

[Cite as *In re O.S.*, 2018-Ohio-2949.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106698

IN RE: O.S., ET AL.
Minor Children

[Appeal By M.S., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD16915308 and AD16915309

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: July 26, 2018

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MARY J. BOYLE, J.:

{¶1} Appellant, M.S., appeals the juvenile court's order granting appellee, Cuyahoga County Division of Child and Family Services ("CCDCFS"), permanent custody of her son, O.S., and her daughter, O.S. ("the children"). M.S. raises two assignments of error for our review:

1. The juvenile court erred in permitting unauthenticated medical records offered by CCDCFS into evidence.
2. The evidence submitted at disposition was insufficient to be considered clear and convincing because the juvenile court improperly considered unauthenticated evidence.

{¶2} Finding no merit to her assignments of error, we affirm.

I. Procedural History and Factual Background

{¶3} On November 12, 2008, M.S. gave birth to twins, O.S. and O.S. According to medical records and by her own admission, M.S. has bipolar disorder that she reported began when she was around the age of 21.

{¶4} In July 2012, CCDCFS removed the children from M.S.'s custody after she had a "mental health episode[.]" during which she "couldn't articulate where the kids could go" after she received an eviction notice and a homeless shelter denied her entry. While the children were reunited with M.S. 30 days later, the juvenile court granted CCDCFS protective supervision over the children in January 2013. As part of her case plan, M.S. received treatment for bipolar disorder from The Centers for Families and Children (the "Centers") and became "compliant." The juvenile court terminated CCDCFS's protective supervision in February 2014.

{¶5} On January 2, 2015, M.S. had another mental health related episode, during which she "became belligerent with the police[.]" "was taken to the hospital[.]" and could not provide "any contacts for the children." The children were taken to CCDCFS. As a result of the

incident, the juvenile court adjudicated one of the twins dependent in May 2015 and the other twin dependent in December 2015. The juvenile court also gave CCDCFS temporary custody of the children. According to Earl Thomas, the social worker from CCDCFS who has worked with M.S. and the children since 2015, M.S. was “not complying with her medication” at the time of the January 2015 incident, and CCDCFS developed a case plan to address “mental health, parenting, domestic violence, and basic needs.” Eventually, M.S. became compliant with the mental health requirements of her case plan after receiving services from the Centers, including visits with a psychologist and medication. As a result, M.S. was reunited with her children on June 2, 2016. CCDCFS retained protective supervision over the children, and M.S. and the children continued to receive services for medication, mental health, and family preservation.

{¶6} On October 19, 2016, CCDCFS held a staff meeting with M.S. and her children after learning that M.S. “wasn’t following through with the service providers” to “have counseling for the kids and medication counseling for herself.” Thomas explained that during the meeting, he learned that M.S. was “getting evicted and she didn’t have any lights or gas in the house” and that M.S. told him that the house had become “rat and roach infested.” Thomas stated that the children told workers that “they [were not] eating [at home].” According to Thomas, during the meeting, M.S. became “upset,” “stormed out of the room, threw her phone down the hallway, [and] started punching the walls and the glass,” requiring CCDCFS workers to call security to escort her from the building. Thomas testified that M.S. left the building without her children. Thomas stated that later that day, CCDCFS “got a call from the police stating that they responded to mom’s house because she was outside half naked busting out windows. When the police got there, she barricaded herself in the house, and * * * eventually they got her to come out and they took her to St. Vincent.”

{¶7} As a result, CCDCFS removed the children from M.S.'s custody and filed a complaint for dependency and permanent custody that same day. CCDCFS also filed a motion for predispositional temporary custody. The trial court appointed Kimrey Elzeer as the children's guardian ad litem. It also appointed James Schulz as M.S.'s guardian ad litem. Schulz was later replaced by Rachel Kopec, who took over as M.S.'s guardian ad litem.

{¶8} The trial court held a hearing on CCDCFS's motion for temporary custody on the same day as removal, during which Thomas testified. In addition to describing the previous two removals of the children as well as the events that transpired during the meeting with M.S. earlier that day, Thomas explained that he had concerns about M.S.'s ability to provide for her children's needs because "there's limited food in the home, and when mom is unstable with her medication, she's not in an appropriate mindset to care for the kids appropriately." The trial court granted CCDCFS's motion for predispositional temporary custody.

{¶9} On January 6, 2017, the trial court held an adjudication hearing. CCDCFS presented testimony from Thomas. The trial court found the children to be dependent under R.C. 2151.04(B). The trial court then asked Thomas what efforts were "being made to prevent the continued removal of [the] children and to finalize their permanency plan." Thomas explained that the children were in a foster home at the time and receiving counseling services. After the trial court asked what services M.S. was receiving, Thomas explained that she was receiving a number of services with the Centers, including medication and monitoring.

{¶10} In its journal entry, the trial court stated, "The [children are] adjudicated to be Dependent. The Court further finds, pursuant to R.C. 2151.04 and R.C. 2151.28(L) that : the [children lack] adequate parental care by reason of the mental or physical condition of the child's parents, guardian or custodian." The trial court also found that the children's "continued

residence in or return to the home of mother * * * [would] be contrary to the [children's] best interest[s]." The trial court noted that the children "have been referred to engage in counseling through Pathways. Mother is engaged in mental health services through The Centers for Family and Children, to receive counseling, case management, medication, and monitoring." During the same hearing, the parties agreed to waive the 90-day statutory time frame for disposition to give M.S. "the opportunity to continue engaging in services, to work the case plan, and possibly to get some consistency with visitation[.]" The trial court then continued the matter and ordered CCDCFS to file an amended case plan for M.S. and to refer M.S. to undergo a permanent custody evaluation with the trial court's diagnostic clinic.

{¶11} On October 27, 2017, the trial court held a dispositional hearing. CCDCFS presented testimony from Dr. Robert Kurtz, a psychologist with the juvenile court's diagnostic clinic, Thomas, and Elzeer, the children's guardian ad litem.

{¶12} Dr. Kurtz testified that he interviewed M.S., the children, the children's foster mother, and CCDCFS workers, conducted psychological tests and questionnaires, and observed interactions between M.S. and the children as part of his psychological evaluation. He testified that he then drafted a psychological report, which CCDCFS admitted as Exhibit 2. Dr. Kurtz stated that he believed that M.S. "was not ready to take full custody of her children [because] * * * [s]he didn't have adequate housing for her children[,], * * * [h]er intellectual functioning meant that she would have difficulty helping her children with their academics success[,], * * * and [h]er emotional condition * * * was unstable." Dr. Kurtz also testified that M.S. told him that when she has "mental health problems, [she] can't help [herself] or the children." He stated that M.S. expressed that "she has difficulty communicating with her children."

{¶13} Thomas testified that CCDCFS was requesting permanent custody because, since 2015, M.S. had issues “with housing[,] * * * with the kids going to school on a consistent basis[,] * * * with [domestic violence,] and * * * the inconsistency for mom to take [her bipolar] medication and stay stable in order to parent the kids appropriately.” Thomas described the mental health episodes from July 2012 and January 2015 that led to CCDCFS removing the children from M.S.’s custody. Thomas stated that M.S. had been hospitalized “12 to 13 times” for psychiatric issues between 2000 and 2015. He also explained that M.S. received medication and psychiatric treatment from the Centers to address her mental health issues. Thomas then again testified as to M.S.’s violent behavior during the staff meeting with CCDCFS staff members on October 19, 2016. He stated that at that time, M.S. was not taking her medication and did not have gas or lights at home. He also testified that the children informed CCDCFS workers that they “weren’t eating on a regular basis” and that he did not know whether M.S. had a source of income because she does not work. Thomas also testified that during visits with her children, M.S. is “[u]sually on her phone or just sitting there[,]” and that the children have “anxiety about the visits[.]”

{¶14} During Thomas’s testimony, the following exchange occurred:

CCDCFS: Your Honor, may I approach the witness with what is marked CCDCFS Exhibit 1?

COURT: Yes, sir.

MOTHER’S

COUNSEL: Your Honor, I would just want to note an objection to what’s being marked as State’s Exhibit 1, which are medical records. Even though they do have an affidavit attached, counsel would argue that there’s not someone here from the Centers, from the medical (inaudible) to maintain Court verification of what these records are.

CCDCFS: And my response would be that they are supplementing any records, being medical records. There is a provision of the statutory rules of evidence that allow for the supplementation of medical records pursuant to a properly certified affidavit.

COURT: Are they properly certified?

CCDCFS: Yes.

COURT: May I see them? For purposes of the record, upon due consideration, your objection is overruled.

The records were admitted as CCDCFS's Exhibit 1.

{¶15} After Thomas's testimony, Elzeer recommended that the trial court grant CCDCFS permanent custody of the children. She stated that she based her recommendation on the fact that the children "have been in [CCDCFS's] care 12 out of 22 months prior to the filing." She stated:

[M.S.] has failed to actually remedy the conditions of her bad behavior, the utilization of any type of psychiatric counseling services that would allow the children to return to her care, and it's in the best interest of the children, due to their interactions with the foster mom, how well they're thriving, and that their needs can be adequately met outside of mother's care.

{¶16} When asked about the children's wishes, Elzeer stated that "they want to stay in the foster mom's home[.]"

{¶17} At the close of the hearing, M.S.'s records from the Centers were admitted into evidence. Additionally, the state admitted Dr. Kurtz's psychological report, dated February 8, 2017, which concluded the following:

[T]he children both told the examiner that they were afraid of their mother. * * * From the information gathered it appears as though mother will continue having trouble controlling her emotions. Therefore, it is recommended that she continue being monitored for her medication to help her deal with her emotional instability. Both the children seem to be progressing well in the foster mother's home.

Therefore, it is recommended that she retain residential custody for now. In addition, it appears as though mother does not have adequate facilities to take care of the children or the emotional stability to be consistent as a parent.

{¶18} CCDCFS also admitted certified entries and judgment entries related to the 2012 and 2015 removals of the children from M.S.’s custody. Counsel for M.S. admitted a 2016 letter from Amissa Bell with Ohio Guidestone that stated that M.S. “has made progress when she is able to maintain appointments[.]” Counsel for M.S. also admitted staffing notes and activity logs from CCDCFS.

{¶19} After hearing the evidence, the trial court found that CCDCFS proved its allegations contained in its motion for permanent custody by clear and convincing evidence. In its journal entry, the trial court stated that “there are no relatives of the [children] who are able to take permanent custody” and that the children have “been removed [and] adjudicated [as] abused, neglected, or dependent [children] on three separate occasions[.]” The trial court found that “the chronic mental illness * * * of M.S. is so severe that it makes the parent unable to provide an adequate permanent home for the [children] at the present time and, as anticipated, within one year[.]” The trial court then awarded CCDCFS permanent custody and terminated M.S.’s parental rights.

{¶20} It is from this judgment that M.S. now appeals.

II. Law and Analysis

{¶21} In her first assignment of error, M.S. argues that CCDCFS failed to properly authenticate the submitted records from the Centers where M.S. received a psychiatric evaluation and medication and, therefore, the trial court’s admission of those records constituted an abuse of discretion. In her second assignment of error, M.S. argues that, without the admission of the allegedly improperly admitted and unauthenticated medical records, there was insufficient

evidence to award CCDCFS permanent custody of her children. Specifically, M.S. argues that, without the records from the Centers, there was insufficient evidence to show that she suffered from a mental illness requiring the removal of her children. Because we find that M.S.'s assignments of error are interrelated, we will address both together.

{¶22} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *Austin v. Chukwuani*, 8th Dist. Cuyahoga No. 104590, 2017-Ohio-106, 80 N.E.3d 1199, ¶ 40. To justify reversal, the admission of the evidence must have materially prejudiced the defendant. *State v. Lowe*, 69 Ohio St.3d 527, 532, 634 N.E.2d 616 (1994), citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984).

{¶23} Evid.R. 901 provides for the authentication or identification of evidence prior to its admissibility. The rule provides, in pertinent part: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). By way of illustration, Evid.R. 901(B) provides that evidence may be properly authenticated by "testimony of witness with knowledge" that "a matter is what it is claimed to be." "Circumstantial evidence, as well as direct, may be used to show authenticity." *State v. Teague*, 8th Dist. Cuyahoga No. 90801, 2009-Ohio-129, ¶ 7. Further, the authentication requirement of Evid.R. 901(A) is a low threshold that does not require conclusive proof of authenticity, but only sufficient foundation evidence for the trier of fact to conclude that the evidence is what its proponent claims it to be. *State v. Toudle*, 8th Dist. Cuyahoga No. 98609, 2013-Ohio-1548, ¶ 21, citing *Yasinow v. Yasinow*, 8th Dist. Cuyahoga No. 86467, 2006-Ohio-1355.

{¶24} Evid.R. 902(8) states that a proponent need not produce extrinsic evidence for authenticity purposes when seeking to admit “[d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.”

{¶25} Foremost, we find that the records from the Centers qualify as “medical records” because they discussed M.S.’s medication and treatment for her mental health issues.

{¶26} Further, CCDCFS’s Exhibit 1, which contains the medical records, is 60 pages long. The first page of that exhibit is titled, “Certificate of Authenticity of Business Records,” (“Certificate”) and states,

I, John Kovacevic, declare that I am employed by The Centers for Families and Children (the “Centers”) and that my official title or position is Clerical III. In that position I am familiar with the records and documents attached hereto, numbering 58 pages. I further declare that each of the records attached hereto is the original or a duplicate of an original record in the custody of the Centers. I further state that:

A) such records were made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

B) such records were kept in the course of a regularly conducted business activity;

C) the business activity made such records as a regular practice; and

D) if such record is not the original, such record is a duplicate of the original.

I declare under penalty of perjury that the foregoing is true and correct.

The Certificate is signed by Kovacevic and notarized. Following the Certificate is a Notice of Disclosure and Notice of Prohibition on Redisclosure of Confidential Information and 58 pages of records, all of which indicate that the patient, or “client,” is M.S. Based on this, we find that

the medical records from the Centers were self-authenticating under Evid.R. 902(8) and were properly admitted.

{¶27} In support of our conclusion that the records were authenticated and properly admitted, we reiterate the following from the Fourth District: “The purpose of the authentication requirement is simply to establish that the item is what the proponent of its admission purports it to be.” *State v. Lee*, 4th Dist. Pickaway No. 10CA12, 2010-Ohio-6450, ¶ 28, citing Evid.R. 901(A). Further, “the court does not decide whether the evidence is authentic. That decision is left to the [trier of fact].” *Id.*, citing Gianelli & Snyder, *Rules of Evidence Handbook*, Article IX, *Authentication and Identification*, Authors’ Comments (2009).

{¶28} After a review of the Certificate and the attached records, we have no doubt that there is clear and convincing evidence to support that the medical records are exactly what CCDCFS purported them to be. Each entry or record lists M.S. as the patient or client and were attested to by a clerk from the Centers. Accordingly, we overrule M.S.’s first assignment of error.

{¶29} Turning now to whether there was sufficient evidence underlying the trial court’s grant of permanent custody to CCDCFS, a parent’s interest in the custody of their child is not absolute, and the state may permanently terminate parental rights when it would serve a child’s best interests. *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶ 11. “By terminating parental rights, the goal is to create a ‘more stable life’ for dependent children and to ‘facilitate adoption to foster permanency for children.’” *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 21, quoting *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314.

{¶30} When deciding whether to terminate parental rights and award permanent custody to a public services agency, R.C. 2151.414 requires a court to employ a two-part test. First, the court must find, by clear and convincing evidence, one of the following:

(a) the child * * * cannot be placed with either parent within a reasonable period of time or should not be placed with either parent if any one of the factors in R.C. 2151.414(e) are present[;]

(b) the child is abandoned[;]

(c) the child is orphaned and there are no relatives of the child who are able to take permanent custody[; or]

(d) the child has been in the temporary custody of one or more public or private children services agencies for [12] or more months of a consecutive [22]-month period.

R.C. 2151.414(B)(1)(a)-(d). Second, a court must find, again by clear and convincing evidence, that granting permanent custody under R.C. 2151.414(D) is in the child's best interest.

{¶31} "Clear and convincing evidence" is a higher standard of proof than a mere "preponderance of the evidence," but a lower standard than "beyond a reasonable doubt." *In re J.S.*, 8th Dist. Cuyahoga Nos. 101991 and 101992, 2015-Ohio-2701, ¶ 48, citing *In re Awkal*, 95 Ohio App.3d 309, 642 N.E.2d 424 (8th Dist.1994). It is satisfied when the evidence presented "produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Id.*, quoting *Awkal*.

1. R.C. 2151.414(B)(1)

{¶32} We first look to whether clear and convincing evidence supports the juvenile court's finding that the children have been "in the temporary custody of a public children services agency or private child placing agency * * * for twelve or more months of a consecutive twenty-two month period" and that M.S.'s "chronic mental illness * * * is so severe * * * [that

she is] unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year[.]”

{¶33} Here, the record contains clear and convincing evidence that the children were in CCDCFS’s temporary custody for over 12 months in a consecutive 22-month period between January 2015 and June 2016. In fact, M.S. conceded this point at oral argument. This alone is enough to satisfy R.C. 2151.414(D) and the first part of the test for permanent custody.

{¶34} For the sole purpose of addressing M.S.’s argument related to evidence of a chronic mental illness, the record also contains clear and convincing evidence of R.C. 2151.414(B)(1)(a), which requires the presence of “any one of the factors in R.C. 2151.414(E).” R.C. 2151.414(E) sets forth 16 factors used to determine whether children cannot or should not be placed with their parents. Some of those factors include whether the parent:

(1) * * * has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child’s home[;]

(2) [has] [c]hronic mental illness[;] * * *

(16) [a]ny other factor the court considers relevant.

R.C. 2151.414(E). If a trial court finds by clear and convincing evidence that any one of the 16 factors exists, it must find that the children cannot or should not be placed with a parent within a reasonable period of time and award permanent custody to an authorized agency. *In re D.J.*, 8th Dist. Cuyahoga No. 88646, 2007-Ohio-1974, ¶ 64.

{¶35} We find that CCDCFS presented clear and convincing evidence of numerous factors listed in R.C. 2151.414(E). The record contains evidence establishing that M.S. has bipolar disorder. In fact, M.S. concedes in her appellate brief that she “suffers from a mental illness.” Additionally, the record shows that her mental illness substantially affects her ability to

take care of the children and that she becomes unstable when she does not take her medication. The record makes it clear that she has failed to take her medication resulting in mental health episodes on more than one occasion and that CCDCFS removed the children from M.S.'s custody two times before due to those mental health episodes. M.S. also told CCDCFS workers that she did not have gas or lights at home, and Thomas testified that M.S. became violent during a meeting with CCDCFS staff workers. Accordingly, we will move on to the second part of the test.

2. R.C. 2151.414(D)

{¶36} To determine whether a grant of permanent custody is in a child's best interest, the juvenile court must 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, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
- (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public service children agencies or private child placing agencies for [12] or more months of a consecutive [22]-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 [R.C. 2151.414](E)(7) to (11) * * * apply in relation to the parents and child.

R.C. 2151.414(D)(1). The juvenile court only needs to find one of the above factors in favor of permanent custody to terminate parental rights. *In re J.S.*, 8th Dist. Cuyahoga Nos. 101991 and

101992, 2015-Ohio-2701, at ¶ 51, citing *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827.

{¶37} Dr. Kurtz’s child custody evaluation stated that M.S. explained to him that she had trouble controlling and is “uncomfortable” communicating with her children and does not know how to connect with them. Dr. Kurtz’s report also stated that one of the twins “said she likes living with her foster mother” and that “she’s afraid of her mother when she gets angry and would prefer to continue living with her foster mother.” As to the other twin, Dr. Kurtz’s report stated, “[H]e likes living with his foster mother. He said he worries about his mother ‘hitting us.’” The same twin also told Dr. Kurtz that “[h]e does not want to go back and live with [M.S.].”

{¶38} Additionally, the record shows that M.S. lost custody of the children twice before based on mental health related issues and M.S.’s failure to take her medication. The record also shows that the children were in CCDCFS’s custody for more than 12 months in a consecutive 22-month period between January 2015 and June 2016. Finally, Elzeer, the children’s guardian ad litem, testified that “these children desperately need their placement. That can’t be achieved without an award of permanent custody to [CCDCFS].”

{¶39} We find that the above evidence constitutes clear and convincing evidence that granting CCDCFS permanent custody is in the children’s best interests. Accordingly, we find that the termination of M.S.’s parental rights was proper because clear and convincing evidence showed that the children could not be placed with M.S. and that granting permanent custody to CCDCFS was in the children’s best interests. Therefore, we overrule M.S.’s second assignment of error.

{¶40} 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 be sent to said court 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.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR