

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:	:	
K.J.D.,	:	No. 12AP-652
(M.S.S.,	:	(C.P.C. No. 06JU-18965)
Appellant).	:	(REGULAR CALENDAR)
In the Matter of:	:	
K.R.D.,	:	No. 12AP-653
(M.S.S.,	:	(C.P.C. No. 10JU-5851)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 21, 2013

Robert J. McClaren, for Franklin County Children Services.

Reynard & Rice, LLP, and *Jeff Reynard*, for appellant.

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

BRYANT, J.

{¶ 1} Appellant-mother, M.S.S., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating her parental rights and awarding permanent custody of her two children, K.J.D. and K.R.D., to Franklin County Children Services ("FCCS"). Because: (1) the requisite competent, credible evidence supports the trial court's determination; and (2) M.S.S. did

not establish prejudice as a result of the trial court's decisions regarding the level of participation of her Guardian ad Litem ("GAL") at trial, we affirm.

I. Facts and Procedural History

{¶ 2} M.S.S. gave birth to K.J.D. on December 23, 2006; both M.S.S. and K.J.D. tested positive for cocaine, and M.S.S. also tested positive for marijuana. Three days later, FCCS filed a complaint to have K.J.D. declared neglected, dependent, or both, due to M.S.S.'s substance abuse during pregnancy. As a result, K.J.D. was placed in foster care upon leaving the hospital. On March 29, 2007, the court filed a judgment finding K.J.D. to be an abused, neglected, and dependent child and granted temporary custody to FCCS. FCCS created a case plan for M.S.S. with the goal of reunifying her with K.J.D. While K.J.D. was in FCCS's custody, M.S.S. gave birth to K.R.D. on October 6, 2008.

{¶ 3} On April 21, 2009, FCCS filed a motion to terminate temporary custody and return K.J.D. to M.S.S. with court-ordered protective supervision. In a May 8, 2009 judgment entry, the trial court granted FCCS's motion and returned K.J.D. to M.S.S.'s custody under FCCS's protective supervision. After a caseworker discovered K.R.D. unsupervised during a scheduled home visit on February 2, 2010, FCCS filed a motion for shelter care for both children, and the magistrate issued an emergency care order to FCCS pending a custody hearing. FCCS developed a new case plan for M.S.S. with the goal of reunifying her with both children, and the trial court granted a temporary order of custody to FCCS as to both.

{¶ 4} In a November 17, 2010 filing, FCCS requested permanent custody of K.J.D. and K.R.D. After a number of continuances for various reasons in 2011, the trial court was able to commence a dispositional hearing on December 5, 2011 but, "[d]ue to Mother's confused and irrational mental condition during cross examination, the matter was continued from that date and by agreement of the parties, a Guardian ad Litem was appointed for mother." (R. 459, July 6, 2012 Decision and Judgment Entry.) On March 14, 2012, K.J.D. and K.R.D.'s maternal grandmother, M.A.S., filed a motion seeking legal custody of the children. After further delays concerning the children's representation, the matter was tried, and the trial court issued its decision granting FCCS permanent custody of K.J.D. and K.R.D.

II. Assignments of Error

{¶ 5} M.S.S. timely appeals, assigning the following errors:

[I.] THERE IS INSUFFICIENT CREDIBLE EVIDENCE TO SUPPORT THE JUDGMENT OF THE TRIAL COURT.

[II.] THE TRIAL COURT ERRED IN NOT PERMITTING THE GUARDIAN AD LITEM FOR MOTHER TO PARTICIPATE IN THE TRIAL.

III. First Assignment of Error - Clear and Convincing Evidence

{¶ 6} In her first assignment of error, M.S.S. asserts the trial court erred in granting permanent custody of K.J.D. and K.R.D. to FCCS because the record lacks the requisite evidence.

{¶ 7} As M.S.S. correctly asserts, the right to rear a child is a basic and essential civil right. *In re O.J.*, 10th Dist. No. 05AP-810, 2006-Ohio-286, ¶ 9, citing *In re Hayes*, 79 Ohio St.3d 46 (1997). Consequently, a parent must be given every procedural and substantive protection the law allows before that parent's rights to rearing the child are terminated. *Id.* Due process includes a hearing upon adequate notice, assistance of counsel, and, under most circumstances, the right to be present at the hearing. *Id.*, citing *In re Thompson*, 10th Dist. No. 00AP-1358 (Apr. 26, 2001). A parent's natural rights nonetheless are subject to the ultimate welfare of the child. As a result, although a parent has a constitutionally protected right to rear his or her child, the right may be terminated when necessary for the best interest of the child. *In re S.W.*, 10th Dist. No. 05AP-1368, 2006-Ohio-2958, ¶ 7, citing *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979).

{¶ 8} Once a child is determined to be dependent, neglected or abused as defined in R.C. 2151.04, the court may enter an order of disposition provided for in R.C. 2151.353(A), including committing the child to the temporary custody of the agency pursuant to R.C. 2151.353(A)(2). After a court has granted the agency temporary custody pursuant to R.C. 2151.353(A)(2), the agency may file a motion under R.C. 2151.413(A) to request permanent custody of the child and thus terminate parental rights.

{¶ 9} To terminate parental rights pursuant to an R.C. 2151.413 motion for permanent custody, the court must conduct a hearing at which it determines by clear and convincing evidence that: (1) one of the four factors enumerated in R.C. 2151.414(B)(1)

applies, and (2) such action is in the child's best interests. R.C. 2151.414(A)(1); 2151.414(B)(1); *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 22 (noting that once an R.C. 2151.413 motion for permanent custody is filed, the court must follow R.C. 2151.414). Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. *O.J.* at ¶ 10, citing *In re Abram*, 10th Dist. No. 04AP-220, 2004-Ohio-5435. It does not mean the evidence must be unequivocal; nor does the standard require proof beyond a reasonable doubt. *Id.*

{¶ 10} On appellate review, permanent custody motions supported by the requisite evidence going to all the essential elements of the case will not be reversed as against the manifest weight of the evidence. *In re Brown*, 10th Dist. No. 03AP-969, 2004-Ohio-3314, ¶ 11, citing *In re Brofford*, 83 Ohio App.3d 869 (10th Dist.1992). In determining whether a judgment is against the manifest weight of the evidence, the reviewing court is guided by the presumption that the findings of the trial court are correct. *Brofford* at 876, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 11} Here, the trial court held a hearing in accordance with R.C. 2151.414(A)(1). The court's judgment entry reviewed the circumstances surrounding custody and addressed each of the pertinent R.C. 2151.414 statutory factors.

A. R.C. 2151.414(B)(1) Factors

{¶ 12} FCCS needed to demonstrate at least one of the R.C. 2151.414(B)(1) factors applied to each child. The trial court determined it met its burden, and the record supports the trial court's determination.

1. R.C. 2151.414(B)(1)(d) and K.J.D.

{¶ 13} Under R.C. 2151.414(B)(1)(d), a court may grant permanent custody if 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." For purposes of R.C. 2151.414(B)(1)(d), a child "shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated [to temporary custody] or the date that is sixty days after the removal of the child from home." Here, the trial court found, and M.S.S. does not dispute, that FCCS

could obtain permanent custody of K.J.D. under the twelve out of twenty-two rule, as K.J.D. was in FCCS's temporary custody for "twelve or more months of a consecutive twenty-two-month period" immediately prior to FCCS's permanent custody motion. Accordingly, we need not address any other R.C. 2151.414(B)(1) factors regarding K.J.D.

2. R.C. 2151.414(B)(1)(a) and K.R.D.

{¶ 14} Unlike K.J.D., K.R.D. was not in FCCS's temporary custody for at least 12 months of a consecutive 22-month period. Applying R.C. 2151.414(B)(1)(a), the trial court determined whether FCCS proved K.R.D. could not "be placed with her mother within a reasonable time and should not be placed with either of her parents," taking into account the factors in R.C. 2151.414(E). (Decision and Judgment Entry, at 14.) To that end, the trial court found "FCCS presented clear and convincing evidence at trial as to the existence of factors [R.C. 2151.414](E)(1), (E)(2), (E)(4), (E)(9), (E)(10), and (E)(14) as to [M.S.S.] and [(E)](1), (E)(4), and (E)(10), as to each child's father." (Decision and Judgment Entry, at 15.) The evidence supports the trial court's determination.

{¶ 15} Initially, FCCS has not been able to identify either child's biological father. M.S.S. was not able to provide FCCS with information as to K.R.D.'s father other than that he is a drug dealer named Frank. K.J.D.'s biological father has not been located, and the child's legal father neither has any role in the child's life nor has seen the child for several years. M.S.S. does not challenge the trial court's findings as to the children's fathers.

{¶ 16} As to whether the children could be placed with M.S.S. herself within a reasonable time, or should be placed with her, the trial court determined FCCS staff engaged in both "reasonable case planning and diligent efforts" to assist M.S.S. in remedying the problems that initially caused the children to be placed outside the home, yet M.S.S. still "failed continuously and repeatedly to substantially remedy the conditions that caused the initial removal." (Decision and Judgment Entry, at 13.) *See* R.C. 2151.414(E)(1). The record supports the trial court's conclusion.

{¶ 17} After the children were removed from M.S.S.'s custody in 2010, FCCS developed a case plan with the goal of reunifying the children with their mother. The case plan stemmed from the reunification case plan FCCS created for M.S.S. in 2006 after K.J.D.'s removal at birth from M.S.S.'s care. The new case plan required M.S.S. to maintain stable housing and employment, complete parenting classes and demonstrate

skills learned, consistently visit the children, obtain substance abuse and mental health counseling, and complete random urine screens.

{¶ 18} According to the evidence, M.S.S. struggles with substance abuse and has a history of abusing cocaine, alcohol, marijuana, and prescription drugs such as Percocet, Xanax, and Seroquel, often without a prescription. *See* R.C. 2151.414(E)(2). At trial, she stated she was then self-medicating with Suboxone in order to treat her opiate addiction. She also admitted to taking un-prescribed Xanax regularly until approximately one month before trial, when she stopped "because they cost too much." (June 18, 2012 Tr. 30.) She stated she was using marijuana as a replacement for the Xanax, and she last smoked marijuana "two days ago." (June 18, 2012 Tr. 28.)

{¶ 19} M.S.S. has ongoing mental health issues as well. *See* R.C. 2151.414(E)(2). She testified she knows she has "got a mental problem," she cannot "remember stuff" and uses the drugs "for [her] nerves until [she] can get [her] mental health stuff every now and then." (June 18, 2012 Tr. 11, 15.) An FCCS caseworker testified that M.S.S. had threatened her with physical violence on multiple occasions.

{¶ 20} M.S.S. had some success participating in substance abuse and mental health treatment pursuant to the case plan created after K.J.D. was placed in FCCS's custody in December 2006, enough that K.J.D. was returned to her custody in April 2009. "[S]hortly after reunification," M.S.S. stopped attending counseling. (June 19, 2012 Tr. 13.) M.S.S.'s caseworker testified that in November 2009, she "made a referral for Berea that does in-home mental health services, they also have a psychiatric doctor" who would have come "into the home to provide mom with services." (June 19, 2012 Tr. 16.) Berea set up two appointments with M.S.S., "but she failed to meet at either appointment." (June 19, 2012 Tr. 16.) The caseworker further testified that Berea wanted to cancel its services, but FCCS convinced it to give M.S.S. one more chance. When Berea set up another appointment in December 2009, M.S.S. again "failed to meet that appointment, and so therefore, they terminated their services, closed their case." (June 19, 2012 Tr. 16.)

{¶ 21} Since the children were removed from M.S.S.'s care in February 2010, FCCS has secured M.S.S. placement in several substance abuse treatment and mental health counseling programs but she has not successfully completed any of those programs. Shortly after the children's removal, and in accordance with the new case plan, FCCS

connected M.S.S. to North Central Mental Health (Family Focus), an alcohol and drug treatment program with a mental health component; M.S.S. was "discharged for non-compliance" in July 2011. (June 19, 2012 Tr. 8.) FCCS also "linked" M.S.S. with a seven-day detoxification program intended to include aftercare, but M.S.S. failed to engage with the aftercare program. As of April 2012, M.S.S. also had gone through the orientation for a program with Southeast Mental Health, but the program determined she was not capable of participating in the intended 12-week recovery group after she arrived at one meeting under the influence of prescription drugs, and fell asleep during another meeting.

{¶ 22} In addition, M.S.S. regularly failed to submit the drug screens required as part of her reunification case plan, and she frequently tested positive to the screens she submitted. M.S.S.'s testimony makes clear that she never obtained stable housing; rather, she stayed at various relatives' and friends' houses. She did not secure steady legal employment, but lived on money from her parents, occasional work at a cousin's appliance store, and money obtained on several occasions by driving to Florida, procuring prescription pain pills, and selling the pills in Ohio.

{¶ 23} To M.S.S.'s credit, the evidence indicates she attended visitation regularly for long stretches of time. Further, when M.S.S. was with the children, she worked on maintaining her bond with them and they looked forward to seeing her. M.S.S., however, did not see K.J.D. between December 2007 and July 2008 during K.J.D.'s first removal from M.S.S.'s care. After both children were removed from M.S.S.'s care in February 2010, she did not see them from July 2011 to December 2011. *See* R.C. 2151.414(E)(4) and (10).

{¶ 24} Overall, the evidence indicates M.S.S. failed to remedy any of the personal issues that caused her to lose custody in 2010. Although she and her children have a bond, M.S.S. has serious drug abuse and mental health problems that prevent her from capably caring for her children or providing for their basic needs. *See* R.C. 2151.414(E)(14). Over the six years since K.J.D. was first removed from her care, M.S.S. has not made significant and lasting progress in critical aspects of her life, including her substance abuse and mental health issues and her ability to provide and care for K.J.D. and K.R.D., despite FCCS's attempts to provide support.

{¶ 25} Furthermore, M.S.S.'s failure to make progress with her personal issues reflects her failure to demonstrate commitment to achieving her case plan goals. "Failure to complete significant aspects of a case plan despite opportunities to do so is grounds for terminating parental rights." *O.J.* at ¶ 14, citing *In re M.L.J.*, 10th Dist. No. 04AP-152, 2004-Ohio-4358; *Brofford* at 878 (observing that "noncompliance with the case plan is a ground for termination of parental rights"); *In re Bailey*, 11th Dist. No. 2001-G-2340 (July 20, 2001); *In re Carr*, 5th Dist. No. 2004-CA-00256, 2004-Ohio-6144.

{¶ 26} The trial court thus did not err in finding clear and convincing evidence that K.R.D. could not be placed with M.S.S. within a reasonable time and should not be placed with M.S.S. That R.C. 2151.414 factor being satisfied, we need not address the other factors under that section. The remaining issue is whether the best interests of the children support the trial court's decision to terminate M.S.S.'s parental rights.

B. Children's Best Interest

{¶ 27} In assessing the best interests of the child, the court is to consider all relevant factors, including, but not limited to: (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; (b) 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; (c) the custodial history of the child; (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; and (e) whether any of the factors in divisions (E)(7) to (11) apply in relation to the parents and child. R.C. 2151.414(D)(1).

{¶ 28} Here, the court determined "FCCS presented clear and convincing evidence that permanent custody of [K.J.D.] and [K.R.D.] are in each child's respective best interest." (Decision and Judgment Entry, at 21, citing R.C. 2151.414(D).) M.S.S. disagrees, asserting on appeal that "[w]eighing all the factors used to determine best interests together at once does not support, by clear and convincing evidence, the proposition that the best interests of the children would be served by a grant of PCC to FCCS." (Appellant's brief, at 6.) Contrary to M.S.S.'s contentions, the trial court considered each of the R.C. 2151.414(D)(1) factors to reach its "best interest" determination.

{¶ 29} R.C. 2151.414(D)(1)(a) considers the child's interaction with parents, relatives, and foster parents. The trial court determined the children are bonded with M.S.S. and the maternal grandmother, a finding the testimony of FCCS caseworkers supports. The court, however, further found the children are bonded with their foster mother. The record supports the trial court's determination. FCCS caseworkers testified that the children are "doing well in the foster home," their GAL stated K.J.D. has a "[v]ery, very good relationship" with her foster mom, and the GAL testified K.R.D. is "also very affectionate with her." (June 20, 2012 Tr. 53, 137.)

{¶ 30} R.C. 2151.414(D)(1)(b) considers the custodial wishes of the child as expressed by the child or through their GAL. The trial court noted that, despite K.J.D.'s earlier indicating she wanted to live with M.S.S., K.J.D.'s attorney advocate testified the child, by the time of trial, wanted to remain living with her foster mother. K.R.D. was too young to express an opinion, but the children's GAL, in recommending the trial court grant permanent custody to FCCS, confirmed the advocate's testimony, stating K.J.D. "indicated she wanted to stay with foster mom." (June 20, 2012 Tr. 135.)

{¶ 31} R.C. 2151.414(D)(1)(c) addresses the child's custodial history. K.J.D. was in FCCS's custody from birth until two and one-half years of age. Less than one year after she was returned to M.S.S., FCCS regained custody and has retained it since February 2010. K.R.D. lived with M.S.S. for the first 14 months of life, was removed with K.J.D. in February 2010, and has remained in FCCS's custody since that date.

{¶ 32} R.C. 2151.414(D)(1)(d) takes into account the child's need for a legally secure placement and considers whether that placement can be achieved without a grant of permanent custody to FCCS. *See In re J.S.*, 10th Dist. No. 05AP-615, 2006-Ohio-702, ¶ 27 (observing that "[w]ithout doubt, every child needs a legally secure placement" and the pertinent "question is whether or not the parent[] can provide such a placement"). The trial court noted K.J.D. had been in FCCS's custody for over two years and no longer qualifies for temporary custody. Indeed, FCCS has had custody of both children for a substantial portion of their lives, making a priority the children's need to procure a legally secure placement. To that point, the foster mother is a possible adoptive placement for both children, and permanent custody with FCCS would allow such a placement.

{¶ 33} Further, after the children were removed from her care in 2010, M.S.S. was unable to remedy the issues that caused them to be placed with FCCS, as she could not maintain stable housing and employment and obtain substance abuse and mental health counseling. Because housing, employment, mental health, and drug abuse are unabated issues in M.S.S.'s life that show no signs of improvement, leaving the children with her was not a viable option.

{¶ 34} Finally, R.C. 2151.414(D)(1)(e) considers whether any of the factors in divisions (E)(7) to (11) apply in relation to the parents and child. The trial court found (E)(9) and (E)(10) applied. *In re Damron*, 10th Dist. No. 03AP-419, 2003-Ohio-5810, ¶ 7. The evidence reflects that M.S.S. left the children with her mother, M.A.S., where, because of M.A.S.'s responsibilities in caring for several other family members as well, the children were left unsupervised in dangerous situations, primarily because of M.S.S.'s drug abuse. R.C. 2151.414(E)(9). The record also demonstrates, under R.C. 2151.414(E)(10), that M.S.S. abandoned the children in the length of her absence from their lives. *See also* R.C. 2151.011. Competent, credible evidence supports the trial court's holding regarding the applicability of the R.C. 2151.414(E) factors to M.S.S.'s case.

{¶ 35} In the final analysis, the trial court had sufficient evidence to find by clear and convincing evidence that the children's best interests are served by placing them in the permanent custody of FCCS to facilitate their adoption into a permanent home.

C. Custody to Maternal Grandmother, M.A.S.

{¶ 36} M.S.S. argues, alternatively, that the trial court should have awarded custody to her mother, M.A.S. M.A.S. filed a motion for custody in the trial court but did not appeal the court's decision granting permanent custody to FCCS.

{¶ 37} This court previously "question[ed] whether [a parent] has standing to assert the rights of others who are not parties" to an appeal from an order terminating that parent's custody. *S.W.* at ¶ 30, citing *In re Conn*, 10th Dist. No. 03AP-348, 2003-Ohio-5344, ¶ 7; *In re W.A.*, 10th Dist. No. 06AP-485, 2006-Ohio-5750, ¶ 20. "Even if [the parent] has the requisite standing, a trial court is not required to consider placing a child with a relative prior to granting permanent custody to an agency," as relatives seeking custody of a child are not afforded the same presumptive rights that a parent receives. *Id.*, citing *In re Zorns*, 10th Dist. No. 02AP-1297, 2003-Ohio-5664, ¶ 28. Further, a "trial

court is not even required to find by clear and convincing evidence that a relative is not a suitable placement option." *S.W.* at ¶ 30, citing *J.S.* at ¶ 34. Instead, the trial court has the discretion to determine whether to place children with a relative, and we will reverse such a decision only upon an abuse of that discretion. *Id.*

{¶ 38} Here, FCCS investigated M.A.S. as a possible placement option for the children but concluded such a placement was not in the children's best interest. The trial court agreed, finding insurmountable issues that related to both M.A.S.'s own limitations and her ability to protect the children from M.S.S. The evidence at trial supports the trial court's conclusion.

{¶ 39} At the permanent custody hearing, both the FCCS caseworkers and the children's GAL challenged M.A.S.'s testimony that she could adequately care for the children. One caseworker testified she could not recommend M.A.S. for placement "[d]ue to concerns about her ability to care for the children and -- and conditions of the home." (June 19, 2012 Tr. 46.) Another caseworker testified she did not think M.A.S.'s home was safe for the children and, further, that even if the home were improved she "would still have concerns in regards to supervision." (June 20, 2012 Tr. 72.) The GAL similarly stated she had "concerns about [M.A.S.'s] ability to supervise kids." (June 20, 2012 Tr. 142.)

{¶ 40} Although M.A.S. claimed she could control M.S.S., she acknowledged M.S.S. acts against M.A.S.'s wishes without repercussions. A caseworker confirmed, noting M.A.S. could not "stand up" to her daughter, and when M.S.S. "bosses her mom around," M.A.S. "just goes with it." (June 20, 2012 Tr. 12-13.) As a result, the caseworker stated M.A.S. "doesn't have control of the things that happen in her home." (June 20, 2012 Tr. 13.) The children's GAL similarly testified M.A.S. does not have "any control over [M.S.S.] whatsoever." (June 20, 2012 Tr. 140.) Indeed, at trial when the GAL expressed to M.A.S. her concern that M.A.S. could not stop M.S.S. from taking the children away, even if M.S.S. were "using," M.A.S. responded, "I see your point. Yeah. Yeah." (June 20, 2012 Tr. 145.)

{¶ 41} Further, under M.S.S.'s own characterization, M.A.S. was the children's "primary caregiver when the children were in the home from October 2008 to February 2010." (Appellant's brief, at 3.) The time period includes the February 2, 2010 incident that led to FCCS seeking an emergency order and taking custody of both children. In that

instance, M.A.S. later explained that she left the children in the care of a relative, whom M.A.S. stated she would rely on again if she received custody of the children. Although M.S.S. claims any objections FCCS and the trial court had to M.A.S.'s abilities as a permanent placement for the children could have been remedied easily with further FCCS intervention, the trial court heard testimony from FCCS caseworkers and the children's GAL that they attempted to address ongoing issues to no avail. *See State v. DeHass*, 10 Ohio St.2d 230 (1967) (noting that, in resolving conflicts in the evidence, the credibility of the witnesses and the weight to be given to their testimony are matters for the trier of fact to resolve).

{¶ 42} Given the evidence, the trial court did not abuse its discretion in determining the children should not be placed with M.A.S.

{¶ 43} M.S.S.'s first assignment of error is overruled.

IV. Second Assignment of Error - GAL's Trial Participation

{¶ 44} M.S.S.'s second assignment of error asserts the trial court "erred in not permitting the guardian ad litem for mother to participate in the trial." (Appellant's brief, at 6.) She alleges her GAL should have been permitted to cross-examine the trial witnesses and to present a closing argument. (Appellant's brief, at 9.)

{¶ 45} FCCS asserts M.S.S. lacks standing to challenge on appeal the GAL's level of involvement at trial because, in so doing, she essentially seeks "to assert the rights of a non-appealing party." (Appellee's brief, at 22.) We decline to address the issue because, even if M.S.S. has standing to present the argument, her substantive assignment of error lacks merit. *See In re A.S.*, 10th Dist. No. 05AP-351, 2005-Ohio-5492, ¶ 9 (declining to address standing issue where parent asserted right of child to have counsel because court found no such right to counsel).

{¶ 46} R.C. 2151.281(C) and Juv.R. 4(B)(3) require that the court appoint a GAL "to protect the interests of an incompetent adult in a juvenile proceeding where the parent appears to be mentally incompetent." *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232 (1985). R.C. 2151.281(C) (providing that "[i]n any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child in which the parent appears to be mentally incompetent * * *, the court shall appoint a guardian ad litem to protect the interest of that parent"); Juv.R. 4(B)(3) (providing that "[t]he court shall

appoint a guardian *ad litem* to protect the interests of a child or incompetent adult in a juvenile court proceeding when * * * [t]he parent * * * appears to be mentally incompetent").

{¶ 47} The GAL's introduction into the proceedings "provides an additional level of protection for the incompetent parent" and "works to ensure that the parent's rights are not compromised." *In re Moore*, 12th Dist. No. CA99-09-153 (Sept. 5, 2000). The GAL's role differs from the attorney's role in that, while the attorney represents the parent's wishes, the GAL investigates the parent's situation and, regardless of the parent's wishes, recommends to the court the course of action that would be in the parent's best interest. *See Matter of Doe*, 6th Dist. No. L-93-045 (Dec. 30, 1993); *Baby Girl Baxter* at 232.

{¶ 48} Because neither M.S.S.'s counsel nor her GAL objected to the GAL's level of participation at trial, M.S.S. has forfeited all but plain error. Courts are to notice plain error under Civ.R. 52(B) "with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997).

{¶ 49} In an attempt to demonstrate plain error, M.S.S. relies on the Supreme Court of Ohio's decision in *Baby Girl Baxter*, where the appellant-parent asserted her trial representative, "who served as both her attorney and guardian ad litem in juvenile court, had conflicting duties and that he, therefore, failed to provide her with proper representation." *Id.* at 232. M.S.S. alleges *Baby Girl Baxter* implicitly requires the trial court to permit the GAL, separately from her attorney, to elicit testimony at trial. M.S.S. also cites Juv.R. 4(C)(3), which states that "[i]f a court appoints a person who is not an attorney admitted to the practice in this state to be a guardian ad litem, the court may appoint an attorney admitted to the practice in this state to serve as attorney for the guardian ad litem." From this provision, M.S.S. states "it seems apparent that the role of the GAL for a parent is to participate in the trial." (Appellant's brief, at 10.)

{¶ 50} Even if we assume, without deciding, that M.S.S.'s GAL should have been permitted to cross-examine witnesses and give a closing argument, M.S.S. has not pointed to anything in the record suggesting the GAL's not participating in proceedings prejudiced

her, much less demonstrated the level of prejudice necessary for plain error. *See In re Amber G. & Josie G.*, 6th Dist. No. L-04-1091, 2004-Ohio-5665, ¶ 17 (declining to presume prejudice and determining that, even where a GAL for a parent was not appointed but clearly should have been, whether the error constitutes reversible error depends on "whether there was any prejudice by the failure to appoint a guardian ad litem"); *In re King-Bolen*, 9th Dist. No. 3196-M (Oct. 10, 2001) (noting the "failure to appoint a guardian *ad litem* does not constitute reversible error where no request for a guardian *ad litem* is made or the party cannot show prejudice").

{¶ 51} Initially, *Baxter* and M.S.S.'s case are factually distinct in that M.S.S. had both a GAL and an attorney. Apart from the factual distinction, M.S.S.'s argument seems to misunderstand the GAL's role. The GAL is not always advocating for reunification and may believe the ward's wishes do not align with her best interests. *See Baby Girl Baxter* at 232 (noting the attorney/GAL, acting in his capacity as GAL, elicited testimony "from the psychologist that his ward-client would have great difficulty in caring for her child"); *Doe*. Accordingly, insofar as M.S.S. asserts her GAL should have been able to elicit testimony in his role as GAL, such testimony may well have been "detrimental to [the parent's] legal case." *Baby Girl Baxter* at 232.

{¶ 52} M.S.S. nonetheless asserts that because the trial court is required to consider the "interaction and interrelationship of the child with the child's parent[s]" under R.C. 2151.414(D)(1)(a), "it is important that the parent's GAL be permitted minimally to elicit testimony concerning whether the relationship is in his ward's best interest." (Appellant's brief, 10.) M.S.S., however, does not explain how, given the overall evidence, her GAL's cross-examination would have differed from her counsel's cross-examination or produced information more favorable to M.S.S. Considering M.S.S.'s challenges in areas such as housing, employment, substance abuse, and mental health, M.S.S. is less than persuasive in suggesting her GAL, if given the opportunity to participate more fully in the trial, would have advocated that having custody of her children would be in M.S.S.'s best interest. *See Amber G.* at ¶ 36 (concluding the failure to appoint a GAL did not constitute reversible error where attorney protected parent's rights by advocating for reunification and raising arguments in parent's favor); *In re Love*, 6th Dist. No. L-89-359 (Dec. 21, 1990).

{¶ 53} Moreover, the trial court's decision granting FCCS permanent custody of the children is based on substantial evidence that M.S.S. continually failed to make progress in dealing with her substance abuse and mental health issues, that she did not comply or follow through with her case plan or the various treatment programs provided through FCCS, and that she failed to find regular employment or stable housing. M.S.S. does not address how allowing her GAL to cross-examine witnesses or set forth a closing argument would have impacted the court's decision in light of such determining factors. Unable to demonstrate prejudice, M.S.S. necessarily fails to demonstrate plain error.

{¶ 54} Lastly, M.S.S., in passing, contends the record does not indicate "that there was an investigation into the mother's situation by the GAL, that the GAL for mother determined her best interests, or that the best interests of mother were expressed to the Court." (Appellant's brief, at 9.) M.S.S. did not raise the issue in an assignment of error, and it therefore is not properly before us. *Everhome Mtge. Co. v. Baker*, 10th Dist. No. 10AP-534, 2011-Ohio-3303, ¶ 20. Even if it were properly presented, M.S.S. fails to set forth any evidence establishing the GAL's actions or inaction prejudiced her case; *Doe* (determining that when a GAL "neglects his duties and fails to conduct an independent investigation, the error is harmless 'where, during the trial, the information is presented which could have been presented by the guardian ad litem' "), citing *In re: Matter of the Doe Children*, 6th Dist. No. L-92-296 (Sept. 17, 1993).

{¶ 55} M.S.S.'s second assignment of error is overruled.

V. Disposition

{¶ 56} Having overruled M.S.S.'s two assignments of error, we affirm the decisions of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgments affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
