[Cite as *In re C.S.*, 2010-Ohio-4463.]

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

IN RE: C. S.	C.A. No. 25344
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DN 08-06-470

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

MOORE, Judge.

{¶1} Appellant, Alaina C., ("Mother") has appealed from the judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her child, C.S., and placed the child in the permanent custody of the Summit County Children Services Board ("CSB"). This Court reverses.

I.

{¶2} C.S. was born on May 5, 1996. Her mother is Alaina C. and her father is unknown. C.S. lived with Mother until approximately 2003 when Mother sought assistance with child care from members of her family. C.S. stayed with various relatives until May 2008 when her maternal great-aunt, Wilma Smith, was no longer willing or able to keep the child in her care due to her own declining health and the child's occasionally aggressive behavior. On June 13, 2008, CSB initiated this case.

{¶3} On September 12, 2008, C.S. was adjudicated dependent and was placed in the temporary custody of the agency. A case plan was developed to attempt to reunite Mother and C.S. The plan focused on Mother's need to address parenting skills, obtain safe and stable housing, maintain a steady source of verifiable income, and address mental health concerns. Over the course of these proceedings, Mother obtained stable housing, secured stable income, and maintained regular contact with medical providers at Portage Path to obtain medications for depression and anxiety. Her attendance for counseling was somewhat less consistent. The child's counselor testified that Mother was involved in two incidents of discipline of her child prior to 2003 that may have been considered abusive towards C.S., but there is no evidence of any court findings that Mother ever abused her child. In 2006, Mother completed parenting classes, which included anger management. It is unclear whether she attended additional parenting classes, as requested, more recently. There is no evidence that Mother has a criminal record or a problem with substance abuse.

{¶4} In September 2009, CSB moved for permanent custody of C.S., asserting that C.S. had been in the temporary custody of the agency for more than 12 of 22 consecutive months, that the child's father had abandoned her, and that permanent custody was in the best interest of the child. On March 15, 2010, the trial court granted CSB's motion for permanent custody and terminated the parents' parental rights. Mother appeals and assigns one error for review.

II.

Assignment of Error

> "The trial court erred in finding that permanent custody was supported by clear and convincing evidence; the grant of permanent custody was against the manifest weight of the evidence; and was contrary to the best interest of the minor child."

{¶5} Mother challenges the trial court conclusion that permanent custody was in the best interest of C.S. by asserting that the decision was not supported by the weight of the evidence. Before a juvenile court can terminate parental rights and award permanent custody of a child to a proper moving agency, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99.

{¶6} The trial court found that the first prong of the permanent custody test was satisfied because C.S. had been in the temporary custody of CSB for more than 12 of the prior 22 months and that the child's father had abandoned her. Mother does not challenge the trial court's findings on the first prong of the permanent custody test, but instead maintains that the trial court's finding that permanent custody was in the best interest of C.S. was against the weight of the evidence.

{¶7} To satisfy the best interest prong of the permanent custody test, CSB was required to establish, by clear and convincing evidence, that the order of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). In so doing, 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 her life. See *In re R.G.*, 9th

Dist. Nos. 24834 & 24850, 2009-Ohio-6284, at ¶11. "Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors." *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711. See, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, at ¶24.

{¶8} When evaluating whether a judgment is against the manifest weight of the evidence in a permanent custody case, this Court reviews the entire record and

> "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the [judgment].'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Accordingly, before reversing a judgment as being against the manifest weight of the evidence in this context, the court must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice. See *In re M.C.*, 9th Dist. No. 24797, 2009-Ohio-5544, at ¶8 and ¶17.

Overview

{¶9} In presenting her appellate argument on the best interest factors, Mother points to the fact that she was not permitted to have any visitation or other contact with her daughter for nearly eighteen months during this case. Mother asserts that this prohibition has affected several of the best interest factors that are fundamental to the result in this matter and that the evidence, therefore, does not clearly and convincingly weigh in favor of termination.

{¶10} We are not unmindful that there are matters in this record which might counsel against Mother's ability to parent this child. Moreover, we do not suggest that Mother should, at this time, automatically gain custody of her daughter. The fact, however, that C.S. and Mother

were unable to have even minimal contact for nearly a year and a half has distorted the significance of evidence on the best interest factors, and especially on such key factors as the parent-child relationship and the child's wishes for her own custody – and not just one factor as asserted by the dissent. The result is that the evidence presented at the permanent custody hearing does not demonstrate clearly and convincingly that this parent-child relationship must be permanently terminated. See R.C. 2151.414(B)(1) and R.C. 2151.414(D)(1)(a) and (b).

{¶11} The denial of visitation is even more troublesome because the first prong of the permanent custody test was not established substantively, as for example, through evidence why the child could not or should not be returned to a parent within a reasonable time. See R.C. 2151.414(B)(1)(a). Instead, CSB chose to rely on the mere passage of time, even requesting a six-month extension of temporary custody and filing its motion for permanent custody just past the twelve-month marker. See, e.g., R.C. 2151.414(B)(1)(d).

{¶12} This Court is also concerned with the fact that much reliance was placed on a history based on records that were not entered into evidence. In opening argument, CSB's attorney explained that, "the case is in large part based on history, [including] prior cases * * * in Georgia * * * and * * * Summit County[.]" In closing, CSB's attorney again emphasized the importance of past proceedings: "Your Honor, in some ways this feels like a case that has lasted ten years because we've heard so much history." In addition to these comments, a key prosecution witness testified that she relied heavily on out-of-state records in reaching critical opinions. Over objection, her testimony was allowed. Significantly, none of the records from any Georgia or earlier Ohio proceedings were admitted into evidence and are not, therefore, included in the record before this Court. Even the trial judge indicated, at one point, that she had no information about what "the legal relationship" was in Georgia.

{¶13} When the state seeks to terminate parental rights, a fundamental liberty interest is involved. *Santosky v. Kramer* (1982), 455 U.S. 745, 753; *In re Murray* (1990), 52 Ohio St.3d 155, 157. In such cases, parents "'must be afforded every procedural and substantive protection the law allows.'" *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. This Court is obligated to ensure that the parties have received a fair hearing, and that their constitutional and other legal rights have been recognized and enforced. R.C. 2151.01. Unless a parent-child relationship has been measured by fair procedures, the courts exceed their bounds in terminating that relationship. Accordingly, and as explained more fully below, this Court sustains Mother's sole assignment of error.

The custodial history of the child

{¶14} The custodial history of this child, as considered for purposes of R.C. 2151.414(D)(1)(c), reveals that C.S. apparently lived with Mother for the first few years of her life until going to live with paternal relatives in Georgia.[1] While it appears from the testimony that the initial placement with relatives was voluntary on the part of Mother, it may have become involuntary at some point. These details are unclear because the relevant court records are not before this Court and there are deficiencies and inconsistencies in the oral testimony. It appears that C.S. resided with relatives in Georgia for at least two years, including an intermittent stay with Mother, and then in 2005 or 2006, she came to stay with her maternal great-aunt, Ms. Smith, in Akron, Ohio, for roughly two more years. A portion of the placement time with Ms. Smith was said to have been pursuant to an Ohio court order of legal custody, but those records

[1] The people with whom C.S. stayed in Georgia were not technically biological relatives, but instead were paternal relatives of the child's siblings. We refer to them as relatives for convenience and because much of the testimony does so.

are not before this Court either.

{¶15} We have negligible information about Mother's involvement with C.S. during the time the child was in the care of the Georgia relatives. There is evidence that Mother voluntarily gave her child to these paternal relatives some time after the death of her own mother and that Mother subsequently attempted to retrieve C.S., but the relatives did not want to return her. During the time when C.S. stayed with Ms. Smith, there were no court-ordered restrictions and Mother and Ms. Smith were apparently able to set their own visitation schedule. According to Mother, she maintained a relationship and bond with her daughter during that period through regular contact. Mother testified that she saw C.S. at least once every two weeks and talked to her almost daily by telephone. The caseworker at that time, Dana Klapper, verified that Mother visited with C.S. at Ms. Smith's home and that she would also stop by for a few minutes while on her route driving an ice cream truck. Ms. Klapper described these contacts as "sporadic." Shelter Care counselor, Diane Gingo, estimated Mother's contact to be "several" times a year.

{¶16} C.S.'s placement history while she was in the custody of CSB began with an initial placement at Safe Landing. After two weeks, she was moved to a foster home. Six weeks later, she was returned to Safe Landing because she had threatened to burn down the foster home. During the second placement at Safe Landing, Mother and C.S. had one visit at which Mother was generally said to have behaved appropriately. One week later, CSB moved C.S. to Shelter Care, Inc., a site described as a family-style group home, and C.S. remained there for approximately eighteen months until the permanent custody hearing took place. During the entire time C.S. was at Shelter Care, Mother and daughter had no visits and no contact with one another until the week before the permanent custody hearing took place.

{¶17} As noted above, the record is unclear on the family's legal or custodial status while they were in Georgia, and after they returned to Ohio, the details are also uncertain. There is testimony that Ms. Smith obtained legal custody of C.S. at some point, but the record does not reveal any details of those proceedings. Regarding those earlier Ohio proceedings, we note that several of the magistrate's written orders indicate that he took "judicial notice" of two prior Summit County juvenile court cases involving C.S. See, e.g., Order of Magistrate, filed June 16, 2008; Order of Magistrate, filed August 19, 2008; Order of Magistrate, filed March 12, 2009. The problem with this procedure is that the magistrate did not specify that he was taking judicial notice of any particular facts or holdings and he did not otherwise enter any part of those proceedings into the record. Unless such matters are included in the record before the trial court, this Court is unable to review the propriety of the trial court's reliance on them. See *In re J.C.* 186 Ohio App.3d 243, 2010,-Ohio-637, at ¶15.

{¶18} Similarly, language by the magistrate indicating that interim reports by the guardian ad litem were incorporated by reference does not serve to include those documents in the appellate record. See, e.g., Magistrate's Decision, filed September 12, 2008; Magistrate's Order, filed December 3, 2008; Order of Magistrate, filed March 12, 2009; Decision of Magistrate, filed July 8, 2009. Unless such documents are included within the record, an appellate court cannot review them or the propriety of any reliance on them by the trial court.

The interaction and interrelationships of the child

{¶19} C.S. was reported to have a number of behavioral problems, some dating back at least to the time she was placed with Ms. Smith, and perhaps before that. While she was in CSB custody, C.S. occasionally suffered from depression, suicidal ideations, and angry rages. Her counselor, Ms. Gingo, diagnosed her with oppositional defiant disorder and post-traumatic mood

disorder. She stated that C.S. has improved somewhat while in care, but continues to have problems.

{¶20} By all accounts, C.S. had a positive relationship with her great-aunt, her grandfather, and her siblings and wished to continue those relationships after these proceedings conclude, wherever she is ultimately placed. C.S. also wished to continue her relationship with Mother regardless of her eventual placement. The relationship with Ms. Smith had not always been positive either. In addition to Ms. Smith's declining health, the impetus for C.S.'s removal from that home was aggressive behavior by the then twelve-year-old child, which resulted in domestic violence charges being brought against her. Apparently, Ms. Smith and C.S. resolved their relationship during the course of visits and telephone contact after C.S. left Ms. Smith's home.

{¶21} Early on, C.S. was able to visit with one local sibling, but had not seen her two out-of state siblings for several years. C.S. was able to keep in touch with them by telephone, email, and letters, but no personal visits with them were apparently allowed despite her frequent requests. Caseworker Luhring expressed her belief that C.S. "needs" to maintain contact with extended family members. She testified that if permanent custody were granted, the agency would make an effort to allow C.S. to continue her relationships with her great aunt, her grandfather, and her siblings.

{¶22} The key relationship issue in this case, however, is the relationship or the potential relationship between Mother and child, and how that has been affected by the lack of any contact between them for nearly eighteen months.

Lack of Visitation

{¶23} It is important to review the procedural facts regarding the visitation issue. The original case plan provided for supervised visitation between Mother and C.S. at the CSB Visitation Center for one hour weekly. Days after the adoption of the case plan, a visit took place on September 8, 2008. That visit was observed by the caseworker at the time, Tiffany Wilson, and the guardian ad litem, Deborah Dayton. Ms. Dayton stated in her final report that the two observers agreed that, "for [the] most part, [Mother] behaved in an appropriate manner, except when she talked about regaining custody of C.S. and her siblings[.]" At the permanent custody hearing, Ms. Dayton testified that the visit "went pretty well." Nevertheless, that was the last visit Mother and child had for nearly eighteen months.

{¶24} CSB filed an amended case plan on October 29, 2008. This plan (later described by the magistrate as never adopted by the trial court) purported to put control over Mother's visitation in the hands of Ms. Gingo, the child's counselor at Shelter Care. The amended plan stated that visits were to take place at Shelter Care, which is located in Tallmadge, Ohio, and that the frequency and duration of any visits would be determined by Shelter Care personnel. Ms. Gingo apparently also determined that it would not be in C.S.'s best interest to have visits with Mother unless and until Mother first had three therapy sessions with her at the Shelter Care site. From Ms. Gingo's testimony, it appears that she believed the original case plan allowed for this condition. She testified that "until such time that [Mother] responded to the *initial case plan* of coming in for counseling that we would postpone all visitation." (Emphasis added.) This requirement does not appear in the initial case plan. Nor, for that matter, does it appear in the amended case plan, although that document appeared to give Shelter Care the ability to control the frequency and duration of visits.

{¶25} In terms of what reasons Ms. Gingo might have had for imposing this additional requirement, the record indicates that Ms. Gingo was concerned that there was a history of abuse between Mother and daughter and that Mother made "empty promises" of reunification. She referred to two incidents, a slap to the face and the use of a wiffle baseball bat, but admitted there was no indication of abuse since 2003.

{¶26} The dissent concludes that there are more examples of abuse and that Mother "only stopped hitting the child with a belt because it 'gave too much backlash,'" and caused pain to Mother. Mother's exact testimony came in the context of admitting that she had not always used discipline in a good way and acknowledging that she had once slapped C.S. Mother stated: "Well, that slap wasn't very smart, and I'd try using belts, but that gave too much backlash. She was the one getting punished, not me." It should be noted that no one else claimed that Mother ever struck C.S. with a belt - not C.S., not any of the caseworkers, not Ms. Gingo, and not the evaluating psychologist, Dr. Robin Tener. This is significant since, despite the opportunity, those individuals referred only to a slap and a wiffle baseball bat incident as examples of improper discipline utilized by Mother. Based on the precise wording of Mother's testimony above, it is possible that Mother's efforts to discipline C.S. with the belt resulted in no harm to C.S., but only to Mother, and that Mother stopped "trying" without actually causing any harm to C.S. While Mother's testimony certainly raises questions about her approach to discipline and her thought processes, the record does not demonstrate that it is as clearly abusive as the dissent suggests. In addition, we do not know when this purported event occurred or in what context. Such details can be important in assessing Mother's behavior.

{¶27} Ms. Gingo later explained that her opinion was based on "my brief contacts [of] only one hour" with Mother and "the history that I know of mom." Significantly, Ms. Gingo

stated that most of the background and history upon which she relied came from records obtained from Georgia. None of those records were admitted into evidence or were before the trial court. For that reason, Mother's attorney specifically moved to strike the witness's testimony that was based on this history, but the motion was overruled.

{¶28} Mother attended the first therapy session with Ms. Gingo, but not the next two. As for the reasons she failed to attend, Mother later explained that she had been led to believe she would see her daughter at the sessions; the quick pace of the questions was confusing to her and she felt the interviewer did not give her time to answer one question before going to the next; she felt the interviewer accused her of using illegal drugs; and the location was a problem for her because it involved a difficult walk from the bus stop on her arthritic knees.

{¶29} Thereupon, because Mother failed to attend all three sessions, Ms. Gingo decided that a parenting evaluation was needed before Mother could have any visits with her daughter. This requirement was purportedly included in a second amended case plan, filed on December 11, 2008. That case plan (also described by the magistrate as not approved by the trial court) declared that "[C.S.] is *not permitted* to have visitation with her mother at this time. *** [Mother] will need to consistently participate in therapy and [C.S.'s] therapist (Ms. Gingo) must make the recommendation that it is in [C.S.'s] best interst [sic] to have visitation with her mother." (Emphasis added.) Ms. Gingo later testified that she believed it was in C.S.'s best interest not to have visited with Mother for the last year and one-half.

{¶30} Mother then began the process of obtaining a parenting assessment with Dr. Tener of Northeast Ohio Behavioral Health ("NEOBH"). Mother had appointments with Dr. Tener in April and May 2009, and the psychologist issued her report in June 2009. Dr. Tener made it clear that the purpose of her assessment was not with the goal of determining whether visits were

appropriate, but rather to determine Mother's mental health status.[2] Nevertheless, Dr. Tener expressed her view that Mother should not have any visitation with C.S. She expressed concern about Mother's promises to C.S. about reunification because "my feeling is that that is not what [Mother] really can do. *** [S]o it presents a setup for failure, unfortunately, for [C.S.], and that's what concerns me." According to the guardian ad litem, Dr. Tener had no plan to propose visitation between Mother and C.S. at any time in the future.

{¶31} In the meantime, Mother's attorney filed a motion with the juvenile court on March 12, 2009, seeking an order for visitation because CSB had consistently refused visitation to Mother for the last six months. Contrary to the assertions of the dissent, Mother was not seeking unrestricted visitation, but merely her one hour of supervised visitation weekly. Regardless, the motion took eleven additional months to make its way through the juvenile court and no visitation was offered to Mother in the meantime. The magistrate conducted three days of hearings over the course of three months. In his decision, the magistrate eventually ordered weekly visitation at the CSB Visitation Center pursuant to the original case plan, and indicated that the two amended case plans were never adopted by the trial court. He also found that CSB had failed to make reasonable efforts. Thereupon, CSB filed objections to the magistrate's decision. Seven months later, the trial court overruled CSB's objection as to visitation, sustained the objection to the finding on reasonable efforts, and ordered weekly visits after Mother met

[2] On the question of Mother's mental health, Dr. Tener's testing revealed that Mother had a personality disorder, not otherwise specified, with a primary feature of narcissistic personality. She added that Mother has a diagnosis of bipolar disorder and is taking medication for that condition, although Dr. Tener was uncertain whether Mother did, in fact, have a bipolar disorder. Based on her evaluation, Dr. Tener recommended that C.S. should not be placed with Mother due to concerns regarding Mother's impulse control, her ability to make good choices in relationships, her ability to manage her emotions and reactions, and her lack of insight.

with the child's therapist. Ms. Gingo agreed to meet Mother at a more convenient location for the remainder of her therapeutic visits and the second Mother-daughter visit then took place one week before the permanent custody hearing.

{¶32} In entering its ruling, the trial court found: (1) the child wants visits; (2) the one visit went well; (3) Mother is compliant with her medications and attends counseling on a walk-in basis; (4) sufficient safeguards can be put in place to allow visits without concern to the child's physical safety and emotional well-being; and (5) even if re-unification with Mother does not occur, visits in a therapeutic setting can improve the likelihood of healthy future contact. Thus, the trial court found that visitation should be provided because it was important to the reunification process and to the emotional health of the parent and child, regardless of future permanency. Unfortunately, this decision was not issued until February 12, 2010, and Mother and C.S. had just one visit the week before the permanent custody hearing was scheduled to take place. At that point, there was no time for them to develop a relationship and no realistic framework upon which the child might consider her wishes as to custody.

{¶33} Caseworker Tammy Luhring testified that, from the beginning, the goal in this case was always reunification. The trial judge recognized that visitation is a valuable part of the reunification process. Regular and frequent visitation between parents and children has traditionally been a routine component of reunification case plans. Juvenile courts have been said to have the discretion to deny visitation only in "exceptional cases." *In re Jeffrey S.* (Dec. 18, 1998), 6th Dist. No. L-96-178. This is not an exceptional case. Mother was not incarcerated, a reason sometimes cited as an exceptional situation, and the guardian ad litem reported that C.S. generally wanted to visit with Mother, although there was some vacillation during the course of these proceedings – as might be expected with such a lengthy separation. The guardian ad

litem's report concludes by asking that some visitation be worked out between Mother and C.S. because "C.S. is very adamant about wanting this."

{¶34} This Court has recently stated that visitation, properly supervised and carefully graduated, permits the parties in such custody cases to safely work towards the statutorily mandated goal of reunifying families whenever possible. *In re C.R.*, 9th Dist. Nos. 25211, 25223, 25225, 2010-Ohio-2737, at ¶25. Indeed, it has been recognized that a complete lack of visitation between parents and their children can "alienate children and break familial bonds." *In re Jeffrey S.*, supra. "Until permanent custody is granted by the court, visitations should not be prematurely curtailed, unless it can be shown that the child will truly be harmed by the visitation." Id. When there has been a lack of contact over an extended period of time, there is a risk that children's perceptions can change and children can lose a previously held desire to see their parents. See *In re McCormick* (Aug. 28, 1992), 6th Dist. No. E-91-79.

> "The testimony from the children's counselor that they had missed their mother for the first six months after visitation was stopped but then had no desire to see her after that is heartbreaking. Such gratuitous denial of visitation characterizes [the agency's] efforts to reunify mother and child as anything but diligent." Id.

Given that the goal of this case was reported to be reunification and the original case plan provided for weekly visitation, visitation was a critical component of the process. In addition, the trial judge recognized the importance of visitation to the individuals involved, regardless of the eventual outcome of the case. As noted, the trial judge specifically found that sufficient safeguards could be put in place to allow visits without concern to the child's physical safety and emotional well-being.

{¶35} In addition, we conclude that the reasons given by Ms. Gingo do not support the complete denial of visitation. Ms. Gingo expressed concern about allowing visitation because of Mother's minimal patience in terms of questions, topic changing, and anger. Ms. Gingo said the

fact that Mother jumped from topic to topic "raised some red flags." As to anger, she asserted that Mother got a bit defensive and strong as she denied substance abuse, which was never alleged, much less proven, to be a part of this case. These reasons do not support the denial of visitation based on an exceptional situation.

{¶36} Moreover, many of the reasons expressed to deny visitation appear to be based on a foregone conclusion that Mother would not be gaining custody. Ms. Gingo testified that she believed Mother had not been in regular contact with C.S. in the past, "so why get a child's hope up if mom's not going to follow through." Ms. Gingo claimed that if C.S. had visits with Mother, C.S. might have "[a]n increased hope that she's going to be possibly, you know, involved with mom *** and then if mom doesn't follow through that this could lead to further despair, sadness, depression possibly." Ms. Gingo admitted that these issues could be dealt with in therapy. These reasons do not support the denial of visitation based on an exceptional situation.

{¶37} Similarly, Dr. Tener expressed a concern that Mother's promises to C.S. about reunification would be "very compelling for a child to believe that that could happen, that mom's better, that mom can finally do what she needs to do for me, when my feeling is that that is not what [Mother] really can do. *** [S]o it presents a setup for failure, unfortunately, for [C.S.], and that's what concerns me."

{¶38} The guardian ad litem stated that she went along with the recommendation of no visitation, predominantly by relying on the opinions of Ms. Gingo and Dr. Tener, and because of their concern that if Mother failed to attend visits, it would set back C.S.'s emotional progress. However, Ms. Dayton admitted that C.S.'s emotional problems could just as likely have arisen from the fact that she was not allowed to see Mother. The guardian ad litem also allowed that

part of C.S.'s emotional problems could have been leftover from the relationship she had with her great-aunt when that relationship was not going well. According to the testimony of the guardian ad litem, it is preferable to attempt to heal a relationship between the parent and child when possible, and it is also better for the child to have visitation with a parent, especially when the child wants it and is older, such as is C.S. The guardian ad litem also pointed out that Shelter Care has a visitation program that can be conducted in a therapeutic setting with a mental health professional supervising, but Shelter Care recommended against that until the parenting evaluation had taken place.

Records Not in Evidence

{¶39} In weighing the evidence in this case, we are confronted with the fact that a key prosecution witness relied heavily on records that were never placed in evidence. Ms. Gingo, a licensed clinical counselor, was qualified to testify as an expert witness. She was largely responsible for the decisions that resulted in no visitation between Mother and C.S. and later testified that it was in the best interest of the child that Mother and child had no visits for a year and a half. In forming her opinion, Ms. Gingo explained that she relied not just on her one-hour interview of Mother, but also on the "history that there has been recurring cycles of abuse and neglect and a removal of children and a lack of follow-through[.]" When asked to explain the allegations of abuse, she cited two pre-2003 incidents and also admitted that she had not gotten into a great deal of detail on Mother's current mental health status. She said that most of the negative history she obtained about Mother's relationships, history of prior abuse, and "empty promises" to C.S., came from "records that we obtained through, you know, Georgia about her background and her history." Thereupon, Mother's attorney moved to strike the testimony based

on that history because those records were not in evidence. The trial court overruled the motion, finding that the witness was allowed to rely on those records for treatment purposes.

{¶40} In addition, CSB employee, Dana Klapper, testified regarding matters that came from the Georgia court records. In specific, she testified that some of Mother's current statements were not consistent with those court records. Thus, she sought to impeach Mother using records not in evidence. Mother's attorney objected to the testimony from the records because they were not in evidence. The trial judge overruled the objection, stating that she did not think there had been any statements given from records, although the trial judge had just previously indicated that the same witness could not have had personal knowledge of events in Georgia and, therefore, barred the witness from going further into such records.

{¶41} The Rules of Evidence apply in hearings on motions for permanent custody. Juv.R. 34(I). Evid.R. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." Thus, the rule requires that the facts or data upon which an expert bases an opinion must be either perceived by the expert or admitted into evidence at the hearing. *State v. Jones* (1984), 9 Ohio St.3d 123, 124. The Ohio Supreme Court has explained that it is sufficient if the expert relies entirely or "in major part" on facts or data perceived by him. *State v. Solomon* (1991), 59 Ohio St.3d 124, syllabus. See, also, *In re Fox* (Sept. 27, 2000), 9th Dist. Nos. 00CA0039, 00CA0038, 00CA0040, 00CA0041, abrogated on other grounds by *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, at ¶8-10, where this Court held that the opinion of the psychologist was admissible because it was based "in major part" on facts or data actually perceived by the psychologist. On the other hand, an expert may not testify to an opinion where the expert has relied in major part on records that have not been admitted into evidence. *In re*

Sherman, 3d Dist. Nos. 05-04-47, 05-04-48, 05-04-49, 2005-Ohio-5888, at ¶16-19. In that situation, the expert would be placing significant reliance on unsubstantiated hearsay that is beyond the court's ability to evaluate.

{¶42} The CSB prosecutor stated in her opening and closing arguments that this case was largely based on "history" from earlier Georgia and Ohio cases. Ms. Gingo similarly made it clear that her opinion was based in significant part upon the lengthy history provided by "the Georgia records." From the testimony at the permanent custody hearing, it is apparent that those records contain statements that amount to hearsay. These records were not admitted into evidence, and the resultant testimony was permitted over objection of Mother's attorney. Without the admission of these records or the testimony of the individuals who created those reports, that testimony does not meet the requirements of Evid.R. 703 and should have been excluded. *Sherman*, 2005-Ohio-5888, at ¶16-19.

{¶43} Ordinarily, where the trial judge is the trier of fact, it might be presumed that the judge can disregard improper hearsay evidence, unless prejudice is demonstrated. See id., citing *In re Sims* (1983), 13 Ohio App.3d 37, 41. In this case, prejudice is apparent in that at least two objections to such testimony were overruled by the trial judge and there was a resultant denial of visitation to Mother and child.

{¶44} Where there has been no visitation between a parent and child for nearly eighteen months, despite visitation being a part of the court-ordered case plan and being desired by the parent and child, evidence of their relationship is distorted and cannot be meaningfully measured. This factor does not clearly and convincingly weigh in favor of termination.

The wishes of the child

{¶45} The guardian ad litem testified that initially C.S. would have liked to have been returned to Ms. Smith, but since that became impossible due to her health, C.S. wanted to live with her siblings in Georgia. C.S. further specified, however, that she would not want to live with one of the Georgia relatives who did not get along well with Mother, because a placement there would likely mean she would not be able to see Mother, which she wanted to do.

{¶46} Shortly before the permanent custody hearing took place, C.S. expressed an interest in returning to Mother. It was apparently a serious enough interest that separate counsel was appointed to represent her. Following an in camera interview, however, the attorney represented to the court that there did not appear to be a conflict and the attorney was granted permission to withdraw.

{¶47} The guardian ad litem testified that she believes C.S. would like to live with an adoptive family, but still visit with Mother, her grandfather, and her great-aunt. Ms. Gingo similarly testified that C.S. told her that she wants to be adopted, but Ms. Gingo also acknowledged that C.S. cares about Mother. She testified that C.S. had, at one point, expressed a desire to return to her Mother and her siblings.

{¶48} In the context of C.S.'s reported belief that Mother had let the family down, the guardian ad litem verified that she never told C.S. that Mother currently has stable housing and stable income or that she was going to counseling. The guardian ad litem told C.S. very little about Mother in the last year and one-half. She left that to the counselors.

{¶49} Given the lack of contact between them, Mother has argued on appeal that C.S.'s wishes should not be given much weight. She contends, instead, that the child really would want to be returned to her care. As more fully noted above in regard to the relationship factor, a

deprivation of contact by a child with a parent can lead the child to forego a previous desire to maintain that relationship. *In re McCormick*, supra. Where there has been no contact between Mother and child for nearly eighteen months, the evidence regarding the wishes of the child, much like the evidence of their relationship, is distorted and cannot be said to be clear and convincing.

Legally secure permanent placement

{¶50} For her part, Mother has argued that she currently has stable housing and stable income. She had recently obtained a car, a driver's license, and automobile insurance. She has no criminal record and no history of problems with substance abuse. Mother had been in counseling at Portage Path since before this case began. At last report, just before the permanent custody hearing, her Portage Path counselor indicated that she was "doing pretty good with counseling" and was taking her medications. Mother has admitted to using inappropriate discipline in the past, but there is evidence of only two incidents and none since 2003. Since Mother last had custody of C.S., she has taken parenting classes that included anger management. Mother believes she can provide a home for her daughter.

Conclusion

{¶51} Again, we do not decide that Mother should have custody of her daughter; rather, only that CSB has not met its burden of clearly and convincingly establishing that Mother's parental rights should be terminated. The denial of visitation and the delays of the court system eliminated any realistic chance of reunification. Had visitation been permitted, Mother may or may not have been successful, but at least, there would have been a reasoned basis for a finding as to their relationship and the child's wishes. There was an opportunity to remove some of the uncertainty by providing visitation in a supervised, protected environment. As noted by the trial

judge, visitation would have been emotionally healthy for both Mother and daughter. This was not a case where Mother was found to have abandoned her child, nor was she denied visitation for having missed three visits in a row, a rule CSB sometimes imposes. Instead, this was a case where Mother was not permitted to continue with any visits after a reasonably successful visit. There was no evidence that this is the exceptional case where the child should not have been permitted to visit with her parent at all, and the trial court never made such a finding.

{¶52} Assuming, without deciding, that the two sets of changes to the original case plan were valid, and assuming reasonable transportation or locations for appointments were made, fault could be attributed to Mother failing to attend the remaining two therapy sessions with Ms. Gingo. But once the December 2008 case plan was filed and "no visitation" became the apparent rule, fault should not be attributed to Mother. Shortly thereafter, there began an eleven-month odyssey on a motion for visitation that ended with an order for visitation that was essentially futile.

{¶53} The dissent concludes that the two amended case plans were validly implemented pursuant to R.C. 2151.412(E)(2)(b) and discounts the magistrate's comments that they were never adopted. In ruling on the objections to the magistrate's decision on the motion for visitation, however, the trial judge specifically entered an order establishing the continued effectiveness of the original case plan and made no reference to any effectiveness of the amended case plans.

{¶54} The efforts of CSB and the service providers were not conducive to rehabilitation or reunification. The concerns expressed by the counselor and psychologist were too speculative to warrant a no-visitation order and they could have been remedied by having trained personnel supervise the visits. Moreover, the concerns were largely based on records not in evidence.

{¶55} Regardless of the reasons for the lack of visitation, the result is that Mother and C.S. did not have a meaningful process by which the question of permanent custody could be determined. In resolving evidentiary conflicts and making credibility determinations, this Court concludes that the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment of the trial court must be reversed. The weight of the evidence fails to support the judgment of the trial court. Mother's sole assignment of error is sustained.

III.

{¶56} Mother's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is reversed.

Judgment reversed,
and cause remanded.

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 Summit, 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(E). 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 Appellee.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶57} I respectfully dissent.

{¶58} I disagree with the majority's approach in its analysis relevant to this appeal. While it properly enumerates the relevant factors which must be considered pursuant to R.C. 2151.414(D), the majority focuses its analysis primarily on one facet of one factor, specifically, the relationship between Mother and child and how that was affected by the lack of visitation between them for nearly eighteen months.

{¶59} The majority concludes that the trial court's judgment awarding permanent custody to CSB is against the weight of the evidence, while asserting that Mother's lack of visitation with the child deprived the parties of "a meaningful process by which the question of permanent custody could be determined." I believe these two statements are inconsistent. Either the issue of permanent custody is ripe for consideration and the evidence supports a judgment to the agency or it does not, or the issue is not ripe for consideration due to some procedural defect such as the agency's failure to use reasonable efforts to effect reunification. See R.C. 2151.413(D)(3)(b) which states that "[a]n agency shall not file a motion for permanent custody under division (D)(1) or (2) of this section if *** reasonable efforts to return the child to the child's home are required under section 2151.419 of the Revised Code, the agency has not

provided the services required by the case plan to the parents of the child or the child to ensure the safe return of the child to the child's home." The majority opinion appears to consider reasonable efforts by the agency towards reunification as a factor in its analysis of the best interest of the child. The result is the conclusion that, because CSB failed to use reasonable efforts towards reunification by depriving Mother of visitation, the award of permanent custody was against the manifest weight of the evidence. I disagree with this reasoning and conclusion.

{¶60} I do not dispute that visitation between parent and child provides evidence of their interaction and interrelationship, as well as the opportunity for the parent to work towards the goal of reunification. However, in dependent/neglect/abuse cases where removal of the child and intervention by the State are warranted, parents are always subjected to limitations or restrictions on visitation with their children.

{¶61} It is inconceivable that a parent who has abused her child and had only limited contact with her child prior to removal would not have restrictions and conditions on visitation pending final disposition. In this case, the child reported that Mother had abused her while she still retained custody. Mother admitted to hitting the child with Wiffle-type bats and belts. In fact, she asserted that she only stopped hitting the child with a belt because it "gave too much backlash," causing Mother pain. Mother found that result unacceptable, reasoning that after all, "[s]he was the one getting punished, not me." The majority emphasizes that CSB only discussed abusive acts by Mother that occurred prior to 2003. It is important to remember, however, that Mother did not have custody of the child after that time. Wilma Smith refused to allow Mother to take the child away for unsupervised visits while she was the legal custodian. It is, therefore, not surprising that there were no further instances of abuse by Mother during that time.

{¶62} If the prior legal custodian placed restrictions on Mother's visitation with the child, it is reasonable to expect that a child welfare agency would do the same given its knowledge of Mother's history. The child's counselor had an obligation to her client. It was reasonable, given the family's history as evidenced in the records provided by other service providers, for the counselor to require sessions with Mother to gauge whether Mother posed a threat of harm to the child and how visitation could be facilitated with any necessary precautions to avoid risk to the child.

{¶63} Significantly, CSB did not deny Mother visitation with the child. Rather, the agency merely established parameters to ensure the child's safety and well-being during visits with Mother. Mother was aware of the requirement that she have three therapy sessions with Ms. Gingo before she could visit with the child. It was Mother who chose not to pursue visitation within those parameters. In fact, she admitted that she failed to comply with that requirement as a precursor to visitation because she was being "petty" and placing her own interests above her child's. The only person who foreclosed the opportunity for visitation between Mother and the child was Mother herself. It does not further the best interests of children to allow their parents to balk at the requirements designed to ensure the safety of their children during visitation and then cry procedural foul when their parental rights have been terminated.

{¶64} The majority asserts that it took the juvenile court eleven months to address Mother's March 12, 2009 motion seeking visitation and that there was no visitation order in place during that time. When the magistrate issued his decision on the motion, however, he expressly noted that there was already a visitation order in place pursuant to the terms of the original case plan and he, therefore, issued no ruling on the motion. Mother's motion for an

order of visitation was superfluous because there was already a visitation order in place. Accordingly, Mother's options were to follow the terms of the existing visitation order or file a motion for contempt if the agency failed to comply with the order. I disagree with the majority's assertion, however, that Mother and the agency were not subject to any visitation order for almost a year.

{¶65} The majority also states that the magistrate noted that the first and second amended case plans were never adopted by the court. While the trial court may not have formally adopted the amended plans, the law provides a mechanism by which they nevertheless became effective. R.C. 2151.412(E)(1) states that all parties are bound by the terms of a journalized case plan. R.C. 2151.412(E)(2) sets out the procedure by which any party may propose a modification to the case plan. Parties have seven days from the date that notice of the proposed amendment is sent in which to object and request a hearing. Id. If, however, no party objects, yet the juvenile court fails to approve and journalize the proposed amendment, CSB may nevertheless implement the proposed changes 15 days after the agency submitted the amendment to the court. R.C. 2151.412(E)(2)(b); see, also, *In re P.C.*, 9th Dist. Nos. 21734, 21739, 2004-Ohio-1230, at ¶43. Thus, the magistrate's comments about the adoption of the amended case plans are irrelevant to the issues in this appeal.

{¶66} In addition, when it ruled on CSB's objections to the magistrate's decision on the issue of visitation, the trial court ordered that "the case plan" be adopted as the order of the court, retroactive to the date of disposition. The magistrate originally found that the case plan should be adopted at the time of disposition. The reasonable inference is that the juvenile court, in an abundance of caution, was reiterating the adoption of the original case plan. Once that was done,

however, R.C. 2151.412(E)(2)(b) still served to allow for the implementation of any amended case plans by operation of law.

{¶67} Moreover, while the majority accurately reiterates the juvenile court's findings in the order on the objections, the actual order places significant limitations on Mother's ability to visit with the child. In fact, the order accords the child's therapist the discretion to control visitation between Mother and the child, requiring that Mother meet with the therapist prior to allowing any visitation and restricting visitation to a therapeutic setting "until the therapist feels that visitation can occur elsewhere in a supervised setting." Therefore, while the majority is correct in saying that the trial court found that visitation should occur, it clarified that "Mother was given the option to visit earlier under circumstances that are similar to those being outlined in this order but failed to follow through." Significantly, the trial court found that CSB had used reasonable efforts to reunify the child with her family, the implication being that Mother always had the opportunity for visitation but that she failed to comply with her obligations to facilitate visitation. In addition, while the majority is correct that the juvenile court found that visitation between Mother and child was important to the parties' emotional health, the trial court was clear that such visitation must be "in a therapeutic setting[.]"

{¶68} I disagree with the majority's heightened scrutiny of this case because CSB met the first prong of the permanent custody test merely by alleging and establishing that the child had been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period pursuant to R.C. 2151.414(B)(1)(d). The majority asserts that the first prong was not established substantively because the agency failed to allege and prove that the child cannot or should not be placed with Mother pursuant to R.C. 2151.414(B)(1)(a). This statement is legally inaccurate. The agency may establish the first prong of the test by way of any of the four

subsections enunciated in R.C. 2151.414(B)(1), including subsection (d). With the passage of HB 484 in 1998, the legislature created a paradigm shift, emphasizing timely permanence for children who were removed from their homes. The goal was to avoid situations where children were allowed to languish in the foster care system indefinitely without any sense of stability. The agency's reliance on "the mere passage of time," constitutes a significant and substantive basis in furtherance of the legislative intent to ensure timely permanence for children.

{¶69} The majority takes issue with the agency's reliance on family history included in records that were not entered into evidence. The majority's concerns do not persuade me that the evidence was not properly admitted. First, social services and mental health providers routinely and necessarily consider the records of other providers when assessing clients and creating a current plan for services. Second, the agency had no obligation, and was not trying, to establish abuse at this stage in the proceedings. Therefore, the discussion of the records of the family's history was relevant only to show one element of the basis for the providers' determinations regarding the plan for the child. Many factors, including the family's history, were important to a determination of how to establish counseling, visitation, and other service plans for the child. Third, Mother made admissions at the hearing regarding the information purportedly contained in the prior records and relied upon by the agency in conditioning visitation. Accordingly, I find no problem with the agency's elicitation of testimony regarding the family's history as contained in prior records which were not admitted into evidence.

{¶70} I would not discuss judicial notice by the magistrate of two prior juvenile court cases involving this child and the magistrate's incorporation of interim reports by the guardian ad litem because it is not relevant to the issues before this Court. The only evidence relevant to a determination of whether permanent custody was properly granted is the evidence adduced at the

permanent custody hearing which was conducted by the juvenile court judge. Therefore, any findings made by the magistrate at hearings addressing other issues are immaterial to this Court's review. Moreover, Mother has not assigned error to the magistrate's taking of judicial notice or incorporation of guardian ad litem reports, and I would, therefore, not address it.

{¶71} Based on a review of the evidence, I would affirm the juvenile court's award of permanent custody of the child to CSB because the judgment is not against the weight of the evidence. The agency presented evidence to allow the juvenile court to find, by clear and convincing evidence, that the award of permanent custody was in the best interest of the child. Mother, by her own choice and decisions, had very limited contact with the child during most of her life, whether or not a custody case was pending in any court. Throughout the child's life, Mother never exhibited the ability or desire to make an effort to establish a nurturing, meaningful, and stable relationship with the child. When the child was with Mother, she was subjected to abuse and inappropriate situations and questions. The child's custodial history has changed frequently since 2003. The child is a teenager who expressed a desire to be adopted and attain permanency and stability. This child has experienced instability and custodial disruptions throughout most of her life. No relatives are available to provide her the permanence she needs. The weight of the evidence supports the juvenile court's conclusion that permanent custody is in the best interest of this child. Accordingly, I would affirm the trial court's judgment.

APPEARANCES:

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SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.