

[Cite as *In re N.H.*, 2016-Ohio-1547.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103574

**IN RE: N.H.
A Minor Child**

[Appeal by J.H., Mother]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-14-905809

BEFORE: Celebrezze, J., Keough, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 14, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} J.H. (“appellant”), mother of N.H., brings this appeal challenging the trial court’s judgment granting permanent custody of N.H. to the Cuyahoga County Division of Children and Family Services (“CCDCFS”). Specifically, appellant argues that the trial court failed to comply with the Indian Child Welfare Act (“ICWA”) and that the trial court’s custody award was not supported by clear and convincing evidence. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In 2013, both of N.H.’s parents were incarcerated. Appellant pled guilty to endangering children, R.C. 2919.22(A), and was sentenced to three years in prison. C.H., father of N.H., pled guilty to rape and gross sexual imposition and was sentenced to sixteen years in prison. During this time, N.H. resided with his paternal grandfather. The paternal grandfather requested that N.H. be removed from his care because he was unable to manage the child’s behavior and special needs.

{¶3} On May 6, 2014, CCDCFS filed a complaint alleging N.H. to be a dependent child and requesting an order of temporary custody. Furthermore, CCDCFS requested a predispositional temporary custody order.

{¶4} On May 30, 2014, the trial court held a hearing on CCDCFS’s motion for predispositional temporary custody. The following parties were present: (1) N.H.’s

paternal grandfather, (2) the CCDCFS case worker, (3) the assistant prosecuting attorney, and (4) N.H.'s guardian ad litem ("GAL"). Appellant was not present at the hearing. The magistrate ordered predispositional temporary custody to CCDCFS, finding probable cause for N.H.'s removal and that removal was in N.H.'s best interest.

{¶5} On July 28, 2014, the trial court held an adjudicatory hearing on CCDCFS's complaint. Appellant was not present at the hearing, but was represented by counsel. Through counsel, appellant indicated that she was in agreement with granting temporary custody of N.H. to CCDCFS. The trial court held that CCDCFS proved the allegations in its complaint "by clear and convincing evidence." Accordingly, the trial court found N.H. to be a dependent child.

{¶6} Based on the testimony presented at the hearing and the GAL's recommendation, the trial court held that granting temporary custody to CCDCFS was in N.H.'s best interest. The trial court held that (1) CCDCFS made reasonable efforts to allow N.H. to remain in the family home, (2) continued residence in the family home is not in N.H.'s best interests, and (3) no relatives were able to properly care for N.H. and his special needs.

{¶7} On March 5, 2015, CCDCFS filed a motion to modify temporary custody to permanent custody. On August 11, 2015, trial commenced on CCDCFS's motion to modify custody. The following parties were present: (1) N.H.'s GAL, (2) N.H.'s counsel, (3) the assistant prosecuting attorney, (4) CCDCFS social workers Kayleen Lessman and Abigail Galligan, (5) appellant, and (6) appellant's counsel. The state

presented the testimony of Lessman and Galligan. Appellant did not present any witnesses on her behalf. At the close of trial, the trial court requested the parties to submit proposed findings of fact and conclusions of law. The trial court granted permanent custody of N.H. to CCDCFS.

{¶8} Appellant filed the instant appeal assigning two errors for review:

- I. The trial court committed error when it proceeded with the permanent custody hearing without complying with 25 U.S.C. 1912.
- II. The trial court committed error when it terminated appellant's parental rights and granted permanent custody to CCDCFS.

II. Law and Analysis

A. The Indian Child Welfare Act ("ICWA")

{¶9} In the first assignment of error, appellant claims that the trial court erred when it proceeded with the permanent custody hearing without complying with the ICWA.

{¶10} The ICWA, codified in 25 U.S.C. 1912, provides certain procedural safeguards in child custody proceedings when the subject child is an Indian child. The ICWA was enacted due to the increasing concern over the large number of Native American children who were being placed in non-Native American foster or adoptive homes. *See* 25 U.S.C. 1901(4). The ICWA provides, in part:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian

children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture[.]

25 U.S.C. 1902.

{¶11} A tribe has exclusive jurisdiction over child custody proceedings in situations in which the Native American child resides or is domiciled within its reservation. 25 U.S.C. 1911(a). However, when a subject child does not reside on a reservation, child custody proceedings may be initiated in a state court. 25 U.S.C. 1911(b). In these situations, the state court, “in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.” *Id.* Notice must be given to the tribe “in any involuntary [child custody] proceeding in a state court, where the court knows or has reason to know that an Indian child is involved[.]” 25 U.S.C. 1912(a).

{¶12} In order to invoke the provisions of the ICWA, there must be a preliminary showing that a custody proceeding involves an “Indian child.” *In re Williams*, 9th Dist. Summit Nos. 20773 and 20786, 2002 Ohio App. LEXIS 271, *22 (Jan. 30, 2002). An “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” 25 U.S.C. 1903(4). The party who asserts the applicability of the ICWA bears the burden of proving that a child meets the statutory definition of an “Indian child.” *Williams* at *22. To meet this burden, the party asserting the applicability of the ICWA must do more than raise the

possibility that a child has Native American ancestry as defined in 25 U.S.C. 1903. *See In re B.S.*, 184 Ohio App.3d 463, 2009-Ohio-5497, 921 N.E.2d 320, ¶ 63 (8th Dist.).

{¶13} In the instant matter, the prosecutor inquired about N.H.’s paternal grandfather’s Native American ancestry during the trial court’s hearing on CCDCFS’s motion for predispositional temporary custody. The grandfather stated that there is no Native American ancestry.

{¶14} Appellant argues that the prosecutor’s inquiry about the grandfather’s Native American ancestry placed the trial court on notice that Native American ancestry was an issue. Appellant argues that because the trial court was notified that Native American ancestry was an issue, it “had an obligation to inquire further.” Appellant argues that the trial court failed to fulfill this obligation because it neither inquired about her Native American ancestry nor determined N.H.’s status.

{¶15} In *In re J.M-R*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, the appellant-mother had the burden of proving that her children met the statutory criteria required for the ICWA to apply. *Id.* at ¶ 51. This court held that the ICWA did not apply because the mother “never notified the trial court orally or in writing that J.M-R had Native American heritage, nor did she request a transfer to a tribal court.” *Id.*

{¶16} In *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, the prosecutor inquired about the child’s ancestry during the trial court’s emergency custody hearing. *Id.* at ¶ 42. Although both of the child’s parents were present at the hearing, neither parent indicated whether the ICWA applied. *Id.* This court held that the ICWA

did not apply because (1) neither parent indicated whether the ICWA applied when the issue came up at the emergency custody hearing and (2) appellant-mother did not claim that the child was an “Indian child” under the ICWA. *Id.* at ¶ 42-43.

{¶17} In the instant matter, appellant, as the party asserting the applicability of the ICWA, had the burden of proving that N.H. meets the statutory definition of an “Indian child.”

{¶18} After reviewing the record, we find that the trial court did not err by proceeding with the permanent custody hearing because the ICWA was inapplicable. Despite having several opportunities to do so, neither appellant nor her counsel asserted that N.H. is an “Indian child,” the trial court lacked jurisdiction over N.H., or the ICWA applied. First, although appellant was not present at the trial court’s adjudicatory hearing on CCDCFS’s complaint, she was represented by counsel. Appellant’s counsel indicated that appellant was in agreement with the trial court’s order granting temporary custody of N.H. to CCDCFS. Appellant’s counsel did not assert that N.H. was an “Indian child” at this hearing. Second, at the initial appearance on CCDCFS’s motion to modify temporary custody to permanent custody, appellant acknowledged that she received the motion and the trial court reviewed her constitutional rights. Appellant acknowledged that she understood the complaint’s allegations and her rights. However, appellant did not assert that N.H. was an “Indian child” during the hearing. Third, appellant was present for the trial on CCDCFS’s motion to modify temporary custody to

permanent custody. At no time during trial did appellant inform the trial court that N.H. had Native American ancestry.

{¶19} We further find that appellant merely raises the possibility that N.H. has Native American ancestry without pointing to anything in the record to support her claim.

Thus, appellant fails to meet her burden of proof regarding the applicability of the ICWA.

{¶20} Accordingly, appellant's first assignment of error is overruled.

B. Trial Court's Award of Permanent Custody

{¶21} In the second assignment of error, appellant argues that the trial court's order granting permanent custody of N.H. to CCDCFS was (1) not in the child's best interest and (2) "against the weight of the limited evidence presented."

{¶22} A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990). However, a parent's right is not absolute. "The natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed." *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979). Consequently, the state may terminate parental rights when the child's best interest demands it.

{¶23} A trial court's decisions with respect to child custody issues should generally be accorded the utmost respect, especially in view of the nature of the

proceeding and the impact the court's determination will have on the parties' lives. *See generally Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997). The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding (i.e., observing their demeanor, gestures and voice inflections, and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. *Id.*, citing *Trickey v. Trickey*, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). As the Ohio Supreme Court has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990).

{¶24} Absent an abuse of discretion, a reviewing court should affirm a trial court's judgment. Thus, a reviewing court will not overturn a trial court's custody or placement decision unless the trial court has acted in a manner that can be characterized as arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶25} R.C. 2151.414 sets forth a two-part test that courts must apply when deciding whether to award permanent custody to a public services agency. The statute requires a court to find, by clear and convincing evidence, that (1) granting permanent custody of the child to the agency 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).

{¶26} A review of the record reveals clear and convincing evidence upon which the trial court could determine that N.H. could not and should not be placed with either parent within a reasonable time. The evidence demonstrated that both parents were incarcerated at the time CCDCFS filed the motion for permanent custody. The evidence demonstrated that N.H.'s father sexually abused N.H.'s sister, pled guilty to rape, R.C. 2907.02(A)(1)(a), and gross sexual imposition, R.C. 2907.05(A)(4), and received a prison sentence of 16 years. The evidence further demonstrated that appellant was aware of the father's abuse, pled guilty to child endangering, R.C. 2912.22(A), and received a prison sentence of three years. The evidence of the parents' convictions and incarceration alone mandated the trial court to enter a finding that N.H. cannot or should not be placed with either of his parents within a reasonable time. *In re Shanequa H.*, 109 Ohio App.3d 142, 671 N.E.2d 1113 (6th Dist.1996); *In re Higby*, 81 Ohio App.3d 466, 611 N.E.2d 403 (9th Dist.1992). Thus, the second prong of R.C. 2151.414(B) was met and the trial court needed only to consider whether permanent custody was in N.H.'s best interests. *See In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 44.

{¶27} In determining the best interests of a child, R.C. 2151.414(D)(1) directs the trial court to consider “all relevant factors, including, but not limited to”:

(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, * * * ;

(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.

{¶28} A review of the record reveals clear and convincing evidence upon which the trial court could determine granting permanent custody of N.H. to CCDCFS is in the child’s best interest.

{¶29} R.C. 2151.414(D)(1)(a) asks the court to consider the child’s relationships with his caregivers. The record demonstrates that appellant had not had any visitation or communication with N.H. since “at least May 2014.” Social worker Lessman testified that she developed a case plan for appellant, and the case plan’s objectives “were mainly to cooperate with the prison officials, and do any services that might be of benefit to [appellant] for whenever she would be released[.]” The record demonstrates that appellant completed the Mosaic program and cooperated with prison officials.

Furthermore, although appellant did inquire about visitation with N.H. and a visitation arrangement was initially part of appellant's case plan, the psychiatrist who evaluated the child recommended that it would not be in his best interests to communicate with appellant due to his past trauma. The record demonstrates that N.H.'s father has made no attempt to contact him. The record demonstrates that N.H.'s grandparents were unable to appropriately address his behavioral needs, did not comply with CCDCFS's case plan, and stated that they do not want to be reunified with the child.

{¶30} 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 GAL. N.H. expressed an interest in returning to the care of his grandparents. However, the record does not demonstrate that N.H. verbalized a desire to go back with appellant or his father. Furthermore, N.H.'s GAL stated that it was in the child's best interest to grant permanent custody to CCDCFS.

{¶31} Under R.C. 2151.414(D)(1)(_), the court may consider the custodial history of the child, including whether the children had 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. *In re D.S.*, 8th Dist. Cuyahoga No. 101906, 2015-Ohio-2042, ¶ 25. While his parents were incarcerated, N.H. was in the care of his paternal grandparents for approximately one year. The record demonstrates that N.H. was removed from the grandparents' home on May 30, 2014, and remained in CCDCFS's

custody when trial commenced on August 11, 2015. Thus, at the time of trial, N.H. had been in CCDCFS's custody for 15 months of a consecutive 22-month period.

{¶32} 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 to CCDCFS. The record reflects that permanent placement could not be achieved without a grant of permanent custody. The trial court found that N.H. could not be placed with his parents within a reasonable time or should not be placed with the parents. Furthermore, N.H.'s grandparents could not attend to his behavioral needs and did not wish to be reunified with him. CCDCFS exhausted all efforts to find a suitable home with a relative.

{¶33} Pursuant to R.C. 2151.414(D)(1)(e), the court may consider whether any of the factors under R.C. 2151.414(E)(7) through (E)(11) apply in relation to the parents and child. R.C. 2151.414(E)(7) applies in the instant matter because (1) N.H.'s father was convicted of rape and gross sexual imposition, and (2) appellant was convicted of endangering children.

{¶34} Although a trial court is required to consider each of the factors under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, this court has noted that "[o]nly one of these factors needs to be resolved in favor of the award of permanent custody." *In re M.W.*, 8th Dist. Cuyahoga No. 96817, 2011-Ohio-6444, ¶ 52, citing *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000). The trial court's best interests determination was based on several of the R.C. 2151.414(D)(1) factors, and those findings were supported by competent, credible

evidence. Accordingly, we cannot say that the trial court abused its discretion when it found by clear and convincing evidence that granting permanent custody to CCDCFS was in N.H.'s best interests.

{¶35} The trial court's journal entry delineates the statutory considerations and determinations:

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; the child's need for a legally secure permanent placement and whether the type of placement can be achieved without a grant of permanent custody; and, the report of the Guardian ad Litem, the Court finds by clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

The court further finds:

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.

The court further finds:

The parent is incarcerated for an offense committed against the child or a sibling of the child.

The parent has been convicted of or pleaded guilty to an offense listed in O.R.C. __ 2151.414(E)(6) or 2151.414(E)(7).

The parent is incarcerated at the time of the filing of the Motion for permanent custody or the dispositional hearing of the child and will not be

available to care for the child for at least eighteen months after the filing of the Motion for permanent custody or the dispositional hearing.

{¶36} In sum, the record reflects that the trial court properly considered and determined the existence of the requisite conditions pursuant to R.C. 2151.414(B)(1)(a)-(d). Furthermore, the record sustains the trial court's proper consideration and determination of the best interests of N.H. under R.C. 2151.414(D) and (E). Accordingly, the trial court did not abuse its discretion by granting permanent custody of N.H. to CCDCFS.

{¶37} Appellant's second assignment of error is overruled.

III. Conclusion

{¶38} The trial did not err by proceeding with the permanent custody hearing without complying with the ICWA. Appellant had the burden of proving that N.H. met the statutory criteria required for the ICWA to apply. To meet this burden, appellant was required to do more than raise the possibility that N.H. has Native American ancestry. Neither appellant nor her counsel asserted that (1) N.H. is an "Indian child," (2) the trial court lacked jurisdiction over N.H., or (3) the ICWA applied. Furthermore, appellant merely raises the possibility that N.H. has Native American ancestry without pointing to anything in the record to support her claim. Thus, appellant failed to meet her burden of proof regarding the applicability of the ICWA.

{¶39} The trial court did not abuse its discretion when it granted permanent custody of N.H. to CCDCFS. First, the record reflects that the trial court properly

considered and determined the existence of the requisite conditions pursuant to R.C. 2151.414(B)(1)(a)-(d). The evidence of the parents' convictions and incarcerations alone satisfied the second prong of R.C. 2151.414(B). Second, the record reflects the trial court's proper consideration and determination of the best interests of N.H. under R.C. 2151.414(D) and (E). Based on several of the R.C. 2151.414(D)(1) best interests factors, the trial court determined that granting permanent custody to CCDCFS was in N.H.'s best interests.

{¶40} Appellant's assignments of error are overruled and the juvenile court's order is 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 said court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY J. BOYLE, J., CONCUR