

IN THE SUPREME COURT OF OHIO

IN RE:

CASE NO. 08-0401

**T.R.
T.H.
A.H.
D.H.**

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

**COURT OF APPEALS
CASE NO. 22291**

APPELLANT'S MERIT BRIEF

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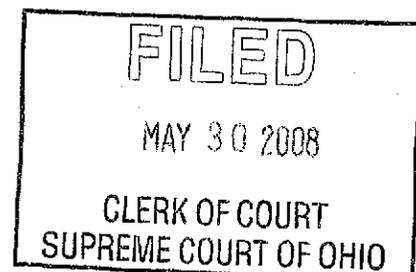


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Statement of the Case

This case is before the court on a certified conflict from the Second District Court of Appeals: “Does R.C. 2151.413(E) require a children services board to file an adoption plan with the court, prior to the court granting permanent custody of a minor child?”¹ The conflicting decisions are from the courts of appeals for the Fifth and Twelfth Districts: *In re McCutchen*² and *In re Cavender*³.

The Montgomery County Juvenile Court granted the Montgomery County Department of Job and Family Services’ motion for permanent custody of S.H.’s four children after holding the hearing required by R.C. 2151.414 and determining that the evidence the agency presented, when considered in light of the factors listed in the statute, clearly and convincingly established that it was in each child’s best interest to award permanent custody to the agency.⁴

The Second District Court of Appeals reversed, holding that, although the manifest weight of the evidence supported the juvenile court’s determination that permanent commitment was in the children’s best interests, the commitment was defective because the agency had not supplemented the case plans for the children with the adoption plans described in R.C. 2151.413(E). This was a reversal of the position the court had taken in a prior case and upon which the juvenile court and the agency relied, where the court had held that “[t]he agency is not required to set forth an exact plan for

¹ Entry, Apr. 9, 2008, Supp. 1.

² (Mar. 8, 1991), Knox App. No. 90 CA 25.

³ (Mar. 9, 2001), Madison App. No. CA 2000-06-37.

⁴ Decision and judgments, July 6, 2007.

adoption until permanent custody is granted.” *In re Muldrew*.⁵ According to the court, despite its prior holding, a juvenile court cannot determine whether an award of permanent custody is in a child’s best interest unless it considers the child’s prospects for adoption.⁶

Statement of Facts

In late December, 2003, the Montgomery County Department of Job and Family Services – Children Services Division (“MCCS”) removed S.H.’s four young children from her care, after finding the family living in a filthy, roach-infested, urine-smelling house.⁷ Two weeks later the court held a shelter-care hearing and granted interim temporary custody of the children to MCCS, who found foster families for them.⁸ T.R., the oldest, was eight at the time and had not been attending school; D.H. was just four; A.H. was almost two; and T.H., who had significant medical problems, was not quite one.⁹ At the hearing on the agency’s complaint for temporary custody, which occurred in March, 2004, the agency amended the complaint to omit allegations of abuse, S.H. agreed to give temporary custody of the children to the agency, and the juvenile court approved the case plan, which by law set family reunification as the goal of the parties.¹⁰ The court twice extended temporary custody at the agency’s request; the first time citing, among other reasons, the mother’s failure to respond to the services the agency provided because

⁵ Montgomery App. No. 19469, 2002-Ohio-7288, ¶17.

⁶ Opinion, Dec. 7, 2007.

⁷ Transcript, permanent custody hearing, p. 13. (“Tr.”)

⁸ Tr. 26, 45.

⁹ Tr. 20-21, 46, 55, 60, 98.

¹⁰ Orders of Adjudication, May 11, 2004, Supp. 6 to 8.

of her unaddressed mental health problems and housing difficulties; the second time noting that she was making progress on the case plan but needed to demonstrate an ongoing ability to meet the needs of her children and follow the plan. Both times the court found probable cause to believe the children could be reunited with their mother.

MCCS filed a motion for permanent custody for each of the children under R.C. 2151.413(D)(1) on January 26, 2006, after the children had been in temporary custody for the preceding 12 consecutive months.¹¹ One of the two men who fathered the children had some minimal contact with the children and the agency at the beginning of the proceedings, the other, whose paternity was not established, didn't. By the time of the hearing on the motion for permanent custody, neither man could be found.¹² Evidence at the hearing included the testimony of caseworkers, a foster parent, and the guardian ad litem, whose reports were also admitted. The evidence demonstrated that S.H. had lost her apartment, was neither seeing a therapist for her mental illness nor taking the medicine prescribed for it, and was not attending her children's medical or school-related appointments.¹³ This was particularly troublesome since her youngest child, who was three years old when the hearing was held, had significant medical problems, and the oldest child came into care performing well below her grade level.¹⁴

Adopting the recommendations of the magistrate and overruling S.H.'s objections, the court determined by clear and convincing evidence that commitment to the agency

¹¹ Motion for Permanent Custody, Supp. 9-11.

¹² Tr. 23-24, 33, 68-73.

¹³ Tr. 15-19, 43, 53-54, 97-100.

¹⁴ Tr. 21, 54-56; GAL Report, Supp 12-14.

was in the best interests of each of the children. As the basis for its decision, the court found that established that S.H. had not complied with the terms of the case plan despite the agency's efforts: she did not maintain clean and stable housing; she did not take the medicine prescribed for her mental illness and could not or would not verify that she was under a therapist's care; and she had completely stopped attending her children's medical and school appointments. Citing *In re Muldrew*,¹⁵ the court also rejected S.H.'s claim that, under R.C. 2151.413(E), the agency's failure to file an adoption plan at the same time it filed the motion for permanent custody prevented the court from granting the it.¹⁶

S.H. argued on appeal that the commitment could not stand because the agency had not filed an adoption plan with the motion for permanent custody, which she asserted was a requirement under R.C. 2151.413(E). The Court of Appeals agreed with S.H. and reversed the judgment of commitment, though to do so it had to retreat from its decision in *In re Muldrew*, where it held that "[t]he agency is not required to set forth an exact plan for adoption until permanent custody is granted." According to the Court of Appeals, an agency's motion for permanent custody necessarily rejects the goal of reuniting the family, and R.C. 2951.413(E), which directs the agency to include a case plan for adoption with the motion for permanent custody, resolves any possible inconsistency between a case plan for the child's adoption and a temporary custody case plan that requires the parties to work toward reuniting the family. The court stated that the purpose of including the adoption case plan with the motion for permanent custody is

¹⁵ Montgomery App. No. 19469, 2002-Ohio-7288.

¹⁶ Decisions & Judgments, July 6, 2007, Supp. 25-30.

to allow the court to consider the child's prospects for adoption, which, it said, directly relates to the best interests of the child who is the subject of the motion.

Proposition of Law and Argument

R.C. 2151.413(E) does not require a children services board to file an adoption plan with the court before the court can grant a motion for permanent custody of a minor child.

A. Summary of Argument: The Second District Court of Appeals nullified a grant of permanent custody to the Montgomery County Department of Job and Family Services – Children Services Division because the agency had not supplemented the case plan with the adoption plan described in R.C. 2151.413(E), even though at the same time it found that the evidence supported the lower court's determination that termination of parental rights was in the children's best interests. However, the statute does not require the agency to file an adoption plan when it files a motion for permanent custody or before the hearing on the motion and forcing an agency to do so would conflict with its obligations under the R.C. 2151.412 case plan, which imposes a duty on the agency to work toward reuniting the family even after the agency has filed for permanent custody.

The court based its decision on the premise that a juvenile court cannot ever determine the best interest of a child without knowledge of the child's prospects for adoption. While the likelihood of adoption may be relevant in a particular case, it is no longer a factor a juvenile court must consider to reach a sound determination of the best interest of a child in a permanent custody proceeding. While the adoption plan that R.C. 2151.413(E) requires the agency to file in connection with a permanent custody

proceeding is helpful and important, it is buttressed by a network of statutes and rules that set out exactly what is required of an agency to find an adoptive home for a child and to prepare the child for adoption. These statutes and rules also provide for periodic reviews of the agency's efforts to find a permanent home for the child. The Court of Appeal's decision exalts form over substance, to the detriment of the children in the custody of the agency.

Finally, even if the juvenile court erred in granting the motion for permanent custody without having seen an adoption plan, the court was not justified in reversing the commitment. First, because S.H. has not shown that filing the adoption plan referenced in the statute would have altered the outcome of the case, and the court of appeals in fact found the evidence sufficient to support the juvenile court's determination that termination of parental rights was in the best interests of the children, any error was harmless. Second, S.H. did not raise this issue until she filed her objections to the magistrate's recommendation. Because she did not give the court the opportunity to correct the error she claims, she has forfeited it.

B. The statute does not require a public children services agency or a private child placement agency to file an adoption plan before the juvenile court can grant permanent custody to the agency. Nothing in the text of R.C. 2151.413(E) requires an agency that files a motion for permanent custody of a child to supplement the case plan already in effect with an adoption plan prior to the hearing on the motion. R.C. 2151.413(E) states that "[a]ny agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a

specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption." The statute does not impose a duty on the agency to file an adoption plan at the same time it files the motion for permanent custody, and it does not require the plan to be filed before the court decides whether or not to grant the motion.¹⁷ The subordinate clause "that files a motion for permanent custody under this section" functions as an adjective that modifies the phrase "any agency," and tells the reader that the obligation to file the adoption plan falls to any public children services agency or private child placing agency that has taken the step of filing for permanent custody in the case. The clause *describes* the agency that must file the plan; it does not *require* the agency to file the adoption plan with the motion for permanent custody or before the hearing on the motion. See, *In re Cavender*, supra¹⁸ Valen, J. concurring, but see *In re Threaderman*.¹⁹

If the legislature intended for the adoption plan to be filed at the same time the agency filed the motion for permanent custody or before the hearing, it would have written the statute to clearly say just that. For example: "Any agency that files a motion for permanent custody under this section shall, *at the time it files the motion or before a hearing is held on the motion*, include in the case plan . . ." Or, "*At the time an agency files a motion for permanent custody under this section, or before the court holds a*

¹⁷ *In re Cavender*, (Mar. 19, 2001), Madison App. No. CA2000-06-037; *In re McCutchen et al.* (Mar. 8, 1991), Knox App. No. 90-CA-25.

¹⁸ (Mar. 19, 2001), Madison App. No. CA2000-06-037.

¹⁹ (Jan. 18, 2002) Brown App. No. CA2001-04-003, CA 2001-04-004, CA2001-08-012, CA2001-08-013.

hearing on a motion for permanent custody under this section, it shall supplement the case plan to include . . .” Unlike some complicated statutes that must account for many possibilities or contingencies, this statute simply requires an agency such as MCCA, who files a motion for permanent custody, to file an adoption plan. If the legislature intended to impose a deadline for filing the plan, it would have done so, in the statute.

Ohio Administrative Code 5101:2-42-95(D), a regulation promulgated by Ohio’s department of job and family services, states that “[a]t the time a motion is filed with the court to obtain permanent custody of the child, the PCSA or PCPA shall submit a case plan to the court which includes a specific plan to seek an adoptive family or planned permanent living arrangement for the child and to prepare the child for adoption of permanency with a specified individual.” In R.C. 2151.413(F), the legislature gave the department of job and family services the authority to make “rules that set forth the time frames for case reviews and for filing motions requesting permanent custody under division(D)(1) of the section.” It did not authorize the department to make the rule that it did, which directs the agency to file an adoption plan at the same time it files a motion for permanent custody. An otherwise valid judgment awarding permanent custody to a children services agency should not be defeated by the agency’s failure to comply with a regulation that exceeds the scope of the delegated authority.

C. The Court of Appeals was wrong in concluding that the juvenile court could not determine the best interest of the child unless it had before it a plan setting out the actions the agency intended to take to find an adoptive home for the child and to prepare her for adoption.

1. The “adoptability” of the child is a factor that may or may not be relevant to the court’s determination as to the best interest of the child in a proceeding for permanent custody under R.C. 2151.414(A). The Court of Appeals found that the purpose of the case plan for adoption described in R.C. 2151.413(E) is to allow the juvenile court to consider the child’s prospects for adoption if the motion is granted, which, it said, is a matter that relates directly to the best interest of the child. The Court is mistaken: a former version of R.C. 2151.414(D) expressly required the court to consider “the reasonable probability of the child being adopted, whether an adoptive placement would positively benefit the child, and whether a grant of permanent custody would facilitate an adoption.” The current version of R.C. 2151.414(D), which became effective September 18, 1996, does not. The “adoptability of the child” has been deleted from the list of express factors that a trial court must consider in arriving at a “best interest” determination. *In re Torres*.²⁰ If the adoptability of the child is relevant in a particular case, then the court may consider it, particularly if the child’s chances for adoption affected the agency’s ability to secure a legally secure placement for the child without a grant of permanent custody under R.C. 2151.414(D)(4). *In re James C.*²¹

R.C. 2151.414(D) provides that in determining the best interest of a child at a permanent custody hearing under R.C. 2151.414(A), the court must consider all relevant factors, including but not limited to several that are listed:

²⁰ (Dec. 2, 1999), Cuyahoga App. No. 75266.

²¹ (Aug. 20, 1999), Lucas App. No. L-98-1258, *23.

1. The interaction and interrelationship of the child with his parents, siblings, relatives, foster parents and 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 his guardian ad litem, with due regard for the maturity of the child;
3. The custodial history of the child;
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.
5. [Whether any of certain other listed factors apply with relation to the parent and child]

Absent from the list is any duty to consider the child's prospects for adoption in every case that comes before the court.

2. The court had before it evidence that the four children could be adopted, and statutes, regulations, and agency policies dictate the actions the agency must take to find adoptive families for children in its permanent custody. At the hearing on the motion for permanent custody in this case, the caseworker most recently assigned to work with the family testified that the children were adoptable, and that even if they could not be placed together in an adoptive home, they would be better off adopted separately than returning to S.H.²² The caseworkers also testified that it was possible that the children could be placed together and failing that, that some of them could be adopted into the same family.²³

²² Tr. 59, 77-78.

²³ Tr. 41-44, 76-78.

Not only was the court wrong to conclude that juvenile court must also consider a child's prospects for adoption, it overlooks the enormous network of statutes and regulations that exist to make certain that the agency will strive to find an adoptive family for every child in its permanent custody, and the internal policies of the agency that serve the same purpose. The statutes contained in Chapter 2151 of the Revised Code and rules contained in Chapter 5101:2 of the Ohio Administration Code dictate the actions an agency must take in every case where permanent custody is granted, and they hold the agency accountable by requiring periodic reviews of the child's status. This is not to discount the value of an adoption plan that sets out what the agency intends to do with respect to the child that is the subject of the motion, but it dispels any idea that a child might be lost in the bureaucracy of an agency if the agency has not informed the court of the specific actions it plans to take if the motion is granted.

Given the extensive framework of statutes and rules that dictate what an agency such as MCCS must do to find adoptive families for children in permanent custody and the agency's own policies, and considering the evidence that the children were adoptable, if additional evidence were necessary to show that the adoptability of the children was a significant factor in determining the best interest of any one of them, then counsel had an obligation to raise that issue at the hearing. The court of appeals erred in declaring that the juvenile court could not have fairly determined the best interest of the children on the motion for permanent custody without considering their chances for adoption.

The court's resolution of S.H.'s third assignment of error on appeal proves the point. The Court of Appeals rejected S.H.'s claim that the weight of the evidence did not

support the juvenile court's conclusion that termination of S.H.'s parental rights was in the best interest of the children. But if the juvenile court must have before it an adoption plan so that it can consider the likelihood of the child's adoption before it can make a determination as to the child's best interest, then the evidence before the juvenile court in this case necessarily fell short. In other words, the court of appeals held that a valid award of permanent custody of a child requires the court to consider the likelihood of the child's being adopted, but the evidence in this case supported the court's decision, even though no case plan was filed.

3. The Agency cannot unilaterally opt out of its obligations under the existing case plan by simply filing a motion for permanent custody and an adoption plan.

The court of appeals found, in effect, that the R.C. 2151.413(E) case plan with its goal of adoption trumps the R.C. 2151.412 case plan that seeks family reunification. But nothing suggests that the agency can opt out of a binding case plan by filing a motion for permanent custody and an adoption plan.

Several cases holding that the agency need not file the adoption plan before the permanent custody hearing note that under R.C. 2151.412(D), the case plan already in force, which became a court order when the court awarded temporary custody to the agency, cannot be changed in any material way without the consent of all parties or by court order after a hearing. But R.C. 2151.412(I) allows the agency to supplement the case plan with a plan for finding a permanent family placement for the child without agreement or a hearing. As a result, R.C. 2151.412(D) does not prevent the agency from unilaterally filing a supplement to the case plan that details the agency's plan for the

child's adoption, even though it is bound by a case plan that requires it to direct its efforts to reuniting the family. To the extent that these cases suggest that filing an adoption plan while an R.C. 2151.412 case plan is in effect is not possible, they are wrong.

But these cases also make the point that a supplement to the case plan that sets adoption as its goal and details just what the agency intends to do to find a family to adopt the child and prepare the child for the end of her relationship with her natural mother necessarily undermines the agency's obligation under the case plan that is still in place, by which it is bound to work for family re-unification.²⁴ After all, according to R.C. 2151.412(E)(1), the case plan that the court journalized with the award of temporary custody became part of the dispositional order. Nothing in the law suggests that the agency could unilaterally opt out of its obligation under the case plan to work for family reunification by simply filing a motion for permanent custody and an adoption plan.

The record in this case shows that when the court held the hearing on the motion for permanent custody, the agency still considered itself bound by the case plan that sought family reunification. Both caseworkers testified that the case plan that sought reunification of the family was in effect on the date of the hearing.²⁵ Caseworker Hill, who was assigned to the family one month before the agency filed the motion for permanent custody, was making home visits, providing referrals, and trying to get S.H. to attend her children's medical appointments up until the date of the hearing.²⁶ These

²⁴ *In re Cavender*, supra.

²⁵ Tr. 10, 49.

²⁶ Tr. 49-59.

caseworkers were committed to the ideal voiced by a social worker and cited by this Court in its opinion in *In re C.F.*:²⁷ although the agency was seeking permanent custody at the time, the reunification of the family was always possible. It makes no sense to require the agency to plan for the child's adoption while it is bound by an order that imposes a duty to reunite the family.

D. S.H. was not entitled to reversal of the judgment of commitment. S.H. was not entitled to reversal of the judgment of commitment for an alleged error that she brought to the court's attention only after the time when the claimed error could have been avoided or corrected.²⁸ She has forfeited this perceived error. What's more, she did not show that filing the adoption plan referenced in the statute would have altered the outcome of the case. "In order to support reversal of a judgment, the record must show affirmatively not only that error intervened but that such error was to the prejudice of the party seeking such reversal."²⁹ It is unlikely that inclusion of an adoption plan would have; even without it, the court of appeals found the evidence sufficient to support the juvenile court's conclusion that termination of parental rights was in the best interests of the children.

Conclusion

The Court of Appeals read a requirement into R.C. 2151.413(E) that does not exist, and treated it as if it were a jurisdictional requirement for an order of permanent.

²⁷ 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶47.

²⁸ *State v. Childs* (1968), 14 Ohio St. 2d 56, 236 N.E. 2d 545.

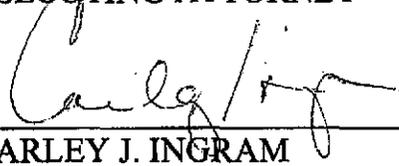
²⁹ *Smith v. Flesher* (1967), 12 Ohio St. 2d 107, paragraph one of the syllabus.

The statute does not require the agency to file an adoption plan before the court makes an award of permanent custody, and forcing an agency to do so interferes with its obligations under the existing case plan. Although the adoption case plan described in R.C. 2151.413(E) is important, it is not the child's only defense against the bureaucracy of an agency. Other statutes and a network of regulations promulgated by the Ohio Department of Job and Family Services lay out in detail just exactly what the agency must do to find an adoptive family for every child that comes into its permanent custody, and how the agency must care for the child, including how it will prepare her for adoption. The court of appeals was wrong; the likelihood of a child's adoption may be pertinent in a particular case, but absence of evidence on the issue, without more, does not prevent the juvenile court from reaching a valid decision that termination of parental rights is in the child's best interest.

The Court should reverse the judgment of the Second District Court of Appeals.

Respectfully submitted,

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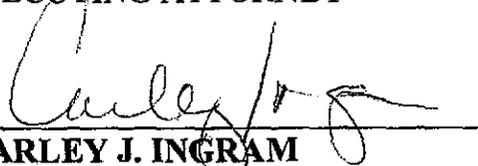
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Certificate of Service

I hereby certify that a copy of the foregoing Appellant's Merit Brief was sent by first class mail on this 30th day of May, 2008, to Opposing Counsel: Byron K. Shaw, 4800 Belmont Place, Huber Heights, OH 45424.

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APPENDIX

IN THE SUPREME COURT OF OHIO

IN RE:

CASE NO. **08-0401**

T.R.
T.H.
A.H.
D.H.

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
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APPELLATE DISTRICT

COURT OF APPEALS
CASE NO: 22291

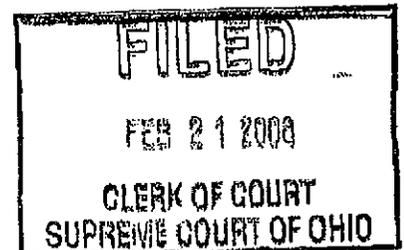
NOTICE OF CERTIFIED CONFLICT

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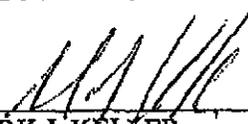


NOTICE OF CERTIFIED CONFLICT

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, pursuant to S. Ct. Prac. R. IV Sec. 1, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *In re: T.R., T.H., A.H., D.H.*, Case No. 22291 on February 4, 2008, in accordance with Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 20th day of February, 2008, to the following: Byron K. Shaw, Counsel of Record for Appellant, 4800 Belmont Place, Huber Heights, Ohio 45422; and Timothy Young, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43215-2998.


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FILED
COURT OF APPEALS

2007 DEC 7 AM 8:43

COURT OF APPEALS

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: :

: C.A. CASE NO. 22291

T.R. : T.C. CASE NO. JC03-13412

T.H. : JC03-13413

A.H. : JC03-13414

D.H. : JC03-13415

: (Civil Appeal from

: Common Pleas Court,

: Juvenile Division)

O P I N I O N

Rendered on the 7th day of December, 2007.

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GRADY, J.:

This is an appeal from orders of the Juvenile Court
granting motions filed by Appellee Montgomery County
Children's Services Board ("CSSB") pursuant to R.C. 2151.413,

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custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

* * *

"The failure of the court to comply with the time periods set forth in division (A) (2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court."

CSSB filed its motion for permanent custody on January 26, 2006. A hearing on the motion was set for April 17, 2006, but was continued until July 19, 2006, to accommodate appointment of new counsel for Appellant Hiner. Following a hearing, the magistrate entered a decision granting CSSB's motion on November 3, 2006. On July 5, 2007, the Juvenile Court overruled Hiner's objections and adopted the magistrate's decision.

The hearing commenced one hundred and seventy-four days after CSSB's motion was filed, and the court granted the

motion more than a year after that motion was filed. Continuance of the hearing appears to have been for good cause. The court's final judgment was outside the time limits set by R.C. 2151.414(A)(2), but per that section, the failure did not deprive the court of jurisdiction to decide the motion, which is the particular error Appellant assigns.

Article IV, Section 4(B) of the Ohio Constitution confers on the General Assembly authority to determine the jurisdiction of the court of common pleas and its divisions. Per R.C. 2151.07, the Juvenile Court is a division of the court of common pleas and its jurisdiction is conferred in Chapters 2151 and 2152 of the Revised Code. In enacting R.C. 2151.414(A)(2), the General Assembly expressly disclaimed any intention to condition the jurisdiction otherwise conferred on the court on the time limits that section imposes. Those time limits are, therefore, merely directive, and absent an abuse of discretion in failing to comply with them, no error is demonstrated. On this record, no abuse of discretion is shown, and none is claimed.

The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION OF GRANTING PERMANENT CUSTODY TO CHILDREN SERVICES SHOULD BE OVERRULED BECAUSE THE CASE PLAN

WAS DEFECTIVE AS BEING IN VIOLATION OF THE OHIO REVISED CODE."

Appellant Hiner argues that the Juvenile Court erred when it granted the motions for permanent custody CSSB filed, absent a case plan for adoption that R.C. 2151.413(E) requires an agency to file with a motion for permanent custody. We agree.

R.C. 2151.412(A)(2) provides that an agency that files a complaint alleging that a child is abused, neglected, or dependent, and/or which is providing services for a child, must prepare and maintain a case plan for the child. R.C. 2151.42(D) contemplates agreement of the child's parents with the plan, or, if no agreement is reached, for the agency to present evidence on the contents of its case plan for the court's approval at the dispositional hearing on the complaint. That section further provides: "The court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child."

R.C. 2151.412(F)(1) states:

"All case plans for children in temporary custody shall have the following general goals:

"(a) Consistent with the best interest and special needs

of the child, to achieve a safe out-of-home placement in the least restrictive, most family-like setting available and in close proximity to the home from which the child was removed or the home in which the child will be permanently placed;

"(b) To eliminate with all due speed the need for the out-of-home placement so that the child can safely return home." (Emphasis supplied).

R.C. 2151.413 governs motions for permanent custody. Division (E) of that section states:

"Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption."

Appellant Hiner argues that the Juvenile Court erred when it granted CSSB's motion for permanent custody absent a case plan for adoption of the four children included with the motion for permanent custody that CSSB filed. CSSB responds that the case plan for adoption required by R.C. 2151.413(E) need not be filed until after the court grants the motion for permanent custody. CSSB relies on decisions which have so held: *In re McCutchen* (Mar. 8, 1991), Knox App.No. 90-CA-25, and *In re Cavender* (Mar. 19, 2001), Madison App. No. CA2000-

hearing on the motion for permanent custody is whether "it is in the best interest of the child to grant permanent custody to the agency that filed the motion." R.C. 2151.414(A)1). The purpose of the case plan for adoption required by R.C. 2151.413(E) is to allow the court to consider the child's prospects for adoption if the motion is granted, which is a matter that directly relates to the best interest of the child at issue. It defies logic to allow the agency to defer filing the adoption case plan required by R.C. 2151.413(E) until after permanent custody is ordered. Therefore, we decline to apply the rule announced in *McCutchen, Cavender, and Gordon*. Further, to the extent that it relied on those precedents, our holding in *Muldrew* is overruled.

CSSB did not file an adoption case plan mandated by R.C. 2151.413(E) when it filed its motion for permanent custody. When the trial court granted the motion, the court had no adoption case plan before it. Evidence relevant to adoptability to which CSSB refers in its brief that the court heard was tangential, at best. Therefore, the Juvenile Court erred when it granted the motion that CSSB filed.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION OF GRANTING PERMANENT CUSTODY

TO CHILDREN SERVICES SHOULD BE OVERRULED AS BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Following hearings conducted pursuant to R.C. 2151.414, the magistrate found, with respect to each of the four children, that placing the child in the permanent custody of CSSB is in the child's best interest, R.C. 2151.414(A)(1), and that the child cannot be placed with either Appellant Hiner or the child's father within a reasonable time. R.C. 2151.414(B)(2). The magistrate then granted permanent custody of the four children to CSSB. The Juvenile Court entered an interim order adopting the magistrate's decision.

Appellant filed objections and supplemental objections to the magistrate's decision. Appellant argued that the magistrate's decision that the children could not be placed with her within a reasonable time was against the manifest weight of the evidence, contending that she had substantially complied with her case plan for reunification.

Appellant repeats her objection on appeal; indeed, she repeats the text of her objection as her argument in support of the error she assigns.

The Juvenile Court overruled the objections. The court found that, following a psychological assessment which diagnosed a bi-polar disorder, Appellant failed to take the

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, Syllabus by the Court. The "weight of the evidence" analysis was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387:

"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' (Emphasis added.) *Black's, supra, at 1594.*"

The trial court's judgment cannot be reversed merely because it is contrary to some evidence. The judgment must be shown to be contrary to the obvious and gross probative value of all the admissible evidence that was before the trial court. That showing necessarily challenges the trial court's rationale for the judgment it reached. However, a reviewing

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court is not authorized to reverse a correct judgment because of an erroneous rationale. *State ex rel. Gilmore v. Mitchell* (1999), 86 Ohio St.3d 302. The judgment must be sustained if there are any grounds to support it. *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525.

A "manifest weight" argument is not a method to obtain a second bite of the apple. The trial court's findings of fact and the legal conclusions it reached enjoy a strong presumption of correctness. Thus, it is particularly necessary that parties who claim that a judgment is against the manifest weight of the evidence support that claim with "reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A)(7). "Broadbrush" attacks on the trial court's rationale are insufficient.

In her brief on appeal, Appellant merely references matters that could preponderate against the findings the court made. However, her contentions fail to demonstrate that the court's judgment is against the manifest weight of the evidence because it is contrary to the obvious and gross probative value of all the admissible evidence that was before the Juvenile Court. Therefore, we must find, in accordance with the presumption of correctness, that the court's findings



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COURT OF APPEALS

2007 DEC 7 AM 8:43

COURTS
MONTGOMERY COUNTY

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: :

: C.A. CASE NO. 22291

T.R. : T.C. CASE NO. JC03-13412

T.H. : JC03-13413

A.H. : JC03-13414

D.H. : JC03-13415

: :

: FINAL ENTRY

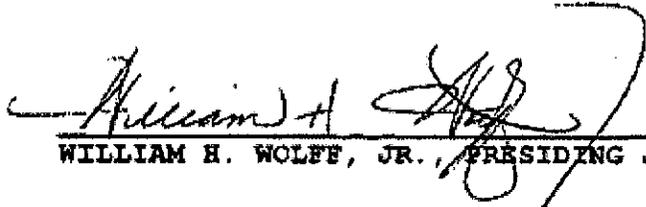
Pursuant to the opinion of this court rendered on the

7th day of December, 2007, the judgment of the trial

court is Reversed and the matter is Remanded to the trial

court for further proceedings consistent with the opinion.

Costs are to be paid as provided in App.R. 24.



WILLIAM H. WOLFE, JR., PRESIDING JUDGE



JAMES R. BROGAN, JUDGE



THOMAS J. GRADY, JUDGE

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§ 2151.413. Agency may file motion requesting permanent custody

(A) A public children services agency or private child placing agency that, pursuant to an order of disposition under division (A)(2) of section 2151.353 [2151.35.3] of the Revised Code or under any version of section 2151.353 [2151.35.3] of the Revised Code that existed prior to January 1, 1989, is granted temporary custody of a child who is not abandoned or orphaned may file a motion in the court that made the disposition of the child requesting permanent custody of the child.

(B) A public children services agency or private child placing agency that, pursuant to an order of disposition under division (A)(2) of section 2151.353 [2151.35.3] of the Revised Code or under any version of section 2151.353 [2151.35.3] of the Revised Code that existed prior to January 1, 1989, is granted temporary custody of a child who is orphaned may file a motion in the court that made the disposition of the child requesting permanent custody of the child whenever it can show that no relative of the child is able to take legal custody of the child.

(C) A public children services agency or private child placing agency that, pursuant to an order of disposition under division (A)(5) of section 2151.353 [2151.35.3] of the Revised Code, places a child in a planned permanent living arrangement may file a motion in the court that made the disposition of the child requesting permanent custody of the child.

(D) (1) Except as provided in division (D)(3) of this section, if a 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, the agency with custody shall file a motion requesting permanent custody of the child. The motion shall be filed in the court that issued the current order of temporary custody. For the purposes of this division, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) Except as provided in division (D)(3) of this section, if a court makes a determination pursuant to division (A)(2) of section 2151.419 [2151.41.9] of the Revised Code, the public children services agency or private child placing agency required to develop the permanency plan for the child under division (K) of section 2151.417 [2151.41.7] of the Revised Code shall file a motion in the court that made the determination requesting permanent custody of the child.

(3) An agency shall not file a motion for permanent custody under division (D)(1) or (2) of this section if any of the following apply:

(a) The agency documents in the case plan or permanency plan a compelling reason that permanent custody is not in the best interest of the child.

(b) If reasonable efforts to return the child to the child's home are required under section 2151.419 [2151.41.9] 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.

(c) The agency has been granted permanent custody of the child.

(d) The child has been returned home pursuant to court order in accordance with division (A)(3) of section 2151.419 [2151.41.9] of the Revised Code.

(E) Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption.

(F) The department of job and family services may adopt rules pursuant to Chapter 119. of the Revised Code that set forth the time frames for case reviews and for filing a motion requesting permanent custody under division (D)(1) of this section.

HISTORY:

138 v H 695 (Eff 10-24-80); 142 v S 89 (Eff 1-1-89); 146 v H 419 (Eff 9-18-96); 147 v H 484 (Eff 3-18-99); 148 v H 176 (Eff 10-29-99); 148 v H 471. Eff 7-1-2000.

§ 2151.412. Case plan for each child; changes; priorities

(A) Each public children services agency and private child placing agency shall prepare and maintain a case plan for any child to whom the agency is providing services and to whom any of the following applies:

(1) The agency filed a complaint pursuant to section 2151.27 of the Revised Code alleging that the child is an abused, neglected, or dependent child;

(2) The agency has temporary or permanent custody of the child;

(3) The child is living at home subject to an order for protective supervision;

(4) The child is in a planned permanent living arrangement.

Except as provided by division (A)(2) of section 5103.153 [5103.15.3] of the Revised Code, a private child placing agency providing services to a child who is the subject of a voluntary permanent custody surrender agreement entered into under division (B)(2) of section 5103.15 of the Revised Code is not required to prepare and maintain a case plan for that child.

(B) (1) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code setting forth the content and format of case plans required by division (A) of this section and establishing procedures for developing, implementing, and changing the case plans. The rules shall at a minimum comply with the requirements of Title IV-E of the "Social Security Act," 94 Stat. 501, 42 U.S.C. 671 (1980), as amended.

(2) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code requiring public children services agencies and private child placing agencies to maintain case plans for children and their families who are receiving services in their homes from the agencies and for whom case plans are not required by division (A) of this section. The agencies shall maintain case plans as required by those rules; however, the case plans shall not be subject to any other provision of this section except as specifically required by the rules.

(C) Each public children services agency and private child placing agency that is required by division (A) of this section to maintain a case plan shall file the case plan with the court prior to the child's adjudicatory hearing but no later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care. If the agency does not have sufficient information prior to the adjudicatory hearing to complete any part of the case plan,

the agency shall specify in the case plan the additional information necessary to complete each part of the case plan and the steps that will be taken to obtain that information. All parts of the case plan shall be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child.

(D) Any agency that is required by division (A) of this section to prepare a case plan shall attempt to obtain an agreement among all parties, including, but not limited to, the parents, guardian, or custodian of the child and the guardian ad litem of the child regarding the content of the case plan. If all parties agree to the content of the case plan and the court approves it, the court shall journalize it as part of its dispositional order. If the agency cannot obtain an agreement upon the contents of the case plan or the court does not approve it, the parties shall present evidence on the contents of the case plan at the dispositional hearing. The court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child.

(E) (1) All parties, including the parents, guardian, or custodian of the child, are bound by the terms of the journalized case plan. A party that fails to comply with the terms of the journalized case plan may be held in contempt of court.

(2) Any party may propose a change to a substantive part of the case plan, including, but not limited to, the child's placement and the visitation rights of any party. A party proposing a change to the case plan shall file the proposed change with the court and give notice of the proposed change in writing before the end of the day after the day of filing it to all parties and the child's guardian ad litem. All parties and the guardian ad litem shall have seven days from the date the notice is sent to object to and request a hearing on the proposed change.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing pursuant to section 2151.417 [2151.41.7] of the Revised Code to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. The agency may implement the proposed change after the hearing, if the court approves it. The agency shall not implement the proposed change unless it is approved by the court.

(b) If it does not receive a timely request for a hearing, the court may approve the proposed change without a hearing. If the court approves the proposed change without a hearing, it shall journalize the case plan with the change not later than fourteen days after the change is filed with the court. If the court does not approve the proposed change to the case plan, it shall schedule a hearing to be held

pursuant to section 2151.417 [2151.41.7] of the Revised Code no later than thirty days after the expiration of the fourteen-day time period and give notice of the date, time, and location of the hearing to all parties and the guardian ad litem of the child. If, despite the requirements of division (E)(2) of this section, the court neither approves and journalizes the proposed change nor conducts a hearing, the agency may implement the proposed change not earlier than fifteen days after it is submitted to the court.

(3) If an agency has reasonable cause to believe that a child is suffering from illness or injury and is not receiving proper care and that an appropriate change in the child's case plan is necessary to prevent immediate or threatened physical or emotional harm, to believe that a child is in immediate danger from the child's surroundings and that an immediate change in the child's case plan is necessary to prevent immediate or threatened physical or emotional harm to the child, or to believe that a parent, guardian, custodian, or other member of the child's household has abused or neglected the child and that the child is in danger of immediate or threatened physical or emotional harm from that person unless the agency makes an appropriate change in the child's case plan, it may implement the change without prior agreement or a court hearing and, before the end of the next day after the change is made, give all parties, the guardian ad litem of the child, and the court notice of the change. Before the end of the third day after implementing the change in the case plan, the agency shall file a statement of the change with the court and give notice of the filing accompanied by a copy of the statement to all parties and the guardian ad litem. All parties and the guardian ad litem shall have ten days from the date the notice is sent to object to and request a hearing on the change.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing pursuant to section 2151.417 [2151.41.7] of the Revised Code to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. The agency shall continue to administer the case plan with the change after the hearing, if the court approves the change. If the court does not approve the change, the court shall make appropriate changes to the case plan and shall journalize the case plan.

(b) If it does not receive a timely request for a hearing, the court may approve the change without a hearing. If the court approves the change without a hearing, it shall journalize the case plan with the change within fourteen days after receipt of the change. If the court does not approve the change to the case plan, it shall schedule a hearing under section 2151.417 [2151.41.7] of the Revised Code to be held no later than thirty days after the expiration of the fourteen-day time period and give notice of the date, time, and location of the hearing to all parties and the

guardian ad litem of the child.

(F) (1) All case plans for children in temporary custody shall have the following general goals:

(a) Consistent with the best interest and special needs of the child, to achieve a safe out-of-home placement in the least restrictive, most family-like setting available and in close proximity to the home from which the child was removed or the home in which the child will be permanently placed;

(b) To eliminate with all due speed the need for the out-of-home placement so that the child can safely return home.

(2) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code setting forth the general goals of case plans for children subject to dispositional orders for protective supervision, a planned permanent living arrangement, or permanent custody.

(G) In the agency's development of a case plan and the court's review of the case plan, the child's health and safety shall be the paramount concern. The agency and the court shall be guided by the following general priorities:

(1) A child who is residing with or can be placed with the child's parents within a reasonable time should remain in their legal custody even if an order of protective supervision is required for a reasonable period of time;

(2) If both parents of the child have abandoned the child, have relinquished custody of the child, have become incapable of supporting or caring for the child even with reasonable assistance, or have a detrimental effect on the health, safety, and best interest of the child, the child should be placed in the legal custody of a suitable member of the child's extended family;

(3) If a child described in division (G)(2) of this section has no suitable member of the child's extended family to accept legal custody, the child should be placed in the legal custody of a suitable nonrelative who shall be made a party to the proceedings after being given legal custody of the child;

(4) If the child has no suitable member of the child's extended family to accept legal custody of the child and no suitable nonrelative is available to accept legal custody of the child and, if the child temporarily cannot or should not be placed with the child's parents, guardian, or custodian, the child should be placed in the temporary custody of a public children services agency or a private child placing agency;

(5) If the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with either, if no suitable member of the child's extended family or suitable nonrelative is available to accept legal custody of the child, and if the agency has a reasonable expectation of placing the child for adoption, the child should be committed to the permanent custody of the public children services agency or private child placing agency;

(6) If the child is to be placed for adoption or foster care, the placement shall not be delayed or denied on the basis of the child's or adoptive or foster family's race, color, or national origin.

(H) The case plan for a child in temporary custody shall include at a minimum the following requirements if the child is or has been the victim of abuse or neglect or if the child witnessed the commission in the child's household of abuse or neglect against a sibling of the child, a parent of the child, or any other person in the child's household:

(1) A requirement that the child's parents, guardian, or custodian participate in mandatory counseling;

(2) A requirement that the child's parents, guardian, or custodian participate in any supportive services that are required by or provided pursuant to the child's case plan.

(I) A case plan may include, as a supplement, a plan for locating a permanent family placement. The supplement shall not be considered part of the case plan for purposes of division (D) of this section.

HISTORY:

142 v H 403 (Eff 1-1-89); 146 v H 274 (Eff 8-8-96); 146 v H 419 (Eff 9-18-96);
147 v H 484 (Eff 3-18-99); 148 v H 471. Eff 7-1-2000.

§ 2151.414. Hearing on motion for permanent custody; notice; determinations necessary for granting motion

(A) (1) Upon the filing of a motion pursuant to section 2151.413 [2151.41.3] of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section 2151.314 [2151.31.4] of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 [2151.35.3] of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section 2151.35 of the Revised Code. If the court issues an order pursuant to section 2151.353 [2151.35.3] of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code.

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order

under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B) (1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

(a) The child is not abandoned or orphaned 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 ending on or after March 18, 1999, 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 ending on or after March 18, 1999.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code, the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be

submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 [2151.35.3] or division (C) of section 2151.415 [2151.41.5] of the Revised Code, the court shall 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 and out-of-home providers, and any other person who may significantly affect the child;

(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, 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 twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

(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;

(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

For the purposes of this division, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code whether a child cannot be placed with either parent within a reasonable

period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code that one or more of the following 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:

(1) Following the placement of the child outside the child's 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 to substantially remedy the conditions causing the child to be placed outside the child's 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.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code;

(3) The parent committed any abuse as described in section 2151.031 [2151.03.1] of the Revised Code against the child, caused the child to suffer any neglect as described in section 2151.03 of the Revised Code, or allowed the child to suffer any neglect as described in section 2151.03 of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34,

2905.01, 2905.02, 2905.03, 2905.04*, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12**, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161 [2923.16.1], 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(7) The parent has been convicted of or pleaded guilty to one of the following:

(a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;

(b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a) or (d) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat

the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 [2151.41.2] of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated pursuant to this section or section 2151.353 [2151.35.3] or 2151.415 [2151.41.5] of the Revised Code with respect to a sibling of the child.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

(15) The parent has committed abuse as described in section 2151.031 [2151.03.1] of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

HISTORY:

138 v H 695 (Eff 10-24-80); 142 v S 89 (Eff 1-1-89); 146 v H 274 (Eff 8-8-96);
146 v H 419 (Eff 9-18-96); 147 v H 484 (Eff 3-18-99); 148 v H 176 (Eff 10-29-
99); 148 v H 448. Eff 10-5-2000.

5101:2-42-95. Obtaining permanent custody: termination of parental rights.

(A) Unless the public children services agency (PCSA) or private child placing agency (PCPA) has compelling reasons for not pursuing a request for permanent custody of a child, the agency, pursuant to section 2151.413 of the Revised Code, shall petition the court that issued the current order of disposition to request permanent custody of a child when any of the following conditions are present:

(1) A court of competent jurisdiction has determined that the parent from whom the child was removed has:

(a) Been convicted of or pleaded guilty to one of the following:

(i) An offense under section 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (voluntary manslaughter) of the Revised Code or under existing or former law of this state, another state, or the United States that is substantially equivalent to an offense described in those sections and the victim was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense.

(ii) An offense under section 2903.11 (felonious assault), 2903.12 (aggravated assault), or 2903.13 (assault) of the Revised Code or under existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense.

(iii) An offense under division (B)(2) of section 2919.22 (endangering children) of the Revised Code or under existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense.

(iv) An offense under section 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (sexual corruption of a minor), 2907.05 (gross sexual imposition), or 2907.06 (sexual imposition) of the Revised Code or under existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense.

(v) A conspiracy or attempt to commit, or complicity to committing, an offense described in paragraph (A)(1)(a)(i) or (A)(1)(a)(iv) of this rule.

(b) Repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food. If the parent has withheld medical treatment in order to treat the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body, the court or agency shall comply with the requirements of division (A)(1) of section 2151.419 of the Revised Code.

(c) Placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refuses to participate in further treatment two or more time after a case plan was developed pursuant to rule 5101:2-39-08.1 or 5101:2-39-10 of the Administrative Code, or rule 5101:2-38-05 or 5101:2-38-07 of the Administrative Code, if applicable, requiring such treatment of the parent and was journalized as part of the dispositional order issued with respect to the child or an order was issued by any other court requiring such treatment of the parent.

(d) Abandoned the child pursuant to rule 5101:2-1-01 of the Administrative Code.

(e) Had parental rights involuntarily terminated pursuant to section 2151.353 (disposition of abused, neglected or dependent child), 2151.414 (hearing on motion for permanent custody), or 2151.415 (motion requesting disposition order upon expiration of temporary custody order) of the Revised Code with respect to a sibling of the child.

(2) A court of competent jurisdiction has determined the child to be a deserted child pursuant to section 2151.3520 of the Revised Code.

(3) Any PCSA or PCPA has had temporary custody of the child under one or more orders of disposition for twelve or more months (three hundred and sixty-five days or more) of a consecutive twenty-two month period ending on or after March 18, 1999. For the purpose of calculating the twelve or more months of a consecutive twenty-two month period, a child shall be considered to have entered the temporary custody of an agency on the earlier of the following:

(a) The date the child is adjudicated abused, neglected or dependent pursuant to section 2151.28 of the Revised Code.

(b) Sixty days after the child was removed from his or her home and placed into substitute care.

The PCSA or PCPA must not include trial home visits or runaway episodes when calculating the twelve of the most recent twenty-two months. Trial home visits and runaway episodes are included when calculating the twenty-two month period.

(B) The PCSA or PCPA is not required to file a motion for permanent custody of a child when one of the following is met:

(1) The PCSA or PCPA has documented in the case plan there is a compelling reason for determining that the filing of a motion to seek permanent custody of the child and terminate parental rights is not in the best interest of the child.

(2) The PCSA or PCPA has documented in the case plan that the agency has not provided the child's parent, guardian, or custodian with services outlined in the case plan which were deemed necessary for the safe return of the child to the child's home.

(C) The PCSA or PCPA shall meet with the parent to review the agency's decision to file a motion with the court to terminate parental rights. The PCSA or PCPA shall seek to amend the case plan prior to filing a motion to terminate parental rights.

(D) At the time a motion is filed with the court to obtain permanent custody of the child, the PCSA or PCPA shall submit a case plan to the court which includes a specific plan to seek an adoptive family or planned permanent living arrangement for the child and to prepare the child for adoption or permanency with a specified individual.

History:Effective: 10/09/2006.

FILED
JUVENILE DIVISION
07 JUL -6 AM 9:36
COMMON PLEAS
MONTGOMERY COUNTY

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO
JUVENILE DIVISION

In re: * CASE NO. JC-2003-13415
* JUDGE ANTHONY CAPIZZI
* MAGISTRATE DURDEN
* DECISION AND JUDGMENT
OVERRULING OBJECTIONS
TO THE DECISION OF THE
MAGISTRATE

This matter is before the Court upon objections filed by September Hiner, mother of said child, by and through counsel, Byron K. Shaw, on November 9, 2006, and supplemented on April 23, 2007. Ms. Hiner objects to the Decision of the Magistrate filed on November 3, 2006, by Magistrate Durden. A response was filed by Montgomery County Job and Family Services – Children Services Division (“MCCS”), by and through the Office of the Montgomery County Prosecuting Attorney, on November 17, 2006.

This case came before Magistrate Durden on July 19, 2006, in the matter of the Motion for Permanent Custody of said child filed on January 26, 2006, by MCCS. In her Decision, the Magistrate found that there is clear and convincing evidence that the commitment of the child to the Permanent Custody of MCCS is in the child’s best interest. The Magistrate also found that there is clear and convincing evidence that the child cannot/will not be placed with the mother or father within a reasonable time, despite 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 Magistrate found that there is no legal father of the child, but that there is an alleged father of the child. Mr. David Hiner is the alleged father of said child and has failed to establish paternity. The Magistrate found that said child had been in foster care since December 30, 2003, a period of twelve (12) or more months out of the last twenty-two (22) months. The Magistrate further found that reunification of the child with the mother or alleged father is not possible within a reasonable period of time. The Magistrate found that the mother has mental health issues, housing issues that have not been addressed, and a mental illness severe enough to interfere with the care of the child into the foreseeable future. The Magistrate found that the father has not provided any care, interest or financial support for the child, has failed to visit or communicate with the child, and is

unwilling to provide food, clothing, shelter, or other basic needs to the child. The Magistrate found that the mother and father are unable to demonstrate parenting skills, have failed to remedy the conditions causing the child to be placed outside the home, failed to regularly support the child financially, and that placement of the child with the mother and the father is a threat to the child's safety.

In regards to Ms. Hiner's case plan objectives, the Magistrate found that (1) although the mother obtained appropriate subsidized housing during July of 2005 through the Section 8 Program, the ongoing caseworker testified that the mother had failed to maintain the house in an appropriate manner in that pursuant to a recent visit the Agency caseworker observed the mother's home to be in a deplorable condition; (2) the mother completed a psychological and parenting assessment, however she failed to follow the recommendations; (3) the mother was diagnosed with bi-polar disorder and had consistently failed, despite repeated requests, to provide verification that she is taking her medication or is attending mental health counseling. The mother continues to state that she attends counseling at Advanced Therapeutics, however the caseworker was unable to verify her attendance; (4) the mother has not attended a medical appointment since December of 2005; and (5) the mother completed parenting classes. The Magistrate found that Ms. Hiner did not complete the case plan as indicated.

In regards to Mr. Hiner's case plan objectives, the Magistrate found that (1) the alleged father did not have the Temporary Protection Order amended so that he could visit the child; and (2) the alleged father did not establish paternity. The Magistrate found that the father did not complete the case plan as indicated.

Ms. Hiner objects to the Decision of the Magistrate claiming that the Juvenile Court did not have jurisdiction to continue with the dispositional hearing in July 2006 beyond the ninety (90) day period of the date of the filing of the complaint in January 2006. Ms. Hiner contends that O.R.C. 2151.35 and Juv. R. 34 require the Court to dismiss the permanent custody complaint immediately without discretion. Ms. Hiner argues that the permanent custody complaint should have been dismissed immediately because the complaint was filed in January 2006 but no proceedings of the dispositional hearing were commenced prior to the hearing of July 19, 2006.

Ms. Hiner further objects to the Decision of the Magistrate claiming the case plan was in violation of the Ohio Revised Code. Ms. Hiner contends that O.R.C. 2151.413(E) requires that "any agency that files a motion for permanent custody under the section shall include in the case plan of the child who is the subject of the motion, a specific plan of the Agency's actions to seek an adoptive family for the child and to prepare the child for adoption." Ms. Hiner argues that in the present case, because the Agency never included a specific plan for adoption in the case plan, the case plan violates the Ohio Revised Code.

Ms. Hiner further objects to the Decision of the Magistrate claiming that it is against the manifest weight of the evidence. Ms. Hiner contends that she made more than reasonable efforts to comply with the Children Services' case plan. Ms. Hiner argues that

she maintained stable housing, completed psychological and parenting assessments, was receiving mental health counseling, has ample income through SSI, and made additional parenting skills efforts to deal with her autistic child along with make pediatrician's appointments. Ms. Hiner further contends that several of the children stated that they want to return home with their mother. Thus, Ms. Hiner argues, she should have received her children back prior to or on the date of the hearing in accordance with Ohio law.

Upon a careful review of the objections, including the record and transcript, the Court hereby **OVERRULES** the same.

First, the Court finds that the Magistrate had proper jurisdiction over the July 19, 2006 hearing. O.R.C. 2151.414 governs the Court regarding a hearing on an agency's motion requesting permanent custody. The statute provides in part, "The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline." O.R.C. 2151.414(A)(2). In the present case, the Motion for Permanent Custody was filed by MCCA on January 26, 2006. The hearing was initially set for April 17, 2006, eighty one (81) days later and well within the time limitation. Following this hearing, Magistrate Durden filed an Order of Continuance on April 27, 2006 with an Interim Order assigning a new attorney to Ms. Hiner. This continuance was not only reasonable but also for the benefit of Ms. Hiner.

Second, the Court finds the Magistrate's Decision granting permanent custody to MCCA was not in violation of the Ohio Revised Code. O.R.C. 2151.413(E) provides, "Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption." The Agency, however, "is not required to set forth an exact plan for adoption until the permanent custody is granted." *In re Muldrew*, 2002 Ohio 7288 (Ohio Ct. App., Montgomery County, December 27, 2002). Thus, although MCCA never included a specific plan for adoption in the case plan, they are not required to do so until after permanent custody is granted. Therefore, the Magistrate's Decision does not violate O.R.C. 2151.413(E).

Third, the Court finds that there is clear and convincing evidence that the commitment of the child to Permanent Custody of MCCA is in the child's best interest. The child has been in foster care since December 30, 2003, a period of a over two and a half years by the time of trial, so said child have been in foster care for twelve (12) out of the last twenty-two (22) months as required in O.R.C. 2151.414. The Agency made reasonable efforts to reunify the child and parents under O.R.C. 2151.419 by providing both the mother and father with a case plan. The biological mother, Ms. Hiner, has a case plan with the following objectives: (1) to obtain and maintain stable housing and income to be able to meet the basic needs of her children; (2) to complete a parenting and psychological assessment; (3) to complete parenting classes and follow the recommendations from the parenting and psychological assessment; (4) to attend any

medical and school appointments that she was notified of by the Agency; and (5) to visit her children at the Agency. The case plan of the alleged father, Mr. Hiner, has the following objectives: (1) to have a temporary protective order lifted so that he could go to the Agency to visit with the child; and (2) to establish paternity. The Court finds that Ms. Hiner and Mr. Hiner have not substantially completed their respective case plans. Thus, reunification with the child is not possible within a reasonable amount of time. O.R.C. 2151.414.

The Court finds that Ms. Hiner has not substantially completed her case plan objectives; therefore, she is unsuitable to care for the child. The Court finds that Ms. Hiner was to maintain stable housing and maintain a clean and free-of-health-hazard environment for the child. (T. 50) Although Ms. Hiner obtained appropriate housing in June of 2005, the conditions became deplorable and she did not have appropriate or stable housing at the time of the hearing. (T. 14, 51-52) The Court finds that Ms. Hiner was to maintain income. (T. 50) Ms. Hiner receives SSL. (T. 100) The Court finds that Ms. Hiner was to complete a parenting and psychological assessment. (T. 11) Ms. Hiner was referred to Dr. Cordell's office for the parenting and psychological assessment, and she completed the assessment. (T. 14-15) The Court finds that Ms. Hiner was to follow recommendations of the parenting and psychological assessment. (T. 11) After the assessment, recommendations were made for mental health counseling and to comply with any medications that were prescribed to address her diagnosis. (T. 15) With regards to these recommendations, Ms. Hiner was not taking her medications and there is no verification that she was attending her Advanced Therapeutic appointments to complete her mental health recommendation. (T. 53-54) Ms. Hiner completed parenting classes through Family Services in October of 2004, but there are still some concerns regarding her parenting ability and whether she will be able to provide appropriate care for the child over the long-term. (T. 19, 97) The Court finds that Ms. Hiner was to attend the child's medical and educational appointments. (T. 21) While Ms. Hiner initially attended the child's appointments, eventually her attendance tapered off and she stopped attending. (T. 21) The Court finds that Ms. Hiner was to visit regularly with children. (T. 50) Ms. Hiner has had regular attendance at the visitation, which has been appropriate. (T. 57-58) Therefore, the Court finds that Ms. Hiner, mother of said child, did not substantially complete her case plan.

The Court finds that Mr. Hiner has not substantially completed his case plan objectives; therefore, he is unsuitable to care for the child. The Court finds that Mr. Hiner was to have a temporary protective order lifted so that he could go to the Agency to visit with the child. (T. 23) Mr. Hiner did not have the temporary protective order lifted. (T. 23) The Court finds that Mr. Hiner was to establish paternity. (T. 23) The Agency was unable to contact Mr. Hiner to establish paternity. (T.23-24) Therefore, the Court finds that Mr. Hiner, alleged father of said child, did not substantially complete his case plan.

The Court finds that it is in the best interest of the child to grant Permanent Custody to MCCS. The evidence supports a finding that the child has bonded with Ms. Hiner and with his siblings. (T. 74, 96) Additionally, the child expressed to the Guardian ad Litem ("G.A.L.") that he would like to remain in his foster home and visit with his

mother. (G.A.L. Report) Although the four children are in three separate foster homes, the foster parents communicate with each other and make sure that the children have contact with each other. (T. 78) Additionally, Ms. Hiner has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the home. Ms. Hiner has not shown that she can follow through with her own treatment nor has she shown that she will follow through with treatment needed by the child. (T. 98) The child is very intelligent and may be gifted, but needs constant structure because he was at one time diagnosed with ADHD. (T. 98) The child also needs therapy to address a speech slur. (G.A.L. Report) The child had been in the same foster home for approximately two (2) years at the time of the hearing. (G.A.L. Report) The child is stable in his placement and the child is adoptable. (T. 46, 59) Further, the G.A.L., Ben Swift, recommends that Permanent Custody be granted to M CCS. (G.A.L. Report) Additionally, no relative placement was approved. (T. 79) Therefore, the Court finds that there is clear and convincing evidence that the commitment of the child to Permanent Custody of M CCS is in the child's best interest.

With the above determinations, the Court hereby adopts the Decision of the Magistrate, as its own, with all the provisions and requirements contained therein, and hereby makes the same the ORDER OF THIS COURT.

IT IS SO ORDERED.

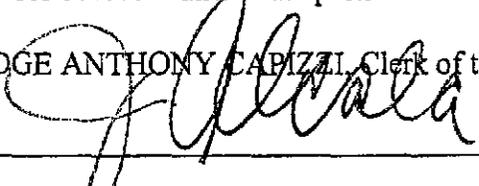
APPROVED:


Anthony Capizzi, Judge 7/31/17

NOTICE OF FINAL APPEALABLE ORDER

Copies of the foregoing order were entered upon the journal and mailed to counsel of record and/or the parties on the date indicated below by ordinary mail.

JUDGE ANTHONY CAPIZZI, Clerk of the Juvenile Court

by:  Date: 7/6/07

MCCS, ATTN: Mandated Services, 3304 North Main Street, Dayton, Ohio 45405
Matthew Overholt, Assistant Prosecuting Attorney for MCCS, CPU
September Hiner, 745 Taylor St., Dayton, Ohio 45404
David Hiner, 312 Park End Dr., Dayton, Ohio 45415
Attorney for children, Brent Rambo, 318 W. Fourth St., Dayton, Ohio 45402
Attorney for father, Douglas Hahn, Atty., 1600 Liberty Tower, Dayton, Ohio 45402
Attorney for mother, Byron Shaw, 4800 Belmont Pl., Huber Heights, Ohio 45424
Guardian Ad Litem, Ben Swift, Atty., 333 W. First St., Suite 445, Dayton, Ohio 45402
Dayton City Schools, ATTN: Christine Pruitt, 115 South Ludlow St., Dayton, Ohio 45402
Montgomery County Support Enforcement Agency
Citizen Review Board
C. Clemons, Case Management Specialist
Magistrate Durden
Mary Reid, Bailiff
Therese Schumacher, Law Clerk

IN THE SUPREME COURT OF OHIO

IN RE:

CASE NO. **08-0401**

T.R.
T.H.
A.H.
D.H.

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

COURT OF APPEALS
CASE NO: 22291

NOTICE OF CERTIFIED CONFLICT

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By **MARK J. KELLER (COUNSEL OF RECORD)**

REG. NO. 0078469

Assistant Prosecuting Attorney

Montgomery County Prosecutor's Office

Appellate Division

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Dayton, Ohio 45422

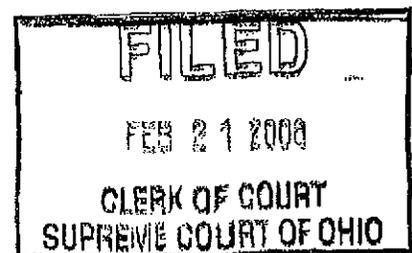
(937) 225-4117

COUNSEL FOR APPELLEE, STATE OF OHIO

BYRON K. SHAW (COUNSEL OF RECORD)

4800 Belmont Place, Huber Heights, Ohio 45424

COUNSEL FOR APPELLANT,



NOTICE OF CERTIFIED CONFLICT

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, pursuant to S. Ct. Prac. R. IV Sec. 1, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *In re: T.R., T.H., A.H., D.H.*, Case No. 22291 on February 4, 2008, in accordance with Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY

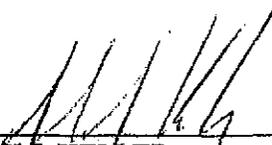


MARK J. KELLER
REG NO. 00678469
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 20th day of February, 2008, to the following: Byron K. Shaw, Counsel of Record for Appellant, 4800 Belmont Place, Huber Heights, Ohio 45422; and Timothy Young, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43215-2998.



MARK J. KELLER
REG. NO. 0078469
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R.C. 2151.413 governs motions filed by a public children's services agency or a private child placing agency to terminate an order for temporary custody of a child the agency was previously awarded and to award permanent custody of the child to the agency. Paragraph (E) of that section provides:

"Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption."

The courts in *McCutchen and Cavender* held that an agency that has filed a motion for permanent custody need not file the case plan for adoption mandated by R.C. 2151.413(E) until after the court grants the motion for permanent custody.

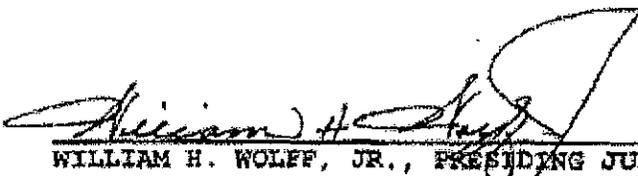
In the present case, we held that the trial court erred when it granted an agency's motion for permanent custody absent a case plan for adoption. In so doing, we rejected the agency's contention that the statutory requirement was satisfied by evidence that could relate the child's adoptability. Subsequently, in *In re A.U.*, (Jan 11, 2008), Montgomery App. No. 22264, ___ Ohio ___, we held that evidence the agency offered in the hearing on the permanent

custody motion, showing that the foster parent wished to adopt the child, satisfied the requirement of R.C. 2151.413(E) on a substantial compliance standard.

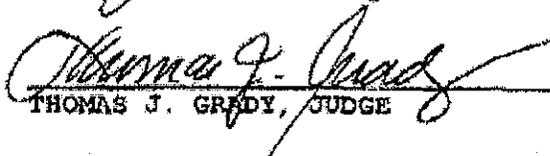
We agree that a conflict exists. Therefore, the State's motion is granted, and the record herein is ordered certified to The Supreme Court of Ohio for review and final determination of the issue identified in the State's motion.

The State also moves that we stay our judgment of December 7, 2007, until The Supreme Court acts. The motion is granted, and our judgment is Ordered stayed until The Supreme Court accepts our certification and, if it does, renders a final determination of the judgment certified.

So Ordered.


WILLIAM H. WOLFF, JR., PRESIDING JUDGE


JAMES A. BROGAN, JUDGE


THOMAS J. GRADY, JUDGE

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THE COURT OF APPEALS OF OHIO

FILED
2007 DEC -7 AM 9:01

COURT OF APPEALS
MONTGOMERY COUNTY, OHIO

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: :

: C.A. CASE NO. 22291

T.R. *Tabitha Rudy* : T.C. CASE NO. JC03-13412

T.H. *Terrence Hines* : JC03-13413

A.H. *April Hines* : JC03-13414

D.H. *David Hines* : JC03-13415

: (Civil Appeal from

: Common Pleas Court,

: Juvenile Division)

.....

O P I N I O N

Rendered on the 7th day of December, 2007.

.....

Mathias H. Heck, Jr., Pros. Attorney; Mark J. Keller, Atty.
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OH 45422

Attorney for Plaintiff-Appellee, State of Ohio

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Attorney for Defendant-Appellant

.....

GRADY, J.:

This is an appeal from orders of the Juvenile Court
granting motions filed by Appellee Montgomery County
Children's Services Board ("CSSB") pursuant to R.C. 2151.413,

awarding permanent custody of Appellant September Hiner's four minor children to CSSB pursuant to R.C. 2151.414. Hiner presents three assignments of error on appeal.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION SHOULD BE OVERRULED SINCE THE JUVENILE COURT DID NOT HAVE JURISDICTION TO PROCEED WITH THE DISPOSITIONAL HEARING ON JULY 19, 2006 BEYOND THE NINETY DAY PERIOD OF THE COMPLAINT'S FILING DATE AS EXPRESSLY REQUIRED BY OHIO REVISED CODE SECTION 2151.35 AND JUVENILE RULE 34."

The time limit to which Hiner refers and the section of the Revised Code and the Rule of Juvenile Procedure in which that time limit is imposed apply generally to proceedings on complaints alleging delinquency, abuse, or neglect of a child. Proceedings on motions filed subsequently pursuant to R.C. 2151.413 by a public agency seeking permanent custody of a child are instead governed by R.C. 2151.414. Division (A)(1) of that section provides that "[t]he court shall conduct a hearing in accordance with section 2151.35 of the Revised Code." However, R.C. 2151.414(A)(2) more specifically provides, in pertinent part:

"The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent

custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

* * *

"The failure of the court to comply with the time periods set forth in division (A) (2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court."

CSSB filed its motion for permanent custody on January 26, 2006. A hearing on the motion was set for April 17, 2006, but was continued until July 19, 2006, to accommodate appointment of new counsel for Appellant Hiner. Following a hearing, the magistrate entered a decision granting CSSB's motion on November 3, 2006. On July 5, 2007, the Juvenile Court overruled Hiner's objections and adopted the magistrate's decision.

The hearing commenced one hundred and seventy-four days after CSSB's motion was filed, and the court granted the

motion more than a year after that motion was filed. Continuance of the hearing appears to have been for good cause. The court's final judgment was outside the time limits set by R.C. 2151.414(A) (2), but per that section, the failure did not deprive the court of jurisdiction to decide the motion, which is the particular error Appellant assigns.

Article IV, Section 4(B) of the Ohio Constitution confers on the General Assembly authority to determine the jurisdiction of the court of common pleas and its divisions. Per R.C. 2151.07, the Juvenile Court is a division of the court of common pleas and its jurisdiction is conferred in Chapters 2151 and 2152 of the Revised Code. In enacting R.C. 2151.414(A) (2), the General Assembly expressly disclaimed any intention to condition the jurisdiction otherwise conferred on the court on the time limits that section imposes. Those time limits are, therefore, merely directive, and absent an abuse of discretion in failing to comply with them, no error is demonstrated. On this record, no abuse of discretion is shown, and none is claimed.

The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION OF GRANTING PERMANENT CUSTODY TO CHILDREN SERVICES SHOULD BE OVERRULED BECAUSE THE CASE PLAN

5
WAS DEFECTIVE AS BEING IN VIOLATION OF THE OHIO REVISED CODE."

Appellant Hiner argues that the Juvenile Court erred when it granted the motions for permanent custody CSSB filed, absent a case plan for adoption that R.C. 2151.413(E) requires an agency to file with a motion for permanent custody. We agree.

R.C. 2151.412(A)(2) provides that an agency that files a complaint alleging that a child is abused, neglected, or dependent, and/or which is providing services for a child, must prepare and maintain a case plan for the child. R.C. 2151.42(D) contemplates agreement of the child's parents with the plan, or, if no agreement is reached, for the agency to present evidence on the contents of its case plan for the court's approval at the dispositional hearing on the complaint. That section further provides: "The court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child."

R.C. 2151.412(F)(1) states:

"All case plans for children in temporary custody shall have the following general goals:

"(a) Consistent with the best interest and special needs

of the child, to achieve a safe out-of-home placement in the least restrictive, most family-like setting available and in close proximity to the home from which the child was removed or the home in which the child will be permanently placed;

"(b) To eliminate with all due speed the need for the out-of-home placement so that the child can safely return home." (Emphasis supplied).

R.C. 2151.413 governs motions for permanent custody. Division (E) of that section states:

"Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption."

Appellant Hiner argues that the Juvenile Court erred when it granted CSSB's motion for permanent custody absent a case plan for adoption of the four children included with the motion for permanent custody that CSSB filed. CSSB responds that the case plan for adoption required by R.C. 2151.413(E) need not be filed until after the court grants the motion for permanent custody. CSSB relies on decisions which have so held: *In re McCutchen* (Mar. 8, 1991), Knox App.No. 90-CA-25, and *In re Cavender* (Mar. 19, 2001), Madison App. No. CA2000-

06-037.

In *Cavender*, the Twelfth District Court of Appeals reasoned that requiring an agency to file an adoption plan before permanent custody is granted would undermine the goal of reunification set out in R.C. 2151.412(F)(1)(b). The Fifth District Court of Appeals agreed with that reasoning in *McCutchen*, and further observed that a case plan can be amended only by agreement of the parties, and that adoption is not a viable option until permanent custody is granted.

The Eleventh District Court of appeals cited *Cavender* and *McCutchen* for authority in *In re Gordon*, Trumbull App. No. 2002-T-0073, 2002-Ohio-4959, in which that court held: "An agency is not required to set forth an exact plan of adoption until permanent custody is granted. A case plan outlining the ultimate goal of adoption and the agency's treatment actions to prepare the child for the adoption process is in accord with the requirements of R.C. 2151.413(E)." *Id.*, at ¶44.

We cited the holding in *Gordon* in *In re Muldrew*, Montgomery App. No. 19469, 2002-Ohio-7288, holding that the trial court abused its discretion when it denied a motion for permanent custody on a finding that a planned permanent living arrangement which the court ordered was a better option.

The reunification goal identified in R.C. 2151.412(F)(1)

expressly applies to case plans concerning children who are in the temporary custody of a public agency. In that circumstance, the agreement of the child's parent contemplated by R.C. 2151.412(D) functions to procure the parents' commitment to the case plan for reunification the agency proposes.

Motions for permanent custody are instead governed by R.C. 2151.413. The motion is filed while temporary custody is in effect, but by its nature, a motion for permanent custody necessarily rejects reunification as a goal. Further, parental agreement with permanent custody is neither expected nor sought.

Any inconsistency between a case plan for adoption and the goals and purposes of a temporary custody case plan is resolved by the express legislative mandate of R.C. 2151.413(E), which provides that the agency "shall include" a case plan for adoption with its motion for permanent custody. In our view, the rationales of *McCutchen* and *Cavender* mistakenly conflated the elements and purposes of a temporary custody case plan required by R.C. 2151.412 with the case plan for adoption required by R.C. 2151.413 when a motion for permanent custody is filed.

The paramount issue for the court to determine in the

hearing on the motion for permanent custody is whether "it is in the best interest of the child to grant permanent custody to the agency that filed the motion." R.C. 2151.414(A)1). The purpose of the case plan for adoption required by R.C. 2151.413(E) is to allow the court to consider the child's prospects for adoption if the motion is granted, which is a matter that directly relates to the best interest of the child at issue. It defies logic to allow the agency to defer filing the adoption case plan required by R.C. 2151.413(E) until after permanent custody is ordered. Therefore, we decline to apply the rule announced in *McCutchen, Cavender, and Gordon*. Further, to the extent that it relied on those precedents, our holding in *Muldrew* is overruled.

CSSB did not file an adoption case plan mandated by R.C. 2151.413(E) when it filed its motion for permanent custody. When the trial court granted the motion, the court had no adoption case plan before it. Evidence relevant to adoptability to which CSSB refers in its brief that the court heard was tangential, at best. Therefore, the Juvenile Court erred when it granted the motion that CSSB filed.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION OF GRANTING PERMANENT CUSTODY

TO CHILDREN SERVICES SHOULD BE OVERRULED AS BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Following hearings conducted pursuant to R.C. 2151.414, the magistrate found, with respect to each of the four children, that placing the child in the permanent custody of CSSB is in the child's best interest, R.C. 2151.414(A)(1), and that the child cannot be placed with either Appellant Hiner or the child's father within a reasonable time. R.C. 2151.414(B)(2). The magistrate then granted permanent custody of the four children to CSSB. The Juvenile Court entered an interim order adopting the magistrate's decision.

Appellant filed objections and supplemental objections to the magistrate's decision. Appellant argued that the magistrate's decision that the children could not be placed with her within a reasonable time was against the manifest weight of the evidence, contending that she had substantially complied with her case plan for reunification.

Appellant repeats her objection on appeal; indeed, she repeats the text of her objection as her argument in support of the error she assigns.

The Juvenile Court overruled the objections. The court found that, following a psychological assessment which diagnosed a bi-polar disorder, Appellant failed to take the

medications she was prescribed or attend the necessary therapeutic counseling. Further, with respect to special health and psychological needs of one child, Appellant failed to attend the child's appointments and therapy. The court also found that Appellant was, at the time of the hearing, unable to maintain a "clean and free-of-health hazard environment" for the children, and that the conditions of her housing were "deplorable."

In determining whether a child cannot be placed with a parent within a reasonable time, the court must consider whether, the agency's diligent efforts notwithstanding, "the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the home." R.C. 2151.414(E)(1). In that connection, the court must consider the parent's failure to utilize medical, psychiatric, or therapeutic services made available to her. *Id.* The court must also consider whether chronic mental illness of the parent is so severe that the parent is "unable to provide an adequate home for the child," presently and within the following year. R.C. 2151.414(E)(2). The findings the trial court made involve those considerations. Appellant argues that those findings are against the manifest weight of the evidence.

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, Syllabus by the Court. The "weight of the evidence" analysis was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387:

"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' (Emphasis added.) *Black's, supra, at 1594.*"

The trial court's judgment cannot be reversed merely because it is contrary to some evidence. The judgment must be shown to be contrary to the obvious and gross probative value of all the admissible evidence that was before the trial court. That showing necessarily challenges the trial court's rationale for the judgment it reached. However, a reviewing

court is not authorized to reverse a correct judgment because of an erroneous rationale. *State ex rel. Gilmore v. Mitchell* (1999), 86 Ohio St.3d 302. The judgment must be sustained if there are any grounds to support it. *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525.

A "manifest weight" argument is not a method to obtain a second bite of the apple. The trial court's findings of fact and the legal conclusions it reached enjoy a strong presumption of correctness. Thus, it is particularly necessary that parties who claim that a judgment is against the manifest weight of the evidence support that claim with "reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A)(7). "Broadbrush" attacks on the trial court's rationale are insufficient.

In her brief on appeal, Appellant merely references matters that could preponderate against the findings the court made. However, her contentions fail to demonstrate that the court's judgment is against the manifest weight of the evidence because it is contrary to the obvious and gross probative value of all the admissible evidence that was before the Juvenile Court. Therefore, we must find, in accordance with the presumption of correctness, that the court's findings

are not against the manifest weight of the evidence.

The third assignment of error is overruled.

Conclusion

Having sustained the second assignment of error, we will reverse the judgment from which this appeal was taken and remand the case to the Juvenile Court for further proceedings.

WOLFF, P.J. And BROGAN, J., concur.

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Hon. Anthony Capizzi

FILED
2007 DEC -7 AM 9:01

COURT REPORTERS
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: :

: C.A. CASE NO. 22291

T.R. : T.C. CASE NO. JC03-13412

T.H. : JC03-13413

A.H. : JC03-13414

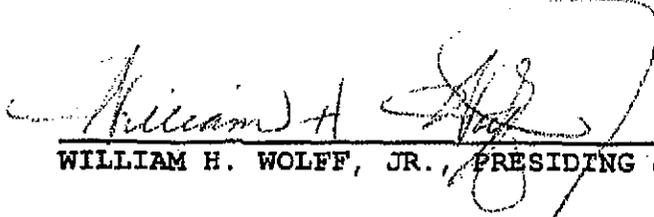
D.H. : JC03-13415

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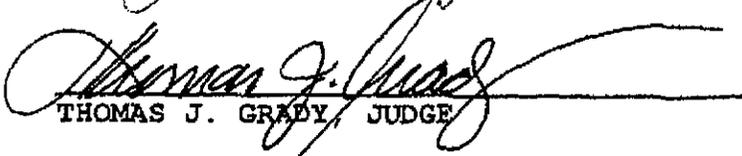
: FINAL ENTRY

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Pursuant to the opinion of this court rendered on the
7th day of December, 2007, the judgment of the trial
 court is Reversed and the matter is Remanded to the trial
 court for further proceedings consistent with the opinion.
 Costs are to be paid as provided in App.R. 24.


 WILLIAM H. WOLFF, JR., PRESIDING JUDGE


 JAMES A. BROGAN, JUDGE


 THOMAS J. GRADY, JUDGE

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Hon. Anthony Capizzi
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In the Matter of: PAULA McCUTCHEN and VANESSA ROGERS, Alleged
Dependent Children

Case No. 90-CA-25

Court of Appeals of Ohio, Fifth Appellate District, Knox County

1991 Ohio App. LEXIS 1089

March 8, 1991

PRIOR HISTORY: [*1] Character of Proceeding:
Civil Appeal from the Court of Common Pleas; Case No.
88-1171.

DISPOSITION: JUDGMENT: Affirmed

HEADNOTES

*PERMANENT CUSTODY - MANIFEST WEIGHT
OF THE EVIDENCE, EVIDENCE ALIUNDE THE
CASE PLAN - COMPLIANCE WITH CASE PLAN -
GUARDIAN AD LITEM'S REPORT, TIME OF FILING,
R.C. 2151.414(C) - ADOPTIVE CASE PLAN, TIME OF
FILING, R.C. 2151.413*

COUNSEL: For Appellant Brenda Rogers: BRUCE J.
MALEK, Ass't Public Defender, Mount Vernon, Ohio.

For Appellee: MICHAEL D. SCHLEMMER, Knox
County Department of Human Services, Mount Vernon,
Ohio.

JUDGES: John R. Milligan, J. Norman J. Putman, P.J.,
W. Scott Gwin, J., concur.

OPINION BY: MILLIGAN

OPINION

OPINION

On June 4, 1990, the Knox County Department of
Human Services (DHS) was granted permanent custody
of Paula McCutchen (age 6) and Vanessa Rogers (age 3).
Brenda Rogers, the mother of both girls, appeals:

ASSIGNMENTS OF ERROR NO. I

THE TRIAL COURT ERRED IN GRANTING
PERMANENT CUSTODY OF THE CHILDREN OF
APPELLANT TO THE CHILDREN'S SERVICES
UNIT OF THE KNOX COUNTY DEPARTMENT OF
HUMAN SERVICES IN THAT THE STATE FAILED
TO ESTABLISH BY CLEAR AND CONVINCING

EVIDENCE SUCH PERMANENT CUSTODY WAS IN
THE BEST INTEREST OF SAID CHILDREN OR
THAT THE CHILDREN CANNOT BE PLACED
WITH THE APPELLANT WITHIN A REASONABLE
TIME AND, THEREFORE, SHOULD NOT BE
PLACED WITH THE APPELLANT.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN GRANTING
PERMANENT CUSTODY OF PAULA [*2]
McCUTCHEN AND VANESSA ROGERS TO THE
CHILDREN SERVICES UNIT OF THE KNOX
COUNTY DEPARTMENT OF HUMAN SERVICES IN
THAT THE STATE FAILED TO ESTABLISH BY
CLEAR AND CONVINCING EVIDENCE THAT
APPELLANT WOULD CONTINUE TO ACT IN
SUCH A MANNER THAT SAID CHILDREN WOULD
CONTINUE TO BE CHILDREN WITHOUT
ADEQUATE PARENTAL CARE IF A
REUNIFICATION PLAN WERE PREPARED
PURSUANT TO SECTION 2151.412 OF THE OHIO
REVISED CODE.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN OVERRULING
APPELLANT'S MOTION TO DISMISS IN THAT THE
GUARDIAN AD LITEM FOR APPELLANT'S
CHILDREN, VANESSA ROGERS AND PAULA
McCUTCHEN FAILED TO FILE HER WRITTEN
REPORT TO THE COURT PRIOR TO OR AT THE
TIME OF THE HEARING HELD PURSUANT TO
DIVISION (A) OF THE REVISED CODE, AS
REQUIRED BY DIVISION C THEREOF OF SECTION
2151.414.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN OVERRULING
APPELLANT'S MOTION TO DISMISS IN THAT THE
CHILDREN SERVICES UNIT OF THE KNOX
COUNTY DEPARTMENT OF HUMAN SERVICES
FAILED TO INCLUDE IN THE CASE PLANS OF
APPELLANT'S CHILDREN, A SPECIFIC PLAN OF
THE AGENCY'S ACTIONS TO SEEK AN ADOPTIVE

FAMILY FOR SAID CHILDREN AND PREPARE THE CHILDREN FOR ADOPTION.

The nexus between Brenda Rogers and DHS is longstanding.

[*3] Prior to October of 1988, Paula and Vanessa resided with their mother, Clyde Rogers (Vanessa's father and Paula's stepfather), and two children from Mr. Rogers' former marriage (Frankie and Sylvia). In 1988, Frankie was severely beaten, locked in his room for several days, and given only minimal food. Mr. Rogers pled guilty to felonious assault for his role in the abuse; mother pled guilty to child endangering. In addition, there were allegations that mother participated in abuse of Sylvia. Due to the impending incarceration of mother, she gave DHS temporary placement of Paula and Vanessa on October 25, 1988. The girls were found to be dependent on December 2, 1988, by the Knox County Juvenile Court.

Mother was in jail from December 30, 1988, through August 29, 1989. During this time, a third child was born to mother. A case plan was prepared before her incarceration. While in prison, mother did participate in a parenting class. However, she did not regularly attend personal counseling or substance abuse counseling, as required by the case plan.

On May 3, 1989, temporary custody was continued with DHS, as mother was still incarcerated. A new case plan, dated March 1, 1989, had been [*4] entered into; it was essentially the same as the case plan executed before mother went to prison.

Following her release from prison, mother visited her children and attended meetings with her case worker. While her attendance was somewhat sporadic, she attended a parenting class and a parent-helper program at a preschool. She also attended personal counseling and alcohol abuse counseling.

Following a review hearing on December 27, 1989, the court found that mother had made significant progress in pursuit of the case plan, and it was reasonable to believe that the family could be reunited within six months. The case plan was amended on January 26, 1990, to require mother to maintain a stable home, free from health and safety hazards.

Mother's progress toward reunification ended around the same time as this review. She informed her case worker that she would no longer pursue counseling, and ceased participation in both alcohol and personal counseling. She stopped attending the parenting programs. She told DHS in January of 1990, that she had moved in with a Mr. Ron Clark and was pregnant with his child. Mr. Clark is well-known to the Knox County Courts for his drunkenness, perpetration [*5] of

domestic violence, his abuse, neglect, and corruption of children. In early 1990, mother pled no contest to a charge of assault, in which she attempted to hit her youngest child's custodian with a car. DHS filed a motion for permanent custody of Paula and Vanessa on March 7, 1990; permanent custody was granted on June 4, 1990.

I, II

Assignments of error one and two challenge the award of permanent custody as against the manifest weight of the evidence. As the second assignment challenges the portion of the best interest determination relating to adoptability, we address both assignments together.

Mother first argues that she complied with the goals in the case plan, and her parental rights cannot be terminated for a reason not in the case plan. This argument, if accepted, would convert the goal of the reunification process into one of mere rigid compliance with the rules of DHS, rather than a process in which the parent learns to exercise her own judgment in a manner which will insure the protection and well-being of the children. When a case plan is prepared a long period of time before the permanent custody hearing, a requirement that the court consider only the goals in the [*6] plan would: (1) not effectively deal with the need to promptly resolve questions of custody, and (2) lead to courts not seeking detailed case plans in the first place. Neither result is desirable. A court may consider any otherwise admissible evidence relevant to disposition upon motion for permanent custody.

A trial court's finding which is supported by some competent, credible evidence may not be reversed as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co. (1978)*, 54 Ohio St.2d 279, 376 N.E.2d 578; *In Re Lay (1987)*, 43 Ohio App.3d 78, 80, 539 N.E.2d 664. To make an award of permanent custody, the trial court must find by clear and convincing evidence that the child cannot be placed with one of his parents within a reasonable time, and permanent commitment is in the best interest of the child. *R.C. 2151.353, 2151.414(D) and (E)*.

Reasonable time: Mother only sporadically attended parenting classes after her release from prison, then discontinued such classes. While there is no indication that alcohol was involved in the abuse of Frankie, mother is an admitted alcoholic. However, she has discontinued treatment. She stopped attending [*7] personal counseling; yet, the incident in which she attempted to hit her child's custodian with a car indicates that she has not yet learned to control her temper.

Despite warnings by DHS, mother continues to reside with Mr. Clark. She has placed herself in substantially the same position as before her incarceration. She is seeking the return of the child born while she was incarcerated, and was expecting a fourth child at the time of the hearing. The last time she parented four young children was prior to and concluding with the abuse of Frankie. Her inability to deal with Frankie's oppositional behavior was cited as a contributing factor to his abuse; Paula has similar behavior problems.

There is abundant evidence to support the court's finding that the girls could not be placed with mother within a reasonable period of time.

When the trial judge confronted this difficult task of predicting future conduct, the "crystal ball" was remarkably clear.

Best interest: Paula has been in counseling since December of 1988. She has experience behavior problems including defiance, bed wetting, day wetting, and conflict with other children. Such problems are attributed to anxiety from [*8] the impermanence of her placement. The girls have formed a strong attachment to each other, but not to their mother. Absent a permanent placement, Paula's behavior problems are likely to continue. Due to mother's failure to remedy the problems which led to her incarceration, continued temporary custody or a return of custody to mother would likely place the girls at a great risk of further impermanence.

There was testimony that the girls could be placed in an adoptive home together within thirty to sixty days, on an "at-risk" basis pending appeal. Mother argues that the behavior problems which DHS believed she could not effectively deal with would make the girls unadoptable. The fact that mother has not dealt with her problems in dealing with such behavioral difficulties does not necessarily mean that the behavioral problems are so serious as to preclude or hinder an adoptive placement for the girls.

There is abundant evidence to support the court's finding that permanent commitment was in the best interest of Paula and Vanessa.

Any other conclusion would do violence to sound principles undergirding permanency planning. See "Permanency Planning for Children (A New Ball Game in Appellate [*9] Courts), J.R. Milligan and E. Loth, IV App. Court Adm. Rev., 1982-83, 37 A.B.A.

The first and second assignments of error are overruled.

III

The guardian ad litem filed her report several days into the hearing. *R.C. 2151.414(C)* requires the report to be filed prior to or at the time of the hearing. As the report was filed during the time of the hearing, the court did not err in overruling mother's motion to dismiss. Appellant demonstrates no prejudice in this regard.

The third assignment of error is overruled.

IV

While *R.C. 2151.413* requires filing of the agency's plan for adoption of the child, the statute does not specify when such plan must be filed. DHS filed such a plan after the award of permanent custody.

We agree with DHS that such adoption plan need not be filed until permanent custody is granted, making adoption a viable option. A substantive change to a case plan may only be made by agreement of all parties or after a hearing. *R.C. 2151.412(E)(2), (3)*. To require DHS to go through this amendment process to add an adoptive case plan before parental rights are terminated would undermine the agency's efforts to help parents deal with their problems and work toward [*10] reunifying the family.

The fifth assignment of error is overruled.

The judgment of the Knox County Juvenile Court is affirmed.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Juvenile Court Division, of Knox County, Ohio, is affirmed and this cause is remanded to that court for further proceedings according to law.

IN THE MATTER OF MICHAEL CAVENDER, Dependent Child.

CASE NO. CA2000-06-037

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT,
MADISON COUNTY

2001 Ohio App. LEXIS 1262

March 19, 2001, Decided

DISPOSITION: [*1] Judgment affirmed.

COUNSEL: Stephen J. Pronai, Madison County Prosecuting Attorney, Rachel M. Price, London, Ohio, for appellee, Madison County Department of Human Services.

J. Michael Murray, West Jefferson, Ohio, for appellant, Michael Cavender, Sr.

Richard A. Dunkle, London, Ohio, guardian ad litem.

JUDGES: POWELL, J. YOUNG, P.J., concurs. VALEN, J., concurs separately.

OPINION BY: POWELL

OPINION

POWELL, J. Michael Cavender ("Father") appeals the determination of the Madison County Court of Common Pleas, Juvenile Division, granting permanent custody of his son, Michael Cavender ("Michael"), to the Madison County Department of Children's Services ("MCDCS"). We affirm the trial court's award of permanent custody to the agency.

Father and Sylvia Cavender ("Mother") were married in 1990. Melinda, Michael's sister, was born to the couple on July 7, 1990. Michael was born to the couple on January 19, 1992. After Mother and Father divorced in 1996, Father did not visit on a regular basis; Father saw Michael only three to four times over a two-year period. By the time he was six years old, Michael displayed extreme behavioral problems.

On October 9, 1998, MCDCS filed a complaint alleging [*2] Michael was a dependent child. During the dependency adjudication, the trial court heard evidence that Michael displayed such aberrant behavior as

jumping out of a second-story window; taking his mother's boyfriend's van and driving it into a tree; engaging in self-mutilation; urinating on other children; pulling down his pants in front of adults; defecating on beds; biting and kicking; and cursing and using language not typically associated with children his age.

1 Although a transcript of the dependency hearing is not included in the record, the trial court recited these facts, which were elicited in that hearing, in its order granting the agency permanent custody.

In the dependency hearing, Mother admitted that she could not handle Michael's behavioral problems, admitted his dependency, and requested that temporary custody be granted to MCDCS. Mother alleged in the hearing that Father had behaved inappropriately, dumping a bowl of oatmeal on Michael's head and acting cruelly in front of the children. [*3] Mother also alleged that Father had killed the family puppy because the puppy had bitten Father while he attempted to have sex with it. In an order dated November 3, 1998, the court found that Michael was a dependent child and granted MCDCS temporary custody. Melinda remained in Mother's custody.

In July 1998, Michael was placed in the foster home of Claudia Whitis, who had been specially trained to act as foster parent for challenging children. When Michael arrived in Whitis' foster home, he displayed such aberrant behavior as sexually acting out and self-mutilation. He was angry and aggressive, and he could not follow simple directions. At the age of seven, Michael was diagnosed with attention deficit/hyperactivity disorder ("ADHD"), obsessive-compulsive disorder ("OCD"), and several other psychiatric disorders. In addition, Michael functioned in the mild to moderate range of mental retardation. He demonstrated severe cognitive delays, as well as serious

delays in verbal skills and all academic skills. Whitis found Michael a very difficult child to control.

Michael was placed on medication to control the ADHD, and he began a special educational program for children with multiple [*4] handicaps who could not be taught in regular classrooms due to severe disabilities. Since Michael could not respond to people appropriately and became "out of control" with change, he required a strictly structured classroom to do well. Like Whitis, Michael's teacher, Margaret VanHoose, found Michael a difficult child to manage. Nonetheless, according to Whitis and VanHoose, Michael's behavioral problems began to improve with the special education program and a structured home environment.

On September 17, 1999, MCDHS filed its first Motion for Permanent Custody of Michael. The court scheduled a permanent custody hearing for November 16, 1999. Before the hearing, however, Father expressed an interest in renewing contact with Michael. As a result, the agency withdrew its motion for permanent custody in order to give Father six months to establish his interest in acting as Michael's parent and to work on the agency's case plan. The previously-scheduled permanent custody hearing was changed to a review hearing.

In the November 1999 review hearing, the court apprised Father that he would be required to complete the agency's case plan. That plan included Father's completion of a psychological [*5] assessment, in addition to a parenting assessment that Dr. Melissa Layman-Guadalupe had completed in August 1998. Father's live-in girlfriend, Brenda Bonecutter, was also required to complete a psychological assessment. In addition, the case plan included the agency's recommendation that Father and Bonecutter establish and maintain regular supervised visitation with Michael.

Dr. Guadalupe attempted to contact both Father and Bonecutter to complete psychological assessments. Father appeared for one appointment, but did not appear for two additional scheduled appointments and he never completed the assessment. The results of Father's personality tests indicated he presented himself in an overly positive light, and Dr. Guadalupe believed that there was something Father did not acknowledge. Dr. Guadalupe was concerned that Father's failure to appear for the additional appointments reflected his parenting limitations, and she felt that he did not understand Michael's significant behavioral problems. Bonecutter, whose own children had been involved with the Franklin County Children Services agency, refused to complete the psychological assessment, stating that she was not Michael's parent [*6] and would not take care of him if he came to live with them.

Father and Bonecutter did, however, complete parenting classes taught by parenting educator Sue McClelland. Although Bonecutter always appeared for class, she told McClelland that Michael was not her child and she would neither take care of him nor discipline him. Father conveyed to McClelland that he did not think Michael needed the ADHD medication and said he would not give it to him.

Father began visitation with Michael in November 1999. Once father began to see Michael, Michael's behavioral problems escalated. Both Whitis and VanHoose indicated that Michael, who had been doing better, began to become more agitated. After Father missed scheduled visits, Michael became even more agitated. He began to engage in behavior that had stopped for almost a year, such as urinating and defecating in his bedroom. Michael also began again to engage in self-mutilation, and told Whitis that he did so because of his Father. Since Michael's behavior escalated in anticipation of his scheduled visits with Father, Whitis attributed it to Father's visits.

Michael's behavior at school also began to deteriorate in November 1999, once his [*7] visits with Father began. VanHoose noticed that Michael's aberrant behavior escalated out of control. He did not care about behaving well, as he had before. In addition, Michael began to engage in dangerous behavior such as hurting himself, throwing objects and classroom furniture, and threatening other children with death. At one point, Michael even locked VanHoose out of the classroom. Michael also became visibly more nervous and could not focus on class work.

Not only did Whitis notice that Michael's aberrant behavior escalated with Father's resumed visitation, but she had serious concerns about father's ability to parent Michael effectively. Whitis noted that, on one occasion, Father had dumped a bowl of oatmeal on Michael's head, stating that if the child would not eat it, he would wear it. Father also had to be repeatedly told about Michael's allergies. Moreover, Bonecutter's children, who also lived with Father, repeatedly cursed and acted inappropriately in front of Michael. Bonecutter herself apparently told Father to get "that damn brat," meaning Michael, out of the home on one occasion.

McClelland also expressed concerns about Father's ability to parent Michael. She observed [*8] Father and Bonecutter visit with Michael on one occasion. During that visit, Father asked inappropriate questions of Michael, and McClelland saw that Michael's agitated behavior escalated throughout the visit. McClelland felt that Father and Bonecutter were limited in their ability to understand and follow through with the parenting education.

From November 1999 through March 2000, Father missed two of five scheduled visits with Michael. MCDCS filed a second Motion for Permanent Custody of Michael on March 7, 2000. On April 7, 2000, and May 3, 2000, the trial court held hearings on the motion. The trial court heard testimony from Claudia Whitis, Dr. Guadalupe, VanHoose, social workers, and a counselor, all of whom had had substantial involvement with Michael. All agreed that Michael was a child who demanded substantial attention and parenting skill, and who would require a strictly structured environment and special effort years into the future. They also agreed that Michael's behavior had deteriorated upon contact with Father, and Father did not have the skill necessary to manage Michael or to provide for his special needs.

The court also heard testimony from Mother, Father, and [*9] Bonecutter. Mother agreed that the agency should have permanent custody of Michael. While admitting that he did not have the skills to take custody of Michael in the foreseeable future, Father requested that the court establish permanent long-term foster care in lieu of granting the agency permanent custody. At the conclusion of the hearing, the court granted permanent custody to MCDCS. Father now appeals the trial court's ruling.

Assignment of Error No. 1:

THE TRIAL COURT ERRED BY OVERRULING THE APPELLANT'S MOTION TO DISMISS CITING THE STATE'S FAILURE TO COMPLY WITH SECTION 2151.413(E) OF THE OHIO REVISED CODE.

In this assignment of error, Father alleges that the trial court should have dismissed the agency's motion for permanent custody since the agency did not file an adoption plan for Michael as it was required to do pursuant to *R.C. 2151.413(E)*. The agency responds that *R.C. 2151.413(E)* does not require it to file an adoption plan before permanent custody is granted.

R.C. 2151.413(E) reads:

Any agency that files a motion for permanent custody under this section [*10] shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption.

The Fifth District Court of Appeals addressed the issue Father raises in *In re McCutchen*, 1991 Ohio App. LEXIS 1089 (Mar. 8, 1991), 1991 WL 34881, at *4, Knox App. No. 90-CA-25. In that case, the agency did not file an adoption plan until the court had granted permanent custody. *Id.* Mother argued that the agency violated *R.C. 2151.413(E)* by failing to file the adoption plan before

permanent custody was granted. *Id.* The court of appeals looked to the language of *R.C. 2151.413(E)* to determine that the statute did not specify the time at which an adoption plan must be filed, although it did require the agency to file a plan. *Id.*

In its ruling, the court noted that a substantive change to a case plan could only be made by agreement of all parties or after a hearing, and requiring the agency to amend the case plan to add an adoption plan before parental rights were terminated would undermine the agency's efforts to reunify the family. [*11] *McCutchen*, 1991 Ohio App. LEXIS 1089, 1991 WL 34881 at *4. For this reason, the court determined that the agency was not required to file an adoption plan before the court granted permanent custody. *Id.*

We agree with the Fifth District Court of Appeals. *R.C. 2151.413(E)* does not require the agency to file an adoption plan either at any specific time or before permanent custody is granted. Here, the agency did not file an adoption plan at any point in these proceedings. While MCDCS social workers testified that Michael was an adoptable child, social worker Sharon Manion explained that the agency's original goal was the family's reunification, and it would not seek an adoptive home for Michael until permanent custody had been granted.

Indeed, before permanent custody is granted, the agency cannot know whether adoption is a viable option. Requiring the agency to file an adoption plan before Father's parental rights were terminated would have undermined the agency's reunification efforts and caused additional work that may have been rendered moot had permanent custody been denied. Moreover, as the trial court pointed out in denying Father's motion to dismiss, requiring [*12] a court to dismiss a motion for permanent custody when the agency has not filed an adoption plan places procedure over the child's best interests.

The trial court did not err when it denied Father's motion to dismiss the permanent custody motion because the agency did not file an adoption plan before termination of Father's parental rights. Father's first assignment of error is overruled.

Assignment of Error No. 2:

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR PERMANENT CUSTODY, SUCH DECISION BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Father contends that the court improvidently granted the agency permanent custody of Michael when that finding was not supported by clear and convincing evidence. The agency responds that the trial court's grant

of permanent custody is grounded firmly upon clear and convincing evidence.

When granting a motion for permanent custody, the trial court is required to make specific statutory findings. See *In re William S.* (1996), 75 Ohio St. 3d 95, 661 N.E.2d 738, syllabus. A reviewing court must determine whether the trial court followed the statutory factors in making its decision or abused its discretion by [*13] deviating from the statutory factors. *Id.*

A court may terminate parental rights and grant permanent custody of a child to an agency if the agency meets a two-pronged test. See *In re Egbert Children* (1994), 99 Ohio App. 3d 492, 651 N.E.2d 38; R.C. 2151.414. When a state agency moves for permanent custody, the trial court is required first to determine "if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion." R.C. 2151.414(A)(1). In making the best interest determination, the trial court must consider all relevant factors, including but not limited to the following factors enumerated in R.C. 2151.414(D):

(1) The interaction and inter-relationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child;

(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

(3) The custodial history [*14] 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;

(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;

(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

The agency must show by clear and convincing evidence that a grant of permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

In its May 26, 2000 order granting permanent custody, the court made specific findings relating to each of the R.C. 2151.414(D) factors. In making its best interest [*15] finding, the court considered Michael's interaction with Father; Michael's wishes as expressed through the guardian *ad litem*; his custodial history; and his need for legally secure placement. The court heard substantial evidence from Michael's foster parent, social workers, counselor, teacher, and guardian *ad litem* in assessing each of the statutory best interest factors.

The court noted that Michael's interaction with his parents was such that he could not live with either. Indeed, the evidence showed that Michael's aberrant behavior increased with contact with Father. The court specifically found that Michael's age and condition made it imperative that he be placed in a legally secure permanent placement that could not be achieved without a grant of permanent custody to the agency.

Contrary to Father's claim that the weight of the evidence does not support this finding, all of the witnesses, who had substantial training and interaction with Michael, testified that permanent custody was in Michael's best interest. There is no evidence contrary to the court's finding that permanent custody was in Michael's best interest. The court's best interest finding is supported by clear [*16] and convincing evidence.

In addition to determining the child's best interest, however, the court must make a second determination before granting permanent custody: it must determine whether the child can be placed with a parent within a reasonable time or should not be placed with the parent. R.C. 2151.414(B)(1)(a). The court is required to enter a finding that the child cannot be placed with a parent within a reasonable time if any factors set forth in R.C. 2151.414(E) apply, including the following:

(1) Following the placement of the child outside the child's 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 to substantially remedy the conditions causing the child to be placed outside the child's 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 [*17] that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.

The court in the present case specifically enumerated *R.C. 2151.414(E)(1)* and (4) as applicable to Father and set forth the facts that supported its findings.

The trial court specifically found that, following Michael's placement outside the home, Father had failed continuously and repeatedly to remedy the problems that initially caused Michael's placement, although he had been provided the services by which to do so. Indeed, the evidence showed that Father and Bonecutter had completed parenting training, but they did not have the capacity to carry out that training. Bonecutter demonstrated unwillingness to parent Michael, and Father had refused to give Michael needed medication and continued to act inappropriately with Michael. Several of the witnesses [*18] expressed the opinion that Father did not have the capacity or the skills to give Michael the attention and care his condition demands.

The trial court also specifically found that Father had demonstrated a lack of commitment toward Michael by failing to regularly support, visit, or communicate with the child. The evidence showed that Father had seen Michael only three to four times during a two-year period. Even after the agency provided Father with visitation beginning in November 1999, Father missed two of five scheduled visits. Moreover, neither Father nor Bonecutter had demonstrated willingness to complete the agency's case plan by following through with psychological evaluations.

The court's determination that Michael could not be placed with Father within a reasonable time is supported by clear and convincing evidence. Likewise, the court's best interest determination is supported by clear and convincing evidence. We find no abuse of discretion by the trial court in its application of *R.C. 2151.414*. Accordingly, Father's second assignment of error is overruled.

Assignment of Error No. 3:

THE TRIAL COURT ERRED IN ITS RELIANCE UPON EVIDENCE ADDUCED [*19] FROM A PRIOR DEPENDENCY ADJUDICATION.

Father claims that the trial court improperly relied upon evidence presented at the hearing in which Michael was adjudicated a dependent child, and the court's reliance on evidence elicited during that hearing, for which Father was not present, amounts to an impermissible readjudication of Michael's dependency. The agency responds that the trial court could take into

account evidence elicited in the dependency hearing, of which it took judicial notice, and Father missed his opportunity to contest that evidence by failing to appear.

Without pointing to the trial court's specific findings of fact, Father makes ill-defined assertions that the trial court based some of its findings in the permanent custody determination on statements Mother made when she testified at the dependency hearing. The trial court took judicial notice of the previous hearings in this case. Under *Evid.R. 201(C)*, a trial court may take judicial notice of its own proceedings in the immediate cause under consideration. *In re Knotts (1996)*, 109 Ohio App. 3d 267, 271, 671 N.E.2d 1357; see, also, *Diversified Mortgage Investors, Inc. v. Athens County Board of Revision (1982)*, 7 Ohio App. 3d 157, 454 N.E.2d 1330. [*20]

Although a transcript of the October 1998 hearing in which Michael was adjudicated a dependent child is not included in the record, we find that the trial court could properly take judicial notice of the hearing and consider the evidence elicited there when making its permanent custody determination. The dependency adjudication, filed under the same case number as the motion for permanent custody, is part and parcel of the immediate cause under consideration. Indeed, it was necessary for the court to look at Michael's adjudication as a dependent child. Only after a dependency determination has been made must the trial court consider the agency's request for permanent custody and determine if it is appropriate. See *In re Pitts (1987)*, 38 Ohio App. 3d 1, 4, 525 N.E.2d 814.

Moreover, testimony elicited at the dependency adjudication hearing was essential to the trial court's understanding of Father's involvement in the case. See *In re Baby Boy Eddy, 1999 Ohio App. LEXIS 5397 (Nov. 12, 1999)*, 1999 WL 1071641, at *3, Fairfield App. No. 99-CA-17 (court could consider history of case in making permanent custody determination). Since Michael's dependency adjudication is part of the [*21] immediate cause, it is both relevant and indispensable to the court's consideration. See *id.* The trial court properly considered evidence elicited in Michael's dependency adjudication when determining whether MCDCS should be granted permanent custody.

Father contends, however, that the court's consideration of this evidence amounts to a "readjudication" of its previous determination that Michael was a dependent child, in violation of *R.C. 2151.414(A)(1)*. That statute states, in relevant part:

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the

agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 [2151.35.3] of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

A plain reading of the statute's language reveals [*22] that during the dispositional phase of a hearing on a motion for permanent custody the court shall not readjudicate a previous finding that the child who is the subject of that case was dependent, abused, or neglected. *In the Matter of Charnina J.*, 2000 Ohio App. LEXIS 629 (Feb. 25, 2000), 2000 WL 216621, at *4, Lucas App. No. L-99-1250. ² The issue in this case is what constitutes the "readjudication" of a previous dependency finding, which is prohibited by R.C. 2151.414(A)(1).

² In *Charnina J.*, the court determined that R.C. 2151.414(A)(1) only applies to cases in which the agency has filed a motion for permanent custody, as opposed to a complaint for permanent custody, so that the statute did not apply to that case. 2000 WL 216621 at *4. Here, the agency filed a motion for permanent custody, and neither party has challenged the statute's application. Therefore, we assume the statute applies in this case to preclude the "readjudication" of Michael's status as a dependent child.

[*23]

In order to initially adjudicate a child a "dependent child," a court must find, by clear and convincing evidence, that the child meets the definition in R.C. 2151.04. Therefore, the issue at the adjudicatory phase of the proceedings is whether the agency has proven that the child is a dependent child. *In re Baxter (1985)*, 17 Ohio St. 3d 229, 233, 479 N.E.2d 257. The focus of a charge that a child is dependent is on the child and his conditions and not on parental or custodial blameworthiness. *Pitts*, 38 Ohio App. 3d at 3, citing *In re Bibb (1980)*, 70 Ohio App. 2d 117, 435 N.E.2d 96. Thus, in order to "readjudicate" a dependency finding, the court must, for a second time, focus upon whether the child is receiving proper care and find that the child meets the definition of a "dependent child" in R.C. 2151.04.

Here, the court initially adjudicated Michael a dependent child in November 1998. It appears from the trial court's order granting permanent custody that evidence elicited in the dependency hearing duplicated much of the evidence elicited in the permanent custody hearing. However, [*24] the court did not reassess Michael's status as a dependent child as defined in R.C.

2151.04 in the permanent custody hearing. While the court may have considered evidence elicited in Michael's dependency adjudication, the trial court assessed the statutory requirements for granting permanent custody pursuant to R.C. 2151.414, that is, whether permanent custody was in Michael's best interest and whether he could be placed with Father within a reasonable period of time.

In making its determination pursuant to R.C. 2151.414, the trial court took into account all of the relevant evidence before determining that the statutory antecedents for permanent custody had been met. The trial court could consider evidence elicited in the dependency hearing in making its determination of permanent custody without engaging in the "readjudication" of Michael's status as a dependent child that is prohibited by R.C. 2151.414(A)(1) in a permanent custody determination.

We also note that Michael's dependency adjudication, which was followed by a temporary award of custody to MCDCS, was a final appealable [*25] order. *In re Murray (1990)*, 52 Ohio St. 3d 155, 159, 556 N.E.2d 1169. Father did not appeal from the dependency adjudication which resulted in a grant of temporary custody in his absence. ³ He cannot now contend that the trial court cannot consider evidence obtained at that hearing.

³ Although Father was absent from the dependency hearing, his attorney was present.

Accordingly, the trial court properly considered evidence that had been elicited during Michael's dependency hearing when awarding permanent custody to MCDCS. Father's third assignment of error is overruled.

Judgment affirmed.

YOUNG, P.J., concurs.

VALEN, J., concurs separately.

CONCUR BY: VALEN

CONCUR

VALEN, J., concurring separately. I concur in the opinion affirming the trial court's termination of Father's parental rights. I write separately regarding the first assignment of error because I disagree with the reasoning supporting the court's conclusion.

I believe that *McCutchen's* holding ignores the implications of [*26] R.C. 2151.413(E)'s nebulous language:

Any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the agency's actions to seek an adoptive family for the child and to prepare the child for adoption. (Emphasis added.)

While it is true that the statute does not explicitly set forth a particular time at which an agency must file the adoption plan, the statute may be read to imply that an agency must include an adoption plan with the child's case plan at the time that it files its motion for permanent custody. Nevertheless, I interpret the language "that files a motion for permanent custody under this section" as nothing more than a phrase modifying "agency." Interpreted in this way, the statute's plain language does not require the agency to file an adoption plan at the time it files for permanent custody.

I must also take issue with *McCutchen's* reasoning that requiring the agency to file an adoption plan before permanent custody is granted would undermine the agency's attempts to reunify the family. Once a motion for permanent custody [*27] is filed, the agency is no longer attempting such reunification. Requiring the agency to file an adoption plan at that time would have no impact upon that goal, but such a requirement would further the child's best interest in the event the court grants permanent custody.

Nonetheless, I agree with the trial court that granting a motion to dismiss when an agency has not filed an adoption plan would place form over the child's best interest. Therefore, I concur in the court's disposition of the first assignment of error.