[Cite as *In re N.E.*, 2010-Ohio-1815.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN THE MATTER OF:	:	
N.E., et al.	:	CASE NO. CA2009-12-300
	:	O P I N I O N 4/26/2010
	:	
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JN2007-0566

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BRESSLER, J.

{¶1} Appellant, the biological mother of N.E.,[1] appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, granting permanent custody of the child to the Butler County Department of Job and Family Services.

{¶2} N.E. was born on October 11, 2007. Prior to the child's birth, BCDJFS was

1. N.E.'s father has not appealed the juvenile court's decision.

involved with the mother and a half-sibling of N.E. who had been removed from the mother's home and was in agency custody. The day after N.E.'s birth, a complaint alleging dependency was filed based on the agency's prior history and concerns with the parents. N.E. was placed in the temporary custody of BCDJFS and was adjudicated dependent on March 11, 2008.

{¶3} BCFJFS moved for permanent custody of N.E. on October 10, 2008. A hearing on the motion was held before a magistrate on March 16-17, 2009. The magistrate issued a decision granting the motion for permanent custody. The parents filed objections to the magistrate's decision and the trial court remanded the case to the magistrate for a limited purpose regarding an evidentiary matter. The magistrate issued an amended decision, again granting permanent custody of N.E. to BCDJFS. The parents again filed objections, which were overruled by the trial court.

{¶4} Appellant now appeals the trial court's decision to grant permanent custody to BCDJFS. She raises the following two assignments of error for our review:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MOTHER-APPELLANT WHEN IT ADMITTED THE SOCIAL SUMMARY [ ] AND ENTERED IT INTO EVIDENCE AGAINST THE OBJECTION OF MOTHER THAT IT CONTAINED HEARSAY EVIDENCE."

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MOTHER-APPELLANT WHEN IT GRANTED THE AGENCY'S REQUEST FOR PERMANENT CUSTODY, SEVERING THE MOTHER'S RELATIONSHIP WITH HER CHILD AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED."

{¶7} In her first assignment of error, appellant argues that the trial court erred when it admitted a social summary prepared by the agency caseworker into evidence. At the hearing, Lisa Leverette, an agency caseworker, testified that she prepared a

social summary which contained the history of the agency's involvement with the child. Leverette testified that it is standard procedure for BCDJFS to create a social summary to submit to the court. Counsel for the mother objected to the admission of the document on the grounds that it contained hearsay. The magistrate admitted the document, stating he would take "into consideration when I do review it that there are certain aspects that will be hearsay and I will take that into consideration also."

{¶8} On appeal, appellant again argues that the admission of the social summary was error as it contained inadmissible hearsay. However, appellant failed to object to the admission of this exhibit when she filed objections to the magistrate's decision. The juvenile rules require written objections to a magistrate's decision to be filed within 14 days of the magistrate's decision. Juv.R. 40(D)(3)(b)(i). The rules provide that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's addition of any factual finding or legal conclusion *** unless the party has objected to that finding as required by Juv.R. 40(D)(3(b)." Juv.R. 40(D)(3)(b)(iv). This waiver under the rule embodies the long-recognized principle that the failure to draw the trial court's attention to possible error when the error could have been corrected results in a waiver of the issue for purposes of appeal. *In re Etter* (1998), 134 Ohio App.3d 484, 492. The objections made under this rule must be "specific" and must "state with particularity all grounds for objection." Juv.R. 40(D)(3)(b)(ii). "The failure to file specific objections is treated the same as the failure to file any objections." *In re D.R.*, Butler App. No. CA2009-01-018, 2009-Ohio-2805, ¶29.

{¶9} In her objections to the magistrate's first decision, appellant challenged the manifest weight of the evidence. Appellant also objected to an evidentiary issue involving the magistrate's decision to take judicial notice of the testimony and evidence in the mother's case as a juvenile with the agency and a half-sibling's case and

permanent custody decision. The trial court sustained the evidentiary issue and remanded the case for the limited purpose of allowing the parties to be heard on the judicial notice issue involving the mother's and half-sibling's cases. The magistrate issued a second decision, removing two paragraphs from the first decision which contained conclusions based on this evidence. The mother objected to the second decision of the magistrate on the exact same grounds as the previous objections. Neither of these objections contained mention of the magistrate's admission of the social summary.

{¶10} At the hearing on the second set of objections, counsel for the mother argued her position and mentioned that the court improperly admitted the social summary and argued briefly that it was inadmissible hearsay. However, Juv.R. 40(D)(3)(b)(i) clearly states that a party must file **written** objections to a magistrate's decision. Appellant's oral argument on this issue at the objection hearing is not contemplated by the rules and the issue was therefore not properly raised. See Juv.R 40(D)(3)(b)(i); *Barber v. Barber*, Columbiana App. No. 05 CO 46, 2006-Ohio-4956; *Smith v. Jenkins*, Clark Co. App, No 04CA0074, 2006-Ohio-581.

{¶11} Appellant has not argued on appeal that the admission of this exhibit was plain error. In addition, appellant has failed to address in any manner how the admission of the social summary prejudiced her. The majority of the evidence contained in the summary was testified to in some manner at the hearing and there is no indication that the trial court specifically used any evidence from the social summary not mentioned at the hearing in its decision. In fact, the court specifically stated when it admitted the social summary that it would be reviewed with the hearsay issues taken into consideration. Accordingly, we find no merit to appellant's first assignment of error.

{¶12} In her second assignment of error, appellant argues that the trial court's decision is against the manifest weight of the evidence. Specifically, she argues that the evidence shows she is ready to take her daughter back or custody could be granted to a relative. She contends she has successfully completed case plan services, maintained sobriety and demonstrated her determination to appropriately provide for and meet the needs of her child by participating in visits even though transportation was an issue.

{¶13} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey,* 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. As an appellate court reviewing a decision granting permanent custody, we neither weigh the evidence nor assess the credibility of the witnesses, but instead determine whether there is sufficient clear and convincing evidence to support the juvenile court's decision. See *In re Dunn,* Tuscarawas App. No. 2008AP030018, 2008-Ohio-3785.

{¶14} R.C. 2151.414 (B)(1) requires the juvenile court to apply a two-part test when terminating parental rights and awarding permanent custody to a children services agency. Specifically, the court must find that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and, (2) any of the following apply: the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; the child is abandoned; the child is orphaned; or the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. R.C. 2151.414

(B)(1)(a), (b), (c) and (d); *In re Schaefer,* 111 Ohio St.3d 498, 2006-Ohio-5513, ¶31-36; *In re Ebenschweiger,* Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶9.

{¶15} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶16} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶17} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶18} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

{¶19} "(d) 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 to the agency;

{¶20} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶21} With respect to R.C. 2151.414 (D)(1)(a), the juvenile court found that the child was removed approximately one day after birth and placed in foster care. She has been in the same foster home since the time of removal and is placed with her half-sibling with whom she has a close bond. She has adjusted well to the foster home, foster parents and foster-siblings and the family is interested in adoption. The foster family takes N.E. to the Help Me Grow program where she engages in physical therapy

to address some large muscle issues. The court further found that the mother, father and maternal grandmother regularly visit N.E. at the agency and for the most part appear to interact appropriately. The father missed some visits when he was deported and/or in jail. In addition, concerns were noted regarding the grandmother's lead in parenting with N.E.'s sibling and regarding the candy and junk food brought for the children during visits.

{¶22} With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that the guardian ad litem recommended that the permanent custody motion be granted as being in the best interest of N.E.

{¶23} With respect to R.C. 2151.414(D)(1)(c), the juvenile court found that N.E. has been in foster care since shortly after birth and at the time of the hearing, had been in foster care for 17 months from the time of removal.

{¶24} With respect to R.C. 2151.414 (D)(1)(d), the juvenile court found that N.E. is in need of a legally secure placement as she has been in foster care for all of her life. She is bonded with the foster family, who is interested in adoption and her half-sibling is placed in the same home. The court further found that N.E.'s only contact with her parents was twice-weekly visits and that the mother's progress on the case plan was inconsistent and incomplete. The mother was required to successfully complete an in-home parenting program, successfully complete residential substance abuse treatment, address mental health issues including psychological and psychiatric evaluations and counseling, maintain employment and maintain stable housing.

{¶25} The court found that while the mother participated in the in-home parenting classes, there were still problem areas and at the end of the program, the mother reverted to some of her old bad habits. There was also concern regarding the mother's ability to retain information from the lessons presented. The trial court detailed the

mother's various attempts at residential and nonresidential substance abuse treatment and indicated that to date the mother has not completed the required residential substance abuse treatment. The trial court indicated that the mother did not demonstrate insight into what was necessary to maintain sobriety. The mother's mental health continues to be an issue as she did not follow through with referrals nor did she take prescriptions to address her mental health issues, particularly a diagnosis of bipolar disorder and depression. The mother refused to take medication because she determined her bipolar condition is "not serious," despite professional opinions to the contrary.

{¶26} The court further found that the mother has not complied with the case plan requirement of stable employment and has depended on the income of her parents and N.E.'s father, an illegal alien who works seasonally in construction. Finally, the court found that the parents were not able to maintain stable housing and that while the case was pending the mother has moved approximately 11 times and often lived with friends or the maternal grandparents.

{¶27} The court further found that there are no appropriate family members to take custody of N.E. While the maternal grandmother testified that she would be willing to take custody of the child, she did not file a motion for custody and there was evidence that her home was not appropriate and the agency would not approve her as an appropriate custodian of the child.

{¶28} Based on consideration of these factors, the trial court determined that it is in N.E.'s best interest to grant permanent custody to the agency. Based on our review of the record, we find the court's conclusions on this finding are supported by the evidence.

{¶29} In addition to finding permanent custody was in the child's best interest,

the juvenile court examined the factors in R.C. 2151.414(E) in order to determine if the child "cannot be placed with either parent within a reasonable time or should not be placed with either parent." R.C. 2151.414(E) states that if the court determines, by clear and convincing evidence, one or more of the factors listed exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent.

{¶30} The court first considered R.C. 2151.414(E)(1), which provides:

{¶31} "Following the placement of the child outside his home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly for a period of six months or more to substantially remedy the conditions causing the child to be placed outside his home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties."

{¶32} The court found that the complaint pertaining to N.E. was filed due to the agency's history with the mother and maternal grandmother dating back to 1993, regarding issues of neglect and psychological problems, allegations involving N.E.'s sibling, drug abuse by the mother and a failure to complete drug treatment and the mother's mental health needs. The court again discussed the mother's failure to complete case plan services, including residential drug treatment, mental health issues, employment and housing requirements and found that the parents have failed continuously and repeatedly to substantially remedy the conditions that caused N.E. to

be placed outside the home.

{¶33} The court also considered R.C. 2151.414(E)(2) which addresses chronic mental illness and found the mother's bipolar condition constitutes a chronic mental illness and as a result, the mother is unable to provide an adequate home for the child at present time, or within a year. Based on these findings, the court determined that N.E. cannot be placed with either parent within a reasonable time and should not be placed with either parent. These findings by the trial court are supported by the evidence.

{¶34} We find no error in the trial court's determination that a grant of permanent custody was in N.E.'s best interest or in the court's determination that N.E. cannot be placed with her parents within a reasonable time or should not be placed with her parents. However, after making a best interest determination and a finding that the child could not be placed with either parent pursuant to R.C. 2151.414(E), the court stated, "[h]aving previously found that permanent custody is in the best interest of the minor child, and that this child cannot be placed with any parent or relative within a reasonable period of time or should not be placed with any parent or relative, this Court **is required under 2151.414(B)(2)** to grant permanent custody to the agency." (Emphasis added.)

{¶35} The requirements in R.C. 2151.413(B)(2) for granting permanent custody only apply to cases in which the court has made a previous determination that reasonable efforts are not required by the agency. *In re E.M.D.R.E.*, Butler App. Nos. CA2009-08-220, CA2009-08-222, 2010-Ohio-925; see, also, *In re A.W.* Butler App. No. CA2006-09-210, 2007-Ohio-274, fn. 2. In this case, the trial court did not make a finding pursuant to R.C. 2151.419 that reasonable efforts were not required, so the standard for granting permanent custody under R.C. 2151.414(B)(2) is not applicable. Instead, the standard in R.C. 2151.414(B)(1) applies. Because the child is not abandoned, not orphaned and has not been in the custody of the agency for 12 of 22 months prior to

filing the motion, the standard in subsection (a) applies. This subsection states that a court "**may grant**" permanent custody to the agency if it determines that permanent custody is in the best interest of the child and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents. R.C. 2151.414(B)(1)(a). While the findings underpinning each subsection are the same, this standard differs from that in the (B)(2) subsection, which states that if those findings are made, the court "**shall grant**" permanent custody of the child to the agency.

{¶36} As discussed above, we find no error in the court's determination that it is in the child's best interest to grant permanent custody to the agency or in the court's determination that the child cannot be placed with either parent or should not be placed with her parents. However, once those findings were made, the court erroneously determined that it was required to grant permanent custody under the "shall grant" language in R.C. 2151.414(B)(2). Accordingly, we must reverse the court's decision and remand this case to the trial court to determine if, having made those findings, permanent custody is proper under the "may grant" standard in R.C. 2151.414(B)(1).

{¶37} Judgment reversed and remanded.

YOUNG, P.J., and POWELL, J., concur.