[Cite as *In re J.K.*, 2015-Ohio-1393.]

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

In re J.K., K.K.

Court of Appeals No. L-14-1225

Trial Court No. JC 13235076

DECISION AND JUDGMENT

Decided: April 6, 2015

* * * * *

Adam H. Houser, for appellants.

David T. Rudebock, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} V.V. and M.K., the mother and father, respectively, of J.K. and K.K., appeal the September 24, 2014 decision of the Lucas County Court of Common Pleas, Juvenile Division, which terminated their parental rights and placed their children in the permanent custody of Lucas County Children Services ("LCCS"). For the reasons that follow, we affirm the trial court's judgment.

I. Background

A. LCCS Becomes Involved

{¶ 2} J.K, born April 2007, and K.K., born August 2013, came to the attention of LCCS in September of 2013, when K.K. tested positive at birth for opiates and cocaine. At that time, V.V., the children's mother, also tested positive for opiates and cocaine, as well as marijuana. She admitted that she sought no prenatal treatment during her pregnancy for fear that her drug use would be discovered. She and M.K. acknowledged their active use of cocaine, marijuana, heroin, and suboxone. They also reported that they were living in a house with no working utilities and were being evicted from the home.

{¶ 3} LCCS filed a complaint in dependency, neglect, and abuse and a motion for shelter care hearing on September 10, 2013. An ex parte order was issued granting the motion for shelter care and removing the children from the home. J.K. was placed in the temporary custody of his grandmother, J.V., and K.K. was placed in the temporary custody of LCCS. The court appointed J. Michael Salmon to serve as both guardian ad litem ("GAL") and attorney for the children. V.V. and M.K. were referred to the Lucas County Family Drug Court Program ("FDC"). They were ordered to attend 12-step meetings, to obey the rules and regulations of UNISON, to comply with treatment and case plan requirements, and to provide urine samples as required by TASC. They ultimately conceded to a finding of dependency and neglect.

{¶ 4} LCCS filed an initial case plan, with a goal of reunification, approved by the court on October 9, 2013. The case plan required V.V. and M.K. to obtain and maintain

adequate housing, obtain the financial means to support themselves, engage in substance abuse treatment and alleviate substance abuse issues so that they could provide a stable and sober environment for their children, attend and successfully complete parenting classes, and visit regularly with their children. They were permitted supervised visitation with the children. LCCS conducted periodic reviews and amendments to the case plan.

B. V.V. and M.K. Fail to Meet the Goals of the Case Plan

{¶ 5} V.V. and M.K. got off to a rough start in FDC. They failed to appear in court as ordered and were found in contempt. They tested positive for drug use and failed to make a number of required urine drops. There was a brief period of compliance with treatment and case plan requirements in November and December of 2013. During that period, V.V. participated in residential programming through Sparrow's Nest and M.K. participated in residential programming through the Cherry Street Mission. M.K. successfully completed intensive outpatient treatment at UNISON, but relapsed on January 14, 2014, and left the Cherry Street Mission on January 18, 2014. He unsuccessfully sought to be released from FDC. When his motion was denied, he ceased appearing at FDC. V.V. left Sparrow's Nest on January 17, 2014, and also ceased appearing at FDC. Thereafter, V.V. and M.K. failed to make their whereabouts known.

{¶ 6} Arrest warrants were ultimately issued for both V.V. and M.K. M.K. was ordered to appear at COMPASS. Arrangements were made for inpatient treatment for V.V. Neither V.V. nor M.K. followed through.

C. LCCS Moves for Permanent Custody

{¶ 7} On March 27, 2014, LCCS sought a change in disposition and requested an emergency hearing after learning that J.V. had been arrested for felonious assault, was in jail, and had left J.K. in the care of her cousin, who too had substance abuse problems and a history with LCCS. Shelter care placement was granted to LCCS. The court granted temporary custody of J.K. to LCCS on June 2, 2014, so that a permanency plan could be pursued.

{¶ 8} On June 6, 2014, LCCS filed its motion for permanent custody. It asserted that terminating V.V.'s and M.K.'s parental rights and granting permanent custody to LCCS was in the best interest of the children. In support of its assertions, LCCS described the parents' failure to complete the case plan requirements. With respect to the children's status, LCCS stated that J.K. did not have behavioral issues but struggled with reading and math. He was being referred to counseling to address separation, loss, and grief issues. K.K. was no longer on methadone, was evaluated by Help Me Grow with no services recommended, and was developmentally on target. At that time, the children were with different foster parents, but LCCS represented that K.K.'s foster mother may be willing to adopt both children. The option of placing the children with a relative in Michigan was also being explored.

D. V.V. Waives Her Right to a Hearing and M.K. Fails to Appear

{¶ 9} LCCS's motion was set for a hearing on September 22, 2014. M.K. failed to appear, however, his lawyer was present. V.V. was there with her attorney. GAL Salmon and LCCS caseworker, Patricia Samson, were also there.

{¶ 10} V.V. opted to waive her rights to a hearing on LCCS's complaint and motion. She signed the necessary forms and the court examined V.V. to ensure that she understood her rights and was waiving them voluntarily, knowingly, and intelligently. V.V. and her attorney were then permitted to leave, and LCCS presented evidence in support of its motion.

{¶ 11} Samson and Salmon testified. Samson testified in support of the facts presented in LCCS's motion and generally as to V.V.'s and M.K.'s failure to meet the case plan requirements. She said that both parents visit weekly with their children. She described that J.K. is struggling because he believes he is going back home or to live with a relative. He has had problems bonding with his current and former foster parents which Samson attributed to J.K.'s belief that he is going home. She said that J.K. was comfortable living with his grandmother, but she explained that J.V.'s arrest made placement with her not possible. V.V. and M.K. indicated that another family member may be interested in placement, but they never provided the names of those family members. Samson recalled that during one of her visits to the foster home, J.K. approached her and asked if he was going to live with his grandfather; he did not know which grandfather or where he lives.

{¶ 12} Salmon also testified. He said that he conducted an independent investigation, including meeting with each of the foster parents with whom the children had been placed. He reviewed LCCS and school records and met with V.V. and M.K. several times. He said that he no longer knows how to reach them because he has no current contact information. Salmon provided his opinion that termination of parental rights would be in the children's best interest. He said that K.K. is doing well. He acknowledged, however, that J.K.'s situation is different. He remains attached to his parents—they visit regularly and apparently made representations to him that he would be going somewhere else. Salmon said that he hopes the current foster parents will adopt the children, but recommended that J.K. be permitted to maintain contact with his parents.

{¶ 13} The court granted LCCS's motion, terminated V.V.'s and M.K.'s parental rights, and placed K.K. and J.K. in the permanent custody of LCCS. V.V. and M.K. appealed the trial court's decision, assigning the following error for our review:

> 1. The termination of Appellants' parental rights was not in the best interest of the child because there was a conflict between the wishes of child one and the report and recommendation of the Guardian ad Litem and there was no separate attorney appointed for child one.

II. Law and Analysis

{¶ 14} In their sole assignment of error, V.V. and M.K. challenge the trial court's failure to grant separate counsel to J.K. in light of his desire to remain with his parents. They argue that J.K.'s wishes were in conflict with the recommendation of the GAL, thereby necessitating the appointment of separate counsel.

{¶ 15} Before we address the merits of the assignment of error, we note that neither V.V. nor M.K. raised this objection in the trial court. We are, therefore, limited to a plain-error analysis. The plain error doctrine originated in criminal law and is embodied in Crim.R. 52(B). It provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). This doctrine may be applied in civil cases as well, but only where exceptional circumstances require its application "to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, public confidence in, judicial proceedings." (Citations and quotations omitted.). *In re Amber G. & Josie G.*, 6th Dist. Lucas No. L-04-1091, 2004-Ohio-5665, ¶ 7-8.

{¶ 16} R.C. 2151.414 provides the analysis that a court must undertake when considering whether to terminate parental rights and vest permanent custody in a children's services agency. Under that provision, the court must first find that one of the circumstances described in R.C. 2151.414(B)(1)(a)-(d) exists. Subsection (b) of that provision requires a finding that the child is abandoned; subsection (c) requires a finding

that the child is orphaned and there are no relatives who are able to take permanent custody; and subsection (d) requires a finding that the child has been in the temporary custody of a public children's services agency or a private child placing agency for at least 12 months of a consecutive 22-month period. Subsection (a) requires a finding that the child has not been abandoned or orphaned, has not been in the custody of a public children's services agency or a private child placing agency for at least 12 months of a consecutive 22-month period, and that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *In re E.B.*, 12th Dist. Warren Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶ 14-15.

{¶ 17} If the court finds that R.C. 2151.414(B)(1)(b), (c), or (d) applies, it must next determine whether granting permanent custody to the agency is in the child's best interest. This requires the court to evaluate the factors enumerated in R.C. 2151.414(D)(1). *In re K.M.D.*, 4th Dist. Ross. No. 11CA3289, 2012-Ohio-755, ¶ 30. If the court finds that R.C. 2151.414(B)(1)(a) applies, it must consider both whether granting permanent custody to the agency is in the child's best interest *and* whether any of the factors enumerated in R.C. 2151.414(E) are present which would indicate that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *In re B.K.*, 6th Dist. Lucas No. L-10-1053, 2010-Ohio-3329, ¶ 43.

{¶ 18} All of the court's findings under R.C. 2151.414 must be by clear and convincing evidence. "Clear and convincing evidence" is evidence sufficient for the trier of fact to form a firm conviction or belief that the essential statutory elements for a

termination of parental rights have been established. *In re Tashayla S.*, 6th Dist. Lucas No. L-03-1253, 2004-Ohio-896, ¶ 14; *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Clear and convincing evidence is the highest level of evidentiary support necessary in a civil matter. *In re Stacey S.*, 136 Ohio App.3d 503, 520, 737 N.E.2d 92 (6th Dist.1999). On appeal from an order terminating parental rights, we will not reverse the trial court's judgment if, upon a review of the record, we determine that the trial court had before it sufficient evidence to satisfy the clear-and-convincing-evidence standard. *In re Terrence*, 162 Ohio App.3d 229, 2005-Ohio-3600, 833 N.E.2d 306, ¶ 86 (6th Dist.), citing *In re Wise*, 96 Ohio App.3d 619, 626, 645 N.E.2d 812 (9th Dist.1994).

{¶ 19} Apparently finding that R.C. 2151.414(B)(1)(a) applies, the trial court determined that there were applicable (E) factors indicating that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent, and it determined that under section (D)(1), granting permanent custody to LCCS was in the best interest of the children.

{¶ 20} Under section (E), the trial court determined R.C. 2151.414(E)(1), (2), and (16) to be applicable. Those sections provide:

> (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.

(2) Chronic 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 permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code.

(16) Any other factor the court considers relevant.

{¶ 21} As to (1), the court found that V.V. and M.K. were referred to services to alleviate their respective substance abuse issues, stabilize their respective mental health issues, educate them on appropriate parenting techniques, and assist them with obtaining appropriate and stable housing. It concluded that V.V. and M.K. did not avail themselves of these services and failed to alleviate the issues that caused J.K. and K.K. to be removed from their care.

{¶ 22} As to (2), the court found that both V.V. and M.K. have chronic chemical dependency issues that are so severe that they are presently unable to provide a permanent home for J.K. and K.K., and would remain unable to do so a year from now.

{¶ 23} As to (16), the court noted that V.V. stipulated that she believes an award of permanent custody would be in the best interest of the children, and it noted that M.K. failed to appear for the hearing.

{¶ 24} Turning to the R.C. 2151.414(D)(1) factors, the court considered whether granting permanent custody to LCCS was in the children's best interest. R.C. 2151.414(D)(1) provides:

> In determining the best interest of a child at a hearing held pursuant to division (A) of this section * * *, 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;
>
> (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;

{¶ 25} As to (a), the court found that the children interact well with the prospective adoptive placement.

{¶ 26} As to (b), the court found that the GAL, after an independent investigation, recommended permanent custody as being in the best interest of the children.

{¶ 27} And as to (d), the court found that the children were in need of a legally secure placement and that an award of permanent custody would facilitate an adoptive placement.

{¶ 28} While we find no error—and V.V. and M.K. appear to assign no error—with respect to the majority of the trial court's conclusions, its findings with respect to R.C. 2151.414(D)(1)(b) warrant discussion.

{¶ 29} The parents' primary challenge is to the failure to appoint independent counsel for J.K. due to his wishes being in conflict with the GAL's recommendation. In truth, however, the GAL's report, filed with the court on the day of the hearing, states that "[J.K.] has refused to state his wishes, although he tells me he is going to live with a relative soon." And at the hearing the GAL provided no testimony as to J.K.'s wishes or whether he ever asked J.K. what his wishes were. Thus it is not apparent that a conflict exists. This in itself poses an issue that we must address.

{¶ 30} The GAL testified as follows:

> Q: In conducting your investigation, have you formulated an opinion as to what you believe to be in the best interest of these two minor children.

A: Yes.

Q: And what is that opinion, please?

A: It's pretty easy with regard to [K.K.]. * * * [J.K.] is a little bit different. I think obviously what it comes to, it's in his best interest, but it's a little more complicated with him. He is very attached to his parents. They did visit him regularly. That's a good thing, but like was testified, he pretty much told me that for whatever reason they told him that he's going to be somewhere else, and I don't know if that's their delusion or what, but that's kind of causing problems with him.

I would move to see him maintain contact with them, but with their substance abuse issues and their failure to follow through, I don't think that that would be - - that there is much chance that he's ever going to be placed back with them. * * * [B]ut as far as the best interest I think it is, given all the circumstances for [J.K.], that permanent custody be granted.

{¶ 31} No mention is made of J.K.'s wishes. J.K.'s wishes are also not addressed in the trial court's judgment entry. The judgment entry states only that "the *guardian ad litem* conducted an independent investigation, and based on that investigation recommended permanent custody as being in the best interest of the minor children."

{¶ 32} Ohio case law is clear that as part of the "best interest" analysis, the trial court *must* consider "[t]he wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child." *In*

re Ridenour, 11th Dist. Lake Nos. 2003-L-146, 2003-L-147, 2003-L-148, 2004-Ohio-1958, ¶ 43, citing R.C. 2151.414(D)(1)(b). Typically, the failure to address this factor warrants reversal. *See, e.g., id.* at ¶ 46; *In re T.M. III*, 8th Dist. Cuyahoga No. 83933, 2004-Ohio-5222, ¶ 44; *In re Lopez*, 3d Dist. Wyandot Nos. 16-05-10, 16-05-12 to 16-05-14, 2006-Ohio-2251, ¶ 42, 58. This is particularly true given that J.K. was seven years old at the time of trial and was presumably capable of expressing his wishes. *See In re Swisher*, 10th Dist. Franklin No. 02AP–1408, 02AP–1409, 2003-Ohio-5446, ¶ 37 (finding three-and-a-half, four-and-a-half, almost-six, and almost-seven-year-old potentially capable of expressing their wishes); *In re Lopez* at ¶ 37 (five-year-old); *In re Ridenour* at ¶ 44 (eight-year-old); *In re T.V.*, 10th Dist. Franklin No. 04AP-1159, 04AP-1160, 2005-Ohio-4280, ¶ 59 (five-year-old); *In re T.M., III* at ¶ 43 (eight-year-old).

{¶ 33} Having said this, we are employing a plain-error analysis here due to the parents' failure to raise this issue in the trial court. "[A]n alleged error is not prejudicial for purposes of plain error review unless, but for the error, the outcome of the trial clearly would have been otherwise." (Internal citations and quotations omitted.) *In re Amber G. & Josie G.*, 6th Dist. Lucas No. L-04-1091, 2004-Ohio-5665, at ¶ 38.

{¶ 34} Neither V.V. nor M.K. attended or participated at the trial. Neither came remotely close to successfully completing the treatment and case plan requirements. And although not elaborated upon, the GAL in his report indicated that J.K. refused to state a preference as to custody, suggesting that there likely is no conflict between the child's wishes and the GAL's recommendation. Given these facts, we cannot say that the failure

to elicit testimony about J.K.'s wishes, to address the factor in the trial court decision, or to appoint independent counsel would have changed the outcome of the case.

{¶ 35} Accordingly, we find that under a plain-error analysis, V.V.'s and M.K.'s sole assignment of error is not well-taken.

III. Conclusion

{¶ 36} On consideration whereof, we find that substantial justice was done the parties complaining and the September 24, 2014 judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, the costs of this appeal are assessed to appellants.

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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

James D. Jensen, J.,
DISSENTS AND WRITES SEPARATELY.

JENSEN, J.

{¶ 37} I respectfully dissent from the majority decision.

{¶ 38} It is often recognized that "parents have a constitutionally protected fundamental interest in the care, custody, and management of their children." *In re R.H.*, 10th Dist. Franklin No. 09AP-127, 2009-Ohio-5583, ¶ 11, citing *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The termination of parental rights has been described as the "family law equivalent of the death penalty in a criminal case." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). As such, parents "must be afforded every procedural and substantive protection the law allows." *Id.* Because the trial court's best interest analysis was incomplete, I believe that reversal and remand is necessary to ensure that V.V. and M.K. are, in fact, afforded every procedural and substantive protection allowed by the law.

{¶ 39} R.C. 2151.414(D)(1) is clear that the trial court *must* consider the wishes of the child in conducting its analysis of the child's best interest. As the cases cited by the majority make clear, the failure to consider this factor requires reversal. In *In re A.S.*, 7th Dist. Mahoning No. 13MA182, 2014-Ohio-4282, ¶ 8-12, 15, the parent argued on appeal that the trial court erred in failing to ascertain the wishes of the child and to determine whether she required independent counsel. The children's services agency argued that the issue had been waived by appellant's failure to raise it in the trial court. The court disagreed. It held:

> The record reflects that the permanent custody case under review involves a five-year-old child. The child was not asked about her desires regarding custody, was not provided independent counsel, and was not given a hearing as to whether she should be appointed counsel. A child is a party to a juvenile custody proceeding and has a right in some cases to independent counsel. When it is not clear whether the child should have counsel, and particularly where the wishes of the child have not been ascertained, the court is required to hold a hearing on the matter. The judgment of the trial court is vacated and the case is remanded for a hearing on whether to appoint counsel for [the child]. *Id.* at ¶ 15.

See also In re B.D., 11th Dist. Lake No. Nos. 2009-L-003, 2009-L-007, 2009-Ohio-2299, ¶ 104 (explaining that "the provisions of R.C. 2151.414(D) are mandatory and 'must be scrupulously observed.'").

{¶ 40} Here, J.K. was seven years old, yet LCCS elicited no testimony as to his wishes. The GAL's report, filed the day of trial, was not discussed or referenced during the hearing nor was it addressed in the trial court's decision. Although that report indicates that J.K. refused to express his wishes, the GAL and the LCCS caseworker testified about J.K.'s difficulty bonding with both sets of non-family foster parents, which they attributed to his belief that he would be going home. They said that V.V. and M.K. visited with J.K. weekly. At the hearing, the GAL went so far as to recommend that J.K. maintain contact with his parents—a request that, of course, cannot be legally mandated.

This information suggests that J.K. may, in fact, have had an opinion that needed to be considered and, if contrary to the GAL's recommendation, independent counsel may have been required.

{¶ 41} I would, therefore, reverse the September 24, 2014 judgment of the Lucas County Court of Common Pleas, Juvenile Division, and remand for the trial court's consideration of J.K.'s wishes.