[Cite as *In re T.B.-G*, 2018-Ohio-4116.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106713

IN RE: T.B.-G., ET AL.

Minor Children

[Appeal by Mother, M.B.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 15910825, AD 15910826, and AD 15910827

BEFORE: Stewart, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 11, 2018

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MELODY J. STEWART, P.J.:

{¶1} The juvenile court terminated appellant-mother M.B.'s parental rights with respect to three of her children: T.B.-G., K.B., and J.B. Although the mother made good progress on a case plan implemented after appellee Cuyahoga County Department of Children and Family Services ("agency") obtained temporary custody of the children, the agency sought permanent custody after a tip to a child abuse hotline indicated that the mother may have physically abused five-year-old K.B. Prior to trial, the court conducted an in-camera interview of K.B. Following the interview, the court found "no conflict between what the child's wishes were and what [the guardian ad litem] is recommending * * *." The court later granted the agency's motion for permanent custody. The issues on appeal center on whether the court abused its discretion by conducting the in-camera interview without notice to the mother and whether the mother's attorney was ineffective for failing to subpoena records from the child abuse hotline call.

I. In-Camera Interview

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{¶2} The mother complains that the in-camera interview of K.B., requested by the children's guardian ad litem, occurred without notification to her attorney, thus depriving the mother of the opportunity to argue why her attorney should be present for the interview. She argues that R.C. 3109.04(B)(2)(c), which states that "in the judge's discretion, the attorney of each parent shall be permitted in chambers during the [in-camera] interview," creates a presumption that the attorney of each parent shall be permitted in chambers for the interview and that the trial judge has to articulate a reason to exclude a parent's attorney. She says that by failing to articulate any reason for excluding the mother's attorney, the court abused its discretion.

{¶3} In a child custody matter, the juvenile court must exercise its jurisdiction consistent with R.C. 3109.04 to determine the best interests of the child. *See* R.C. 2151.23(F)(1); *In re Poling*, 64 Ohio St.3d 211, 1992-Ohio-144, 594 N.E.2d 589. When determining the best interests of a child for purposes of allocating parental rights and responsibilities, the court "in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation." R.C. 3109.04(B)(1). "The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview." R.C. 3109.04(B)(2)(c). R.C. 3109.04(B) has been interpreted to give "a trial court the discretion to sua sponte interview the children in camera in child custody proceedings, but mandates that it interview the children in camera at the request of either party." *Church v. Church*, 7th Dist. Noble No. 03 NO 314, 2004-Ohio-6215, ¶ 9. The guardian ad litem for the children was a "party" for purposes of R.C. 3109.04(B)(1). *See* Juv. R. 2(Y) (defining a "party" as, among things, "the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court.").

{¶4} Closure is the rule, not the exception, for an in-camera interview under R.C. 3109.04(B)(2)(c). Although R.C. 3109.04(B)(1) required the court to conduct an in-camera interview upon the guardian ad litem's request, it had the discretion to decide whether to allow the attorneys for the other parties to be present during the interview. *See* R.C. 3109.04(B)(2)(c). Permitting the attendance of attorneys for the parties would have been an exception to the rule, so the court had no obligation to state any reasons why it did not allow the mother's attorney to attend. Even if we assume for purposes of this argument that the court made the affirmative decision to close the in-camera interview to attorneys for both parties, the mother offers no compelling reason why the court acted arbitrarily by doing so. The rationale for presumptively excluding persons other than the trial judge, necessary court personnel, and the child's attorney from the in-camera interview of a child is manifest: in cases where parents risk losing custody of a child, the possibility exists that the parent's mere presence in an interview (or even the presence of a parent's attorney) could create an intimidating environment that might adversely affect the manner in which a child responds to the court's questions. *Patton v. Patton*, 5th Dist. Licking No. 94 CA 40, 1995 Ohio App. LEXIS 357, 9 (Jan. 9, 1995). This policy of excluding parties from the interview is so strong that it extends to keeping transcripts of the interview confidential — parties are not normally entitled to review a transcript of the in-camera interview. *Chapman v. Chapman*, 2d Dist. Montgomery No. 21652, 2007-Ohio-2968, ¶ 27; *Lawson v. Lawson*, 5th Dist. Licking No. 13-CA-8, 2013-Ohio-4687, ¶ 57. We have no basis for finding that the court abused its discretion

by not notifying the mother of the in-camera interview and consequently preventing the mother's attorney from attending it.

{¶5} The mother additionally complains that the procedure set forth in R.C. 3109.04(B)(1) violates her constitutional due process right to be heard at a meaningful time and in a meaningful manner. She did not raise this argument below; in fact, her attorney raised no objection when the court noted on the record that it had interviewed K.B. in-camera. "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. The issue is forfeited.

II. Ineffective Assistance of Counsel

{¶6} When granting the agency's motion for permanent custody, the court made identical findings for all three children that overnight visits with the mother were stopped when K.B. returned with a large bruise under her eye. The bruise apparently prompted someone to call the child abuse hotline, causing the agency to investigate. The agency concluded that physical abuse was "indicated" despite K.B. giving "different explanations" on how she suffered the bruise. The mother maintains that she was denied the effective assistance of counsel with respect to (1) the contents of a telephone call to a child abuse hotline that reported suspicions that the mother had physically abused K.B.; (2) what the guardian ad litem learned from social worker "reports" about K.B.'s behavior and tantrums; and (3) who made the call to the child abuse hotline.

{¶7} To show ineffective assistance of counsel, the mother must first establish that counsel's performance was deficient by showing that counsel committed errors so serious that he or she was not, in effect, functioning as counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the mother must demonstrate that these errors prejudiced her defense such that there exists a reasonable probability that, were it not for counsel's errors, the outcome of the hearing would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶8} As the mother made progress with the case plan, she was granted unsupervised visitation with the children. Those visits were terminated, however, after the agency received a child abuse hotline call alleging that the mother had physically harmed K.B. The case worker investigated and characterized K.B.'s injury as a "black eye." K.B. said that she received the black eye after jumping on her bed and falling off; the hotline referral, however, said that K.B. received the black eye when "her mom threw her up the stairs." The mother argues that the inconsistent explanations for K.B.'s black eye meant that trial counsel had the duty to seek an in-camera inspection of records of the hotline referral because the childrens' foster parents could have fabricated the report to serve their own self-interests in adopting the children.

{¶9} The mother acknowledges that referrals made to a child abuse hotline are confidential. *See* R.C. 2151.142(I)(1) ("Except as provided in divisions (I)(4) and (O) of this section, a report made under this section is confidential."). In addition, "[t]he information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report." *Id*.

{¶10} Nevertheless, reports of child abuse are not absolutely confidential and the court may, after conducting an in-camera inspection of the relevant records, order disclosure for good cause, but only if disclosure outweighs considerations of confidentiality. *In re J.C.*, 8th Dist. Cuyahoga No. 87028, 2006-Ohio-2893, ¶ 18. "In this context, the term 'good cause' means 'when it is in the best interests of the child or when the due process rights of other subjects of the record are implicated.'" *Id*., quoting *Swartzentruber v. Orrville Grace Brethren Church*, 163 Ohio App.3d 96, 2005-Ohio-4264, 836 N.E.2d 619, ¶ 9 (9th Dist.).

{¶11} The hotline referral was made around the same time that the case worker had conversations with the foster parents about adopting the children. But even if we accept the mother's argument that trial counsel should have attempted to subpoena the hotline records in order to prove that the foster parents had a motive to accuse the mother of abuse in order to further their aim of adoption, we find no prejudice from the failure to do so. The foster mother was asked at trial whether she would be willing to adopt the children if the agency obtained permanent custody of them, and she replied it was "something that we are willing to consider." This was such an equivocal statement of interest in adopting the children that it would not reasonably support an insinuation that the foster mother falsified an allegation that the mother physically abused K.B. in order to further a goal of adopting them.

{¶12} This leads to a broader point: the mother relies on speculation that the foster parents made the call and further speculation that they falsified the allegations against the mother to serve their interest in adopting the children. "[S]peculation is insufficient to demonstrate prejudice as defined by *Strickland* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674], i.e., a reasonable probability that, but for counsel's alleged errors, the outcome of the proceeding would have been different." *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 142. In any event, the court was well-aware of the inconsistency in how K.B. suffered the black eye because the case worker conceded in cross-examination that the investigation of the hotline allegations was inconclusive — it concluded that abuse "was indicated, meaning that something happened, but they aren't sure what happened." The court was also aware that the foster parents had discussed their interest in adopting the children at around the same time the hotline referral caused the agency to terminate temporary custody and seek protective supervision. Even if the foster parents had reported the abuse as alleged by the mother, there is no reasonable probability that production of that fact alone would have changed the outcome of this case.

{¶13} The mother argues that even if trial counsel had no obligation to subpoena the hotline records, trial counsel could have asked the foster mother whether she made the hotline call. We reject this argument because there is no indication in the record that trial counsel knew the answer to this question. It is an old legal adage that an attorney should never ask a question on cross-examination without knowing how the witness will answer. As the mother necessarily acknowledges, she did not know who reported the abuse, so there was no indication that trial counsel would have known the answer to the question. This was an important consideration: had the foster mother denied making the hotline referral, it would have destroyed the mother's theory that the foster mother fabricated the child abuse in order to further the aim of adoption. In addition, a negative response from the foster mother would have indicated that there was a second person other than the foster mother (who testified to K.B.'s bruising and claim that the mother caused the bruising) to believe that the child had been abused. The risk of the added weight that a second claim of abuse would have given to the agency's case would have outweighed any possibility that the foster mother may have admitted making the hotline referral. And even if trial counsel took the chance and the foster mother admitted making the referral, it would not necessarily follow that she fabricated the abuse allegation solely to further her aim of adopting the children. There is no question that the child suffered bruising, so the cause of that bruising would have gone to the foster mother's credibility in relating what the child told her, an issue that, standing alone, was unlikely to affect the outcome of the trial. We conclude that trial counsel's refusal to ask the question fell within the ambit of

debatable trial tactics that do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101.

{¶14} Finally, the mother complains that trial counsel should have objected to the contents of the guardian ad litem's report and testimony on grounds that both contained references to documents that are hearsay and unavailable for review.

{¶15} A guardian ad litem is an "agent of the court," *In re K.W.*, 2d Dist. Clark No. 2013-CA-107, 2014-Ohio-4606, ¶ 17, and charged with providing the court with information "to assist it in making sound decisions concerning permanent custody placements." *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 13. A report issued by a guardian ad litem is offered to explain the basis for a recommendation, *Ash v. Dean*, 2016-Ohio-5589, 70 N.E.3d 987, ¶ 25 (10th Dist.), so "a guardian ad litem may testify to others' out-of-court statements to explain how the information conveyed in those statements shaped her conclusions." *Id*., citing *Sypherd v. Sypherd*, 9th Dist. Summit No. 25815, 2012-Ohio-2615, ¶ 13. It follows that a guardian ad litem's report is not considered evidence. *In re Sherman*, 3d Dist. Hancock Nos. 05-04-47, 05-04-48, and 05-04-49, 2005-Ohio-5888, ¶ 29; *In re K.W.* at ¶ 17. "[A] juvenile court may consider the GAL's report despite hearsay within it, so long as the trial court provides due process protection for the parent by making the GAL available for cross-examination." *In re S.W.*, 12th Dist. Brown No. CA2011-12-028, 2012-Ohio-3199, ¶ 14.

{¶16} The guardian ad litem was present at trial and subjected to cross-examination by the mother's trial counsel. During that cross-examination, the guardian ad litem testified that she did not speak directly with the children's service providers, but reviewed all of their records and monthly reports when preparing her report. The makers of those reports were themselves offered as witnesses at trial and subject to cross-examination by the mother. We thus have no basis for reversing the court's judgment on grounds that the guardian ad litem's report and testimony relied on hearsay.

III. Best Interests

{¶17} Finally, the mother complains that the court's judgment that granting permanent custody of the children to the agency would be in their best interests is flawed and incapable of review because important pieces of evidence supporting the trial court's judgment are not a part of the record on appeal. She complains that unnamed reports relied upon by the guardian ad litem and unverified child abuse hotline referrals were never reviewed by the court.

{¶18} We reject the mother's argument to the extent it attempts to rehash conclusions we have reached regarding the guardian ad litem's report and the child abuse hotline referral. Her remaining argument consists of language that appears to challenge the court's best interests finding, but do not actually maintain that the court abused its discretion by finding that granting permanent custody of the children to the agency would be in their best interests. In fact, at no point does the mother's brief reference R.C. 2151.414 (although that statute is listed in the table of contents), nor does she even use the word "discretion" in her argument. With no discernable argument consistent with the requirements of App.R. 16(A)(7), we summarily overrule the final assignment of error.

{¶19} Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to 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.

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MELODY J. STEWART, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR