

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: J.H.
 S.H.

C.A. Nos. 27574
 27589
 27595

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 12 11 0730
 DN 12 11 0731

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

WHITMORE, Judge.

{¶1} Appellants, a minor child (“S.H.”) and her father (“Father”), appeal from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated parental rights to S.H. and her sibling, J.H. This Court affirms.

I

{¶2} Father is the natural father of J.H., born May 8, 2003; and S.H., born July 15, 2004. Although the children’s mother (“Mother”) is relevant to this appeal, she did not appeal the trial court’s termination of her parental rights. Mother and Father each have other children who do not reside in their custody, but those children are not at issue in this appeal.

{¶3} CSB filed a prior involuntary case involving J.H. and S.H. on April 3, 2010. At that time, the children were living with Mother and were removed from her custody because of domestic violence in the home, unstable housing, substance abuse by Mother and her failure to

meet the children's basic needs. J.H. and S.H. were later adjudicated neglected and dependent children and placed in the temporary custody of CSB.

{¶4} During the 2010 case, Mother did not work on the goals of the case plan and had little involvement with the children. Because Mother had no contact with the children for a lengthy period of time, the trial court eventually granted CSB a reasonable efforts bypass as to Mother because she had abandoned the children. *See* R.C. 2151.419(A)(2)(d).

{¶5} CSB moved for permanent custody in that case, but it later withdrew the motion because Father began to make progress on the reunification goals of the case plan. The children were ultimately placed in the legal custody of Father and the case was closed on March 29, 2012.

{¶6} This case began on November 20, 2012, when CSB filed complaints to remove the children from Father's custody, alleging that he lacked stable income and housing, was abusing drugs and alcohol, and was otherwise failing to meet the children's basic needs. The trial court later adjudicated J.H. and S.H. dependent children.

{¶7} Because the children had been removed from Father's home, the case plan initially focused on reunifying the children with him. Father did not work toward reunification, however, and Mother was incarcerated for a period of time and, even after her release, did not work on reunifying with the children. Neither parent had a stable home, nor had they adequately addressed their mental health and/or substance abuse problems. Mother kept "bouncing from place to place[,]” engaged in counseling only intermittently, and did not consistently visit the children. Father did not visit the children or engage in reunification services.

{¶8} CSB moved for permanent custody during March 2013, but it withdrew the motion after the maternal grandfather was approved to take custody of the children. By

agreement of the parties, J.H. and S.H. were placed in the legal custody of the grandfather, who lives in Texas.

{¶9} The children had been engaging in counseling for many years to address the emotional problems that had resulted from the lack of stability in their lives. In addition to the emotional problems caused by moving from place to place, the children had witnessed domestic violence in Mother's home and substance abuse by each of their parents. At the beginning of this case, S.H. would pretend to be happy all the time, but through counseling, would later reveal that she was hiding significant anger and sadness toward Father, from whose custody she had most recently been removed.

{¶10} Moreover, shortly before they moved to Texas to live with their grandfather, the children disclosed that each of them had been sexually abused. The specifics of the allegations at that time are not clear from the record. Through the children's subsequent counseling, however, they disclosed that S.H. had been sexually abused by Father and that both of them had been subjected to repeated sexual abuse by older foster children in one of their prior foster homes.

{¶11} The children's relocation to the home of their grandfather did not provide them with a stable home, however, but instead caused yet another emotional setback. Shortly after the children moved to his home, the grandfather discovered that he was not prepared to address their emotional problems and need for intensive and ongoing counseling. After having custody of the children for only a short period, the grandfather notified CSB that he was no longer willing and able to provide a permanent home for J.H. and S.H. According to their caseworker, the children returned from Texas with "a lot of emotional baggage." In addition to being let down by yet

another family member, the children would later reveal that the grandfather had verbally abused them.

{¶12} J.H. and S.H. returned from Texas and were again placed in CSB temporary custody. Because CSB did not believe that it had another viable option for providing the children with a permanent home, it again moved for permanent custody. The matter did not proceed to a hearing for approximately six months. During that six-month period, Mother made progress on some of the goals of the case plan. Two weeks before the hearing began, Mother filed a motion for legal custody of the children or alternatively for a six-month extension of temporary custody. At the hearing, S.H. and Father supported Mother's request for an extension of temporary custody because they agreed that she had made significant progress on the case plan.

{¶13} Following the hearing, the trial court found that the children could not be placed with either parent within a reasonable time or should not be placed with them and that permanent custody was in the best interest of J.H. and S.H. *See* R.C. 2151.414(B)(1). Father and S.H. appeal, raising a total of seven assignments of error, which will be consolidated and rearranged for ease of review.

II

Father's Assignment of Error Number One

THE TRIAL COURT'S DECISION TO GRANT THE STATE'S MOTION FOR PERMANENT CUSTODY IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

S.H's Assignment of Error Number One

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN FINDING THAT PERMANENT CUSTODY WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

S.H.'s Assignment of Error Number Two

THE GRANT OF PERMANENT CUSTODY WAS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE.

{¶14} Because S.H. jointly argues her first and second assignments of error, which are essentially the same as Father's first assignment of error, this Court has consolidated the three assignments of error. S.H. and Father argue that the trial court's permanent custody decision was not supported by the evidence presented at the hearing. We disagree.

{¶15} R.C. 2151.414(B)(1) establishes a two-part test for courts to apply when determining whether to grant a motion for permanent custody to a public children services agency. The statute requires the court to find, by clear and convincing evidence, that: (1) one of the enumerated factors in R.C. 2151.414(B)(1)(a)-(e) apply, and (2) permanent custody is in the best interest of the children. R.C. 2151.414(B)(1). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶16} CSB alleged the following grounds under the first prong of the permanent custody test: that the children had been in its temporary custody for at least 12 of the prior 22 months; and that they could not or should not be returned to either parent's custody based on the grounds set forth in R.C. 2151.414(E)(1), (E)(4) and (E)(10), and/or (E)(16). It also alleged that permanent custody was in the best interest of both children.

{¶17} Following an evidentiary hearing, the trial court found that CSB had failed to establish the "12 of 22" ground because the children had not been in its temporary custody for the requisite period of time when CSB filed the permanent custody motion. *See In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, syllabus. Instead, the trial court found that CSB established

the first prong of the permanent custody test because the children could not be returned to the custody of Father or Mother within a reasonable time or should not be returned to them based on several alternate grounds under R.C. 2151.414(E). It also found that permanent custody was in the best interest of S.H. and J.H. Father and S.H. challenge the trial court's findings on both prongs of the test.

{¶18} The trial court's conclusion that the children could not or should not be returned to the custody of either parent was based on several alternate findings under R.C. 2151.414(E): that Father had failed to substantially remedy the conditions that caused the children to be placed outside his home; that both parents demonstrated a lack of commitment toward the children; and that both parents had abandoned the children. *See* R.C. 2151.414(E)(1); R.C. 2151.414(E)(4); and R.C. 2151.414(E)(10).

{¶19} To demonstrate reversible error, Father and S.H. must demonstrate not only that the trial court committed error but also that the error negatively affected the outcome of the case. *Lowry v. Lowry*, 48 Ohio App.3d 184, 190 (4th Dist.1988), citing *Gries Sports Ents., Inc. v. Cleveland Browns Football Co., Inc.*, 26 Ohio St.3d 15, 28 (1986). Because the trial court was required to find only one statutory ground to support the first prong of the permanent custody test, this Court has repeatedly emphasized that any error in its alternate findings is not prejudicial as long as one of the trial court's stated grounds is proper. *See, e.g., In re R.H.*, 9th Dist. Lorain Nos. 11CA010002 and 11CA010003, 2011-Ohio-6749, ¶ 13-14.

{¶20} Father and S.H. challenge the trial court's findings under R.C. 2151.44(E)(1) and (E)(10) that Father failed to remedy the conditions that caused the removal and that both parents abandoned the children, but they do not dispute its finding that both parents demonstrated a lack of commitment to the children. *See* R.C. 2151.414(E)(4). As we have reviewed the record and

determined that the evidence fully supported the trial court's finding of lack of commitment under R.C. 2151.414(E)(4), we will limit our written review to that factor. Because any error pertaining to the trial court's alternate findings under R.C. 2151.414(E)(1) and (10) would be harmless, this Court need not reach those issues.

{¶21} To demonstrate a lack of commitment under R.C. 2151.414(E)(4), CSB was required to present clear and convincing evidence that Mother and Father “demonstrated a lack of commitment toward the child[ren] by failing to regularly support, visit, or communicate with [them] when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[ren.]”

{¶22} The trial court heard considerable evidence about each parent's lack of commitment toward their children. Although Mother made sporadic attempts to work on some of the reunification goals of the case plan, Father made no effort to be reunified with the children. He did not regularly visit the children, nor did he engage in drug and alcohol treatment. He continued to abuse drugs throughout the case and was convicted of another drug offense shortly before the permanent custody hearing. In fact, neither appellant suggests otherwise. They instead focus their arguments on Mother and her reunification efforts in this case.

{¶23} Although Mother made intermittent efforts to work to reunify with her children, her conduct throughout this case and over the past several years had demonstrated her “unwillingness to provide an adequate permanent home for the child[ren.]” *Id.* Although Mother claimed to love her children and know how to provide for them, she had continually popped in and out of their lives rather than trying to provide them with a stable permanent home.

{¶24} Mother had been diagnosed with antisocial personality disorder. A psychological expert testified that one of the hallmarks of that diagnosis is Mother's inability to understand or accept responsibility for how her behavior affects others. It was apparent from the evidence and Mother's own testimony that her level of involvement in her children's lives had always been on her own terms, based on her own wants and needs, not those of her children.

{¶25} After the children were removed from her custody in 2010, Mother did not work toward reunification but she allowed Father to assume that role, with very little involvement from her. In fact, because she had no contact with them for an extended period during that case, the trial court relieved CSB from its obligation to include her in its reunification efforts. After the children were placed with Father, Mother admitted that "it wasn't very often" that she would visit them.

{¶26} During this case, after Mother was released from incarceration on her forgery conviction, she visited the children and worked on the case plan goals on a sporadic basis. When the children went to live with her father in Texas, she stopped going to counseling or working on other goals of the case plan. Mother explained that she assumed that the children were safe with her father and she needed a break. Although she talked about moving to Texas to be near them, she did not.

{¶27} After the children returned from Texas and CSB moved for permanent custody, Mother reengaged in counseling but she stopped visiting the children. She explained at the hearing that it was difficult to visit because she was not allowed to answer the children's questions about the status of the case. Essentially, because their interaction during visits had become uncomfortable for her, she stopped visiting her children. She never gave any explanation to the children for why she stopped visiting.

{¶28} At the time of the permanent custody hearing, the children had been living outside of Mother's custody for more than four years. Her only involvement with them had been her sporadic attendance at weekly, supervised visits. She liked to visit them and have fun but demonstrated no desire to address their emotional problems or any of the more difficult aspects of day-to-day parenting.

{¶29} Several witnesses testified that both children had a lot of sadness, anger, and anxiety toward both of their parents for continually coming in and out of their lives. Their most recent counselor testified that both children lack self-esteem and have difficulty trusting adults because they have never had the opportunity to develop a long-term relationship with an adult caregiver. S.H. did not really remember living with Mother, as she had been out of her custody for more than four years. J.H. had unpleasant memories, as he recalled witnessing domestic violence, being inappropriately disciplined, and sometimes left to fend for himself at a very young age. J.H. informed his counselor that he did not think Mother had changed.

{¶30} Mother's own testimony demonstrated that she accepted no responsibility for her children living out of her care for several years, nor did she show any understanding of her need to provide them with consistent emotional support and to try to understand how the instability and traumas in their lives had affected them emotionally. Mother's only testimony when asked about the sexual abuse of the children was that it made her angry, focusing on how the abuse affected her, not her children. She almost immediately changed the subject to her own problems.

{¶31} The children's counselor expressed concern about Mother's tendency to downplay the children's emotional problems and their need for ongoing counseling, support, and stability in their lives. Despite the efforts of the counselor to get Mother involved in the children's counseling, Mother never followed up with the counselor nor did she ask the

caseworker about the children's progress in counseling. Mother testified that she knew that the children were in "a good place for counseling," so she decided to stay away and let them focus on their counseling.

{¶32} Mother's behavior throughout this case and the prior case demonstrated her unwillingness to do what is necessary to provide her children with a safe and stable home. Consequently, the trial court had clear and convincing evidence to support its finding under R.C. 2151.414(E)(4) that she demonstrated a lack of commitment to her children.

{¶33} CSB also presented clear and convincing evidence that permanent custody was in the best interest of the children. Although Father argues that a six-month extension of temporary custody was in the best interest of the children, he has not assigned error to the trial court's failure to grant Mother's motion for a six-month extension.

{¶34} When determining whether a grant of permanent custody is in the children's best interest, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, their wishes, the custodial history of the children, and their need for permanence in their lives. *See In re R.G.*, 9th Dist. Summit Nos. 24834 and 24850, 2009-Ohio-6284, ¶ 11. "Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors." *In re Smith*, 9th Dist. Summit No. 20711, 2002 WL 5178, *3 (Jan. 2, 2002); *see also In re Palladino*, 11th Dist. Geauga No. 2002-G-2445, 2002-Ohio-5606, ¶ 24.

{¶35} The interaction between the children and the parents had been sporadic and never progressed beyond supervised visits because the parents did not comply with the reunification goals of the case plan.

{¶36} S.H. had expressed a desire to live with Mother. Her counselor testified, however, that S.H. did not understand what day-to-day life would be like in Mother's home because she had been out of her custody for so long. S.H. thought Mother was nice and enjoyed having her nails painted and doing "girl things" with her but she did not remember her as a parent figure. The counselor further testified that J.H. still did not trust Mother and did not believe that she had changed. His memories of living with her were not positive.

{¶37} The guardian ad litem opined that permanent custody was in the best interest of both children. He expressed concern that Mother made choices based on her own needs and not those of her children and that, despite being involved with CSB for four years, none of that had changed. In particular, he expressed concern that Mother had done nothing to address the special emotional needs of her children that had resulted from the many traumas that they have experienced. Mother admitted to him that the children's counselor had encouraged her to become involved in their counseling but that she did not see any need to be involved.

{¶38} As explained already, the custodial history of these children has included more than four years of moving from place to place and continually being let down by their adult caregivers. They were in need of a legally secure permanent placement and neither parent had demonstrated the ability to provide them with that stability. Because CSB had been unable to find a suitable relative who was willing to do so, the trial court reasonably concluded that a legally secure permanent placement would only be achieved by granting CSB permanent custody. Father's first and S.H.'s first and second assignments of error are overruled.

Father's Assignment of Error Number Two

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT GRANTED THE STATE'S MOTION FOR PERMANENT CUSTODY WHEN IT WAS CLEAR THAT THE STATE FAILED TO MAKE REASONABLE EFFORTS TO REUNIFY THESE CHILDREN.

S.H.'s Assignment of Error Number Three

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT TERMINATED PARENT[AL] RIGHTS EVEN THOUGH CSB DID NOT MAKE REASONABLE REUNIFICATION EFFORTS BEFORE MOVING TO TERMINATE PARENTAL RIGHTS.

{¶39} Father and S.H. argue that the trial court erred in terminating parental rights because CSB failed to make reasonable reunification efforts. They base their arguments on CSB's failure to involve the parents in the development of the first case plan and that it continually amended the case plan after it moved for permanent custody.

{¶40} As explained already, the trial court's permanent custody decision was premised on numerous alternate grounds, including the parents' demonstrated lack of commitment to their children under R.C. 2151.414(E)(4), a ground that this Court has determined was fully supported by the evidence. Because Father and S.H. premise their arguments under these assigned errors on different grounds that CSB alleged for permanent custody, they have failed to demonstrate that they suffered prejudice by these alleged errors.

{¶41} Specifically, Father's argument is that prejudice resulted from the alleged errors in the case plan because the trial court "relied solely upon R.C. 2151.414(E)(1) in satisfaction of the first prong of the permanent custody test[.]" R.C. 2151.414(E)(1) requires the agency to prove that, notwithstanding reasonable case planning efforts, the parent failed to substantially remedy the conditions that caused the children to be placed outside the home. As explained already, although the trial court found that Father had failed to remedy the conditions that caused the children to be placed outside the home, that finding was one of three alternate factors pertaining to Father. The trial court made no finding under (E)(1) as to Mother.

{¶42} S.H. points to amendments that were made to the case plan after CSB moved for permanent custody. She argues that, because "Mother did not receive a full 12 months of

reasonable reunification efforts to address the mental health concerns of the children[.]” CSB had no basis to move for permanent custody based on the “12 of 22” ground. The trial court agreed that CSB could not move for permanent custody based on the “12 of 22” ground because the children had not been in the agency’s custody for the requisite period when it filed the motion. *See In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, syllabus.

{¶43} Because Father and S.H. have failed to connect their arguments to the trial court’s finding of lack of commitment under R.C. 2151.414(E)(4), they cannot demonstrate reversible error. Father’s second assignment of error and S.H.’s third assignment of error are overruled.

Father’s Assignment of Error Number Three

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT APPOINTED
A NEW GUARDIAN AD LITEM AND ATTORNEYS FOR EACH CHILD IN
THE MIDDLE OF THE PERMANENT CUSTODY HEARING.

Father’s Assignment of Error Number Four

R.C. 2151.011(C), WHICH SAYS THAT ALL PARENTS THAT HAVE NOT
HAD CONTACT WITH THEIR CHILDREN FOR 90 DAYS HAVE
ABANDONED THEIR CHILDREN, IS UNCONSTITUTIONALLY
OVERBROAD AS IT PUNISHES ALL PARENTS THAT HAVE NOT HAD
CONTACT WITH THEIR CHILDREN REGARDLESS OF THE REASONS OR
CIRCUMSTANCES.

{¶44} This Court consolidates Father’s final two assignments of error because he forfeited all but plain error by failing to raise these issues in the trial court. *See In re D.T.*, 9th Dist. Summit No. 26344, 2012-Ohio-3552, ¶ 15. Father has failed to argue and/or demonstrate that either of these alleged errors rose to the level of plain error, however.

{¶45} Father’s third assignment of error is that the trial court committed plain error by appointing a new guardian ad litem and counsel for the children during the permanent custody hearing. To begin with, the record reflects that S.H. was represented by separate counsel throughout the permanent custody hearing. Moreover, Father mistakenly argues that the trial

court failed to explain the change in guardian ad litem and that it made the change “just prior to [the] final full-day of the hearing.”

{¶46} After the first day of the hearing, upon request of the attorney who was then serving as the children’s guardian ad litem, the trial court appointed a new, non-attorney guardian ad litem to represent both children and allowed the former guardian ad litem to serve as counsel for J.H. The trial court fully explained its reasons for making the change through an order that was journalized more than two months before the last two days of the hearing. The new guardian ad litem submitted a full report, attended the last two days of the hearing, testified, and was subject to cross-examination by all parties. None of the parties raised an objection to the change in guardian ad litem during the hearing and Father has failed to argue or demonstrate how the change prejudiced any of the parties.

{¶47} Father’s fourth assignment of error challenges the constitutionality of the statutory presumption of abandonment based on a parent’s lack of contact with the child for a period of 90 days. *See* R.C. 2151.011(C). As explained already, any error in the trial court’s finding of abandonment under R.C. 2151.414(E)(10) was harmless, because the first prong of the permanent custody test was fully supported by the trial court’s alternate finding under R.C. 2151.414(E)(4) that the parents had demonstrated a lack of commitment to the children. Father’s third and fourth assignments of error are overruled.

III

{¶48} The assignments of error of Father and S.H. are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

SHUBRA AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

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