[Cite as *In re L.C.G.*, 2016-Ohio-8217.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	
L.C.G.	)	
	)	CASE NO. 16 MA 0039
	)	
	)	OPINION
	)	
	)	
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Juvenile Division of Mahoning County, Ohio Case No. 10 JC 1677
JUDGMENT:	Affirmed
APPEARANCES: For Appellee	Attorney Lori Shells 222 West Federal Street, 4th Floor Youngstown, Ohio 44503
For Appellant	Attorney Rhonda G. Santha 6401 State Route 534 West Farmington, Ohio 44491

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 12, 2016

[Cite as *In re L.C.G.*, 2016-Ohio-8217.]
DONOFRIO, P.J.

{¶1} Appellant, Timothy G., appeals from a Mahoning County Juvenile Court judgment terminating his parental rights and granting permanent custody with the power of adoption of his son to appellee, the Mahoning County Children's Services Board.

{¶2} L.G. was born on August 24, 2010, to Tammy H. Appellee took custody of L.G. just three days after his birth based on the fact that Tammy had lost permanent custody of three of her children and had open cases regarding three other children.

{¶3} The trial court adjudicated L.G. a dependent child on October 8, 2010. Appellant was determined to be L.G.'s father.

{¶4} Appellee put case plans in place for both Tammy and appellant. After approximately one year, however, Tammy did not have any contact with L.G. and eventually cut off all contact with appellee as well. She has been absent throughout much of this case.

{¶5} Included in appellant's case plan goals were mental health counseling, substance abuse treatment, and suitable housing. These goals stemmed from concerns regarding appellant's marijuana and cocaine use, his mental health, and the home he shared with his mother, which had numerous safety and cleanliness issues.

{¶6} At an August 22, 2011 review hearing, the court found neither parent had made any progress on their case plan.

{¶7} On January 23, 2012, appellee filed a motion for permanent custody with the power of adoption. The trial court overruled the motion on April 5, 2012. It found appellee had failed to make reasonable efforts to help appellant complete his case plan. Therefore, temporary custody continued.

{¶8} On July 25, 2012, appellee filed a motion to modify temporary custody to a planned permanent living arrangement. This was to allow appellant more time to complete his case plan while allowing L.G. to continue to reside with the same foster family. The court granted this motion on October 15, 2012.

{¶9} On October 15, 2013, appellee filed another motion for permanent

custody of L.G. with the power of adoption. The matter was heard before a magistrate. The magistrate's decision granted the motion for permanent custody. Appellant filed objections.

{¶10} Based on appellant's objections, the trial court initiated a de novo trial on August 28, 2015. However, after the trial began, the parties and the court realized that Tammy had never been served with notice of the trial. Therefore, the court stopped the trial.

{¶11} After service by notice had been perfected on Tammy, the court began a new trial on November 12, 2015. Although her counsel and her guardian ad litem appeared, Tammy did not appear. The court heard testimony from several caseworkers and counselors and L.G.'s guardian ad litem. Appellant did not testify.

{¶12} The trial court granted appellee's motion for permanent custody with the power of adoption. In doing so, it found L.G. had been in appellee's care for at least 12 of the last 22 months and that granting the permanent custody motion was in L.G.'s best interest.

{¶13} Appellant filed a timely notice of appeal on March 31, 2016. Tammy did not file a notice of appeal. Appellant now raises a single assignment of error.

{¶14} A parent's right to raise his or her children is an essential and basic civil right. *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). However, this right is not absolute. *In re Sims*, 7th Dist. No. 02-JE-2, 2002-Ohio-3458, ¶ 23. In order to protect a child's welfare, the state may terminate parents' rights as a last resort. *Id*.

{¶15} We review a trial court's decision terminating parental rights and responsibilities for an abuse of discretion. *Sims*, 7th Dist. No. 02-JE-2, ¶ 36. Abuse of discretion connotes more than an error of law or judgment; it implies that the

court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶16} Appellant's assignment of error states:

> APPELLANT FAILED TO RECEIVE A FAIR TRIAL IN HIS PERMANENT CUSTODY HEARING WHEN THE TRIAL COURT PERMITTED REPEATED INCRIMINATING HEARSAY IN VIOLATION OF OHIO EVIDENCE RULE 802.

{¶17} As noted above, Tammy did not attend the permanent custody hearing. During the hearing, caseworker Patty Amendolea testified as to various statements Tammy made to her. These statements included Tammy's wishes that L.G. remain with his foster parents as well as statements that appellant and his mother held Tammy in their home against her will. Appellant's counsel voiced a continuous objection to all statements allegedly made by Tammy. (Tr. 132-135). The court and counsel discussed whether Tammy was a party to the case and whether her statements to Amendolea were admissible as an exception to the hearsay rule. (Tr. 132-135). The court determined that it would allow Amendolea to testify as to Tammy's statements and it would later determine whether or not it would consider those statements as evidence. (Tr. 133-135). Ultimately, in its judgment entry, the court ruled on appellant's objection:

> This Court affirms Defense Counsel's Motion and strikes any statements allegedly made by Mother or referenced by Mother which includes any hearsay statements made by her to witnesses. Mother had the opportunity to attend and present testimony at Trial. Her testimony cannot be entered via a back door mechanism. Therefore all hearsay statements allegedly made by Mother shall not be considered by this Court.

(March 4, 2016 Judgment Entry).

{¶18} Appellant now argues the trial court erred in allowing Tammy's hearsay statements into evidence. He notes that he could not cross examine Tammy regarding her statements because she did not attend the permanent custody hearing. He also cites to a criminal case where the trial court admitted an out-of-court statement by a non-testifying co-defendant that implicated the defendant. *State v. Render*, 5th Dist. No. 93-CA-61, 1995 WL 495662 (June 27, 1995). He points out that the court of appeals reversed finding the admission of the co-defendant's statement was a violation of his right to confrontation even though the trial court gave an instruction that the confession could only be used against the co-defendant and not the defendant.

{¶19} Appellant acknowledges that the trial court stated it would not consider Tammy's hearsay statements in rendering its judgment. But appellant goes on to argue that without the hearsay statements there was not clear and convincing evidence to support the trial court's grant of permanent custody.

{¶20} First, we will address the hearsay issue. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay is inadmissible. Evid.R. 802. As stated above, the court allowed Amendolea to testify as to hearsay statements Tammy made to her. However, the court stated it would rule on the statements' admissibility at a later time. In its judgment entry, the court made clear that it did not consider any hearsay statements in reaching its decision.

{¶21} We take the trial court at its word. There is no reason to believe that the trial court considered testimony that it ruled was inadmissible. This is not the case of a jury trial where the jury hears inadmissible evidence and is later instructed to disregard it and we are left to wonder whether the jury indeed disregarded the evidence. This was a hearing before the court. We presume the court considered only the testimony that it found to be admissible. Moreover, as will be seen below, the trial court discussed all of the statutory best interest factors in detail. Not once in its discussion did it mention any hearsay testimony. Therefore, the trial court did not

err in allowing Amendolea to testify as to the hearsay statements and then later ruling that the hearsay statements were inadmissible and it would not consider them.

{¶22} Next, we must consider whether the trial court's judgment granting permanent custody to appellee was supported by clear and convincing evidence.

{¶23} Pursuant to R.C. 2151.414(B)(1):

> [T]he court may grant permanent custody of a child to a movant if the court determines at the hearing * * *, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:
>
> * * *
>
> (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, * * *.

{¶24} Clear and convincing evidence is evidence that produces in the mind of 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).

{¶25} In this case, it was undisputed that L.G. has been in appellee's continuous custody since August 27, 2010, when he was three days old. Thus, as long as there was clear and convincing evidence that permanent custody was in L.G.'s best interest, we must affirm the trial court's judgment.

{¶26} The trial court found it was in L.G.'s best interest to grant permanent custody to appellee.

{¶27} In determining whether it is in the child's best interest to grant custody to the agency, the court shall consider:

> (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, * * * 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 [regarding certain crimes, withholding food or medical treatment, drug and alcohol abuse, abandonment, and having previously had parental rights terminated].

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

{¶28} The trial court made detailed findings regarding each of these factors. Because Tammy did not appear at the hearing or appeal the trial court's judgment, we will only address the factors and the trial court's findings as they apply to appellant.

{¶29} As to the first statutory factor, the court found L.G.'s relationship with appellant was "nominal." It concluded the evidence demonstrated that appellant's parental abilities were limited and he could not parent without his mother. It noted appellant's mother pays all of his bills and handles all of his money. It found appellant is likable and friendly, though he suffers from post-traumatic stress disorder, depression, and a learning disability. The court noted that visitations were limited and appellant had not established a meaningful relationship with L.G. The court found appellant's chronic chemical dependency, chronic emotional illness, and unresolved family dysfunction are severe enough that he cannot provide a home for L.G. The court noted that appellant tested positive for cocaine on the day of the hearing. It found appellant failed to successfully utilize the psychological and

substance abuse services that were made available to him.

{¶30} Regarding appellant, the court also found other factors to be relevant. The court noted appellant has been involved in several domestic violence disputes and he and his family members have a history of dysfunction and aggression toward each other. Additionally, the court found appellant's house was not appropriate or safe for L.G. It cited testimony regarding cats and a smell of cat urine and feces, fleas, a moldy-smelling basement from flooding, cigarette butts and nails on the floor, and not enough sleeping quarters for appellant, his mother, and L.G.

{¶31} As to the second statutory factor, the court stated that L.G. expressed his wishes directly to his GAL. The court noted that L.G. wished to remain with his foster parents. It noted that L.G. enjoyed his time with appellant but there was no parental bond.

{¶32} As to the third statutory factor, the court found L.G. has been in appellee's continuous custody for more than 12 months of the past 22 months. In fact, it found L.G. has been in appellee's care since August 27, 2010, which was three days after his birth. The court noted this was an extraordinary amount of time.

{¶33} As to the fourth statutory factor, the court noted that L.G. is well-bonded, happy, and thriving with his foster family. It found appellant has failed to complete his case plan and is unable to secure independent housing due to his felony conviction. Because L.G. has been in appellee's care since August 2010, the court found the need for legally secure placement was great and could not be achieved without a grant of permanent custody.

{¶34} As to the fifth and final statutory factor, the trial court did not find that any of the factors listed in R.C. 2151.414(E)(7) to (11) applied to appellant.

{¶35} Based on the above, the trial court found it was in L.G.'s best interest that it grant permanent custody to appellee.

{¶36} The evidence supports the trial court's findings and judgment.

{¶37} Patty Amendolea was appellee's first witness. Amendolea was assigned as the caseworker for this case from April 2012 until October 2013.

Amendolea testified that L.G. enterer appellee's custody when he was just three days old. (Tr. 127). She stated that appellant's case plan involved addressing his housing situation, attending substance abuse counseling, remaining sober, refraining from criminal activity, and visitation. (Tr. 150).

{¶38} Amendolea next testified that when appellee was looking for a relative placement for L.G., appellant recommended his uncle. (Tr. 153). But Amendolea discovered the uncle had committed a sex offense against a 13-year-old mentally handicapped child. (Tr. 153). Amendolea also had concerns about appellant's nephew who lived with appellant's mother for some time, which was where appellant proposed that he live with L.G. (Tr. 153). The nephew had a record of sexually offending his sister. (Tr. 153).

{¶39} As to appellant's housing, Amendolea stated that appellant lived with his mother in a cluttered two-bedroom house. (Tr. 159-160). She stated there was initially a problem with there being no water, but that was resolved. (Tr. 160). She stated they had problems with the basement flooding. (Tr. 160). Additionally, the basement was "very filthy," musty, and not appropriate for a child. (Tr. 160). Amendolea was also concerned that appellant's brother, his brother's girlfriend, and their children also lived in the house from time to time due to the belongings she would find in the house and because it was listed as the girlfriend's address for her welfare checks. (Tr. 164-165, 168).

{¶40} As to appellant's criminal behavior, Amendolea testified appellant had been incarcerated for a drug offense. (Tr. 168). He also had a domestic violence charge against Tammy. (Tr. 168). And he had domestic violence charges resulting from two separate instances with two of his brothers. (Tr. 168-169).

{¶41} As to visitation, Amendolea testified that appellant started out with two-hour visits at the agency, which were then increased to in-home visits in 2013. (Tr. 170). Amendolea stated that the visits went well. (Tr. 171). In March of 2013, Amendolea increased the visits to allow for overnight visits. (Tr. 172). But on March 19, 2013, Amendolea asked appellant to submit to a random drug test and appellant

told her it would not be a good day because he would test positive. (Tr. 173-175). Two days later, appellant tested positive for marijuana. (Tr. 175). In the next few months, appellant tested positive for cocaine and marijuana. (Tr. 175-176, 187-188). All the while, he was in drug and mental health counseling. (Tr. 176). Due to the positive drug tests, Amendolea canceled the overnight visits and went back to weekly visits at the agency or the park. (Tr. 177-178).

{¶42} Finally, Amendolea testified that L.G. has a very good relationship with his foster parents. (Tr. 192). She stated he has lived with the same foster family for the past four years since he was a year old and they are the family he knows. (Tr. 193). She opined that to remove L.G. from his foster family would cause trauma to him. (Tr. 196). She opined that granting appellee's motion for permanent custody was in L.G.'s best interest so that his foster family could adopt him. (Tr. 193).

{¶43} Mikenzie McKimmie testified next. She is the current caseworker for this case, which she took over in February 2014.

{¶44} McKimmie testified that during her home visits with appellant, sometimes the home had safety concerns and sometimes it did not. (Tr. 246). She has noticed cigarette butts and nails on the floor. (Tr. 246). She has also noticed an odor of cat urine and feces along with fleas from the cats. (Tr. 246). And she stated there is an issue with flooding in the basement. (Tr. 247). McKimmie also testified she was concerned that there were other people living in the home. (Tr. 250). She stated that when she asked appellant he initially denied this but she came to find out that his brother, the brother's girlfriend, and their children were also living there. (Tr. 250-251). She stated appellant eventually admitted to her that they were living in the home. (Tr. 251). McKimmie stated this was a concern because there were only two bedrooms and two beds in the home. (Tr. 252). But she stated that on her most recent visit they did not appear to be living there. (Tr. 252-253). Also on her most recent visit, McKimmie stated that the house was fairly clean and there were not many safety concerns. (Tr. 253).

{¶45} McKimmie stated appellant was still in mental health and substance

abuse counseling. (Tr. 257). She stated he has made minimal progress. (Tr. 257). She also testified appellant was prescribed some medications but that he was not taking them regularly. (Tr. 258). McKimmie stated that when she brought this up to appellant, he stated he would have his mother help him with it when she got home. (Tr. 258-259). McKimmie also testified as to appellant's drug screens. Since November 2013, appellant tested positive for marijuana three times; he failed to show up for his drug screen, which counts as a positive test, 15 times, and he tested negative six times. (Tr. 260-262). She also stated that on one occasion, she went to appellant's home and it smelled like someone had been smoking marijuana. (Tr. 261).

{¶46} As to visitation, McKimmie stated that appellant loves L.G. and tries to play with him. (Tr. 265). But McKimmie testified L.G. is very bonded with his foster family and sees them as his parents. (Tr. 267).

{¶47} McKimmie recommended the court grant the motion for permanent custody. (Tr. 270). She based her opinion on appellant's ongoing drug problem and the fact that L.G. needed permanency. (Tr. 270).

{¶48} Dr. Charles Thorne, a psychologist who evaluated appellant, testified next. Dr. Thorne testified that appellant takes medication for depression and he reported a history of drug problems. (Tr. 320). Dr. Thorne diagnosed appellant with post-traumatic stress disorder and possible paranoid personality disorder. (Tr. 328). He opined it was very unlikely appellant could successfully parent L.G. (Tr. 329).

{¶49} Tina Goynes, one of appellant's past counselors, was the next witness. As to his mental health, Goynes testified appellant had a difficult time gaining insight into the issues he was dealing with. (Tr. 365). She stated he made very limited progress. (Tr. 366). As to his drug problem, Goynes stated appellant told her that his caseworker told him to use cocaine because it would come out of his screens quicker. (Tr. 368). She stated that he was self-reporting his marijuana use to her as recently as four months prior to the hearing. (Tr. 370-371).

{¶50} Christal Mendenhall, appellant's current counselor, was the next

witness. Mendenhall testified that appellant had a negative drug screen on October 13, 2015. (Tr. 387). She was surprised to learn that he screened positive for cocaine on the day of the hearing. (Tr. 388). She stated he denied using any drugs. (Tr. 388).

{¶51} Mavis Scheetz, L.G.'s guardian ad litem, was the final witness. Scheetz has been L.G.'s guardian ad litem since his birth. (Tr. 415). Scheetz recommended that the court grant the motion for permanent custody. (Tr. 417). She based her recommendation on several factors. (Tr. 418). She stated that appellant's drug use has been going on for too long (five years). (Tr. 418). She pointed to appellant's poor personal hygiene. (Tr. 419). She stated she was informed the Hope House, where visitation had been taking place, did not want appellant back until he bathed. (Tr. 419). She pointed out that appellant does not handle any money but instead his mother does it for him. (Tr. 420). She was also concerned about appellant's involvement with the law. (Tr. 420).

{¶52} Scheetz also testified about her conversations with L.G. and his bond to his foster family. She reported that L.G. expressed to her that he loves his foster parents and his foster grandparents. (Tr. 427). She stated L.G. is very attached to all of them. (Tr. 427). She stated L.G. loves appellant because when he is with appellant it is like a play date. (Tr. 428). But Scheetz stated L.G. has indicated to her that he does not want to live with appellant. (Tr. 428). In fact, she stated L.G. became very upset at that idea. (Tr. 428).

{¶53} Based on the above testimony, the trial court's judgment is supported by clear and convincing evidence. Each of the applicable best interest factors weighs in favor of permanent custody.

{¶54} According to the testimony, L.G.'s interactions with his foster family are such that he sees them as his family. He is bonded to his foster parents and considers them his parents. He has spent the majority of his life with them. And while he enjoys his time with appellant, L.G. expressed that he did not want to live with appellant and became very upset at that idea. (R.C. 2151.414(D)(1)(a) and (b)).

{¶55} L.G. has been in appellee's temporary custody for twelve or more months of a consecutive 22-month period. (R.C. 2151.414(D)(1)(c)). In fact, L.G., who was five at the time of the trial, has been in appellee's temporary custody since he was three days old.

{¶56} The length of time appellant has had to complete his case plan demonstrates that he cannot provide a legally secure permanent placement for L.G. (R.C. 2151.414(D)(1)(d)). Appellant has had five years to get sober and demonstrate that he can care for his son. L.G. should not continue to live in limbo, so to speak, while appellant continues to work on his case plan. L.G.'s foster parents, on the other hand, have provided him with a secure placement for the last four years.

{¶57} In addition to these statutory best interest factors, other factors are also relevant here. Appellant has had on ongoing drug problem throughout the life of this case that he has not been able to overcome despite treatment. In fact, he tested positive for cocaine on the day of the trial. Moreover, both caseworkers and L.G.'s guardian ad litem recommended granting the permanent custody motion.

{¶58} Based on all of the above, clear and convincing evidence supports the trial court's judgment granting permanent custody with the power of adoption to appellee.

{¶59} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶60} For the reasons stated above, the trial court's judgment is hereby affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.