[Cite as *In re R.G.*, 2016-Ohio-7897.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104434

IN RE: R.G.
A Minor Child

[Appeal By R.J.M.G., Father]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD14908399

BEFORE: E.A. Gallagher, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 23, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant, R.J.M.G., (used as putative father and daughter both share the initials R.G.) appeals from the Cuyahoga County Juvenile Division Court's decision granting permanent custody of his putative daughter, R.G., to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). For the following reasons, we reverse and remand.

Factual and Procedural Background

{¶2} R.G. was born on June 29, 2014. CCDCFS filed a complaint for dependency and temporary custody of R.G. on July 1, 2014. On the same date, the juvenile court held a hearing on the matter and CCDCFS case manager Vickie Lynch informed the trial court that R.G.'s mother, M.A., had a 14-year history of substance abuse with alcohol and cocaine. M.A. had positive drug tests in February and May 2014, and refused residential treatment. M.A. also had three other children previously removed from her care.

{¶3} The complaint listed appellant as the "alleged father" of R.G. and stated that he had "failed to establish paternity and has failed to support, visit or communicate with the child since her birth." Lynch also represented to the trial court that appellant had admitted to daily marijuana use and was, at that time, charged with criminal endangering.

{¶4} The trial court granted preadjudicatory temporary custody to CCDCFS and found that R.G. was not in the custody of an Indian custodian nor a ward of a tribal court.

{¶5} CCDCFS's case plan was for reunification of R.G. with her parents. For appellant, the case plan required him to establish paternity, complete a substance abuse and mental health assessment, undergo domestic violence counseling,[1] obtain appropriate housing and provide verification of income sufficient to meet the basic needs of R.G. The latter two requirements were based on an admission by appellant that he did not have stable housing and was financially unable to care for R.G.

{¶6} The juvenile court conducted a hearing on the complaint and, on November 24, 2014, issued a decision finding the allegations of the complaint proven by clear and convincing evidence. The record from the hearing reflects that M.A. was unable to maintain sobriety. In regards to the issue of paternity, Lynch testified that appellant had signed R.G.'s birth certificate at the hospital. However, appellant had not provided CCDCFS with necessary documentation to establish paternity. The court found R.G. to be dependent, terminated emergency temporary custody and committed R.G. to the temporary custody of CCDCFS.

{¶7} R.G. was entrusted to the care of a foster mother while appellant and M.A. pursued reunification through compliance with the case plan. The guardian ad litem provided reports throughout the pendency of this case detailing highly positive interactions between appellant and R.G. during weekly two-hour visits arranged through CCDCFS.

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[1] CCDCFS's case plan reported that M.A. and appellant had participated in acts of domestic violence and appellant had demonstrated an inability to control his emotions.

{¶8} On June 26, 2015, CCDCFS filed a motion to modify temporary custody to permanent custody due to appellant and M.A.'s failure to make progress on the case plan. Appellant filed his own motion for legal custody on August 18, 2015. R.G. remained in foster care until the case proceeded to trial on April 4, 2016.

{¶9} At trial it was established that M.A. had abandoned any pursuit of reunification with R.G. under the case plan. The record reflects that during the year and a half prior to trial R.G. did well in her foster placement. A guardian ad litem report dated December 7, 2015, stated that R.G. had bonded with her foster mother and viewed her as her parent. The foster family accepted and nurtured R.G. and the foster mother wished to adopt R.G. if permanent custody was granted to CCDCFS.

{¶10} During this time appellant consistently engaged in positive visits with R.G. as discussed above. It was established that appellant had completed both mental health and substance abuse assessments and that neither resulted in any treatment or intervention recommendations. However, appellant did not complete a domestic violence counseling course as set forth in the case plan. Additionally, CCDCFS argued that appellant had failed to establish income for the purpose of demonstrating that he could provide for R.G.'s basic needs and that appellant had failed to obtain appropriate housing.

{¶11} Regarding his income, appellant testified that he does property maintenance work for his landlord and, therefore, does not pay rent. When the landlord has tenants in his various properties, appellant collects rent for the landlord and earns pay. However, the landlord had no tenants (other than appellant) at the time of trial and appellant was not

being paid. Appellant also testified that he earns money through subcontracting work and scrapping and that he earns sufficient money to meet his basic needs without food stamps.

{¶12} Appellant testified that his residence has a room and crib for R.G. but did not have a working gas line for heat. The remedial action necessary to connect gas to the home was out of appellant's control but, rather, dependant upon his landlord. Appellant reported to CCDCFS in March 2016, that he did not anticipate this defect being remedied anytime soon. Appellant testified that he heats the home with space heaters and he conceded at trial such space heaters would not be safe for R.G. because it would be a "dangerous environment" for her. However, he maintained that, at the time of trial in April 2016, the home was safe for R.G. because heating the home at that time was no longer necessary.

{¶13} Finally, the guardian ad litem reported positive actions between appellant and R.G. but recommended that it was in R.G.'s best interest to be placed in permanent custody with the goal of adoption by the foster mother. The guardian's recommendation was based on appellant's failure to complete the goals of the case plan and the relationship between R.G. and the foster mother. The guardian concluded in her report that if R.G. was able to articulate her wishes she would want to live with her foster parent and visit with her birth parents.

Law and Analysis

I. Compliance with 25 U.S.C. 1912

{¶14} In his first assignment of error appellant argues that the trial court erred in failing to inquire as to whether or not R.G. had any Native American ancestry for the purposes of 25 U.S.C. 1912, the Indian Child Welfare Act ("ICWA").

{¶15} 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).

{¶16} 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 N.H.*, 8th Dist. Cuyahoga No. 103574, 2016-Ohio-1547, ¶ 12, citing *In re Williams*, 9th Dist. Summit Nos. 20773 and 20786, 2002-Ohio-321. 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." *In re N.H.* at ¶ 12. 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. *In re N.H.* at ¶ 12, citing *In re B.S.*, 184 Ohio App.3d 463, 2009-Ohio-5497, 921 N.E.2d 320 (8th Dist.).

{¶17} In this instance, the trial court raised the issue of any potential Native American ancestry at the initial hearing in this matter with the case manager who stated that she had no knowledge of the child having such ancestry or the parents being members of a Native American tribe. Neither the mother, her representative, the putative father, his representative or the guardian ad litem was questioned as to the bloodlines of the child. In its order dated July 1, 2014, then, the court found that the child is not in the custody of an Indian custodian and the child is not a ward of a tribal court.

{¶18} We find merit in appellant's argument that the trial court erred in failing to address the ICWA inquiry to either of the relevant parties with actual knowledge of R.G.'s ancestry: appellant and R.G.'s mother. The trial court's inquiry on the matter was limited to the CCDCFS case manager who possessed no knowledge of R.G.'s ancestry and this inquiry occurred outside the presence of appellant and R.G.'s mother. Throughout the pendency of the case the trial court had ample opportunities to address the applicability of the ICWA when appellant and R.G.'s mother were present but such inquiry was never made. We agree with appellant's position that the trial court has a duty under the ICWA to make an inquiry to the participating putative parents. This duty is hardly onerous and can be satisfied with a "yes" or "no" answer to a single question. We find that the trial court erred in failing to so inquire in this instance.

{¶19} Appellant's first assignment of error is sustained.

II. The Permanent Custody Decision

{¶20} In his second assignment of error appellant argues that the trial court erred in awarding permanent custody to CCDCFS.

{¶21} "All children have the right, if possible, to parenting from either [biological] or adoptive parents which provides support, care, discipline, protection and motivation." *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hitchcock*, 120 Ohio App.3d 88, 102, 696 N.E.2d 1090 (8th Dist.1996). Likewise, a "parent's right to raise a child is an essential and basic civil right." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67, quoting *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). By terminating parental rights, the goal is to create "a more stable life" for dependent children and to "facilitate adoption to foster permanency for children." *In re N.B.* at ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, *5 (Aug. 1, 1986). However, termination of parental rights is "the family law equivalent of the death penalty in a criminal case." *In re J.B.* at ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. It is, therefore, "an alternative [of] last resort." *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21.

{¶22} To terminate parental rights and grant permanent custody to a county agency, the trial court must find by clear and convincing evidence: (1) the existence of any one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d) and (2) that granting permanent custody to the agency is in the best interest of the child.

{¶23} The conditions set forth in R.C. 2151.414(B)(1)(a) through (d) are as follows:

> (a) The child is not abandoned or orphaned, has not 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 has not 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 if, 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, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.
>
> (b) The child is abandoned.
>
> (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.
>
> (d) 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.

R.C. 2151.414(B)

{¶24} In this instance the trial court found the first prong to be satisfied pursuant to R.C. 2151.414(B)(1)(d) because R.G. had been in the temporary custody of CCDCFS for 12 or more months of a consecutive 22-month period. Appellant does not challenge this finding but instead argues under the second prong that the trial court erred in finding that permanent custody was in R.G.'s best interests.

{¶25} In determining whether permanent custody is in the best interest of the child, R.C. 2151.414(D)(1) directs that the trial court "shall consider all relevant factors," including, but not limited to, the following:

> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
>
> (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
>
> (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D)(1).

{¶26} "Clear and convincing evidence" is that measure or degree of proof that is more than a "preponderance of the evidence," but does not rise to the level of certainty required by the "beyond a reasonable doubt" standard in criminal cases. *In re. M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 8, citing *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), citing *Lansdowne v. Beacon*

Journal Publishing Co., 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987). It "produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re M.S.* at ¶ 18; *see also In re J.F.*, 11th Dist. Trumbull No. 2011-T-0078, 2011-Ohio-6695, ¶ 67 (a permanent custody decision "based on clear and convincing evidence requires overwhelming facts, not the mere calculation of future probabilities") (emphasis omitted), quoting *In re A.J.*, 11th Dist. Trumbull No. 2010-T-0041, 2010-Ohio-4553, ¶ 76.

{¶27} We review a trial court's determination of a child's best interest under R.C. 2151.414(D) for abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. An abuse of discretion is more than a mere error of law or judgment; it implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). While a trial court's discretion in a custody proceeding is broad, it is not absolute. "A trial court's failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 60, citing *In re T.W.*, 8th Dist. Cuyahoga No. 85845, 2005-Ohio-5446, ¶ 27, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 574 N.E.2d 1055 (1991).

{¶28} Although a trial court is required to consider each relevant factor under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, "[t]here is not one element that is given greater weight than the others pursuant to the statute." *In re T.H.*, 8th Dist. Cuyahoga No. 100852, 2014-Ohio-2985, ¶ 23, quoting *In re Schaefer*, 111

Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. Further, only one of the enumerated factors needs to be resolved in favor of an award of permanent custody for the trial court to terminate parental rights. *In re A.B.*, 8th Dist. Cuyahoga No. 99836, 2013-Ohio-3818, ¶ 17. The best interest determination focuses on the child, not the parent. *In re N.B.* at ¶ 59; *In re Awkal* at 315.

{¶29} We find the trial court abused its discretion in terminating appellant's parental rights in this instance. The record reflects that appellant substantially complied with CCDCFS's case plan for reunification. It is undisputed that throughout the pendency of this case appellant consistently attended visitations with R.G. and court events. The record reflects that appellant and R.G. had formed a positive bond from their visitation opportunities. Finally, there is no evidence that, at the time of trial, the lack of an active gas line to appellant's home prevented reunification. Although appellant conceded that the return of R.G. to his care may be unsafe because of the lack of gas in the home and his use of space heaters, it was not a legitimate reason to deny reunification.

{¶30} We cannot say that the record contains clear and convincing evidence that it is in the best interest of R.G. to be placed in the permanent custody of CCDCFS on these facts.

{¶31} Appellant's second assignment of error is sustained.

{¶32} Although we reverse the trial court's order of permanent custody, we note that appellant has yet to establish paternity in this case. And since CCDCFS conceded

that appellant had signed R.G.'s birth certificate, the record before us is otherwise silent on the resolution of paternity. As noted by CCDCFS below, appellant has not provided the court with confirmation information from the center of paternity registry. Nor does the record contain any other information to establish a final and enforceable acknowledgment of paternity by appellant consistent with R.C. 3111.23 and 3111.25. We remand for proper resolution of this issue by the trial court.

{¶33} This cause is reversed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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 Court of Common Pleas, 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR