



weighed three pounds and eleven ounces. T.K.K.'s biological mother has an extensive history with the agency. In addition to T.K.K., biological mother has six children, none of whom are in her custody. The agency received a referral the day after T.K.K. was born. The intake worker who received the referral, Alisa Muncy, was familiar with biological mother as Muncy was involved with investigating referrals on two of biological mother's other children. Based on biological mother's history and an investigation conducted by Muncy, the agency filed a complaint alleging dependency on December 6, 2010. The complaint requested a disposition of permanent custody. The agency also filed for emergency temporary custody, which the trial court granted. T.K.K. was placed in a foster family on his release from the hospital at 18 days old.

{¶ 3} On May 4, 2011, after a hearing, T.K.K. was adjudicated dependent. Muncy and biological mother testified at the hearing. Muncy testified that when she conducted a home visit, she observed that biological mother's home was sparsely furnished and only had a bed and an air mattress. Muncy was concerned with the lack of a crib where T.K.K. could sleep. Muncy testified that biological mother told her that T.K.K. would initially sleep in bed with her until a crib could be donated by one of her friends. However, biological mother had some baby supplies, including a breast pump, "onesies," and some blankets. In addition, her house was clean.

{¶ 4} Biological mother testified that she would visit T.K.K. in the hospital, give him a tube feeding, change his diaper, and hold him for approximately a half-hour. She testified that she participated in services at the Transitional Living Center (T.L.C.), counseling, and Alcoholics Anonymous on her own. She admitted that at least one of her children was initially removed from her care in 2006 when she had a relapse and began drinking alcohol again. She also admitted that another child, who was born in 2006, was placed in the permanent custody of the agency. Biological mother testified that she had been clean for

about four years before relapsing in 2006, and she stated that after being clean for a period of time, she relapsed again in 2009. In addition, she testified that she had friends from Alcoholics Anonymous who were willing to donate a crib and other baby supplies, but she told them to hold off because she was not sure T.K.K. would be coming home with her.

{¶ 5} Based on the testimony and the evidence, the trial court found that two of biological mother's children had previously been adjudicated neglected, and biological mother's parental rights were involuntarily terminated regarding one child. The trial court found that biological mother admitted to cyclically relapsing between periods of sobriety and stability, and that there was no reason to believe the acknowledged cycle, which had triggered Agency intervention in the past, had ended. The trial court also found that while biological mother disputed the hospital records, the hospital records reflect minimal involvement by biological mother with T.K.K. The trial court found that placing T.K.K. in her care would "clearly" place him at risk of neglect similar to his older siblings.

{¶ 6} The matter was set for a dispositional hearing in front of a magistrate on September 7 and 8, 2011. Several people testified at the hearing, including foster mother, caseworkers from the Agency, and biological mother.

{¶ 7} Foster mother testified that T.K.K. has been in her custody since he was 18 days old, and that she is willing to adopt T.K.K. She is also able to stay home with him full-time. Foster mother testified that in the days following a call from the Agency inquiring as to whether she wanted to foster T.K.K., she continually arrived at the hospital around 6 a.m. for T.K.K.'s first feeding and stayed through his second feeding at 9 a.m. After his second feeding, she would leave and return in the evening. Foster mother testified that prior to T.K.K.'s release from the hospital, she was comfortable with the special feeding technique required to ensure that T.K.K. was still breathing while being fed and that he did not choke. Foster mother also testified that T.K.K. has a loving relationship with foster father. Foster

father is able to get T.K.K. to "belly laugh," and T.K.K. appears happy and content when being cared for by foster father. In contrast, foster mother testified that as T.K.K. has gotten older he is more agitated and harder to settle down after visits with biological mother. She testified that she was once called to pick up T.K.K. early from a visit with biological mother because he would not stop crying.

{¶ 8} Muncy testified that she had continued concerns for T.K.K. because she was unsure of biological mother's ability to care for a premature infant, provide proper items for T.K.K., and maintain her own mental health and sobriety. Muncy testified that over the years she has observed biological mother in a pattern of doing well for a year and then relapsing.

{¶ 9} In addition to Muncy, several other employees of the agency testified, including Lisa Brock and Ryan Williams. Brock, an ongoing social worker for the agency, was assigned to T.K.K.'s case in late December. Brock testified regarding her observations of the foster family with T.K.K. and biological mother with T.K.K., and the case plan requirements for biological mother. Brock testified that she visited the foster family a minimum of eight times and she had no concerns. Brock testified that T.K.K. appeared bonded with the foster parents. T.K.K. would smile and coo at the foster parents, and they were able to calm him when upset. In observing T.K.K. with biological mother, Brock testified that T.K.K. smiles at her when she takes him out of his carrier. However, Brock testified that biological mother sometimes seemed unsure about what to do with T.K.K. during the visits and needed suggestions as to how to interact with him. She also sometimes needed help getting the high chair or warming T.K.K.'s bottle.

{¶ 10} The infrequency of biological mother's visits posed a concern for Brock. Visits were initially scheduled twice per week. However, because of biological mother's frequent nonattendance, visits were reduced to once per week. From January 19 to April 13, biological mother did not attend any visits. Visits were then suspended by the agency.

When visits were first reinstated in May, biological mother continued to miss visits and would leave early. However, Brock testified she stayed the entire time the past few visits.

{¶ 11} Brock testified that a case plan was developed that required biological mother to follow through with T.L.C. and counseling, and also required her to take a substance abuse assessment. Brock testified that biological mother continued with T.L.C. Brock also testified that biological mother completed the substance abuse assessment, which recommended she continue to attend Alcoholics Anonymous daily and maintain counseling. However, biological mother was discharged from counseling on April 26 for nonattendance. Brock testified that biological mother independently re-enrolled in counseling and attended her first appointment on August 15. Nevertheless, she did not attend her follow-up appointment on August 23, and also missed an appointment with a nurse on August 22.

{¶ 12} Ultimately, Brock testified that she was concerned about biological mother caring for T.K.K. Brock was unsure whether biological mother would continue to take her medication, because her history has been to take medication for a while and then stop. Brock also expressed uneasiness regarding biological mother's bouts with depression and comments biological mother made indicating that she wanted to sign away her parental rights.

{¶ 13} Williams, a family resource specialist for the agency, was able to observe both the foster parents and biological mother interact with T.K.K. Williams testified that T.K.K. appears bonded with his foster parents. T.K.K. communicates with his foster parents "quite a bit" and "bounces around and gets really excited" when they talk to him.

{¶ 14} Williams testified that biological mother only attended four out of eight visits at Butler County Children Services in December and January, despite living only a block and a half from the agency. The visits biological mother did attend, she left early. Williams testified that after missing so many visits, he made phone calls to biological mother and visited her at

her home. When Williams visited biological mother at her home, she expressed that she was struggling with depression and was having difficulty deciding whether to keep T.K.K. Williams testified that he had five or six conversations with biological mother as to her intent regarding T.K.K.

{¶ 15} Following the suspension and reinstatement of visitation, Williams thought the visits improved and biological mother interacted more with T.K.K. However, from his observations, Williams was concerned with the lack of bonding between biological mother and T.K.K. Williams testified that the visits often were stressful for biological mother, and she appeared "anxious" and "bewildered." Williams also testified that biological mother struggled to feed and hold T.K.K.

{¶ 16} Biological mother's testimony revealed that she thought she could adequately take care of T.K.K. Biological mother testified that she receives approximately \$300 per month, including food stamps and general disability. Biological mother testified that she could take care of T.K.K., because she would receive additional monetary assistance if he was in her care. In addition, biological mother has lived in the same residence since May 2011 and receives a shelter care grant. While she has not had a job in many years, biological mother testified that she is attending Miami University Middletown for nursing. She also testified that she attends Alcoholics Anonymous at least three times per week and has not consumed alcohol in over three years. She averred that she has pursued treatment for herself and sought counseling.

{¶ 17} Biological mother testified that all six of her other children are not in her custody and that the agency was granted permanent custody of one of the children. She admitted to being hospitalized for mental illness on several occasions. Biological mother testified that she "probably" told her case manager several times in late December or early January that she wanted to be admitted to the hospital for mental illness, but was afraid it would be used

against her. She testified that again in February she was depressed and wanted to be admitted to the hospital, but changed her mind. Biological mother also conceded that she often started substance abuse programs, but did not complete them. Biological mother also testified as to her diagnoses, including bi-polar disorder, and provided a laundry list of medications she was taking.

{¶ 18} After hearing all the evidence and arguments presented, the magistrate issued a decision granting the motion for permanent custody. Biological mother filed an objection to the magistrate's decision, which was overruled by the trial court. Biological mother now appeals the trial court's decision to grant permanent custody of T.K.K. to the agency, and raises two assignments of error for review.

{¶ 19} In her first assignment of error, biological mother argues that the trial court abused its discretion by granting permanent custody to the agency. In her second assignment of error, biological mother argues that the decision to grant permanent custody to the agency is against the manifest weight of the evidence and that there is insufficient evidence to support the trial court's finding by clear and convincing evidence. Because her assignments of error are related, we will address them together.

{¶ 20} Biological mother argues that the court abused its discretion because its decision was solely based upon her history and did not address her present circumstances. Biological mother also argues that it was inappropriate for the court to focus on the best interest factors without first considering whether the child could not or should not be placed with biological mother within a reasonable period of time. We disagree.

{¶ 21} 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*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982). An appellate court's review

of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶ 16 (7th Dist.). A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers*, 138 Ohio App.3d 510, 520 (12th Dist.2000).

{¶ 22} An agency may obtain permanent custody of a child in two ways. *In re E.P.*, 12th Dist. Nos. CA2009-11-022, CA2009-11-023, 2010-Ohio-2761, ¶ 22. An agency may first obtain temporary custody of the child and then file a motion for permanent custody. See R.C. 2151.413. Or, an agency may request permanent custody as part of its original abuse, neglect, or dependency complaint. See R.C. 2151.27(C) and 2151.353(A)(4).

{¶ 23} In order to grant permanent custody as part of its original disposition, a juvenile court must apply a two-prong test. First, using the factors in R.C. 2151.414(E), the court must determine that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. Second, using the factors in R.C. 2151.414(D), the court must determine that permanent custody is in the best interest of the child. R.C. 2151.353(A)(4).<sup>1</sup>

{¶ 24} Despite biological mother's argument to the contrary, in this case, the trial court considered appropriate factors regarding whether T.K.K. could or should be placed with her within a reasonable time. The trial court determined that R.C. 2151.414(E)(1), (4), and (11) applied to biological mother by clear and convincing evidence.<sup>2</sup> R.C. 2151.414(E)(1)

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1. It appears both parties rely on R.C. 2151.414(B)(1), which generally applies when an agency files a motion for permanent custody after an initial disposition. See R.C. 2151.413(A)-(C). This is also the statute the trial court applied in granting permanent custody in this case. However, as discussed above, the trial court made the necessary determinations for granting permanent custody under R.C. 2151.353(A)(4).

2. Biological father was found in default for failing to appear and is not a part of this appeal. In its analysis, the trial court considered the factors in both R.C. 2151.414(E) and R.C. 2151.414(D)(1) in regard to biological father.

concerns whether the parent has "failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home." R.C. 2151.414(E)(4) concerns whether "[t]he parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[.]" R.C. 2151.414(E)(11) concerns whether the parent has had his or her parental rights involuntarily terminated with respect to a sibling of the child. If so, the trial court must also determine that the parent has failed to "provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child."

{¶ 25} The trial court found that biological mother had her parental rights to one of T.K.K.'s siblings involuntarily terminated. The trial court also found she failed to prove that she is in a position to provide a legally secure and permanent home for T.K.K. Furthermore, the trial court found that despite some actions by biological mother to remedy the negative conditions, she failed consistently and repeatedly to remedy the conditions which led to the filing of the complaint to remove T.K.K. from her care. Biological mother reinitiated contact with mental health services, participated in a substance abuse assessment, enrolled in school, and attended regular Alcoholics Anonymous meetings. However, she ceased to participate in mental health services during the time she was not exercising visitation with T.K.K., indicating a continuing cycle of relative stability and instability. The trial court found that biological mother chose to not visit T.K.K. for an extended period of time, and, but for the action of the agency suspending visitation, it is likely she would have failed to visit T.K.K. for 90 days. Biological mother failing to visit T.K.K. for 90 days could have led to a finding of

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The trial court found, by clear and convincing evidence, that biological father abandoned T.K.K., biological father exhibited a lack of commitment to T.K.K., and T.K.K. has no relationship with biological father.

abandonment. The trial court found the above factors demonstrated biological mother had a lack of commitment to T.K.K.

{¶ 26} The trial court's determination that T.K.K. cannot or should not be placed with either of his parents is supported by the evidence. The evidence shows that biological mother previously had her parental rights to one of T.K.K.'s siblings terminated. Although she attempted to participate in her case plan requirements, she failed to complete counseling. Ultimately, biological mother failed to present clear and convincing evidence that her cycle of stability and instability ended in order to provide a legally secure placement and adequate care for T.K.K. See *In re M.B.*, 8th Dist. No. 96724, 2011-Ohio-4645 (despite efforts to comply with a case plan, biological mother's cycle of substance abuse and lack of attention to her mental health needs failed to clearly and convincingly demonstrate she could provide for child when she previously had her parental rights to child's siblings terminated. Furthermore, her lack of visitation and statements to case workers that she was unsure whether she wanted to take care of T.K.K. indicates she does not have a commitment to T.K.K. Consequently, we find no error in the trial court's determination that T.K.K. cannot or should not be placed with either of his parents.

{¶ 27} While biological mother argues that it was unfair for the trial court to consider the best interest factors because T.K.K. has never been in her custody, a trial court is required to consider such factors before granting permanent custody to the agency. 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:

- (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;

(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;

(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;

(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;

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

{¶ 28} In this case, the trial court found that the factors in R.C. 2151.414(D)(1) were met by clear and convincing evidence. With respect to R.C. 2151.414 (D)(1)(a), the trial court found that the relationship between biological mother and T.K.K. was superficial. Despite being granted supervised visitation with her child, biological mother only sporadically exercised visitation during the first few months of T.K.K.'s life and T.K.K. never resided with biological mother. The trial court found that while the frequency and duration of visits increased as the date of the hearing drew closer, they remained somewhat inconsistent. Furthermore, the trial court found that biological mother's visits completely stopped for a period of over three months in early 2011. In contrast, the trial court found that T.K.K. had a strong and loving bond with his foster family, and that foster mother invested time to learn how to take care of T.K.K.'s medical needs.

{¶ 29} With respect to R.C. 2151.414(D)(1)(b), the trial court indicated that the guardian ad litem filed a recommendation in favor of granting permanent custody to the agency.

{¶ 30} With respect to R.C. 2151.414(D)(1)(c), the trial court found that T.K.K. was placed in the temporary custody of the agency on December 6, 2010, and has remained in its custody continuously since that point. However, the trial court found that T.K.K. had not been in the temporary custody of one or more public children services agencies or private child placing agencies for 12 or more months of a consecutive 22-month period, and he had not previously been in the temporary custody of an equivalent agency in another state.

{¶ 31} With respect to R.C. 2151.414 (D)(1)(d), the trial court found that T.K.K.'s need as an infant for a legally secure permanent placement was self-evident. The trial court found that biological mother's commitment to T.K.K. was "on-again off-again," and that she ceased her contact with T.K.K. for a significant period of time. The court found that while biological mother may love T.K.K., any reciprocal connection was superficial. The trial court further found that biological mother's issues with substance abuse and mental health "wax and wane in an unpredictable manner." Despite her current relatively stable status, there was no objective reason to conclude that the destructive pattern has been broken. The trial court found that as a result of this pattern of behavior, combined with her negative custodial history involving her other children, biological mother could not provide T.K.K. with the security or stability that he needs.

{¶ 32} With respect to R.C. 2151.414(D)(1)(e), the trial court considered whether any factors in R.C. 2151.414(E)(7) to (11) applied, as discussed in the previous section.

{¶ 33} The record reveals that the trial court's findings are supported by the evidence. The record indicates that there is a strong bond between the foster parents and T.K.K., the guardian ad litem recommended granting permanent custody of T.K.K. to the agency, T.K.K. has been in the temporary custody of the agency his entire life, and biological mother's pattern of behavior shows that she could not provide T.K.K. with a secure and stable home. Consequently, we find no error in the trial court's determination that granting permanent

custody to the agency is in T.K.K.'s best interest.

{¶ 34} Upon a thorough review of the record, we find that clear and convincing evidence supports the trial court's determination that it is in the best interest of T.K.K. to be permanently placed in the custody of the agency, and that the child cannot and should not be placed with either parent. The trial court made findings related to the applicable statutory factors set forth in R.C. 2151.414(D) and (E) which are supported by the evidence. Accordingly, the trial court did not abuse its discretion in granting permanent custody of T.K.K. to the agency, and its decision is supported by sufficient evidence and is not against the manifest weight of the evidence. Biological mother's two assignments of error are overruled.

{¶ 35} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.