[Cite as *In re Dixon*, 2004-Ohio-5361.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J.
CHINA DIXON	Case No. 2004CA00134
MINOR CHILD	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. JU 125045
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 4, 2004

APPEARANCES:

For Appellant-Father	For Appellee
MATTHEW A. PETIT 300 Bank One tower 101 Central Plaza South Canton, Ohio 44702	RANDALL MUTH STARK COUNTY DJFS 220 East Tuscarawas Street Canton, Ohio 44702

Wise, J.

{¶1} Appellant Kevin Dixon appeals the decision of the Stark County Court of Common Pleas, Juvenile Division, which granted permanent custody of his daughter to Appellee Stark County Department of Job and Family Services ("SCDJFS"). The relevant facts leading to this appeal are as follows.

{¶2} Appellant is the father of China Dixon, born in 2001. The child's mother is Genita Turner, who is not a party to the present appeal.[1] On November 21, 2002, SCDJFS filed a complaint in the Stark County Court of Common Pleas, Juvenile Division, alleging China was a dependent child, based on allegations that mother had an ongoing substance abuse problem. On December 17, 2002, China was adjudicated as a dependent child, with custody remaining with her mother, Genita, and SCDJFS maintaining protective supervision. On February 4, 2003, SCDJFS filed a post-dispositional motion seeking temporary custody of China, based in part upon allegations that Genita had failed to cooperate in her court-ordered drug urine screens. On February 5, 2003, following a hearing, the court granted temporary custody of China to SCDJFS.

{¶3} As part of his case plan, appellant completed a psychological evaluation with Dr. Gerald Bello. The report filed by Dr. Bello on June 2, 2003, recommended that appellant establish paternity of China, take a QUEST evaluation, take parenting classes, maintain stable employment for one year, maintain stable housing, and have no further legal entanglements. Appellant accordingly established paternity and

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[1] Genita did not appear at either portion of the bifurcated permanent custody evidentiary hearing.

completed his QUEST evaluation. On August 4, 2003, appellant commenced Goodwill parenting classes, but was terminated from the program about two months later due to excessive absenteeism.

{¶4} In the meantime, China's paternal grandmother, Mozell Dixon, and paternal aunt, Regina Wartley, filed motions to intervene and motions for custody in May, 2003. Both motions to intervene were denied, although SCDJFS did complete home studies on both relatives.

{¶5} On October 16, 2003, SCDJFS filed a motion for permanent custody. The matter was tried before the court on February 10, 2004 (Tr. Vol. I) and April 5, 2004 (Tr. Vol. II). On April 27, 2004, the court issued a judgment entry with findings of fact and conclusions of law, granting permanent custody of China to SCDJFS.

{¶6} Appellant filed a notice of appeal on May 3, 2003, and herein raises the following four Assignments of Error:

{¶7} "I. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW WHEN IT FAILED TO GRANT CUSTODY OF THE MINOR CHILD TO THE PATERNAL AUNT, REGINA WARTLEY.

{¶8} "II. THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE MINOR CHILD WOULD BE SERVED BY THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶9} "III. APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION WHEN THE COURT DENIED HIM THE OPPORTUNITY TO FULLY PRESENT HIS CASE.

{¶10} "IV. APPELLANT WAS PREJUDICIALLY DEPRIVED OF HIS UNITED STATES AND OHIO CONSTITUTIONAL RIGHTS TO A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL.

I., II.

{¶11} In his First Assignment of Error, appellant argues the trial court erred in denying any grant of custody to the child's paternal aunt. In his Second Assignment of Error, appellant argues that the trial court erred in concluding that a grant of permanent custody to SCDJFS was in the child's best interest. We disagree on both counts.

{¶12} As an initial matter, we note that appellant's claim of error in the denial of custody of China to the paternal aunt, Regina Wartley, presents some interesting procedural questions. In this case, Wartley apparently appeared with counsel at several of the proceedings as the case progressed, although she was not permitted to intervene as a party. See, e.g., Tr. at 24. Wartley, however, has apparently not appealed any denial of her attempts to intervene. During the permanent custody hearing, Wartley was called as a witness by appellant's counsel. See Tr. 2 at 38-55. On October 16, 2003, appellant filed a motion seeking the dispositional alternative of relative custody, one of the issues he now raises in the absence of Wartley. See R.C. 2151.415(F) and R.C. 2151.415(A)(3). In the interest of judicial economy, we will address the denial of custody to Wartley as part of our overall analysis of whether permanent custody to SCDJFS was in the child's best interest.

{¶13} In determining the best interest of a child, the trial court is required to consider the factors contained in R.C. 2151.414(D). These factors are as follows:

{¶14} "(1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care givers and out-of-home providers, and any other person who may significantly affect the child;

{¶15} "(2) 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;

{¶16} "(3) 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 ending on or after March 18, 1999;

{¶17} "(4) 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;

{¶18} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶19} During the permanent custody proceedings in the case sub judice, SCDJFS called as a witness Judy Gaetje, appellant's Goodwill parenting program instructor. Gaetje described appellant as a "very capable individual," but a person who unfortunately lacked the commitment to be a "twenty four seven" parent. Tr. at 74. Appellant eventually was terminated from the program due to excessive absenteeism. Tr. at 71.

{¶20} The ongoing social services aide from SCDJFS, Karin Haddad, testified as follows regarding her experiences in working with appellant:

{¶21} "I have found Mr. Dixon to be extremely difficult to work with. Um I can honestly say that I've never encountered someone that makes it impossible to work with. You know I . . . I explain my role . . . he from the very beginning was adamant in telling me that he doesn't have to listen to anything I say. I'm basically just a transporter. I tried to explain to him what my role was that I was a representative of the Agency. I will represent the worker in her absence. If he had any further questions he could direct them to her. Um simple directions ah directives during the course of the visit such as um providing a snack or changing a diaper. All of those were received with defiance um and he literally would not speak with me to me throughout the visitations. Um I consulted with the worker on that . . . she . . . it is my understanding that she had a conversation with him . . . explaining my role and I actually was um part of a discussion that my supervisor Linda Chambliss had with him explaining what my role was and what you know how he needed to . . . to follow any directive that I would give him through the course of any visitation. It still made no difference.

"* * *

{¶22} "At the beginning of the case um my observations included I noticed that China would not even go to Mr. Dixon. Um for a good portion of the beginnings of the visits for the first couple of months. Um there because his attitude and his tone came into the visit certainly I viewed that that hindered his ability to properly interact with his child. There was a time where um he would actually tease her and taunt her. He um you know he would raise his voice at times. If she would start crying and would be fussy and she couldn't be calmed down he would get frustrated with it and even remark you know you're not going to act like some white kid falling out in a grocery store. He clearly

came across as he did not have an understanding of appropriate interaction with his child." Tr. at 43-45.

{¶23} The trial court found China, age two, to be an adoptable child. Findings of Fact at 14. It is undisputed that she has no known physical, emotional, psychological or developmental delays. It is further undisputed that China is placed in a foster-to-adopt home, with a family who has already adopted her biological brother. The court found that she was bonded both with her foster family and her brother. Findings of Fact at 14. China has no bond with her mother; the court additionally found that severing the bond China had with appellant would be overridden by the stability and permanency potential for the child upon a grant of permanent custody. Id. at 5.

{¶24} In regard to whether the best interests of China would have been served by a grant of custody to the aunt, Regina Wartley, the record reveals SCDJFS completed a home study and placed China in the Wartley home for about eight days during the pendency of the case. However, SCDJFS removed China from the Wartley home in April 2003, with court approval. Appellant herein notes that Regina has lived with her husband, Lewis, at the same home for approximately nine years. Regina has had steady employment with Heinz Foods for seventeen years, and has a nine-year-old daughter who enjoys helping taking care of China. Testimony also indicated that Regina and Lewis are certified type-E child care providers. However, ongoing caseworker Marge Kazlauskas testified that she had concerns about the possible presence of an adult stepson with a felony record in the Wartley home. Moreover, Kazlauskas expressed her additional concerns that the Wartleys would not prevent contact between China and her parents should relative custody be granted, although

Regina testified she would not allow this scenario. Finally, as the trial court noted, the report of the guardian ad litem recommended permanent custody to SCDJFS.

{¶25} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. "The discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *In re Mauzy Children* (Nov. 13, 2000), Stark App. No.2000CA00244, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316. Furthermore, "[i]t is axiomatic that both the best-interest determination and the determination that the child cannot be placed with either parent focus on the child, not the parent." *In re Mayle* (July 27, 2000), Cuyahoga App. Nos. 76739, 77165, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 75, 523 N.E.2d 846.

{¶26} In the case sub judice, upon review of the record and the extensive findings of fact and conclusions of law therein, we conclude the trial court's grant of permanent custody of China to SCDJFS, and corresponding denial of custody to her aunt, were made in the consideration of the child's best interests and did not constitute an abuse of discretion.

{¶27} Appellant's First and Second Assignments of Error are overruled.

III.

{¶28} In his Third Assignment of Error, appellant contends the trial court deprived him of due process by preventing him from fully presenting his case. We disagree.

{¶29} Appellant specifically contends that he was improperly prevented from cross-examining a SCDJFS caseworker, Marge Kazlauskas, concerning her actions in another case. According to the proffer of evidence, Kazlauskas was disciplined in an unrelated case for failure to perform certain duties of her position.

{¶30} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. Our task is to look at the totality of the circumstances in the particular case under appeal, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App. No.1999CA00027. As a general rule, all relevant evidence is admissible. Evid.R. 402. However, Evid.R. 404(A) provides that evidence of a person's character is not admissible to prove the person acted in conformity with that character. Evid.R. 404(B) sets forth an exception to the general rule against admitting evidence of a person's other bad acts. The Rule states as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶31} From the record, we conclude the trial court could have reasoned appellant was essentially seeking to show that as Kazlauskas had allegedly not used reasonable efforts in the past, she must not have used reasonable efforts in the case sub judice. Upon review, we find appellant has failed to demonstrate an abuse of discretion in regard to the evidentiary decision of the trial court under Evid.R. 404 (A), 404(B), and 608(B).

{¶32} Appellant's Third Assignment of Error is therefore overruled.

IV.

{¶33} In his Fourth Assignment of Error, appellant claims he was deprived of his constitutional right to the effective assistance of counsel. We disagree.

{¶34} "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." *In re Wingo* (2001), 143 Ohio App.3d 652, 666, 758 N.E.2d 780, quoting *In re Heston* (1998), 129 Ohio App.3d 825, 827, 719 N.E.2d 93. This Court has recognized "ineffective assistance" claims in permanent custody appeals. See, e.g., *In re: Utt Children*, Stark App. No.2003CA00196, 2003-Ohio-4576.

{¶35} Our standard of review for an ineffective assistance claim is thus set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's

assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different. Id. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any give case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142, 538 N.E.2d 373.

{¶36} Appellant sets forth two specific instances of alleged ineffective assistance: (1) counsel's failure to object to appellant being called as if on cross-examination during SCDJFS's case-in-chief; and (2) counsel's failure to advise appellant of his Fifth Amendment right to remain silent on several occasions. Appellant contends that these failures permitted appellant to be questioned as to whether he "always" followed court orders, whether he completed the Goodwill parenting program, the nature of his criminal history, and whether his discharge from the military was honorable (as he informed Dr. Bello during his evaluation) or other-than-honorable. Appellant herein asserts that his attorney did not inform him of his right to remain silent and to avoid confessing perjury on the stand.

{¶37} We first note appellant makes no challenge to the applicability of R.C. 2317.07, which states that "[a]t the insistence of the adverse party, a party may be examined as if under cross-examination ***." Moreover, although an appellate court

can, and should, certainly review a transcript in such a situation to determine if indeed trial counsel raised no Fifth Amendment objections, appellant's claim in this case that his counsel never informed him of his right to remain silent appears to speculate as to evidence dehors the record. Such a claim is not properly raised in a direct appeal. See *State v. Lawless*, Muskingum App. No. CT2000-0037, 2002-Ohio-3686, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452. See, also, *In re Epperly-Wilson Children* (Aug. 6, 2001), Stark App. No. 2001CA00098, (wherein we found a trial court record "devoid of any evidence to support father's assertion trial counsel did not advise him of his rights prior to trial"). Assuming arguendo, counsel did fail to inform him of his Fifth Amendment rights, we are unpersuaded that this decision would fall below a standard of reasonable representation under these facts. SCDJFS called Goodwill instructor Gaetje, as previously noted, who testified as to appellant's failure to complete the class. Furthermore, appellant's municipal court criminal records were later admitted as State's exhibits. Moreover, it simply stretches practical reason to conclude that appellant's propounding of his prior failures to obey court orders, as well as his past problems with local law enforcement and military superiors, were actually perjurious and "self-incriminating" in regard to a proper Fifth Amendment analysis, as opposed to merely being potentially damaging to his case as a parent.

{¶38} Accordingly, we find no deprivation of the effective assistance of counsel as urged by appellant. Appellant's Fourth Assignment of Error is therefore overruled.

{¶39} For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 922

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
CHINA DIXON	:	JUDGMENT ENTRY
MINOR CHILD	:	Case No. 2004CA00134

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

Costs to appellant.

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JUDGES