[Cite as *In re R.S.*, 2021-Ohio-2271.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE R.S., ET AL.,	:	
	:	No. 110210
Minor Children	:	
	:	
[Appeal by B.T., Mother]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 1, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD-18905413 and AD-19903996

Appearances:

Erin R. Flanagan, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Joseph C. Young, Assistant Prosecuting Attorney, *for appellee* CCDCFS.

EILEEN T. GALLAGHER, J.:

{¶ 1} Appellant-mother ("Mother") appeals an order of the Juvenile Division of the Cuyahoga County Court of Common Pleas (the "juvenile court") that terminated her parental rights and granted permanent custody of two of her sons, R.S. and M.T., to the Cuyahoga County Department of Child and Family Services ("CCDCFS" of "the agency"). She claims the following two errors:

1. The trial court's award of permanent custody to CCDCFS was not supported by clear and convincing evidence and was against the manifest weight of the evidence.

2. The trial court committed plain error to the prejudice of appellant by requesting and receiving the unsworn advocacy of the foster caregivers and GAL after CCDCFS had rested its case and delivered closing argument.

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} R.S. and M.T. were born to Mother and J.S. ("Father") on January 26, 2018 and November 15, 2018, respectively. (Dec. 9. 2020, tr. 6-7.) Mother and Father have an older child, D.T., who was born in April 2013, and a younger child born in April 2020. In April 2018, CCDCFS filed a complaint in AD-18905413, alleging that a child, R.S., and an older sibling, D.T., were neglected and that their mother's substance abuse interfered with her ability to care for them. According to the complaint, Mother tested positive for cocaine and marijuana during her pregnancy with R.S. and previously tested positive for marijuana during her pregnancy with D.T. In the prayer for relief, CCDCFS requested protective supervision. The complaint further alleged that Father also had substance abuse issues and that both Mother and Father failed to ensure that R.S. received necessary medical care. In November 2018, the juvenile court found R.S. to be neglected and placed him in the protective custody of CCDCFS.

{¶ 4} Around the same time, CCDCFS filed another complaint in Cuyahoga J.C. No. AD19903996, alleging that M.T. was also neglected and that Mother's

substance abuse interfered with her ability to care for him. The complaint alleged that M.T. had been hospitalized since birth due to multiple health complications and that Mother failed to cooperate with the hospital staff to resolve the child's medical issues. Thus, CCDCFS sought and obtained temporary custody of M.T. due to the medical neglect resulting from Mother and Father's ongoing substance abuse and mental health issues.

{¶ 5} In February 2020, CCDCFS filed a motion to modify temporary custody to permanent custody in each child's case. Aimee Shipman ("Shipman"), the ongoing caseworker assigned to the children's cases in March 2019, testified at the permanent custody hearing that R.S. and M.T. have an older sister, D.T., and a younger sister, C.T. At the time of the permanent custody hearing, D.T. had already been committed to the legal custody of her maternal uncle and his wife. The youngest child, C.T., was committed to the temporary custody of CCDCFS since the time of her birth in April 2020.

{¶ 6} On December 9, 2020, the juvenile court held a dispositional hearing on the agency's complaints for permanent custody in AD-18905413 and AD-19903996. Mother failed to appear, and her lawyer requested a continuance, which was denied. Father was also absent from the proceedings. At the time of the dispositional hearing, R.S. was almost three years old, and M.T. had recently turned two. (Dec. 9, 2020, tr. 15-16.) R.S. and M.T. had been in a foster home for nearly two years. Both children require special medical care and suffer from developmental delays because they were both born prematurely. (Dec. 9. 2020,

tr. 54-55.) M.T. had numerous medical issues, including lung and respiratory issues. Shipman testified that the agency was granted emergency custody of M.T. in April 2019, when he was discharged from the hospital following his birth due to his parents' continuing substance abuse, mental health issues, and because he had special medical needs. In May 2019, the agency was granted emergency custody of D.T. and R.S. In July 2019, the agency was granted temporary custody of M.T. and, in December 2019, the agency was granted temporary custody of D.T. and R.S.

{¶ 7} Shipman testified that Mother and Father were given case plans to address their substance abuse and mental health issues with the goal of reunifying them with their children. (Dec. 9, 2020, tr. 30.) Father was referred to Recovery Resources for treatment of his substance abuse and mental health issues. Father failed to complete any of the services provided and failed to provide another drug test after November 2019, as required. Shipman testified that she believed Father was living in an apartment with a roommate in Cleveland, but Father never allowed the agency to view the apartment. Father apparently told the agency that the apartment was not appropriate for children. According to Shipman, the agency was unable to reach Father since July 2020.

{¶ 8} Mother's case plan also required her to provide regular, random drug tests, and she frequently tested positive for marijuana and cocaine. In March 2019, Mother was referred to Community Actions Treatment Center ("CATS") for treatment, but she was discharged shortly thereafter for not attending. (Dec. 9, 2020, tr. 41.) Shipman subsequently referred her to Catholic Charities, Matt Talbot,

and Recovery Resources for treatment of her substance abuse and mental health issues, but she never scheduled an assessment or otherwise followed up at Catholic Charities. Mother scheduled an assessment at Recovery Resources, but never completed it. (Dec. 9, 2020, tr. 42.)

{¶ 9} After Shipman discovered that Mother failed to complete services at Catholic Charities or Recovery Resources, Mother told her she would seek services at MetroHealth Medical Center ("MetroHealth"), where she was going for prenatal care while she was pregnant with C.T. (Dec. 9. 2020, tr. 44.) Shipman did not know if Mother ever completed services at MetroHealth because she was never able to obtain a release from Mother to verify that she completed any services. (Dec. 9 2020, tr. 44-45.) However, as previously stated, Mother failed to provide regular, random drug screens, and her last drug screen in November 2019, was positive for marijuana. (Dec. 9. 2020, tr. 46.) Mother acknowledged to Shipman that she had a substance abuse problem, that she had been "clean and sober before in the past," and that she "wants to do it again." Shipman explained, however, that Mother "just doesn't follow through." (Dec. 9, 2020, tr. 46.)

{¶ 10} Shipman testified that Mother was living with her parents until she moved in with her husband, R.S. and M.T.'s father, in May 2020. Shipman did not know where Mother was living at the time of the permanent custody hearing. Shipman stated that she visited Mother when she was living with her parents. Although there was adequate space for the children in the home, D.T. and R.S. were neglected when they lived there, and their medical needs were not met.

{¶ 11} With respect to visitation, Shipman testified that from approximately May 2019 through January 2020, Mother and Father visited regularly with D.T., R.S. and M.T. However, Mother began canceling visits in January 2020. Mother told Shipman that she had to cancel one visit because she was unable to make cupcakes for R.S.'s birthday, and she did not want to come for a visit without the cupcakes. She canceled another visit because she had a cold and did not want to give it to M.T., who has respiratory issues. Between January and March 2020, the parents had one visit with the children. After the pandemic began in March 2020, they began virtual visits, and the parents stopped attending altogether. Mother told Shipman that because the children were "unable to speak to her," "there was no point in visiting them." (Dec. 9, 2020, tr. 49.)

{¶ 12} According to Shipman, R.S. was "globally delayed" by approximately nine months and it is "unknown" whether he would "catch up." (Dec. 9, 2020, tr. 52.) Shipman testified that M.T. has "a lot of medical needs" and developmental delays due to his preterm birth. He wears glasses and a patch over one eye because he has a lazy eye. Both R.S. and M.T. were enrolled in the Bright Beginnings program, where they received occupational therapy, physical therapy, and speech therapy. Although Mother was permitted to participate in her children's services and doctor's visits, she had not done so.

{¶ 13} CCDCFS investigated several family members as possible placements for the children. CCDCFS wanted to investigate the children's maternal grandparents for a possible placement, but they refused to allow anyone from

CCDCFS into their home. (Dec. 9, 2020, tr. 48.) CCDCFS investigated the children's paternal grandparents, but they were ruled out due to substance abuse issues. (Dec. 9, 2020, tr. 62.) The maternal aunt and uncle who presently have legal custody of D.T. initially agreed to take the other three children. However, after visiting with all the children at once, they decided they were unable to take care of all four children and indicated they could only have custody of D.T. (Dec. 9 2020, tr. 62-63.)

{¶ 14} Finally, Mother's sister, H.T., offered to take the three older children because, at that time, C.T. had not yet been born. However, because H.T. was living in a two-bedroom apartment and had four children of her own, she was told her home was not suitable. H.T. later moved to a three-bedroom apartment in Parma Heights, which was appropriate for the children. (Dec. 9, 2020, tr. 74.) However, CCDCFS was concerned that H.T.'s home might not be safe because she had a history of domestic violence dating back to 2016. (Dec. 9, 2020, tr. 67.)

{¶ 15} H.T. had multiple cases with CCDCFS for domestic violence from 2016 to 2020, in which her children witnessed the violence. (Dec. 9, 2020, tr. 68.) Shipman explained that there had been six to eight referrals to the agency, alleging that either H.T. or her children were victims of domestic violence at the hands of her boyfriend, and later husband, L.S.[1] Some of the referrals were substantiated, some were unsubstantiated, and some were indicated. Despite multiple referrals, there were no cases filed in juvenile court relating to H.T. or any of her children. Further

[1] H.T. and L.S. married in July 2017, and moved, temporarily, to Wayne County.

investigation revealed that L.S. had been charged with domestic violence in Wayne County in 2017, and again in Cuyahoga County in 2020.

{¶ 16} In December 2019, CCDCFS received a referral because one of H.T.'s children had contacted Mother, H.T.'s sister, asking for help because L.S. was beating H.T. The child took a video recording of the beating and sent it to Mother, and Mother came to the scene to help her sister. After the incident, instead of pressing charges against her abusive husband, H.T. attempted to press charges against her sister (Mother), who had come to her aid. (Dec. 9, 2020, tr. 71.) Shipman testified that H.T.'s behavior in this incident raised concerns about her judgment and her ability to protect herself and the children. (Dec. 9, 2020, tr. 71.)

{¶ 17} Although H.T. informed CCDCFS that she was planning to divorce L.S., nothing was filed at the time of the permanent custody hearing, and there was no evidence that H.T. ever tried to obtain a civil protection order against L.S. (Dec. 9, 2020, tr. 72.) According to Shipman, H.T. was offered domestic violence services for herself, but she did not complete them. Domestic violence services were also offered to H.T.'s children because they witnessed the domestic violence, but H.T. refused those services. (Dec. 9, 2020, tr. 74.) Thus, although H.T. had moved into a "beautiful home" that was appropriate for the children and Mother wanted the children placed with H.T., CCDCFS could not recommend H.T. for legal custody due to concerns about her poor judgment and inability to protect the children. (Dec. 9. 2020, tr. 73-74.)

{¶ 18} As previously stated, R.S. and M.T. had been with the foster family for nearly two years at the time of the permanent custody hearing. The "licensed to adopt" foster home was equipped to meet the special medical needs of the children in their care. (Dec. 9, 2020, tr. 95.) Shipman testified that since being in the care of the foster family, R.S. has made "great progress," and M.T. is doing "very well." (Dec. 9, 2020, tr. 55, 57.) As previously stated, the foster family also has custody of R.S. and M.T.'s younger sister, C.T., since birth. The family facilitates the children's continued relationship with their older sister, D.T., who lives with an aunt and uncle. (Dec. 9, 2020, tr. 61.)

{¶ 19} The foster family has four children of their own, some of whom are adults. Their children help care for the younger children by feeding them and changing their diapers. Shipman testified that the foster family is "very attentive" to the children and attend all of the children's appointments and services. All three of Mother's children, who are in the home, are bonded to the foster family and to each other. (Dec. 9, 2020, tr. 58.) Shipman testified that if permanent custody were awarded to CCDCFS, the children would remain with the family, who live in a six-bedroom house in the country.

{¶ 20} Shipman testified that CCDCFS believed permanent custody was in the children's best interests because the parents have had two years to complete their case plans and had not made any progress on them. Shipman explained that the agency "likes to keep children within their family[,] whether it be with a relative

or it be with their own parents," but that it also likes "to keep siblings together." (Dec. 9, 2020, tr. 75.)

{¶ 21} Prior to the permanent custody hearing, the guardian ad litem ("GAL"), submitted a report recommending that R.S. and M.T. remain with their foster parents. The GAL report states, in relevant part:

> The parents have not been in contact with the GAL. It [sic] recommended that the sons, [R.S.] and [M.T.], remain in Bluffton with the foster parents. They have stated an interest in having all three children, including [C.T.], be placed with them. They indicated that they would encourage a relationship with [D.T.], who is currently placed with her maternal uncle. If the Court determines that [C.T.] should continue to be placed with the foster parents in Bluffton, she would do very well there. However, the GAL believes that a placement with the maternal aunt, [H.T.], would be in the child's best interests. She would be able to be raised by her family. * * *.

Thus, the GAL recommended that R.S. and M.T. remain with their foster family, but recommended that C.T. be placed in the legal custody of H.T.

{¶ 22} Shipman was the sole witness in the agency's case-in-chief, and Mother did not present any witnesses. After concluding Shipman's testimony and before closing arguments, the court asked the GAL to state his recommendation for the record. The GAL stated, in relevant part:

> I had an opportunity to talk to the foster parents who are here. They're doing a[n] excellent job with both boys. As Miss Shipman mentioned it seems like they're very on top of the boys' special needs and they take great care of both of them.
>
> I've had the opportunity to go out to their place a couple of times and they're doing great out there. They seem to be flourishing. And as I mentioned they're doing a great job and I would recommend that the Agency's motion * * * be found well taken and the boys stay where they are right now.

(Dec. 9, 2020, tr. 118). After hearing the GAL's recommendation, the court asked counsel if they had any questions based on the GAL's recommendation. None of them asked any questions. Following closing arguments, the court offered the foster family an opportunity to make a statement. They each made a separate, unsworn statement without objection from any party.

{¶ 23} Thereafter, the court issued its ruling and found, by clear and convincing evidence, that the children could not or should not be placed with either parent within a reasonable time, that permanent custody was in the children's best interest, and that "an extension of temporary custody would not be in their best interest as neither parent has made substantial progress or significant progress on the case plan." (Dec. 9, 2020, tr. 143-145.) This appeal followed.

II. Law and Analysis

A. Best Interests of the Children

{¶ 24} In the first assignment of error, Mother argues the juvenile court's award of permanent custody to CCDCFS was not supported by clear and convincing evidence and was against the manifest weight of the evidence. She contends the award of permanent custody to CCDCFS was not in the children's best interests.

{¶ 25} A parent has a "'fundamental liberty interest' in the care, custody and management" of his or her child. *In re Murray*, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990), quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Indeed, the right to raise one's own child is "an essential and

basic civil right." *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). Nevertheless, the right to raise one's own child is not absolute; it is "always subject to the ultimate welfare of the child[.]" *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979).

{¶ 26} CCDCFS may obtain permanent custody by first obtaining temporary custody of a child and then filing a motion for permanent custody under R.C. 2151.413. *See In re M.E.*, 8th Dist. Cuyahoga No. 86274, 2006-Ohio-1837. There is no dispute that the proper procedure occurred in this case. When CCDCFS files a permanent custody motion under R.C. 2151.413 after obtaining temporary custody, the guidelines and procedures set forth under R.C. 2151.414 apply.

{¶ 27} R.C. 2151.414 sets forth a two-part test courts must apply when deciding whether to award permanent custody to a public services agency. R.C. 2151.414 requires the court find, by clear and convincing evidence, that (1) granting permanent custody of the child to CCDCFS is in the best interest of the child, and (2) either the child (a) cannot be placed with either parent within a reasonable period of time or should not be placed with either parent if any one of the factors in R.C. 2151.414(E) are present; (b) is abandoned; (c) is orphaned and no relatives are able to take permanent custody of the child; or (d) has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1).

{¶ 28} "'Clear and convincing evidence' is evidence that 'will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be

established.'" *In re C.B.*, 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, ¶ 28, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

> A juvenile court's decision to grant permanent custody will not be reversed as being against the manifest weight of the evidence "if the record contains some competent, credible evidence from which the court could have found that the essential statutory elements for permanent custody had been established by clear and convincing evidence."

In re G.W., 8th Dist. Cuyahoga No. 107512, 2019-Ohio-1533, ¶ 62, quoting *In re A.P.*, 8th Dist. Cuyahoga No. 104130, 2016-Ohio-5849, ¶ 16.

{¶ 29} In determining that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent, the trial court must consider the factors contained in R.C. 2151.414(E). If the court determines at a hearing that one or more of the factors set forth in R.C. 2151.414(E) exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable period of time or should not be placed with either parent. *In re I.K.*, 8th Dist. Cuyahoga No. 96469, 2011-Ohio-4512, ¶ 8. The existence of any one of the factors is sufficient to determine that a child cannot be placed with a parent within a reasonable period of time. *In re C.C.*, 187 Ohio App.3d 365, 2010-Ohio-780, 932 N.E.2d 360, ¶ 10 (8th Dist.), citing *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996).

{¶ 30} The juvenile court found several factors enumerated in R.C. 2151.414(E) existed in this case. The court first found, pursuant to R.C. 2151.414(E)(1), that

> following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the child's home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.

(Lower case entries in AD-18905413 and AD-19903996, dated Dec. 14, 2020.) In support of this finding, the trial court's judgment entry in M.T.'s case further states that

> [b]oth parents have not engage [sic] in, completed, or benefitted from case plan services. Neither parent has provided a urine screen for the agency in over a year, despite continuous requests to do so.

Shipman's undisputed testimony that the parents failed to provide drug screens and failed to complete substance abuse treatment supports the trial court's finding.

{¶ 31} The trial court also included a finding, pursuant to R.C. 2151.414(E)(2), that Mother's chronic mental illness or chemical dependency was "so severe that it makes [her] unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year." Shipman's testimony that Mother failed to follow up with Catholic Charities and Recovery Resources and failed to demonstrate that she completed any other drug treatment program supports the court's finding. Indeed, Mother admitted to Shipman that she has an ongoing substance abuse problem.

{¶ 32} The trial court further found, pursuant to R.C. 2151.414(E)(4), that Mother lacked commitment to her children by failing to regularly support, visit, or communicate with them when able to do so. The court also found, pursuant to R.C.

2151.414(E)(10) that Mother abandoned the children. As previously stated, Shipman testified that Mother stopped visiting M.T. and R.S. because, as Mother stated, they were "unable to speak to her, so there was no point." (Dec. 9. 2020, tr. 49.) R.C. 2151.011(C) provides that "[f]or purposes of this chapter, a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days."

{¶ 33} In M.T.'s case, the court made an additional finding pursuant to R.C. 2151.414(E)(16), which permits the court to consider "any other factor the court considers relevant." The court found that neither parent was present for the dispositional hearing and that neither parent had been present at the emergency custody hearing. This finding is also supported by the fact that Mother's lawyer stated on the record that Mother was not present and requested a continuance, which was denied. Therefore, the trial court's findings under R.C. 2151.414(E) are supported by competent, credible evidence in the record. Based on these findings, the juvenile court was required to find that R.S. and M.T. could not be placed with either of their parents within a reasonable time or should not be placed with either parent. *See, e.g., In re C.H.*, 8th Dist. Cuyahoga Nos. 82258 and 82852, 2003-Ohio-6854, ¶ 58, citing *In re Glenn*, 139 Ohio App.3d 105, 113, 742 N.E.2d 1210 (8th Dist.2000.).

{¶ 34} Mother does not challenge the court's findings under R.C. 2151.414(E). She focuses instead on the court's finding that granting permanent

custody of R.S. and M.T. to CCDCFS was in the children's best interests. In determining whether permanent custody is the child's best interest pursuant to R.C. 2151.414(D)(1), the juvenile court must consider "all relevant factors," including, but not limited to (1) 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; (2) the wishes of the child, as expressed through the child's guardian ad litem depending on the maturity of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions R.C. 2151.414(E)(7) to (11) apply.

{¶ 35} Although the juvenile court is required to consider each factor listed in R.C. 2151.414(D)(1), no one factor is to be given greater weight than the others. *In re T.H.*, 8th Dist. Cuyahoga No. 100852, 2014-Ohio-2985, ¶ 23, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. Only one of the factors set forth in R.C. 2151.414(D)(1) needs to be resolved in favor of permanent custody. *In re A.B.*, 8th Dist. Cuyahoga No. 99836, 2013-Ohio-3818, ¶ 17.

{¶ 36} The Ohio Supreme Court recently held that

> R.C. 2151.414(D)(1) does not require a juvenile court to expressly discuss each of the best-interest factors in R.C. 2151.414(D)(1)(a) through (e). Consideration is all the statute requires. Although a reviewing court must be able to discern from the magistrate's or juvenile court's decision and the court's judgment entry that the court

> satisfied the statutory requirement that it consider the enumerated factors, we may not graft onto the statute a requirement that the court include in its decision a written discussion of or express findings regarding each of the best-interest factors.

In re A.M., Slip Opinion No. 2020-Ohio-5102, ¶ 31.

{¶ 37} The weight given to the R.C. 2151.414(D)(1) factors is within the juvenile court's discretion. *In re P.B.*, 8th Dist. Cuyahoga Nos. 109518 and 109519, 2020-Ohio-4471, ¶ 76, citing *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. We, therefore, will not disturb the juvenile court's determination of a child's best interest absent an abuse of discretion. *Id.* "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699, ¶ 19. An abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.). When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

{¶ 38} The juvenile court stated both on the record and in the journal entries of both R.S. and M.T.'s cases that it considered the factors required under R.C. 2151.414(D)(1). (Dec. 9, 2020, tr. 144; Dec. 14, 2020 journal entries in AD-18905413 and AD-19903996.) First, the court found that both children were "very bonded"

with their foster parents and their children. The children were also bonded to each other since three siblings live together in the foster family. This finding is supported by Shipman's testimony and the GAL's observations. With respect to M.T., the court observed that "[t]his is the only home that the child has ever resided in since birth." (Journal entry dated Dec. 14, 2020, AD-19903996.) This fact is also supported by the record.

{¶ 39} The court noted that the children were too young to express their wishes with respect to custody, but the GAL recommended permanent custody. As previously stated, the GAL stated in both his written report and on the record, that he recommended permanent custody. Therefore, this finding is also supported by the record.

{¶ 40} With respect to custodial history, the court observed that R.S. had been in temporary custody for more than 12 months of the previous consecutive 22-month period and that M.T. had been in agency custody "since his release from the NICU, in April 2019." The court further acknowledged that M.T. had been temporary custody since July 2019. The court found that both children need a legally secure and permanent placement. In M.T.'s case, the court further stated, in relevant part:

> Child deserves a safe and stable environment where all of his needs can be met. This cannot be achieved with Mother or Father as they have failed to engage in, complete, and benefit from case plan services that led to the removal of the Child. No other family members are willing or able to care for the Child.

(Journal entry, Dec. 14, 2020, Cuyahoga J.C. No. AD19903996.) Again, these findings are supported by Shipman's undisputed testimony. Therefore, the court's finding that permanent custody is in children's best interest is supported by manifest weight of the evidence.

{¶ 41} Mother nevertheless contends the trial court's judgment is against the manifest weight of the evidence because the court failed to consider placing the children in the legal custody of her sister, H.T. She contends "consideration of the permanent custody factors set forth in R.C. 2151.414(D) demonstrate that legal custody should have been granted to the maternal aunt." (Appellant's brief 13.) However, no motion for legal custody was ever filed with respect to R.S. or M.T. despite that fact that one was filed for C.T., who is not the subject of this appeal. R.C. 2151.353(A)(3) requires that prior to awarding legal custody to "either parent or to any other person," the person requesting legal custody must file a motion requesting legal custody and a signed statement of understanding. *In re L.B.*, 8th Dist. Cuyahoga No. 108446, 2019-Ohio-3374, ¶ 16. "The motion is mandatory, and, as a matter of law, a juvenile court cannot award legal custody in the absence of a written motion." *In re G.P.*, 6th Dist. Lucas Nos. L-18-1126, L-18-1130, and L-18-1132, 2018-Ohio-4584, ¶ 73, citing *In re J.G.*, 6th Dist. Lucas No. L-17-1311, 2018-Ohio-3981, ¶ 43, 44. Because H.T. never filed a motion for legal custody of R.S. or M.T., the trial court could not award her legal custody of those children. Since the children could not be placed with their parents within a reasonable time, a legally secure placement could not be achieved without awarding permanent custody.

{¶ 42} Therefore, the first assignment of error is overruled.

B. Unsworn Testimony

{¶ 43} In the second assignment of error, Mother argues the trial court committed plain error by allowing the foster parents and GAL to provide unsworn statements, which were not subject to cross-examination, at the permanent custody hearing.

{¶ 44} The foster parents each made an unsworn statement at the conclusion of the permanent custody hearing regarding how R.S. and M.T. came into their care. They also described the children's special needs, their development, and their relationships with members of the foster family.

{¶ 45} R.C. 2151.424(A) states:

> If a child has been placed in a certified foster home or is in the custody of, or has been placed with, a kinship caregiver as defined in section 5101.85 of the Revised Code, a court, prior to conducting any hearing pursuant to division (F)(2) or (3) of section 2151.412 or section 2151.28, 2151.33, 2151.35, 2151.414, 2151.415, 2151.416, or 2151.417 of the Revised Code with respect to the child, shall notify the foster caregiver or kinship caregiver of the date, time, and place of the hearing. At the hearing, the foster caregiver or kinship caregiver shall have the right to be heard.

{¶ 46} Mother contends there was no evidence that the foster parents' home was a "certified" foster home. Indeed, Shipman testified that it was a "licensed" home, but did not state that it was a "certified" foster home. Therefore, Mother contends, they should not have been permitted to make a statement at the permanent custody under R.C. 2151.424(A). She further asserts that even if the foster parents had a right under R.C. 2151.424(A) to make a statement, the

statement should have been under oath. Mother similarly contends the GAL should not have been permitted to make an unsworn statement. However, Mother never objected to any of the unsworn statements nor did she request an opportunity to cross-examine them. In fact, the court asked counsel if they had any questions for the GAL, and counsel declined. Mother's failure to object to these unsworn statements forfeited all but plain error. *See, e.g., In re E.C.*, 2020-Ohio-3807, 156 N.E.3d 375, ¶ 55 (8th Dist.).

{¶ 47} Plain error is limited to those "extremely rare cases" in which "exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). We, therefore, only apply plain error "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." *Id*. at syllabus.

{¶ 48} We recently rejected a claim of plain error based on a trial court's failure to swear in a witness prior to receiving the witness's testimony in *E. Cleveland v. Harris*, 8th Dist. Cuyahoga No. 109404, 2021-Ohio-952. In *Harris*, we explained, in relevant part:

> The Supreme Court explained in *Stores Realty* [*Co. v. Cleveland*, 41 Ohio St.2d 41, 322 N.E.2d 629 (1975)] that it "is well-established that a party may not, upon appeal, raise a claim that the oath of a witness was omitted or defective, unless objection thereto was raised at trial. If no objection was raised, the error is considered to be waived." *Id*. at 43. "This is because the failure to administer an oath can easily be corrected at the time; an attorney may not fail to object and then cite the lack of an oath as error." *State v. Norman*, 137 Ohio App.3d 184, 198, 738 N.E.2d 403 (8th Dist.1999); *see also State v. Davis*, 8th Dist. Cuyahoga No. 105299, 2017-Ohio-8873, ¶ 19 (defendant was not entitled to a new hearing due to unsworn testimony because the defendant did not object to the unsworn testimony and failed to show that the outcome of the proceeding would have been different but for the error).

Id. at ¶ 10. *See also In re G.W.*, 1st Dist. Hamilton Nos. C-190388, and C-190390, 2020-Ohio-3355, ¶ 21 ("the mere failure to have a witness sworn is error that may be waived, and thus, unsworn testimony is competent evidence where the opposing counsel neither requests that the witness be sworn nor makes a timely objection to the testimony.").

{¶ 49} Mother asserts that the juvenile court committed plain error by allowing the foster parents and GAL to provide unsworn testimony. However, she fails to explain how this amounts to plain error. She has not demonstrated how the unsworn statements affected the outcome of the proceedings or how she was otherwise prejudiced by the unsworn statements. There is nothing to suggest that the juvenile court relied on the foster parents' statements in rendering its judgment. Although the court considered the GAL's recommendation in its final decision, the recommendation was already part of the record pursuant to R.C. 2151.414(C), which requires submission of a GAL report prior to the permanent custody hearing.

{¶ 50} Moreover, R.C. 2151.414(C) specifically provides that the GAL report "shall **not** be submitted under oath." (Emphasis added.) The GAL did not provide any unsworn testimony outside the scope of the recommendation contained in his previously submitted report. The GAL's unsworn statement did not add to or change the evidence in the record. Therefore, Mother fails to demonstrate that the court's decision to allow the GAL and the foster parents to provide unsworn statements at the conclusion of the permanent custody hearing constituted plain error.

{¶ 51} The second assignment of error is overruled.

{¶ 52} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR