

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE K.C.	:	
	:	No. 112556
A Minor Child	:	
	:	
[Appeal by Father, B.C.]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 7, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD22907725

Appearances:

Barbara Martincic, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Zachary J. LaFleur, Assistant Prosecuting Attorney, *for appellee.*

LISA B. FORBES, J.:

{¶ 1} B.C. (“Father”) appeals the juvenile court’s decision terminating his parental rights and awarding permanent custody of his daughter, K.C., to the Cuyahoga County Division of Children and Family Services (“CCDCFS”). On appeal, Father raises four assignments of error for our review.

I. The trial court erred when it held a dispositional hearing on the complaint for permanent custody beyond the 90-day statutory timeframe.

II. The trial court erred in not appointing a separate counsel for the child when the child's wishes conflicted with the guardian ad litem's recommendation.

III. Father was denied effective assistance of counsel when his counsel failed to move to dismiss the complaint after the statutory timeframe ran out and when she failed to request that an attorney be appointed for the child.

IV. The trial court erred in granting permanent custody.

{¶ 2} After reviewing the facts of the case and pertinent law, we affirm the juvenile court's judgment.

I. Procedural History

{¶ 3} K.C., whose date of birth is December 16, 2014, was removed from her mother's care in February 2021. CCDCFs filed two successive complaints alleging neglect and dependency, and the court dismissed both complaints for procedural technicalities. It is undisputed that K.C.'s mother's whereabouts are unknown, she did not participate in this case in juvenile court, and she is not part of this case on appeal. It is also undisputed that K.C. has been in the custody of CCDCFs since February 2021.

{¶ 4} On August 2, 2022, CCDCFs filed a third complaint alleging neglect and dependency and requesting permanent custody of K.C. to CCDCFs. That same day, CCDCFs also filed a motion for predispositional temporary custody.

{¶ 5} Father lives in Pennsylvania, and according to the complaint, "since [K.C.'s] removal on February 23, 2021, [Father] has failed to support [K.C.] or to

visit with [K.C.] consistently despite efforts by CCDCFS to facilitate in-person visitation.” CCDCFS further alleged in the complaint that Father “has not established a relationship with [K.C.] * * * and has only visited [K.C.] in person twice in July of 2021 since at least [K.C.’s] removal on February 23, 2021.”

{¶ 6} The next day, on August 3, 2022, the court held a hearing on CCDCFS’s motion for predispositional temporary custody of K.C. Counsel for CCDCFS, counsel for Father, and a CCDCFS social worker were the only three people to appear at this hearing. Father did not appear. At this hearing, the court granted CCDCFS’s predispositional motion and committed K.C. to the emergency temporary custody of CCDCFS.

{¶ 7} On August 8, 2022, the court appointed a guardian ad litem (“GAL”) for K.C. On August 22, 2022, CCDCFS filed a case plan, in which services were identified for Father. This case plan states, in parts pertinent to this appeal, as follows:¹

Father * * * have not been consistently involved in [K.C.’s] life. Father need to consistently provide [K.C.] with care and support and need to consistently visit [K.C.]. Father and [K.C.] have a strained relationship at this time. * * * Father will demonstrate an ability to meet [K.C.’s] needs for food, stable housing, supervision, and nurturing by using his own income and community resources. Father will consistently visit [K.C.] and will strengthen his relationship with [K.C.]. Father will be a safe, healthy and involved parent. * * * Father does not consistently call [K.C.] or participate in virtual visits. Father have only seen [K.C.] twice since she’s been in agency custody.

* * *

¹ Excerpts from the CCDCFS case plan are quoted verbatim.

Father will consistently visit [K.C.] and show that he is able to ensure that her needs are met. Father will have at least a 3-day supply of food on hand for [K.C.] at all times. [CCDCFS] will use community resources/programs to assist with income problems * * *. Father will have a childcare plan (responsible or licensed caregiver) in place for times when unable to care for [K.C.] Father will sign release of information as requested and cooperate with agency caseworker in scheduling of family team meetings, agency staffing, and will allow caseworker access to the family residence no less than once per month.

{¶ 8} The case plan further noted that K.C. “is in need of counseling to learn coping skills to help manage feelings/emotions from being abandoned by mother and father’s lack of consistency/follow through with visits.” The case plan also stated that K.C.’s current foster parents are “working with services provider near foster home to address [K.C.’s] mental health concerns.”

{¶ 9} According to the case plan, K.C.’s foster home is three hours from Father’s home. CCDCFS “will work with family and foster care network for supervised virtual visits and transportation for in person visits at a neutral location.” The case plan details that Father is “visiting” with K.C. “2 times Monthly /2 Hourly” at a “Neutral Off-Site” location. These visits are unsupervised, there are no restrictions placed on the visits, and “Father is able to receive phone calls, pictures etc and have virtual visits with” K.C.

{¶ 10} The final notable entry on the case plan states as follows: “Father * * * established paternity and stated that he wanted [legal custody] of [K.C.]. [CCDCFS] wanted to give father and [K.C.] more time to bond. Father have not made himself [available] for an in person visit with [K.C.] since prior to initial custody. Father also

have not been consistent with virtual visits/phone calls. Staffing was held[.] [CCDCFS] will be filing for [permanent custody] of [K.C.]”

{¶ 11} On August 24, 2022, the court held a hearing on the complaint for permanent custody but continued the hearing to September 26, 2022, because it found that service was not perfected on Father. The court held a hearing on September 26, 2022. Father was present at this hearing. An adjudication and dispositional hearing was set for October 20, 2022.

{¶ 12} K.C.’s GAL, Father’s counsel, CCDCFS’ counsel, and the CCDCFS social worker attended the October 20, 2022 adjudication and dispositional hearing. Father was not present. Father’s counsel requested a continuance “for * * * [F]ather to be present.” The court denied the continuance “based on the fact that this matter has been re-filed three times * * *.” The court heard testimony and accepted evidence, and the court adjudicated K.C. neglected and dependent. The court then continued the matter and held it in “abeyance” to conduct an in camera interview with K.C. prior to making a final determination on disposition.

{¶ 13} On October 24, 2022, the court held an in camera interview of K.C. and continued the matter “for further hearing.”

{¶ 14} The court held another hearing on November 15, 2022, at which the following people were present: K.C.’s GAL, counsel for CCDCFS, counsel for Father, and the CCDCFS social worker. Father was not present for this hearing “due to funds.” At this hearing, the court extended temporary custody to February 23, 2023, and ordered Father “to have phone calls with [K.C.] every Wednesday at 7:00 p.m.

The phone calls must be initiated by” Father. The court further stated that K.C.’s foster mother shall keep a log of the aforementioned phone calls. The court also ordered that “[v]isits are to take place every other week at the Jane Edna Hunter Building. For at least 50% of the visits [Father’s] girlfriend and her child must be present. Failure to comply with these orders will be used by this Court to determine what is in the child’s best interest and whether or not parental rights should be terminated.”

{¶ 15} CCDCFS submitted a semiannual administrative review (“SAR”) in this case on January 26, 2023. This SAR states in part relevant to Father’s relationship with K.C. as follows:²

Father has been court ordered to establish a relationship with [K.C.] via visitation and phone calls. Father has not demonstrated consistency or commitment to this. Father has been court ordered to engage in bi weekly supervised visits at [CCDCFS] he has not complied since August his last spoke with [K.C.] 3 weeks ago. He continue to make promises to visit, bring gifts etc. with no follow through. As a result it has started to effect [K.C.] in a negative way. [K.C.] is now stating that she does not want to visit with * * * Father and has begun to question why he does not love her. An OTI³ was submitted for Father but he did not comply with his portion.

* * *

Over the last review period [K.C.] was disrupted from the foster home and placed with the [REDACTED]. [K.C.] is adjusting [to] placement with the family. She is on the waitlist for counseling with Children’s Resource Center. [K.C.] is receiving counseling via her school based guidance counselor. [K.C.] has become withdrawn and sad. She struggles with the fact that * * * Father does not visit or communicate with her. [K.C.] has adjusted well, she is bonding with the caregivers,

² Excerpts from the CCDCFS’ SAR are quoted verbatim.

³ It is not clear from the record what “OTI” stands for.

they report that she is very creative. At times she can be anxious, nervous does not really want to talk about her feelings around [F]ather. [K.C.] has had some meltdowns when it comes to the lack of support from * * * Father. Current caregivers are working with [K.C.] to help her process these feelings.

* * *

Father * * * have not been consistently involved in [K.C.'s] life. Father need to consistently provide [K.C.] with care and support and need to consistently visit [K.C.]. Father and [K.C.] have a strained relationship at this time.

* * * Father has not visited [K.C.] since August of 2022. Father have only visited [K.C.] 3 times since [she] has been in [CCDCFS] custody. The first visit occurred in July of 2022. Father was court ordered * * * to have bi weekly visits with [K.C.]. Father has not followed through with court order.

{¶ 16} The SAR further stated that Father has made “Insufficient Progress” toward his case plan goals, “[t]here are concerns about [F]ather’s ability to financially care for [K.C.],” and K.C. “does not have a relationship with [Father’s] live in girlfriend or her daughter.” Furthermore, according to the SAR, an Interstate Compact for Placement of Children, otherwise known as an “ICPC[,] was submitted for [F]ather in PA in October of 2022. PA is still waiting for [F]ather [to] submit paperwork.” The SAR states that K.C. is “bonded with foster parent and her brother who also reside[s] in the home. * * * Foster parent is interested in adoption.”

{¶ 17} The court held a continuation of the dispositional hearing on February 13, 2023. K.C.’s GAL, the CCDCFS social worker, counsel for CCDCFS, and counsel for Father were present at this hearing. Father did not attend the hearing. The court heard further testimony and accepted evidence at this hearing.

On February 24, 2023, the court granted permanent custody of K.C. to CCDCFS, finding that this disposition was in K.C.'s best interest.

{¶ 18} It is from this order that Father appeals.

II. Hearing Testimony

A. August 3, 2022 Hearing

{¶ 19} At the August 3, 2022 hearing regarding the motion for predispositional temporary custody, CCDCFS social worker Gohinnie Jackson (“Jackson”) testified that K.C. was born in Pennsylvania, where Father still currently lives. At some point, K.C. moved with her mother to Ohio. Dating back to February 2021, when K.C. was removed from her mother’s care, Father did not have transportation. Father is currently employed as a truck driver. At the time of this hearing, Father did not have “stable transportation” because his “car broke down,” but “he was able to get to the last [two] visits.” Those visits occurred on July 6, 2022, and July 17, 2022.

{¶ 20} Although an official “home study” was never conducted concerning Father’s residence in Pennsylvania, a “courtesy home visit” was completed. The outcome of this visit was that Father’s “home was found to be safe and appropriate.” Jackson also testified that Father does not have a criminal record and he currently lives with his fiancée. Jackson further testified that she “had an opportunity to observe a visit between” Father and K.C. and Father was “appropriate” with K.C.

B. September 26, 2022 Hearing

{¶ 21} The court held an arraignment hearing on September 26, 2022, at which Father was present. Father’s counsel stated on the record that Father was “not in agreement with the allegations in the Complaint.” The court noted that a “trial” date was set for October 20, 2022, and the hearing was adjourned.

C. October 20, 2022 Hearing

{¶ 22} The court held an adjudication and disposition hearing on October 20, 2022, at which Jackson and K.C.’s GAL testified. Prior to any witnesses taking the stand, Father’s counsel requested a continuance because Father did “not have transportation to come to Court” for the hearing. CCDCFS opposed the continuance, stating that it was “concerned with the permanency for” K.C. The court denied the request for continuance, stating that time was an issue in this case because the complaint for permanent custody had been dismissed and refiled twice. The court further stated that “at some point you just gotta get your ride together and it is what it is.”

1. Adjudication Portion

{¶ 23} During the adjudication portion of this hearing, Jackson testified that she is an Extended Service Case Worker with CCDCFS and she is assigned to K.C.’s case. K.C. came to the attention of CCDCFS when she “was found home alone by law enforcement” in February 2021. K.C. was removed from the home, and CCDCFS was granted temporary custody of her. She has remained in foster care under the temporary custody of CCDCFS throughout the pendency of this case. Jackson’s

testimony is consistent with the information from the SAR that Father has “only had three face-to-face visits with” K.C. since CCDCFS became involved in this case. Father was inconsistent with Zoom calls and telephone calls to K.C. Jackson testified that CCDCFS “tried to accommodate [F]ather’s work schedule by offering different times, different days, but he still was not consistent with that.”

{¶ 24} According to Jackson, “[a]s of recently [F]ather has missed the last three phone calls with” K.C. “He had a face-to-face visit scheduled for October 16th, but [F]ather called to cancel that visit he said due to the lack of funds.” Jackson testified that, as of the time of this hearing, K.C. had no relationship with Father’s live-in girlfriend and her child and K.C. has “never met either one of them.” Jackson further testified that Father has “made minimal efforts to be involved in [K.C.’s] life, to visit K.C. They have a strained relationship at this time.”

{¶ 25} Jackson testified that K.C. stated the following to her: “You know, my father’s only responsibility is to visit me and to call me and he can’t do that.” Jackson “was surprised to hear her say that, that she was able to articulate that.”

{¶ 26} Jackson attempted to set up visitation between Father and K.C. in June, August, and December 2021, and in January 2022. All four visits did not occur “due to [F]ather’s lack of transportation.” The first face-to-face visit occurred in July 2022. It was scheduled to be a two-hour visit, but Father arrived 45 minutes late. A second visit occurred in late July 2022, and the third and final visit occurred in August 2022. CCDCFS scheduled another visit for October 2022. Father called the

“Friday before the visit and stated that due to a lack of funds he would not be able to attend the visit.”

{¶ 27} Based on Jackson’s testimony, the court found a “showing of neglect and dependency.” The court then commenced the disposition hearing.

2. Disposition Portion

{¶ 28} Jackson testified as to the objectives in Father’s case plan. Father completed two objectives by establishing paternity of K.C. and obtaining appropriate housing, which was confirmed via a “courtesy home visit” by an Allegheny County, Pennsylvania agency in November 2021. According to Jackson, Father’s other objectives were to complete “an ICPC for just a home study to be completed for [F]ather, and then it was for him to establish a relationship with [K.C.] and to consistently visit [K.C.]”

{¶ 29} Jackson testified as follows about the three visits that Father had with K.C.

So the first visit took place, it was in July of 2022. It was at Chuck E. Cheese.

[F]ather met me and the foster parents and [K.C.] at Chuck E. Cheese. It was supposed to take place from 1 to 3 p.m.

Father got there maybe around 1:45. [K.C.] left school early that day to get there, so we were waiting.

Usually we would cancel a visit after 15 minutes of the parent being late, but since [F]ather was coming from far away, we gave him the time to get there.

So they played games, they ate, they talked a little bit.

[K.C.] is a very friendly person and she's no stranger, so she was just happy to be at Chuck E. Cheese and to play.

The second visit took place — well, at the second visit the foster parents were willing to meet [F]ather halfway, so they met him halfway at a location and he was late again.

And it was a play place and they played, they ate. [K.C.] was happy to be out.

And then the third visit the foster parents met [F]ather again halfway. This was in August of 2022.

He was late again for the visit, but they waited.

{¶ 30} Jackson testified that Father was approximately 40 minutes late to each visit, and all three visits ended on time so that each visit lasted approximately one hour and 20 minutes.

{¶ 31} Jackson next testified about K.C.'s foster parent and K.C.'s brother. According to Jackson, K.C. currently lives with her brother in foster care. K.C. "and her brother are bonded. He's really been the only consistent person in her life." K.C. and her brother have been living with this foster parent for "a little over a month and a half," and this foster parent is interested in adopting K.C. and her brother. K.C. has her own room in the foster home, she "likes her school," and she is "making friends." Prior to the current foster home, K.C. and her brother were in a foster placement "for almost a year and a half." The prior foster parents moved to Michigan while this case was pending.

{¶ 32} Asked if K.C. is "involved in any services," Jackson answered that K.C. was referred to counseling because she would get "agitated * * * [d]ue to the lack of consistency with the visits" with Father. Jackson testified that K.C. "was really

struggling” and “was really upset” because Father was not visiting her or calling her regularly.

{¶ 33} Jackson testified as follows about why permanent custody of K.C. to CCDCFS was in K.C.’s best interest.

Father had to make minimal efforts to be involved in [K.C.’s] life at this time. He’s only visited [K.C.] — he’s only had three in-person visits with [K.C.], and the first visit took place in July of 2022.

[K.C.], she’s in need of permanency. She’s been with her brother her whole life. He’s the only consistent person in her life.

* * *

It’s in their best interest to be together, to be placed together. * * *

There are concerns about [F]ather’s ability to financially care for [K.C.] He’s been unable to consistently come to Ohio to visit [K.C.].

It’s either due to transportation issues or due to the lack of funds, so there is concerns if he will really be able to provide for [K.C.] on a daily basis if she’s in Pennsylvania.

Also [K.C.] does not have a relationship with his live-in girlfriend or his girlfriend’s daughter. We don’t know the dynamics or how they would get along in the home.

Also if [F]ather would be able to consistently bring [K.C.] back to Ohio to see her brother who is the only consistent person in her life.

{¶ 34} On cross-examination, Jackson testified that Father obtained employment and “attempted” to make the biweekly visits. Asked if CCDCFS “ever offer[ed] to transport [K.C.] to Pittsburgh for a visit,” Jackson answered, “No. Visits would take place in Cleveland and we tried to make visits take place halfway.” Jackson furthered testified that she observed Father’s visits with K.C., and Father was “appropriate with the child.” Asked if there would be “a safety concern” if K.C.

“were to stay with” Father, Jackson responded as follows: “I don’t believe there’s a safety concern, but I have concerns about his ability to financially care for her and their relationship.”

{¶ 35} Jackson testified that, at times, CCDCFS “assist[s] with providing a bus pass to families,” but it does not provide transportation to visitations. Jackson further testified that when parents and children live far away from each other, “virtual visits” can be set up. However, in the instant case, Father has “only maybe participated in one or two Zoom visits, but his phone has always not been able to accommodate a Zoom visit or have video calls.” According to Jackson, Father would call K.C. “25 percent” of the time that he was scheduled to call and these calls would last “five to ten minutes. * * * [F]ather would go weeks at a time where he just would not call the child.” According to Jackson, her testimony regarding the length of time of these phone calls was based on a phone call log the foster parents kept.

{¶ 36} Jackson further testified that when scheduling the three in-person visits between K.C. and Father, she suggested “a library, but [Father] wanted to go somewhere where [K.C.] would have fun,” so they went to Chuck E. Cheese or someplace similar to Chuck E. Cheese.

{¶ 37} At this dispositional hearing, K.C.’s GAL gave a recommendation on the record, which is consistent with the report he filed on October 13, 2022. The GAL stated that, other than “having * * * inconsistent visits and phone calls,” as well as “transportation issues due to his distance[,] * * * I don’t see anything wrong with [F]ather having legal custody * * *.” According to the GAL, Father’s “home is

appropriate. He has a job at Amazon. He is willing and able to care for” K.C. Additionally, the GAL stated that he “think[s]” K.C. and Father “still have a relationship.” The GAL added that K.C. had “no relationship with the foster parents.” The GAL opined the following: “I don’t think that [K.C.] should have her relationship with [F]ather completely severed because of a transportation issue.” The GAL added that “if [Father] lived five minutes down the street, I don’t think there would ever be an incident.”

{¶ 38} According to the GAL, K.C. “indicated that she basically took care of raising her brother when he was in infancy, and they had a very strong bond.” The GAL stated that “it’s not best to separate” K.C. and her brother, but if Father had custody of K.C., “visitation can continue between [K.C.] and her brother.” The GAL further stated that visitation between K.C. and her brother “may be an issue” if “transportation’s not provided.” The GAL concluded that it was in K.C.’s “best interest to stay with her brother,” and that it was in her best interest to be with Father. Asked why it was in K.C.’s best interest to be with Father, the GAL stated as follows: “Because they have a prior relationship. It’s her biological father, and she has no relationship with her current foster parents.”

{¶ 39} After testimony was taken, the court stated on the record as follows: “[W]e are going to do one more thing before we make a final decision in this matter, and we’re gonna schedule an in camera interview with” K.C. The court held the case in abeyance and set the in camera interview for October 24, 2022.

D. October 24, 2022 In camera Interview

{¶ 40} The GAL and K.C. were present in the courtroom for the court's in camera interview of K.C. K.C. testified that she is in first grade, and she lived with her foster mother, Brandi, two dogs, a cat, and her brother, who is two years old. According to K.C., she does not see her mom but she has visits with Father. Asked what she and Father talk about at their visits, K.C. testified that she likes to ask him "what his favorite things are. * * * His favorite color is purple. He * * * likes barbeque. He likes to watch car games. He plays car games. He fixes cars. He likes to ride his skateboard. His favorite food is pizza. And he likes pineapple on his pizza and do I. And he likes going on bike rides." K.C. testified that what she liked about the visits with Father is that they "got to have fun together."

{¶ 41} Asked, "If you could live with anyone, who would you want to live with," K.C. answered, "I would like to live with my dad." K.C. explained why she wants to live with Father: "Because so I can help him fix his car. So we don't have to have any more visits any more because I will get to see him everyday if I live with him. * * * I'll get to help him out with anything if he needs help with something. I want to do fun things on my birthday and Christmas. Because Christmas is the only day he gets a day off of work." Asked if she "would rather live with [Father], even if that means not living with [her] brother," K.C. responded, "Yes."

{¶ 42} After hearing K.C.'s testimony, the GAL told the court the following: "I didn't know what to do. * * * That's why the one time I couldn't make a decision."

E. November 15, 2022 Hearing

{¶ 43} At this hearing, it was established that Father was not present because “he didn’t have the funds” to travel from Pittsburgh. The court stated that “it’s fair to say [that K.C. is] not really attached to anybody.” According to the court, it “was going to extend temporary custody until the two-year date in February and then make a pretty strict order of visitation and * * * failure to comply will lead to the termination of parental rights.” The court iterated some of the “strict orders”: “Visitations biweekly supervised at the Jane Edna Hunter Building [“Jane Edna”]”; “Phone calls initiated by [F]ather once a week with a log”; “Foster mother to testify as a Court witness at the next Court hearing with the length of time these calls lasted”; “For at least 50 percent of the visits the girlfriend and the child must be present”; “The phone calls are to happen once a week on Wednesday at 7 p.m. They must be initiated by [F]ather. If [F]ather does not initiate the phone calls, they will not happen.”

{¶ 44} The court also ordered that the visits not take place at Chuck E. Cheese or be any “play date kind of visit.” The court concluded by saying that “[f]ailure to cooperate with the visitation will be the driving factor in this Court’s ultimate decision.” The court also noted that “this is not an issue of transportation. This is an issue of establishing a relationship with your child which is why the phone contact is so significant for this Court, because then transportation is no longer an excuse.”

F. February 13, 2023 Hearing

{¶ 45} The court stated that this hearing was “the conclusion of the disposition” on permanent custody. Father did not attend this hearing “because he was having transportation issues,” and Father’s attorney requested a continuance. The court denied the request, finding that this “has been the issue with this case all along.”

{¶ 46} Jackson testified that an ICPC investigation was set in motion by CCDCFS, who had “Pennsylvania reach[] out to [F]ather in November 2022 to do a home study.” Jackson explained that an ICPC is “an investigation that has to be done when one State wants to place a child in its custody in another State.” Although “Pennsylvania” was able to go out to Father’s home, Father did not complete the required paperwork. “Pennsylvania” gave Father another 30 days to complete the required paperwork, but Father did not do this. In January 2022, the ICPC was withdrawn “due to [F]ather’s lack of compliance and he had not submitted any of the paperwork.”

{¶ 47} Jackson further testified that she emailed Father and “spoke to him over the phone several times” regarding the visitation orders that the court put in place during the previous hearing. Jackson scheduled the biweekly in-person visits at Jane Edna. Jackson reached out to Father and reminded him of the visits. Each time, Father told Jackson that he was not planning to attend the visits “[d]ue to lack of funds or transportation issues * * *.”

{¶ 48} Jackson again testified that CCDCFS “does not provide transportation for the parents” for visitation. Jackson further testified that Father had not attended any visitation sessions with K.C. at Jane Edna since the November 15, 2022 hearing.

{¶ 49} Brandi Routson, who is K.C.’s foster parent, testified that the weekly scheduled phone conversations between Father and K.C. were inconsistent. Father would call right at 7. They would talk at length about a lot of things for the full hour. 8 p.m. was bedtime, so she would tell dad it’s bedtime, I have to go, and that lasted for about four weeks. After that he was very inconsistent. He did not call four weeks in a row, and then he started calling later. Instead of calling at 7, he would call at 7:45 or 7:30, and then he would kind of fight when it was bedtime.

{¶ 50} Routson explained as follows about Father saying things to K.C. during the phone calls “that hurt her feelings.”

She asked [Father] like why he wasn’t showing up or why he wasn’t keeping promises, and he said that I don’t make promises to you. I always say maybe. But for her that was very hard because he would say maybe, and then he would say, oh, the next time I see you I’m gonna take [you to] the movies or I want to take you here or there, and to her that was a promise.

She didn’t understand the difference, so we did talk about that.

And then she asked specifically why didn’t you call me on [the] 17th and [Father] said, well, I told you nobody answered the phone last week, which was true, he did call the previous week and [K.C.] did not want to talk to him, so we did not answer.

{¶ 51} Routson testified that Father told K.C. on the phone the following: “[S]ometimes I just get distracted. I’m at work. I’m busy playing video games and only allowed to call you at certain times. I can’t call you whenever I want.”

{¶ 52} Routson testified that K.C. goes “back and forth” between calling her “Brandi” and “mom.” According to Routson, K.C. told her after a phone call with Father that “she shouldn’t have talked to [Father], that she does feel like it would be better and that she does better emotionally when he’s not involved and he’s not around. She did say that a lot of that hurt her feelings because she doesn’t understand and it’s confusing and she’s like this does feel like my home, this does feel like my family.”

{¶ 53} Routson testified that, “especially after [K.C.’s] last phone call with [Father], [K.C.] has been really struggling. She has had a lot of anxiety.” Asked if K.C.’s relationship with Father is the cause of this anxiety, Routson stated as follows: “I would say just the inconsistency, the fact that she doesn’t really understand why he’s not coming around and why we can’t do more on our end [because Father] has to initiate.” Asked about K.C.’s statement that she would be “better off” without Father, Routson replied, “She has said that, yes. I wouldn’t say she feels that way consistently. She is very confused, and she even said that she didn’t want to have to come back to Court. She didn’t want to have to talk to anybody about it.”

{¶ 54} The GAL made the following recommendation at this hearing: “Your Honor, at this point considering that it appears that [F]ather has failed to comply with this Court’s visitation schedule, I do believe that it is in [K.C.’s] best interest that this Court grant permanent custody” to CCDCFS.

{¶ 55} The court made the following findings on the record at the close of the final disposition hearing:

[T]he fact that [F]ather did not comply with the ICPC paperwork is of huge significance to me because that has nothing to do with transportation, it has nothing to do with having a job that prevents him from making contact at a specified date or time.

He didn't complete the paperwork despite having weeks to do so and also I would note from the log he spends his Sundays gaming, which means that he had time to complete the paperwork.

The Court further notes that the child is currently living with her biological brother, which is a significant factor.

The Court appreciates the foster mother, her participation as it is in this part of the case because it really did help me decide what to do.

III. Law and Analysis

A. 90-Day Statutory Timeframe for Dispositional Hearings

{¶ 56} In his first assignment of error, Father argues that the “trial court failed to resolve the complaint for permanent custody of K.C. within a statutory timeframe.” Specifically, Father argues that the juvenile court erred because final judgment, which committed K.C. to the permanent custody of CCDCFS, was issued “195 days after the filing of the complaint.”

{¶ 57} Pursuant to R.C. 2151.35(B)(1), which governs dispositional hearings in abuse, neglect, and dependency cases,

[t]he dispositional hearing shall not be held more than ninety days after the date on which the complaint in the case was filed * * *.^[4] If the dispositional hearing is not held within the period of time required by this division, the court, on its own motion or the motion of any party or the [GAL] of the child, shall dismiss the complaint without prejudice.

⁴ The statute allows for continuances to the hearing beyond the 90-day limit, not to exceed 45 days “for good cause shown,” although this option is not available if the complaint has been dismissed and subsequently refiled, which is the procedural posture of the case at hand. R.C. 2151.35(B)(1).

See also Juv.R. 34(A); *In re E.S.*, 5th Dist. Perry No. 20 CA 00008, 2020-Ohio-4843, ¶ 30 (“Juv.R. 34[A] contains essentially the same language” as R.C. 2151.35(B)(1) concerning dispositional hearings and the 90-day timeframe.).

{¶ 58} Father did not file a motion to dismiss regarding, object to, or otherwise challenge in the juvenile court the issue of whether the 90-day timeframe in R.C. 2151.35(B)(1) was violated. As a result, our review is limited to whether the juvenile court committed plain error by failing to “resolve the complaint for permanent custody” within the statutory timeframe. *See State v. Dandridge*, 8th Dist. Cuyahoga No. 109608, 2021-Ohio-3355, ¶ 58 (“Failure to object at trial waives all but plain error.”).

In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of and public confidence in, judicial proceedings.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 120, 679 N.E.2d 1099 (1997). *See also In re De.D.*, 8th Dist. Cuyahoga No. 108760, 2020-Ohio-906, ¶ 13 (“It is well-established that failure to object to an issue in the lower court waives a party’s right to challenge that issue on appeal absent plain error.”).

{¶ 59} In the instant case, CCDCFS filed the complaint for permanent custody on August 2, 2022. The dispositional hearing commenced on October 20, 2022, which is within the 90-day timeframe. The dispositional hearing was

continued and finalized on February 13, 2023. The final disposition journal entry was issued on February 24, 2023.

{¶ 60} This court, as well as other Ohio courts, have interpreted R.C. 2151.35(B)(1)'s 90-day timeframe to mean that the dispositional hearing must commence within 90 days from the date the complaint was filed. “The dispositional hearing must at least begin within the ninety-day time limitation of R.C. 2151.35(B)(1) or the court is obligated to dismiss the complaint without prejudice.” *In re White*, 8th Dist. Cuyahoga No. 74358, 1999 Ohio App. LEXIS 168, 10 (Jan. 28, 1999). *See also In re Davis*, 5th Dist. Stark No. 1996CA00017, 1996 Ohio App. LEXIS 6005 (Nov. 18, 1996) (“[T]he fact that the dispositional hearing was commenced within the ninety day time period [is] sufficient to comply with the time limitations set forth in R.C. 2151.35(B)(1)”; *In re Dixon*, 6th Dist. Erie No. E-91-55, 1992 Ohio App. LEXIS 5175 (Oct. 9, 1992) (holding that the “only limitation on the court” regarding the timeframe of dispositional hearings under R.C. 2151.35(B)(1) “is that the dispositional hearing must be commenced within ninety days after the complaint was filed”).

{¶ 61} In applying this court’s precedent that, under R.C. 2151.35(B)(1), the dispositional hearing must commence within 90 days of the date the complaint was filed, we find no error — let alone plain error — in the juvenile court’s failure to dismiss the complaint in the case at hand. Accordingly, Father’s first assignment of error is overruled.

B. Separate Counsel for K.C.

{¶ 62} In his second assignment of error, Father argues that the juvenile court “erred in not appointing a separate counsel for [K.C.] when [K.C.’s] wishes conflicted with the GAL’s recommendation.” We note that Father did not object to the failure to appoint separate counsel in the juvenile court. Therefore, we review this argument for plain error.

{¶ 63} R.C. 2151.352, which governs the right to counsel in juvenile proceedings, states in part that “[i]f the interests of two or more * * * parties conflict, separate counsel shall be provided for each of them.” The Ohio Supreme Court has interpreted R.C. 2151.352 to mean that “a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances.” *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, ¶ 29. Although the *Williams* Court did not elaborate on the “certain circumstances” necessary to require independent counsel for a child, it noted that “courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child * * *.” *Id.* at ¶ 17.

{¶ 64} Ohio courts, including this district, have cited with approval the test found in *In re Hilyard*, 4th Dist. Vinton Nos. 05CA600-05CA609, 2006-Ohio-1977, ¶ 36, quoting *In re Brooks*, 10th Dist. Franklin Nos. 04AP-164, 04AP-202, 04AP-165, and 04AP-201, 2004-Ohio-3887, ¶ 78: “Generally, the appointment of independent counsel is warranted when a child has ‘repeatedly expressed [a] desire’

to remain or be reunited with a parent but the child's [GAL] believes it is in the child's best interest that permanent custody of the child be granted to the state." See also *In re An.M.*, 8th Dist. Cuyahoga No. 111368, 2022-Ohio-2873, ¶ 52 (citing *Hilyard* with approval). However, Ohio courts have also held that "there is no need to consider the appointment of counsel based upon a child's occasional expression of a wish to be reunited with a parent or because of a statement made by an immature child." *In re Williams*, 11th Dist. Geauga Nos. 2002-G-2454 and 2002-G-2459, 2002-Ohio-6588, ¶ 24. See also *In re P.B.*, 8th Dist. Cuyahoga Nos. 109518 and 109519, 2020-Ohio-4471, ¶ 64 (citing *In re Williams*, 11th Dist. Geauga Nos. 2002-G-2454 and 2002-G-2459, 2002-Ohio-6588, with approval).

{¶ 65} In the case at hand, the GAL first recommended at the October 20, 2022 dispositional hearing that Father be awarded legal custody of K.C. The GAL also concluded that it was in K.C.'s best interest to stay with her brother, then potentially inconsistently concluded that it was in K.C.'s best interest to be with Father.

{¶ 66} At the October 24, 2022 in camera interview, K.C. stated that she would like to live with Father. The GAL stated on the record at this interview that he did not "know what to do."

{¶ 67} The January 26, 2023 SAR states that Father's inconsistency in visiting and calling K.C. "has started to effect [K.C.] in a negative way. [K.C.] is now stating that she does not want to visit with * * * Father and has begun to question why he does not love her."

{¶ 68} At the February 13, 2023 dispositional hearing, K.C.’s foster parent testified that K.C. expressed inconsistent feelings about having Father in her life. Asked about a statement that K.C. would be “better off” without Father, the foster parent testified, “She has said that, yes. I wouldn’t say she feels that way consistently. She is very confused * * *.” At this final dispositional hearing, the GAL recommended that permanent custody of K.C. be granted to CCDCFS.

{¶ 69} The court’s February 24, 2023 journal entry states in part as follows: “The GAL for the child now recommends granting the prayer for permanent custody as being in the child’s best interest, and the Court finds no conflict between his recommendation and the child’s wishes.”

{¶ 70} Our review of the record shows that K.C. did not repeatedly and consistently express a wish to live with Father. Although K.C. expressed this wish at the in camera interview, she also expressed a desire to stay with her brother. According to evidence in the record, these are mutually exclusive options. K.C. also expressed frustration and confusion to her foster parent regarding Father’s inconsistent visitation. Accordingly, we find no error in the court’s conclusion that K.C.’s wishes do not conflict with the GAL’s recommendation, and we find no error in the court’s failure to appoint K.C. independent counsel.

{¶ 71} Father’s third assignment of error is overruled.

C. Ineffective Assistance of Counsel

{¶ 72} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney’s performance was deficient and that the

defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance.” *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶ 73} On appeal, Father argues that his trial counsel was ineffective for reasons similar to the reasons he raised in his first two assignments of error: (1) his counsel failed to file a motion to dismiss concerning R.C. 2151.35(B)(1)’s 90-day timeframe; and (2) his counsel failed to request an attorney be appointed for K.C. Father argues on appeal that he was first prejudiced because, had his counsel filed a motion to dismiss, “the court would have no option but to grant the motion * * *.” Second, Father argues that he “was prejudiced by not having another attorney appointed [for K.C.] that supported his position of having [K.C.] live with him.”

{¶ 74} However, upon review of Father’s first two assignments of error, we found no error in the trial court’s failure to dismiss this case under R.C. 2151.35(B)(1) and we found no error in the trial court’s failure to appoint separate counsel for K.C. Accordingly, we find that Father failed to show how his trial counsel’s performance prejudiced him. We cannot say that Father’s counsel was ineffective for failing to challenge these issues. Father’s third assignment of error is overruled.

D. Permanent Custody

{¶ 75} In Father’s fourth assignment of error, he argues that the “court erred in granting permanent custody.” Specifically, Father argues that the trial court’s finding “that [K.C.] cannot be placed with Father within a reasonable period of time or should not be placed with Father and that permanent custody was in [K.C.’s] best interest, were not supported by the record.”

1. Standard of Review

{¶ 76} “An appellate court will not reverse a juvenile court’s termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence.” *In re M.J.*, 8th Dist. Cuyahoga No. 100071, 2013-Ohio-5440, ¶ 24. “Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof.” (Citations omitted.) *In re V.S.*, 8th Dist. Cuyahoga No. 109966, 2021-Ohio-1818, ¶ 27.

{¶ 77} Pursuant to R.C. 2151.353(A)(4), if a child is adjudicated abused, neglected, or dependent, the juvenile court may “[c]ommit the child to the permanent custody of [CCDCFS], if the court determines in accordance with division [R.C. 21514.414(E)] that the child cannot be placed with one of the child’s parents within a reasonable time or should not be placed with either parent and determines in accordance with [R.C. 2151.414(D)(1)] that the permanent commitment is in the best interest of the child.”

2. R.C. 2151.414(E) Placement with Father Factors

{¶ 78} In its February 24, 2023 journal entry granting permanent custody of K.C. to CCDCFS, the court found that, pursuant to R.C. 2151.414(E), K.C. could not be placed with Father within a reasonable time or should not be placed with Father. Specifically, the court found in part as follows:

(E)(1) Following placement of the child outside the child's home and 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.

(E)4) 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 heard testimony from the social worker and the foster mother. Particularly compelling was the father's failure to complete the paperwork for the [IPCP] in which neither transportation nor work hours were barriers to completion. This paperwork was necessary for the child protection agency in Pennsylvania to be able to recommend placement with the father which they now cannot do. The Court notes that the father did not attend a single visit with the child since at least the November 2022 court hearing * * *.

3. R.C. 2151.414(D)(1) Best-Interest Factors

{¶ 79} Also in the February 24, 2023 journal entry, the court considered the best-interest factors under R.C. 2151.414(D)(1) as follows:

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 * * * for twelve or more months of a consecutive twenty-two month period; 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; and whether any of the factors in [R.C. 2151.414(E)(7)-(11)] apply in relation to the parents and child. All of these factors weigh in favor of permanent custody.

The GAL for the child now recommends granting the prayer for permanent custody as being in the child's best interest, and the Court finds no conflict between his recommendation and the child's wishes.

The child is doing well in her current home with her biological brother to whom she is very attached, and her foster mother is willing to adopt her.

The Court finds that there is clear and convincing evidence that permanent custody is in the child's best interest and is therefore granted.

4. Clear and Convincing Evidence Supports the Trial Court's Findings

{¶ 80} Upon review, we find that the court's findings under R.C. 2151.414 are supported by clear and convincing evidence in the record. Father's case plan included that he become consistently involved in K.C.'s life, that he consistently visit her, and that he consistently ensure K.C.'s needs are met. Evidence in the record shows that, although Father appears to love and care for K.C., he was inconsistent in calling her, visiting her, and generally establishing a relationship with her. Additionally, as the juvenile court noted, Father failed to fill out simple paperwork allowing the state of Pennsylvania to engage with CCDCFS to determine whether Father's home and the people who live in it are appropriate for raising K.C.

{¶ 81} This evidence supports the juvenile court's finding under R.C. 2151.414(E)(4) that Father "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.” See *In re R.H.*, 8th Dist. Cuyahoga No. 111748, 2023-Ohio-78, ¶ 39 (“[T]he testimony established that Mother was initially scheduled to visit weekly with the children but missed 80 percent of these in-person visits. * * * Mother’s failure to engage in the objectives of the case plan is demonstrative of her lack of commitment to being reunited with the children.”).

{¶ 82} Furthermore, the evidence in the record supports the juvenile court’s findings under R.C. 2151.414(D)(1) that the following factors “[a]ll * * * weigh in favor of permanent custody” to CCDCFS: K.C.’s relationship with her brother and her foster parent; K.C.’s wishes; the fact that K.C. had been in CCDCFS’ uninterrupted custody since February 2021; the fact that K.C. needed a secure permanent situation; and the GAL’s ultimate recommendation that custody be granted to CCDCFS. See *In re R.S.*, 8th Dist. Cuyahoga No. 111353, 2022-Ohio-4387, ¶ 51 (permanent custody to CCDCFS was in the children’s best interest because Mother “failed to engage with the objectives of [the] case plan and thus failed to remedy the conditions that caused the children’s removal. * * * The children deserve permanency the foster parents were willing and able to provide.”).

{¶ 83} Accordingly, we find the court acted within its discretion, as shown by clear and convincing evidence in the record, when it terminated Father’s parental rights and granted custody of K.C. to CCDCFS. Father’s fourth and final assignment of error is overruled.

{¶ 84} 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.

LISA B. FORBES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
MICHAEL JOHN RYAN, J., CONCUR