



custody of the child to the Butler County Department of Job and Family Services<sup>1</sup>.

{¶12} E.M.D.R.E. was born on May 31, 2006. In February 2007, the child was removed from her home and a complaint was filed alleging that she was neglected and dependent. On June 5, 2007, the child was adjudicated dependent and placed in the temporary custody of the BCDJFS. The agency moved for permanent custody of the child on February 1, 2008. The mother filed a motion requesting custody of the child, or in the alternative for custody to the maternal grandparents<sup>2</sup>. The maternal grandmother also filed a pro se motion for legal custody of the child.

{¶13} A hearing on the motions was conducted over several dates, beginning in July 2008 and ending on March 9, 2009. In a decision issued April 28, 2009, the magistrate granted permanent custody of the child to the agency. The mother and grandmother filed objections to the decision. After a hearing, the trial court overruled the mother and grandmother's objections and adopted the magistrate's decision.

{¶14} The child's mother and grandmother now appeal, each raising several assignments of error for our review. Essentially, these assignments of error challenge the trial court's determinations regarding the best interest of the child and the sufficiency of the evidence. As these assignments of error are interrelated, for ease of discussion, we will address them together.

{¶15} Before a natural parent's constitutionally protected liberty interest in the care and custody of her child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to

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1. This agency was previously known as the Butler County Children Services Board.

whether sufficient credible evidence exists to support the juvenile court's determination.

*In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16.

{¶6} R.C. 2151.414 (B)(1) requires the juvenile court to apply a two-part test when terminating parental rights and awarding permanent custody to a children services agency. Specifically, the court must find that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and, (2) any of the following apply: a) where the child is not abandoned, or orphaned, or has not been in agency custody for at least 12 months of a consecutive 22-month period, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; b) the child is abandoned; c) the child is orphaned; or d) the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. R.C. 2151.414 (B)(1)(a), (b), (c) and (d). *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, ¶12-16.

{¶7} In this case, the trial court made findings that it was in the best interest of the child to grant permanent custody to the agency and that the child could not be placed with either parent within a reasonable time or should not be placed with either parent. As mentioned above, in their assignments of error, the mother and grandmother challenge various aspects of these findings.

{¶8} At the hearing, numerous witnesses testified regarding the family's involvement with the agency, the mother's progress on the case plan, and the grandparents' suitability as a custody placement. Witnesses included: the child's mother, a clinician at a drug treatment facility, a counselor at another drug treatment facility, the director of a drug treatment aftercare program, a behavioral health case

manager, the foster mother, the BCDJFS caseworker, a mental health social worker, an in-home parenting educator, a family resource coordinator, a home study worker, the maternal grandmother and grandfather, and several friends and neighbors. The guardian ad litem was cross-examined regarding her report and involvement in the case.

{¶9} The evidence revealed that BCDJFS became involved with the mother and child in November 2006 because of concerns involving substance abuse by the mother, the hygiene of the child, and conditions of the grandmother's home where the child was living. The agency began working with the family to remedy these problems, but had ongoing concerns which eventually led to the child's removal from the home in February 2007. These concerns included criminal charges against the mother for carrying a concealed weapon and possession of marijuana, the condition of the home, which did not have a working furnace, and the continuing poor hygiene of the child.

{¶10} BCDJFS also had concerns due to the fact that the agency had previous significant involvement with the grandmother and mother dating back to 1993, when the mother was a child. As a child, the mother was removed from the grandmother's home in 1993. She was in agency custody until emancipation in 2001 and during that time, evidenced psychological issues.

{¶11} A case plan was prepared that required substance abuse treatment, mental health treatment, parenting classes, stable housing and employment. With regard to substance abuse treatment, the mother had attempted but failed treatment programs prior to the child's removal from the home. In February 2007, she completed an evaluation with the Sojourner program, but was required to complete a psychological evaluation before starting the program. The mother completed the psychological

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2. The child's father is unknown.

evaluation and the recommendation was for residential substance abuse treatment and for her to enter a program that could address both her mental health issues and substance abuse. The mother entered First Step program for this purpose, but signed herself out less than two days after starting. She told a caseworker that someone told her if she "reworded her responses" on the screening evaluation, she could get outpatient treatment instead. After another evaluation, the recommendation was still for residential treatment. In June 2007, the caseworker suggested the mother apply at First Step again, and the mother refused because she was not allowed cigarettes or caffeine, which she claimed she "needed for her bipolar" condition.

{¶12} In July 2007, the mother entered Sojourner's residential program. She was placed on restrictions for failing to follow facility rules and was also having problems getting along with the other residents. In late July, she was placed on a "behavior contract" which was her last chance at the facility. On August 23, she signed herself out of the facility because she did not get a weekend pass. The mother was court-ordered<sup>3</sup> to go back into residential treatment, and spent the next months trying to get into another facility, but refused to go back to First Step. After not being able to get into other facilities, she eventually was admitted back to First Step in November 2007 and almost immediately began having problems. She was caught smoking several times and told she would be discharged if she was caught again. In December, she left the facility for a few days due to problems with the residents and staff. The mother told caseworkers she was going to get into treatment several times over the next few months, but it took her several months to follow through and she again complained about the programs and was not compliant. She attended Horizons in March 2008 and

Community Behavioral Health for aftercare in May 2008. The caseworker testified that the mother has still not completed the residential treatment as required. The mother admitted she has not completed residential treatment and stated that it was "too much stress" and "too much trouble."

**{¶13}** The director of Community Behavioral Health Care, an aftercare program the mother attended, testified that the mother's attendance was not good and he was concerned with her bipolar condition and the fact that she was not taking her medication. He also had concerns with the mother's current romantic relationship, which he described as "dysfunctional." The director stated that the mother "doesn't appear to have a great deal of insight into what it would take to stay clean and sober." He explained that she shows desire and verbalizes, but does not seem to be internalizing and her prognosis for the future is poor.

**{¶14}** With regard to the mental health requirement, the mother was to have an assessment, a treatment plan and counseling. The mother had been prescribed medication for her mental health problems at Sojourner, but stopped taking them when she left the facility because she said they made her tired. The mother did not initially perform the evaluation and let a period of time elapse before she followed through on this requirement. At the time of her evaluation she was prescribed Seroquel, which she did not take, and Lithium. Her counselor explained that the bipolar condition was "severe" and she need to take her medication. Not taking the medication would make the mother prone to anger outbursts, which would affect her parenting ability. At an April 2008 review, the mother stated that she did not feel she needed counseling. She stated that she did not think weekly counseling was necessary, nor did she feel that the bipolar

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3. It is unclear what "court order" witnesses were referring to with this testimony, as the mother was also

medications were necessary. She testified that she was not taking the medications and her bipolar condition is "not serious."

{¶15} The mother was also required to complete in-home parenting classes. She began classes in October 2007, covering food and nutrition, home safety and sanitation, money management, development of personal resources, and child development and parenting. The instructor stated that from a parenting standpoint, the mother is not ready to have her children back. She also stated that the mother had a hard time with money management and paying bills and relies on the grandmother and boyfriend for support. As an example of poor money management, the instructor explained that the mother put off purchasing her medication and having a mammogram because of money problems, but still purchased cigarettes. The instructor stated that the mother had "reached her saturation point" with the lessons and her motivation to do well had gone down. When the services expired, the mother said she had enough of the lessons and that she had been doing them for a year and thought that was enough.

{¶16} Stable housing was also a requirement of the case plan. At the start of the case plan, the mother was living on and off with the grandmother. During the time the case was pending, she lived in a number of places. The caseworker stated that in the 17 months the agency had been working with the mother, she had lived in seven places. Some of these were the homes of friends and some were motels. The mother was evicted from a number of these places.

{¶17} The mother was also required to obtain stable employment, but at the first hearing she stated that her only work during the case has been with a temporary

service. At a later hearing, she testified that she worked at Burger King for a month and a half, but was fired. She stated that she relied on her boyfriend, who it appears is in the country illegally from Mexico. At one point during the pendency of the case, he was deported, but has returned to the area. The caseworker testified that she had concerns with this relationship and possible domestic violence as the mother called her one morning at 2:00 a.m. and left a message that the boyfriend was "putting his hands on her."

{¶18} According to the caseworker, there were other issues with the mother, including a lack of medical care at times, as she was on and off Medicaid. She was also arrested in January 2007 for failing to pay fines, and arraigned on nonpayment of child support charges, but failed to appear at a hearing on those charges. The mother also had previously had a son who tested positive for marijuana when he was born. The mother testified that the child was "signed over" to an aunt for care and the agency was not involved with this child.

{¶19} After the grandmother requested custody of E.M.D.R.E., a home study was performed to determine her suitability as a custodian for the child. The grandmother was given the information in February 2007, but did not contact the investigator to schedule a visit until February 2008. Each time the completion of the home evaluation was questioned, the grandmother would respond that the home was "almost ready." The first date set by the grandmother was rescheduled a few days prior at the request of the grandmother who said the home was again not ready. When the home was eventually examined, it did not pass because of safety and cleanliness concerns. Between hearings, the grandparents made repairs and at a later date, the home passed a safety audit.

{¶20} However, the home study evaluator stated that even with improvements to the home, the grandparents' home study would still be denied because of other concerns. She explained that in 1988, the grandmother had problems in Franklin County, Indiana with severe neglect of her two children and her parental rights to these two children were terminated in 1990. In 1991, BCDJFS received referrals about the grandmother concerning her parenting of the mother as a child. In 1993, the mother was removed from the grandmother's home and the grandmother never regained custody. There were also concerns regarding the grandmother's past drug use and that fact that the grandmother had previous convictions for drug-related charges.

#### Best Interest Determination

{¶21} With regard to the best interest determination, the mother and grandmother argue that permanent custody was not the only means of providing permanency for the child as she could have been placed with the mother or grandmother. They also argue that permanent custody is not in the child's best interest as the mother has completed major case plan objectives.

{¶22} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶23} "(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;

{¶24} "(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;

{¶25} "(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 ending on or after March 18, 1999;

**{¶26}** "(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;

**{¶27}** "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

**{¶28}** With respect to R.C. 2151.414 (D)(1)(a), the juvenile court found that the child was removed from the mother's custody and placed in foster care at the age of approximately nine months and at the time of the decision was almost three years old. The court further found that at the time of the child's removal, she was most closely bonded with the grandmother, who was the primary caregiver and provider and that this bond was so strong that the agency had to limit the grandmother's time with the child in order to allow the mother an opportunity to more closely bond with the child. Since that time, the mother has been able to develop more of a bond with the child. The court further determined that both the mother and grandmother appear to interact appropriately with the child for the most part during visitation. The court further found that the child is bonded well with the foster parents and their children and that her half-sibling is also placed in the same foster home.

**{¶29}** With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that the guardian ad litem recommended that permanent custody be granted as being in the child's best interest.

**{¶30}** With respect to R.C. 2151.414(D)(1)(c), the juvenile court found that the

child resided in the grandmother's home from her birth until the age of about nine months and during that time, the mother sometimes lived with the grandmother. The court found that the child was removed from the home on February 12, 2007 and has been in agency custody since that time with placement in the same foster home since the date of removal. The court further determined that by the first trial date on the motion for permanent custody, the child had been in agency care for approximately 17 months since the date of removal.

{¶31} With respect to R.C. 2151.414 (D)(1)(d), the juvenile court found that the evidence makes it clear that there is a need for a legally secure placement for the child as she had been in the custody of the agency for about 17 months from the time of removal until the first hearing on the permanent custody motion. The court also found that the child has been with the same foster family since that time and is bonded to them, particularly the foster mother. Her only contact with her mother since removal has been twice-weekly supervised visitation. The court determined that the grandmother's relationship with the child made it difficult for the mother to bond with the child as the grandmother was the primary caregiver for the child prior to removal. The court further determined that the grandmother resides in the home from which the child was removed in February 2007, the condition of that home was a factor in the removal and that issues remain with the safety and cleanliness of the home.

{¶32} The court determined that the larger issue for the grandmother was her background and previous history with the agency. These factors included the fact that the grandmother lost permanent custody of two children in Indiana, BCDJFS was involved with the grandmother for a long period of time and that the mother herself was in foster care from approximately the ages of ten to 18. Based on these facts, the court

determined that placement of the child with the grandmother was not in the child's best interest.

{¶33} The juvenile court examined the facts presented regarding the mother and found that her progress on case plan services was inconsistent and incomplete. Although she participated in parenting classes, at the end of the program, the mother had reverted to old practices, had reached her "saturation point" and was terminated from services. All areas of the curriculum remained of concern because of an inability to retain information from the lessons. The mother failed to complete an inpatient substance abuse program as required by the case plan and there were issues and concern regarding the treatment the mother did obtain regarding her ability to maintain sobriety. The mother also failed to complete the mental health requirements of the plan and concerns remained regarding her ability to parent with severe bipolar disorder. The court also noted that the mother had not obtained stable employment or housing as ordered under the case plan. We find no error with the juvenile court's determination that it was in the best interest of the child to grant permanent custody to the agency, as sufficient, credible evidence supports the findings and the determination is not against the manifest weight of the evidence.

{¶34} The grandmother argues that it was error for the court to fail to address her motion for permanent custody, but it is apparent that the court did, in fact, consider whether the grandmother should be granted custody. The court specifically stated that it was not in the child's best interest for the grandmother to be granted custody, which is the proper standard in considering a motion for legal custody. See *In re D.R.*, 153 Ohio App.3d 156, 2003-Ohio-2852. In addition, the court's findings regarding the grandmother are also supported by the record. The grandmother permanently lost

custody of two children and has a lengthy history with BCDJFS which creates serious concern regarding her ability to parent. In addition, despite eventually cleaning and fixing the home to pass a safety audit, given the grandmother's past history of cleanliness and safety concerns, this continues as an area of concern.

{¶35} Both the grandmother and mother present arguments relating to the mother's ability to remain drug-free and to her completion of "major case plan services." However, the evidence supports the trial court's findings that despite her involvement in case plan services, the mother did not complete many of the objectives, including inpatient substance abuse treatment. Despite the arguments that the mother is "cured" of drug abuse, the professionals involved in her treatment still have concerns with her ability to maintain sobriety, along with concerns regarding her bipolar disorder.

{¶36} Finally, the mother and grandmother argue that the court erred in failing to consider the mother's request regarding custody to the grandfather<sup>4</sup>. The trial court found that the issue was ruled on by the magistrate when he found that the grandmother was not a viable placement, as she resides with the grandfather. We find no error in the trial court's decision on this issue. The possibility of placement with the grandfather could not be severed from placement with the grandmother. Moreover, the evidence revealed that when the child resided with the grandparents, the grandmother was the caretaker and that it was contemplated this arrangement would continue if legal custody were granted to the grandparents.

R.C. 2151.414(E) Factors

{¶37} The court also examined the factors in R.C. 2151.414(E) in order to determine whether the child cannot be placed with either parent within a reasonable

time or should not be placed with either parent.

**{¶38}** This section lists factors for determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. The section also states that if the court determines, by clear and convincing evidence, one or more of the factors listed 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.

**{¶39}** As relevant to this case, the court determined that: "[f]ollowing the placement of the child outside the child's home and notwithstanding reasonable 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." R.C. 2151.414(E)(1).

**{¶40}** In making this determination, the court found that the mother's case plan required her to successfully complete an in-home parenting program, successfully complete substance abuse treatment, address her mental health issues, including psychological and psychiatric evaluations and individual counseling, maintain employment and stable housing. The court determined that the mother has not completed case plan services, particularly she has not maintained stable housing or

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4. We note that it appears from the record that the "grandfather" is not the biological grandfather of the

income, has not completed residential drug treatment, has not complied with the recommendations of her psychiatric evaluation and her counselor to address her mental health issues and she refuses to take the medication prescribed to her. The court further noted that although the mother completed the in-home parenting program, the instructor determined that she was not able to retain all of the lessons and consistently put them into effect.

{¶41} The court then concluded that notwithstanding reasonable efforts on the part of the agency to assist the mother to remedy the problems that caused the child's removal, the mother had failed continuously and repeatedly to remedy the problems that initially caused the child to be placed outside the home. This finding is supported by the record, as evidence was presented to show the mother's failure to utilize the services provided to remedy the problems that caused the child's removal.

{¶42} The trial court also found that pursuant to R.C. 2151.414(E)(2) the mother's bipolar condition constitutes a "chronic mental illness" and as a result, the mother is unable to provide an adequate home for the child at present time, or within a year.

{¶43} With regard to the court's finding that the child cannot be placed with either parents or should not be placed with either parent, the mother and grandmother both present arguments relating to the mother's reported ability to avoid substance abuse without completing the residential program required by the case plan. As these arguments have been addressed above, we find no error in the court's conclusions regarding its finding that the child could not be placed with her mother and should not be placed with her within a reasonable time.

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child, but is instead the grandmother's husband. However, as this is the reference used by the parties, for

Standard for Granting Permanent Custody

{¶44} In discussing the standard for granting permanent custody, the trial court stated: "Pursuant to Revised Code 2151.414(B)(2), the court *must* grant a permanent custody motion when, after making a finding by clear and convincing evidence that it is in the best interest of a child to grant the motion, it is determined by that same degree of proof, using the factors contained in 2151.414(E), that the child in question cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent." (Emphasis sic.)

{¶45} After making a best interest determination and a finding that the child could not be placed with either parent pursuant to R.C. 2151.414(E), the court stated, "[h]aving previously found that permanent custody is in the best interest of the minor child, and that this child cannot be placed with any parent or relative within a reasonable period of time or should not be placed with any parent or relative, this Court *is required under 2151.414(B)(2)* to grant permanent custody to the agency." (Emphasis added.)

{¶46} However, more precisely, R.C. 2151.414(B)(2) states: "*With respect to a motion made pursuant to division (D)(2) of section 2151.413 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." (Emphasis added.)

{¶47} The prepositional phrase, "with respect to a motion made pursuant to division (D)(2) of section 2151.413 of the Revised Code" necessarily limits the

remainder of the sentence to those circumstances. Therefore, the R.C. 2151.414(B)(2) mandatory requirements for granting permanent custody only apply to motions made pursuant to R.C. 2151.413(D)(2).

{¶48} R.C. 2151.413 discusses the circumstances in which a motion for permanent custody may be filed, or in some cases, where a motion must be filed. Subsection (D)(2) states that an agency shall file for permanent custody if the court has previously "made a determination pursuant to division (A)(2) of section 2151.419." A determination under the (A)(2) subsection of R.C. 2151.419 occurs when a court determines that "the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home."

{¶49} Therefore, under R.C. 2151.413(D)(2), an agency is required to file a motion for permanent custody if the court determines pursuant to R.C. 2151.419(A)(2) that reasonable efforts are not required on the part of the agency to prevent removal of the child from the home, eliminate the continued removal and return the child to the home. Therefore, by its plain language, the requirements in R.C. 2151.413(B)(2) for granting permanent custody only apply to cases in which the court has made a previous determination that reasonable efforts are not required by the agency. See *In re A.W.* Butler App. No. CA2006-09-210, 2007-Ohio-274, fn. 2; see, also, *In re Brown*, Lake Co. App. No. 2004-L-027, 2004-Ohio-3337, ¶10-11 (because trial court determined pursuant to R.C. 2151.419(A)(2) that reasonable efforts were not required, the standard in R.C. 2151.414(B)(2) applied in deciding permanent custody motion).

{¶50} In this case, the trial court did not make a finding pursuant to R.C. 2151.419 that reasonable efforts were not required, so the standard for granting

permanent custody under R.C. 2151.414(B)(2) is not applicable to this case. Instead, the standard in R.C. 2151.414(B)(1) applies. Because the child is not abandoned, not orphaned and has not been in the custody of the agency for 12 of 22 months prior to filing the motion, the standard in subsection (a) applies. This subsection states that a court "**may grant**" permanent custody to the agency if it determines that permanent custody is in the best interest of the child 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. R.C. 2151.414(B)(1)(a). While the findings underpinning each subsection are the same, this standard differs from that in the (B)(2) subsection, which states that if those findings are made, the court "**shall grant**" permanent custody of the child to the agency.

{¶51} As discussed above, we find no error in the court's determination that it is in the child's best interest to grant permanent custody to the agency or in the court's determination that the child cannot be placed with either parent or should not be placed with her parents. However, once those findings were made, the court erroneously determined that it was required to grant permanent custody under the "shall grant" language in R.C. 2151.414(B)(2). Accordingly, we must reverse the court's decision and remand this case to the trial court to determine if, having made those findings, permanent custody is proper under the "may grant" standard in R.C. 2151.414(B)(1).

{¶52} Judgment reversed and remanded.

BRESSLER, P.J., and POWELL, J., concur.