[Cite as *In re D.A.*, 2012-Ohio-1104.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re D.A., A.A.

Court of Appeals No. L-11-1197

Trial Court No. JC 10201866

DECISION AND JUDGMENT

Decided: March 16, 2012

* * * * *

Karin L. Coble, for appellant.

Jill E. Wolff, for appellee Lucas County Children Services.

Ann M. Baronas and Charles S. Rowell, Jr., for appellee guardians ad litem.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, C.P., is a father who appeals an August 5, 2011 judgment of the Juvenile Division of the Lucas County Court of Common Pleas that awarded permanent custody of his minor daughter, D.A., and minor son, A.A., to Lucas County Children

Services ("LCCS"). K.A. is the mother of the children. K.A. is not a party to this appeal. Both mother and father opposed the award of permanent custody of the children to LCCS in the trial court.

{¶ 2} Mother was arrested in Toledo on February 2, 2010, on criminal charges brought against her in Monroe County, Michigan. At the time of arrest, mother and the children resided together in a homeless shelter in Toledo. On the following day, LCCS applied to the trial court for an ex parte order with respect to child custody. A trial court magistrate granted the request and ordered that LCCS take shelter care custody of the children provided that LCCS filed a complaint concerning the children and secured a shelter care hearing on custody within 72 hours.

{¶ 3} On February 4, 2010, LCCS filed a complaint in dependency, neglect, and abuse concerning D.A. and A.A. A trial court magistrate conducted a shelter care hearing on that date. Father attended. The magistrate awarded interim temporary custody of D.A. and A.A. to LCCS and scheduled a further hearing for March 31, 2010.

{¶ 4} At a hearing on March 31, 2010, mother and father, both represented by counsel, consented to an adjudicatory finding of dependency and neglect with respect to D.A. and A.A. The court magistrate issued a decision on that date and found by clear and convincing evidence that D.A. and A.A. were dependent and neglected children. The magistrate also found that it was in the best interests of the children to award temporary custody to LCCS. The magistrate awarded temporary custody of D.A. and A.A. to

LCCS. The trial court approved the judgment and adopted it as the decision of the trial court in a judgment filed on April 27, 2010.

{¶ 5} LCCS provided plan services for both mother and father. Father submitted to court ordered genetic testing to establish parentage. Test results confirmed that father is the biological father of D.A. and A.A.

{¶ 6} LCCS filed a motion for permanent custody of D.A. and A.A. on November 30, 2010. The trial court conducted a hearing on the motion on June 20 and 27, 2011 and July 6, 2011. Father appeals the trial court's judgment filed on August 5, 2011, granting the motion and awarding permanent custody of D.A. and A.A. to LCCS.

{¶ 7} Father asserts two assignments of error on appeal:

> Assignment of Error One: The judgment terminating Father's parental rights is unsupported by clear and convincing evidence such that the essential statutory elements have not been met.
>
> Assignment of Error Two: The grant of permanent custody to LCCS was against the children's best interest.

{¶ 8} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28. The interest in the care, custody, and control of one's children is "one of the oldest of the fundamental liberty interests recognized in American law." *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895

N.E.2d 809, ¶ 39, citing *Troxel*, 530 U.S. at 65. As a termination of parental rights to raise one's children strikes at the core of the parent-child relationship, parents "must be afforded every procedural and substantive protection the law allows." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 9} R.C. 2151.353(A)(4) provides:

> (A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:
>
> * * *
>
> (4) Commit the child to the permanent custody of a public children services agency or private child placing agency, if the court determines in accordance with division (E) of section 2151.414 of the Revised Code that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D)(1) of section 2151.414 of the Revised Code that the permanent commitment is in the best interest of the child. If the court grants permanent custody under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding.

{¶ 10} In the August 5, 2011 judgment, the trial court granted the motion of LCCS for permanent custody of the children. The court found pursuant to R.C. 2151.353(A)(4) and 2151.414(E)(1), (2), (4), and (14) and by clear and convincing evidence, that D.A.

and A.A. could not and should not be placed with either parent within a reasonable period of time and that pursuant to R.C. 2151.414(D) an award of permanent custody to LCCS was in the best interests of the children.

{¶ 11} Under Assignment of Error No. 1, father argues that a finding of parental unsuitability under R.C. 2151.414(E) was not supported by clear and convincing evidence either under subparagraphs (1), (2), (4) or (14) of the statute. The statute provides that should the court determine by clear and convincing evidence any one of the listed factors under R.C. 2151.414(E) exists, as to each of the child's 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). Under Assignment of Error No. 2, father argues that the grant of permanent custody to LCCS was against the children's best interests.

Mother

{¶ 12} The case plan services provided mother included diagnostic assessment, psychological evaluation, and domestic violence victim services. Nancy Bain of Central Access diagnosed mother, in a March 1, 2010 assessment, to be bipolar with borderline personality disorder to be ruled out. Ms. Bain referred mother to Unison Behavioral Health Group for treatment. Ramona Bethany, a clinical therapist at Unison, treated mother for depression and anxiety.

{¶ 13} Mother also initiated treatment with another clinical therapist, Nancy Bowman, of Lutheran Social Services of Northwest Ohio. Ms. Bowman saw mother in

treatment for approximately one year. Ms. Bowman diagnosed mother's condition as major depression, recurrent with delusional disorder, not otherwise specified ("NOS"). There was evidence at trial that mother made up many stories that could not have occurred. A psychological evaluation stated mother could not parent her children long term.

{¶ 14} Expert testimony at trial indicated that additional mental health treatment for mother is particularly warranted and mother needed very long-term mental health treatment. No party disputes that the severity of mother's mental illness made her unable to provide an adequate home for the children at the time of the hearing and for a period of more than one year after the hearing. It is also not disputed that a return of child custody to mother is not in the best interests of the children.

Father

{¶ 15} At the time of mother's arrest for charges in Monroe County, Michigan, father had outstanding warrants for his arrest in the state of California and had falsified his identity for six years. During that period, father and mother moved state to state. Father lived under his brother's name. At the time of mother's arrest, father held Ohio state identification identifying him as his brother.

{¶ 16} At the hearing on the motion to award permanent custody of the children to LCCS, father testified that he was convicted of a sex offense involving a child in the state of California. Under the terms of his sentence he was required to register as a sex offender in the state and to attend a one-year sex offender treatment program. Father

admits that he has never registered as a sex offender either in California or Ohio. He has never attended a sex offender treatment program.

{¶ 17} The requirements for registration and treatment were included in the conditions of his probation for the sex offense. Father admits that he left the state of California while on probation without notice or permission. Criminal records from the state of California were admitted in evidence in the trial court and disclose that in 1997 a California court revoked father's probation in the case and issued a bench warrant for father's arrest.

{¶ 18} Father testified that at the time of mother's arrest he learned that there was also another outstanding warrant for his arrest in California. That warrant concerned a different criminal charge. Lori Segura testified that she is an investigator for LCCS, assigned to this case, and that her investigation disclosed that the second warrant arose from a 2001 charge in California of sexual battery, a felony.

{¶ 19} The case plan for father included father undergoing a diagnostic assessment and psychological evaluation and successfully completing a sex offender treatment program. Father was also to follow any and all recommendations arising from his evaluations and treatment.

{¶ 20} Father completed an assessment by Lloyd Letterman in March 2010. Julie Miller, the LCCS continuing caseworker assigned to this case, testified that she spoke with father on several occasions and gave him names and phone numbers to contact to secure sex offender treatment. Ms. Miller also testified that father stated throughout the

case that he did not have enough money to pay for the sex offender treatment. He was told that LCCS does not pay for sex offender treatment.

{¶ 21} At the hearing on the motion to award permanent custody to LCCS, father testified that he lacked funds for treatment and that he had been unemployed until securing employment three months before the hearing. Even after securing employment father made no effort to secure sex offender treatment. Father also hid the fact of his employment from the LCCS caseworker and the guardians ad litem. Father first disclosed in these proceedings that he had secured employment at the hearing on June 20, 2011.

{¶ 22} Father testified at the hearing that for the prior three months, he had earned $1,500 per month. He also testified that he did not believe he needed sex offender treatment and that he intentionally stopped cooperating with the LCCS caseworker once the agency filed its motion for permanent custody. The motion was filed on November 30, 2010.

{¶ 23} In its decision the trial court found that father was not a credible witness. The court described his testimony as "inconsistent and unbelievable."

R.C. 2151.414(E)(1)

{¶ 24} Father argues that LCCS failed to prove by clear and convincing evidence that the facts in this case come within the circumstances set forth in R.C. 2151.414(E)(1). R.C. 2151.414(E)(1) provides:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 25} LCCS has contended that father failed continuously and repeatedly to substantially remedy a condition that caused D.A. and A.A. to be placed outside the home in that he failed to attend sex offender treatment. Father argues first that the failure to attend sex offender treatment was not a condition that caused a loss of custody of the children, within the meaning of R.C. 2151.414(E)(1). LCCS and the guardians ad litem argue that the children were removed from father due in part to issues arising from past and pending criminal prosecutions of father for sexual offenses.

{¶ 26} The record demonstrates that at the time the children were originally removed, both mother and father had outstanding felony warrants against them for their arrest. In the dependency and neglect complaint, LCCS asserted that father was living

under a false name and had been convicted in California of a sex related offense involving a minor. The complaint also stated that father had violated parole on the conviction. While the facts later demonstrated that father violated his probation, not parole, and that the violation included failures to register as a sex offender and failure to secure sex offender treatment, there can be no reasonable dispute that issues arising out of criminal prosecution in California were a cause of dependency and neglect upon which placement with LCCS was based. *See* R.C. 2151.353(A)(2).

{¶ 27} Father next contends that a showing under R.C. 2151.414(E)(1) requires the children's services agency to establish by clear and convincing evidence that the agency made reasonable case planning and diligent efforts to remedy the condition that caused the children to be removed from the home. Father argues that he could not afford sex offender treatment and that LCCS did not provide him any assistance to obtain it. He argues that LCCS was neither reasonable nor diligent in assisting him to secure sex offender treatment.

{¶ 28} Appellees argue that LCCS was not required to pay for sex offender treatment and further that sex offender treatment was reasonably available to father in the community at a cost set on a sliding scale depending on the ability to pay. LCCS cites the testimony of caseworker Miller in support of the contention that sex offender treatment was available in the community on a sliding scale based upon the ability to pay.

{¶ 29} We have reviewed the record, including the testimony of caseworker Miller. Our review of the record, however, discloses that the caseworker did not testify

on the issue of availability of sex offender treatment in the community based upon on a sliding scale depending on ability to pay. Father was directly questioned on the issue and denied that billing on a sliding scale was available. He claimed the cost of treatment was $5,000.

{¶ 30} R.C. 2151.414(E)(1) presents one of 16 means under R.C. 2151.414(E) to establish a finding that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(E). This court has previously considered the requirement under R.C. 2151.414(E)(1) that a children services agency prove by clear and convincing evidence that it employed "reasonable case planning and diligent efforts" to remedy conditions that initially caused removal of a child from the home. We addressed the standard in the decision of *In re A.J.*, 6th Dist. No. L-10-1038, 2010-Ohio-4206, ¶ 37. In that case we concluded "[t]hat the definition of 'reasonable efforts' adopted in some states makes sense: reasonable efforts means that a children's services agency must act diligently and provide services appropriate to the family's need to prevent the child's removal or as a predicate to reunification." *Id.* We considered an analysis of "reasonable efforts" in Will L. Crossley, Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation (2003), 12 B.U.Pub. Int. L.J. 259, 295-296. *Id.* at ¶ 26-27, 37.

{¶ 31} Sex offender treatment was a service specifically delineated in the case plan. In our view, reasonable case planning and diligent efforts by LCCS under R.C. 2151.414(E)(1) required a showing by LCCS that sex offender treatment was reasonably

available to father under the circumstances. In our view LCCS failed to establish with clear and convincing evidence that sex offender treatment was available in the community at a time when father could attend and at a cost father could pay. Accordingly, we agree with father that LCCS failed to prove by clear and convincing evidence the existence of the R.C. 2151.414(E)(1) factor in this case.

R.C. 2151.414(E)(2)

{¶ 32} R.C. 2151.414(E)(2) applies upon a showing of "[c]hronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate home" at present and within one year of the hearing. Here, the trial court did not specify whether its finding under R.C. 2151.414(E)(2) extended to both mother and father. On appeal, LCCS has acknowledged that the finding relates to mother alone.

R.C. 2151.414(E)(4)

{¶ 33} R.C. 2151.414(E)(4) provides:

> (4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.

{¶ 34} The trial court found "that father is a sexual offender and has not completed a sexual offender's program in order to reduce the risk to his children." The court referred to the California conviction and failure of father to complete sex offender

treatment and to register as a sex offender as required under that conviction. The court also considered the 2001 charge for another sex offense. Father took no action to address that criminal charge once he learned that California would not extradite him to stand trial, due to the cost of extradition.

{¶ 35} Under father's case plan, father was to attend a sex offender treatment program and to follow all recommendations of the program. LCCS made referrals to places where father could secure the treatment.

{¶ 36} Father acknowledges that a parent's unwillingness to utilize services provided him may demonstrate a basis for a finding under R.C. 2151.414(E)(4). *In re Steven C. O.*, 6th Dist. No. WM-08-010, 2008-Ohio-5206, ¶ 24. However, father argues that he was financially unable, not unwilling, to pursue sex offender treatment. Father claims that evidence is lacking in the record to support a finding by clear and convincing evidence under R.C. 2151.414(E)(4).

{¶ 37} LCCS argues that father's own testimony demonstrates that he failed to register, start, or complete sex offender treatment in the three months after father gained employment. Father also hid the fact of his employment from the LCCS caseworker and the guardians ad litem. Father also testified that he does not believe he needs sex offender treatment. Father also admitted that he intentionally failed to cooperate with LCCS once it filed a motion for permanent custody in November 2010.

{¶ 38} The trial court specifically found that father's testimony at the disposition hearing was "inconsistent and unbelievable." In our view, there is competent, credible

evidence in the record supporting the conclusion that father simply refused to pursue treatment. Such a conclusion is supported by father's conduct of living for years under an assumed identity in an apparent effort to avoid obligations under a sentence for a sex offense that required him to register as a sex offender and to secure sex offender treatment. It is also furthered by father's failure to disclose to LCCS and the guardians ad litem his employment and failure to take any step to register or begin treatment after securing employment.

{¶ 39} Under these circumstances, we conclude that the trial court's determination that father's actions in failing to secure sex offender treatment demonstrated an unwillingness to provide an adequate permanent home for D.A. and A.A. within the meaning of R.C. 2151.414(E)(4) is supported by clear and convincing evidence.

R.C. 2151.414(E)(14)

{¶ 40} The R.C. 2151.414(E)(14) factor reads:

> (14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

{¶ 41} Father argues that a finding under R.C. 2151.414(E)(14) against him is unsupported in the record. Father argues that there is no evidence in the record demonstrating that he is unwilling to prevent the children from suffering abuse or neglect. Father argues that although he is a convicted sex offender that he has not abused or

harmed the children and that his status as a sex offender alone is not a basis for a finding under R.C. 2151.414(E)(14).

{¶ 42} The trial court found that father "is a sexual offender and has not completed a sexual offender's program in order to reduce the risk to his children." The court noted that the sexual offense conviction involved a minor and that father had not completed treatment or registered as a sex offender. The court also considered that there is also a more recent charge for a sex offense pending against father in California.

{¶ 43} LCCS argues that father's failure under R.C. 2151.414(E)(14) was a failure to treat and not merely father's status as a sex offender. LCCS and the guardians ad litem argue that the facts demonstrate father failed to complete or even start his sexual offender's treatment which demonstrates an unwillingness to take action to prevent harm to the children under R.C. 2151.414(E)(14).

{¶ 44} We recognize that the Ohio Supreme Court has not held that sex offender status alone constitutes a basis for restricting or terminating parental rights. *In re K.H.*, *supra*, at ¶ 52. However, a parent must protect his or her child from risks of sexual abuse. *Id*. at ¶ 47, 56; *In re B.K.*, 6th Dist. No. L-10-1053, 2010-Ohio-3329, ¶ 70; R.C. 2151.414(E)(14).

{¶ 45} We agree that the trial court's finding in this case under R.C. 2151.414(E)(14) is not based upon father's status as a sex offender alone. The trial court concluded that father was a sex offender and failed to complete sex offender treatment "in order to reduce the risk to his children." The requirement to secure treatment was

central to plan services for father. Father had avoided an obligation to secure such treatment under a criminal sentence in California for years. In addition to the original conviction for a sex offense involving a minor, appellant has an outstanding charge in California of sexual battery that was filed in 2001.

{¶ 46} In our view, the finding that father was unwilling to secure sex offender treatment and that the failure constituted an unwillingness to protect the children from risk of sexual abuse within the meaning of R.C. 2151.414(E)(14) is supported by clear and convincing evidence in the record.

{¶ 47} We find father's Assignment of Error No. 1 is not well-taken.

{¶ 48} Once a trial court makes a finding under R.C. 2151.414(E), the court must also find that permanent custody is in the child's best interests in order to award permanent custody to a public children services agency. R.C. 2151.414(A) and (D)(1). Under R.C. 2151.414(D)(1), the court is required to consider all relevant factors including factors identified in R.C. 2151.414(D)(1)(a)-(e) in making that determination. The findings of the best interests of the child must be supported by clear and convincing evidence. R.C. 2151.414(B). Under Assignment of Error No. 2, father argues that the grant of permanent custody to LCCS was against the best interests of D.A. and A.A.

{¶ 49} R.C. 2151.414(D)(1)(a)-(e) provides:

> (D)(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.

{¶ 50} Father argues that the trial court failed to consider whether placement of the children could be achieved without granting permanent custody to LCCS. Father argues that placement with LCCS would have been unnecessary had the agency paid for sex offender treatment. In making this argument father also disputes any finding under R.C. 2151.414(E)(14) applies to him. He also claims the remainders of the factors establishing the best interests of the children under R.C. 2151.414(D)(1) favor him.

{¶ 51} Both LCCS and the guardians ad litem for the children disagree. We agree with the guardians ad litem that at the time of trial father remained a fugitive from justice in California on a sexual battery charge, a felony. He continued to be an unregistered and untreated child sex offender. He also remained uncooperative with the LCCS caseworker and guardians ad litem by withholding information as to where he lived and his employment. Father admittedly refused to cooperate after LCCS filed its motion for permanent custody.

{¶ 52} The trial court considered the best interests of the children under R.C. 2151.414(D). A.A. was largely uncommunicative when he originally was placed in custody of LCCS. He was ten years of age and did not speak in an age appropriate manner. When he did speak, he spoke in what has been described as a type of gibberish, cartoon language, Pokeman.

{¶ 53} A.A. has been identified as having special needs. He was diagnosed as having a learning and reading disorder. In August 2010 he was diagnosed with an anxiety disorder NOS and adjustment disorder with mixed anxiety and depressed mood. The diagnosis indicated that personality disorder and psychotic disorder needed to be ruled out.

{¶ 54} A.A. underwent individual counseling with Kris Buffington at A Renewed Med. With counseling, A.A. is able to start a conversation on his own. He no longer speaks Pokeman. He knows how to socially interact with others. The LCCS caseworker described A.A. as having made tremendous progress.

{¶ 55} D.A. was age 11 when first placed with LCCS. She was provided special services, including individual counseling with Mr. Buffington. The LCCS caseworker described D.A. as being sad and crying at the time of placement with LCCS and that she is now described as outgoing and happy. She is a good student and a member of the Junior National Honor Society.

{¶ 56} Both guardians ad litem for the children testified that they conducted their own investigations and have concluded that an award of permanent custody of the children to LCCS is in their best interests. Both testified as to the children's wishes. D.A. was noncommittal and did not want to say anything against or in favor of either parent. She was content in the present placement with foster parents. Ms. Baronas testified that both children are particularly bonded to their present placement. The present foster parents have expressed an interest in adopting the children.

{¶ 57} We earlier addressed the fact that a finding of an unwillingness of father to pursue sex offender treatment was supported by clear and convincing evidence in the record as are findings under R.C. 2151.414(E)(4) and (14).

{¶ 58} We conclude that the trial court's determination that an award of permanent custody is in the best interests of D.A. and A.A. is supported by clear and convincing evidence in the record. Accordingly, we find father's Assignment of Error No. 2 is not well-taken.

{¶ 59} We conclude that father has not been denied a fair trial. We affirm the judgment of the Juvenile Division of the Lucas County Court of Common Pleas. Father is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE