

[Cite as *In re Ca. C.*, 2019-Ohio-546.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107514

**IN RE: Ca.C., ET AL.
Minor Children**

[Appeal By Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 15901738 and AD 15901739

BEFORE: Keough, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 14, 2019

ATTORNEYS FOR APPELLANT

For D.C. (Father)

Mark A. Stanton
Cuyahoga County Public Defender
By: Britta M. Barthol
Assistant Public Defender
9300 Quincy Avenue, 5th Floor
Cleveland, Ohio 44106

ATTORNEYS FOR APPELLEES

For Cuyahoga County Division of Children and Family Services

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Cheryl Rice
Assistant County Prosecutor
3955 Euclid Avenue
Cleveland, Ohio 44115

Guardian Ad Litem for Children

Mark A. Schneider
21055 Lorain Road
Cleveland, Ohio 44126

KATHLEEN ANN KEOUGH, J.:

{¶1} Appellant-father (“Father”) appeals from the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, granting permanent custody of his minor children, Ca.C. and Co.C, to appellee, the Cuyahoga County Division of Children and Family Services (“CCDCFS” or the “agency”). For the reasons that follow, we affirm.

I. Background

{¶2} In 2015, Ca.C. and Co.C. were living with their biological mother. Father filed for custody due to mother's mental health and substance abuse issues. Subsequently, in light of its concerns regarding Father's substance abuse, the court asked CCDCFS to evaluate the family.

{¶3} In February 2015, CCDCFS filed a complaint for neglect, dependency, and temporary custody due, in part, to both parent's substance abuse issues. The children were subsequently adjudicated to be neglected and dependent, and placed in the temporary custody of the agency in June 2015.

{¶4} The court approved a case plan for Father that included maintenance of a drug-free lifestyle and a psychological assessment. Father was to complete the recommended intensive outpatient drug treatment and submit to random drug screens for the agency. Subsequently, in light of several outbursts by Father during court proceedings, the psychological portion of Father's case plan was changed to anger management classes. A case plan was also developed for Mother; the goal of both Mother and Father's case plans was reunification with the children.

{¶5} In March 2016, the court granted the agency's motion to extend temporary custody for six months, finding that CCDCFS had made reasonable efforts to finalize the plan for reunification but that neither parent had completed their case plan objectives. In June 2016, CCDCFS filed a motion to modify temporary custody to permanent custody. After a hearing, the court denied the agency's motion and ordered that temporary custody again be continued. Although the court denied the agency's motion, it again found that the agency had made reasonable efforts to eliminate the continued removal of the children from the home.

{¶6} On October 25, 2017, CCDCFS filed a second motion to modify temporary custody to permanent custody. On July 20, 2018, after a hearing, the court granted the agency's motion, and the children were placed in the permanent custody of the agency. In its journal entry, the court found that CCDCFS had made reasonable efforts for reunification, but pursuant to R.C. 2151.414(B): (1) the children could not or should not be placed with either parent within a reasonable time; (2) Father had abandoned the children; (3) Mother's location was unknown; and (4) the children had been in the temporary custody of CCDCFS for more than two years. The court also found that permanent custody was in the best interest of the children.

{¶7} Father now appeals from this judgment.¹

II. Law and Analysis

{¶8} Termination of parental rights is an alternative of last resort but is sanctioned when necessary for the welfare of a child. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 7. Under R.C. 2151.414, a trial court may grant permanent custody of a child to an agency if the court determines by clear and convincing evidence that one of the factors enumerated in R.C. 2151.414(B)(1)(a) through (e) applies, and that an award of permanent custody is in the child's best interest. "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 C.B.*, 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, ¶ 28, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶9} The R.C. 2151.414(B)(1)(a) through (e) factors are: (a) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; (b) the

¹Mother is not a party to this appeal and has not challenged the trial court's decision.

child is abandoned; (c) the child is orphaned and no relatives are able to take permanent custody of the child; (d) the child has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period; and (e) the child or another child of the parent or parents has been adjudicated an abused, neglected, or dependent child.

{¶10} In his single assignment of error, Father contends that the record lacks clear and convincing evidence to support the trial court's findings that the children could not be placed with him within a reasonable time or should not be placed with him, and that the award of permanent custody to CCDCFS was in the best interest of the children.

A. Whether the children could not be placed with Father within a reasonable time or should not be placed with him

{¶11} As an initial matter, we note that the trial court's finding that the children could not be placed with Father within a reasonable time or should not be placed with him was unnecessary because it was undisputed that when CCDCFS filed its second motion for permanent custody of the children, they had been in the agency's custody for more than 12 months of the preceding 22-month period. The time period for R.C. 2151.414(B)(1)(d) is calculated from when the child enters agency custody and the filing of the motion for permanent custody. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1176, ¶ 26. There is no dispute that the children entered agency custody in June 2015, and the second motion for permanent custody was filed 29 months later in November 2017. Thus, by that time, the children had been in the temporary custody of CCDCFS for well over two years, and the trial court could immediately proceed to a determination of whether permanent custody was in their best interest.

{¶12} Moreover, even if the trial court's finding were not superfluous, the record clearly and convincingly supports the court's conclusion that the children could not or should not be placed with Father. To determine whether a child cannot be placed with a parent within a reasonable time or should not be placed with a parent, courts look to the factors set forth in R.C. 2151.414(E). If a court determines that one or more of the R.C. 2151.414(E) factors exist as to each of the parents, the 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. R.C. 2151.414(E).

{¶13} In this case, the trial court found that several factors under R.C. 2151.414(E) applied. With respect to Father, the court found that Father had failed to substantially remedy the conditions causing the children to be placed outside the home (R.C. 2151.414(E)(1)); Father had demonstrated a lack of commitment by failing to regularly support, visit or communicate with the children, or by showing an unwillingness to provide a permanent home (R.C. 2151.414(E)(4)); and Father had abandoned the children (R.C. 2151.414(E)(10)). Our review of the record demonstrates there was more than sufficient evidence to support the trial court's findings.

{¶14} At the hearing on the agency's motion, Jamessa Motley, the CCDCFS social worker assigned to the case, testified that Father's case plan objectives included substance abuse treatment, anger management, and visitation with the children. She said that Father initially completed an intensive outpatient treatment program and submitted to monthly drug tests. After Father tested negative for six months, the agency arranged for Father's unsupervised in-home visits with the children. However, Father tested positive for marijuana in the seventh month. In accord with agency protocol, CCDCFS stopped the in-home visits and arranged for supervised

visits at another location. Motley testified that Father was angry that the home visits had been discontinued and chose not to visit with the children for the next ten months.

{¶15} Motley further testified that after he tested positive for marijuana in November 2016, Father refused to submit to random drug testing, as required by his case plan, until February 2017, at which point he tested positive for cocaine and marijuana. At the permanent custody hearing in April 2018, Father admitted that he had refused to submit to any drug screens after May 2017, when he had submitted to a drug test in response to the court's order and again tested positive. Father said he refused the drug tests because the agency had stopped his home visits with the children.

{¶16} Motley testified that Father's case plan also included anger management classes. She testified that although Father had completed an anger management course, he had not benefitted from the classes and continued to display angry and hostile behavior. She said that Father refused to speak to her when she brought the children for visits with him and would not respond to her telephone calls and texts regarding drug screening. Additionally, she said that in the several months before the permanent custody hearing, he would become angry and storm out of case management meetings with the agency after only several minutes. At the hearing, Father admitted that he stormed out of the meetings, but said it was because he did not want to hear Motley's "lies."

{¶17} In light of this evidence, the trial court's finding that the children could not be placed with Father within a reasonable time or should not be placed with him is supported by clear and convincing evidence. The evidence demonstrated that Father failed to remedy the conditions that led to the children's removal by not addressing his substance abuse issue; he

demonstrated a lack of commitment to the children by not visiting them for ten months; and further, he abandoned them.

{¶18} We are not persuaded by Father's argument that the children could be placed with him because he has stable housing, was sober for six months at one point, visited the children, and completed an anger management course. Housing was never an issue or part of Father's case plan. With respect to his drug use, Father's sobriety for a six-month period in 2015 does not demonstrate that he complied with his case plan objective of a drug-free lifestyle. Father tested positive in the month immediately after this six-month period, and then refused any further testing. Father's admitted refusal to provide any drug screens for a ten-month period when the children were in the temporary custody of the agency, and his refusal to submit any drug screens after May 2017 can only be considered as evidence that Father has not remedied his drug use.

{¶19} Furthermore, although Father contends that he should have been given more time to demonstrate his sobriety, that would have required an extension of temporary custody, which was legally impossible because the court had already granted two extensions. *See* R.C. 2151.415(D)(4) (a court may not order more than two extensions of a temporary custody order, and may not continue a temporary custody order more than two years after the complaint was filed). Father had numerous opportunities throughout the nearly three years the case was pending to demonstrate he was sober; he simply chose not to.

{¶20} Likewise, Father admitted that he refused to visit with his children for ten months because he was angry that the agency had discontinued his home visits. Father's actions demonstrate that he willfully abandoned his children for a significant period of time; the fact that he resumed visitation does not alter the fact that he did not visit when he was able to do so.

Under R.C. 2151.011(C), a child is presumed abandoned when the child's parents have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after the 90-day period. Here, Father's actions clearly demonstrated both a lack of commitment to his children and his abandonment of them. *See* R.C. 2151.414(E)(4) and 2151.414(E)(10).

{¶21} With respect to Father's completion of an anger management course, the relevant question is not whether a parent has successfully completed the requirements of a case plan, but whether the parent has substantially remedied the conditions that caused removal. *In re J.H.*, 8th Dist. Cuyahoga No. 105073, 2017-Ohio-1564, ¶ 41. *In re C.C.*, 8th Dist. Cuyahoga Nos. 94013 and 94014, 2010-Ohio-780, ¶ 25. Father's admission that even after completion of the course, he refused to interact with Motley and stormed out of meetings because he was angry demonstrates that he failed to benefit from the classes or remedy the conditions that led to the removal of the children.

{¶22} Likewise, we are not persuaded by Father's argument that the trial court's decision should be reversed because the agency failed to make reasonable efforts toward his reunification with the children. Father contends that in light of his difficult relationship with Motley, the agency's denial of his request to replace her on the case demonstrates its lack of reasonable efforts. He further contends that Motley's failure to seek a court order for drug testing when he would not respond to her calls and texts to submit urine screens demonstrates that the agency did not make reasonable efforts toward reunification.

{¶23} Contrary to Father's argument, the record reflects that the agency made reasonable, and indeed substantial, efforts to reunify Father with his children. The agency offered specific

services to Father, including substance abuse assessment and treatment, a psychological evaluation, and anger management counseling. Father's failure to submit drug screens and his failure to visit with his children for ten months was purely his own choice. Father admitted that he would not respond to Motley's calls and texts and would not engage in drug testing because he was unhappy his home visits with the children had been discontinued. In short, Father refused to participate in his case plan because he was unhappy that he was not getting his way. Father's refusal was not based on Motley; he chose to put his feelings over the needs of his children.

{¶24} Further, Father has not demonstrated that a different social worker or a court order would have made any difference in this case. Father seems to suggest that his ability to cooperate with the guardian ad litem for the children demonstrates that he would have cooperated with a social worker other than Motley. We are not persuaded. Consistent with agency protocol, a different social worker would not have reinstated Father's home visits with the children until he demonstrated six months of sobriety. And Father testified that he would not submit to drug tests because the home visits had been discontinued. Thus, there is no basis for concluding that Father would have acted any differently with another social worker than he did with Motley. As the trial court properly found, "it is the actions of the parents, and not the agency, that is the basis of the court's decision."

B. The Best Interest of the Children

{¶25} Having found that the trial court properly concluded that at least one of the R.C. 2151.414(B)(1) conditions applied, we must determine whether the trial court appropriately found that permanent custody to the agency was in the children's best interest.

{¶26} When determining the best interest of a child, R.C. 2151.414(D)(1) directs the court to consider all relevant factors, including, but not limited to: (a) the interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers; (b) the wishes of the child, as expressed directly by the child or through the child’s guardian ad litem; (c) the custodial history of the child; (d) the child’s need for a legally secured permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (e) whether any of the factors set forth in R.C. 2151.414(E)(7) through (11) apply. Although a trial court is required to consider each of the R.C. 2151.414(D)(1) factors in making its permanent custody determination, “only one of these factors needs to be resolved in favor of the award of permanent custody.” *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 10.

{¶27} In this case, the trial court stated that it considered the R.C. 2151.414(D)(1) factors and found they weighed in favor of permanent custody. “In particular,” the court noted, “the custodial history weighs strongly in favor of permanent custody.”

{¶28} We agree. R.C. 2151.414(D)(1)(c) instructs a court to consider the child’s custodial history, including whether the child has been in the continual custody of the agency for 12 or more months of a consecutive 22-month period. At the time of the second permanent custody hearing, the children had been in the temporary custody of the agency for nearly three years. Notably, the guardian ad litem for the children admitted at the hearing that even though Mother and Father had been engaged with the agency for nearly three years, the children still could not be returned to either parent.

{¶29} R.C. 2151.414(D)(1)(d) instructs a court to consider the child's need for a legally secure placement and whether such placement can be achieved without a grant of permanent custody. In this case, the testimony at trial established that the children's need for legal permanency could only be achieved through a grant of permanent custody. The children could not immediately be returned to either parent, and there were no appropriate relatives available to take legal custody of the children as a less restrictive option. Motley testified that the agency had considered the maternal and paternal grandmothers but neither felt she could care for the children on a long-term basis. Although Father contends that the children could have been placed with his adult daughter, Motley testified that the agency had investigated her as a possible placement and determined that her husband had issues that precluded the agency's approval of this placement. Additionally, as the trial court noted, there were no motions for legal custody to a relative pending at the time of the permanent custody hearing. *See* R.C. 2151.414(D)(2)(d).

{¶30} Moreover, despite Father's argument, it is not apparent that the children even want to live with him. The trial court interviewed the children separately before making its decision. The record reflects that both children said their preference was to live with their mother, and if not her, their foster mother. Father was the last of both child's preferences. In her testimony, Motley said that the children "had been hesitant" regarding whether they wanted to live with Father.

{¶31} We agree with the trial court that the children's custodial history and need for a legally secure placement weigh in favor of permanent custody. As this court has recognized, "neglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term, and are not required to languish in legally insecure placements for years while

natural parents are unwilling or unable to correct serious parenting deficiencies.” *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 35, citing *In re Mayle*, 8th Dist. Cuyahoga Nos. 76739 and 77165, 2000 Ohio App. LEXIS 3379 (July 27, 2000). Father’s inability to correct his parenting deficiencies after three years demonstrates that permanent custody to the agency was in the children’s best interest.

{¶32} Moreover, on this record, the trial court was required to find that permanent custody was in the children’s best interest. Under R.C. 2151.414(D)(2), the court “shall” commit the child to the permanent custody of a child services agency if all of the following apply:

- (a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist 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.
- (b) The child has been in an agency’s custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.
- (c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.
- (d) Prior to the dispositional hearing, no relatives or other interested person has filed, or has been identified in, a motion for legal custody of the child.

{¶33} In this case, the court properly found that all of the R.C. 2151.414(D)(2) factors applied. The children could not be placed with either parent because neither parent had remedied the conditions that caused the children to be removed. At the time of the hearing, the children had been in the custody of CCDCFS for nearly three years, and temporary custody could not be extended. The children did not meet the requirements for a planned permanent living arrangement because they were not at least 16 years of age. *See* R.C. 2151.353(A)(3). And no

relative or interested individuals had filed or been identified in a motion for legal custody. Thus, because all of the R.C. 2151.414(D)(2) factors applied, the trial court was required to make a finding that permanent custody was in the best interest of the children.

{¶34} We review a trial court's grant of permanent custody for an abuse of discretion. *In re J.C.*, 8th Dist. Cuyahoga No. 106272, 2018-Ohio-2234, ¶ 39. When reviewing a trial court's custody decision, an appellate court must make "every reasonable presumption in favor of the lower court's judgment and finding of facts." *In re Brodbeck*, 97 Ohio App.3d 652, 647 N.E.2d 240 (3d Dist.1994).

{¶35} In light of the evidence discussed above, we find that the trial court did not abuse its discretion in determining that permanent custody of the children should be awarded to CCDCFS. The trial court's determinations that the children could not or should not be placed with Father, and that permanent custody was in the children's best interest were supported by clear and convincing evidence; the assignment of error is therefore overruled.

{¶36} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR