[Cite as *In re I.D.*, 2009-Ohio-6805.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 09 CO 13
	)	
I.D.,	)	O P I N I O N
	)	
A DEPENDENT CHILD.	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Juvenile Division, Case No. J2007-0179.

JUDGMENT: Affirmed.

APPEARANCES:

For Appellee:

Attorney Robert Herron
Prosecuting Attorney
Attorney Allyson Lehere
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For Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 21, 2009

VUKOVICH, P.J.

¶{1} Appellant Steven A. appeals the decision of the Columbiana County Juvenile Court terminating his parental rights to I.D. Steven raises multiple issues in this appeal, including whether he waived his right to counsel and whether the juvenile court's grant of permanent custody to Columbiana County Department of Job and Family Services (CCDJFS) was against the manifest weight of the evidence. However, the issue at the heart of this appeal is whether the juvenile court erred when it determined that the "12 of 22" provision in R.C. 2152.414(B)(1)(d) was met. Steven contends the "12 of 22" provision was not met. His specific arguments require this court to interpret the "12 of 22" provision and determine two separate issues.

¶{2} First, we are asked to determine whether a child must be at least twenty-two months old for the consecutive twenty-two month portion of the "12 of 22" provision to be met. Or in other words, is a court prohibited from granting permanent custody based on the "12 of 22" provision when a child is under twenty-two months of age, but has been in the temporary custody of the agency for at least twelve months of the child's life? For the reasons explained below, we find that a trial court can legally terminate parental rights based on the "12 of 22" provision of a child under twenty-two months of age who has been in the temporary custody of the agency for twelve months.

¶{3} Second, we are asked to determine when the agency's temporary custody of I.D. began for purposes of R.C. 2151.414(B)(1)(d) and whether I.D. had been in the temporary custody of the agency for a twelve month period. Finding that temporary custody of I.D. began sixty days after the removal from the mother's care, we hold that I.D. had been in the agency's temporary custody for over twelve months at the time the motion for permanent custody was filed.

¶{4} We find no merit with any of the arguments raised. Thus, the trial court's order terminating Steven's parental rights to I.D. is hereby affirmed.

STATEMENT OF CASE

¶{5} I.D. was born July 19, 2001, and is the biological child of K.D. (mother). When the child was one day old he was removed from the mother's care and alleged to be dependent. An order was issued that same day granting temporary custody of I.D. to the Columbiana County Department of Job and Family Services (CCDJFS).

07/20/09 J.E. At the time of removal, it was not clear who was the biological father of I.D.; it was between two men, one of whom was Steven.

¶{6} An adjudicatory hearing was held on September 28, 2007, which Steven attended. At the hearing, the mother, Steven, as punitive father, and the Guardian Ad Litem (GAL) stipulated that I.D. was a dependent child. The court found I.D. to a dependent child and ordered that he remain in the custody of CCDJFS. 10/10/07 J.E. It was also ordered that Steven could have no part in the case plan until it was proven that he was the father. 11/05/07 J.E. On November 13, 2007, it was confirmed that Steven was the father and his visitation began on November 16, 2007; the case plan was modified to include him.

¶{7} In January 2008, CCDJFS recommended that I.D. be placed in Steven's custody. As of that date, Steven had attended all visits and did everything that was asked of him. A hearing was held on January 15, 2008, and at that hearing the trial court stated that while CCDJFS's temporary custody of I.D. was continued I.D. could be placed in the physical custody of Steven. 01/23/08 J.E. Immediately following the hearing, I.D. was physically placed with Steven.

¶{8} The physical placement with Steven continued until April 22, 2008, at which time I.D. was removed from Steven's residence because of concern for I.D.'s safety. While the placement at first was successful, Steven's residence changed when he and his fiancé broke up. Following the break up, CCDJFS learned that Steven was leaving the child with unauthorized people. Further, when a worker from CCDJFS came to visit Steven and I.D. in the new residence, the worker found that I.D. was dressed too warmly and smelled of sweat, Steven was asleep while I.D. was awake, Steven had not set up I.D.'s crib for him to sleep in, dried formula was found in the nipple I.D. was drinking from, and Steven was smoking around I.D.

¶{9} Following removal, Steven was permitted to visit. He visited on May 5, 2008, and then over the next year he only visited four times, September 8, 2008, December 1, 2008, February 17, 2009 and March 2, 2009; he missed the other 18 scheduled visits. Furthermore, after I.D. was removed, Steven moved multiple times and at one point was living at the YMCA. (TR. 52). He maintained limited contact with CCDJFS during that time; he would leave messages that he had new information for the worker, but he did not leave a call back number. (Tr. 52). CCDJFS also points out

that it attempted to contact him through letters and phone calls, when they had his telephone or cellular number(s), but he did not respond to either. (Tr. 54).

¶{10} On December 30, 2008, CCDJFS filed a motion for permanent custody and a hearing was set for April 20, 2009. Despite having received notice of the hearing from the court by certified mail, Steven failed to appear at the hearing. However, his counsel did appear. Counsel asked to withdraw stating that he only had contact with Steven in February 2009, when he first met with Steven. He explained that his next attempted contact with Steven was a letter he sent Steven informing him of the permanent custody hearing date. That letter, however, was returned as not deliverable and no forwarding address was given. Following the hearing, the trial court granted the motion and terminated the mother and Steven's rights. Steven timely appeals raising four assignments of error.

FIRST AND SECOND ASSIGNMENT OF ERROR

¶{11} "THE COURT ERRED IN ALLOWING COUNSEL FOR APPELLANT-FATHER TO WITHDRAW AT THE DISPOSITIONAL HEARING, IN VIOLATION OF JUVENILE RULE 7.2."[1]

¶{12} "THE COURT ERRED IN ALLOWING THE DISPOSITIONAL HEARING TO CONTINUE WITHOUT COUNSEL FOR APPELLANT-FATHER PRESENT, IN VIOLATION OF HIS STATUTORY RIGHTS PURSUANT TO O.R.C. SECTION 2151.352."

¶{13} Steven argues the first two assignments of error together and, as such, they are addressed in that manner. Under these assignments of error, Steven contends that the trial court denied him the right to counsel when it allowed counsel to withdraw. He asserts that the court should have appointed new counsel and/or postponed the hearing until he could attend.

¶{14} Our analysis starts with the basic understanding that "[t]he right to raise a child is an 'essential' and 'basic' civil right," and that a parent's interest in the care, custody and management of his or her child is "fundamental." *In re Murray* (1990), 52 Ohio St.3d 155, 157, quoting *Stanley v. Illinois* (1972), 405 U.S. 645. The permanent termination of parental rights has been described as "the family law equivalent to the

[1]There is no Juv.R. 7.2. It appears Steven's citation to this rule comes from a case out of the Sixth District where there is a Local Juvenile Court Rule 7.2. There is no such rule in Columbiana County Juvenile Court.

death penalty in a criminal case." *In re Hayes* (1997), 79 Ohio St.3d 46, 48. Thus, a parent "must be afforded every procedural and substantive protection that the law allows." Id. Parental rights receive even more stringent protection under Ohio law than the Constitution requires. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46.

¶{15} R.C. 2151.352 and Juv.R. 4 delineate a parent's right to counsel within the context of an Ohio termination of parental rights proceeding. *In re Tyler S.*, 6th Dist. No. L-04-1294, 2005-Ohio-1225, ¶25. R.C. 2151.352 provides:

¶{16} "A child, the child's parents or custodian, or other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this Chapter or Chapter 2151 of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code * * *."

¶{17} Juv.R. 4 similarly states:

¶{18} "**(A) Assistance of counsel**

¶{19} "Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. * * *

¶{20} "* * *

¶{21} "(**F) Withdrawal of counsel or guardian ad litem**

¶{22} "An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown." Juv.R. 4. (Emphasis in Original).

¶{23} Thus, considering Juv.R. 4 and R.C. 2151.352, a parent has the right to counsel in a termination of parental rights proceeding. *In re Tyler S.*, 6th Dist. No. L-04-1294, 2005-Ohio-1225, at ¶31; *In re C.H.*, 162 Ohio App.3d 602, 2005-Ohio-4183, ¶9 (3d Dist.); *In re M.L.R.*, 150 Ohio App.3d 39, 2002-Ohio-5958, ¶12 (8th Dist.). However, some courts have found that that right is not absolute; "a parent facing termination of parental rights can, under certain circumstances, be found to have waived the right to counsel, in which case a court may properly grant a request by counsel to withdraw." *In re Tyler S*., 6th Dist. No. L-04-1294, 2005-Ohio-1225, at ¶31; *In re C.H*., 162 Ohio App.3d 602, 2005-Ohio-4183, at ¶10; *In re M.L.R.*, 150 Ohio App.3d 39, 2002-Ohio-5958, at ¶14-22.

¶{24} In the case at hand, the request to withdraw was based on uncooperativeness and/or lack of communication between counsel and Steven, and the inability of counsel to contact Steven. The Sixth Appellate District has formulated a two prong test to determine whether counsel is permitted to withdraw due to lack of communication and/or lack of cooperativeness. It has explained:

¶{25} "A court considering whether to grant an attorney's request to withdraw must use caution and, in the interest of safeguarding a parent's right to counsel and avoiding plain error, must undertake the following two-pronged inquiry: First, the court must ascertain that counsel's attempts to communicate with and obtain the cooperation of the client were reasonable; and second, the court must verify that the failure of this communication resulted in the inability of counsel to ascertain the client's wishes. *In the matter of: Sadie R.,* 6th Dist. No. L-04-1057, 2005-Ohio-325, at ¶ 35, 36; *In the matter of: Savanah M.,* supra, Singer, J., concurring, at ¶ 45. Unless both prongs of this inquiry are satisfied, the motion to withdraw must be denied. See id." *In re Tyler S.*, 6th Dist. No. L-04-1294, 2005-Ohio-1225, at ¶32.

¶{26} We agree with this well reasoned opinion and adopt it as our own. Accordingly, we now apply the facts of this case to that two prong test.

¶{27} As to the first prong, Steven's counsel only made one attempt to contact him after their initial meeting in February 2009. Approximately a week and half prior to the permanent custody hearing counsel sent Steven a letter informing him of the hearing date. That correspondence was sent to the address Steven provided to him. However, it was returned undeliverable with no forwarding address. Despite that, Steven was aware of CCDJFS's intention to seek permanent custody. He attended a meeting with the caseworker on September 8, 2008, and at that meeting he was informed of CCDJFS's intention. (Tr. 54). He also received notice of the hearing by the court via certified mail. That certified mail was not sent to the address that Steven provided to his counsel, rather it was sent to a different address that counsel did not have.

¶{28} The fact that counsel made only one attempt to contact Steven prior to the hearing could possibly indicate that counsel's attempt was not reasonable. See *In re Tyler S.*, 6th Dist. No. L-04-1294, 2005-Ohio-1225; *In re Alyssa C.*, 153 Ohio App.3d 10, 2003-Ohio-2673 (Counsel indicated that had not been in contact with the mother for more than six months, but the caseworker testified that she spoke to the

mother two days prior to the hearing. Thus, the court concluded that counsel's attempts at communication were questionable). However, the record reflects that Steven consistently failed to keep others, such as the court, the CCDJFS caseworker, and the GAL apprised of his current address and information. For example, the court file shows that some entries and notices had to be resent to Steven because the court did not have his correct address. The hearing notice for the Motion to Extend Temporary Custody had to be resent to Steven twice. Following that hearing, there are two other instances in the record where entries had to be resent to Steven; one was a trial court's judgment entry and the other was a magistrate's order.

¶{29} The GAL also had difficulties keeping in contact with Steven. At the permanent custody hearing, she testified that before I.D. was removed from Steven's home, he contacted her several times, but since the removal he had moved several times, had not had significant contact with her, and due to lack of current contact information, she had been unable to contact him. (Tr. 7-8). The previous GAL's August 1, 2008 report substantiates that testimony. In that report, the previous GAL acknowledged speaking with Steven on May 21, 2008. However, following that date she attempted on several occasions to contact him, but the cellular phone number he provided her was no longer working. She further noted that he had not left her any messages on her voicemail as he had previously done. 08/01/08 GAL report.

¶{30} Additionally, the social worker from CCDJFS also testified at that hearing and her testimony was very similar to the GAL's regarding the inability to contact Steven. She testified that since I.D.'s removal from Steven's home, Steven has had limited contact with her and with I.D. (Tr. 54). She also noted that Steven has failed to keep her apprised of his new contact information and even when he did call her, he failed to leave a call back number. (Tr. 52).

¶{31} The above clearly indicates that since I.D.'s removal from his home, Steven's contact with all parties has been very limited and he failed to keep them apprised of his current address and telephone and/or cellular number(s). As such, counsel's attempt at communication was reasonable. See *In re Rachal G.*, 6th Dist. No. L-02-1306, 2003-Ohio-1041, ¶16-17; *In re C.H.*, 162 Ohio App.3d 602, 2005-Ohio-4183, ¶26-29.

¶{32} As to the second prong of the test, whether counsel knew of Steven's wishes regarding permanent custody, the record does not expressly evidence what

counsel knew. While the record does clearly show that in the beginning Steven did do everything that was asked of him, after I.D.'s removal from his home in April 2008 his involvement was minimal to non-existent. Following the removal, there were twenty-three scheduled visits; he only attended five of them and missed the other eighteen. Likewise, the caseworker testified that at the September 2008 meeting Steven indicated to CCDJFS that he could not regain custody of I.D. at that time because he did not have a place to live and did not have his life together. (Tr. 54). Furthermore, one previous attorney requested to withdraw in August 2008 because of Steven's "failure to appear [at the Hearing on CCDJFS's Motion to Extend Temporary Custody] and **obvious lack of interest in pursuing his parental rights in regard to the child**." 08/19/08 J.E. granting the motion to withdraw (Emphasis Added). Consequently, the record tends to show and counsel could logically conclude that Steven had a lack of interest in pursuing his parental rights.

¶{33} Therefore, considering all the above, Steven waived his right counsel, and thus, the trial court did not err in allowing counsel to withdraw. These assignments of error lack merit.

STANDARD OF REVIEW FOR THE THIRD AND FOURTH ASSIGNMENTS OF ERROR

¶{34} The third and fourth assignments of error challenged the trial court's decision, pursuant to R.C. 2151.414(B)(1)(d), to terminate Steven's parental rights.

¶{35} According to that statute, a court may terminate parental rights if it determines by clear and convincing evidence that: 1) it is in the best interest of the child to grant permanent custody to the agency, and 2) "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." R.C. 2151.414(B)(1)(d).

¶{36} "Clear and convincing evidence is evidence that produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368." *In re S.G.*, 7th Dist. No. 08BE42, 2009-Ohio-4815, ¶20.

¶{37} We have recently explained that we will not reverse a trial court's decision to terminate parental rights and responsibilities absent an abuse of discretion. *In re S.G.*, 7th Dist. No. 08BE42, 2009-Ohio-4815, ¶19, citing *In re Sims,* 7th Dist. No.

02JE2, 2002-Ohio-3458, ¶36. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219."

¶{38} With those principles in mind, we now address each assignment of error in turn.

THIRD ASSIGNMENT OF ERROR

¶{39} "THE APPELLANT, STATES THAT THE TRIAL COURT MADE A SUBSTANTIAL AND PREJUDICIAL ERROR BY NOT MAKING A FINDING THAT HIS SON, I.D., BORN **JULY 19th, 2007**, HAVING BEEN **ONLY 21 MONTHS OLD** AT THE TIME OF THE HEARING HELD ON **APRIL 20th, 2009**, COULD NOT HAVE BEEN IN THE CARE AND CUSTODY OF THE COLUMBIANA COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES (HEREAFTER REFERRED TO AS CC DJFS) FOR 12 OF THE **LAST 22 MONTHS**, AS REQUIRED BY LAW.

¶{40} "FURTHER, THE APPELLANT STATES THE TRIAL COURT MADE A SUBSTANTIAL AND PREJUDICIAL ERROR BY NOT FINDING THAT, WITH REGARD TO THIS APPELLANT, THE CHILD WAS **NOT** IN THE CUSTODY OF THE CC DJFS FOR THE **MINIMUM 12 MONTHS** OF THE LAST 22 MONTHS BECAUSE THE RECORD SHOWS HE SURRENDERED THE CHILD TO CC DJFS ON **APRIL 22, 2008** AND THE **HEARING** ON THE PETITION HERE WAS HELD ON **APRIL 20th, 2009**.

¶{41} "BECAUSE **NEITHER THE 12 MONTH NOR THE 22 MONTH** THRESHOLDS HAD BEEN MET, THE CC DJFS STILL HAD, BY THE EXPLICIT DIRECTION OF THE STATUTES IN ORC CHAPTER 2151, TO DILIGENTLY ATTEMPT TO REUNITE I.D. WITH AT LEAST ONE [SIC] HIS NATURAL PARENTS, AND THE COURT SHOULD HAVE EITHER DISMISSED THE PETITION TO TERMINATE PARENTAL RIGHTS AS PRE-MATURELY FILED, OR CONTINUED THE MATTER UNTIL SUCH TIME AS THE MINIMUM 12 MONTHS AND 22 MONTHS HAD BEEN ATTAINED, UNLESS THE COURT MADE A FINDING THAT TO DO SO WOULD BE AGAINST THE BEST INTERESTS OF THE CHILD UNDER THE REQUISITE ITEMS LISTED IN ORC SECTION 2151.414 OR ANY RELATED STATUTE IN ORC CHAPTER 2151." (Emphasis in Original).

¶{42} In this assignment of error, Steven challenges the court's "12 of 22" finding on two fronts. First, he asserts that since I.D. was only twenty-one months old

at the time of the permanent custody hearing, the twenty-two month requirement was not met. It is Steven's position that a trial court cannot grant a motion for permanent custody based on the "12 of 22" provision before a child is twenty-two months of age because, technically there has not been a full consecutive twenty-two month period to consider for determining if the child had been in the temporary custody of the agency for twelve months. Second, he argues that when CCDJFS filed the motion for permanent custody, I.D. had not been in CCDJFS's temporary custody for twelve months, and thus, the motion was premature and was required to be overruled.

¶{43} We will start with Steven's first argument, which calls upon this court to interpret the "12 of 22" provision of R.C. 2151.414(B)(1)(d). Specifically we are asked to determine whether a court, based on the "12 of 22" provision, can terminate parental rights to a child under twenty-two months of age who has been in the temporary custody of the agency for 12 months. For the reasons provided below, we find that it legally can. The twenty-two month requirement is merely a limitation period that prohibits a court from looking beyond on a twenty-two consecutive month period to find that a child has been in the temporary custody of the agency for twelve months. It, however, does not prohibit the court from terminating the parental rights to a child who is in the temporary custody of the agency for twelve months and who also happens to be under twenty-two months of age.

¶{44} There does not appear to be any case that specifically analyzes how the twenty-two consecutive month requirement in the "12 of 22" provision applies to a child under twenty-two months of age. However, without addressing the twenty-two month requirement, the Twelfth Appellate District has affirmed a trial court's decision to terminate the parental rights of a mother and father to a fourteen and a half month old child on the basis of the "12 of 22" provision. *In re T.J.*, 12th Dist. No. CA2008-10-019, 2009-Ohio-1844, ¶17 (finding that K.J. (d.o.b. November 13, 2006) was removed from the home November 20, 2006 and adjudicated dependent on December 12, 2006, was in the temporary custody of the agency for at least twelve months when the permanent custody motion was filed on January 31, 2008). If a trial court was required to wait until a child was at least twenty-two months of age prior to deciding the agency's permanent custody motion based on the "12 of 22" provision, our sister district could not have upheld the termination of parental rights in that case. Thus, *In re T.J.* tends

to support the conclusion that a trial court can grant the agency's permanent custody motion based on the "12 of 22" provision before the child is twenty-two months old.

¶{45} Furthermore, the purposes and goals of R.C. 2151.414(B)(1)(d)'s "12 of 22" provision support the conclusion that the agency can seek permanent custody of a child less than twenty-two months of age under the "12 of 22" provision when the child has been in the temporary custody of the agency for at least twelve months.

¶{46} "The '12 of 22' provisions set forth in R.C. 2151.413(D)(1) and R.C. 2151.414(B)(1)(d) balance the importance of reuniting a child with the child's parents against the importance of a speedy resolution of the custody of a child. See *In re K.G.,* 2004-Ohio-1421 at ¶19. Through the '12 of 22' provisions in the permanent-custody statutes, the legislature provides parents with 12 months to work toward reunification before an agency can institute a permanent-custody action asserting R.C. 2151.414(B)(1)(d) grounds. Id. at ¶21; *In re Workman,* 4th Dist. No. 02CA574, 2003-Ohio-2220, ¶40.

¶{47} "* * * Therefore, in light of the purpose of R.C. Chapter 2151 and a court's obligation to provide parents with procedural protections in permanent custody proceedings, an agency must afford parents the full 12-month period to work toward reunification before moving for permanent custody on R.C. 2151.414(B)(1)(d) grounds." *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶22-23 (holding solely addressed what was required of the twelve month part of the "12 of 22" provision).

¶{48} It is easy to see how the "12 of 22" provision balances the goals of reuniting the child with his/her parents and the speedy resolution of custody issues. The twelve month period protects the child because it does not leave the child in limbo for an extended period. It also protects the parents in that it gives them a full twelve months to work for reunification. The twenty-two month period is also a protection for the parent because an agency cannot look back farther than a consecutive twenty-two month period to find that a child has been in its temporary custody for twelve months. For example, the agency obtains temporary custody of the child. Six months later, the parent regains custody. Then, two years after regaining custody, the agency once again obtains temporary custody. If the agency continues to retain temporary custody for the next six months, it cannot then file a motion for permanent custody based on the "12 of 22" provision by using the earlier six month period to support a twelve month finding.

¶{49} If we are to accept Steven's position that a child under twenty-two months of age who has been in the temporary custody of the agency cannot have permanent custody decided until the child is at least twenty-two months of the age, the speedy resolution for such child is diminished. A child who is in the temporary custody of the agency from birth until his or her first birthday would have to wait an additional ten months before the agency could file the permanent custody motion based on the "12 of 22" provision, despite the fact that the twelve month period the parent is entitled to in order to work towards reunification has already expired. That is not providing protection to the child.

¶{50} Consequently, the twenty-two consecutive month requirement in the "12 of 22" provision does not prevent a court from granting permanent custody of a child under twenty-two months of age who has been in the permanent custody of the agency for at least twelve months. As such, the fact that I.D. was only twenty-one months old at the time of the permanent custody hearing does not hinder the trial court's ability to find that the "12 of 22" provision was met if I.D. was in CCDJFS's temporary custody for twelve months.

¶{51} Since Steven's first argument lacks merit, we must now determine whether his second argument has any merit. As aforementioned, in this argument Steven challenges the trial court's finding that I.D. was in CCDJFS temporary custody for twelve months. In regards to this issue, we are asked to determine on what date I.D. entered temporary custody. Was it sixty days after removal from his mother's care, sixty days after physical custody with Steven was terminated or the adjudication date? After deciding that issue, we are asked to determine if I.D. was in the temporary custody of the agency for a full twelve months prior to the filing of the motion for permanent custody. As is explained below, we find that I.D. entered temporary custody on September 18, 2007 and was in the custody of the agency for twelve months prior to the agency filing the motion for permanent custody.

¶{52} R.C. 2151.414(B)(1)(d) provides that a child is considered to have entered the temporary custody of the agency on either the date that the child is adjudicated pursuant to R.C. 2151.28, "or the date that is sixty days after the removal of the child from home," whichever is earlier. R.C. 2151.414(B)(1)(d).

¶{53} Here, I.D. was alleged to be dependent and removed from his mother's care on July 20, 2007, one day after he was born. Sixty days from the date of removal

is September 18, 2007. On October 10, 2007, the trial court issued its adjudicatory order finding I.D. to be a dependent child. Steven obtained physical custody of I.D. in January 2008, however, on April 22, 2008, I.D. was removed from his care.

¶{54} Steven argues that, as applied to him, temporary custody started after April 22, 2008, the date I.D. was removed from his home. He implies that neither the September 18, 2007 date or the October 10, 2007 date are applicable to him because when I.D. was removed from the mother's care, he was not aware that he was I.D.'s biological father; he was not named on the birth certificate and paternity was not established until November 13, 2007. CCDJFS asserts that temporary custody began on September 18, 2007.

¶{55} We agree with CCDJFS. The statutory language is clear that temporary custody is deemed to have started **either** on the adjudication date **or** sixty days after removal from the home, whichever is earlier. Sixty days after removal from the home, which was removal from the mother, was the earlier date. Nothing in the statute indicates that this date would not apply to Steven. Thus, temporary custody began on September 18, 2007.

¶{56} That said, we acknowledge that Steven was not aware he was I.D.'s father when I.D. was removed from the mother's care. And as such, it may seem unfair to conclude that as to Steven temporary custody began on September 18, 2007, sixty days after removal from the mother's care. However, even if that date is not applicable to him that does not mean that Steven's argument that temporary custody began after I.D. was removed his care (April 22, 2008) is correct. As aforementioned, the statute states that we begin to count the period beginning sixty days after removal or the date of adjudication, **whichever is earlier**. The October 2007 date of adjudication is earlier than sixty days after I.D. was removed from Steven's care. Applying the adjudication date would not be unfair to Steven. He appeared at the September 28, 2007 Adjudicatory hearing with appointed counsel and stipulated, as punitive father, that I.D. was a dependent child on the date of removal. 10/10/07 J.E. Thus, even if this court is incorrect in its determination that temporary custody began on September 18, 2007, temporary custody certainly would have began on October 10, 2007.

¶{57} Having concluded that temporary custody began on September 18, 2007, or at the latest October 10, 2007, we must now determine whether I.D. was in the temporary custody of the agency for at least 12 months.

¶{58} The Ohio Supreme Court has stated that in determining whether a child has been in the temporary custody of an agency for twelve months of a consecutive twenty-two month period, that twelve months must occur between the time the child enters the temporary custody of the agency and the date the agency filed the motion for permanent custody. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶23-26. CCDJFS filed the motion for permanent custody on December 30, 2008. This is fifteen months and ten days after September 18, 2007, and fourteen months and twenty days after October 10, 2007. Thus, the twelve month period was met.

¶{59} Admittedly, on January 15, 2008, I.D. was placed in the care of Steven and remained there until April 22, 2008, when CCDJFS removed I.D. In permitting I.D. to be placed in the care of his father, the trial court specifically stated that CCDJFS still retained temporary custody of I.D. with the option of physical placement with Steven. 01/23/08 J.E. Thus, Steven was not granted custody of I.D. and CCDJFS's temporary custody of I.D. was not terminated.

¶{60} The Second Appellate District has recently explained that when the child is in the physical custody of the parent, but still is in the temporary custody of the agency, that time counts toward the twelve month requirement in the "12 of 22" provision. *In re S.K*, 2d Dist. Nos. 2008CA67, 2008CA69, 2008CA69, 2009-Ohio-427, ¶29-32. It explained:

¶{61} "The motion for permanent custody was filed on April 30, 2008; therefore, the relevant twenty-two month period begins on June 30, 2006. The parties agree that pursuant to R.C. §2151.413(D)(1), the children came into the Agency's custody sixty days after the May 4, 2006 shelter care hearing, i.e., July 3, 2006. The children remained in the Agency's legal custody for ten months, until May 2, 2007, when their father regained custody. However, the children had physically been returned to their father two months earlier, thus K. argues that only eight months had passed. While we sympathize with K.'s interpretation, a plain reading of R.C. §[21]51.413(D)(1) shows that the standard is the length of time of 'temporary custody' by the Agency and not 'physical custody.' Because the Agency maintained temporary

custody of the children during their trial return to their father, those two months count toward the twelve-month requirement." Id. at ¶31.

¶{62} We acknowledge that *In re S.K.*'s holding is based on R.C. 2151.413(D)(1), however, that does not make its holding inapplicable or unpersuasive. R.C. 2151.413 is titled Motion for Permanent Custody, while R.C. 2151.414 is titled Procedures upon Motion. R.C. 2151.413(D)(1) states that "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, the agency with custody shall file a motion requesting permanent custody of the child." This is the same "12 of 22" provision found in R.C. 2151.414(B)(1)(d) that a trial court must find (along with a best interest finding) before it can grant the permanent custody motion.

¶{63} Therefore, considering the above, we agree with the Second Appellate District's logic. When the agency has temporary custody but physical custody is given to the parent, the time spent in the parent's physical custody counts toward the twelve months in the "12 of 22" provision because the language of the "12 of 22" provision uses the term "temporary custody," not "physical custody." Consequently, the three month seven day time period I.D. spent in the physical custody of Steven counts toward the twelve months. Thus, the trial court did not commit error in finding that I.D. had been in the temporary custody of the agency for twelve months. Consequently, this assignment of error is meritless.

FOURTH ASSIGNMENT OF ERROR

¶{64} "THE APPELLANT STATES THAT THE ORDER TO TERMINATE HIS PARENTAL RIGHTS WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED HERE AGAINST HIM."

¶{65} Steven argues that the trial court's decision to terminate his parental rights was against the manifest weight of the evidence. As explained above, the trial court's decision was based on R.C. 2151.414(B)(1)(d), which required the court to find by clear and convincing evidence that: 1) it was in the best interest of I.D. for permanent custody to be granted, and 2) the "12 of 22" provision was met. In the third assignment of error, it was found that the "12 of 22" provision was met by clear and convincing evidence. Thus, the concentration under this assignment of error is on

whether the trial court abused its discretion in finding by clear and convincing evidence that it was in I.D.'s best interest for permanent custody to be granted to CCDJFS.

¶{66} R.C. 2151.414(D)(1) lists factors for the court to consider when determining the best interest of a child. They are:

¶{67} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

¶{68} "(b) 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;

¶{69} "(c) 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, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

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

¶{71} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.[2]" R.C. 2151.414(D)(1)(a)-(e).

¶{72} In addition to the above factors, the statute also provides that the trial court can consider any other relevant factor. R.C. 2151.414(D)(1).

¶{73} In finding that it was in the best interest of I.D. to terminate Steven's parental rights, the trial court considered the above factors and additionally considered other relevant factors. It found that I.D. had bonded with his current foster care provider, that the GAL was of the opinion that it was in the best interest of I.D. for Steven's parental rights to be terminated, that I.D. was in CCDJFS for twelve or more months of a consecutive twenty-two month period, and that the goal of permanency

[2]None of subsection (D)(1)(e) factors are applicable to this case.

and security could not reasonably be achieved by return of the child to the care and custody of either parent.

¶{74} Furthermore, specifically as to Steven, the court considered other facts:

¶{75} "During the pendency of this case, Steven * * * initially was involved in the case planning and permanency planning process and initially exercised visitation with the minor child. Since on or about December of 2007, [Steven] has not been involved in any active pursuit of the Case Plan. He failed to maintain stable housing and has lived a transient lifestyle. [Steven] suffers from mental illness and has attempted suicide, requiring hospitalization as recently as the month of October 2008. Early on in the case, the child was temporarily placed in the home of the child's father. The child's father failed to provide for appropriate care of the child and was found to have a long-standing drug and alcohol problem, as well as other mental illness. [Steven] lacks adequate resources to provide a safe, stable and permanent home environment for his child." 04/28/09 J.E. paragraph 11.

¶{76} Steven contends that the trial court's findings are inaccurate, not supported by the record and that the medical report admitted at the hearing cannot be considered since it was admitted without proper foundation. That report specifically deals with Steven's alleged mental illness and suicide attempt.

¶{77} Despite his instance to the contrary, the majority of the trial court's findings are accurate and supported by the record. Both the GAL and CCDJFS caseworker's testimony support the trial court's findings as to bonds between I.D. and the foster parents, and the finding regarding the GAL's recommendation for termination of parental rights. The GAL's testimony recommended that permanent custody of I.D. be granted to CCDJFS because he does not have a relationship with his mother or father and he is attached to the foster family. (Tr. 7). The caseworker from CCDJFS testified that from her observations, I.D. had bonded with his foster parents and that it was in his best interests for permanent custody to be granted to CCDJFS. (Tr. 49, 61).

¶{78} In regards to the finding that permanent placement could not reasonably be achieved by returning I.D. to Steven, that determination appears to be based on Steven's "transient lifestyle" and lack of adequate resources to provide a safe, stable and permanent home for I.D. As previously discussed, the record clearly indicates that Steven has been unable since approximately March 2008 when I.D. was in his

physical custody to maintain a permanent home. About two months after I.D. was placed with Steven, Steven and his fiancé broke up and within two months Steven had moved I.D. to two different residences. Reports from the caseworker also indicate that Steven, around that time, would leave I.D. with neighbors for days at a time. Then after I.D. was removed, neither the caseworker nor the GAL were able to get in touch with Steven because he frequently moved. The previous GAL stated in her August 1, 2008 report that she had attempted on several occasions to contact him, but the cellular phone number he provided her was no longer working. The current GAL testified that she had attempted to contact him outside the Court proceedings, but because he moves often she had not been able to reach him. (Tr. 6). Furthermore, the caseworker testified in depth that Steven had been unable to keep a permanent home and that after he lost physical custody of I.D. she was unable to contact him and he made little effort to keep her apprised of his contact information. (Tr. 49-55). She also testified that after April 22, 2008, Steven only attended five of twenty-three scheduled visits with I.D. (Tr. 58-60).

¶{79} In addition to failing to visit I.D., Steven also drastically limited his involvement in completing the case plan after he lost physical custody of I.D. The caseworker testified that initially Steven did everything that was asked of him, which resulted in him being awarded physical custody of I.D. in January 2008. However, his cooperation in completing the case plan deteriorated about two months after Steven obtained physical custody of I.D. While I.D. was in his physical custody, Steven admitted to the caseworker that he was not doing the exercises with I.D. that were prescribed by I.D.'s doctor and confirmed that he had left I.D. with neighbors for a weekend. Both of those actions were in violation of the case plan. Then after physical custody was terminated, Steven further failed in completing the case plan by failing to visit I.D. and in failing to keep a permanent home. Furthermore, he admitted to the GAL that he did not complete the Help Me Grow program that was required of him by the case plan. 08/01/08 GAL Report. Thus, all the above shows that Steven was not willing and/or able to provide a stable and secure home for I.D.

¶{80} Admittedly, the trial court's indication that Steven had not been involved with I.D. since December 2007 is inaccurate and the date used should have been April or May 2008. However, that does not change the fact that other findings were supported by the record and that those facts support the best interest finding.

¶{81} As to the medical report, Steven argues that since the examiner did not testify, it was inadmissible hearsay. Regardless of whether it is considered, when looking at all the above evidence, we can still find that the trial court did not abuse its discretion in finding that there was clear and convincing evidence that termination of Steven's parental rights was in I.D.'s best interest. For the above reasons, this assignment of error lacks merit.

CONCLUSION

¶{82} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.