[Cite as *In re E.S.*, 2011-Ohio-586.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: E.S.	:	APPEAL NOS. C-100725, C-100747
	:	TRIAL NO. F04-02307x
	:	*D E C I S I O N.*
	:	
	:	

Civil Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 11, 2011

Timothy McKenna, for Appellant Laura Stiver,

Susannah M. Meyer, for Appellant Latonie Smith,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Katie Woodside*, Assistant Prosecuting Attorney, for Appellee Hamilton County Department of Job and Family Services.

Please note: This case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Appellants Laura Stiver ("Mother") and Latonie Smith ("Father") appeal a judgment of the Hamilton County Juvenile Court adopting a magistrate's decision to grant permanent custody of their child, E.S., to the Hamilton County Department of Job and Family Services ("HCJFS"). Mother raises one assignment of error, and Father raises six. For the following reasons, we overrule their assignments of error and affirm the judgment of the trial court.

Mother's Assignment of Error

{¶2} In her sole assignment of error, Mother argues that the trial court erred by granting permanent custody of E.S. to HCJFS. A court may grant permanent custody of a child to an agency if it determines, by clear and convincing evidence, that (1) doing so is in the best interest of the child, and (2) the child cannot or should not be placed with either of the child's parents within a reasonable time.[1] In addition, absent narrowly defined exceptions, the agency must make "reasonable efforts to reunify the family during the child-custody proceedings prior to the termination of parental rights."[2]

{¶3} The trial court made the appropriate findings, but Mother challenges each as either contrary to the manifest weight of the evidence or based upon insufficient evidence. Because this is a civil case, the tests for reviewing the weight and sufficiency of the evidence are essentially the same.[3] We will not reverse the trial court's findings as

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[1] R.C. 2151.414(B)(1).
[2] *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, at ¶43.
[3] *Capeheart v. O'Brien*, 1st Dist. No. C-040223, 2005-Ohio-3033, at ¶11.

long as they were supported by some competent, credible evidence.[4] We hold in this case that they were.

{¶4} Mother first argues that that it was contrary to the manifest weight of the evidence to find that granting permanent custody was in the child's best interest. When considering the best interest of a child, a court must take into account all relevant factors, including (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers, out-of-home providers, and any other person who may significantly affect the child; (2) the wishes of the child, as expressed directly by the child or through the child's guardian ad litem; (3) the custodial history of the child, including whether the child has been in the temporary custody of public or private children services agencies for 12 or more months; and (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody.[5]

{¶5} Having reviewed the record, we are satisfied that the trial court considered each of these factors and that the court based its finding on competent, credible evidence that met the clear-and-convincing standard. The court relied on evidence of (1) the child's relationships with the child's parents, grandparents, and foster caregivers, (2) the guardian ad litem's recommendation to grant permanent

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[4] Here, the court was required to support its findings with clear and convincing evidence. See R.C. 2151.414(B)(1); *In re C.F.* at ¶70. This standard is met when the evidence creates a "firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

[5] *In re Kennedy*, 1st Dist. No. C-060758, 2007-Ohio-548, at ¶19 (citing R.C. 2151.414[D][1]).

custody to HCJFS, (3) the child's custodial history in his foster home, and (4) the inability of Mother and Father to provide a stable, permanent home. The court also considered evidence of the parents' lengthy substance-abuse history, their close relationships with relatives accused of sexual abuse, and Father's ongoing—and only sporadically treated—mental-health issues. We hold, therefore, that the finding concerning the best interest of the child was not contrary to the manifest weight of the evidence.

{¶6} Next, Mother argues that there was insufficient evidence for the trial court to find that E.S. could not and should not be placed with Mother within a reasonable time. Such a finding is mandatory when a court determines that one of several statutory factors applies to each parent.[6] After considering the evidence, the trial court concluded that three applied to Father and that four applied to Mother.[7]

{¶7} For instance, there is no dispute that Mother had permanently lost custody of other children. Therefore, under R.C. 2151.414(E)(11), it became Mother's burden to show that she could provide a legally secure permanent placement for E.S. and provide adequate care for the child's health, welfare, and safety. The trial court concluded that she had not met this burden despite her assurances. This alone required

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[6] R.C. 2151.414(E). See R.C. 2151.414(E)(1) through (16).

[7] Specifically, the trial court found that (1) Mother and Father had not remedied the problems that caused HCJFS to become involved with the family; (2) Mother had a lengthy substance-abuse history and Father had a lengthy history of mental-health and substance-abuse issues; (3) Mother had other children who had been placed in the permanent custody of the state; (4) Mother abused cocaine with E.S.; (5) Father was engaged in mental-health treatment but did not understand the need for ongoing treatment, (6) Mother and Father failed to appreciate the risk of their child being around relatives accused of sexual abuse; and (7) Mother and Father could not adequately protect their child from known risks. See R.C. 2151.414(E)(1), (2), (11) and (16).

the finding that E.S. could not or should not have been placed with Mother within a reasonable time.[8] Having reviewed the record, we are satisfied that the trial court relied upon competent, credible evidence to show, under the clear-and-convincing standard, that several R.C. 2151.414(E) factors applied to Mother and Father, each of which independently required a finding that E.S. could not and should not have been placed with either parent.

{¶8} Finally, Mother argues that there was insufficient evidence to find that HCJFS had made reasonable efforts to reunify the family. Mother cites the testimony of an HCJFS caseworker who indicated that the agency had planned to seek permanent custody of E.S. even if Mother fully complied with her case plan. The caseworker expressed concerns regarding Mother's extensive substance-abuse history and the fact that Mother's parental rights had been terminated in the past.

{¶9} However, the issue was not whether there was anything more that the agency could have done, but whether the agency's case planning and efforts were reasonable under the circumstances.[9] That HCJFS may have planned to continue seeking permanent custody of E.S. did not render the agency's efforts per se unreasonable. With competent, credible evidence that was clear and convincing, the

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[8] There was also competent, credible evidence under the clear-and-convincing standard to show that Mother and Father had not substantially remedied the conditions that had caused HCJFS to become involved with E.S. despite reasonable efforts by the agency to reunify the family. Although Mother had committed herself to sobriety and had tested negative in recent toxicology screens, the trial court also considered evidence of her lengthy substance-abuse history—including past relapses—and ultimately doubted her ability to remain sober. We are bound by such credibility determinations of the trial court. *In re Harris*, 1st Dist. No. C-020512, 2003-Ohio-672, at ¶16.

[9] *In re S.L.*, 3d Dist. Nos. 4-10-09 and 4-10-10, 2010-Ohio-6380, at ¶49.

trial court found that HCJFS had provided Mother with a chemical-dependency assessment and random toxicology screens. Given her substance-abuse history, this evidence was sufficient to support a finding that the agency had made reasonable efforts to reunify the family.

{¶10} Accordingly, Mother's sole assignment of error is overruled.

Father's Assignments of Error

{¶11} In his first assignment of error, Father argues that the trial court committed plain error by accepting his admissions without determining whether he understood their consequences. Specifically, he refers to a September 3, 2009, hearing at which he stipulated to several facts alleged in the amended complaint for permanent custody. Father maintains that this violated Juv.R. 29(D) as well as constitutional guarantees of due process and due course of law.[10]

{¶12} Under Juv.R. 29(D), a court must address a party personally before accepting his or her admissions to determine that (1) the admissions are voluntary and made with an understanding of their nature and consequences, and (2) the party understands that by admitting to the facts he or she is waiving the rights to challenge witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.[11] Courts do not require strict compliance with Juv.R. 29(D);[12]

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[10] See Section 1, Fourteenth Amendment to the United States Constitution; Section 16, Article I, Ohio Constitution.
[11] *In re Etter* (1998), 134 Ohio App.3d 484, 488, 731 N.E.2d 694.
[12] See id. at 489 ("A trial court need not recite the provisions of the rule verbatim. Nor must a court's inquiry constitute a formal colloquy.").

however, in cases that threaten the permanent loss of parental rights, it is plain error for a court not to comply substantially with the rule's requirements. We review a court's degree of compliance with Juv.R. 29(D) de novo.[13]

{¶13} Father complains that the trial court never informed him that it would use his admissions to adjudicate E.S. abused and dependent, and that the consequences of this adjudication would be that HCJFS would obtain permanent custody of E.S. Despite this contention, the court determined that Father had made his admissions voluntarily, and it told Father that it would decide whether to adjudicate E.S. abused and dependent based on those admissions. The court also warned Father that there would be no trial, no witnesses, and no evidence introduced. Therefore, we hold that the trial court substantially complied with Juv.R. 29(D). This substantial compliance also comported with the constitutional guarantees of due process and due course of law. Father's first assignment of error is overruled.

{¶14} In his second assignment of error, Father argues that the trial court abused its discretion by finding that E.S. could not be placed with Father within a reasonable time because HCJFS failed to demonstrate that it had made reasonable efforts to reunify the family. "When there is competent and credible evidence to support the trial court's decision concerning child custody, that decision will not be overturned absent an abuse of discretion."[14]

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[13] See *In re R.A.*, 11th Dist. No. 2009-P-0063, 2010-Ohio-3687, at ¶15.
[14] *Schaeffer v. Schaeffer*, 1st Dist. Nos. C-020721, C-020722, C-030255, and C-030385, 2004-Ohio-2032, at ¶20.

{¶15} The trial court found that HCJFS had provided Father with reasonable efforts by offering a chemical-dependency assessment and mental-health case management. In addition, there was competent, credible evidence under the clear-and-convincing standard to show that Father had not complied with his mental-health case plan and saw little need for continued mental-health treatment. Further, Father cites nothing in the record to show that this finding was arbitrary, unreasonable, or unconscionable. Therefore, Father's second assignment of error is overruled.

{¶16} In his third assignment of error, Father argues that the trial court abused its discretion by failing to discuss all the required factors under R.C. 2151.414(D)(1) when it determined that granting HCJFS permanent custody was in the child's best interest. Specifically, Father alleges that the trial court did not discuss (1) the child's interaction and interrelationship with Father[15] and (2) whether the child's need for a legally secure permanent placement could be achieved without granting permanent custody to the agency.[16] However, as we have already determined, the court considered these factors and, therefore, did not abuse its discretion. Father's third assignment of error is overruled.

{¶17} In his fourth assignment of error, Father argues that it was against the weight and sufficiency of the evidence for the trial court to terminate his parental rights. Specifically, he maintains that there was insufficient evidence in the absence of expert

[15] R.C. 2151.414(D)(1)(a).
[16] R.C. 2151.414(D)(1)(d).

testimony to support a finding that he could not care for his child due to his mental condition.

{¶18} Father cites *In re Bowman* from the Tenth Appellate District in his brief. However, we find *Bowman* distinguishable, as that court considered the best interests of a developmentally disabled child, not whether a parent has a chronic mental illness that renders the parent unable to care for his or her child.[17] In this case, the trial court relied on evidence that Father had been diagnosed with bipolar and schizo-affective disorders, and that he had only sporadically complied with his mental-health treatment. Therefore, there was competent, credible evidence under the clear-and-convincing standard to show that Father's mental health was so severely impaired that he could not provide adequate care for E.S. for at least a year.

{¶19} Furthermore, even if we were to accept Father's argument, the result of this case would not change. As we have stated, the trial court made numerous findings that required it to determine that E.S. could not and should not be placed with Father within a reasonable time. The court also considered many other factors in deciding that permanent custody was in the child's best interest. These findings were based on competent, credible evidence that also met the clear-and-convincing standard. Therefore, we overrule Father's fourth assignment of error.

{¶20} In his fifth assignment of error, Father argues that his constitutional rights to a fair trial, due process, and due course of law were violated when the trial

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[17] See R.C. 2151.414(E)(2).

court failed to appoint an expert *sua sponte* to evaluate the disputed issue of his mental condition.

{¶21} This court addressed whether the United States and Ohio constitutions require courts to appoint psychiatric experts to assist indigent parents in permanent-custody proceedings in which a parent's mental health is at issue in *In re Brown*.[18] There, a mother's attorney specifically asked the court to appoint an expert to review her psychiatric records, which the state had subpoenaed. The trial court denied the request, and we reversed. However, unlike *Brown*, Father never asked for an expert to evaluate his mental condition in this case. If a party fails to request an expert at trial, he or she waives that issue on appeal.[19] Likewise, in another permanent-custody case, one of our sister districts noted a lack of authority requiring it "to make a sua sponte appointment [of an expert] in the absence of a request by the indigent party or his/her counsel."[20]

{¶22} Further, as we have noted in our discussion of Father's fourth assignment of error, even if we were to accept Father's argument, the error would have been harmless given the other multiple and independent grounds upon which the trial court found that granting permanent custody to HCJFS was in the best interest of the child, and that E.S. should not and could not have been placed with Father within a reasonable time. Therefore, we overrule Father's fifth assignment of error.

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[18] *In re Brown* (Nov. 26, 1986), 1st Dist. No. C-850878.
[19] *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081.
[20] *In re M.W.*, 8th Dist. No. 83409, 2005-Ohio-1305.

{¶23} In his last assignment of error, Father argues that he was denied the effective assistance of counsel because his attorney (1) did not cross-examine the guardian ad litem and (2) did not offer favorable evidence to rebut the claim by HCJFS that the maternal grandfather was a sex offender.

{¶24} Under R.C. 2151.352 and Juv.R. 4, parents in permanent-custody proceedings have the right to counsel, which includes the right to effective assistance of counsel: "the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody."[21] Therefore, to prevail in this case, Father must show that his counsel's performance was deficient and that the deficient performance so prejudiced him that it denied him a proceeding whose result was reliable and fundamentally fair.[22] "In order to show deficient performance, [Father] must prove that his counsel's performance fell below an objective level of reasonable representation. To show prejudice, [Father] must show a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different."[23] Father has failed to do so.

{¶25} Father relies on *In re Hoffman* in which the Ohio Supreme Court recognized a party's right to cross-examine guardians ad litem in permanent-custody proceedings when their reports will have a bearing on a court's decision.[24] However,

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[21] Id.
[22] Id. (citing *Lockhart v. Fretwell* [1993], 506 U.S. 364, 372, 113 S.Ct. 838; *Strickland v. Washington* [1984], 466 U.S. 668, 693, 104 S.Ct. 2052).
[23] *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶133.
[24] *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, at ¶25.

Hoffman in no way stands for the proposition that the failure to cross-examine a guardian ad litem rises to the level of ineffective assistance of counsel. In fact, "trial counsel need not cross-examine every witness."[25] This type of decision "is firmly committed to trial counsel's judgment."[26] Father has failed to demonstrate how counsel's decision fell below an objective level of reasonable representation in this case. He also does not indicate how, but for his counsel's alleged errors, the result of the proceeding would have been different. Father's sixth assignment of error is overruled, and the trial court's judgment is affirmed.

Judgment affirmed.

HILDEBRANDT, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry this date.

[25] *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶120.
[26] Id.