

**IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY**

IN THE MATTER OF:	:	Case No. 19CA3
	:	
E.C.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	

APPEARANCES:

Evan N. Wagner, Columbus, Ohio, for Appellant.

Krystin N. Martin, Assistant Pickaway County Prosecuting Attorney, Circleville, Ohio, for Appellee.

Smith, P. J.

{¶1} M.P., the child’s biological father, appeals the trial court’s judgment that granted Pickaway County Department of Job and Family Services (hereinafter DJFS) permanent custody of one-and-a-half-year-old E.C. The father raises the following assignment of error:

The trial court committed reversible error by finding that E.C. had been in the temporary custody of DJFS for twelve or more months of a consecutive twenty-two-month period.

{¶2} The child was born in June 2017, and exhibited withdrawal symptoms.

Testing revealed that the child had illegal substances in his system. The child remained hospitalized through July 7, 2017. Upon his release from the hospital, the agency obtained temporary custody of the child and also filed a complaint that alleged the child is abused and neglected.

{¶3} Over the next several months the agency worked to identify the child's biological father. In December 2017, DNA testing revealed appellant to be the child's father. Once the agency learned the name of the child's biological father, it filed an amended abuse and dependency complaint. Throughout this time, the child remained in the agency's temporary custody. In March 2018, the trial court adjudicated the child an abused and dependent child.

{¶4} The agency developed a case plan for the mother and the father to follow. Neither successfully completed the case plan. Thus, on September 21, 2018, the agency filed a permanent custody motion. The agency alleged that the child has been in its temporary custody for twelve or more months of a consecutive twenty-two-month period and that placing the child in its permanent custody is in the child's best interest.

{¶5} On January 19, 2019, the trial court held a hearing to consider the agency's permanent custody motion. At the start, the court noted that the father had not appeared for the hearing but that his counsel was present. The father's counsel asked the court to continue the matter, and the court denied the motion to continue.

{¶6} The mother's counsel stated that the mother has determined that awarding the agency permanent custody is in the child's best interest.

{¶7} DJFS caseworker Dave Groff testified that the agency became involved with the family after the hospital where the child was born reported that the child tested positive for illegal substances and exhibited withdrawal symptoms. Groff explained that the child remained hospitalized to treat his withdrawal symptoms and that upon the child's release, the agency obtained temporary custody of the child.

{¶8} Groff indicated that the mother initially identified an individual she believed to be the child's father, but that subsequent DNA testing excluded him as the child's father. Groff stated that later DNA testing proved appellant to be the child's father.

{¶9} Groff related that the agency developed a case plan for both parents. He stated that the case plan required the father to (1) maintain sobriety, (2) submit to random drug screens, (3) complete a drug and alcohol assessment and follow any treatment recommendations, (4) obtain and maintain safe and stable housing, and (5) obtain and maintain steady employment.

{¶10} Groff testified that the father did not comply with the case plan requirements to maintain sobriety and to submit to random drug screens. He explained that on December 8, 2017, the father refused a drug screen, and the father admitted that he had been taking Percocet without a prescription. On February 20, 2018, the father tested positive for opiates, oxycodone and marijuana. Between April 10, 2018, and June 12, 2018, the father refused four drug screens.

{¶11} Groff explained that he attempted to assist the father with obtaining a drug and alcohol assessment by helping the father complete a health insurance application. Groff reported that in January 2018, the father informed him that he lacked insurance. Groff helped the father obtain an application and offered to help him complete the application. Groff stated that the father indicated that he would take it home, complete it, and then return it. However, Groff testified that the father did not return the application until mid-March, 2018.

{¶12} Groff related that in April 2018, the father completed a drug and alcohol assessment at Prism Behavioral Health. Groff further stated, however, that the father did

not complete a treatment program and was discharged from the program due to noncompliance.

{¶13} Groff explained that he attempted to visit the father's current residence, but he was denied access to the home. Groff stated that he went to the residence "dozens of times," but he was never allowed inside. The father informed Groff that "it wasn't his home and the people living there basically did not want" to allow Groff inside.

{¶14} Groff additionally indicated that he attempted to help the father obtain independent housing. Groff stated that in February 2018, he gave the father a housing voucher, but the father did not use it.

{¶15} Groff testified that although the father appeared to interact appropriately with the child during visits, the father did not consistently visit with the child and frequently canceled appointments.

{¶16} Groff related that the child has been in the agency's continuous temporary custody since July 7, 2017 and has remained in the same foster-to-adopt home since that time. Groff stated that the foster family provides for the child's basic needs and that the child appears bonded with the foster family.

{¶17} Summer Sisterman, counselor at Prism Behavioral Health, testified that the father completed a drug and alcohol assessment but that he did not follow through with any of the recommendations. She stated that he was discharged from the program due to noncompliance. She further explained that the treatment center attempted to reach the father by telephone multiple times but he would not return phone calls.

{¶18} Wendy Gatewood, the Associate Director of Pickaway Area Recovery Services, testified the father attended an orientation program that informed him of the

visitation center rules and procedures. Gatewood stated the father consistently did not follow them. She explained that the father either showed up late, failed to show, brought unauthorized guests, or was argumentative with staff. Gatewood indicated that due to the father's noncompliance with the rules and procedures, the center notified the father that he could no longer have visits at the center and that he would need to contact the court to arrange further visits with the child.

{¶19} The child's foster mother testified that the child has lived in her home since he was twenty-one days old and that she and her husband are willing to adopt the child.

{¶20} The child's guardian ad litem testified and opined that placing the child in the agency's temporary custody is in his best interest.

{¶21} On January 24, 2019, the trial court granted the agency permanent custody of the child. The court noted that the child was born addicted to drugs and required extensive hospitalization to treat withdrawal symptoms.

{¶22} The court found that the father admitted to taking Percocet without a prescription, tested positive for opiates, oxycodone, and marijuana, and refused to submit to drug screens in April, May, and June 2018. The court noted that the father completed some parts of a counseling program at Prism, but he later was discharged due to noncompliance.

{¶23} The court observed that the father has refused to allow agency case workers to enter the home where he resides with his girlfriend and his girlfriend's family. The court also noted that the father received a voucher for housing assistance, but he never sought to obtain independent housing.

{¶24} The court determined the child has been in the agency’s temporary custody for twelve or more months of a consecutive twenty-two-month period. The court found that the child was adjudicated dependent and abused on March 22, 2018, and that the child was removed from the mother’s care on July 7, 2017. The court found that by the time the agency filed its permanent custody motion, the child had been in the agency’s temporary custody for fourteen months.

{¶25} The court next considered whether granting the agency permanent custody of the child is in the child’s best interest. The court considered the child’s interactions and interrelationships. The court found neither parent has consistently visited the child and that the father canceled several scheduled visits. The court also observed that the father did not comply with basic visitation center rules and that “he was notified of his dismissal from the use of that facility.” The court pointed out that father never attempted to re-engage with the center or to seek other ways of visiting the child.

{¶26} The court found the child has lived with the same foster family since he was released from the hospital and that he has positive interactions with the other children in the home.

{¶27} The court found the child is too young to express his wishes.

{¶28} The court noted that the child has been in the same foster home since his release from the hospital and has been in the agency’s temporary custody since July 7, 2017.

{¶29} The court found the child needs a legally secure permanent placement and that the child cannot achieve this type of placement without granting the agency permanent custody. The court noted that the mother did not complete the case plan and

agreed that placing the child in the agency's permanent custody is in the child's best interest. The court found the father did not appear at the permanent custody hearing, did not obtain independent housing, did not successfully complete substance abuse or mental health counseling, and "has done nothing to try to demonstrate that he could provide a legally secure permanent placement" for the child.

{¶30} The court thus granted the agency permanent custody of the child. This appeal followed.

{¶31} In his sole assignment of error, the father argues that the trial court's finding that the child has been in the agency's temporary custody for twelve or more months of a consecutive twenty-two-month period is against the manifest weight of the evidence. The father asserts the permanent custody statutes are designed to afford each parent at least twelve months to work towards reunification before an agency may seek permanent custody of a child. The father contends that because he was not made a party to the case until December 28, 2017, he was not afforded at least twelve months to work towards reunification before the agency filed its September 21, 2018 permanent custody motion.

Standard of Review

{¶32} A reviewing court generally will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 53 (4th Dist.). When an appellate court reviews whether a trial court's permanent custody decision is against the manifest weight of the evidence, the court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence,

the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.’ ” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist. 2001), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶33} In a permanent custody case, the ultimate question for a reviewing court is “whether the juvenile court’s findings * * * were supported by clear and convincing evidence.” *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 43. In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). “Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court’s decision is not against the manifest weight of the evidence.” *R.M.* at ¶ 55.

{¶34} Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, “ ‘clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.’ ” *Thompkins* at 387, 678 N.E.2d 541, quoting *Martin* at 175, 485 N.E.2d 717. A reviewing court should find a trial court’s permanent custody decision against the manifest weight of the evidence only in

the “ ‘exceptional case in which the evidence weighs heavily against the [decision].’ ”
Id., quoting *Martin* at 175, 485 N.E.2d 717.

Permanent Custody Principles

{¶35} A parent has a “fundamental liberty interest” in the care, custody, and management of his or her child and an “essential” and “basic civil right” to raise his or her children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990); accord *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶¶ 8-9. A parent’s rights, however, are not absolute. *D.A.* at ¶11. Rather, “ ‘it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.’ ” *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting *In re R.J.C.*, 300 So.2d 54, 58 (Fla.App.1974). Thus, the State may terminate parental rights when a child’s best interest demands such termination. *D.A.* at ¶ 11.

Permanent Custody Framework

{¶36} A children services agency may obtain permanent custody of a child by (1) requesting it in the abuse, neglect or dependency complaint under R.C. 2151.353, or (2) filing a motion under R.C. 2151.413 after obtaining temporary custody. In this case, the agency sought permanent custody of the child by filing a motion under R.C. 2151.413. When an agency files a permanent custody motion under R.C. 2151.413, R.C. 2151.414 applies. R.C. 2151.414(A).

{¶37} R.C. 2151.414(B)(1) specifies that a trial court may grant a children services agency permanent custody of a child if the court finds, by clear and convincing

evidence, that (1) the child's best interest would be served by the award of permanent custody, and (2) any of the following conditions applies:

(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.

{¶38} In the case at bar, the trial court found that the child had been in the agency's temporary custody for more than twelve months of a consecutive twenty-two-month period, and thus R.C. 2151.414(B)(1)(d) applies. The father challenges the court's finding. He asserts that the trial court mistakenly denoted July 7, 2017, the date of removal, as the starting date for the twelve-month period. He argues that at the earliest, the starting date would have been September 5, 2017, which is sixty days after the date of

the child's removal. The father then claims, however, that because he had not been identified as the biological father as of September 5, 2017, the twelve-month time period could not start running. The father alleges that the twelve-month period could not begin to run until December 28, 2017, when he was made a party to the case. The father thus contends that the agency could not rely upon R.C. 2151.414(B)(1)(d) to obtain permanent custody of the child.

{¶39} We recognize that the “ ‘12 of 22’ provisions set forth in R.C. 2151.413(D)(1) and R.C. 2151.414(B)(1)(d) balance the importance of reuniting a child with the child's parents against the importance of a speedy resolution of the custody of a child.” *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1176, ¶ 22. The “12 of 22” provisions in the permanent custody statutes are intended to provide “parents with 12 months to work toward reunification before an agency can institute a permanent custody action asserting R.C. 2151.414(B)(1)(d) grounds.” *Id.* at ¶ 22. Accordingly, “[b]efore a public children-services agency or private child-placing agency can move for permanent custody of a child on R.C. 2151.414(B)(1)(d) grounds, the child must have been in the temporary custody of an agency for at least 12 months of a consecutive 22-month period.” *Id.* at paragraph one of syllabus. Moreover, “the time that passes between the filing of a motion for permanent custody and the permanent custody hearing does not count toward the 12-month period set forth in R.C. 2151.414(B)(1)(d).” *Id.* at ¶26.

{¶40} A plain reading of the statute suggests that the trial court correctly found the child had been in the agency's temporary custody for twelve or more months of a consecutive twenty-two-month period. On March 22, 2018, the court adjudicated the

child abused and dependent. On July 7, 2017, the child was released from the hospital and placed in the agency's temporary custody. The father agrees that July 7, 2017 was the date of the child's removal from the home. Sixty days after the child's removal would have been September 5, 2017. September 5, 2017 is earlier than the date of adjudication, March 22, 2018. Thus, pursuant to R.C. 2151.414(B)(1)(e), the agency's temporary custody began on September 5, 2017. Therefore, when the agency filed its September 18, 2018 permanent custody motion, the child had been in its temporary custody for more than twelve months of a consecutive twenty-two-month period.

{¶41} Moreover, the father has not cited any Ohio cases that support his assertion that a child will be deemed to enter a children services agency's temporary custody, for purposes of R.C. 2151.414(B)(1)(d), based upon the date a parent is made a party to the action or discovers that the parent is the child's biological parent. The father refers to one case in which the court recognized the uniqueness of the argument but ultimately rejected it. *In re I.D.*, 7th Dist. Columbiana No. 09 CO 13, 2009-Ohio-6805, 2009 WL 4985234.

{¶42} In *I.D.*, the father argued that even though the child had been removed from the mother's home months earlier, the twelve-month time period did not start to run against him until his paternity was established. The appellate court rejected the father's argument. The court stated: "The statutory language is clear that temporary custody is deemed to have started either on the adjudication date or sixty days after removal from the home, whichever is earlier. Sixty days after removal from the home, which was removal from the mother, was the earlier date. Nothing in the statute indicates that this date would not apply to [the father]." *Id.* at 55. The court did, however, recognize the

potential unfairness of concluding that the twelve-month time period began to run against the father even though the father had been unaware that he was the biological father at the time of the child's removal from the mother's care. *Id.* at ¶ 56. The court nevertheless affirmed the trial court's decision granting the agency permanent custody of the child based upon R.C. 2151.414(B)(1)(d).

{¶43} Consequently, because the father agrees that the child was removed from the home on July 7, 2017, the child had been in the agency's temporary custody for twelve or more months of a consecutive twenty-two-month period at the time the agency filed its permanent custody motion.

{¶44} Accordingly, based upon the foregoing reasons, we overrule the father's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas 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.

McFarland, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.