

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In re:	:	
S.S.,	:	No. 12AP-322
(C.S.,	:	(C.P.C. No. 09JU-5341)
Appellant).	:	(REGULAR CALENDAR)
	:	
In re:	:	No. 12AP-323
A.L. et al.,	:	(C.P.C. No. 09JU-5339)
(C.S.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on October 16, 2012

Linda K. Allison, Guardian ad Litem for S.S., A.L., and N.L.;
and *Phyllis Rowan*, for S.S.

Nicholas J. Walstra, for appellee, Franklin County Children
Services.

William T. Cramer, for appellant.

APPEALS from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

BROWN, P.J.

{¶ 1} C.S. ("mother"), appellant, appeals from judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court granted the motion of Franklin County Children Services ("FCCS"), appellee, for permanent custody with regard to mother's three minor children, S.S., N.L., and A.L.

{¶ 2} Mother has five children, the youngest three of which – S.S., N.L., and A.L. – are the subject of the present matter. S.S., a daughter, was born in December 2004; and N.L. and A.L. (collectively "the twins"), twin sons, were born in March 2009. On April 18, 2009, mother was arrested and jailed after being involved in an altercation, while intoxicated, with one of the men alleged to be the twins' father. Several days before, FCCS had also received a referral that S.S. had been abused by the same man involved in the altercation with mother. FCCS was granted an emergency care order with regard to S.S., N.L., and A.L. On April 21, 2009, FCCS was granted a temporary order of custody. Court Appointed Special Advocates ("CASA") was appointed as guardian ad litem ("GAL") for the children. In November 2009, Melissa Hoffman became the children's caseworker, followed by Lyndsay Brumfield in October 2010, and then Angela Lykins in June 2011.

{¶ 3} On June 30, 2009, S.S. was adjudicated to be abused, neglected, and dependent, the twins were adjudicated to be dependent, and the children remained in the temporary custody of FCCS. The court then adopted a case plan, which included requirements that mother complete a drug and alcohol assessment and follow all resulting recommendations, complete random urine screens, complete a psychological evaluation and follow all resulting recommendations, maintain stable income, provide safe and stable housing, and complete a domestic violence assessment and follow resulting recommendations. On March 16, 2010, FCCS filed a motion seeking permanent custody but later withdrew the motion, and a six-month extension was granted. On November 15, 2010, another six-month extension was granted. None of the alleged fathers of any of the children has established paternity or has ever entered an appearance in the case.

{¶ 4} On March 15, 2011, FCCS filed another motion for permanent custody. After a seven-day trial over the span of several months, the trial court granted FCCS's motion for permanent custody. Mother appeals the judgments of the trial court, asserting the following assignments of error:

[I.] The juvenile court's conclusion that it was in the best interests of the children to grant permanent custody to Franklin County Children Services was not supported by clear and convincing evidence.

[II.] S.S. was denied the effective assistance of counsel because appointed counsel failed to advocate for her wishes.

{¶ 5} Mother argues in her first assignment of error that the trial court's decision regarding the best interest factors in R.C. 2151.414(D) was against the manifest weight of the evidence. A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312. Judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), paragraph one of the syllabus.

{¶ 6} A decision to award permanent custody requires the trial court to take a two-step approach. First, pursuant to R.C. 2151.414(B)(1), a trial court must find whether any of the following apply:

(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, 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.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the

child was previously in the temporary custody of an equivalent agency in another state.

{¶ 7} Once the trial court finds that one of the circumstances in R.C. 2151.414(B)(1)(a) through (d) apply, the trial court then must determine whether a grant of permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). FCCS must prove by clear and convincing evidence that an award of permanent custody is in the child's best interest. R.C. 2151.414(B)(1). Clear and convincing evidence is that degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the facts to be established. *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. It is more than a mere preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 8} With regard to the first step of the permanent custody analysis, mother does not contest that the trial court correctly determined that the children had been in the custody of FCCS for 12 months or more of a consecutive 22-month period prior to the hearing. Thus, R.C. 2151.414(B)(1)(d) has been satisfied. We note that, although the trial court also addressed the grounds under R.C. 2151.414(B)(1)(a), and correspondingly the factors under R.C. 2151.414(E), this analysis was not necessary because R.C. 2151.414(B)(1)(d) was met. *See In re S.H.*, 2d Dist. No. 24619, 2011-Ohio-4721, ¶ 6, 8 (R.C. 2151.414(B)(1)(a) and (d) are alternative findings); *In re T.W.*, 10th Dist. No. 10AP-897, 2011-Ohio-903, ¶ 51 (same); *In re T.D.*, 12th Dist. No. CA2009-01-002, 2009-Ohio-4680, ¶ 15-16 (same). Therefore, we need not review the findings under R.C. 2151.414(B)(1)(a) and the associated findings under R.C. 2151.414(E). *See In re T.W.* at ¶ 52 (when R.C. 2151.414(B)(1)(d) has been satisfied, it is unnecessary for the trial court to analyze when a child could or should be placed with either parent, and we need not consider such extraneous findings as to R.C. 2151.414(B)(1)(a)).

{¶ 9} Mother contests only the trial court's findings regarding the best interest factors. R.C. 2151.414(D) provides that, in determining the best interest of the child, the court must consider all relevant factors, including, but not limited to, the following: (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 GAL, with due regard for the maturity of the child; (3) 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 12 or more months of a consecutive 22-month period; (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 to the agency; and (5) whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child. The factors set forth in R.C. 2151.414(E)(7) through (11) include: (1) whether the parents have been convicted of or pled guilty to various crimes; (2) whether medical treatment or food has been withheld from the child; (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse; (4) whether the parent has abandoned the child; and (5) whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶ 10} In her brief, mother first contests the trial court's findings under R.C. 2151.414(D)(2), and only with regard to S.S. R.C. 2151.414(D)(2) requires the trial court to consider the wishes of the child, as expressed directly by the child or through the child's GAL, with due regard for the maturity of the child. The trial court here found that S.S. had told the GAL that she desired to live with her foster parents, the twins' wishes were not expressed because of tender years, and that the GAL firmly supported the motion for permanent custody with regard to all of the children.

{¶ 11} Mother contends that the trial court completely ignored that, during the in-camera hearing, S.S. said she did not want to live with the foster parents and indicated a desire to go home with her mother. Mother asserts that, at trial, the GAL tried to "explain this away" by insisting that S.S. consistently told the GAL that she wanted to live with the foster parents. Mother emphasizes that the trial court appointed S.S. separate counsel due to a perceived conflict between S.S.'s and the GAL's views, so it is difficult to believe that S.S. "consistently" told the GAL that she wanted to live with the foster parents. Mother also points out that FCCS's transportation worker testified that S.S. regularly said she wanted to spend more time with mother. Mother further points out that the transportation worker testified that the visits with mother went well, despite the fact that the GAL said they went poorly, thereby undermining the GAL's credibility generally.

Mother also claims that, during the in-camera hearing, at which the foster mother and the GAL were present, there were no representatives of mother present to pressure S.S.

{¶ 12} Our review of the in-camera interview, GAL's testimony, and transportation provider's testimony reveals the following. During the in-camera interview, S.S. first stated she would like to live with the foster mother. She said she did not like it when her mother cancelled visits, and it made her feel sad. She said she would be sad if she could not ever see her mother again, and she would be sad if she lived with the twins and the foster mother but could never see her mother again. When asked what was good about living with the foster mother, she responded, "nothing." When asked what would be good about living with her mother, she responded, "nothing." S.S. and her attorney also engaged in the following exchange during the in-camera interview:

ATTORNEY ROWAN: And – and if you – if you – if you get to choose, would you like to stay there?

[S.S.]: Stay where?

ATTORNEY ROWAN: With [foster mother].

[S.S.]: (Non-verbal response).

ATTORNEY ROWAN: Pardon? What is that a yes or [no]?

[S.S.]: Un-un (negative response).

ATTORNEY ROWAN: Is that a yes or no?

[S.S.]: No.

ATTORNEY ROWAN: You aren't; not sure or you don't?

[S.S.]: Not – not sure.

ATTORNEY ROWAN: Well, if you get to stay with your brothers at [foster mother] – at [foster mother's] house; what's the dad's name?

[S.S.]: [Foster dad's name].

ATTORNEY ROWAN: [Foster dad's name]. Do you call him dad or do you call him [foster dad's name] or daddy?

[S.S.]: Papa.

ATTORNEY ROWAN: Papa. And do you think you would get to finish enjoying all your drawing and gymnastics if you get to stay there?

[S.S.]: Yeah.

ATTORNEY ROWAN: Does that make you happy; would that make you happy?

[S.S.]: Uh-huh (affirmative response). And my mom is going to let me do gymnastics too.

ATTORNEY ROWAN: Uh-huh (affirmative response).

[S.S.]: She's going to let me do everything I did with [foster mother].

ATTORNEY ROWAN: Oh, really; okay.

[S.S.]: She's a nice mom.

ATTORNEY ROWAN: Oh, is that what she told you?

[S.S.]: Uh-huh (affirmative response).

ATTORNEY ROWAN: Okay. Did you do that before, when you were with your mom?

[S.S.]: (Non-verbal response).

[LAY GAL]: Where do you think [the twins] want to live?

[S.S.]: With my mom.

[LAY GAL]: With which mom?

[S.S.]: Our mom.

[LAY GAL]: [Foster mom]?

[S.S.]: Uh-huh (affirmative response).

{¶ 13} With regard to S.S.'s wishes, the CASA GAL, Peggy Blevins, testified at the hearing that she had asked S.S. on several occasions where she would like to live, and S.S. told her "several times" and "consistently" that she would like to live with the foster parents, although she would be sad if she never could see her mother again. Blevins was at the in-camera hearing, and she did not believe S.S. was comfortable or relaxed and thought she was hesitant and anxious. Blevins interpreted S.S.'s statements at the in-camera hearing as being that S.S. would miss her mother, but she wanted to live with the foster parents. Blevins testified that she had no reason to think that S.S. wanted to live anywhere but with the foster parents.

{¶ 14} Tahira Craft, a social service aide for FCCS, testified that, when she was driving S.S. after a visit with her mother on October 11, 2011, S.S. told her that she wanted to spend more time with her mother, and S.S. repeatedly told Craft that she wanted to see her mother more. Craft also testified that, during the ten times she observed visitations, mother had appropriate, safe, and positive interactions with the children, was able to feed them, and was able to prepare them for bed.

{¶ 15} Initially, it is apparent that the trial court properly found under R.C. 2151.414(D)(2) that the GAL indicated S.S. had expressed to the GAL that she desired to live with mother. The GAL's testimony was clear and explicit, in this respect. The GAL stated that S.S. consistently told her that she would like to live with the foster parents and never indicated any desire to the contrary. Thus, the trial court's portrayal of the GAL's testimony in addressing this best interest factor was not erroneous.

{¶ 16} Mother's main argument is actually a credibility argument. Mother attempts to discredit the GAL's testimony by pointing out Craft's testimony and the fact that the trial court appointed a separate attorney for S.S. However, credibility was for the finder of fact, as the trial court was best able to view the GAL and determine whether her testimony seemed truthful. *See Lumley v. Lumley*, 10th Dist. No. 09AP-556, 2009-Ohio-6992, ¶ 46, citing *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶ 70 (as the fact finder, the trial court determines the GAL's credibility). Because assessment of the credibility and weight of the evidence is reserved for the trial court, we will not second guess a court's decision regarding a GAL's testimony and recommendation. *Id.*, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 419 (1997) (the determination of credibility of

testimony and evidence must not be encroached upon by a reviewing tribunal), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984); see also *In re E.C.*, 12th Dist. No. CA2006-03-060, 2007-Ohio-39, ¶ 20, citing *Galloway* at ¶ 70 (the trial court determines a GAL's credibility). Here, we have no reason to question the trial court's apparent determination that the GAL's testimony was credible.

{¶ 17} As for Craft's testimony, Craft merely reiterated what the GAL stated; that is, S.S. liked spending time with her mother. Craft did not testify that S.S. told her that she desired to live with mother permanently or that she did not want to live with the foster parents permanently. In this regard, Craft's testimony neither contradicts the GAL's testimony nor contributes to the analysis under R.C. 2151.414(D)(2).

{¶ 18} As to mother's argument that the trial court erred when it completely ignored S.S.'s in-camera statements that she did not want to live with the foster parents and desired to go home with her mother, we fail to see where S.S. made such an indication. Our own review of S.S.'s statements reveals that they were vague, wavering, and non-committal with regard to where she wanted to live. The trial court also commented after S.S.'s interview that she seemed distracted, and the GAL agreed. Because S.S. never clearly stated her wishes in the in-camera interview, it is understandable why the trial court did not comment on them in its findings. Therefore, we can find no error in the trial court's finding with regard to the best interest factor under R.C. 2151.414(D)(2).

{¶ 19} Mother also contends that the trial court erred when it found mother's ability to parent was hampered by alcohol abuse and mental instability. We first note that the findings cited by mother in her brief were not part of the best interest analysis but, rather, were part of the unnecessary findings under R.C. 2151.414(B)(1)(a) and 2151.414(E). However, because the trial court also mentioned mother's alcohol use and mental health under its consideration of the best interest factor in R.C. 2151.414(D)(4), we will address mother's argument in relation to that factor.

{¶ 20} Under R.C. 2151.414(D)(4), a court must consider 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. In its analysis of this factor, the trial court briefly discussed mother's alcohol and drug use and found that mother was not in compliance

with the random drug screen case plan requirement. Furthermore, in its extraneous but related analysis of R.C. 2151.414(E), the court found that mother was given approximately 71 drug and alcohol screens until July 2011, of which she completed only 28, and four screens from July to October 2011, of which she did not complete any. The court also found that, despite mother's claim at trial and in a February 2010 assessment that she had not consumed alcohol since the opening of the case in April 2009, she admitted to a police officer after being pulled over in her vehicle in March 2010 that she had consumed alcohol, and she later admitted the same to a caseworker in May 2010. Also, the court found that, despite a psychological evaluation that mother completed in November 2010 that recommended a drug and alcohol assessment, mother did not complete it.

{¶ 21} With regard to the trial court's finding with respect to drug and alcohol use under R.C. 2151.414(D)(4), we can find no error. The trial court correctly found that mother did not comply with her random drug screen requirements under the case plan. We agree with mother that there was no evidence that drugs or alcohol hampered mother's abilities to care for the children during any of the visitations. Nevertheless, although mother urges the court to believe she did not have a substance abuse problem, citing the opinion of her therapist, Dr. William Blackburn, her failure to complete a substantial number of the required drug screens does not instill any confidence in this court as to her claim. Her failure to complete a large number of the drug screens shows either her fear of the results or her apathy toward regaining custody of the children. In addition, mother admitted that one screen revealed she had used a narcotic painkiller for which she did not have a prescription, and the record confirms she failed to appear for a scheduled drug and alcohol assessment. Furthermore, mother's claim that drugs and alcohol use had never caused any problems in her life is unpersuasive. Mother relies on the fact that the domestic violence charge that initiated the present case and the operating a motor vehicle while intoxicated ("OVI") charge from March 2010 were dismissed and plea bargained down, respectively; however, it is undisputed that she was intoxicated at the time of the domestic violence incident; a police officer testified that mother admitted she had consumed alcohol prior to the OVI charge and failed a sobriety test; and Brumfield, a caseworker at FCCS, testified that mother admitted she had alcohol the night of the OVI charge. Thus, to say that alcohol use has never caused any problems is

disingenuous. We cannot find the trial court's findings regarding mother's alcohol and drug use were unsupported by the record.

{¶ 22} With regard to mother's mental health under R.C. 2151.414(D)(4), the trial court found that mother did not follow the recommendations of her psychological evaluation and did not show an understanding of the developmental levels of her children. In its extraneous but related analysis under R.C. 2151.414(E), the trial court also found that mother's ability to learn how to nurture, structure, feed, and supervise the children via parenting classes was limited by mother's cognitive skills, even though FCCS arranged for her to complete an in-home, hands-on mentoring program to demonstrate how to care for the children. The trial court also found that mother's mental health was unstable, and she was referred to counseling that she was unable to successfully complete.

{¶ 23} Mother argues that her mental health status was never the problem. Mother asserts that it was always her mental capacity – her ability to learn and adapt – that caused her difficulties, and the trial court did not understand the nature of the problem. We disagree. The trial court's explicit findings acknowledged mother's limited cognitive skills and addressed her inability to understand the developmental levels of her children and to learn how to care for the children. The trial court's conclusions, in this respect, were supported by the record. Hoffman, a caseworker, testified she did not believe mother applied to visitations what she learned at her parenting classes. Also, Blevins saw no improvement in mother's parenting skills for the two and one-half years she observed mother. Blevins also testified that a worker from Berea Family Services did a lot of parental "modeling" and demonstrations for mother, but Blevins never saw mother emulating the worker's actions. The Berea employee also tried to get mother to plan activities for future visits, but mother would still fail to prepare activities before arriving at the next visits. Blevins testified that she also told mother repeatedly to fix certain things in her house to make them less dangerous for the children, but she would not implement them.

{¶ 24} There was testimony that FCCS's employees were aware of mother's intellectual functioning, and they took it into account in attempting to help mother. Brumfield acknowledged that mother was diagnosed with borderline intellectual functioning. She said she explained concepts very clearly and simplified concepts down to

the appropriate level of functioning. She also used simple words and avoided complex sentences. She stated she was trained to adjust her communications to the level of understanding of the clients. Although she testified that she did not know how borderline intellectual functioning and mother's diagnosis of depressive disorder might interact to require a different approach to instructing mother, when she learned the results of mother's psychological examination, she used different words and sentences to convey her ideas to mother. She believed she communicated clearly to mother, and she believed mother understood what she was saying to her. Hoffman also testified that, when she explained things to mother, mother gave no indication that she did not understand what Hoffman had explained. Hoffman said mother always had a lot of questions, and she always answered them. For these reasons, we find the trial court understood the nature of the problem with mother's intellectual functioning, and the evidence in the record supports the trial court's determination that mother could not learn how to care for her children, despite the efforts of FCCS to work with her within her intellectual boundaries. Therefore, we can find no error in the trial court's finding with regard to the best interest factor under R.C. 2151.414(D)(4).

{¶ 25} Although mother does not raise any error with respect to the remaining best interest factors, we have reviewed the trial court's analysis and the record before us and agree with the trial court's analysis. There was clear and convincing evidence to support the court's findings regarding these factors. For all the above reasons, mother's first assignment of error is overruled.

{¶ 26} Mother argues in her second assignment of error that S.S. was denied effective assistance of counsel because her appointed counsel failed to advocate for her wishes. FCCS initially contests whether mother has standing to raise this argument. Parents have standing to appeal an error committed against their children only if the error is prejudicial to the parents' rights. *In re B.L.*, 10th Dist. No. 04AP-1108, 2005-Ohio-1151, ¶ 44, citing *In re Smith*, 77 Ohio App.3d 1, 13 (6th Dist.1991). Thus, when parents and their child all have the same interest – reunification of the family – the parents have standing to assert on appeal that their child's attorney provided ineffective assistance of counsel when the attorney did not adequately represent that interest for the child. *Id.*, citing *Smith* and *In re Moody*, 4th Dist. No. 00CA5 (June 28, 2001).

{¶ 27} Here, as mentioned above, mother contends S.S. desired reunification with her, while FCCS maintains that S.S. did not desire reunification. The only clear evidence in the record as to S.S.'s wishes is the testimony at the hearing, at which the GAL, Blevins, testified that S.S. told her continually that she desired to live permanently with the foster parents. As we found above, S.S.'s statements during her in-camera interview were non-committal and inconclusive on the issue. Thus, mother does not have standing to raise the issue of the ineffectiveness of S.S.'s counsel, as there is no evidence that mother's and S.S.'s desires coincided. Furthermore, even if we were to address mother's argument, mother's only basis for ineffectiveness is counsel's failure to advocate S.S.'s wishes to live with mother, as she believes were expressed in camera, which, again, is not what S.S. expressed. For these reasons, we must reject mother's arguments and overrule her second assignment of error.

{¶ 28} Accordingly, mother's first and second assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, are affirmed.

Judgments affirmed.

SADLER and CONNOR, JJ., concur.
