

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: A.O.-R.

C.A. No. 27261

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 12-04-0242

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

MOORE, Judge.

{¶1} Appellant, Lady Bernadette R. (“Mother”), appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that overruled her objections to a magistrate’s decision and placed her minor child in the legal custody of her paternal grandmother (“Grandmother”). This Court affirms.

I.

{¶2} Mother is the natural mother of A.O.-R., born June 12, 2009, as well as another child who is not a party to this appeal. On April 20, 2012, Summit County Children Services Board (“CSB”) filed a complaint pertaining to then two-year-old A.O.-R., alleging that Mother abused alcohol, lacked stable housing, and failed to adequately supervise the child. Upon agreement of the parties, A.O.-R. was adjudicated a neglected and dependent child. The trial court’s initial dispositional order allowed A.O.-R. to remain in Mother’s home under an order of protective supervision. A.O.-R. was later removed from Mother’s custody, however, because

Mother had lost her housing and was threatening to leave the state with the child. A.O.-R. was placed in the temporary custody of Grandmother under an order of protective supervision.

{¶3} The matter eventually proceeded to a hearing before a magistrate on competing motions for legal custody filed by Grandmother and Mother. The magistrate found that granting legal custody to Grandmother was in the best interest of A.O.-R. After the trial court adopted the magistrate's decision and entered judgment, it allowed Mother's counsel to withdraw and appointed new counsel to represent Mother.

{¶4} Through her new counsel, Mother filed objections to the magistrate's decision, which were overruled by the trial court. The trial court ordered that A.O.-R. be placed in the legal custody of Grandmother. Mother appeals and raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRULING MOTHER'S OBJECTION AND NOT REQUIRING THAT THE TESTIMONY OF THE GUARDIAN AD LITEM BE SWORN.

{¶5} Mother's first assignment of error is that the trial court erred by allowing the guardian ad litem to testify at the hearing without requiring that her testimony be sworn. Although Mother raised this issue through her objections to the magistrate's decision, she raised no timely objection when the guardian ad litem testified at the hearing. Had the issue been raised at that time, the alleged error could have been avoided or corrected by having the guardian ad litem take an oath prior to testifying. By waiting to raise the issue through her objections to the magistrate's decision, after the hearing had concluded and it was too late to correct the alleged error without holding another hearing, Mother forfeited all by plain error. *In re E.A.*, 9th Dist. Wayne No. 14AP0044, 2015-Ohio-806, ¶ 40.

{¶6} Because Mother failed to timely raise this issue during the hearing and has not developed a plain error argument, she cannot now fault the trial court for considering the unsworn testimony of the guardian ad litem. *See In re J.G.*, 9th Dist. Wayne No. 12CA0037, 2013-Ohio-417, ¶ 20. The guardian ad litem was subject to cross-examination by all parties, none of whom suggested that her testimony to the court was not truthful. Moreover, the testimony of the guardian ad litem did not include any evidence that was not already before the court through the testimony of several other witnesses, each of whom had been properly sworn before testifying. Mother's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN
GRANTING PATERNAL GRANDMOTHER'S MOTION FOR LEGAL
CUSTODY AND DENYING MOTHER'S MOTION FOR LEGAL CUSTODY.

{¶7} Mother's second assignment of error is that the trial court erred in placing A.O.-R. in the legal custody of Grandmother rather than in Mother's legal custody. Following an adjudication of neglect, dependency, or abuse, the juvenile court's determination of whether to place a child in the legal custody of a parent or a relative is based solely on the best interest of the child. *See In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852, ¶ 17 (9th Dist.). "Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child." *In re N.P.*, 9th Dist. Summit No. 21707, 2004-Ohio-110, at ¶ 23, citing *In re Fulton*, 12th Dist. Butler No. CA2002-09-236, 2003-Ohio-5984, ¶ 11. The trial court's decision to grant or deny a motion for legal custody is within its sound discretion and will not be reversed absent an abuse of discretion. *In re M.S.*, 9th Dist. Summit No. 22158, 2005-Ohio-10, ¶ 11. An abuse of discretion implies that the court's

decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶8} Mother asserts that Grandmother’s evidence at the hearing unnecessarily emphasized her behavior that predated the adjudication in this case. *See In re K.C.*, 9th Dist. Summit Nos. 26992, 26993, 2014-Ohio-372, ¶ 20. The purpose of the legal custody hearing was not to rehash the facts that brought A.O.-R. into the custody of CSB. Instead, the primary focus at the legal custody hearing should have been on the current parenting ability of each potential custodian and whether it was in the best interest A.O.-R. to be permanently placed in the legal custody of either of them. *Id.*

{¶9} Nevertheless, in addition to evidence about pre-adjudication facts, there was substantial evidence before the trial court about the current parenting ability of Grandmother and Mother, which supported its decision that legal custody to Grandmother was in the best interest of A.O.-R. “[T]his Court has held that the best interest test set forth in R.C. 2151.414(D), although it relates to permanent custody, ‘provide[s] guidance’ in legal custody determinations.” *In re B.G.*, 9th Dist. Summit No. 24187, 2008-Ohio-5003, ¶ 9, quoting *In re T.A.*, 9th Dist. Summit No. 22954, 2006-Ohio-4468, ¶ 17. When determining a child’s best interest under R.C. 2151.414(D), the juvenile court must consider all the relevant enumerated factors: 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, 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.

{¶10} There was undisputed testimony before the court that Grandmother's interaction with A.O.-R. during this case was positive and that she had consistently provided the child with a loving, stable, and structured home environment. Even before A.O.-R. was placed with Grandmother after this case began, she was spending more time with Grandmother than with Mother. Mother lived with Grandmother throughout her pregnancy and for a short period after the child's birth. After Mother moved out of Grandmother's home, Grandmother cared for A.O.-R. during the week while Mother worked and during the weekends when Mother was not working. By April 2011, after Mother had quit her job, Grandmother continued to care for A.O.-R. almost every day. Mother admitted that, during that period, she was a "functioning alcoholic" who spent every weekend partying while A.O.-R. was with Grandmother.

{¶11} Other family members, the CSB caseworker, and three witnesses from A.O.-R.'s preschool testified that A.O.-R. has a loving and positive relationship with Grandmother, whom she calls "MiMi." A.O.-R. talked about MiMi all the time and looked to her for emotional support. Her preschool teacher testified that A.O.-R. was always happy to see MiMi and was "in a good place" in her home. Even Mother admitted that Grandmother was a "really good grandmother" and that she had a close bond with A.O.-R.

{¶12} Grandmother is divorced from A.O.-R.'s paternal grandfather ("Grandfather"), but Grandfather and his current wife have a supportive relationship with Grandmother as grandparents. A.O.-R. would stay with Grandfather and his wife when Grandmother worked at night. Both Grandfather and Grandmother had been involved with A.O.-R. since shortly after she was born and both had a loving and positive relationship with her. Several witnesses opined that Grandmother had a positive and reliable support system with Grandfather and his wife.

{¶13} Moreover, Grandmother and Grandfather testified that they understood their roles as grandparents and were not attempting to replace Mother as A.O.-R.'s parents. Grandmother had been trying to facilitate an ongoing relationship between Mother and A.O.-R. through visits and telephone calls. Even Mother admitted that Grandmother had been lenient in allowing her to call A.O.-R. outside of the times that were designated for her twice-weekly phone calls.

{¶14} On the other hand, Mother's interaction with A.O.-R. during this case had been limited to visits every two weeks that were supervised by Grandmother. Although Mother was also permitted to call A.O.-R. at designated times twice a week, she often failed to make those calls. Mother had been making progress in alcohol treatment, had recently acquired suitable housing, but still had not demonstrated to CSB that she could maintain long-term sobriety or that she had a stable source of income.

{¶15} Because A.O.-R. was only three years old at the time of the hearing, the guardian ad litem spoke on her behalf and gave her opinion that legal custody to Grandmother was in the child's best interest. For the most part, she simply corroborated what several other witnesses had said about being closely bonded to Grandmother, who had been providing for the child's needs on a daily basis.

{¶16} Given the overwhelming evidence before the trial court about who could provide A.O.-R. with a more suitable and stable home at that time, it reasonably concluded that placing the child in the legal custody of Grandmother was in her best interest. Mother's second assignment of error is overruled.

III.

{¶17} Mother's assignments of error 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 Appellant.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

DEREK CEK, Attorney at Law, for Appellant.

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

JAMES M. CAMPBELL and JULIET K. FALCONE, Attorneys at Law, for Appellee.

JOSEPH KERNAN, Guardian ad Litem.