

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In re: J.T., :
(T.H., : No. 11AP-1056
Appellant). : (C.P.C. No. 06JU-03-03742)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 22, 2012

Robert J. McClaren, for appellee Franklin County Children Services.

Lisa C. Julius, for appellant.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, Guardian ad Litem.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} Appellant, T.H. ("mother"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which terminated her parental rights relating to her son, J.T., and granted permanent custody of J.T. to appellee, Franklin County Children Services ("FCCS"), for purposes of adoption. For the following reasons, we affirm.

I. Background

{¶ 2} In March 2006, FCCS re-filed a complaint alleging J.T., born December 31, 2002, to be a dependent minor. The complaint asserted that the whereabouts of mother and J.T.'s father were unknown and that the family had a history of involvement with FCCS dating back to 1994, with neglect being substantiated in 1994 and 1998. According

to the complaint, FCCS received a referral based on concerns for J.T. and his siblings due to the absence of his parents, the lack of electricity and food in the family's home, and allegations that the mother sold the family's food stamps in order to purchase drugs. The complaint further alleged that mother did not have independent housing or income and that her criminal history included a pending revocation hearing.

{¶ 3} The trial court awarded temporary custody of J.T. to FCCS on March 7, 2006. On May 1, 2006, the trial court adopted the magistrate's decision and adjudicated J.T. a dependent minor under R.C. 2151.04(C). The trial court awarded temporary custody to FCCS in June 2006 and approved a case plan. Objectives in the case plan included a drug and alcohol assessment, random urine screens, weekly AA and NA meetings, a psychological evaluation and recommendations, counseling, stable housing and legal income, working utilities, visits, resolution of all criminal charges, parent-education classes, and family counseling.

{¶ 4} Over the next three years, J.T. moved in and out of FCCS custody. In March 2007, temporary custody of J.T. was awarded to J.H.; however, FCCS regained temporary custody in September 2007 based on allegations that Hayes threatened to kill J.T.'s siblings, that a gun was fired in J.T.'s presence, and that drugs were being sold in the house where J.T. resided. On November 27, 2007, temporary custody was granted to Q.S., who relinquished custody in February 2009. Following a hearing in June 2009, temporary custody was granted to FCCS.

{¶ 5} In January 2010, FCCS requested permanent custody of J.T. and his sister T.H. Mother did not contest the request pertaining to T.H., and the matter proceeded to a trial occurring on September 26, 27, and 30, 2011. Therein, FCCS presented witnesses including J.T.'s social worker Rebecca Barnes, his caseworker Brittany Westbrook, and his lay guardian Elizabeth Jakubiak. Following trial, the court filed an entry granting permanent custody to FCCS and terminating mother's parental rights.

II. Mother's single assignment of error

{¶ 6} Mother now appeals, advancing the following assignment of error for our consideration:

THE TRIAL COURT'S DECISION TO TERMINATE [T.H.]'s
PARENTAL RIGHTS WITH HER SON, J.T., WAS NOT

SUPPORTED BY CLEAR AND CONVINCING EVIDENCE
AND WAS AGAINST THE MANIFEST WEIGHT OF THE
EVIDENCE.

{¶ 7} Although mother assigns only one error challenging the weight of the evidence, she presents a variety of distinct sub-arguments ranging from challenges to the admissibility of evidence to arguments regarding whether the guardians properly discharged their duties. For ease of discussion, we will address each argument in an order consistent with a manifest-weight review.

A. Standard for reviewing permanent custody determinations

{¶ 8} Judgments are not against the manifest weight of the evidence when all material elements are supported by competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978). In reviewing a judgment granting permanent custody to FCCS, an appellate court "must make every reasonable presumption in favor of the judgment and the trial court's findings of facts." *In re P.G.*, 10th Dist. No. 11AP-574, 2012-Ohio-469, ¶ 37, citing *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887, ¶ 59. "'[I]f the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment.'" *Brooks* at ¶ 59, quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19 (1988).

{¶ 9} R.C. 2151.414 governs the procedure for granting permanent custody of a child to a public agency such as FCCS. Pursuant to R.C. 2151.414(B)(1), a trial court may grant permanent custody if after a hearing it determines, by clear and convincing evidence, that (1) any of the circumstances in R.C. 2151.414(B)(1)(a) through (d) exist, and (2) such relief is in the best interest of the child. Clear and convincing evidence means the measure of proof that produces " 'a firm belief or conviction as to the facts sought to be established.' " *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 42, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

B. Existence of circumstances in R.C. 2151.414(B)(1)(a) through (d)

{¶ 10} Mother does not dispute the trial court's finding that J.T. had been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period under R.C. 2151.414(B)(1)(d). FCCS presented testimony establishing that J.T. entered

the temporary custody of FCCS on November 26, 2005, 60 days after he was removed from home, and he was in continuous FCCS custody until November 27, 2007—24 months later—when temporary custody was granted to a relative. *See* R.C. 2151.414(B)(1) ("a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to [R.C. 2151.28] or the date that is sixty days after the removal of the child from home"). In total, J.T. was in FCCS custody for 34 months over the span of the case.

{¶ 11} Because the trial court properly found the existence of the "12 of 22" factor in R.C. 2151.414(B)(1)(d), it was unnecessary for the trial court to make further findings regarding whether J.T. could not be placed with either parent within a reasonable time or should not be placed with either parent, and we need not address mother's challenges to that finding on appeal. *See Brooks* at ¶ 52; *In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 52; *In re J.C.*, 10th Dist. No. 10AP-766, 2011-Ohio-715, ¶ 30; *In re M.W.*, 10th Dist. No. 11AP-524, 2011-Ohio-6392, ¶ 36. The issue now becomes whether granting permanent custody was in J.T.'s best interest.

C. Best interest

{¶ 12} In determining the best interest of the child, the trial court shall consider all relevant factors, including, but not limited to, the following:

- (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
- (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
- (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was

previously in the temporary custody of an equivalent agency in another state;

(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.

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

{¶ 13} The trial court addressed each of the above factors in finding permanent custody to be in J.T.'s best interest. Because mother does not appear to challenge the trial court's findings regarding the factors listed in R.C. 2151.414(D)(1)(c) and (e), we will begin by addressing her challenges regarding the remaining factors.

1. R.C. 2151.414(D)(1)(a): Interaction and interrelationship

{¶ 14} In considering J.T.'s interaction and interrelationship with his parents, relatives, foster caregivers, etc., the trial court found that J.T. had no relationship with his father and a poor, unhealthy bond with mother. It was undisputed that J.T. had not lived with mother since 2005 when she was incarcerated for possession of narcotics and carrying a concealed weapon. Moreover, the testimony of Barnes, Westbrook, and Jakubiak established that J.T. feared mother and was consistent in his desire to not live with her or visit her. Barnes testified that J.T.'s behavior dramatically improved when the visitations with mother stopped and that it continued to progress the longer he lived with his foster family. Further, Westbrook testified that J.T.'s bond with mother was "very, very, very strained" in contrast to the strong bond he shared with his foster mother. (Sept. 27, 2011 Tr. 72.) J.T. told Westbrook that he loved his foster mother and repeatedly expressed his desire to live with her permanently.

{¶ 15} Notwithstanding the above, mother argues she had "begun to bond with J.T." based on progress notes from Berea Family Services ("Berea"), which cover June through October 2010. (Appellant's Brief, 27.) However, as explained above, the record is replete with testimony establishing that any bond was weak and harmful to J.T.'s well being. Even after mother entered into the Berea program, she displayed concerning behavior during visits that ultimately caused visitation to be suspended on October 19,

2010. Westbrook described J.T.'s visits with mother as hectic and concerning. Children would run from room to room, engage in inappropriate conversations, and, at one visit, J.T.'s brother wet himself but went unnoticed for a period of time. At a visit on September 11, 2010, Westbrook observed J.T. bite mother before mother bit him back. Westbrook also saw mother "putting [J.T.] down" and being hurtful, which concerned Westbrook because of J.T.'s already low self-esteem. (Sept. 27, 2011 Tr. 49.) Thus, despite mother's claim that she had "begun to bond" with J.T., the trial court was free to assign more weight to the overwhelming testimony establishing the opposite.

2. R.C. 2151.414(D)(1)(b): Child's wishes

{¶ 16} Next, the trial court considered the factor in R.C. 2151.414(D)(1)(b), which requires consideration of the child's wishes, "as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child." This statute "unambiguously gives the trial court the choice of considering the child's wishes directly from the child or through the guardian ad litem." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 55. "The trial court has discretion to accept the testimony of the guardian ad litem on the child's wishes rather than hearing a direct expression of those wishes made by the child." *Id.* at ¶ 56.

{¶ 17} The trial court considered J.T.'s wishes as expressed through the testimony of Jakubiak and the report issued by J.T.'s guardian ad litem Melani Anderson. Jakubiak testified that she met with J.T. several times and described him as consistent in his desire to be adopted and to no longer have contact with mother. Throughout Jakubiak's testimony, she stated that J.T. was "crystal clear" and "unwavering" in his wishes to not have contact with mother and to be adopted. (Sept. 27, 2011 Tr. 182.) J.T. repeatedly expressed his fear of mother and his desire to have a "forever family" through the adoption process. (Sept. 27, 2011 Tr. 182.)

{¶ 18} Mother argues that the guardians failed to comply with R.C. 2151.281(I) and Franklin County Common Pleas Juvenile Division Local Rule 27 ("Loc.Juv.R. 27"), which, according to mother, required them to personally observe J.T. interact with mother. We disagree.

{¶ 19} While mother never raised this challenge below, we find no categorical requirement in R.C. 2151.281 or Loc.Juv.R. 27 for a guardian to personally observe

parent-child interaction in every case. *See In re T.F.*, 8th Dist. No. 91438, 2008-Ohio-6652, ¶ 45 (finding "no requirement that a GAL observe visitations between a parent and child" in R.C. 2151.281 and analogous local rule). R.C. 2151.281(I) directs guardians to "perform whatever functions are necessary to protect the best interest of the child," including, but not limited to, investigation, mediation, monitoring court proceedings, and monitoring the services provided to the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, and shall file any motions and other court papers that are in the best interest of the child. While Loc.Juv.R. 27(G)(12) lists parent-child observation as one of a guardian's duties, the rule excepts a guardian from performing any of the duties where "impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case."

{¶ 20} In her testimony, Jakubiak explained why she did not personally observe J.T. with mother. Given mother's often irate behavior, Jakubiak feared her presence at the visitations "had a strong likelihood of agitating [mother]," adding, "that's not something that I would want to do around the children if I could help it." (Sept. 27, 2011 Tr. 169.) Jakubiak testified that she believed direct observation would have been counter productive and unhealthy for the children. Jakubiak instead assessed the visitations by relying on information from Westbrook, Barnes, J.T., and mother. Given the circumstances of the case and her conversations with J.T., Jakubiak testified that a personal observation between J.T. and mother would not have affected her conclusion regarding J.T.'s best interests.

{¶ 21} Mother also complains that Anderson's report failed to contain an evaluation of J.T.'s competency to express his wishes. To the contrary, the report expressly found J.T. to be "competent to state his wishes and communicate them to the Lay Guardian." (Report of the guardian ad litem, 2.) This report is supported by Jakubiak's testimony regarding J.T.'s ability to express his wishes. Accordingly, we find that the trial court properly relied on the information provided by Jakubiak and Anderson in considering J.T.'s wishes.

3. R.C. 2151.414(D)(1)(d): Need for legally secure permanent placement

{¶ 22} In considering the factor in R.C. 2151.414(D)(1)(d), the trial court found "overwhelming testimony" establishing J.T. needed legally secure permanent placement and that such placement could not be achieved without a grant of permanent custody to FCCS. In addition to the evidence that J.T.'s foster family had been providing him with nurturance and stability, the trial court relied on the testimony regarding mother's failure to comply with the case plan.

{¶ 23} In her brief, mother asserts that she has substantially complied with the case plan because she eventually completed the parenting classes provided by the Berea program. However, whether or not mother completed the Berea classes, Westbrook testified that mother failed to complete the parenting objective because mother did not exhibit the skills learned from those classes. Westbrook also testified that mother failed to complete other requirements of the case plan, including the objectives relating to alcohol and psychological counseling. Although mother completed a drug and alcohol assessment in December 2008, mother did not attend any of the AA or NA weekly meetings and completed only 67 of the 280 random urine screens administered over the life of the case. Moreover, while mother completed a psychological evaluation, Westbrook testified that mother failed to follow the recommendations that she attend counseling and meet with a psychiatrist to ensure she was taking her medications. Accordingly, the trial court's findings regarding mother's non-compliance with the case plan and J.T.'s need for legally secure placement were not against the weight of the evidence.

D. Miscellaneous evidentiary challenges

{¶ 24} Within her manifest-weight challenge, mother raises various arguments challenging the admissibility of the evidence presented at trial. First, she asserts that Barnes offered inadmissible hearsay when she described an incident where J.T. reenacted being beaten with a ruler. Specifically, mother takes issue with the following portion of Barnes' direct examination:

[MS. BARNES]: [J.T.] had different examples of feeling neglected. He started to act out and a lot of times kids will do a reenactment of the trauma.

Q. Such as?

A. Such as sitting there pounding himself with a ruler saying I'm preparing –

[APPELLANT'S ATTORNEY]: Objection Your Honor; hearsay. This is not - - this is not a –

JUDGE LOUDEN: Is this - -

[APPELLANT'S ATTORNEY]: - it has not been established that this would be an otherwise competent witness.

JUDGE LOUDEN: Is this behavior you observed yourself?

MS. BARNES: No. [J.T.] told me and we talked about it in counseling.

(Sept. 26, 2011 Tr. 54-55.)

{¶ 25} Quoting only the last portion of this exchange, mother contends, "The testimony of Ms. Barnes to which [her attorney] objected was a very broad statement of [J.T.'s] actions, spanning from the time he was just three years old until he was eight years old." (Appellant's Brief, 9.) We disagree. The only statement to which there was an objection was Barnes' testimony J.T. told her, "I'm preparing," but Barnes never had the opportunity to finish this statement. The statement "I'm preparing," was not, as mother contends, a broad description of J.T.'s actions over five years. Regardless, if it can be considered a statement at all, it is admissible under Evid.R. 803(3) as a statement of J.T.'s "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." Thus, mother fails to identify any error in the above-quoted exchange.

{¶ 26} Next, mother challenges the basis for Barnes' expert opinion testimony. Without pointing to any specific opinion, mother claims that, even if Barnes were properly qualified as an expert, her opinions relied on records not admitted into evidence in contravention of Evid.R. 703. Mother acknowledges that she did not object on this ground at trial but contends that plain error occurred because it is "impossible" to know which portions of Barnes' testimony were based on her own observations. (Appellant's brief, 10.) We disagree.

{¶ 27} Evid.R. 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." This rule is satisfied where " 'an expert bases his opinion, in whole or in major part, on facts or data perceived by him[.]' " *Herold v. Herold*, 10th Dist. No. 04AP-206, 2004-Ohio-6727, ¶ 16, quoting *State v. Solomon*, 59 Ohio St.3d 124 (1991), syllabus. The objecting party bears the burden of demonstrating that the expert principally relied on facts not admitted into evidence and not perceived by the expert. *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 15, citing *Farkas v. Detar*, 126 Ohio App.3d 795 (9th Dist.1998).

{¶ 28} Here, although Barnes reviewed J.T.'s records during the course of the case, her testimony relied almost exclusively on her own observations of J.T.'s behavior, responses to treatment, and progress with his foster family. Barnes testified that, during her sessions with J.T., she observed J.T. display signs of fear, rejection, neglect, and hatred toward his mother. She saw J.T.'s behaviors worsen when he was forced to visit with mother, improve when the visitations were suspended, and continue to progress when given the stability and nurturance provided by J.T.'s foster family. Barnes also witnessed mother's irate, unstable behavior first-hand and testified about her sometimes obstinate refusal to comply with certain objectives in the case plan. Accordingly, we find no error, much less plain error, in the admission of Barnes' testimony.

{¶ 29} Finally, mother challenges the relevance of testimony regarding her inability to parent J.T.'s sister, T.H. Because mother did not contest the permanent custody motion as it related to T.H., she argues that the trial court erred by allowing testimony regarding her tumultuous relationship with T.H. and T.H.'s desire to live elsewhere. Mother also contends that any probative value of the testimony is substantially outweighed by undue prejudice. We disagree with both contentions.

{¶ 30} " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Here, the testimony regarding mother's inability to parent T.H. was relevant to mother's compliance with the parenting objectives in her case plan. Compliance with the case plan is one of the inquiries required when determining whether a child cannot be placed with

either parent within a reasonable time, or should not be placed with the parents. *See* R.C. 2151.414(E)(1); *Brooks* at ¶ 63; *In re H.K.*, 11th Dist. No. 2010-T-0066, 2010-Ohio-4194, ¶ 55. The testimony was also relevant to mother's ability to parent T.H., of whom FCCS was also requesting permanent custody. Mother's decision to proceed uncontested on the issues pertaining to T.H. did not relieve FCCS of its obligation to satisfy the requirements for permanent custody set forth in R.C. 2151.414(B). Therefore, the testimony constituted relevant evidence, and its admission did not violate Evid.R. 401.

{¶ 31} Nor do we find the probative value of the testimony to be substantially outweighed by a danger of unfair prejudice under Evid.R. 403(A). Relevant evidence of one's inability to parent a child is almost always prejudicial in a permanent custody case, but a danger of "unfair prejudice" is required for relevant evidence to be inadmissible under Evid.R. 403(A). Mother does not explain why the evidence was unfairly prejudicial, and we find nothing to support such a claim. Accordingly, we find no error in the admission of the challenged testimony relating to T.H.

E. Reasonable efforts toward reunification

{¶ 32} Finally, mother argues that the record does not support the trial court's finding that FCCS made reasonable efforts to reunify her with J.T. Reasonable efforts are efforts to " 'resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed.' " *In re C.F.* at ¶ 28, quoting Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U.Pub.Int.L.J. 259, 260 (2003).

{¶ 33} Mother acknowledges that efforts were made but suggests that those efforts were made in bad faith. Specifically, she relies on the testimony of Heather Nicol, an employee with Berea, who stated that Barnes engaged in unprofessional behavior during a teleconference meeting regarding mother's parenting. However, Nicol admitted that she was not present at the meeting and did not actually observe the alleged behavior, whereas Jakubiak, who was present, expressly denied seeing any such behavior. Thus, even if Nicol's testimony could somehow negate the reasonableness of FCCS's efforts toward reunification, the trial court was free to reject her testimony as unreliable. The record in this case proves that FCCS made extensive efforts to assist in reunification. Westbrook testified in detail about the steps taken by FCCS to help mother achieve the objectives of

the case plan. FCCS provided mother with bus passes and taxi cabs, scheduled in-home parenting classes through Berea, and referred mother to Catholic Social Services and Neighborhood House. Additionally, Westbrook scheduled appointments for mother to meet with J.T.'s treatment team. Under these circumstances, we find that the trial court properly determined that FCCS made reasonable efforts toward reunifying J.T. with mother.

III. Conclusion

{¶ 34} Based on the above analysis, we find that FCCS presented clear and convincing evidence satisfying the requirements of R.C. 2151.414(B)(1), and that the trial court's judgment granting permanent custody was not against the manifest weight of the evidence. Accordingly, mother's sole assignment of error is overruled.

{¶ 35} Having overruled mother's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.
