[Cite as *In re M.B.*, 2009-Ohio-2634.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 08 MA 241
	)	
M.B. and M.B.,	)	O P I N I O N
	)	
ALLEGED DEPENDENT CHILDREN.	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Juvenile Division, Case No. 00JC1499

JUDGMENT: Affirmed.

APPEARANCES:

For Appellee: Attorney Paul Gains
Prosecuting Attorney
Attorney Lori Shells-Conne
Assistant Prosecuting Attorney
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For Appellant: Attorney John Ams
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 5, 2009

VUKOVICH, P.J.

¶{1} Appellant Charlotte Bowers appeals the decision of the Mahoning County Juvenile Court which granted permanent custody of two of her children to appellee Mahoning County Children Services Board. Appellant believes that the court abused its discretion in terminating her parental rights, and she takes issue with certain findings and conclusions made by the court. For the following reasons, the juvenile court's decision on permanent custody is affirmed.

STATEMENT OF THE CASE

¶{2} In 1999, four children were removed from appellant's custody, and custody was granted to appellant's sister. As a result of the investigation, appellant pled guilty to two amended felony counts of child endangering in violation of R.C. 2919.22(A).

¶{3} Prior to sentencing, appellant gave birth to twins, who are the children involved in the case before us. When the twins were five weeks old, appellant allegedly dropped one of them. The children were removed from appellant's custody in late August 2000 and placed into the foster home where they remain to this day.

¶{4} In September 2000, appellant was sentenced on the felony child endangering charges and remained incarcerated for two years. The twins were adjudicated dependent in October 2000. The agency successfully filed a motion to bypass having to make reasonable efforts on the basis that the mother had been convicted of child endangering. One year after the children's removal, in August 2001, the agency filed a motion for permanent custody.

¶{5} The motion was finally heard in December 2002. The magistrate granted permanent custody to the agency in May 2003. The juvenile court allowed an extended period for objections, which were filed over a year later. Thus, the original permanent custody motion was not fully resolved by the juvenile court until mid-2004.

¶{6} On appeal, this court held that the agency could not utilize the statutory provision dealing with children in temporary custody for twelve months of a twenty-two month period because their motion was filed too early. *In re Bowers*, 7th Dist. No. 04MA216, 2005-Ohio-4376, ¶41, citing R.C. 2151.413(D)(1) (which statutorily defines

temporary custody as beginning the earlier of the date the child is adjudicated or 60 days after the child is removed from the home) and *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶26 (which held that the twelve-month time period must be satisfied as of the date the agency files the motion).

¶{7} This court thus proceeded to address whether the children could not have been placed with the mother within a reasonable time or should not have been so placed, and we upheld the juvenile court's decision on two alternative grounds. Id. at ¶55-57, citing R.C. 2151.414(E)(5) and (6). We also upheld the court's best interest determination. Id. at ¶59.

¶{8} However, this court then held that the agency was not permitted to use the reasonable efforts bypass procedure merely due to appellant's child endangering conviction because the offense specified in the bypass statute is child endangering in violation of R.C. 2919.12(B)(2), but appellant was convicted of child endangering in violation R.C. 2919.12(A). Id. at ¶65, 69, 76, citing R.C. 2151.419 (A)(2)(a)(iii). We then remanded, concluding that reasonable efforts to reunify had not been made. Id. at ¶77, 105.

¶{9} Upon our August 2005 remand, appellant and her attorney met with the agency and agreed to reinstate the prior case plan in late September 2005. The goals were: counseling for the children to facilitate visitation; counseling for appellant, which included the requirement of following recommendations and dealing with life stressors and past anger problems; parenting classes; psychological evaluation; stable employment with a requirement that she provide pay stubs; and, stable housing with a requirement of utilities and furnishings. Because appellant had moved to Columbus, she was to coordinate with Franklin County Children Services. Her first visit with the children in two years was held on October 15, 2005.

¶{10} On May 18, 2006, the agency moved for permanent custody. At the time, the mother had only visited the children five times: October 15, 2005, January 21, 2006, February 11, 2006 and March 11 and 25, 2006. She missed multiple scheduled visits including the most recent ones, notwithstanding the fact that the agency had been providing free bus tickets since January. She had only attended three counseling sessions in February and March. Franklin County had just closed her

case due to lack of communication and her failure to report on her progress toward her case plan goals.

¶{11} After the motion was filed, appellant then attended one more counseling session in June 2006, but when insurance issues arose, she failed to follow-up on the sliding scale fees as suggested. Thereafter, she only visited the children on July 29, 2006, September 9, 2006 and December 9, 2006, although she could have visited at least twice per month with free bus tickets from Columbus, or she could have moved back from Columbus and visited even more frequently.

¶{12} Shortly after her final visit, she testified at a hearing that she resided in Youngstown part-time, and she provided a local address. As a result, the agency stopped providing bus tickets. Commencing April 1, 2007, appellant was ordered to pay child support in the amount of $25.50 per month per child.

¶{13} The final hearing on permanent custody was delayed for various reasons. For instance, on October 18, 2006, appellant's attorney arrived at a hearing, which had already been reset due to her prior request for a continuance, and asked for a continuance based upon the fact that appellant had not communicated with her in two months. The next scheduled hearing had to be reset due to a medical emergency regarding the agency's attorney.

¶{14} In April 2007, appellant's counsel sought to withdraw on the basis that appellant failed to abide by her advice, had misled her, and had become so highly argumentative, accusatory and disrespectful that it was impossible for counsel to function as such. Although appellant attended a May 2007 hearing regarding whether the court would appoint new counsel, she did not visit the children while in town. At the hearing, appellant complained that counsel asked her to move back to Youngstown without guaranteeing that she would be reunified with her children.

¶{15} Even though appellant did not meet the income requirements for free counsel, an exception was made and new counsel was appointed. The case was reset for October 24, 2007. Just before that hearing, appellant's sister, who is the custodian of appellant's four older children, filed a motion seeking custody of the twins. Also in October 2007, appellant was arrested and charged with felonious assault for

attacking her boyfriend's female cousin with a knife. She pled to aggravated assault and remained incarcerated since her arrest.

¶{16} On July 17, 2008, the permanent custody hearing finally proceeded before the magistrate. Appellant had to testify by telephone due to her incarceration in a community corrections facility. She believed that she would be released by October 2008. She said that she attended counseling, anger management and job-seek programs while incarcerated.

¶{17} She testified that she thought further counseling after her insurance denied coverage was optional. She conceded that she had previously testified that she resided in both Columbus and Youngstown and revealed that she kept some belongings at her cousin's house during the week, which is the local address she provided to the court. She claimed that she missed various visits during 2006 (the year of free bus passes) due to work and suggested that she could not afford to come more than one time in the three months in 2005 or anytime after 2006.

¶{18} It was noted that in May 2007 when she was seeking new counsel, she did not meet the indigency standards due to her income level. Appellant stated that there were better opportunities for work and a home in Columbus and that the only job she could find in Youngstown was at Wendy's, which she implied was beneath her. Yet, she noted that since the remand, she worked at McDonald's (then a warehouse then an eyeglass factory).

¶{19} The caseworker testified at the July 2008 hearing that appellant completed an eight-week parenting course. Appellant had provided proof of employment at an eyeglass factory and lived in a satisfactory home. Franklin County would not approve the home study due to the prior conviction of felony child endangering. Regardless, since October 2007, appellant had no home or job due to her incarceration.

¶{20} The caseworker testified that appellant attended only four counseling sessions when twelve were recommended. She disclosed that she had not heard from appellant since December 2006, appellant's last visit with the children. The caseworker pointed out that in eighty scheduled visits since the remand, appellant attended only eight. From what she observed at the beginning and end of those visits,

the children did not interact much with appellant; she noted that appellant would call her siblings and let the children talk to them. She concluded that the children, who were eight years old and who had lived with their foster-to-adopt parents their entire lives, were doing well and thought of their foster parents as their actual parents.

¶{21} The guardian ad litem opined that the mother failed to complete her case plan and failed to establish a relationship with the children. He recommended granting permanent custody to the agency. His reports were submitted to the court, wherein he opined it could be psychologically devastating to move the children from their home and into the home of a woman they barely know.

¶{22} On August 20, 2008, the magistrate issued a decision, which granted permanent custody to the agency and listed detailed findings of fact and various conclusions of law. Appellant filed a timely objection to the magistrate's decision. The one-sentence objection generally alleged that the permanent custody decision was erroneous.

¶{23} On October 23, 2008, the juvenile court adopted the magistrate's decision and issued its own judgment granting permanent custody to the agency. The court acknowledged that the standard of review was clear and convincing evidence. The court found that it would not be in the children's best interests to be returned to the mother and that it was in their best interests to be placed in the permanent custody of the agency. The court cited the children's long-term integration into a foster home with people they consider their parents, the children's lack of bonding with their mother, and their critical need for a legally secure placement. The court also pointed out that the children have been in the temporary custody of the agency for nearly eight years.

¶{24} The court then alternatively found that the children could not be placed with appellant within a reasonable time. The court found that reasonable efforts to reunify were made but the mother failed to meet her case plan goals over an eight-year period. The court stated that the agency tried to coordinate services with Franklin County. The court noted that visitation and transportation were provided and even increased but were barely utilized by appellant, stating that appellant missed seventy-two out of eighty scheduled visits since the remand.

¶{25} The court noted that appellant ceased contact with the agency and visits with the children in December 2006. The court recognized that appellant was in town for court in May 2007 but failed to visit the children. The court pointed out that just during the period immediately after the remand, there were three periods exceeding ninety days that appellant had no contact with the children: October 15, 2005 until January 21, 2006; March 25, 2006 until July 29, 2006; and, September 9, 2006 until December 9, 2006. The court concluded that this clearly and convincingly established that appellant abandoned the children.

¶{26} The court found that appellant had been incarcerated for felonious conduct twice since the children's removal, noting that the first incarceration concerned endangering of her older children and the second incarceration involved an assault with a knife that just occurred in October 2007. The court opined that these lengthy incarcerations prevented the mother from caring for the children. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR AND GENERAL LAW

¶{27} Appellant sole assignment of error provides:

¶{28} "THE TRIAL COURT LACKED CLEAR AND CONVINCING EVIDENCE TO TERMINATE APPELLANT'S PARENTAL RIGHTS."

¶{29} Appellant divides this assignment into two main parts: whether the children could not be placed with the mother within a reasonable time or should not be so placed and whether permanent custody was in the children's best interests. We shall divide our analysis accordingly after setting forth some general law.

¶{30} A parent's right to raise his or her children is an essential and basic civil right. *In re Murray* (1990), 52 Ohio St.3d 155, 157. However, this right is not absolute, and termination of parental rights can be appropriate where the statutory factors are established by clear and convincing evidence. *In re Cunningham* (1979), 59 Ohio St.2d 100, 105; R.C. 2151.414(B)(1). 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.

¶{31} We point out here that "[a]n objection to a magistrate's decision shall be specific and shall state with particularity all grounds for objection." Juv.R. 40(D)

(3)(b)(ii). “Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Juv.R. 40(D)(3)(a)(ii), unless the party has objected to that finding or conclusion required by Juv.R.40(D)(3)(b).” Juv.R. 40(D)(3)(b)(iv). See, also, Juv.R. 40(D)(3)(a)(iii) (notice to parties in magistrate’s decision that party must timely and specifically object to factual finding or legal conclusion in order to assign such as error on appeal).

¶{32} As aforementioned, the magistrate made detailed findings of fact and entered various conclusions of law. However, appellant’s objection merely stated that the permanent custody decision was erroneous. Thus, we could proceed to review only for plain error. As will be shown below, there is not error here, let alone plain error.

FINDING OF NO POTENTIAL FOR PLACEMENT WITH MOTHER

¶{33} Pursuant to R.C. 2151.414(B)(1), the court may grant permanent custody of a child to the agency if the court determines by clear and convincing evidence, that such decision is in the child’s best interest and that any of the following apply:

¶{34} “(a) The child is not abandoned or orphaned or has not 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, 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.

¶{35} “(b) The child is abandoned.

¶{36} “(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

¶{37} “(d) 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.”

¶{38} In 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 court shall consider all relevant evidence. R.C. 2151.414(E). If the court determines, by clear

and convincing evidence that one or more of the following exist, 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} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent 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. * * *

¶{40} "(4) The 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; * * *

¶{41} "(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child. * * *

¶{42} "(16) Any other factor the court considers relevant."

¶{43} Appellant takes issue with the court's finding that subsections (1), (4) and (13) were applicable in this case. As for division (E)(1), appellant urges that full compliance was not possible because Franklin County would not approve the home study as a result of the child endangering convictions. She claims that since this fact existed at the time of the remand, her ability to comply was doomed to fail. To the contrary, Franklin County's refusal to recommend her home was not the reason for the court's decision. In fact, the court noted that her home, at the time of the home study, was satisfactory.

¶{44} However, appellant no longer had a home at the time of the July 2008 permanent custody hearing and had not had one since her arrest in October 2007. Similarly, although she previously maintained employment which had been verified,

she was no longer employed as a result of her incarceration. Considering her felonious assault charge in which she pled to aggravated assault and her admission that she used a knife in the assault, it is also clear that she failed to comply with the case plan goal regarding dealing with anger management and life stressors.

¶{45} She completed a parenting course, and nearly seven months after signing the new case plan, she finally obtained her psychological evaluation. She did not begin her required counseling until some months after signing the case plan and then only attended three sessions before the motion was filed and one more session thereafter. She claimed that she believed that any more sessions were optional, but the caseworker testified that twelve sessions were recommended and that appellant was to apply for sliding scale fees for the remaining sessions. It was said that appellant failed to cooperate with the agency in Franklin County. She also did not contact the local caseworker after December 2006. The agency investigated placement with five different family members, none of which worked out.

¶{46} The fact that the case plan appellant agreed to in September 2005 was similar to the one initiated prior to our remand does not mean that reasonable efforts were not implemented. In fact, we did not have a problem with the case plan itself. Rather, we had a problem with the efforts of the agency, who filed their motion before appellant had been released from prison. Since the agency believed that it was permitted to bypass reunification efforts and specifically received permission to bypass such efforts, it was clear the agency had not engaged in any effort to reunify. The situation here is distinguishable as the agency set goals and attempted to assist her in reaching these goals in conjunction with the agency in Franklin County. Appellant and her counsel agreed to the case plan in September 2005, but she did not begin attempting many of these goals for some months, and as set forth above and below, the progress on many other goals was lacking.

¶{47} Importantly, appellant did not visit the children sufficiently. Specifically, after our remand, she visited the children only one time in each of the following months: October 2005, January, February, July, September and December 2006; she visited them twice in March 2006. Her transportation from Columbus to Youngstown was provided by the agency's free bus tickets in all of 2006. She was scheduled to

visit twice a month. Still, she visited only seven times during the year of free bus tickets. In December 2006, she testified that she lived in Youngstown part-time. She attended a hearing in May 2007, but she did not seek to visit her children at the time. Thus, from December 2006 until her incarceration in October 2007, appellant made no attempt to see or contact her children.

¶{48} During the eight visits she did attend, there was said to be a lack of bonding; appellant noted that the children were shy with her and seemed to blame this on some type of influence or revenge motive on the part of an unnamed actor. Although the caseworker did not sit through the visits, she did witness the interaction before and after the visits and did witness some independent playing and the mother's telephone calls to her siblings.

¶{49} It should also be noted that appellant refused to move back to Youngstown, claiming that opportunities for a home and job were better in Columbus. However, the jobs she held in Columbus allegedly did not even provide enough income for her to afford to visit her children in Youngstown; that is, the only time that she paid for her own transportation to visit her children was the one time in October 2005.

¶{50} Considering all of these facts and circumstances, the trial court could find by clear and convincing evidence that, notwithstanding reasonable case planning and diligent efforts by the agency, appellant failed to substantially comply with her case plan, allowing a finding under R.C. 2151.414(E)(1).

¶{51} This analysis also relates to an alternative factor found by the court and disputed by appellant here: that appellant showed a lack of commitment by failing to regularly support, visit or communicate with the children when able. See R.C. 2151.414(E)(4). The minimal visits over the years showed a lack of commitment. Appellant's alleged inability to visit during the year of free bus tickets due to work and her alleged inability to visit during the end of 2005 and most of 2007 due to expense were matters of credibility, which is best left to the trier of fact. Contrary to appellant's suggestion, the fact that she continued to fight the permanent custody motion does not rebut a lack of commitment under the language of the statute. As such, the court had before it sufficient evidence to find by clear and convincing evidence the existence of

the factor in R.C. 2151.414(E)(4), which thus required a finding that the children could not have been placed with appellant within a reasonable time or should not have been so placed.

¶{52} Appellant contests another alternative factor found by the court: that her repeated incarceration prevented her from providing care for the children. See R.C. 2151.414(E)(13). She notes that the first incarceration arose from an incident that predated the birth of these children. However, the incarceration began after their birth in 2000 and lasted nearly two years. She was then incarcerated from October 2007 through the date of the July 2008 permanent custody hearing and was anticipating release in October 2008. These repeated incarcerations prevented her from providing care for the children and she was still prevented from providing such care as of the permanent custody hearing. Thus, the court had sufficient evidence to find by clear and convincing evidence the existence of the factor in R.C. 2151.414(E)(13). Accordingly, any one of the court's three alternative holdings constituted a reasonable method for finding that the children could not be placed with appellant within a reasonable time or should not be so placed.

¶{53} Regardless, as the agency points out, the court made two alternative findings, either one of which would make the "placement with a parent" finding under R.C. 2151.414(E) irrelevant. As set forth above, the statute provides that whether the child cannot or should not be placed is only relevant where the alternative findings (orphaned, abandoned or long-term temporary custody) are not applicable. See R.C. 2151.414(B)(1)(a)-(d).

¶{54} Here, the court found that the children had been abandoned due to the following three periods during which the mother failed to communicate with the children for more than ninety days: between October 15, 2005 and January 21, 2006; between March 25, 2006 and July 29, 2006; and, between September 9, 2006 and December 9, 2006. See R.C. 2151.414(B)(1)(b). There was free transportation in 2006. There was no contact after December 2006. For the purposes of chapter 2151, a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days. R.C. 2151.011

(C). Contrary to appellant's suggestion, participation in hearings does not constitute visitation or maintenance of contact.

¶{55} In any event, the children had been in the agency's temporary custody since soon after their birth eight years prior to the permanent custody hearing. Thus, the court found that they had been in the temporary custody of the agency for more than twelve of the twenty-two consecutive months prior to the filing of the motion. It is well-established that consideration of whether the child could or should be placed with the parents is not necessary where this factor exists. R.C. 2151.414(B)(1)(a), (d) (plain language of statute); *In re C.W.*, 104 Ohio St.3d 63, 2004-Ohio-6411, ¶21 ("After H.B. 484's addition of the '12 of 22' provision to R.C. 2151.414, an agency need no longer prove that a child cannot be returned to the parents within a reasonable time or should not be returned to the parents, so long as the child has been in the temporary custody of an agency for at least 12 months."); *In re C.R.*, 7th Dist. No. 06BE53, 2007-Ohio-3179, ¶34. As such, there are many reasons why appellant's arguments here are without merit.

BEST INTERESTS FINDING

¶{56} This leaves us with whether an award of permanent custody to the agency was in the children's best interests. R.C. 2151.414(B)(1). In determining the best interests of a child, the court shall consider all relevant factors, including, but not limited to, the following:

¶{57} "(1) 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;

¶{58} "(2) 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;

¶{59} "(3) 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;

¶{60} “(4) 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;

¶{61} “(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.” R.C. 2151.414(D).

¶{62} As for the latter factor, division (E)(10) involving parental abandonment was said to apply here. As for division (B)(4), the court emphasized how these eight-year-old children, who have been in foster care nearly since birth, critically require a legally secure placement, especially considering their lack of bonding with their mother. As for division (B)(3), the children were removed from the mother’s care when they were five weeks old and placed with a foster family. They remain with this foster family to this day. They are doing well in their placement, and the foster family has been waiting to adopt them for years.

¶{63} The children’s wishes were not directly ascertained for purposes of division (B)(2). However, the guardian ad litem testified that permanent custody would be in their best interests. As for division (B)(1), the court noted that the children consider their foster parents their actual parents and are very integrated into the family and the extended family. The father had no contact with the children. Additionally, the court found that the children have not bonded with their mother.

¶{64} At this point, appellant contends that there was insufficient testimony as to a lack of bonding. Although the caseworker testified that she was not present during the two-hour visitation periods, she did observe encounters between the mother and child at the beginning and end of each visitation. The caseworker suggested that the children kept to themselves and there was not a lot of interaction; she noted that the mother would call her siblings and let the children talk to them. She opined that the children did not really know appellant. The mother stated that during the visits she did attend, one of the children was very shy with her, which was the only fact she could give about the children’s differences and which she attributed to someone’s negative influence on her child. Besides football and eating, she could not really say what the children liked. The guardian ad litem had also reported that appellant failed to really establish a relationship with the children.

¶{65} Combined with this testimony, the following case history allowed the court to infer that bonding was unlikely: no visits for nearly the children's first two years of life due to incarceration until late 2002; some visits for a year; then, no visits from October 2003 (when the children were three) until October 2005; then, eight visits from October 2005 (when the children were five) through December 2006 (when the children were 6.5); and then, no visits from early December 2006 through the date of the hearing in July 2008 (when the children were turning eight). As such, there was sufficient testimony and evidence for the court to conclude there was a lack of bonding. From all of this, the juvenile court could rationally conclude by clear and convincing evidence that the award of permanent custody to the agency was in the children's best interests.

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

Donofrio, J., concurs.
Waite, J., concurs.