[Cite as *In re D.S.*, 2011-Ohio-1279.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN THE MATTER OF:	:	
		CASE NOS. CA2010-08-058
D.S., et al.	:	CA2010-08-064
		CA2010-08-065
	:	
		O P I N I O N
	:	3/18/2011
	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2007JC3839

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PIPER, J.

{¶1} Appellants, the biological parents of D.S., G.H. and J.H., appeal a decision of the Clermont County Juvenile Court granting permanent custody of the children to a children services agency.

{¶2} The Clermont County Department of Job and Family Services removed D.S. and G.H. from their home on May 24, 2007. The agency also filed a complaint asking the juvenile court to determine that the children, who were three and nine months old at the time, were dependent. The complaint alleged that the agency received a referral after police were called to the home on a domestic violence complaint. According to the complaint, the mother told police she was involved in an altercation with the father who left the home, then returned, punching her in the eye and barricading himself and the youngest child in the apartment. The complaint stated that according to the mother, the father was extremely intoxicated and under the influence of cocaine at the time and that he threatened to kill her. The complaint further alleged that the father refused to cooperate and police officers had to kick in the door and use a taser on the father in order to arrest him. The father was charged with felony domestic violence with priors and two counts of resisting arrest. According to the complaint, the mother indicated to agency workers that this was not the first incident of domestic violence.

{¶3} The dependency complaint further alleged that although the mother stated she would have no further contact with the father after this incident, the caseworker received information that the father had been staying with the family after his release from jail. The complaint stated that police went to the apartment because the mother failed to show for grand jury testimony in the case and officers discovered the father hiding in a closet in the home. The agency stated that since neither parent was willing to protect the children under the circumstances, it was requesting temporary custody as the agency believed the children to be in grave danger if they remained in their parents' custody.

{¶4} The juvenile court found the children dependent and granted temporary custody to the agency. A case plan was prepared requiring the father to cooperate with domestic violence, substance abuse and mental health programs, and to establish financial security and housing. The mother was required to complete the Women of Worth program to address the domestic violence issues, and to attend substance abuse and parenting programs.

{¶5} J.H. was born to the parents on August 20, 2008. The parents were making progress on the case plan, and at a semi-annual review of the case on September 25, 2008, the two older children were returned to the home with protective supervision by the agency.

{¶6} On December 30, 2008, the father was again charged with domestic violence against the mother. The agency filed a motion to modify the protective supervision with the children in the custody of the mother only, on the basis that the father was an increased risk to the children and the mother had obtained a protective order which prohibited the father from being with the mother or children.

{¶7} On May 7, 2009, the agency requested emergency custody of the children because a well-check on the family revealed that despite the protection order, the father was again living with the mother and children. In addition, the mother had an invalid urine test and the father refused to be tested. The agency also filed a complaint alleging J.H., the youngest child, was dependent. The court found J.H. was a dependent child on September 10, 2009 and the agency was granted temporary custody of all three children. A case plan was again filed with similar goals as the previous plans.

{¶8} On January 25, 2010, the agency moved for permanent custody of the children. At a hearing on the motion, an attorney from the Child Support Enforcement

Agency testified that although support orders were established, there had never been a support payment by either parent. William Moore, a clinical psychologist, testified regarding an examination he performed of the father and his diagnosis of antisocial personality disorder, which he found would grossly interfere with the father's ability to effectively parent the children. Melissa Lunken, an agency caseworker, testified regarding the history of the case, the parents' progress on the case plan, and the agency's efforts to determine if placement with a relative was possible.

{¶9} Julie Jordan, an adoption supervisor, testified that an adoption plan would be put in place if permanent custody were granted to the agency and placement with relatives would be given preferential consideration. The paternal grandfather and paternal aunt testified regarding possible placements for the children. The children's father testified and stated that he is currently serving an 18-month sentence for violation of a domestic violence protection order and that he has had problems with cocaine and heroin abuse.

{¶10} A magistrate granted the motion for permanent custody. The trial court overruled objections to the magistrate's decision on July 21, 2010. The parents now separately appeal the trial court's decision to grant permanent custody of the children to the agency.

{¶11} The father raises three assignments of error for our review, arguing that the trial court's decision is contrary to law and against the manifest weight of the evidence and that the court failed to consider all relative placements for the children. The mother raises two assignments of error, arguing that the trial court's decision is contrary to law and against the manifest weight of the evidence.

{¶12} Both parents argue the juvenile court's decision is contrary to law and is against the manifest weight of the evidence. Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶ 16. As an appellate court reviewing a decision granting permanent custody, we neither weigh the evidence nor assess the credibility of the witnesses, but instead determine whether there is sufficient clear and convincing evidence to support the juvenile court's decision. *In re S.F.T.*, Butler App. Nos. CA2010-02-043, CA2010-02-044, CA2010-02-045, CA2010-02-046, 2010-Ohio 3706.

{¶13} Pursuant to R.C. 2151.414(B)(1), a court may terminate parental rights and award permanent custody to a children services agency if it makes findings pursuant to a two-part test. First, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D). Second, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re E.B.*, Warren App. Nos. CA2009-10-139; CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶14} The juvenile court found by clear and convincing evidence that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent, and that permanent custody is in the best interest of the children.

{¶15} When considering whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, R.C. 2151.414(E) states that "the court shall consider all relevant evidence." This section also provides that if the court determines, by clear and convincing evidence, that one or more of certain enumerated factors apply," the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent." In this case, the court found that the factor in R.C. 2151.414(E)(4) applied. This section requires a finding that "[t]he parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[.]"

{¶16} The father argues that the record does not support this determination by clear and convincing evidence since he visited when he was able, acted appropriately with the children and they are bonded to him. He further argues that although he did not pay support for the children, the court failed to make a determination as to whether his failure to pay was justified or not. The mother argues that the record does not support this determination as it relates to her because she is bonded to the children, visited for 73 percent of the available visits and she is working on her addiction issues and other case plan services and has had negative urine screens only since June 2009.

{¶17} The juvenile court found both parents failed to pay child support. While the father argues the court did not determine if that failure was justified due to his

disability, the father failed to present any evidence or argument on this issue. The court further found the father was incarcerated for violation of his probation for a domestic violence incident against the mother. The court also found Dr. Moore diagnosed father with antisocial personality disorder and indicated the father is a threat to society and his children and is untreatable. The court stated that the mother has not completed a substance abuse treatment program, has not maintained housing or employment, and did not complete individual counseling or the Women of Worth program. Although both parents cite facts in their favor, viewing the record as a whole, we find the trial court's finding that the parents failed to support the children and that they showed an unwillingness to provide an adequate permanent home for the children is supported by the evidence.

{¶18} Both parents also argue that the trial court's determination regarding the best interest of the children is contrary to law. When considering the best interest of a child in a permanent custody hearing R.C. 2151.414(D)(1) provides that, "the court shall consider all relevant factors, including, but not limited to the following:

{¶19} "(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;

{¶20} "(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;

{¶21} "(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 ending on or after March 18, 1999;

{¶22} "(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;

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

{¶24} With regard to R.C. 2151.414(D)(1)(a),[1] the trial court determined that the children are bonded to each other and are well-bonded to the foster parents. The court also found that the father was incarcerated in September/October of 2009, but that he has a good bond with the children. The mother missed some visits, including for two months before entering a detox center, but is also bonded with the children.

{¶25} With regard to section (b), the court found that the oldest child has periods of depression and sadness and attends counseling. This child has made the statement that he wants to go home to his parents, but the other two children are too young to have made such statements. The court further found that the guardian ad litem recommended permanent custody so that the children could obtain a home that is safe and secure for them.

{¶26} In considering the custodial history of the children under section (c), the court found that D.S. and G.H. were in agency custody from May 2007 to September 2008. The court stated that in addition to that 15-month period, all three children were in agency custody from May 2009 to the time of the hearing.

{¶27} The court found that under section (d), multiple relatives were considered as possible homes for the children, but for a variety of reasons none resulted in

1. The court cited "R.C. 2151.414(D)(1)-(5)" as factors; however this section was amended in 2008 and these subsections renumbered as (D)(1)(a)-(e).

placement and no relatives or other persons had filed a motion for custody of the children. The court determined that the children need a legally secure placement as the father is incarcerated. The court found the mother lives with her father and has not engaged in services to facilitate reunification from the time the children were removed in May 2009 until entering detox in December 2009, waiting shortly until before the hearings to address counseling and substance abuse issues. The court also found issues of trustworthiness exist with regard to the mother's actions in allowing the father back home, which led to the removal of the children in May 2009. The court concluded that neither parent is in a position to provide a legally secure placement for the children.

{¶28} Despite the parents' various arguments to the contrary, the record contains sufficient credible evidence to support the trial court's determination that granting permanent custody is in the best interest of the children. Domestic violence by the father has been an ongoing issue throughout this case and the mother has not demonstrated that she can protect herself or the children. In addition, the parents have a history of substance abuse and the mother has only recently begun to address her dependency issues. We find no merit to the parents' first assignments of error.

{¶29} In their second assignments of error, both parents contend that the court's decision is against the weight of the evidence. The mother simply argues this assignment of error on the same basis as the first assignment of error. For the reasons discussed above, we find no merit to this argument and overrule the mother's second assignment of error.

{¶30} The father argues that the trial court's decision is against the manifest weight of the evidence because the court erred in considering the testimony of Dr. Moore and Melissa Lunken, the agency caseworker.

{¶31} In his objections to the magistrate's decision, the father challenged the manifest weight of the evidence, but failed to specifically raise the issues he now argues in his objections. The juvenile rules require written objections to a magistrate's decision to be filed within 14 days of the decision. Juv.R. 40(D)(3)(b)(i). The rules provide that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's addition of any factual finding or legal conclusion * * * unless the party has objected to that finding as required by Juv.R. 40(D)(3)(b)." Juv.R. 40(D)(3)(b)(iv). This waiver under the rule embodies the long-recognized principle that the failure to draw the trial court's attention to possible error when the error could have been corrected results in a waiver of the issue for purposes of appeal. *In re Etter* (1998), 134 Ohio App.3d 484, 492. The objections made under this rule must be "specific" and must "state with particularity all grounds for objection." Juv.R. 40(D)(3)(b)(ii). "The failure to file specific objections is treated the same as the failure to file any objections." *In re D.R.*, Butler App. No. CA2009-01-018, 2009-Ohio-2805, ¶29. In addition, the father failed to object at trial to the issues he now raises, with the exception of the hearsay nature of Dr. Moore's report.

{¶32} Therefore, we review the father's arguments only for plain error. The doctrine of plain error 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-Ohio-401, syllabus. See, also, *In re Ebenschweiger*, Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶11.

{¶33} With regard to the testimony of Dr. Moore, the father argues that Dr. Moore relied on inadmissible hearsay in his opinion, that the evaluation was incomplete, inaccurate and should have been updated prior to the hearing, and that the testimony and report do not conform to the requirements of Evid.R. 702.

{¶34} First, the father argues that Dr. Moore's opinion was based on inadmissible hearsay as the psychologist considered the history provided to him by the agency in rendering his opinion. The rules of evidence apply to hearings on motions for permanent custody. Juv.R. 34(I). *In re Mac*k, 148 Ohio App.3d 626, 2002-Ohio-4161, ¶9. Evid.R. 703 requires that the facts or data upon which an expert bases an opinion must either be perceived by the expert or admitted into evidence at the hearing. *State v. Jones* (1984), 9 Ohio St.3d 123, 124. The Ohio Supreme Court has determined that it is sufficient if the expert relies "in major part" on facts or data perceived by him. *State v. Solomon* (1991), 59 Ohio St.3d 124.

{¶35} Dr. Moore testified that he relied on three sources in his evaluation of the father: the information he was given by the agency; his perception and interaction with the father, based on his clinical experience; and the data he obtained from testing performed on the father. He indicated that there was a congruence among the three areas, which supported his diagnosis and explained that he looked at three independent processes and saw consistency across the three modalities. The father argues that the psychologist's report was based on inadmissible history from the agency, as the agency reports were not admitted as evidence in the hearing. However, much of the information given to Dr. Moore by the agency was also reported to the psychologist by the father

during the evaluation. Dr. Moore testified that the information he received from the agency reports was largely corroborated by the father. In addition, the history was only a part of one of three areas considered by the psychologist and Dr. Moore testified that the results in all three areas were congruent. Accordingly, we find no plain error exists in the admission of Dr. Moore's report or in the psychologist's testimony regarding his diagnosis of the father.

{¶36} Next, the father argues that Dr. Moore's report is incomplete, inaccurate and should have been updated prior to the hearing and that his testing did not conform to Evid.R. 702. He contends that the psychologist failed to talk to the father's treating physicians, therapists, counselors and treatment centers regarding the treatment the father was receiving and that he did not have a full record or the case. He also contends the assessment was completed over a year prior to the hearing and was based on a 45-minute interview. However, these issues go to the weight and credibility of Dr. Moore's report and testimony, not to the admissibility. Issues of credibility are for the trier of fact to determine, *In re G.N.*, 170 Ohio App.3d 76, 2007-Ohio-126, ¶24.

{¶37} Finally, the father argues that the testimony of the caseworker does not meet the requirements for lay witness testimony and contains hearsay statements. Many of the statements made by the caseworker that appellant argues are hearsay were statements made by the mother to the caseworker regarding the domestic violence, and therefore, were admissions of a party and not hearsay. Evid.R. 801(D)(2); *In re J.J.*, Butler App. No. CA2005-12-525, 2006-Ohio-2999, ¶21. In addition, the father's testimony corroborated the fact that he was convicted for domestic violence. Accordingly, we find no plain error in the testimony of the agency caseworker. The father's second assignment of error is overruled.

{¶38} In his third assignment of error, the father contends that the agency erred in failing to consider all relative placements for the children and the court erred in failing to grant a continuance to allow exploration of a potential placement.

{¶39} The caseworker testified that the maternal grandmother was investigated as a placement, but stated that she could not take the children because of her medical concerns. The paternal grandfather was also investigated, but a home study was never completed due to noncompliance of a person in the home who failed to complete fingerprinting and, due to a pending criminal charge, the placement was denied. The paternal grandmother was also considered and investigated, but eventually stated she was no longer interested. A paternal great-aunt completed fingerprinting, but was living with the paternal grandfather at the time and was not considered as an appropriate placement.

{¶40} At the start of the hearing, counsel for the father requested a continuance so that the great-aunt could be considered as a placement. The magistrate denied the request, but stated that a final decision would be made after it was determined if the basis for the continuance was supported by sworn testimony. The great-aunt testified that she expressed interest in taking the children, and that she was fingerprinted, but told a background check revealed a history of felony bad checks. She stated that the bad check history was a misunderstanding, but she did not pursue the matter with children services because she was told she could not be considered. She indicated that she is now living with her mother, but did not file a motion for legal custody of the children. After the great-aunt testified, the continuance request was not renewed.

{¶41} Whether placement with a relative is an option that can provide a legally secure placement without a grant of permanent custody may be a relevant consideration

under the best interest factors in R.C. 2151.414(D)(1)(d). *In re B.K*. Fayette App. No. CA2006-03-011, 2006-Ohio-4424. However, the statute does not require a trial court to consider relative placement before granting a motion for permanent custody. *In re J.C*., Adams App. No. 07CA834, 2007-Ohio-3783. In this case, the testimony established that the agency investigated possible placements for the children and none were approved at the time. In addition, no motion for legal custody of the children was filed by a relative. Therefore, we find no error in the court's decision to grant permanent custody without considering whether the paternal great-aunt was a viable placement or in failing to grant a continuance on this issue. Appellant's third assignment is overruled.

{¶42} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.