

Boggins, J.

{¶1} This is an appeal from a judgment entered in the Tuscarawas County Court of Common Pleas, Juvenile Division, ordering that Ethan Swisher, a minor child, be placed in the permanent custody of the Tuscarawas County Job & Family Services pursuant to R.C. 2151.353(A)(4). From that judgment, the maternal grandmother, Valerie Swisher and the biological mother, Amanda Diaz, filed appeals. Although Ms. Swisher and Ms. Diaz filed separate appeals and separate appellate briefs, this Court has sua sponte consolidated said cases for purposes of this opinion.

{¶2} Appellant, Valerie Swisher assigns as error:

{¶3} “1. RC 2151,414(D)(3) denies Appellant due process protection of the law, thus the same violates the 5th and 14th Amendment, US Constitution and Article I of the Ohio Constitution in that time is the focus and not parental/custodian fitness; and, the trial court committed plain error when it awarded permanent custody of the minor child to JFS in light of such a violation.

{¶4} “2. The Juvenile Court committed reversible error by awarding permanent custody of the minor child to the Tuscarawas County Jobs and Family Services Agency (JFS) absent substantial credible and competent evidence supporting such an award and the Juvenile Court order and decision awarding permanent custody to JFS was against the manifest weight of the evidence.

{¶5} “3. The trial court committed reversible error when it awarded JFS permanent custody of the minor child to JFS when JFS failed to prove by clear and convincing evidence an award of permanent custody was in the minor child’s best

interests; that a legally secure, permanent placement could not be achieved without a placement with the JFS; or, that Appellant did not have an adequate home.

{¶6} “4. It was against the manifest weight of the evidence and the Juvenile Court abused its discretion by terminating the custodial rights of Appellant where Appellant substantially completed the case plan requirements.

{¶7} “5. The Juvenile Court committed reversible error by not considering all the factors required in RC 2151.414(D)(1)-(5).

{¶8} “6. The trial court committed reversible error in finding the JFS had fulfilled its duty to make a good faith effort to provide services to the Appellant during the pendency of the case. The case plan never provided Appellant a true ability to obtain reunification with the minor child.”

{¶9} Appellant Diaz assigns as error:

{¶10} “Assignment of Error Number One: Job and Family Services failed to prove by clear and convincing evidence that the award of permanent custody was in the child’s best interest, and the Juvenile Court therefore erred in awarding permanent custody of the child to the State.

{¶11} “Assignment of Error Number Two: The judgment of the trial court in granting permanent custody of Ethan Swisher was against the Manifest Weight of the Evidence and contrary to law.

{¶12} “Assignment of Error Three: The trial court erred by concluding that there was clear and convincing evidence that it was in the best interest of the minor child of the appellant to be placed in the custody of the Tuscarawas County Job and Family Services.

{¶13} “Assignment of Error Number Four: The trial court committed prejudicial error in its decision granting in a permanent custody motion without considering wishes of the child.

{¶14} “Assignment of Error Number Five: The trial court abused its discretion in sustaining the motion for permanent custody of the Tuscarawas County Job and Family Services in that the requirements of Ohio Revised Code 2151.414(D) were not met.

{¶15} “Assignment of Error Number Six: Revised Code Section 2151.414(D)(3) is unconstitutional denial of substantive due process, 14th Amendment.

{¶16} “Assignment of Error Number Seven: Job and Family Services failed to prove by clear and convincing evidence that reunification of the child with his mother was not possible and the Juvenile Court therefore erred in awarding permanent custody of the subject child to the State.”

{¶17} The following facts were taken primarily from the Guardian ad Litem’s Report filed on May 14, 2003.

{¶18} The minor child, Ethan Michael Swisher, was born on January 6, 1997. Amanda Diaz is the biological mother of the minor child and the biological father is unknown. On August 21, 1998, Appellant Valerie Swisher, the maternal grandmother of the minor child, obtained legal custody of Ethan. Ms. Swisher raised Ethan from an infant. In February of 2002, Ethan was placed in foster care and has remained in the same placement since that time.

{¶19} Ms. Swisher has had continuous involvement with the Children Services and/or Crippled Children’s Bureau since 1975. Ms. Swisher has seven adult children. The youngest, Elizabeth, age 18, still resides in the home and is attending high school.

Ms. Swisher has resided in three counties (Cuyahoga, Coshocton and Tuscarawas) and has Children's Services history in all three counties.

{¶20} Ms. Swisher married her first husband, Ronald Pettibone, when she was 16 years old. She had two children with Ronald, namely, Nicole and Laura. Valerie had rubella while she was pregnant with Laura and the child was born with multiple medical problems. Mr. Pettibone left shortly after the birth of Laura and Mr. Frederick Thuener, Ronald Pettibone's half brother, became romantically involved with Ms. Swisher. Ms. Swisher had five more children with Mr. Thuener and eventually married him in March of 1978. While living in Cuyahoga County, the family was involved with the Cuyahoga County Crippled Children's Services due to multiple medical and developmental problems with the children. Nicole had a kidney problem and Laura was deaf, had cataracts and rubella syndrome. Amanda also had a hip problem and was placed in a cast in 1976. From 1975 to 1978, the family lived in no less than nine residences and had financial difficulties as a result of public assistance being terminated. Numerous referrals were received alleging neglect and abuse (Amanda had a spiral fracture of the left tibia in 1979; Amanda was passing blood in her urine and reported that she was hit in her stomach by a family member in 1980; Freddie placed keys in a light switch and suffered electrical shock and fell from a porch railing in 1980; Timmy had no diapers and had not received all inoculations in 1980; a babysitter molested Nicole, Laura and Amanda in 1981; the children were sleeping on mattresses with no sheets, lacked food, and suffered abusive punishments in 1982; the children were vandalizing neighbors homes in 1984; Nicole reported molestation in 1984; Freddie received psychiatric consultations in 1984; Amanda was molested by a 13-year-

old brother while her brothers allegedly witnessed this activity in 1985; Tim was fondled by a 15-year-old girl in 1985; Freddie and Jon were arraigned in Juvenile Court on truancy charges in 1986; Jon was arrested for stealing a van in 1986; Amanda had bruises on her back and hips allegedly from a whipping she received from her father in 1987; Tim burned a shed in 1988; Tim, Freddie and Jon were involved with the Juvenile Court in 1989 for stealing, curfew violations, arson and killing animals; Nicole was allegedly sexually and physically abused by her step father and brothers in 1989; Amanda allegedly abused her brother, Tim, in 1990; Laura was the victim of an attempted abduction and was raped by a student in 1990; Jon was arrested for a sexual offense of another boy in 1991; Freddie was in detention for breaking and entering in 1992; Amanda was the alleged victim of sexual abuse and Ms. Swisher's boyfriend, Michael Swisher, was the alleged perpetrator.) Mr. Swisher was later arrested for abusing his sister. Laura was allegedly raped by Mr. Swisher and Ms. Swisher has steadfastly refused to believe that allegation. Ms. Swisher married Mr. Swisher in March or May of 1993 and the family moved to Coshocton in 1993.

{¶21} In September of 1993, Coshocton County received a referral regarding Valerie Swisher. It was alleged that Valerie was making her daughter Laura take medicine that was not Laura's. Ms. Swisher was arrested on outstanding warrants from Cuyahoga County for grand theft (welfare fraud in the approximate amount of \$40,000); kidnapping, obstruction of justice; and intimidation of a witness.) These offenses involved Laura being "kidnapped" by Ms. Swisher since July of 1993 and Ms. Swisher's attempt to have Laura recant the rape allegation against Michael Swisher. Valerie plead guilty to obstruction of justice and grand theft in October of 1993 and spent a

month and a half in jail. During that time, Amanda and Tim disclosed that Ms. Swisher used physical discipline with them. The family had an open case in Coshocton County from September, 1993 until May of 1994. Counseling services were implemented, but the case worker doubted that involvement would ever have any true impact on this family. Valerie was having problems with Tim in 1993 and he was receiving psychiatric counseling. Tim disclosed that he was sexually abused by his step aunt, Bettina Swisher, in 1992. Tim also disclosed that Mr. Thuener sexually abused Amanda, Laura and Elizabeth. In 1995, the Sheriff's Department received a report that Tim, when he was 14, was having sex with a 28-year-old woman. All parties denied the allegations.

{¶22} Thereafter, Ms. Swisher moved to Tuscarawas County. Amanda, Ethan, Elizabeth and Gabe also resided with Ms. Swisher. The family continued to have referrals for neglect and abuse. In 1999, a referral indicated unsanitary conditions in the home (dog feces, dirty and cockroaches). In 1999, another referral alleged physical abuse of Ethan. Amanda reported that her father, Fred Thuener, molested her when she was a child and Amanda also indicated that her mother did not believe her when she disclosed this information.

{¶23} In July of 2000, the Coshocton County Children's Services notified the Tuscarawas County Job and Family Services regarding Veronica Thuener and family. Ms. Thuener, Jessalyn and Jon moved into Ms. Swisher's home in Newcomerstown. This is the same home where Ms. Swisher's 16-year-old daughter, Elizabeth, was residing with Ethan Swisher. Three other adults and two other children also resided, on and off, in this household with Ms. Swisher. Concerns were noted regarding Ethan's behavior of "head banging" when he was frustrated or angry. Ms. Swisher also had

problems setting limits and following through with issues regarding her adult children. Concerns were also noted regarding Ms. Swisher's lack of mobility, which immobility significantly affected her ability to care for three special-needs children. The Swisher home was described as "quite chaotic". Concerns were also raised regarding Ms. Swisher's current marriage to a convicted sex offender. Ms. Swisher eventually moved to 580 Barnett Street, Newcomerstown, in October of 2001. This home continued to have a chaotic environment, but also had problems with roaches and a robbery. On one occasion, Jon was seen at the home swinging a brick on a dog chain. A young child was on the floor within distance of this swinging object and no action was taken by Ms. Swisher to stop this dangerous behavior or to protect Breanna. On another occasion, another infant was found strapped into a high chair for one hour. As the child would cry and beg to be released, Ms. Swisher and the child's parent yelled at the child and told the social worker that they needed time to "have a breather" from this child. Later that same week, the same toddler ingested household bleach that was left within the child's reach. Concerns regarding the childrens' safety, care, and discipline were raised. In November of 2001, Childrens Services received a referral that Ms. Swisher's home was infested with roaches and that one roach had actually crawled into Elizabeth's ear.

{¶24} By December, 2001, concerns regarding Ms. Swisher's health and limited mobility continued to be raised. A Guardian ad Litem was appointed for Jessalyn and Breanna Swisher. The Guardian was "appalled" by the environment in which these girls lived in Ms. Swisher's home. As such, the Guardian recommended that Jessalyn and Breanna be immediately removed from Ms. Swisher's home and placed in the

temporary custody of the Tuscarawas County Job and Family Services. Because of Ethan's young age and apparent risks in the home, he also was placed in the temporary custody of the Tuscarawas County Job and Family Services in February of 2002.

{¶25} The Guardian reported that Ms. Swisher's home environment at the time the children were removed in February of 2000 was inappropriate and unhealthy.

{¶26} In March, 2002, a case plan was filed. Under this plan, Ms. Swisher was to obtain a complete physical and follow recommendations, obtain a psychological evaluation and follow recommendations. An amendment to that plan included therapy for Ethan at the Wellness Center to address his developmental and physical needs. Ms. Swisher was attend individual counseling to learn the effects of sexual abuse and she was ordered not to allow any individual with a history of charges or crimes against children around Ethan. Ms. Swisher was also to complete parent education and to participate in Ethan's therapy at the Wellness Center as recommended by therapists. A subsequent amendment increased visits between Ethan and Ms. Swisher, changed Ethan's therapy to a school-based program, and ordered that Ms. Swisher not permit Jon Thuener in or around her home.

{¶27} It was determined that Ethan had communication and fine motor skill delays. Ethan also had language delays. It was noted that Ethan had suffered hearing loss due to frequent ear infections and "persistent environmental factors." Ethan's gross motor skills appeared to be significantly delayed and possibly attributable to the lack of care he received from Ms. Swisher. As such, it was recommended that Ethan obtain special education. Although it was recommended that Ethan be placed in a full-day pre-school program, Ms. Swisher only placed him in a half-day program.

{¶28} At the time Ethan was placed in foster care, he had an elevated sense of fear and had no ability to dress himself or climb steps. He was terrified to have a bowel movement and became extremely nervous and would “start to gag” if he was removed from the foster home.

{¶29} Physical examinations determined that Ethan’s problems were not related to any medical/neurological condition, but were the result of the environmental conditions to which he was subjected before his removal.

{¶30} Ms. Swisher appeared to always be cooperative with respect to her case plan and her desire to be reunited with Ethan. Despite her attempts to follow through on all recommended case plan services, it was the opinion of the Guardian ad Litem that Ms. Swisher would be unable to incorporate what she was taught into her daily life. According to the Guardian ad Litem, Ethan has a “slim chance of flourishing in Valerie’s home.” As such, the Guardian recommended that permanent custody of Ethan be awarded to the Tuscarawas County Job and Family Services.

{¶31} We now turn to Ms. Swisher’s Assignments of Error.

I.

{¶32} Through her first Assignment, Ms. Swisher asserts that R.C. 2151.414(D)(3) is unconstitutional. That section provides, in pertinent part:

{¶33} “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;”

{¶34} Under that subsection, it is presumed that a parent is unfit to care for his/her child purely on the passage of time.

{¶35} We hereby overrule Ms. Swisher's First Assignment of Error for lack of standing. Ms. Swisher is not the biological parent of Ethan. As such, she does not have standing to raise the issue of whether R.C. 2151.414(D)(3) is constitutional because it only applies to biological parents of a child and not to the maternal grandmother of the child.

{¶36} Ms. Swisher's First Assignment of Error is hereby overruled.

II, III and IV

{¶37} Through her Second, Third and Fourth Assignments of Error, Ms. Swisher claims that the evidence does not support the permanent custody award. We disagree

{¶38} The facts as set forth herein above, clearly demonstrated that Ms. Swisher would be unable to alter her environment in a permanent manner to allow Ethan to flourish in that home. Although it appears that Ms. Swisher made diligent efforts to follow all recommendations of her case plan, she was unable to apply that knowledge in a practical manner. For example, Ms. Swisher continues to deny responsibility for her past actions and her past choices. Ms. Swisher blames her past criminal activity on her ex-husband and attempts to justify the kidnapping charges for which she was convicted. Furthermore, Ms. Swisher's history demonstrates her inability to protect minor children from inappropriate individuals and provide the children that reside with her with a stable and clean environment.

{¶39} For these reasons, and for the reasons set forth in the trial court's judgment, we hereby overrule Ms. Swisher's Second, Third and Fourth Assignments of Error.

V.

{¶40} Through her Fifth Assignment of Error, Ms. Swisher claims the court did not consider all factors set forth on R.C. 2151.414(D)(1)-(5). We disagree.

{¶41} We believe that the Findings of Fact set forth in the trial court's judgment sufficiently indicate that the trial court did consider the factors set forth in R.C. 2151.414(D)(1)-(5).

{¶42} Ms. Swisher's Fifth Assignment of Error is hereby overruled.

VI.

{¶43} Through her Sixth and final Assignment of Error, Ms. Swisher claims that the Tuscarawas County Job and Family Services failed to fulfill its duty to make a good faith effort to provide services to Ms. Swisher during the pendency of this case and provide her a case plan that would allow her to obtain reunification with Ethan.

{¶44} We believe that the case plan that was developed for Ms. Swisher was made in good faith and with the goal of reunification. However, no matter how well designed a case plan may be, the plan provides no benefit if the recipient does not apply what they learn. Here, it does appear that Ms. Swisher was diligently trying to follow the case plan, but her past history prevented her from truly learning how to alter her behavior for the benefit of the minor child.

{¶45} Ms. Swisher's Sixth and final Assignment of Error is hereby overruled.

{¶46} We now turn to Appellant, Amanda Diaz's assigned errors.

{¶47} For the reasons stated above, we hereby overrule Appellant's Diaz's Assignment of Errors I, II, III, V, and VII.

IV.

{¶48} Through her Fourth Assignment of Error, Appellant Diaz maintains the trial court committed error in granting permanent custody without considering the wishes of the child.

{¶49} From the facts of this case, we believe the trial court properly determined that the best interests of Ethan required a permanent custody award in favor of the Tuscarawas County Job and Family Services.

{¶50} Because of the numerous developmental delays that Ethan has suffered and because of his young age, we believe the trial court properly did not consider Ethan's wish to be reunited with his grandmother.

{¶51} Accordingly, we hereby overrule Appellant Diaz's Fourth Assignment of Error.

VI.

{¶52} As did Appellant Swisher, Appellant Diaz challenges the constitutionality of R.C. 2151.414.(D)(3). We decline to rule upon this assigned error because it appears the trial court did not rely on that code section when it ordered permanent custody of Ethan be placed with the Tuscarawas County Job and Family Services.

{¶53} As such, Appellant Diaz's Sixth Assignment of Error is hereby overruled.

{¶54} For the foregoing reasons, the judgment entered in the Tuscarawas County Court of Common Pleas, Juvenile Division, is hereby affirmed.

{¶55} It is so ordered.

12/18/03 Nunc Pro Tunc Judgment Entry Correcting Stark County To Tuscarawas County only. Correction does not affect the ruling.

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|--------------------------|---|--|
| IN RE: The matter of | : | |
| ETHAN SWISHER, | : | |
| A Dependent Child | : | |
| | : | <u>NUNC PRO TUNC</u> |
| Plaintiff-Appellant | : | Case No. 2003 AP 08 0060 |
| Vs. | : | Case No. 2003 AP 08 0066 |
| | : | |
| Tuscarawas County Job & | : | <u>JUDGMENT ENTRY</u> |
| Family Services | : | |
| | : | |
| Defendant-Appellee | : | |
| | : | |
| CHARACTER OF PROCEEDING: | | Civil appeal from Tuscarawas County Court of Common Pleas, Case No. 02 JU 00144 |
| JUDGMENT: | | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs assessed to Appellant.