[Cite as *In re S.G.*, 2015-Ohio-2503.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: S.G.	C.A. No. 27428
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DN 13-01-0067

DECISION AND JOURNAL ENTRY

Dated: June 24, 2015

HENSAL, Presiding Judge.

{¶1} Appellant, Kayla W. ("Mother"), appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that placed her minor child in the legal custody of his paternal grandmother ("Grandmother"). This Court affirms.

I.

{¶2} Mother is the natural mother of seven minor children, but only S.G., born January 18, 2009, is a party to this appeal. S.G. became involved with mental health professionals when he was approximately three years old because he had serious behavioral problems. Eventually, he was diagnosed with five specific mental health disorders: bipolar disorder II, conduct disorder, intermittent explosive disorder, anxiety disorder, and attention deficit hyperactivity disorder. At the age of six, he began taking medication to help stabilize his moods and decrease his distractibility and inattentiveness. Doctors have been continually adjusting the specific medications and dosages to optimize their effectiveness and minimize side effects.

{¶3} On January 22, 2013, Summit County Children Services Board ("CSB") filed a complaint, alleging that S.G. and his siblings were abused, neglected, and dependent children. S.G.'s six siblings had been removed from the home by the police when Mother and the father of some of the siblings were arrested and charged with drug trafficking, drug abuse, and child endangering.

{¶4} At that time the other children were removed from the home, S.G. was with Grandmother, where he had been residing for approximately eight months. Prior to moving in with Grandmother, S.G. had been spending more and more time with her because she had no other children in the home and was able to devote more one-on-one attention to him than Mother. By the time S.G. was residing with Grandmother full-time, Mother had six other children under the age of 10, two of whom were infant twins.

{¶5} At the beginning of this case, the trial court appointed an attorney to represent S.G. and his six siblings in the dual role of attorney and guardian ad litem. When S.G. and the other children were adjudicated abused, neglected, and dependent, because a conflict had developed between the guardian ad litem and the wishes of some of the other children, the trial court appointed a new guardian ad litem for all seven children and the same attorney continued to represent them as counsel.

{¶6} S.G. was placed in the temporary custody of CSB and continued to reside with Grandmother throughout these proceedings. Mother's other six children, who apparently did not have special needs, were initially removed from her custody. During the course of the case, however, they were returned to Mother's custody, under an order of protective supervision.

{¶7} Eventually, Mother moved for legal custody of S.G., and S.G.'s counsel moved for an alternate disposition of legal custody to Grandmother. Following a hearing before a

magistrate on the competing dispositional motions, the magistrate found that it was in the best interest of S.G. to remain with Grandmother and be placed in her legal custody. The magistrate recognized that Mother had been complying with the goals of the case plan and that her other six children had been returned to her custody. The best interest decision focused on the unique needs of S.G. and his critical need for structure and stability in his life. S.G. had been receiving mental health treatment through the same facility for six years and had been with the same counselor for more than two years. He had been enrolled in the same school system since he started school and had developed a stable routine in Grandmother's home. Grandmother had always worked with S.G.'s school and mental health providers to address his special needs at school and at home and S.G. had consistently expressed a desire to remain with Grandmother. Through this structure and stability, S.G. had been making progress in controlling his moods, focus, and behavior.

{¶8} Mother, who formerly resided in Youngstown near Grandmother, had since relocated to Akron. Consequently, relocating S.G. from Grandmother's home to Mother's home would require that S.G. change not only his home but also his school and counselor. His counselors testified that S.G. was very resistant to change and that a change in his home, school, and counselor at this point in his life would not be in his best interest. Moreover, numerous witnesses opined that Mother had her hands full with her other six children, who did not interact well with S.G., and that returning S.G. to that "chaotic" environment would not be in the best interest of S.G. or the other children.

{¶9} Mother filed an objection to the magistrate's decision, which challenged only the weight of the evidence supporting the conclusion that legal custody to Grandmother was in the

best interest of S.G. The trial court overruled the objection and placed S.G. in the legal custody of Grandmother. Mother appeals and raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED PLAIN, REVERSIBLE, AND STRUCTURAL ERROR WHEN IT ALLOWED TESTIMONY FROM AN UNSWORN WITNESS AND THEN BASED [ITS] DECISION UPON THE TESTIMONY OF SAID UNSWORN WITNESS IN VIOLATION OF MOTHER'S STATE CONSTITUTIONAL RIGHTS AS GUARANTEED BY ARTICLE I, §7 OF THE OHIO CONSTITUTION.

{¶10} Mother's first assignment of error is that the trial court committed reversible error by allowing the guardian ad litem to testify without requiring that she take an oath to tell the truth. Mother did not raise an objection during the hearing at a time when the alleged error could have been avoided, nor did she raise this issue through her objections to the magistrate's decision. Consequently, she has forfeited all but plain error. *See* Juv.R. 40(D)(3)(b)(iv).

{¶11} This Court has not determined whether the civil or criminal plain error standard applies in abuse, dependency and neglect cases. *See In re D.S.*, 9th Dist. Summit No. 24619, 2009-Ohio-3167, ¶ 10. In the criminal context, "[p]lain error does not exist unless it can be said that but for the error, the outcome of the trial would have been different and that reversal is necessary to prevent a manifest miscarriage of justice." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 57. The civil plain error standard may be applied only in "the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶12} Under either standard, Mother has failed to demonstrate that the trial court committed plain error by failing to require the guardian ad litem to take an oath to tell the truth. The guardian ad litem did not say anything on the record that was not already before the court through the sworn testimony of other witnesses. Consequently, Mother cannot demonstrate that her unsworn statements on the record created a manifest miscarriage of justice or affected the fundamental fairness of the proceeding. Because Mother has failed to demonstrate plain error when the trial court failed to swear in the guardian ad litem, her first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> MOTHER WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HER TRIAL COUNSEL FAILED TO OBJECT TO THE INCLUSION OF TESTIMONY THAT OTHERWISE WOULD HAVE BEEN EXCLUDED IF PROPER OBJECTIONS WERE MADE.

{¶13} Mother's second assignment of error is that she was denied the effective assistance of counsel during the legal custody proceedings. The test for ineffective assistance of counsel used in criminal cases is also applicable to juvenile cases alleging abuse, dependency, or neglect. *See, e.g.*, *In re P.T.*, 9th District Summit No. 23618, 2007-Ohio-6293; *In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, & 23629, 2007-Ohio-3999, ¶ 27. This two-part test requires a demonstration that counsel's performance fell below an objective standard of reasonable representation and that the client has suffered prejudice. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Proof of both parts of the test is necessary to establish the claim. *Bradley*, 42 Ohio St.3d at 142. In applying the test, the reviewing court should recognize that counsel is strongly presumed to have rendered adequate assistance. *Id.*

{¶14} Mother argues that her trial counsel's performance was deficient because he failed to raise a timely objection to the trial court considering 1) the unsworn statements of the guardian ad litem, 2) the statement of understanding completed by Grandmother, and 3) certain testimony of S.G.'s counselors. This Court will address each potential objection in turn.

{¶15} As this Court has already explained in its review of Mother's first assignment of error, she has failed to demonstrate any prejudicial error in the trial court considering the unsworn oral report of the guardian ad litem under the circumstances of this case. Because there was no prejudicial error, trial counsel's failure to raise a timely objection did not constitute deficient performance.

{¶16} Next, Mother faults trial counsel for failing to object to the trial court considering the "Statement of Understanding for Legal Custody" executed by Grandmother on January 16, 2014, (the date of the hearing) because it was not filed with the trial court prior to the dispositional hearing, nor was it admitted as an exhibit at the hearing. Mother relies on Revised Code Section 2151.353(C)(3), which authorizes the trial court to award legal custody to a nonparent upon motion filed "prior to the dispositional hearing" and further requires that "[a] person identified in a * * * motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person identified signs a statement of understanding[,]" including that: the person is willing and able to assume legal custody of the child; the custodian's legal responsibility continues until the child reaches the age of majority; the parents maintain residual rights; and the person must appear at the hearing and be prepared to be subject to examination. R.C. 2151.353(A)(3)(a) through (d).

{¶17} Mother does not dispute that, on the day of the dispositional hearing, Grandmother signed a statement that complied with the specific requirements of Section

2151.353(A)(3). Instead, she asserts that trial counsel should have objected to the fact that the statement had not yet been filed, nor was it admitted as an exhibit at the hearing. To begin with, had counsel raised an objection at the hearing, the statement likely would have been admitted as an exhibit and/or filed with the court at that time. Moreover, Grandmother did appear at the hearing, testified under oath, and was subject to cross-examination about her understanding of her potential role as S.G.'s legal custodian. Through the questions asked by S.G.'s counsel as well as follow-up questions by the magistrate, Grandmother's testimony covered the substance of the written statement and demonstrated that she fully understood the commitment that she would be making if the trial court were to award her legal custody of S.G. *See In re A.V.O.*, 9th Dist. Lorain Nos. 11CA010115, 11CA010116, 11CA010117, 11CA010118, 2012-Ohio-4092, ¶ 10. Consequently, Mother suffered no prejudice from the trial court's failure to raise an objection on this basis at the hearing.

{¶18} Finally, Mother argues that her trial counsel did not effectively represent her because he failed to object to certain testimony given by S.G.'s counselors because it was protected as privileged communications between counselor and client and was not subject to any exceptions under Revised Code Section 2317.02(G). Again, Mother has failed to demonstrate that her trial counsel erred by failing to object to the testimony. To the extent that any of the counselors' testimony included privileged communications between S.G. and his counselors, the privilege belonged to S.G., not Mother. *See State v. McGriff*, 109 Ohio App.3d 668, 670 (3d Dist.1996).

{¶19} Although a mother may sometimes have standing to assert the rights of her child, that was not the case here. Mother had an interest in the outcome of this case and a close relationship to S.G., but there was no reason that S.G. could not have asserted the privilege for

himself because he was represented by a guardian ad litem and trial counsel throughout these proceedings. *See State v. Orwick*, 153 Ohio App.3d 88, 2003-Ohio-2681, ¶ 10 (3d Dist.). In fact, it was S.G., through counsel, who filed the motion for legal custody to Grandmother, called the counselors as witnesses, and elicited the testimony at issue. Consequently, Mother's trial counsel had no reason to raise an objection to the testimony on behalf of S.G. As Mother has failed to demonstrate that she was prejudiced by any deficient performance by her trial counsel, her second assignment of error is overruled.

III.

{¶20} 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.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR.

APPEARANCES:

DENISE E. FERGUSON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

SALLY PRENTICE, Attorney at Law, for Appellee.

PHIL HERBAUGH, Attorney at Law, for Appellee.

JOSEPH KERNAN, Attorney at Law, for Guardian ad Litem.