[Cite as *In re L.R.S.*, 2017-Ohio-2604.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN RE: L.R.S. AND A.N.W., DEPENDENT CHILDREN.	:	**O P I N I O N**
	:	**CASE NOS. 2016-P-0050**
	:	**2016-P-0051**

Civil Appeals from the Portage County Court of Common Pleas, Juvenile Division. Case Nos. 2016 JCC 133 and 2016 JCC 134.

Judgment: Affirmed.

Stephen C. Lawson, 250 South Chestnut Street, Suite 17, Ravenna, OH 44266 (For Appellants, Neal and Diane White).

Gerrit M. Denheijer, Guilitto Law Office, L.L.P., 222 West Main Street, P.O. Box 350, Ravenna, OH 44266 (For Appellees Charles and Dorothea Beverly).

Wesley C. Buchanan, Buchanan Law, Inc., 12 East Exchange Street, 5th Floor, Akron, OH 44308 (Guardian ad litem).

TIMOTHY P. CANNON, J.

{¶1} In this consolidated appeal, appellants, Neal White and Diane White, appeal the July 13, 2016 judgment of the Portage County Court of Common Pleas, Juvenile Division, granting legal custody of the minor children, L.R.S. (d.o.b. 9/10/09) and A.N.W. (d.o.b. 3/13/12), to appellees, Charles Beverly and Dorothea Beverly, effectively denying appellants' competing motion for custody.

{¶2} L.R.S., age 7, and A.N.W., age 5, have the same mother, Aubrie White. A.N.W.'s father is Leland Wright. The biological father of L.R.S. is unknown and paternity was never established, but Leland Wright acted as his father since L.R.S. was very young.

{¶3} Aubrie White and Leland Wright were both killed in an automobile accident on February 19, 2016.

{¶4} On February 24, 2016, the Portage County Department of Jobs and Family Services ("PCDJFS") filed a complaint alleging L.R.S. and A.N.W. were dependent children. PCDJFS also filed a motion for pre-dispositional interim temporary custody of the minor children, and a shelter care hearing was held. Although pre-dispositional custody of the children was awarded to PCDJFS, they were placed in the home of their maternal great aunt, Anna White. A Guardian Ad Litem was also appointed for the children.

{¶5} Appellants, the maternal aunt and uncle of L.R.S. and A.N.W., filed a motion to intervene on the same date as this order. Appellants live in the state of Washington. They later filed a motion for legal custody of both children on March 15, 2016.

{¶6} On March 2, 2016, Joseph Wright and Elisabeth Wright, the paternal grandparents of A.N.W. and persons who had established a bond with L.R.S., filed a motion to intervene and motion for legal custody of both minor children.

{¶7} On March 17, 2016, the trial court granted the motions to intervene of appellants and of the Wrights.

{¶8} On March 24, 2016, the trial court entered judgment accepting the stipulations from the parties and the Guardian Ad Litem that the children were dependent and should remain in the pre-dispositional interim temporary custody of PCDJFS.

{¶9} On April 28, 2016, Leland Wright's third cousin, Dorothea Beverly, and her husband, Charles Beverly, appellees herein, filed a motion to intervene and a motion for legal or temporary custody. Their motion to intervene was granted.

{¶10} On May 19, 2016, the court accepted the stipulations of the parties. The children remained in the temporary custody of PCDJFS.

{¶11} On May 31, 2016, the Guardian Ad Litem filed a motion to appoint independent counsel for the minor children and a motion for an in camera interview of the children. The trial court overruled the motions, stating the children were unable to have meaningful dialogue with counsel and unable to have meaningful dialogue as to their wishes with regard to their disposition.

{¶12} The Guardian Ad Litem filed his report on June 16, 2016. He recommended legal custody to the Wrights, with orders of visitation for appellants and appellees.

{¶13} A dispositional hearing was held on June 17, 2016. On July 13, 2016, the trial court entered judgment, finding it in the best interest of the children to be placed in the custody of appellees. The trial court ordered that appellants would have visitation with the minor children "for a minimum of 45 days during summer school break, one week alternating every year Christmas and Spring break * * * and for other reasonable visitation times when the Whites are in Ohio on seven (7) days notice to the Beverlys[.]"

Additionally, the court ordered that other maternal relatives may visit with the children at reasonable times upon reasonable notice, that the Wrights should have reasonable visitation, and that other paternal relatives in Washington State may have reasonable visitation when the children are in Washington State.

{¶14} Appellants filed a timely notice of appeal on August 12, 2016.

{¶15} On appeal, appellants assert two assignments of error:

> [1.] It was an abuse of discretion and error for the trial court to disallow the testimony of the caregiver as to the stated wishes of the minor children.
>
> [2.] It was an abuse of discretion for the trial court to place the minor children with the appellees, as this is not in the best interests of the minor children.

{¶16} In their first assignment of error, appellants argue the trial court erred when it did not allow the children's temporary caregiver, Anna White, to testify as to the minor children's wishes with regard to custody. Appellants argue the trial court abused its discretion when it disallowed the hearsay testimony because the children's wishes were relevant in the determination of their best interests.

{¶17} Under Evid.R. 802, hearsay is inadmissible unless a valid exception exists. Juv.R. 34(B)(2) provides an exception for the court to admit hearsay during dispositional hearings in custody cases: "the court may admit evidence that is material and relevant, including, but not limited to hearsay, opinion, and documentary evidence[.]" Although we generally apply a de novo standard of review to determine whether evidence constitutes hearsay or non-hearsay, where an exception exists and the trial court is allowed to admit hearsay, we review the trial court's decision for an abuse of discretion. *See Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing,*

Ltd., 11th Dist. Lake No. 2012- L-145, 2014-Ohio-2875, ¶23; *see also In re Spaulding*, 6th Dist. Lucas No. L-92-180, 1993 WL 115934, *4 (Apr. 16, 1993).

{¶18} Before an appellate court may reverse an evidentiary ruling of the trial court, an appellant "must affirmatively demonstrate through the record on appeal not only that error was committed, in the technical sense, but also that such error was prejudicial to appellant[.]" *Moser v. Moser*, 72 Ohio App.3d 575, 579-580 (3d Dist.1991). A party assigning error to the trial court's exclusion of evidence must have objected to the exclusion at trial and made an offer of proof. Evid.R. 103(A)(1) & (2).

{¶19} "'[A]n offering party must show what a witness was expected to testify to and what that evidence would have proven or tended to prove.'" *Ross v. St. Elizabeth Health Ctr.*, 7th Dist. Mahoning No. 08 MA 17, 2009-Ohio-1506, ¶29, quoting *State v. Darrah*, 12th Dist. Warren No. CA2006-09-109, 2007-Ohio-7080, ¶22 (citation omitted). The proffer of the expected testimony must be sufficient to place the reviewing court on notice of what the testimony would have been. *Moser, supra,* at 580.

{¶20} Here, on direct examination of Anna White by counsel for PCDJFS, the trial court excluded her testimony as to the wishes of the children because it was hearsay. Counsel explained that hearsay may be admitted in a dispositional hearing, but the trial court refused to allow the testimony, stating, "[t]hese children [aren't] capable of testifying since they're under the age of ten and the presumption is unless they qualify to testify that they can't testify." Although counsel objected to the exclusion of Ms. White's testimony, there was no proffer regarding what her testimony would have been with regard to the statements the children made to her regarding their wishes. Since this court does not know what that testimony would have been, we cannot

determine if appellants were prejudiced by the exclusion of that testimony or if the trial court abused its discretion in its ruling.

{¶21} Appellants' first assignment of error is without merit.

{¶22} In their second assignment of error, appellants argue the trial court abused its discretion because it failed to consider all of the relevant factors in determining the best interest of the children. Appellants further maintain that the reasoning of the court in granting legal custody to appellees is unknown because the trial court did not state in its ruling what evidence it considered. Appellants also argue they should have been granted legal custody because they are more closely related to the minor children than appellees.

{¶23} In custody cases, "[t]he appellate court must keep in mind that the trial court is better equipped to examine and weigh the evidence, determine the credibility of the witnesses, and make decisions concerning custody." *Terry L. v. Eva E.*, 12th Dist. Madison No. CA2006-05-019, 2007-Ohio-916, ¶9 (citation omitted). Accordingly, the standard of review in custody cases is whether the trial court abused its discretion. *Brandt v. Brandt*, 11th Dist. Geauga No. 2012-G-3064, 2012-Ohio-5932, ¶11, citing *Liston v. Liston*, 11th Dist. Portage No. 2011-P-0068, 2012-Ohio-3031, ¶15. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler,* 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). "In determining whether the trial court has abused its discretion, a reviewing court is not to weigh the evidence, 'but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court.'" *Foxhall v. Lauderdale*, 11th Dist. Portage No. 2011-P-0006,

2011-Ohio-6213, ¶28, quoting *Clyborn v. Clyborn*, 93 Ohio App.3d 192, 196 (3d Dist.1994).

{¶24} R.C. 2151.353(A)(3) provides, in pertinent part, that "[i]f a child is adjudicated [a] dependent child, the court may * * * [a]ward legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child[.]" Legal custody "vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." Juv.R. 2(V).

{¶25} When a juvenile court makes a legal custody determination incident to a dependency action under R.C. 2151.353, it must consider the totality of the circumstances, including the factors set out in R.C. 3109.04(F). *In re Mitchell*, 11th Dist. Lake Nos. 2002-L-078 & 2002-L-079, 2003-Ohio-4102, ¶14 (citation omitted). However, the trial court is not required to expressly consider or balance those factors before awarding custody. *Id.* The trial court is not required to make express findings of fact unless it has a Civ.R. 52 motion before it as long as there is some indication in the judgment entry that the trial court considered the best interests of the children. *In re K.L.S.*, 11th Dist. Trumbull No. 2011-T-0077, 2012-Ohio-2563, ¶37. Here, appellants did not request that the trial court issue findings of fact and conclusions of law under Civ.R. 52.

{¶26} The trial court's judgment entry states the trial court "reviewed the record, testimony of the witnesses, and evidence presented and O.R.C.

3109.04(F)(1)(c)(d)(e)(f) and (j) in determining the 'best interest' of the children, in making its decision." The trial court found that among appellants, appellees, and the Wrights, none of the couples had a criminal record, all couples were financially able to take care of the children and had medical insurance to cover the children, all couples saw the need for counseling for the children, and all couples were approved by the agencies conducting the home studies. The trial court found each couple suitable to assume legal custody of L.R.S. and A.N.W, stating, "L.R.S. and A.N.W. are very fortunate that they have quality relatives ready and able to assume legal custody." Here, the trial court had to choose the most suitable couple out of three capable options.

{¶27} In determining it was in the best interest of the children to grant custody to appellees, the trial court made several findings of fact that are supported by the record. The trial court stated Appellee Dorothea Beverly, although a fourth cousin to A.N.W. and unrelated to L.R.S., has been like an aunt to the children. This finding shows the trial court considered the fact that appellees are not closely related to the children, but found they still have a strong relationship with the children. The trial court also found Appellee Charles Beverly works unusual hours that make him available to the children most of the year, and that appellees would be in a better position to be liberal with visitation. The trial court stated appellants were "outstanding people," but noted they have had to move and may be required to move again in the future. The trial court also found their proposal for summer visitation "is not as generous as the Court would have liked."

{¶28} It is apparent the trial court considered the totality of the circumstances and the factors set out in R.C. 3109.04, and that the evidence supports its findings. Therefore, the trial court did not abuse its discretion in awarding legal custody to appellees.

{¶29} Appellants' second assignment of error is without merit.

{¶30} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

DIANE V. GRENDELL, J.,

concur.