[Cite as *In re L.L.*, 2021-Ohio-1959.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE L.L.	:	
	:	No. 110030
A Minor Child	:	
	:	
[Appeal by Father]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 10, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 18907610

Appearances:

Timothy R. Sterkel, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony R. Beery, Assistant Prosecuting Attorney, for *appellee.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Appellant father ("father") appeals from a judgment of the juvenile court granting permanent custody of his child L.L. to the Cuyahoga County Department of Children and Family Services (hereafter "CCDCFS" or "agency"). On appeal, he raises the following two assignments of error for our 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.

{¶ 2} Our review reflects the juvenile court complied with the requirement of 25 U.S.C. 1912, the Indian Child Welfare Act ("ICWA"), and clear and convincing evidence supports the trial court's decision granting permanent custody of L.L. to the agency. Accordingly, we affirm the juvenile court's decision.

Procedural Background

{¶ 3} On June 14, 2018, the agency filed a complaint alleging L.L., born in July 2017, was abused and dependent and the agency sought temporary custody of L.L. The complaint alleged that, on May 21, 2018, L.L. suffered second-degree burns on his right leg, resulting in blistering and that L.L.'s mother ("mother"), who was the child's primary caregiver, could not offer a plausible explanation for the cause of the injury. Mother also delayed obtaining medical treatment for the child. The complaint alleged that mother had an aggravated arson conviction in 2014 and was incarcerated for the offense. Due to her incarceration, she did not have custody of her three other older children. The complaint also alleged father "had access to the child near the time that the child suffered the burn" but could not provide an explanation for the injury and that father did not have stable housing in which to provide for the child.

{¶ 4} On September 24, 2018, the trial court journalized a judgment entry, stating that mother and father stipulated to a finding of neglect and dependency and L.L. was committed to the temporary custody of the agency.

GAL's Reports

{¶ 5} L.L.'s guardian ad litem ("GAL") Michael Murphy filed two reports in this case. The first report was filed on March 26, 2019, before the agency moved for permanent custody. The report indicated that, after L.L. was removed from the home, he was originally placed with his maternal grandmother in Columbus but was currently being cared for by his maternal grandfather and his girlfriend in Euclid. Mother was 24 years old and has three other older children, all under the age of seven, and a fifth child, P.L., was born in February 2019. Mother was convicted of aggravated arson and served two years in prison. She suffered from bipolar disorder but had not participated in necessary mental health service, and she did not have custody of any of her other children. L.L. was well cared for by maternal grandfather and his girlfriend. He was healthy and his needs were met. The GAL believed that it was in the child's best interest for him to remain in the current placement.

{¶ 6} On August 8, 2019, the agency filed a motion for permanent custody. Before the permanent custody hearing, the GAL filed his final report on May 27, 2020, recommending that the agency be granted permanent custody of L.L. The GAL reported that maternal grandfather and his girlfriend each owned a home and both homes were appropriate for L.L.

{¶ 7} As to father, the GAL noted that father is interested in the custody of L.L. and has recently obtained an apartment with his brother. The GAL was unable to visit their apartment however due to the COVID-19 pandemic, but had seen pictures of the apartment, and it appeared to be clean and appropriate. While the GAL observed father to be interacting well with L.L., the agency had related to him that father did not make progress on his case plan at the time and he had problems with maintaining stable housing.

{¶ 8} Although the GAL was pleased with father's regular visitations and positive interaction with L.L., he found it imperative that L.L. have permanency in his life but father was not ready to take care of L.L. on a daily basis. The GAL recommended a grant of permanent custody to the agency and it was his hope that L.L.'s maternal grandfather would be ultimately granted custody and that the grandfather would be able to facilitate the parents' visits with L.L.

Trial Testimony

{¶ 9} Mother stipulated to the grant of permanent custody of L.L. to the agency, and the trial court held a permanent custody hearing on August 21, 2020.[1] Tiffany Mahoney, the social work assigned to this case, and GAL Michael Murphy testified at the hearing.

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[1] The permanent custody hearing was held for both L.L. and the baby, P.L., who has a different biological father and has been placed in a different home. We also note that father had earlier filed a motion for legal custody of L.L. to be awarded to an interested individual but father withdrew the motion at the outset of the permanent custody hearing because that individual was no longer available to take that role due to the COVID-19 pandemic.

{¶ 10} Mahoney testified that L.L. was in the agency's custody since 2018. Mother has three older children, in addition to L.L. and the baby, P.L., and all three older children were in the custody of Franklin County Children and Family Services. Father's case plan required him to address the issues of mental health, substance abuse, and housing. In December 2019, he tested positive for marijuana and admitted to using the drug. He completed a drug screen for the agency in January 2020 but has not been tested for drugs since then despite the agency's repeated requests. In June 2020, he was discharged from both the mental health and substance abuse services by the provider due to his lack of participation.

{¶ 11} Mahoney also testified that at the beginning of this custody matter, father had been staying in an apartment with two other individuals but moved out at the start of the COVID-19 pandemic. In July 2020, father indicated he had returned to the apartment, which was his last known address. Mahoney testified that she had visited the apartment and found it inappropriate for L.L. to reside there. The gas was turned off in the residence, and as a result, the agency had to hold visitations outside father's home.

{¶ 12} As for visitations, father did regularly attend weekly supervised visitations until the COVID-19 pandemic. Since then, father was able to maintain contact with L.L.'s care provider himself and visit with L.L. Although the social worker had no concerns with father's interaction with the child — she observed a positive bond and attachment between the two — the agency did not find father able to meet the child's needs as a primary caregiver, as he failed to engage in the mental

health and substance abuse services and his housing situation remained inconsistent. In addition, father could not provide documentation of consistent employment and had never been the full-time caregiver for L.L.

{¶ 13} Mahoney testified that L.L. has been well cared for by his maternal grandfather and his wife[2] and he was "very well attached and bonded to" both of them. Maternal grandfather has expressed a willingness and desire to adopt L.L. Both maternal grandfather and his wife have indicated they would be willing to continue to facilitate contact and visitation between L.L. and both father and mother.

{¶ 14} GAL Michael Murphy testified that he recommended permanent custody due to L.L.'s need for permanency. He stated that as a GAL, he always wants to see the children reunited with their family, but sometimes it is not possible. In this case, he stood by the recommendation he made in his report for permanent custody.

ICWA

{¶ 15} In the first assignment of error, father argues that the trial court erred in proceeding with the permanent custody hearing without complying with the requirement of ICWA.

{¶ 16} In 1978, Congress enacted ICWA "for the protection and preservation of Indian tribes and * * * Indian children who are members of or are eligible for

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[2] Maternal grandfather's significant other was referred to as his girlfriend in earlier proceedings but Mahoney referred to her as his wife at this hearing.

membership in an Indian tribe * * *." 25 U.S.C. 1901(2) and (3). ICWA applies to pending court proceedings, including custody cases, "where the court knows or has reason to know that an Indian child is involved * * *." 25 U.S.C. 1912(a).

{¶ 17} To invoke 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. "[T]he party invoking the ICWA bears the burden of establishing that the IWCA is implicated." *In re L.R.D.*, 2019-Ohio-178, 128 N.E.3d 926, ¶ 20 (8th Dist.)

{¶ 18} The record in this case reflects that, on July 10, 2018, the trial court held a hearing on the agency's complaint. At the beginning of the hearing, the court asked mother and father: "I am required to ask under federal law, do either of you have any Native American ancestry?" Both mother and father answered "no."

{¶ 19} On August 3, 2018, the court held another hearing, in which both mother and father agreed to a grant of temporary custody to the agency. Again, both mother and father were asked if they have any Native American ancestry and both of them answered negatively. The court made a specific finding at this hearing that there is no evidence of any Native American ancestry for L.L.

{¶ 20} In a judgment journalized on September 24, 2018, the court stated "[t]he court finds that the child is not a member of a federally recognized Indian tribe, is not eligible for membership in a federally recognized Indian tribe as the biological child of a member of a federally recognized tribe, and is not in the custody of an Indian custodian."

{¶ 21} On April 2, 2019, the court held a hearing over the agency's motion for an extension of temporary custody. The court asked again if father has Native American ancestry, and he answered "no."

{¶ 22} On appeal, father argues the trial court did not comply with ICWA because it failed to inquire of appellant regarding L.L.'s ancestry *after* the agency filed the motion for permanent custody, citing this court's decision in *In re R.G.*, 8th Dist. Cuyahoga No. 104434, 2016-Ohio-7897, to support his claim.

{¶ 23} In *In re R.G.*, this court found merit to appellant parent's claim that the trial court erred in failing to make the inquiry required by ICWA. In that case, the trial court raised the issue of potential Native American ancestry at the initial hearing in the matter with the *case manager*, who stated that she had no knowledge of the child having such ancestry. This court found the trial court's inquiry did not fulfill its obligation under ICWA because the inquiry was limited to the case manager, who possessed no knowledge of the child's ancestry, and, furthermore, the inquiry was made outside of the presence of the parents. This court emphasized in *In re R.G.* that "[t]hroughout the pendency of the case the trial court had ample opportunities to address the applicability of the ICWA when appellant [father] and R.G.'s mother were present but such inquiry was never made." *Id.* at ¶ 18.

{¶ 24} Therefore, *In re R.G.* does not support father's contention. In contrast to *In re R.G.*, the trial court here addressed the ICWA inquiry directly to father in open court on three separate occasions, and each time he answered that the child has no Indian ancestry. *In re R.G.* does not require the ICWA inquiry to

be made again *after* the agency moved for permanent custody. The first assignment of error is without merit.

Permanent Custody

{¶ 25} In the second assignment of error, father argues the trial court erred in granting permanent custody to CCDCFS.

{¶ 26} We begin our analysis by recognizing that "a parent's right to raise a child is an essential and basic civil right." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). "The permanent termination of parental rights has been described 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, We also recognize that "[a]ll children have the right, if possible, to parenting from either natural or adoptive parents which provides support, care, discipline, protection and motivation." *In re Hitchcock*, 120 Ohio App.3d 88, 102, 696 N.E.2d 1090 (8th Dist.1996).

{¶ 27} R.C. 2151.414 sets forth a two-prong analysis for the juvenile court in adjudicating a motion for permanent custody. The first prong focuses on the parent while the second prong focuses on the child. Under the first prong, the trial court is authorized to grant permanent custody of a child to the public agency if, after a hearing, the court determines, by clear and convincing evidence, that any of the following five factors apply: (a) the child is not abandoned or orphaned, but the child cannot be placed with either parent 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 12 or more months of a consecutive 22-month period; or (e) whether the child or a sibling has been adjudicated as abused, neglected, or dependent on three occasions. R.C. 2151.414(B)(1)(a)-(e). Only one of the five factors must be present for this first prong of the permanent custody analysis to be satisfied. *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 28.

{¶ 28} Clear and convincing evidence is that which will produce in the trier of fact "'a firm belief or conviction as to the facts sought to be established.'" *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. While requiring a greater standard of proof than a preponderance of the evidence, clear and convincing evidence requires less than proof beyond a reasonable doubt. *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), fn. 2. This court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency unless the judgment is not supported by clear and convincing evidence. *See, e.g., In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 48; and *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 24.

{¶ 29} In this case, the trial court found L.L. cannot be placed with either parent within a reasonable time or should not be placed with the parents. For the court to make this finding, only one of the 15 enumerated factors under

R.C. 2151.414(E) is required to present. *In re Glenn*, 139 Ohio App.3d 105, 113, 742 N.E.2d 1210 (8th Dist.2000). These factors include, among others, whether the parent failed to substantially remedy the conditions causing the removal of the child despite reasonable case planning and diligent efforts by the agency; whether the parent demonstrated a lack of commitment toward the child; whether the parent has had parental rights of other children terminated; or whether the parent has committed child abuse or allowed the child to suffer neglect and the abuse or neglect poses a threat to the child's safety.

{¶ 30} The trial court here found two of the R.C. 2151.414(E) factors existed: "notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home" (R.C. 2151.414(E)(1); and "[t]he 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." (R.C. 2151.414(E)(4)).

{¶ 31} Clear and convincing evidence contained in the record supports these findings made by the trial court. Father could not provide appropriate housing for L.L. and did not demonstrate his ability to meet the basic needs of L.L. or be an appropriate full-time caregiver. His lack of commitment to the child was also

reflected in his failure to comply with his case plan that required him to engage in substance abuse and mental health services.

{¶ 32} When any of the five factors under R.C. 2151.414(B)(1) exists, such as here, the trial court proceeds to analyze the second prong — whether, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency. R.C. 2151.414. The court is to undertake this analysis with the recognition that although parents have a constitutionally protected interest in raising their children, that interest is not absolute and is always subject to the ultimate welfare of the child. *In re B.L.*, 10th Dist. Franklin No. 04AP-1108, 2005-Ohio-1151, ¶ 7. *See also In re N.M.*, 8th Dist. Cuyahoga No. 106131, 2018-Ohio-1100.

{¶ 33} In determining the best interest of the child, R.C. 2151.414(D)(1) requires the juvenile court to 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 * * *;
>
> (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.

{¶ 34} When analyzing the best interest of the child, "[t]here is not one element that is given greater weight than the others pursuant to the statute." *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. Only one of these enumerated factors needs to be resolved in favor of the award of permanent custody. *In re S.C.*, 8th Dist. Cuyahoga No. 102350, 2015-Ohio-2410, ¶ 30, citing *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000).

{¶ 35} Here, the trial court found permanent custody to be in L.L.'s best interest after considering the factors set forth in R.C. 2151.414(D)(1)(a)-(d), as well as the report of GAL Murphy. Our review shows clear and convincing evidence supports the trial court's determination. Regarding R.C. 2151.414(D)(1)(a), while father has a positive relationship with L.L. as observed during the visitations, L.L. has been placed with his maternal grandfather and is very attached to him. Regarding R.C. 2151.414(D)(1)(b), although the child was too young to express his wishes, the GAL recommended permanent custody.

{¶ 36} Regarding R.C. 2151.414(D)(1)(c) and (d), L.L. was in the agency's custody since August 3, 2018, and had been in the agency's custody for two years when the court held the permanent custody hearing on August 21, 2020. While father advocated for the continued placement of the child outside the home without granting permanent custody, R.C. 2151.415(D)(4) does not permit the trial court to

continue the temporary custody beyond two years after the child is placed outside the home. Father failed to demonstrate he could provide appropriate housing and meet L.L.'s basic needs. Clear and convincing evidence shows that, in consideration of L.L.'s custodial history and his need for a legally secure permanent placement, a grant of permanent custody to the agency is in his best interest.

{¶ 37} In affirming the trial court's judgment granting permanent custody, we are very mindful that "[i]n proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation cannot be conveyed to a reviewing court by printed record." *In re V.M.*, 4th Dist. Athens No. 18CA15, 2018-Ohio-4974, ¶ 62, citing *Trickey v. Trickey*, 158 Ohio St. 9, 106 N.E.2d 772 (1952). "'The discretion that the juvenile court enjoys in determining 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 determination will have on the lives of the parties concerned.'" *In re Ch.* O., 8th Dist. Cuyahoga No. 84943, 2005-Ohio-1013, ¶ 29, quoting *In re Awkal*, 95 Ohio App.3d at 316, 642 N.E.2d 424.

{¶ 38} For all the foregoing reasons, we affirm the trial court's judgment granting permanent custody of L.L. to CCDCFS.

{¶ 39} 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 issue out of this court directing 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.

MICHELLE J. SHEEHAN, JUDGE

LARRY A. JONES, SR., P.J., and
LISA B. FORBES, J., CONCUR