[Cite as *In re E.A.*, 2015-Ohio-806.]

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

IN RE: E.A.	C.A. No. 14AP0044
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 12-0974-AND

DECISION AND JOURNAL ENTRY

Dated: March 9, 2015

CARR, Presiding Judge.

{¶1} Appellant, Crystal A. ("Mother"), appeals from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, E.A., and placed the child in the permanent custody of Wayne County Children Services Board ("CSB"). This Court affirms.

I.

{¶2} Based on the record before this Court, it appears that Wayne County Children Services became involved with Mother's family in 2009 on a voluntary basis. At that time, Mother's family included Mother, her husband Jeff A., ("Husband") and four children, ranging in age from one to six years. The agency sought to address concerns regarding the inadequate supervision of the children, poor condition of the home, and unmet needs of the children.

Because little progress was made on these matters, in June 2010, CSB filed the case in juvenile court.[1] A fifth child was born on January 25, 2011.

{¶3} E.A. was born on May 24, 2012, while the juvenile court case was still in progress. The five older children had already been removed from the home and placed in foster care. On the day after E.A.'s birth, the agency filed a complaint, alleging that he was a dependent child, and took him into custody directly from the hospital. The complaint focused on the same concerns that existed previously, as well as additional concerns regarding Mother's mental health and lower intellectual functioning, matters that were discovered through a psychological evaluation conducted under the existing case plan.

{¶4} The agency was also concerned that family dynamics presented a particular danger to E.A. This was so because Mother claimed that Husband was not the biological father of E.A., but rather that Robert E., who had been living in the family home, was his biological father. Robert E. is Husband's brother and a registered sex offender, having previously been convicted of gross sexual imposition of his own daughter. It was soon determined through genetic testing that Robert E. was, in fact, the biological father of E.A. Husband was then removed as a party to the custody proceedings involving E.A., and Robert E. was added. Later, it was established that Robert E. was also the biological father of Mother's fifth child.

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[1] The time of the filing of the complaint is based on the testimony of Caseworker Jennifer Harner. The original pleadings of the cases regarding E.A.'s siblings are not a part of the record before this Court. Therefore, we have relied on the testimony of witnesses for background information regarding the cases involving E.A.'s siblings.

{¶5} In August 2013, Husband was granted legal custody of the three oldest children.[2] Mother voluntarily surrendered her parental rights to the next two children. Those two children were placed in the permanent custody of the agency and were adopted.

{¶6} The matter involving E.A. continued alone. The agency expressed the hope that Mother might be able to provide appropriate care for one child as opposed to trying to manage all six. In due course, E.A. was adjudicated dependent and was placed in the temporary custody of the agency. The existing case plan was amended to address the current needs of Mother and E.A. Mother's case plan initially required parenting classes and it later added skills programs through Early Head Start, Head Start, Healthpoint, and Help Me Grow. Her case plan also addressed mental health issues and noted that Mother had cognitive delays that made parenting difficult at times. A psychological assessment had been completed earlier and, based on that, Mother was found to be at risk for physical abuse and neglect to her children. Accordingly, recommendations were made for individual counseling on a bi-weekly basis and for a medication assessment. After it was discovered that Husband was not the biological father of E.A., Mother moved out of the home and the case plan was amended to require that she obtain stable housing of her own and secure sufficient income to meet the needs of E.A. She was also to maintain regular contact with E.A. through once or twice weekly visitations. Based on Mother's limited cognitive functioning, a guardian ad litem was appointed for her.

{¶7} The case plan included Robert E. as well. Robert E. completed a psychological evaluation, but made no further effort to comply with his case plan. He is not a party to the present appeal.

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[2] Caseworker Harner testified that CSB objected to the oldest three children being placed in Father's legal custody if Mother resided in the home due to safety concerns. Accordingly, Mother left the home, first staying with her mother and later obtaining her own apartment.

{¶8} On April 18, 2014, CSB moved for permanent custody. Following a hearing, the trial court terminated the parental rights of Mother and Robert E. in regard to E.A. and placed the child in the permanent custody of CSB. Mother appeals and assigns three errors for review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY ALLOWING THE ADMISSION AND FINDINGS OF A PSYCHOLOGICAL EVALUATION CONDUCTED THREE YEARS AGO AS EVIDENCE OF THE FINDING OF BEST INTEREST[.]

{¶9} Mother asserts that the trial court erred in allowing the admission and findings of a three-year-old psychological evaluation of Mother conducted by Dr. Marianne Bowden as evidence of the best interest of the child. Mother did not object to the admission of the evaluation into evidence, nor did she object to the testimony of Dr. Bowden regarding her findings. Further, Mother has not argued this issue as a matter of plain error. Consequently, the assignment of error is overruled insofar as it relates to the admission of the 2011 evaluation and the testimony of Dr. Bowden regarding her findings from that evaluation.

{¶10} To the extent that Mother's supporting argument challenges the weight of the evidence rather than its admissibility, that argument is similarly without merit. It appears that Mother is asserting that the trial court erroneously relied on Dr. Bowden's conclusion that Mother did not have the ability to parent a child on her own at the time of the 2011 evaluation and also on Dr. Bowden's premise that it was unlikely that Mother's intellectual level could have changed much in the intervening three years. Such reliance is erroneous, Mother argues, for the claimed reason that Mother had made certain "progress and changes" in her life since the evaluation, and those changes were, purportedly incorporated into the somewhat different assessment of Mother's intellectual level by Dr. Danielle Fields later in the proceedings.

{¶11} The argument is without merit for two reasons. First, any difference in the descriptions of Mother's intellectual level by the two psychologists is minimal. Dr. Bowden testified that 2011 test results placed Mother's verbal abilities in the "borderline" range of intelligence, her non-verbal abilities in the range of "mild mental retardation," and her overall intelligence in the range of "mild mental retardation." Alternatively, because Mother had recently managed to obtain two part time jobs and an apartment, Dr. Fields believed that Mother was in the category of "borderline" intellectual functioning, but Dr. Fields also testified that Mother's intelligence level was "on the borderline" between the two categories of "mild mental retardation" and "borderline" intellectual functioning.

{¶12} Mother cites *In re S.C.*, 189 Ohio App.3d 308, 2010-Ohio-3394 (4th Dist.), in support of her position that reliance should not be placed on a three-year-old psychological evaluation in making custody decisions. In *S.C.*, the appellate court reversed the trial court's failure to place children with their father because the decision was based largely on a two-year-old psychological evaluation that found the father had been sober for only a few months and was in "partial remission" from alcohol abuse while the current evidence revealed considerable changes from that evaluation. *Id.* at ¶ 30. At the time of the hearing, the father had achieved two and one-half years of sobriety and was in "full remission" along with successfully completing his case plan and making housing improvements to better accommodate his children. *Id.* at ¶ 30-31. Thus, the evidence in *S.C.* that had changed since the evaluation was much more objectively significant and relevant to the custody decision than the purported change in Mother's intellectual functioning from mild mental retardation to borderline intellectual functioning - or to the borderline between them.

{¶13} Second, any change in Mother's intellectual functioning only becomes important to the custody decision if Mother has, in fact, been able to demonstrate improvements in her parenting ability in recent times. That has not taken place. Instead, the record reflects that Dr. Bowden's conclusion that Mother could not parent a child alone was specifically reaffirmed by Mother's most recent caseworker, Lindsay Overton. Ms. Overton relied on her own observations to testify at the permanent custody hearing that Mother could not care for a child alone. In addition, as shown by the discussion under the second assignment of error, the evidence is overwhelming that Mother has been unable to demonstrate that she has benefited from the extensive parenting assistance she has been afforded over the course of more than five years or that she can parent a child safely and with good judgment. Mother's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE FINDING OF PERMANENT CUSTODY BY THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶14} Mother next contends that the judgment of the trial court, granting permanent custody of E.A. to CSB, is against the weight of the evidence. 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 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 child based on an analysis under R.C. 2151.414(D). 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.

{¶15} The trial court found that the first prong of the permanent custody test was satisfied because E.A. had been in the temporary custody of CSB for at least 12 of the prior 22 months. *See* R.C. 2151.414(B)(1)(d). Mother does not contest that finding, but rather challenges the finding that permanent custody is in the best interest of the child. *See* R.C. 2151.414(D).

{¶16} When determining whether a grant of permanent custody is in a child'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 child, the wishes of the child, the custodial history of the child, and the child's need for permanence in his life. *See In re R.G.*, 9th Dist. Summit Nos. 24834 & 24850, 2009-Ohio-6284, ¶ 11.

{¶17} In her supporting argument, Mother briefly points out that she has obtained employment and housing, that she loves her child, and that she attended virtually every scheduled visit with her child. In determining whether permanent custody would, in fact, be in the best interest of the child, however, Ohio law "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. We proceed to consider the evidence presented under the factors of R.C. 2151.414(D).

{¶18} Mother testified on her own behalf. She insisted that she is able to control her personality disorder and is not an attention-getter or self-centered. She admitted that she lied about her pregnancy with Robert E. She reportedly told her counselor that Robert E. is "not that bad of a guy." Through her parenting instruction, she asserted that she learned that she needs to constantly supervise a young child and that parenting is a very difficult job. She believes she can provide care for E.A. and keep him safe.

{¶19} The record reflects that Mother regularly attended visits and usually greeted her son happily, but her interaction with him was often problematic. During some visits, Mother would engage E.A. in conversation and play with him, but on other occasions, she would not engage with her son at all. Sometimes Mother did not even talk to him or look at him, even when he sought her attention. There was evidence that Mother sometimes fell asleep during visits, read magazines, engaged in conversation with case aides about other matters, or even just talked to herself when she was agitated about some other matter. At those times, she was unable or unwilling to appropriately engage with her son.

{¶20} Mother's visits were closely supervised by a home-intervention specialist and either a case aide or caseworker. Her visits never progressed beyond supervised status, even after two years. This was largely due to a concern for the child's safety and Mother's lack of supervision of him. Witnesses offered examples of safety concerns, including Mother's failure to understand the importance of completely turning off the burners of a gas stove, securing doors to dangerous areas of the home, and maintaining visual supervision of the child.

{¶21} There is no dispute that Mother has some level of cognitive delay. It is well-established, however, that a trial court may not base a best interest determination in a permanent custody case "solely on the limited cognitive abilities" of a parent. *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, syllabus. When it became apparent, in the present case, that Mother was not demonstrating an ability to implement the information that was being taught in a traditional parenting class, her caseworker laudably tailored the reunification services to attempt to address that problem. To her credit, the caseworker did not merely direct Mother into another traditional parenting class, but rather provided her with parenting programs that included individualized and hands-on skills training that enabled her to have an opportunity to role-model appropriate

parenting behavior. *See, e.g., In re D.A.*, 2007-Ohio-1105, at ¶ 4; *In re D.T.,* 9th Dist. Summit No. 26344, 2012-Ohio-3552, ¶ 7; *In re Thomas*, 3d Dist. Hancock No. 5-03-08, 2003-Ohio-5885, ¶ 11. For example, the caseworker connected the family with Early Head Start and Preschool Head Start. Mother was also given assistance from Help Me Grow and Partners in Advocacy as well as referrals to support groups and parenting groups. Finally and notably, Mother was offered weekly hands-on assistance from Community Action for the last five years.

{¶22} In her capacity as a family visitor with Community Action, Melody Johnson attended most, if not all, of Mother's visits with E.A. At those visits, she worked directly with E.A., modeled behaviors for Mother, supervised Mother as she took over the activity, and engaged in parent support with the goal of helping Mother continue the activities with E.A. when she was not in the home. She frequently offered additional explanations and repeated tasks and behaviors. Despite these efforts, Ms. Johnson testified that Mother was only able to implement some of the skills taught while she was coaching her, and Mother was not able to carry the skills on to different situations or utilize them on a consistent basis over several different visits.

{¶23} Ms. Johnson explained that Mother would often not participate in their discussions during the parent support time and failed to provide needed feedback. When she asked Mother if she understood, Mother claimed that she did, but nevertheless was not able to implement behaviors or skills. In another effort to help Mother learn parenting skills, Ms. Johnson gave Mother a notebook to keep the information she provided, but the notebook repeatedly needed to be replaced. Eventually, Mother asked Ms. Johnson to quit giving her notebooks because she did not keep the information. Ms. Johnson ultimately concluded that after years of assistance from multiple parenting instructors, Mother showed no progress from where she began.

{¶24} Other service providers expressed similar sentiments. For example, the Head Start teacher tried to help Mother teach things to E.A., but she found that Mother just wanted to play with him. The first caseworker, Jennifer Harner, expressed concern regarding Mother's lack of interest and need for constant redirecting. The second caseworker, Lindsay Overton, testified that she did not believe it would be safe for E.A. to be returned to Mother's care. Service providers were universal in concluding that Mother was unable to process the information she was given, implement skills she was taught, or transfer skills from one situation or day to another.

{¶25} Psychologist Danielle Fields counseled Mother from December 2013 until the permanent custody hearing in August 2014. She noted a brief improvement in April 2014, when Mother obtained two part-time jobs and an apartment, but also observed a prompt return to her prior behaviors. Dr. Fields testified that Mother's personality disorder continued to affect her daily functions, and she was concerned that these issues would continue to keep her from being an effective parent. Mother's personality disorder had strong narcissistic, histrionic, and dependent features, causing her to believe that she is more capable than she actually is, to fail to pay attention to her child and his needs, and to continually look for someone else to take responsibility for her child's needs.

{¶26} Mother's judgment was also suspect. There was evidence before the trial court that Mother did not recognize the threat that Robert E. posed to her children and claimed that he had been "framed." She bore two children with Robert E., while simultaneously denying any contact or relationship with him, according to Psychologist Bowden and Caseworker Harner. Dr. Fields observed that Mother has not been able to express that it was dangerous to have a sex

offender in the home, and she was concerned, therefore, that Mother might do something like that again.

{¶27} E.A. has no significant relationships with any other relatives. In particular, he has no relationship at all with his father. Because Robert E. failed to comply with recommendations for counseling and treatment following his psychological evaluation, he was not permitted to have contact with E.A. In addition, E.A. has had only limited contact with his siblings. He was originally placed in the same foster home as some of his siblings. After the siblings were moved elsewhere, however, he only saw the three oldest siblings once at a family birthday party.

{¶28} E.A. was reported to be doing well in his foster home. His foster mother would like to adopt him if that becomes possible.

{¶29} E.A. is too young to express his own wishes as to placement. On behalf of the child, the guardian ad litem recommended that permanent custody should be granted to CSB. The guardian ad litem did not testify, but filed a report in which he expressed numerous concerns regarding Mother's ability to parent her child. For example, he expressed concern with Mother's previous unwillingness to remove Robert E. from the home, her failure to accept that he committed the act for which he was convicted, and her frequent defense of him.

{¶30} The guardian ad litem explained that his major concern has always been whether Mother has the ability to competently perform parental responsibilities. He believed it was questionable whether Mother would ever be able to properly parent a child. In addition, he observed that Mother has no reliable support system. Her family has not offered tangible assistance or support for the child.

{¶31} While Mother demonstrated some independence in the last six months by working two part-time jobs and finding housing, the guardian ad litem believed that she still has issues

regarding the basic decision-making that is needed to properly raise a child. According to the guardian ad litem, Mother tends to blame others for her self-inflicted problems. He concluded that it would be in the best interest of E.A. to be placed in the permanent custody of the agency. He believed that the child's best hope for long-term success and happiness was an order of permanent custody and to be adopted by another family.

{¶32} E.A.'s custodial history is that he has been in the custody of CSB for more than two years, virtually his entire life.

{¶33} There was evidence before the trial court that E.A. is in need of a legally secure permanent placement. There were no suitable friends or relatives willing to provide for his care.

{¶34} Upon review, we conclude that the record does not demonstrate that the trial court clearly lost its way and created a manifest miscarriage of justice when it found that permanent custody was in the best interest of the child and granted permanent custody to CSB. *See Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20. Mother's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED BY ALLOWING [IMPERMISSIBLE] TESTIMONY FROM A POLICE OFFICER REGARDING PENDING CRIMINAL CHARGES, RELYING ON SAID TESTIMONY IN THE DECISION TO GRANT PERMANENT CUSTODY[.]

{¶35} Mother argues that the trial court erred by allowing and relying upon testimony by a police officer regarding Mother's arrest for petty theft on June 6, 2014. Mother's attorney objected to the testimony of Officer Matthew Ventura because the evidence did not exist at the time the permanent custody motion was filed and also on the basis of relevance. The trial court overruled the objection, believing the testimony was relevant to the matter before the court.

{¶36} Matthew Ventura, a Medina Township police officer, testified that he was dispatched to a Wal-Mart store where Mother was being held in the custody of the store's loss prevention officer in June 2014. Officer Ventura testified that he advised Mother of her rights and asked her what happened. Mother first responded that she forgot to pay for $87 worth of merchandise and eventually admitted to stealing the items. Mother was arrested. At the time of the permanent custody hearing, the charges had not yet been resolved.

{¶37} During the permanent custody hearing, Dr. Fields testified that Mother's response to the incident demonstrated her changing moods and her failure to take responsibility for her actions. In its opinion, the trial court noted that Mother admitted to the police officer that she stole the items, but also that she told her counselor the arrest was a misunderstanding and later denied any culpability for her actions.

{¶38} First, as to the fact that the incident took place after the motion for permanent custody was filed, *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶ 26, requires only that the grounds for permanent custody shall be in existence at the time of the filing of the motion for permanent custody. It does not limit the evidence that may be introduced at the hearing to that in existence at the time the motion for permanent custody is filed.

{¶39} Second, as to the question of relevancy, we cannot say that the trial court erred to the prejudice of Mother in allowing the testimony of the police officer. The testimony was a very minor part of the totality of the evidence before the trial court and does not appear to have been at all significant to the result. Notwithstanding this testimony, there was extensive evidence regarding Mother's poor judgment, changeable behavior, and inadequate parenting otherwise in the record.

{¶40} Finally, to the extent that Mother seeks to claim on appeal that the police officer's testimony is inadmissible on the grounds of hearsay, the argument is overruled because no objection was made on that basis in the trial court. Consequently, Mother has forfeited any objection on that basis. *See In re J.H.*, 9th Dist. Lorain No. 07CA009168, 2007-Ohio-5765, ¶ 18. Mother's third assignment of error is overruled.

III.

{¶41} Mother's three assignments of error are overruled. The judgment of the Wayne 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 Wayne, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.