

[Cite as *In re L.O.*, 2015-Ohio-1458.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101805

IN RE: L.O.

Minor Child

[Appeal by C.C.D.C.F.S.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 11907729

BEFORE: Stewart, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 16, 2015

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant Cuyahoga County Division of Children and Family Services (CCDCFS or the agency) appeals the denial of its motion for permanent custody of L.O, a five-year-old minor, on grounds that the trial court's decision was against the manifest weight of the evidence and an abuse of discretion. For the following reasons, we affirm the decision of the trial court.

{¶2} On April 28, 2011, CCDCFS filed a complaint, requesting temporary custody of L.O. and his then five-month old sister, La.O., after alleging that the children were abused, neglected and dependant. CCDCFS also filed a motion for predispositional emergency custody of the children, pending resolution of the complaint for temporary custody. The court granted the motion for emergency custody. The status of the children was brought to the agency's attention following the hospitalization of La.O. who sustained severe, unexplained head trauma. The parents were suspects in the ongoing police investigation of La.O.'s injuries.

{¶3} Mother was indicted on charges of felony assault, child endangering, and domestic violence in connection with La.O.'s head injuries. She pled guilty to one count of child endangering under R.C. 2919.22(A)¹ on the condition that the other charges be dismissed. After accepting the plea, the court sentenced Mother to a two-year term of community control sanctions.²

¹ R.C. 2919.22(A) states, in pertinent part:

No person, who is the parent, guardian, custodian, person having custody or control,

{¶4} On August 23, 2011, the juvenile court adjudicated La.O. abused and dependent, and L.O. neglected and dependent. As a result, the court granted the request for temporary custody and committed the children to the custody of the agency. On April 17, 2013, CCDCFS filed a motion to modify temporary custody of the children to an order of permanent custody. The court held a hearing on the motion on August 12, 2014. After the hearing, the court granted the agency's motion for permanent custody as to La.O.,³ but in a separate order denied the agency permanent custody of L.O. The court then ordered the agency to return L.O. to the custody of the mother, with agency supervision. On August 15, 2014, this court granted the agency's request for an emergency stay pending appeal.

or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support * * *.

² The record indicates that the father was also indicted on the same charges and also pled guilty to child endangerment under R.C. 2919.22(A). Tr. 32–33.

³ The disposition of La.O.'s case is not part of this appeal.

{¶5} At trial, the court heard the testimony of Kelly Grayson, a social worker from CCDCFS. Grayson informed that court that she has worked closely with both L.O. and La.O. as their social worker since August 2012 when she was assigned the case. When Grayson became involved with the children's case, they had already been in the temporary custody of the agency for one year. Grayson testified that La.O.'s current placement was with a foster care household, where one of her foster parents is a nurse who specializes in pediatric medical care. She testified that L.O. was also in a foster home, after several failed attempts to place L.O. with various relatives.⁴ At the time of trial, La.O. was three-years old and L.O. was five.

{¶6} Grayson testified that the agency developed a case plan for the family. The case plan involved substance abuse classes, parenting classes, and psychological assessments and recommendations for the mother.⁵ The plan also encouraged Mother to find stable housing and some type of employment or income.

⁴ At the time of trial, L.O. was in his fifth temporary custody placement. Initially, he was in the emergency custody of the agency. L.O. was then placed with his maternal aunt, however she gave up custody because she could not properly care for the child. L.O. was then placed with his paternal aunt, who similarly, soon returned L.O. to CCDCFS because she could no longer care for him. L.O. was then placed with a cousin but was removed shortly thereafter due to evidence that the cousin was using drugs. L.O. was then placed in a non-relative foster home, and at the time of trial, was still living in that placement.

⁵ The father was given a similar case plan, but unlike the mother, he failed to meet many of the objectives.

{¶7} The agency also developed a plan for the children that included parent/child interactional therapy for L.O. The objective for parent/child interactional therapy was for Mother and L.O. to bond with each other and for Mother to develop appropriate disciplinary approaches to L.O.'s defiant behaviors — that included, among other things, temper tantrums, throwing things, and cursing.

{¶8} Grayson testified that as of the time of trial, Mother had stable housing, and had lived in stable housing since she was assigned the case in 2012. Grayson also testified that Mother's sole source of income was social security that she received due to her mental health issues which include diagnoses of depression, bipolar disorder, ADHD, and dysthymia.

{¶9} While Grayson testified that Mother did not meet the requirements of the first recovery program she was assigned to due to lack of participation, she testified that Mother successfully completed a second recovery program in October 2012. During Grayson's time on the case, all of the mother's random urine and hair samples tested negative for drug use.

{¶10} When the children were placed in temporary custody, the trial court imposed a visitation schedule for the parents. Grayson testified that the mother consistently attended her visitation sessions, while the father was more likely to be absent. Grayson also testified that the Saturday unsupervised visitations were discontinued after L.O. alleged that his mother spanked him. The agency investigated the allegations, but according to Grayson, the allegations remained largely unsubstantiated. Despite the outcome of the investigation, Grayson testified that the agency determined that it was best to discontinue the unsupervised Saturday visits. According to Grayson, the agency discontinued these visits because it still did not know who caused La.O.'s severe head injuries.

{¶11} Grayson further testified that the mother completed two parenting classes, yet still, the agency did not feel comfortable with the way she was displaying her parenting skills, so she was referred to another program. The agency's stated concern was that there was not a lot of follow-through on the discipline for L.O, and that Mother, was "not responding to his needs, while simultaneously giving-in to all of his wants."

{¶12} Grayson stated that she sat in on and observed a few of the parent/child interactional therapy sessions between Mother and L.O. While she stated that Mother and L.O. attended the classes, she was concerned that they did not do the follow-up homework, they would laugh when asked to do certain skills in class — although she admitted they would try to do them — and sometimes they would come late or not show up. In her opinion, the mother did not take full advantage of the program and the program was never successfully completed.

{¶13} As the case plan developed further, the mother was also placed with a parent coach, who observed the visits with L.O., La.O., and Mother. In Grayson's opinion, Mother relied too heavily on the parenting coach to follow through with the discipline, rather than being the disciplinarian herself. From Grayson's observations, L.O. seemed to act out when Mother spent time with La.O. and L.O. seemed to feel neglected. He would throw items and do things to get his mother's attention. According to Grayson, it appeared that Mother had trouble focusing on both of her children at the same time and dealing with both of their needs.

{¶14} Grayson also discussed the mother's mental health. She testified that Mother underwent a psychological assessment in December 2011. The basis for this assessment was that neither parent had admitted to causing La.O.'s injuries, and had not explained how La.O. might have gotten so badly injured; therefore, there was some speculation that the injuries might have occurred due to the mother's mental illness. As a result of the assessment, the agency recommended counseling for the mother. Mother attended her counseling sessions, where she met with a psychiatrist and was placed on medication for her depression. Grayson testified that the agency has an ongoing concern that the mother may stop taking her medication because Mother has voiced some opposition to how the medication makes her feel. Grayson testified that the agency is concerned about the mother not taking her medication because her diagnosis is serious and it believes that her illness may have caused her to act aggressively towards La.O., causing the child's injuries. The concern with L.O. is that his defiant behaviors could lead the mother to lash out against him, if she is not of sound mind.

{¶15} Ultimately, the thrust of Grayson's testimony revealed that she did not feel that the mother successfully completed the parenting programs to which she was assigned, and that she was not comfortable with Mother's parenting skills, or the fact that the agency has never fully discovered the cause of La.O.'s injuries.

{¶16} The trial court then heard testimony from Trinity Lazanis, the nurse and foster parent of La.O. Lazanis testified that Mother would come to Friday visitations with La.O. and interact with her daughter. Lazanis also testified that Mother would also come to some of La.O.'s local medical appointments, that were scheduled for Fridays prior to the visitation time. While Lazanis testified that the mother showed interest in learning how to properly care for La.O., she did not believe, from her observations of the mother, that she could provide the round-the-clock care that La.O. needed. Lazanis testified that La.O., at three-years-old, was completely dependent upon her caregivers as her injuries were so severe that she could not feed herself, dress herself, walk by herself, or communicate to express her needs, and that La.O. could easily die if certain medical needs were neglected, even for a short amount of time.

{¶17} Lastly, the court heard from Mark Witt, the guardian ad litem for the children. Witt testified that it was his recommendation that the court order permanent custody to CCDCFS, in the best interest of the children. Witt's main reasons for recommending an order of permanent custody was that he remained concerned over how La.O. was so severely injured. He stated that he confronted both parents personally as to whether they did anything to the child, and they both continued to deny any involvement.

Witt stated that he felt like it was a risk to reunify La.O and L.O. with the mother, without knowing how La.O. was injured. However, Witt also stated that he would understand if the court were to adapt some openness to L.O.'s continued placement so that the mother could possibly be reunified with him in the future.

{¶18} In its judgment entry following the trial, the court denied the agency's request for permanent custody of L.O. but granted it as to La.O. The court reasoned that CCDCFS had failed to show by clear and convincing evidence that it was in L.O.'s best interests to be placed in permanent custody of the agency, in light of the fact that the mother had demonstrated improved parenting skills, and the child's behavior had not improved since being placed in temporary custody. Further, the judgment entry went on to express concern over the fact that L.O. has been in five different temporary placements with relatives and foster parents since being placed in temporary custody three years prior, and that the child is five-years old, ready to start kindergarten, and still remains in a non-adoptive placement.

{¶19} In its sole assignment of error, CCDCFS argues that the trial court's order committing L.O. to the legal custody of the mother, was against the manifest weight of the evidence and an abuse of discretion as the evidence showed that permanent custody with CCDCFS was in the best interests of the child. We disagree.

{¶20} In order for a trial court to grant CCDCFS permanent custody of a child and terminate the parents' parental rights, the court must find by clear and convincing evidence that one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d) is met and that permanent custody is in the best interest of the child. *In re: S.H.*, 8th Dist. Cuyahoga Nos. 97992, 97993, and 97994, 2012-Ohio-4064, ¶ 27. "Clear and convincing evidence is that quantum of evidence that instills in the trier of fact a firm belief or conviction as to the allegations sought to be established." *In re Y.V.*, 8th Dist. Cuyahoga No. 96061, 2011-Ohio-2409, ¶ 13, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶21} The record in this case demonstrates, in accordance with R.C. 2151.414(B)(1)(d), that the child had "been in the temporary custody of a public children services agency * * * for twelve or more months of a consecutive twenty-two month period." Thus, the trial court was correct in finding that the agency met its initial burden of proving one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d). We next consider the best interests of the child.

{¶22} Pursuant to R.C. 2151.414(D), courts analyze the following factors when determining the best interests of the child: (1) the interaction and interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and, (5) whether any of the factors in divisions (E)(7) to (11) of R.C. 2151.414 apply. *In re Y.V.* at ¶ 16. "The 'best interest determination' focuses on the child, not the parent." *Id.* at 14, quoting *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994). "The discretion that the juvenile court enjoys in deciding whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's decision will have on the lives of the parties concerned." *Awkal* at 316. Therefore, a reviewing court should not overturn a trial court's decision on permanent custody absent an abuse of discretion. *See id.* An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶23} The record indicates that the trial court duly considered the R.C. 2151.414(D) factors when making the decision to deny permanent custody to the agency.

In analyzing the interaction and interrelationship of the child with others, the court voiced concerns that the child's behavior, since his removal from his mother's home, has worsened. This finding is supported by the record, as the record reveals that L.O. has started cursing since his placement in temporary custody.⁶

{¶24} Further, the court stated that it considered the recommendation of the guardian ad litem, Mark Witt, when making its decision. The recommendation of the guardian ad litem goes directly to the second factor under R.C. 2151.414(D) that asks the court to consider the wishes of the child. Here, while Witt recommended in his written report that the court place La.O. and L.O. in the permanent custody of CCDCFS, at the custody hearing he stated "I maintain my recommendation as written but I would also understand if the Court were to adapt some openness to [L.O.s] continued placement so that the mother could get reunified with him." Thus, even Witt evidenced some concern over granting permanent custody of L.O. to CCDCFS.

⁶ When he was first placed in temporary custody at the age of two, L.O. was not yet in a position where he could use foul language. However, at the age of five, after being in temporary custody for three years, L.O. repeatedly uses swear words in his limited vernacular. Tr. 67.

{¶25} Further, in considering the custodial history of the child, the court indicated in the journal entry that it is concerned about the child's numerous and fleeting placements with relatives and non-relatives in the last three years, and the fact that the child is soon to start kindergarten but remains in non-adoptive placement. Further, as noted in the journal entry, the court found that CCDCFS failed to prove by clear and convincing evidence that the mother could not provide a legally secure permanent placement for the child. Indeed, the record reflects that at the time of trial, Mother was living in stable housing, and had been living in stable housing for several years. The record also reflects that Mother has a steady and reliable source of income. All of these factors, in the trial courts view, weighed in favor of L.O.'s placement with the mother.

{¶26} The journal entry also reflects that the court considered whether factors in division R.C. 2151.414 E(7) through (11) apply. Subsection (E)(11) requires that a court consider whether the parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to R.C. 2151.414, 2151.353 or 2151.415 and, if so, whether the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child. The court states in its journal entry,

The mother has had parental rights terminated with respect to a sibling of the child⁷ and CCDCFS has failed to provide clear and convincing evidence to prove, that notwithstanding the prior termination, the parent cannot provide a legally secure permanent placement and adequate care for the health, welfare and safety of this child.⁸

Therefore, the trial court considered the prior termination of parental rights in its decision making process but decided that the disposition of the older sibling did not weigh heavily upon this case.

⁷ The child referred to here is the older sibling of L.O. and La.O. whom the mother had as a teenager.

⁸ We note that the trial court appears to have mixed up the party's burdens of proof on this issue. Section E(11) clearly states that the parent has the burden of establishing, by clear and convincing evidence, that she can provide a legally secure, permanent placement and adequate care for the health, welfare, and safety of the child. The statute does not say that the agency must disprove this by clear and convincing evidence. However, in this case, we find the court's error to be harmless in light of the fact that the mother has shown she is capable of maintaining secure housing and income, and the fact that the mother lost custody of the child when she was a teenager and in the foster care system herself.

{¶27} Further, while the court notes in the journal entry that it found that Mother pled guilty to and was convicted of an offense listed in R.C. 2151.414(E)(6)⁹ or 2151.414(E)(7)¹⁰ for La.O.'s injuries, the court then goes on to note that the grant of permanent custody to the agency is not in the best interests of L.O. Therefore, we can interpret from the decision that the court did consider the agency's argument that the home was unsafe due to the fact that the mother had never fully explained what happened to La.O., but did not think that the mother posed an ongoing threat to the child, and thought that the other factors weighed against permanent placement with the agency. Thus, we cannot say that the trial court abused its discretion in reaching this decision.

{¶28} Judgment affirmed.

It is ordered that appellees recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

⁹ Under R.C. 2151.414(E)(6), a court must enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent if it finds that the parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 if the child or a sibling of the child was a victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child. Here, Mother did plead guilty to child endangering under R.C. 2919.22(A) for the harm that befell La.O.; however, the court clearly did not think that the mother posed an ongoing threat to L.O. because it proceeded to award the mother custody.

¹⁰ We note that Mother did not plead guilty to, nor was she convicted of, any offenses listed in R.C. 2151.414(E)(7) for La.O.'s injuries. These offenses are some of the most egregious offenses contained in the criminal law, and would preclude a parent from being reunited with the child. They include homicide offenses, assault offenses, sexual assault offenses, trafficking in persons, and promoting or compelling prostitution. While this section includes child endangering under R.C. 2919.22(B)(2), this form of child endangering requires a person to torture or cruelly abuse a child.

It is ordered that a special mandate be sent to the common pleas court — Juvenile Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR