for his or her child. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28; *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 40. However, that right is not absolute.

In re K.H. at ¶ 40. Government children's services agencies have broad authority to intervene when necessary for a child's welfare. *In re C.F.* at ¶ 28. "All children have the right, if possible, to parenting from either natural or adoptive parents which provides support, care, discipline, protection and motivation." *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hitchcock*, 120 Ohio App.3d 88, 102, 696 N.E.2d 1090 (8th Dist.1996). When parental rights are terminated, the goal is to create "a more stable life" for dependent children and to "facilitate adoption to foster permanency for children." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, *5 (Aug. 1, 1986). We recognize, however, that termination of parental rights is "the family law equivalent of the death penalty in a criminal case." *In re J.B.* at ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14.

In re V.C., 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, ¶ 35.

{¶17} We find that the juvenile court relied on clear and convincing evidence when it decided that the child could not be placed with either parent within a reasonable time or that the child should not be placed with the parents and, therefore, granted permanent custody of L.M. to CCDCFS. The record reveals that the father has unresolved substance abuse and mental health issues; lacks understanding of how to parent a special needs child and has poor decision-making skills. This has been demonstrated by his inability to maintain his sobriety, attend his and L.M.'s health appointments, as well as maintaining his unhealthy relationship with L.M.'s mother.

{¶18} The record reveals that the juvenile court also considered the factors enumerated in R.C. 2151.414(D)(1) to determine if terminating the father's parental rights were in the best interest of the child. R.C. 2151.414(D)(1) states,

(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, 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, 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;

(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.

For the purposes of division (D)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

{¶19} The juvenile court found clear and convincing evidence that a grant of permanent custody to CCDCFS is in the best interest of the child in light of father's ongoing housing, employment, substance abuse, and mental health issues. Given the extensive testimony regarding the father's inability to not only adequately care for himself, but also for L.M., we agree that termination is in the best interest of the child. Therefore, the juvenile court did not abuse its discretion in terminating the parental rights of the father.

{¶20} The first and second assignments of error are overruled.

{¶21} The father, in his third assignment of error, contends that the trial court erred in failing to follow the recommendation of the guardian ad litem.

Although a trial court is generally obligated to consider a recommendation of a guardian ad litem, it is “not bound to adopt” it. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 152. The “ultimate decision” is for the trial judge who “must act upon a consideration of all evidence presented.” *Id.*, citing *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 34.

In re M.S., 2015-Ohio-1847, 34 N.E.3d 420, ¶ 44 (8th Dist.).

{¶22} The juvenile court is obligated to consider the recommendations of the GAL but it is not bound by it. The record reveals that the GAL echoed the concerns of the previous witnesses. McCullough testified as to all the appointments the father had missed, his ongoing mental health and substance abuse issues, and his inability to find continuous employment. The GAL’s ultimate recommendation was, “awe shoot, give him a try.” After reviewing the record, we find that the juvenile court considered all of the evidence when the court decided that it was in the best interest of the child to terminate the father’s parental rights and grant permanent custody to CCDCFS. Therefore, the juvenile court did not err to the prejudice of the father.

{¶23} The third and final assignment of error is overruled.

{¶24} Judgment is affirmed.

It is ordered that the appellee recover from 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 Court of Common Pleas, 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.

ANITA LASTER MAYS, J.

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR