[Cite as *In re D.S.*, 2015-Ohio-2042.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101906

IN RE: D.S., Jr.
A Minor Child

[Appeal By D.S., Sr., Father]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 11919312

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

RELEASED AND JOURNALIZED: May 28, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Appellant, D.S., Sr., appeals the Cuyahoga County Juvenile Court's judgment granting permanent custody of his son, D.S., Jr., to the Cuyahoga County Division of Child and Family Services ("CCDCFS"). He raises the following three assignments of error for review:

> 1. The Juvenile Court committed error when it proceeded in case number AD-11919313 without complying with the requirements of 25 U.S.C. 1912.
>
> 2. The trial court committed error when it terminated appellant's parental rights and granted permanent custody to CCDCFS.
>
> 3. Appellant was denied effective assistance of trial counsel.

{¶2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶3} D.S., Sr. ("Father") and J.W. ("Mother") are D.S., Jr.'s ("D.S.") parents. Mother also has another child, Z.W., who is not biologically related to Father. All the trial court proceedings related to both children, but this appeal, which was only brought by Father, relates only to the termination of his parental rights with respect to D.S.

{¶4} Prior to the removal of the children, D.S. and Z.W. lived with Mother and Father in their paternal grandmother's house. A total of 16 family members lived in the home of which eight or nine were children. On November 1, 2011, D.S. and Z.W. were removed from the home and placed in the emergency custody of CCDCFS after Z.W. was

diagnosed with multiple untreated bone fractures at various stages of healing. At the time of their removal, Z.W. was two years old and D.S. was six months old.

{¶5} Neither Mother, Father, nor any other adult in the home explained how Z.W. sustained her injuries. Indeed, the injuries were not discovered until an aunt took Z.W. to the hospital 24 to 48 hours after she fell from a toilet and broke her tibia. As a result of Z.W.'s unexplained injuries, CCDCFS filed a complaint for temporary custody of the children, and following an adjudicatory hearing in January 2012, the trial court granted temporary custody of the children to CCDCFS, where they remained for the next two and a half years.

{¶6} In November 2013, CCDCFS filed a motion to modify temporary custody to permanent custody. The trial court held a hearing on the motion where there was only one witness: Denise Blair ("Blair"), the social worker assigned to the case. However, in response to the CCDCFS' complaint, Father had previously admitted that, in October 2011, Z.W. was diagnosed with a fractured tibia, and healing but untreated fractures of the humerus of the left arm, the radius and ulna of the right arm, and the end of the radius of the left arm.

{¶7} Mother was charged with, and pleaded guilty to, three third-degree felony child endangering charges as a result of Z.W.'s injuries. The only explanation for the fractured tibia was that the child fell off an unattached toilet seat of an adult toilet where she had been left unattended. The common pleas court sentenced Mother to five years of

community control sanctions and prohibited her from having custody of her children during the probation period.

{¶8} Blair testified that Father regularly appeared for child visitation and was bonded with the children. He also complied with most of the terms of his case plan, which required him to successfully complete parenting classes, undergo a psychological evaluation, and obtain safe and secure housing away from his extended family. The psychological evaluation showed that both Mother and Father had borderline cognitive functioning.

{¶9} Despite Father's genuine effort to comply with all the terms of his case plan, Blair believed he was unable to remedy the conditions that caused the children's removal in the first place. According to Blair, Father was unable to provide a safe home for the children because the perpetrator of Z.W.'s injuries was still unknown, and because Father (1) failed to produce proof of stable and secure housing, (2) failed to provide proof of steady income, and (3) failed to provide a home in which Z.W. and D.S. would have separate bedrooms. At the time of the hearing, Z.W. was five years old and was exhibiting sexualized behaviors, which necessitated separate bedrooms. Blair conceded, however, that Father could share a room with one of the children or sleep on a couch.

{¶10} Blair was also concerned that Father was unable to meet D.S.'s special medical needs. D.S. has a metabolic disorder and requires a special diet. After the children were in temporary custody, Blair learned that D.S. had missed several scheduled doctor's appointments prior to his removal. The foster mother was attending to D.S.'s

medical needs, and he was improving on a vegan diet. D.S. also has some speech impairment that requires speech therapy. (Tr. 49.) Blair was concerned Father was unable to adequately address D.S.'s special needs.

{¶11} Blair attempted to place the children with six different relatives. One aunt would have been approved for placement but a heart condition made it physically impossible for her to care for young children. Another aunt could have been approved, but she insisted on living with a man who had a significant criminal record. A cousin had custody of the children for a brief period, until he lost his job and home and had three of his own children. Another cousin, who lived in Virginia, expressed interest in taking custody, but later withdrew her application because she felt pressure from Mother. At the time of the hearing, the children were settled with and bonded to a foster family. Under all of these circumstances, and the fact that the children had been moved around so much, Blair opined that permanent custody was in the children's best interests because they needed a safe and secure home.

{¶12} The guardian ad litem also opined that permanent custody was in the children's best interests. The guardian ad litem was primarily concerned with the children's safety in light of Z.W.'s severe injuries, lack of medical attention, and the parents' deficient cognitive abilities.

{¶13} Following the hearing, and the court's review of the guardian ad litem's report and recommendation, the court committed the children to the permanent custody of CCDCFS. In its journal entry, the court found that (1) the children had been in agency

custody for more than 12 months of a consecutive 22-month period, (2) residence with the parents would be contrary to the children's best interests, and (3) CCDCFS made reasonable efforts to reunite the children with their parents but was unsuccessful. Notably, the court found that because the children had been in CCDCFS's custody for over two years, the children no longer qualified for temporary custody, and permanent custody with the parents was not feasible at that time.

{¶14} Father now appeals the trial court's judgment.

II. Law and Analysis

A. Indian Child Welfare Proceedings

{¶15} In the first assigned error, Father argues the trial court's judgment should be reversed because the court failed to comply with the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq. ("ICWA"). The ICWA was enacted due to address concerns that a large number of Native American children were being placed in non-Native American foster and adoptive homes. *See* 25 U.S.C. 1901(4). Thus, the act provides certain procedural safeguards in child custody proceedings when the subject child is an Indian child as defined in 25 U.S.C. 1903.

{¶16} The party who asserts applicability of ICWA bears the burden of proving that the child meets the statutory definition of an "Indian" child. *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 41. To satisfy that burden, the party asserting applicability of ICWA must do more than raise the possibility that a child has Native American ancestry. *Id*.

{¶17} The trial court found that D.S. was neither in the "custody of an Indian custodian," nor was "a ward of tribal court" when it granted CCDFS's motion for emergency custody on November 3, 2011. The parties had ten days in which to file a motion objecting those findings, but Father never objected. Moreover, Father has not presented any evidence to suggest that D.S. has any native American ancestry, nor does Father even suggest that he belongs to any Indian tribe.

{¶18} Therefore, the first assignment of error is overruled.

B. Termination of Parental Rights

{¶19} In the second assignment of error, Father argues the trial court erred when it terminated his parental rights and granted permanent custody to CCDCFS. He contends the court's judgment is not sustained by the weight of the evidence.

{¶20} R.C. 2151.414 sets forth a two-part test courts must apply when deciding whether to award permanent custody to a public services agency. R.C. 2151.414 requires the court find, by clear and convincing evidence, that (1) granting permanent custody of the child to CCDCFS is in the best interest of the child, and (2) either the child (a) cannot be placed with either parent within a reasonable period of time or should not be placed with either parent if any one of the factors in R.C. 2151.414(E) are present; (b) is abandoned; (c) is orphaned and no relatives are able to take permanent custody of the child; or (d) has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1).

{¶21} "'Clear and convincing evidence'" is evidence that 'will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *In re C.B.*, 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, ¶ 28, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶22} At the time of the dispositional hearing held on June 26, 2014, D.S. had been in agency custody for two years and five months. Thus, the second prong of the two part test set-forth in 2151.414(B) was met. Therefore, we next consider whether permanent custody was in the D.S.'s best interests. *See In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 44.

{¶23} In making the "best interest" determination, R.C. 2151.414(D)(1) directs the trial court to consider the following non-exclusive factors:

> (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 CCDCFS;
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶24} This court has consistently held that only one of the factors set forth in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to award permanent custody to a proper agency. *In re J.M-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 37, citing *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827, ¶ 56. In this case, more than one factor is met.

{¶25} Under R.C. 2151.414(D)(1)(c), the court may consider the custodial history of the child, including whether the child has been in the temporary custody of one or more public services agencies for 12 or more months of a consecutive 22-month period. This factor is significant because it reflects the child's need for security, which comes from a safe and secure home. Blair testified that D.S. had five different placements while in temporary custody because CCDCFS attempted to place D.S. and Z.W. with several different relatives, who were ultimately unable to maintain custody of the children. At the time of the dispositional hearing, D.S. had been in CCDCFS's custody for two years, and therefore, pursuant to R.C. 2151.415(D)(4), CCDFS no longer qualified for any further extension of temporary custody.[1] D.S. was only six months old when he entered temporary custody and thus has not had a stable home in his entire three-year life.

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[1] R.C. 2151.415(D)(4) provides

{¶26} R.C. 2151.414(D)(1)(a) asks the court to consider the child's relationships with his caregivers. The record demonstrates that Father loves D.S. He completed parenting classes and had a supportive visitation coach. However, Blair testified that he did not engage with the children consistently during visitation. Blair stated:

> Some days he would come into the visit and he would sit over there on the couch and just sit there. And then some days he would come and maybe he would interact.

(Tr. 30.) By contrast, Blair testified that D.S. benefitted from the foster mother's parenting and has bonded with his foster mother. Blair was not convinced that Father could provide for D.S.'s special medical needs.

{¶27} R.C. 2151.414(D)(1)(b) asks the court to consider the child's wishes, as expressed directly by the child or through the child's guardian ad litem. D.S.'s guardian ad litem noted that because D.S. has not spent any significant period of time in one home in his entire life, he has an acute need for stability. Thus, the guardian ad litem recommended the award of permanent custody of D.S. to CCDCFS on belief that it is in his best interests.

{¶28} Pursuant to R.C. 2151.414(D)(1)(d), the court may consider whether the need for permanency can be achieved without granting permanent custody. In this case,

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> No court shall grant an agency more than two extensions of temporary custody pursuant to division (D) of this section and the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, which date is earlier, regardless of whether any extensions have been previously ordered pursuant to division (D) of this section.

the court found that D.S. could not be placed with his parents within a reasonable time, and that CCDCFS exhausted all efforts to find a suitable home with a relative.

{¶29} Moreover, at the time of the dispositional hearing, nobody in D.S.'s family had explained how Z.W. sustained multiple broken bones on several different occasions. What is more, neither Father nor any other adult in the home took Z.W. to a doctor for medical treatment for any of these injuries except for the last one, when an aunt took Z.W. to the emergency room. In the trial court proceedings, Father sought custody of Z.W. as well as D.S. Although Father is not Z.W.'s biological parent and had no legal responsibility for Z.W., his failure to protect the child he seeks to have in his care and custody is indicative of his parenting abilities.

{¶30} Father also neglected to take D.S. to scheduled medical appointments prior to his removal. D.S. has a metabolic disorder that requires regular doctor visits and a special diet. At the time of the hearing, D.S. was thriving on a mostly vegan diet provided by his foster mother. Although the psychiatrist who performed the psychological evaluation believed Father's mental deficiencies would not impair his ability to parent a child,[2] D.S. is a child with special medical needs that present more challenges than the average child.

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[2] It should be noted that, pursuant to R.C. 2151.281(C), the juvenile court appointed a guardian ad litem to represent Father's interests at the dispositional hearing. R.C. 2151.281(C) provides that the juvenile court must appoint a guardian ad litem to protect the interest of a parent who "appears to be mentally incompetent" * * * "[i]n any proceeding concerning [a] * * * neglected, or dependent child."

{¶31} Father moved out of his mother's home a few months before the dispositional hearing as required by his case plan. However, he never produced any evidence that he had stable housing. Blair learned from other people that Father was living in a home that he was "fixing up" while working as a contractor. (Tr. 51-52.) Father did not have a lease for the home, and there was no evidence that Father would be permitted to remain in the home after the work was completed. Prior to moving, Father lived with his mother in the house where Z.W. sustained her multiple injuries. Under these circumstances, it is possible, if not highly probable, that Father would return to his mother's home when his current residence was no longer available. Thus, while Father technically complied with this requirement of his case plan, his compliance failed to establish a stable and secure home.

{¶32} Father also failed to provide proof of income or employment. He told Blair he had no physical proof of employment because he was paid "under the table." There is no evidence as to how long the employment is likely to last or what income Father can expect to receive. Thus, there is no evidence that Father's employment is secure. Father's caseworkers encouraged him to obtain his GED, but he never did, even though a GED would be helpful to any applicant seeking steady employment.

{¶33} Moreover, at the time of the hearing, Mother was pregnant with another child by Father, which suggests that Father is likely to continue his relationship with her. Mother was convicted of three counts of third-degree felony child endangering. The record shows that Mother neglected her own children prior to their removal, and has not

appealed the termination of her parental rights. Her actions demonstrate a complete disregard for her children's welfare. Father's continued relationship with Mother could expose D.S. to further neglect.

{¶34} The combination of (1) the history of neglect, (2) Father's continued relationship with Mother, (3) the lack of stable housing and employment, and (4) a child with special medical needs, combined with Father's cognitive impairment presents a precarious set of circumstances for D.S. — not the safe and secure environment that a young child needs. Therefore, the trial court's finding that the award of permanent custody of D.S. to CCDCFS is in the child's best interest is supported by clear and convincing evidence.

{¶35} Therefore, the second assignment of error is overruled.

C. Ineffective Assistance of Counsel

{¶36} In the third assignment of error, Father argues he was denied the right to the effective assistance of counsel because his trial counsel failed to call any witnesses to testify on his behalf.

{¶37} Parents have a constitutionally protected fundamental interest in the care and custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). 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). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.* Such constitutional protections include the

right to effective assistance of counsel. *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); R.C. 2151.352 (expressly providing for a parent's right to counsel).

{¶38} In order to obtain a reversal of a judgment based upon a claim of ineffective assistance of trial counsel, a movant must establish both that his trial counsel's conduct did not fall within the range of reasonable professional assistance, and that there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶39} It is not clear from the record why Father's trial counsel decided not to call any witnesses to testify on Father's behalf at the hearing. However, as a reviewing court, this court must not second guess the strategic decisions of counsel. *In re J.T.*, 8th Dist. Cuyahoga Nos., 93240 and 93241, 2009-Ohio-6224. Moreover, Father fails to explain how he was prejudiced by his trial counsel's performance. Without prejudice, he cannot establish a claim for ineffective assistance of counsel.

{¶40} Therefore, the third assignment of error is overruled.

III. Conclusion

{¶41} Despite Father's argument to the contrary, the trial court complied with 25 U.S.C. 1912 in its journal entry, dated November 3, 2011, that granted emergency custody of the children to CCDCFS. The trial court's determination that permanent custody was

in D.S.'s best interests is supported by clear and convincing evidence. And Father was not deprived of his right to the effective assistance of counsel.

{¶42} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County 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.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
LARRY A. JONES, SR., P.J., DISSENTS WITH SEPARATE OPINION

LARRY A. JONES, SR., P.J., DISSENTING:

{¶43} Respectfully, I dissent from the majority's resolution of the second assignment of error, and would find that granting CCDCFS permanent custody of D.S. is not in his best interest.

{¶44} My review of the record demonstrates that Father did not, as found by the trial court, "continuously and repeatedly fail to substantially remedy the conditions" that caused the removal of D.S. To the contrary, I believe that throughout this case, Father

was committed to be reunified with his son, and to that end, did what CCDCFS requested of him.

{¶45} Father's case plan consisted of the following (1) submitting to a psychological evaluation, (2) completing parenting classes, (3) secure housing independent of his family, and (4) obtaining a job. Father was present for all nine of the hearings that were held in this case.

{¶46} At the January 2012 adjudicatory hearing, the initial social worker assigned to the case testified that the goal for Father was reunification with his son, stating the following:

> I've observed the parents. I've observed the children. The reunification should * * * take place. Parents are more than willing to do the services. They are in place, but there is not a set date for their psych [evaluations] to occur. Parenting classes will begin for them next month * * *. They're more than apt at — they've asked me every week [at visitations] since their children have been taken out of their home when are services going to start.

{¶47} The social worker stated that if Father's psychological evaluation did not show anything concerning and he completed parenting classes, she would be "comfortable" returning D.S. to him. In regard to the housing situation, she noted that it was her "preference" that Father live independent of his family, but if that did not happen "[t]here would have to be another service probably placed inside that home also."

{¶48} The next hearing on this matter was held in October 2012. It was set as a review hearing, but CCDCFS filed its first motion for extension of temporary custody. The extension was sought because the case plan objectives had not yet been completed. Relative to Father, the motion stated that he had completed his parenting classes and had submitted to a psychological evaluation, but CCDCFS was still awaiting the report on the evaluation. The trial court continued the hearing so that counsel could be secured for Mother.

{¶49} The court reconvened on this matter in November 2012 to entertain CCDCFS's request for a first extension of temporary custody. The record demonstrates that at that time, Mother had not completed her psychological evaluation due to pending criminal charges arising out of Z.W.'s injuries.

{¶50} Father and Mother were not residing together at the time, but Father was still living in his mother's house where he and Mother lived when Z.W. was injured. Father was enrolled in a GED program and had obtained part-time employment. Father consistently visited D.S. The court told Father to keep working toward his GED and on obtaining employment so that he could support D.S. The court also told Father that his son was "not going to be able to come home if you're living with other individuals." The court granted the motion to extend temporary custody.

{¶51} The next hearing occurred in July 2013, upon CCDCFS's second motion to extend temporary custody. The social worker informed the court that Father "had completed the case plan," but needed to obtain housing independent of his family. The

social worker admitted that Father told her that he had located a home, but he did not give her the address. The social worker also informed the court that Father was not working at all. The court granted the second motion for extension.

{¶52} On November 1, 2013, two years after D.S. had been removed from Father's home, CCDCFS filed a motion to modify temporary custody to permanent custody. In support of its motion, CCDCFS submitted the social worker's affidavit, wherein she averred, in part, to the following (1) Mother failed to complete her case plan and pursuant to her sentence in her criminal case, could not be reunified with her children at that time, (2) Mother and Father were living together with Father's family in the same home where Z.W. was injured, (3) Father failed to pursue the "recommendation" that he pursue his GED, and (4) Father's psychological evaluation indicated that he was in the "borderline deficient range."

{¶53} In December 2013, the trial court held a review hearing at which the social worker testified. According to her testimony, Father continued to consistently visit with D.S. He also obtained housing, which the social worker stated she had recently visited. The "only thing left" for Father to do was "furnish the new home and get it ready for [D.S.]" The social worker stated that St. Martin de Porres was helping Father get furnishings. She also stated that Father was not employed.

{¶54} At the conclusion of the hearing, the court addressed Mother and Father as follows:

> Now, there was some discussion too about housing and about furnishing that housing. And [Mother] and [Father], if you're living together, okay, it's your responsibility to provide an appropriate home for the children. If you cannot afford to furnish that home, use the services of the collaborative. [Mother], you are employed.
>
> [Father], if you're not employed, you're not receiving disability, then there are jobs out there. You need to go and find a job and furnish the home so that you can provide an appropriate home for your children, okay?
>
> And again, there are services available through the community, utilize those services. But ultimately, the responsibility as a parent is for the two of you to provide an appropriate home for the children.

{¶55} The dispositional hearing was held in June 2014. At the start of the hearing, Father requested a continuance so that a relative could be investigated as a legal custodian. CCDCFS opposed the motion as untimely, noting that CCDCFS had already investigated nine relatives and that D.S. had been in custody for approximately two years and five months. The court denied Father's request and proceeded with the hearing.

{¶56} CCDCFS maintained that it was seeking permanent custody of D.S. because the perpetrator of Z.W.'s injuries remained unknown and, therefore, CCDCFS was not able to effectively remedy the conditions that led to D.S.'s removal.

{¶57} The evidence presented at the hearing demonstrated the following. The social worker testified that Mother and Father were not living together. Father had his

own apartment, but the social worker did not deem it appropriate because it was a two-bedroom apartment and D.S. and Z.W. each needed their own rooms. The social worker further testified that Mother was pregnant and Mother indicated the child was Father's. The social worker "really did not know" whether the pregnancy would likely reunite Mother and Father in terms of living together again.

{¶58} The testimony further revealed that if Father had been granted custody of D.S., Mother's visitation or contact with Father and D.S. would not put her in violation of the order in her criminal case; she just could not have custody of D.S. for the five years that she was on probation.

{¶59} In disagreeing with the majority's best interest determination, I start with the well-established premise that "a parent's right to raise a child is an essential and basic civil right." *In re Hayes*, 79 Ohio St.3d at 48, 679 N.E.2d 680. The Ohio Supreme Court has further described the permanent termination of parental right as the "family law equivalent of the death penalty in a criminal case." *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. Thus, this court has emphasized that the "termination of the rights of a birth parent is an alternative of last resort." *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21.

{¶60} That said, I would find that Father's termination of his parental rights is unsupported by the record. There were four areas that Father had to comply with under the case plan (1) submit to a psychological evaluation, (2) complete parenting classes, (3)

secure housing independent of his family, and (4) obtain a job. By the time of the dispositional hearing, Father had completed his case plan.

{¶61} Relative to his psychological testing, the results indicated that he was borderline functioning, but, as testified to by the social worker at the dispositional hearing, that was not concerning in terms of Father parenting and being reunited with D.S.

{¶62} The majority intimates in fn. 2 that, because Father had a guardian ad litem, he was mentally incompetent. The guardian was appointed at the December 2013 hearing at the request of Father's new counsel, who sought such because (1) she was new to the case, and (2) the social worker averred in her affidavit that Father's psychological evaluation indicated that he was in the "borderline deficient range." New counsel told the court that she had not had the chance to review anything, but as a measure of precaution, she thought Father should have a guardian. In my review of the record, any concerns about Father's mental capacity vis-a-vis his ability to parent D.S., Jr., did not come to realization.

{¶63} Regarding completion of parenting classes, the record demonstrates that by October 2012, Father had completed the requirement. From that time until the time of the final hearing, the trial court held two intervening hearings: the first in November 2012 and the second in July 2013.

{¶64} At the November 2012 hearing, Father was urged to continue working toward obtaining his GED and employment. At the July 2013 hearing, the issues of

Father's housing and employment were discussed. Of note, there was no discussion that Father had somehow been unsuccessful or deficient in completing the parenting education portion of his case plan.

{¶65} Then, at the final hearing on this matter, the social worker raised an issue with Father's parenting education, stating that he had been "50/50" during visitations with D.S. when a parenting coach, who had been utilized during the visits to help Father "redirect" D.S.'s behavior, was present. According to the social worker, sometimes Father would "just sit on the couch" and not interact with D.S.

{¶66} I find this troubling. Up until the final hearing, there was no indication whatsoever that Father had been deficient in his interactions with D.S. or in fulfilling the parenting education requirements. To the contrary, the record demonstrated that Father interacted well, and consistently, with D.S. and that both were bonded to each other. Further, until the final hearing, Father's consistency in visiting with, and interaction with D.S. was lauded by CCDCFS and trial court alike. To bring this issue up at the final hearing and use it against Father was patently unfair.

{¶67} Further, I think another issue — D.S.'s metabolic disorder — was unfairly used against Father. The record demonstrates that D.S. was removed from his parents' care because of the injuries Z.W. sustained; he was not removed because of the disorder. The disorder was barely mentioned throughout the proceedings, until the final hearing, when the social worker testified that she found it "very concerning" that D.S. had missed

some medical appointments prior to CCDCFS taking custody of him.[3] Presumably, the importance of attending to his child's medical needs would have been addressed in Father's parenting education, which, in my estimation, he successfully fulfilled.

{¶68} In regard to Father's housing situation, the record indicates that at the time of the final hearing, he had obtained housing independent of his family. The social worker testified that the housing was inappropriate, however, because it was a two-bedroom apartment and CCDCFS believed D.S. and Z.W. needed their own bedrooms. There was discussion as to the possibility of the children each having one of the bedrooms and Father sleeping on a couch. But for purposes here, this court need not consider that. This appeal is relative to D.S. only, and further, I question whether Father would have legally been able to gain custody over Z.W., who was not his child, in the proceedings below as they were then postured. Thus, a two-bedroom apartment for Father would seem to have resolved his housing issue.

{¶69} Moreover, I also find troubling in this case the contention that there was concern that Father and Mother would eventually end up residing together again because Mother was pregnant and it was believed that the baby was Father's. First, there was confusion as to whether Mother's order from her criminal case was a no-contact order; it was not — she was prohibited from having custody for five years, but there was no prohibition regarding contact.

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[3] In my review, the only other time it was mentioned was in the early stages of this case at the November 3, 2011 hearing.

{¶70} Second, the court itself indicated to Father that his living with Mother would be acceptable. Specifically, at the December 2013 hearing, the last one before the final hearing, the court told Father "if you're living together, okay, it's your responsibility to provide an appropriate home for the children." I realize that CCDCFS develops the case plans, but without objection from CCDCFS, it implied that it ratified the court's statement. And in fact, CCDCFS had previously intimated earlier on in the case, at the January 2012 hearing, that Mother and Father living together in the same house where D.S. was removed from was a possibility, stating it was CCDCFS's "preference" that Father live independent of his family, but if that did not happen "[t]here would have to be another service probably placed inside that home also."

{¶71} The final case plan requirement for Father was that he obtain employment. He had done so by the final hearing, but CCDCFS was not satisfied because he was being paid "under the table," and it could not verify his income. I would find CCDCFS's position on Father's employment to be another unfair roadblock in this case. His employment situation cannot be viewed in isolation. Rather, the entirety of his actions must be considered in determining whether his parenting rights should be terminated. The entirety of his actions show a man who desired to father his child, and put forth the effort to do so: he consistently, from the beginning of this case, visited his son, he completed his case plan, and he participated in all proceedings. Further, there is no indication that Father has other children for whom he has failed to provide support.

{¶72} Additionally, I would not punish Father for not having his GED. As the majority correctly notes, obtaining a GED was a suggestion, not a requirement. The record indicates that Father heeded the suggestion and started taking classes. The record does not indicate, however, that Father altogether abandoned his attempt to obtain his GED. Transportation was an issue for Father, but nonetheless, he made it to his visitations with D.S. and to his GED classes. He indicated to the court that he was still pursuing a GED, but was doing it at a pace that he could keep up with.

{¶73} I am fully aware that a parent's completion of his case plan is not dispositive of the issue of reunification, as the case plan is a means to a goal, but not the goal itself. *See In re I.K.*, 8th Dist. Cuyahoga No. 96469, 2011-Ohio-4512, ¶ 20. The ultimate determination of whether reunification is appropriate turns on whether the parent has substantially remedied the conditions that caused the child's removal. *Id.*

{¶74} D.S. was removed from Father's care because of injuries Z.W. sustained while living with Mother, Father, D.S., and Father's family. The trial court focused its decision to terminate Father's parental rights, in large part, on its belief that there was an "unknown perpetrator" of Z.W.'s injuries. But Mother pleaded guilty to child endangering relative to Z.W.'s injuries. A guilty plea is a complete admission of guilt. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, syllabus. Father was not charged with any crime relating to Z.W.'s injuries, and I believe it is unfair, after Mother pleaded guilty to a crime relating to the injuries, to hold the injuries against Father.

{¶75} Thus, in light of the above, I do not believe that the record supports the drastic measure of terminating Father's parental rights of D.S. I believe that Father complied with his case plan and, in doing so, substantially remedied the conditions that caused D.S. to be removed. Further, I believe that it was not in D.S.'s best interests to be placed in the permanent custody of CCDCFS. I therefore respectfully dissent.