[Cite as *In re Lehman*, 2001-Ohio-3179.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 99-CO-25
)		
BARBARA LEHMAN, DOB: 10/18/86	)	O P I N I O N
MARY LEHMAN, DOB: 8/3/84	)	

CHARACTER OF PROCEEDINGS: Appeal from Columbiana County Court of Common Pleas, Juvenile Division, Columbiana County, Ohio

Case Nos. J17689-3
J17690-3

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee Columbiana County Department of Human Services:
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Prosecuting Attorney
Atty. Michael J. Krause
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For Defendants-Appellants Mervin and Ruth Lehman:
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Guardian Ad Litem:
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: May 17, 2001

WAITE, J.

{¶1} This timely appeal arises from the decision of th Columbiana County Court of Common Pleas, Juvenile Division, to terminat the parental rights of Appellants Mervin and Ruth Lehman regarding thei minor children, Barbara and Mary Lehman. For the following reasons, w affirm the judgment of the trial court.

{¶2} This matter was certified to the Columbiana Count Juvenile Court from the Stark County Family Court in May, 1994. Th Stark County Family Court had placed the children in foster car although their mother retained custody of them. After the case wa transferred to Columbiana County Juvenile Court, Appellant Mervin Lehma was found in contempt of a no-contact order. On the state's motion, th children were placed in the custody of Raymond and Joyce Smalley wit protective supervision. Mervin's no-contact order was to continue. Th trial court later granted permanent custody to the Smalleys and lifte the protective supervision order; this Court affirmed that judgment i *In the Matter of Elizabeth Paxon, Barbara Lehman and Mary Lehman* (Jan 15, 1998), Columbiana App. No. 96-CO-83, unreported, which also involve Ruth's now-emancipated daughter.

{¶3} On September 29, 1998, the trial court reviewed th matter in light of the separation of the Smalleys and their substandar living conditions. The court again ordered protective supervision. O October 2, 1998, the guardian ad litem for the children filed complaint alleging the dependency of both girls and requesting tha

Appellee, Columbiana County Department of Human Services, be grante permanent custody. The complaints were captioned J16789-2 and J16790-2 On October 29, 1998, the trial court accepted the stipulation that th girls were dependent.

{¶4} On November 18, 1998, Appellee filed new complaint alleging that Mary was an abused child and that Barbara was dependent The proceedings stemming from these complaints, captioned as J17689- and J16790-3, are the sole concern of this appeal. Appellee requeste permanent custody and was granted temporary custody of the girls by e parte order. On November 24, 1998, the trial court upheld that decisio following a hearing with all relevant parties present. On December 18 1998, it was stipulated that Mary was an abused child and that Barbar was a dependent child. On April 9, 1999, a merit hearing on th question of permanent custody was held regarding the November 18, 1998 complaints. In a journal entry filed on April 28, 1999, the trial cour terminated the parental rights of Mervin and Ruth Lehman and place Barbara and Mary in the permanent custody of Appellee. Appellants file their timely notice of appeal on May 11, 1999.

{¶5} Appellants' first assignment of error alleges:

{¶6} **"THE JUDGMENT OF THE TRIAL COURT IS VOID IN THAT TH COURT FAILED TO ACQUIRE JURISDICTION OVER APPELLANTS FOR THE PURPOSE O TERMINATING THEIR PARENTAL RIGHTS WITH RESPECT TO MARY AND BARBAR LEHMAN."**

{¶7} Appellants argue that they did not receive service of th complaint for permanent custody and termination of parental rights Appellants note that they raised this issue before the trial court wit

an oral motion to dismiss but that their motion was denied. (Tr. pp 15-16, 21).

{¶8} Appellants argue that, "[t]he jurisdiction of th juvenile court does not attach until notice of the proceedings has bee provided to the parties. Absent notice, the judgment of the court i void." *In re Miller* (1986), 33 Ohio App.3d 224, 225-226. Appellant assert that they were never served with a complaint and therefore th judgment of the trial court is void. Based on the record herein and th relevant law, we hold that Appellants' argument lacks merit.

{¶9} We first note our concern that the issue before us ha been raised in several other appeals of this nature indicating th possibility that the trial court and the clerk may need to review thei procedures in these matters. A complaint for permanent custody an termination of parental rights is a new complaint, not merely a ne motion in an ongoing open matter. Nevertheless, the record reflect that service here was proper.

{¶10} The Ohio Supreme Court has stated:

{¶11} "* * * the filing of a complaint containing a praye requesting permanent custody, sufficiently apprising the parents of th grounds upon which the order is to be based, and the service of summon upon the parents, explaining that the granting of such an orde permanently divests them of their parental rights, are prerequisite to valid adjudication that a child is neglected or dependent for th purpose of obtaining an order for permanent custody divesting parenta rights."

{¶12} *In Re Fassinger* (1975), 42 Ohio St.2d 505, 508.

{¶13} This requirement is codified in R.C. §2151.414(A)(1 which reads in pertinent part:

{¶14} "Upon the filing of a motion pursuant to section 2151.41 of the Revised Code for permanent custody of a child, the court shal schedule a hearing and give notice of the filing of the motion and o the hearing, in accordance with section 2151.29 of the Revised Code, t all parties to the action and to the child's guardian ad litem. Th notice also shall contain a full explanation that the granting o permanent custody permanently divests the parents of their parenta rights, a full explanation of their right to be represented by counse and to have counsel appointed pursuant to Chapter 120. of the Revise Code if they are indigent, and the name and telephone number of th court employee designated by the court pursuant to section 2151.314 o the Revised Code to arrange for the prompt appointment of counsel fo indigent persons."

{¶15} R.C. §2151.29 provides in relevant part that, "[s]ervic of summons, notices, and subpoenas, prescribed by section 2151.28 of th Revised Code, shall be made by delivering a copy to the person summoned notified, or subpoenaed, or by leaving a copy at his usual place o residence."

{¶16} In the present matter, nothing on the record indicate that the trial court notified Appellants pursuant to R.C. §2151.414 However, the First District Court of Appeals has held that in spite o lack of statutory notice, notice is sufficient where the parent ha actual notice of the custody termination proceedings. *In Re Webb* (1989), 64 Ohio App.3d 280, dismissed for lack of substantia constitutional question, jurisdictional motions overruled 48 Ohio St.3 704. The *Webb* court was cognizant of the holding in *Fassinger, supra* and agreed that a parent must have notice of a hearing to terminat parental rights and to determine permanent custody. *In Re Webb*, 285 The *Webb* court focused on the *Fassinger* court's rationale that, "* * to deprive parents of permanent custody of their children, withou proper notice, summons, and hearing, would be 'manifestly unfair.'" *I*

Re Webb, 284, citing *In Re Fassinger*, 508. The *Webb* court found actua notice to a parent satisfied the notice requirement. The court stated

{¶17} "There is no question that appellant in the instant cas had actual notice of the proceedings, appeared, defended, and was give a full opportunity to be heard. Appellant does not argue that he wa unaware of the nature of the proceedings. Further, appellant wa represented by counsel throughout the proceedings. * * * Because th record clearly demonstrates that appellant had actual notice of th proceedings, fully understood his rights and the nature of th proceedings, and participated throughout, the first assignment of erro is overruled."

{¶18} *In Re Webb*, 284-285.

{¶19} In the matter before us, Appellants appeared with counse at all hearings regarding the relevant complaints for permanent custody Appellants were present at a probable cause hearing on November 19 1998, when they were appointed counsel and received notice of subsequent adjudicatory hearing. (Journal Entry, Nov. 24, 1998) Appellants appeared with counsel at the adjudicatory hearing on Decembe 15, 1998, where they stipulated that Mary was an abused child and tha Barbara was a dependent child and where they received notice of th subsequent final disposition hearing. (Journal Entry, Dec. 18, 1998) Appellants were present at February 9, 1999, preliminary hearing wher the court set the matters for further pre-trial for a merit hearing (Journal Entry, Feb. 12, 1999). Appellants were present with counsel a the pre-trial hearing on March 9, 1999. (Journal Entry, March 17 1999). And, Appellants were present with counsel at the merit hearin held on April 8, 1999. (Journal Entry, April 8, 1999).

{¶20} In adopting the rationale of *In Re Webb, supra,* we ar mindful that, "[t]he sections of the Ohio Revised Code that gover

custody matters are to be liberally construed to provide for the care protection, and mental and physical development of children * * *." *I Re Wise* (1994), 96 Ohio App.3d 619, 624 citing *In Re Cunningham* (1979) 59 Ohio St.2d 100, 105.

{¶21} We also note that Juv.R.22(D) provides that defenses an objections based on defects in the complaint must be heard prior to th adjudicatory hearing. *In Re Shaeffer Children* (1993), 85 Ohio App.3 683, 688, jurisdictional motion overruled 67 Ohio St.3d 1451. In th present instance, Appellants did not challenge the sufficiency of th complaint and notice until after their children were adjudicated, one a an abused child and the other as a dependent child. R.C. §2151.41 clearly distinguishes between the adjudicatory proceedings and the fina termination of parental rights:

{¶22} "The court shall conduct a hearing in accordance wit section 2151.35 of the Revised Code to determine if it is in the bes interest of the child to permanently terminate parental rights and gran permanent custody to the agency that filed the motion. The adjudicatio that the child is an abused, neglected, or dependent child and an dispositional order that has been issued in the case under sectio 2151.353 of the Revised Code pursuant to the adjudication shall not b readjudicated at the hearing and shall not be affected by a denial o the motion for permanent custody."

{¶23} R.C. §2151.414(A)(1)

{¶24} For all the foregoing reasons, we overrule Appellants first assignment of error.

{¶25} Appellants' second assignment of error alleges:

{¶26} **"THE FINDING BY THE COURT THAT PERMANENT CUSTODY SHOUL BE GRANTED TO THE DEPARTMENT AND THE PARENTAL RIGHTS OF THE APPELLANT TERMINATED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE CLEA MANDATES OF R.C. SECTION 2151.414."**

{¶27} Appellants advance the argument that R.C. §2151.414(D requires, in determining the best interest of a child in a permanen custody hearing, that the court shall consider all relevant factor including, but not limited to:

{¶28} "(1) The interaction and interrelationship of the chil with the child's parents, siblings, relatives, foster parents an out-of-home providers, and any other person who may significantly affec the child;

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

{¶30} "(3) The custodial history of the child, includin whether the child has been in the temporary custody of one or mor public children services agencies or private child placing agencies fo twelve or more months of a consecutive twenty-two month period ending o or after March 18, 1999; [and,]

{¶31} "(4) The child's need for a legally secure permanen placement and whether that type of placement can be achieved without grant of permanent custody to the agency * * *"

{¶32} Appellants assert that the first two factors weigh i their favor as they have maintained a relationship with their childre while they were in Appellee's custody and because at least one of th children was sexually abused while in foster care. Moreover, Appellant assert that the children have made it clear that they wish to b reunited with their parents. With respect to the third factor Appellants state that they have a better record as care-givers than doe Appellee, who placed the children in a foster care situation where on was sexually abused. Finally, with respect to the fourth factor Appellants assert that Appellee's stated goal for the children wa adoption. Appellants argue that due to their ages and the bond betwee

them, as well as their emotional problems, adoption is highly unlikely implying that Appellee cannot achieve its goal by gaining custody Again, however, based on the record here, this assignment of error lack merit.

{¶33} When reviewing the decision to grant permanent custody t a state agency, an appellate court must determine whether the lowe court complied with the statutory requirements of R.C. §§2151.353 an .414 and whether there was sufficient evidence to support a finding b clear and convincing evidence that one or more of the factors listed i R.C. §2151.414(E) exist. *In Re Dylan C.* (1997), 121 Ohio App.3d 115 121. Permanent custody may not be granted unless the trial court find clear and convincing evidence that one or more of the eight enumerate factors in this section exist. *Id.* citing *In re William S.* (1996) 7 Ohio St.3d 95, 101. Clear and convincing evidence is that level o proof which would cause the trier of fact to develop a firm belief o conviction as to the facts sought to be proven. *In Re Dylan C.*, 12 citing *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of th syllabus. While the trial court must consider the best interests of th child by examining the factors listed in R.C. §2151.414(D)(1) throug (5), an appellate court will not reverse a trial court's determinatio concerning parental rights and child custody unless the determination i not supported by evidence which meets the clear and convincing standar of proof. *In Re Dylan C.*, 121 citing *In re Adoption of Holcomb* (1985) 18 Ohio St.3d 361.

{¶34} In the present case, the record reflects that there wa

evidence before the trial court to support the finding that it was i the best interest of the children to grant permanent custody t Appellee. A social worker testified that Appellants failed to compl with an established case plan which included addressing issues of sexua abuse with counseling and parenting classes. Appellants failed t address poor housing conditions and poor hygiene. (Tr. pp. 185, 202 208). There was testimony that Ruth stated that she did not want t attend counseling because her children did not need it. (Tr. 41). Rut actually testified that she did not believe her daughter was sexuall abused and "disagreed" with counseling sessions. (Tr. p. 252). Ther was testimony that Appellants lived in deplorable conditions, where th floor was littered with dirty clothes, garbage and animal urine an feces. (Tr. pp. 47, 83, 187). Morever, the children were filthy whe attending school, covered in animal feces and urine. (Tr. pp. 47, 187 205).

{¶35} There was also testimony that Appellants demonstrated lack of commitment by failing to regularly visit their children onc they were removed from Appellants' home. (Tr. p. 38, 139, 191, 221 222). Visitation was described as, "* * * just recently sporadic * * [with] long periods of time where visitation did not occur." (Tr. p 38). There was testimony that the lack of visitation had a visibl impact on the children, forcing them to "cope with disappointment. (Tr. p. 120).

{¶36} The record also includes evidence that could cause th trial court to develop a firm belief that one or more of the factor

found in R.C. §2151.414(E) were proven. Relevant to this appeal, R.C §2151.414(E) provides the following:

{¶37} "(1) Following the placement of the child outside th child's home and notwithstanding reasonable case planning and diligen efforts by the agency to assist the parents to remedy the problems tha initially caused the child to be placed outside the home, the parent ha failed continuously and repeatedly to substantially remedy th conditions causing the child to be placed outside the child's home. I determining whether the parents have substantially remedied thos conditions, the court shall consider parental utilization of medical psychiatric, psychological, and other social and rehabilitative service and material resources that were made available to the parents for th purpose of changing parental conduct to allow them to resume an maintain parental duties.

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

{¶39} "(9) The parent has placed the child at substantial ris of harm two or more times due to alcohol or drug abuse and has rejecte treatment two or more times or refused to participate in furthe treatment two or more times after a case plan issued pursuant to sectio 2151.412 of the Revised Code requiring treatment of the parent wa journalized as part of a dispositional order issued with respect to th child or an order was issued by any other court requiring treatment o the parent."

{¶40} As we have already stated, there was evidence tha Appellants failed to comply with the established case plan designed t remedy the conditions which were the basis for removing the children There was also evidence that Appellants lacked a commitment to visi with their children and failed to provide them with basic necessities such as a healthy living environment. Conversely, there was very littl evidence of record to support the Appellants.

{¶41} For all the foregoing reasons, we overrule Appellants second assignment of error. Accordingly, we affirm the judgment of th

trial court.

Vukovich, P.J., concurs.

Donofrio, J., concurs.