IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: L & M CHILDREN	:	APPEAL NOS. C-180598 C-180628
	:	C-180629
		TRIAL NO. F15-1429Z
	:	
	:	*O P I N I O N.*

Appeals From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 22, 2019

Phyllis Schiff, for Appellant Mother,

Christopher P. Kapsal, for Appellant Great Aunt,

James A. Anzelmo, for Appellant Grandmother,

Raymond T. Faller, Hamilton County Public Defender, and *Marianne Jones Ford,* Assistant Public Defender, Guardian ad Litem for Children,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *R. Michael Waddle*, Assistant Prosecuting Attorney, for Appellee Hamilton County Department of Job and Family Services.

HENDON, Judge.

{¶1} In these consolidated appeals, mother, maternal grandmother, and maternal great aunt each appeal from the judgment of the Hamilton County Juvenile Court adopting the magistrate's decision and granting permanent custody of three of mother's minor children, T.M., D.L.1, and D.L.2 (collectively "the children"), to the Hamilton County Department of Job and Family Services ("HCJFS"), and denying grandmother's and great aunt's motions for legal custody. We affirm.

I. Abuse, Neglect, and Dependency of the Children

{¶2} Mother had five children. Three are the subject of this appeal. T.M. is now 14 years old. Twins D.L.1 and D.L.2 are 12. On May 26, 2015, HCJFS filed a motion for interim temporary custody and a complaint for temporary custody of the children in Hamilton County Juvenile Court. At the time of the filing, the children did not live with mother. The police had found the children living in unsafe and unsanitary conditions and without proper supervision in the home of their great aunt. She claimed to hold guardianship of all three children pursuant to an order of the probate court.

{¶3} At a November 4, 2015 adjudicatory hearing, the parties, including mother and great aunt, stipulated to the complaint with amended facts, including an acknowledgment that mother's history of substance abuse had led to great aunt's role as guardian of the children. Mother and great aunt agreed to a disposition of temporary custody with HCJFS. Upon the stipulated facts, the court found that all three children were abused, neglected, and dependent.

{¶4} After their removal, the children resided with the paternal grandmother of their youngest half-sibling. But they were later moved to a foster

home where they remained together. They did not reside with any of the appellants at any time after their removal from great aunt's home in May 2015.

{¶5} HCJFS devoted substantial resources to remediating the problems facing the children and to ensure their ability to return to the care of their mother or another family member. Mother participated sporadically in reunification services during 2015. She had completed a diagnostic assessment of function ("DAF"), which recommended continued substance-abuse treatment and parenting classes. Mother's occasional visits with the children stopped by the end of 2016. The HCJFS caseworker reported that in early 2017, mother was using crack cocaine regularly. She had become homeless and lived with her drug dealer. Though her appointed counsel continued to attend the various custody proceedings, mother has not appeared in court since October 18, 2016. The children's fathers are both incarcerated for long periods in Michigan and have not been involved in the lives of the children.

{¶6} Great aunt initially informed the court that she did not seek reunification with the children and sought to terminate her guardianship. But by August 2016—15 months after the children had been removed from her care—she had changed her mind and wished to be considered for permanent placement of the children. HCJFS then provided reunification services to great aunt. She completed some of the services and remedied the home safety issues that had prompted removal of the children. She regularly visited the children at the Family Nurturing Center ("FNC"). But she failed to complete a DAF provided by HCJFS or to provide proof that she had completed an assessment by another agency. Her visits with the children ended when they informed their caseworker and other professionals at FNC that they no longer wished to visit with their great aunt. HCJFS caseworkers

expressed their concern that great aunt did not understand the special needs of D.L.1, who had been hospitalized for psychiatric treatment.

{¶7} Grandmother is a resident of Michigan. Although the children had lived there with grandmother in 2011-12, she did not initially express an interest in caring for them. In March 2017, grandmother approached the children's HCJFS caseworker and told her that she was interested in obtaining custody of the children. The caseworker advised grandmother to file a motion for custody with the juvenile court. Since grandmother was a resident of Michigan, an Interstate Compact for Placement of Children ("ICPC") would be required for placement of the children with grandmother. The caseworker used a copy of grandmother's handwritten custody motion to prepare the ICPC referral. Even though the children had resided in HCJFS custody for nearly two years, HCJFS investigated whether grandmother was a suitable custodian for the children.

{¶8} An initial Michigan ICPC study, dated September 11, 2017, did not approve grandmother for placement of the children. But grandmother was able to obtain a second ICPC study which was ultimately admitted into evidence by agreement of the parties. The second Michigan ICPC, dated January 16, 2018, approved placement with grandmother, with the requirement that grandmother continue to work toward becoming a licensed foster parent.

II. HCJFS's Motion for Permanent Custody

{¶9} In April 2016, the magistrate granted HCJFS's motion to extend its temporary custody, noting that mother had stopped engaging in reunification services provided by HCJFS. On August 29, 2016, HCJFS filed a motion to modify temporary custody of the children to permanent custody, citing the lack of progress

in the reunification plan. At that time the children had been removed from great aunt's home and in the custody of HCJFS for more than 15 months.

{¶10} On October 18, 2016, great aunt filed a motion for legal custody of the children. One year later, grandmother filed her motion for legal custody on October 20, 2017, ten days before the custody hearing was to begin.

{¶11} Prior to the custody hearing, the magistrate conducted an in-camera interview with the children. The children expressed their desire to live with grandmother or their foster family. The children's guardian ad litem urged that the children remain with their foster family.

{¶12} A custody hearing began on October 30, 2017. At the conclusion of the hearing, the magistrate designated grandmother as a party and referred her to the public defender's office to obtain counsel if she was indigent. A second hearing was held on December 20, 2017. Over the two days of hearings, the magistrate received testimony from the children's HCJFS caseworkers, grandmother, and great aunt. Mother did not appear, but was represented by counsel.

{¶13} On January 11, 2018, grandmother's newly appointed counsel moved the magistrate to reopen the custody hearing or to permit her to introduce the second ICPC Michigan home study. On February 2, 2018, with the consent of all the parties, the magistrate admitted the second ICPC home study report from Michigan.

{¶14} On February 17, 2018, the magistrate issued his decision granting HCJFS's motion for permanent custody and denying grandmother's and great aunt's motions for legal custody. Each of the appellants filed timely objections to the magistrate's decision. As provided for in Juv.R. 40(D)(4)(i), the juvenile court signed the magistrate's decision, adopted it, and entered it as the judgment of the court before ruling on the objections.

{¶15} While the objections were still pending, HCJFS moved the court for relief from judgment because there had been a suggestion that grandmother was of American Indian descent. In an October 20, 2017 personal-information release form filed with her motion for legal custody, grandmother had described her race as "American Indian." Through mistake or oversight, HCJFS had not notified the relevant tribes of the custody proceedings as required by the federal Indian Child Welfare Act ("ICWA"). *See* 25 U.S.C. 1912 et seq. HCJFS argued that granting its motion would permit it to investigate whether the ICWA applied to any of the children, and, if necessary, to modify its motion for permanent custody and notify the appropriate tribes before the juvenile court ultimately determined permanent custody.

{¶16} On May 1, 2018, the juvenile court granted HCJFS's motion. In light of HCJFS's indication that the children's grandmother might be of American Indian descent, the juvenile court concluded that the better course was to assume that the ICWA did apply "while HCJFS makes an effort to confirm the [children's] qualification as 'Indian children' " under the act. The court held that the need to investigate the applicability of the ICWA justified relief from judgment, and it "rejected and dismissed" the February 18, 2018 "grant of permanent custody" and ordered the HCJFS "to take all necessary measures to determine the applicability of [the] ICWA."

{¶17} Following the juvenile court's ruling, the magistrate held two hearings on the applicability of the ICWA. HCJFS stated that its investigation had failed to disclose any evidence that mother was a member of a federally recognized Indian tribe. Grandmother denied tribal membership and indicated that she had no evidence that mother was a tribal member. The magistrate concluded the children

were neither tribal members nor eligible for tribal membership, and thus the ICWA had no applicability to the permanent-custody proceedings.

{¶18} On July 6, 2018, without any new evidentiary hearings, the magistrate made the "same determinations of fact and law" that he had made in his February 2018 decision and adopted that decision as his disposition granting permanent custody of the children to HCJFS, and denying grandmother's and great aunt's motions for legal custody.

{¶19} The appellants filed objections challenging the magistrate's adoption of his prior decision without holding a new hearing, and the weight of the evidence adduced to support the magistrate's decision. Following argument on the objections, the juvenile court held that once it had concluded that the ICWA was not applicable, the magistrate was under no obligation to hold a new permanent-custody hearing. It adopted the magistrate's decision and entered its judgment granting permanent custody of the children to HCJFS and denying grandmother's and great aunt's motions for legal custody.

{¶20} Mother, grandmother, and great aunt brought these appeals.

III. Right-to-Counsel Challenge

{¶21} In her second assignment of error, grandmother argues that she was denied her right to the assistance of counsel during all stages of the juvenile court proceeding. She argues that although the magistrate had advised her to contact the public defender's office after she had become a party to the proceedings, she was not provided counsel until after the custody hearings had been completed. But the necessary predicate of grandmother's argument is that she was a party entitled to appointed counsel. We hold that she was not entitled to appointed counsel.

{¶22} Although none of the parties addressed this matter in their appellate briefs, we note that grandmother did not raise the issue of the magistrate's failure to provide appointed counsel in the objections filed by her recently appointed counsel. Juv.R. 40(D)(3)(b)(iv) provides that except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, unless the party has objected to that finding or conclusion. *See In re W.W.*, 1st Dist. Hamilton No. C-110363, 2011-Ohio-4912, ¶ 60 (applying plain-error analysis in the review of magistrate's decisions in a permanent-custody case). The plain-error doctrine is reserved for "exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process[.]" *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus; *see State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 41.

{¶23} In *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 46, 693 N.E.2d 794 (1998), the Ohio Supreme Court stated that "Ohio, through R.C. 2151.352, provides a statutory right to appointed counsel that goes beyond constitutional requirements." That right "emanates from R.C. 2151.352" and not from Juv.R. 4(A). *Id.* at 48.

{¶24} R.C. 2151.352 provides:

> A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to [R.C. Chapter 120].

{¶25} Here, grandmother was not a parent or custodian of the children. And she did not did not stand in loco parentis. Neither had she filed a motion to intervene under Civ.R. 24. Instead she filed a motion for legal custody of the children on October 20, 2017, ten days before the permanent-custody trial. On October 30, 2107, the magistrate designated grandmother as a party. *See* Juv.R. 2(Y) (the definition of party includes "any other person specifically designated by the court"). She maintains that after becoming a party by filing a motion for legal custody, assuming indigency, she was entitled to appointed counsel under R.C. 2151.352 and Juv.R. 4(A). *See, e.g., In re Kolling*, 9th Dist. Summit No. 20697, 2002 WL 58001, *4 (Jan. 16, 2002).

{¶26} But the language of R.C. 2151.352 is clear and unambiguous. The first sentence establishes that four specific categories of individuals are entitled to counsel in proceedings brought, as here, under R.C, Chapter 2151: a child, his or her parents, his or her custodian, or one who stands in loco parentis to the child. The second sentence of the statute provides that if "a party" is indigent, she is entitled to appointed counsel. R.C. Chapter 2151 does not define "party" for purposes of R.C. 2151.352. Neither does Juv.R. 2(Y).

{¶27} We hold that the term "party," as used in the second sentence identifying who is potentially eligible for appointed counsel under R.C. 2151.352, does not refer to any and all parties to the juvenile court proceeding. Rather it refers only to the four categories of persons identified in the first sentence of the statute as being entitled to counsel to begin with—persons who stand at risk of loss of important rights guaranteed by the constitution and statute, and not other parties seeking to expand their rights in a civil proceeding in juvenile court.

{¶28} To provide an expansive reading of the term "party" would also be inconsistent with the legislative history of the statute and its precursors. When the Ohio Supreme Court interpreted R.C. 2151.352 in 1998, the language of the current first and second sentences were combined and provided that "[a] child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and *if, as an indigent person, he is unable to employ counsel, to have counsel provided for him* pursuant to Chapter 120. of the Revised Code." (Emphasis added.) *Asberry*, 82 Ohio St.3d at 46, 693 N.E.2d 794. The right to appointed counsel was expressly limited to the four categories of parties. In 2002, the General Assembly amended R.C. 2151.352 to eliminate gender specific language, but retained similar language declaring that only the four categories of parties, if indigent, were entitled to appointed counsel. *See* 2000 S.B. No. 179, effective January 1, 2002.

{¶29} In 2005, the General Assembly again amended R.C. 2151.352 to its current version by enacting 2005 Am.Sub.H.B. No. 66. While the language of the act is silent as to the reason for amendment, the Ohio Legislative Service Commission's Final Bill Analysis identified the purpose of the act was the "removal of the right to counsel for indigents in certain civil juvenile proceedings." Legislative Service Commission Final Bill Analysis of 2005 Am.Sub.H.B. No. 66. The commission stated that "[f]or certain civil matters only, the act removes an indigent person's right to appointed counsel." Under the act, the four categories listed in the first sentence—child, parent, custodian, and one standing in loco parentis—are entitled to appointed counsel if indigent. The change in punctuation from the 2002 version does not change that.

{¶30} The 2005 amendment further limited the language of R.C. 2151.352 when it added that an indigent party was entitled to have counsel provided pursuant to R.C. Chapter 120 "except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2) * * * of section 2151.23 of the Revised Code." R.C. 2151.23(A)(2) confers exclusive jurisdiction on the juvenile court to determine the custody of any child not a ward of another Ohio court. As the Legislative Service Commission explained, "if the party is indigent, the party is not entitled to appointed counsel in a civil matter if the court is exercising jurisdiction * * * [t]o determine the custody of any child not a ward of another Ohio court[.]" *Id.*

{¶31} We note that Juv.R. 4(A) provides a similar limitation on the rights to appointed counsel. It provides that "[e]very party shall have the right to be represented by counsel, and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent." Under the rule, the right to appointed counsel is also limited to indigent children, parents, custodians, and those who stand in loco parentis.

{¶32} Thus we hold that under the express language of R.C. 2151.352 and Juv.R. 4(A), grandmother, although designated as a party to pursue legal custody of the children, was not entitled to appointed counsel.

{¶33} We note that grandmother first inquired about representation at the conclusion of the October 30 hearing, while the magistrate was setting dates for the second custody hearing. She asked "Will I have representation or I would just - -." The magistrate informed grandmother that "You can go to the office of the public defender, but I'm not in charge of that office. You can see what they have to say." By entry, journalized that same day, the magistrate designated that grandmother was a party "based upon her very recent filing and is directed to the Office of the Public

Defender." We hold that nothing in the magistrate's statement could be construed as conferring on grandmother a right to appointed counsel.

{¶34} Since grandmother did not have a statutory right to appointed counsel, we hold that, in failing to appoint counsel for her, the magistrate and the juvenile court did not commit any error, much less error of such magnitude that, if left uncorrected, "would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *See Goldfuss*, 79 Ohio St.3d at 121, 679 N.E.2d 1099; *see also In re E.N.*, 1st Dist. Hamilton No. C-170272, 2018-Ohio-3919, ¶ 27.

{¶35} Grandmother's second assignment of error is overruled.

IV. The ICWA Remand

{¶36} Both grandmother and great aunt argue that the juvenile court erred when, after granting HCJFS's motion for relief from judgment, it permitted the magistrate to simply "reinstate" his first custody decision without holding a new custody trial, and without requiring HCJFS to file a new motion for permanent custody. We disagree.

{¶37} While the objections to the magistrate's first custody decision were pending, HCJFS moved the court for relief from the juvenile court's judgment because there had been a suggestion that grandmother was of American Indian descent. The motion sought relief from the judgment for the sole purpose of investigating whether the children were subject to the protections of the ICWA.

{¶38} The ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families[.]" 25 U.S.C. 1902. The act provides procedural safeguards when an Indian child is the subject of child-custody proceedings. *See In re L.R.D.,* 8th Dist. Cuyahoga No. 107301, 2019-Ohio-178, ¶ 19. But the ICWA requires that a tribe be notified of custody proceedings

only when the court "knows or has reason to know that an Indian child is involved." 25 U.S.C. 1912(a). An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. 1903(4).

{¶39} In its May 1, 2018 entry granting HCJFS's motion, the juvenile court held that it would assume that the ICWA did apply "while HCJFS makes an effort to confirm the [children's] qualification as 'Indian children' " under the act. Therefore it "rejected and dismissed" the February 18, 2018 "grant of permanent custody" and ordered the HCJFS "to take all necessary measures to determine the applicability of [the] ICWA."

{¶40} While the language the juvenile court employed in its entry "rejecting and dismissing" the magistrate's prior custody determination was problematic, the impact of its decision was simple and well within its authority. First, the court's entry did not, as grandmother and great aunt contend, dismiss HCJFS's motion seeking permanent custody. It merely set aside the February 2018 granting of that motion while the parties determined the applicability of the ICWA. By the clear text of the court's entry, HCJFS was under no obligation to file a new motion for permanent custody.

{¶41} Since the juvenile court had entered judgment on HCFJS's permanent-custody motion, pending only resolution of the objections, none of which had raised the ICWA issue, a Civ.R. 60(B) motion provided HCJFS with an appropriate means to set aside the court's judgment solely for the purpose of ensuring compliance with the ICWA—a matter not previously raised by mistake or inadvertence. *See* Civ.R.

60(B)(1) and (B)(5); *see also Hadassah v. Schwartz*, 1st Dist. Hamilton No. C-110699, 2012-Ohio-3910, ¶ 8.

{¶42} The juvenile court clearly identified the sole basis for granting the motion for relief from judgment was to permit resolution of the ICWA issue. No part of the juvenile court's entry challenged any of the evidence actually adduced before the magistrate or his legal conclusions advanced to support the granting of permanent custody on February 17, 2018. No part of its entry mandated a new trial on custody. Rather, the clear import of the entry required the magistrate to determine the applicability of the ICWA and then to rule on HCJFS's motion for permanent custody. *See* Juv.R. 40(D)(1)(b). The juvenile court's granting of HCJFS's Civ.R. 60(B) motion was not intended "as a device by which a party could litigate its case for a second time with the benefit of hindsight." *See Cadle Co. v. White*, 1st Dist. Hamilton No. C-980492, 1999 WL 218755, *2 (Apr. 16, 1999).

{¶43} Thus no part of the juvenile court's entry required the magistrate to again revisit issues that he had already determined and conduct a new custody hearing. Once the magistrate had resolved the issue of whether the ICWA applied, he was fully within his authority to adopt the "same determinations of fact and law" that he had made in his February 2018 decision and to adopt that decision as his disposition granting permanent custody of the children to HCJFS, and denying grandmother's and great aunt's motions for legal custody.

{¶44} Grandmother's first assignment of error and great aunt's second assignment of error are overruled.

V. Custody Challenges

{¶45} All three appellants have raised assignments of error challenging the juvenile court's decision terminating mother's parental rights or denying grandmother's and great aunt's motions for legal custody.

{¶46} In her single assignment of error, mother asserts that the court erred in terminating her parental rights. She argues that the grant of permanent custody to HCJFS was not in the children's best interests solely on grounds that the court had failed to consider whether a capable relative, grandmother, was willing to accept legal custody of the children.

{¶47} Generally litigants must assert their own rights, not the rights of third parties. *See In re K.C.*, 2017-Ohio-8383, 99 N.E.3d 1061, ¶ 5 (1st Dist.). We have held that a parent has no standing to challenge the denial of a relative's custody motion where the parent has not challenged the termination of her own parental rights and the relative did not appeal the denial of her custody petition. *See id.* at ¶ 12. But here, where mother, in part, challenges the termination of her own parental rights, and grandmother and great aunt have challenged the denial of their custody motions, mother has standing also to challenge the denial of legal custody to grandmother. *See In re D.M.*, 1st Dist. Hamilton No. C-140648, 2015-Ohio-3853, ¶ 9. Mother does not argue that the court should have granted great aunt's motion for custody.

{¶48} But the obverse argument—that grandmother and great aunt may challenge the termination of mother's parental rights—does not prevail. In her third assignment of error, grandmother argues that HCJFS has failed to meet its burden of proof by clear and convincing evidence that it was entitled to permanent custody of

the children. Great aunt raises the same argument, in part, in her first assignment of error.

{¶49} As we have noted, in Ohio, permanent custody is different from legal custody. *See In re K.C.* at ¶ 7. An award of permanent custody to a children's services agency divests a parent of all her residual parental rights including the right of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support. *See* R.C. 2151.011(B)(31); *see also* Juv.R. 2(II). An award of legal custody, however, does not divest a parent of those residual rights. *In re K.C.* at ¶ 7. Relatives seeking custody of a child do not have the same rights as natural parents. *See In re C.H.*, 8th Dist. Cuyahoga No. 103171, 2016-Ohio-26, ¶ 27.

{¶50} That portion of the juvenile court's entry granting permanent custody of the children to HCJFS terminated mother's parental rights. In their capacities as the children's grandmother or great aunt, these parties did not have similar parental rights at risk and thus they cannot challenge the juvenile court's ruling on that issue. *See In re A.L.A.*, 11th Dist. Lake No. 2011-L-020, 2011-Ohio-3124, ¶ 2; *see also In re Patterson*, 1st Dist. Hamilton No. C-090311, 2010-Ohio-766, ¶ 13.

{¶51} Their challenges properly arise in grandmother's fourth assignment of error, and in great aunt's first assignment of error, in which they directly argue that the denial of their motions for legal custody of the children was error.

a. Mother's challenge of permanent custody

{¶52} In her assignment of error, mother challenges the weight of the evidence adduced to support terminating her parental rights. She maintains only that the court failed to consider whether grandmother was willing and able to accept legal custody of the children.

{¶53} Parents who are suitable persons have a paramount right to the custody of their minor children. *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977). But the fundamental interest of a parent "is not absolute." In a custody determination, "the best interest of the child controls." *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶ 11.

{¶54} R.C. 2151.414 governs the procedures that apply when, as here, a children's services agency has moved for permanent custody under R.C. 2151.413. The version of R.C. 2151.414 in effect when HCJFS moved for permanent custody provided that before a juvenile court may terminate parental rights and place children in the permanent custody of a children's services agency, it must determine by clear and convincing evidence (1) that one or more of the conditions listed in R.C. 2151.414(B)(1) apply, and (2) that it is in the best interest of the children to grant permanent custody to the agency by considering the factors in R.C. 2151.414(D) and (E) with respect to each child. *See* former R.C. 2151.414; *see also In re C.L.*, 1st Dist. Hamilton No. C-170169, 2017-Ohio-7184, ¶ 18.

{¶55} Here, we cannot say that the juvenile court clearly lost its way and created a manifest miscarriage of justice when evaluating the evidence. *See In re A.B.*, 1st Dist. Hamilton Nos. C-150307 and C-150310, 2015-Ohio-3247, ¶ 16. On appeal, mother admits that the children had been in HCJFS's temporary custody for 12 or more months of a consecutive 22-month period, thus satisfying the requirement of former R.C. 2151.414(B)(1)(d). We note that the magistrate never cited R.C. 2151.414(B)(1)(d) or its "12 of 22" language in his decision. But the magistrate made the requisite finding that the children had been removed from the great aunt's home on May 26, 2015, and that HCJFS had moved for permanent custody on August 29, 2016. Thus, the record clearly and convincingly demonstrates

that when HCJFS moved for permanent custody, the children had been in the temporary custody of HCJFS for more than 12 months of the preceding 22-month period. *See In re W.W.*, 1st Dist. Hamilton No. C-110363, 2011-Ohio-4912, ¶ 53.

{¶56} The magistrate's and the juvenile court's stated findings that the children could not and should not be placed with mother within a reasonable time were also amply supported in the record. *See* former R.C. 2151.414(B)(1)(a). Mother suffered from a serious substance-abuse problem and was unable to provide a safe home for the children. *See In re A.B.* at ¶ 30-31.

{¶57} We also conclude that the juvenile court did not lose its way in making its best-interests determination. Former R.C. 2151.414(D)(1) provided that in determining whether permanent custody is in the best interest of the children, the court shall consider all relevant factors including (1) the interaction and interrelationship of the children with their parents, relatives, foster caregivers, and out-of-home providers, (2) the wishes of the children, (3) the custodial history of the children, (4) the children's need for a legally secure permanent placement and whether that type of placement could be achieved without a grant of permanent custody to the agency, and (5) any other relevant factors including those found in R.C. 2151.414(E)(7) to (11). Former R.C. 2151.353(A) provided that after a child had been adjudicated abused, neglected, or dependent, the juvenile court could award legal custody of the child to a relative or "any other person," who has filed a motion requesting legal custody of the child. *See* former R.C. 2151.414(D)(2)(d).

{¶58} Here, the magistrate or the juvenile court examined each factor as it related to the children. The children had been in HCJFS care for nearly three years. Mother had not been able to remedy the chemical-dependency issues that had prompted her loss of the children, and had not demonstrated an ability to provide

the children with long-term stability. The children's fathers were unknown to them and were serving long terms of incarceration.

{¶59} As to whether great aunt was a suitable alternative to placement with HCJFS, the record reflects that the children had not resided with any member of mother's family since their removal from great aunt's home in May 2015. The children had chosen to end visitation with great aunt. Great aunt did not understand the special medical needs of the children. She had made little progress toward reunification, and had not completed a DAF.

{¶60} As to grandmother, the record reflects that although she had spoken with HCJFS caseworkers about taking custody of the children earlier in the proceedings, she moved for custody more than 29 months after they had been removed from great aunt's home, and only ten days before the custody hearing. The updated Michigan ICPC home study report had approved grandmother for placement but with the requirement that she continue to work toward becoming a licensed foster parent. Should that not occur, however, the children would have to be returned to Ohio, undermining their need for a secure permanent placement. The magistrate noted the difficulty of supervising grandmother's compliance with the Michigan ICPC.

{¶61} Grandmother adduced evidence that she had made considerable progress in preparing to care for the children in her Michigan home. And the children had expressed a desire to live with her or their foster family during an in-camera interview with the magistrate. Yet we cannot say that the juvenile court lost its way in determining the best interests of the children where neither great aunt or grandmother was able to provide a legally stable, permanent placement for the children. *See* former R.C. 2151.414(D)(1)(d).

{¶62} Based on this record, the juvenile court's determination that it was in the children's best interests to terminate mother's parental rights and that no suitable relative was available to facilitate a secure and stable placement was amply supported by clear and convincing evidence and was not against the weight of the evidence. *See In re A.B.*, 1st Dist. Hamilton Nos. C-150307 and C-150310, 2015-Ohio-3247, at ¶ 28. Mother's assignment of error is overruled, in part.

b. Grandmother's and great aunt's motions for legal custody

{¶63} Finally, mother, grandmother, and great aunt maintain that the juvenile court erred in denying grandmother's and great aunt's motions regarding legal custody of the children. The gravamen of their arguments is that once mother's custody rights had been permanently terminated, the court should have granted legal custody of the children to grandmother or great aunt.

{¶64} After a child is adjudicated abused, neglected, or dependent, the trial court may award legal custody of the child to "any other person," who, like grandmother and great aunt, has filed a motion requesting legal custody of the child. *See* former R.C. 2151.353(A); *see also* former R.C. 2151.414(D)(2)(d). When determining to whom legal custody should be awarded, the juvenile court should base its determination on the best interests of the child. The factors found in R.C. 2151.414 are a useful framework for the court's best-interests determination. *See In re A.C.*, 1st Dist. Hamilton No. C-140273, 2015-Ohio-153, ¶ 5-6.

{¶65} We will not reverse the juvenile court's award of custody absent an abuse of its broad discretion. *See id.* at ¶ 6. An abuse of discretion is more than an error of law or judgment; it is a decision that is unreasonable, arbitrary, or unconscionable. *See id.*; *see also In re D.M.*, 1st Dist. Hamilton No. C-140648, 2015-Ohio-3853, at ¶ 11.

{¶66} We have noted that the standard for terminating a parent's parental rights is "a much more rigorous standard" than that for granting or denying legal custody, even to a relative. *In re M.*, 1st Dist. Hamilton No. C-170008, 2017-Ohio-1431, ¶ 29. Thus our resolution of the arguments advanced by mother, grandmother, and great aunt in favor of legal custody being granted to grandmother or great aunt is subsumed in our resolution of this same argument in mother's assignment of error challenging the termination of her parental rights. *See id.*

{¶67} Here, great aunt did not express interest in reunification until 13 months after HCJFS had obtained custody of the children. She had made little progress toward reunification, and had failed to comprehend the special needs of the children, one of whom requires psychiatric inpatient treatment. The children had expressed a desire not to continue visits with her.

{¶68} Grandmother had been able to achieve only conditional placement pursuant to a Michigan ICPC and was unable to provide a legally secure permanent placement for the children.

{¶69} In light of these facts, we cannot say that the juvenile court abused its discretion in reaching its well-supported decision denying grandmother's and great aunt's motions seeking legal custody. *See In re G/D Children*, 1st Dist. Hamilton No. C-180170, 2018-Ohio-3280, ¶ 27.

{¶70} That portion of mother's assignment of error challenging the denial of grandmother's motion for legal custody is overruled. Grandmother's third and fourth assignments of error are overruled. Great aunt's first assignment of error is overruled.

VI. Conclusion

{¶71} Having overruled each of the assignments of error advanced by mother, grandmother, and great aunt, we affirm the judgment of the juvenile court adopting the magistrate's decision granting permanent custody of the children to HCJFS, and denying grandmother's and great aunt's motions for legal custody.

Judgment affirmed.

MOCK, P.J., and **MYERS, J**., concur.

SYLVIA S. HENDON, retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry on the date of the release of this opinion.