

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: B.K.

Court of Appeals No. L-10-1053

Trial Court No. JC 09195473

DECISION AND JUDGMENT

Decided: July 14, 2010

* * * * *

Stephen D. Long, for appellant.

Bruce D. McLaughlin, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, B.K. ("mother"), appeals a January 27, 2010 judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating parental rights to her son, B.K., and granting permanent custody of the child to Lucas County Children Services ("L.C.C.S.") The father of the child, J.K. ("father"), did not personally appear at trial court proceedings and has not filed an appeal. Mother and father are married. For the following reasons, we affirm.

{¶ 2} B.K. was born on June 19, 2007, in Toledo, Ohio. On the following day, L.C.C.S. received a referral regarding B.K. The referral raised concerns that another child (K.K.) had been removed from mother's custody in Kentucky. J.K is not the father of K.K.

{¶ 3} Father and mother reported to hospital staff in Toledo that mother lost custody of K.K. in Kentucky due to allegations that the child was sexually abused by mother's paternal grandfather. Mother, father, and K.K. resided with the paternal grandfather in Kentucky at the time of the alleged abuse. Mother and father also reported to hospital staff that they had purposely moved to Ohio from Kentucky to avoid also losing custody of the newborn, B.K., to Kentucky.¹

{¶ 4} On June 26, 2007, L.C.C.S. filed a complaint in dependency regarding B.K. The trial court awarded L.C.C.S. temporary custody at a shelter care hearing on June 26, 2007. After a hearing on November 7, 2007, the trial court adjudicated B.K. to be a dependent child and awarded temporary custody of the child to L.C.C.S.

{¶ 5} On May 28, 2009, the trial court ordered a change of custody of B.K. to mother. B.K. remained in mother's custody for less than 24 hours when temporary custody with L.C.C.S. was restored. L.C.C.S. filed a complaint in these proceedings for dependency and seeking permanent custody of B.K. on June 25, 2009. Trial proceeded for adjudication of dependency on November 30, 2009, and disposition on November 30, 2009, December 1, 2009, and January 4, 2010. In a judgment filed on January 27, 2010,

¹Mother moved to Ohio in November 2006 and father in December 2006.

the trial court awarded permanent custody of B.K. to L.C.C.S. for adoptive placement and planning. The trial court terminated all parental rights.

{¶ 6} Mother asserts three assignments of error on appeal:

{¶ 7} "Assignments of Error

{¶ 8} "A. The trial court's adjudication of the child as 'dependent' by clear and convincing evidence is against the manifest weight of the evidence and not supported by the substantial weight of the evidence.

{¶ 9} "B. The trial court's award of permanent custody to the agency is against the manifest weight of the evidence and not supported by the substantial weight of the evidence.

{¶ 10} "C. Mother was denied due process of the law as guaranteed by the United States Constitution where the trial court granted permanent custody of her child without a showing of parental unfitness."

{¶ 11} The allegations of the original complaint in dependency centered on the fact that mother lost custody of her older son, K.K., in Kentucky due to allegations of sexual abuse by mother's paternal grandfather and a claimed failure to protect the child. Both mother and father stated that they each observed mother's paternal grandfather masturbating while K.K. was in the bed at the time. The court finding in Kentucky was that K.K. was neglected.

{¶ 12} While a juvenile, father was convicted of delinquency by reason of gross sexual imposition. He pled to the offense. Father was age 17 at the time of the offense.

Mother's 11-year-old sister was the victim. Father chose to be incarcerated rather than to undergo sexual offender treatment in the delinquency case. Both mother and father were sexually abused as children.

{¶ 13} L.C.C.S. provided case plan services to assist the mother and father to remedy the conditions that caused B.K. to be placed in the temporary custody of L.C.C.S. Services included casework management, referrals for diagnostic assessments, mental health services and counseling, and assistance with housing and parenting. Sex offender treatment was offered father.

{¶ 14} A significant concern of the L.C.C.S. caseworker from the beginning was the need of father for sexual offender treatment and a concern as to the relationship between mother and father when he refused. The L.C.C.S. caseworker made direct recommendations to father that he undergo sex offender treatment. Father refused. He said he did not believe he needed treatment. As the caseworker persisted, the issue became contentious between them.

{¶ 15} Ultimately, father did attend parent counseling from September 2007 until February 2008 and requested a diagnostic assessment. The diagnostic assessment was completed in March 2008. The diagnostic assessment resulted in a recommendation for father to receive sexual offender treatment. Father again refused. After the recommendation, father did not participate in any further mental health services. Specifically, he did not pursue sex offender treatment.

{¶ 16} Father moved from Ohio in May 2008. Mother lived with father until he moved. The mother admitted to the L.C.C.S. caseworker that she did not believe father committed a crime against her sister. Mother stated that Children Services could put her through 30 years of counseling and that she would still never admit that father was a sex offender.

{¶ 17} After father refused sex offender treatment, L.C.C.S. staff consistently explained to mother the importance of protecting B.K. from sexual abuse by maintaining a lack of any contact with father. On April 30, 2008, mother filed for divorce from father.² Ultimately mother claimed that she had discontinued any relationship with father. She told L.C.C.S. staff that her last contact with father was in February 2009.

{¶ 18} Subsequently, L.C.C.S. filed a motion to have B.K. reunified with his mother. The trial court awarded custody to mother on May 28, 2009. The order returning custody required mother to have no contact with the father. The order required L.C.C.S. to provide protective supervision of mother's home effective the day of the order.

{¶ 19} Telephone and email records secured by L.C.C.S. disclosed that the assertions of lack of contact with the father were false. The trial court found:

{¶ 20} "Prior to the court hearing returning custody to the mother, the L.C.C.S. staff informed the mother that records were being requested as a means of verifying no contact between the mother and father. Contrary to the mother's statements that she

²Divorce proceedings were dismissed without prejudice on September 23, 2008.

stopped contact with the father, the L.C.C.S. obtained records indicating the mother had ongoing telephone, text message, and email contact with the father. L.C.C.S. had numerous concerns after receiving this information, including that the mother also appeared to be involved in an escort service, and that the child was present with the mother during one of her attempted contacts with the father."

{¶ 21} These records include an email by mother in November 2008, indicating that she planned to move with B.K. to Arizona (where father resided) once custody of B.K. was restored to her by Children Services.

Dependent Child

{¶ 22} Under Assignment of Error A, mother argues that the trial court's determination that B.K. is a dependent child is against the manifest weight of the evidence. Adjudication that a child is abused, neglected, or dependent must be supported by clear and convincing evidence. R.C. 2151.35(A); Juv.R. 29(E)(4). "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶ 23} R.C. 2151.04 defines a "dependent child" as including any child:

{¶ 24} "(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

{¶ 25} "(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

{¶ 26} "(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;

{¶ 27} "(D) To whom both of the following apply:

{¶ 28} "(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

{¶ 29} "(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household."

{¶ 30} The trial court stated its findings with respect to dependency from the bench. It concluded that L.C.C.S. had proved, by clear and convincing evidence, that B.K. is a dependent child on two grounds. First, the court found that under R.C. 2151.04(B), B.K. is a dependent child because he lacked adequate parental care by reason of mother's mental or physical condition. Secondly, he is a dependent child under R.C. 2151.04(C) because his environment was sufficient to warrant guardianship by the state.

{¶ 31} Under Assignment of Error A, mother argues that the trial court reunified B.K. with mother at the request of L.C.C.S. on May 28, 2009, but then, approximately 24

hours later, removed the child from her home. Mother argues that in those 24 hours B.K. did not become a dependent child. Mother argues that the only change of circumstance that resulted in the institution of these proceedings was evidence that there had been continued contact between mother and father by phone, email, and text messaging. Mother contends that these contacts did not place B.K. at any risk because of the physical distance from father.

{¶ 32} L.C.C.S. argues that the child did not become dependent in 24 hours. Within 24 hours of reunification, L.C.C.S. became aware through telephone records including emails and texts that mother never had any intention of preventing contact between B.K. and father. L.C.C.S. argues that "inability to protect the child, coupled with her pattern of deceit, very clearly put the child at risk if permitted to remain in her care."

{¶ 33} In a civil case, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279 at syllabus; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24. Accordingly, we consider whether there was competent, credible evidence to support the trial court's determination that L.C.C.S. proved by clear and convincing evidence that B.K. is a dependent child.

{¶ 34} The unwillingness of a mother to sever ties with a father who presents a danger to their child can present an environment requiring state intervention to protect the

child. *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 54. In the case of *In re K.H.*, the danger presented was the risk of sexual abuse to the children presented by the father's unsuccessful treatment for pedophilia and the mother's questionable ability to protect the children should the father relapse. *In re K.H.* at ¶ 53.

{¶ 35} The Supreme Court of Ohio considered in the case the mother's assertion of her right to remain married "to a pedophile who has not made meaningful progress in therapy" while maintaining custody of their children. *In re K.H.* at ¶ 54. The court held the right of a mother to remain married and her parental right to child custody are not absolute: "The state has the right to intervene when the exercise of her rights presents a safety or health hazard to her children. (Citations omitted.)" *In re K.H.* at ¶ 54.

{¶ 36} At the time of trial, father was age 25 or 26. He was convicted of gross sexual imposition of an 11-year-old girl when age 17. B.K. was born on June 19, 2007. L.C.C.S first took temporary custody of B.K. within days of birth. Father refused to pursue sex offender treatment despite continued and persistent requests from L.C.C.S. staff. L.C.C.S. made the requests for sex offender treatment from when it first secured custody of B.K.

{¶ 37} Father completed a sex offender treatment assessment in March 2008. It also resulted in a recommendation for sex offender treatment. The father refused treatment. He moved out of state in May 2008, without ever securing sex offender treatment.

{¶ 38} Mother lost custody of an older child, K.K., based upon a finding of neglect in Kentucky, after K.K. was sexually abused by a family member, mother's paternal grandfather. Mother has repeatedly stated that she does not believe that father was guilty of the sex offense against her 11-year-old sister, despite his conviction. Given mother's lack of insight into the risks presented to B.K. of sexual abuse through continued contact with father, we conclude that there is competent, credible evidence in the record supporting the trial court's conclusion, by clear and convincing evidence, that B.K. is a dependent child within the meaning of R.C. 2151.04(C). The risks to B.K.'s health and safety in the environment are such as to warrant the state, in the interests of the child, to assume guardianship. Given this determination, we do not address whether B.K. is also a dependent child under either R.C. 2151.04(B) or 2151.04(D).

{¶ 39} We find appellant's Assignment of Error A, asserting that the trial court's determination that B.K. is a dependent child is against the manifest weight or the substantial weight of the evidence, not well-taken.

Award of Permanent Custody

{¶ 40} Under Assignment of Error B, mother asserts that the trial court's award of permanent custody to L.C.C.S. is against the manifest weight of the evidence and is not supported by the substantial weight of the evidence.

{¶ 41} A parent's right to raise his or her children is a fundamental right. *Troxel v. Granville* (2000), 530 U.S. 57, 66; *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28. The interest in the care, custody, and control of one's children is "one of the oldest of the

fundamental liberty interests recognized in American law." *In re K.H.* at ¶ 39, citing *Troxel*, 530 U.S. at 65. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54. Therefore, parents 'must be afforded every procedural and substantive protection the law allows.' *Id.*" *In re Hayes* (1997), 79 Ohio St.3d 46, 48.

{¶ 42} In order to award permanent custody to a public children's services agency, a court must find under R.C. 2151.414(B)(1)(a), where the child is not orphaned or abandoned, that 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." Alternatively, under R.C. 2151.414(B)(1)(d) the court must find that the child has been in the temporary custody of a public children services agency for "twelve or more months of a consecutive twenty-two-month period * * *." The trial court must also determine that an award of permanent custody to the agency is in the child's best interests. R.C. 2151.414(B)(1).

{¶ 43} R.C. 2151.414(E)(1)-(16) lists 16 conditions. Under R.C. 2151.414(E), a finding, by clear and convincing evidence, that one of the conditions exists is necessary to establish that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *In re William S.* (1996), 75 Ohio St.3d 95, syllabus. R.C. 2151.414(D) lists relevant factors to be considered by the court in determining whether an award of permanent custody to a public children's services agency is in the best interests of the child.

{¶ 44} Here the trial court found by clear and convincing evidence under R.C. 2151.414(B)(1)(a) that B.K. is not abandoned or orphaned and cannot be placed with either parent within a reasonable time and should not be placed with either parent. In making that determination, the trial court relied on a full R.C. 2151.414(E) analysis. It alternatively relied on a determination under R.C. 2151.414(B)(1)(d) that B.K. had been in the temporary custody of a public children's services agency for 12 or more months of a consecutive 22 month period.

Findings under R.C. 2151.414(E)

{¶ 45} With respect to mother, the trial court found, by clear and convincing evidence, that R.C. 2151.414(E)(1), (2), and (16) conditions exist.

{¶ 46} R.C. 2151.414(E)(1) relates to a showing that "the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home." Mother argues that the court concluded that she had substantially remedied conditions that originally resulted in removal of B.K. from the home when the court ordered return of B.K. to her custody in May 2009. Mother argues nothing has changed since May 2009 other than the disclosure of continuing contact with father.

{¶ 47} The trial court found that L.C.C.S. had provided numerous case plan services to mother. L.C.C.S. attempted to reunify B.K. with mother in May 2009 based in part upon assurances mother was no longer involved with father, a convicted sex offender. The court also found that "when the L.C.C.S. caseworker obtained information

that the mother continued to have contact with the father, and even made plans to move to Arizona where the father allegedly lived, the L.C.C.S. removed the child after being in mother's care for less than 24 hours." The trial court concluded that mother failed to make progress with respect to her relationship with father.

{¶ 48} The trial court also found that mother started attending her mental health counseling services sporadically beginning immediately before the reunification hearing. Mother was transported to Rescue Crisis for mental health treatment due to suicidal thoughts in June 2009. Although referred to Unison for mental health services, mother failed to engage in any mental health services from June 2009 until late September 2009. Mother was prescribed medication for mental health issues but failed to follow up with necessary appointments to maintain her medication. Mother was hospitalized at Flower Hospital in October 2009 due to mental health problems.

{¶ 49} With respect to housing, the trial court concluded that "mother's housing stability has been an ongoing concern throughout the case." The court also found that mother has had "a chronic history of unstable housing."

{¶ 50} At the time of attempted reunification, mother lived with her mother. That housing became unavailable after a family dispute involving a confrontation with one of mother's sisters. Later mother lived with an aunt. Ultimately her aunt also requested that she leave. Mother resided in a YWCA homeless shelter as of January 4, 2010, the date of the final hearing on disposition. The trial court concluded that mother's instability with housing "is due, in part, to her inability to live with others for long periods of time."

{¶ 51} The court concluded that mother has not made sufficient progress in her case plan services to substantially remedy the conditions that cause B.K. to be placed outside the home. The court also found that mother failed to effectively utilize available medical, psychiatric, psychological and other social and rehabilitative services and material resources necessary to resume and maintain parental duties.

{¶ 52} We find that there is competent, credible evidence in the record supporting the trial court's determination that R.C. 2151.414(E)(1) conditions exist as to mother.

{¶ 53} R.C. 2151.414(E)(2) provides that "[c]hronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year * * *." Mother argues that her mental health condition had sufficiently improved as of May 2009 and that reunification was appropriate.

{¶ 54} The trial court detailed at length appellant's struggle with mental and emotional health issues in its analysis under R.C. 2151.414(E)(1). Her mental health issues have included thoughts of suicide.

{¶ 55} After attempted reunification, mother received treatment in June 2009 at Rescue Services on an emergency basis. She was hospitalized at Flower Hospital in October 2009. Mother was diagnosed in October 2009 with major depressive disorder, recurrent, severe with psychotic features. The psychotic features were identified as the fact that she saw shadows and conversed with relatives who were deceased.

{¶ 56} The trial court concluded that "mother's mental and emotional illness issues have not been resolved and will not be resolved within a year of the trial." The trial court concluded:

{¶ 57} "* * * the court finds that pursuant to ORC 2151.414(E)(2) that the mother's chronic mental illness and chronic emotional illness is so severe that it makes the mother unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the permanent custody hearing."

{¶ 58} We find competent, credible evidence in the record supporting the trial court's findings, by clear and convincing evidence under R.C. 2151.414(E)(2) as to mother.

{¶ 59} R.C. 2151.414(E)(16) relates to "[a]ny other factor the court considers relevant." The trial court found:

{¶ 60} "* * * pursuant to R.C. 2151.414(E)(16) that the mother has not internalized the need and significance of protecting her child. The court finds that the father continues to be an integral part of the mother's daily thought process. The court finds that the mother does not properly understand the risk factors to the child associated with the father. The court finds that the mother appears unable to understand the risk factors associated with a person convicted of crimes such as gross sexual imposition of a minor. The court finds that the mother has not made sufficient or significant progress in her services to demonstrate that the child could soon be returned to the mother. And the court finds that the mother does not have the ability to internalize the need to protect the

child, and she does not have the ability to understand how to protect the child. The court finds that the mother has not demonstrated that she understands the need for the father to engage in services and address his own mental health issues regarding sexual misconduct. The court finds that these factors demonstrate that the child cannot be placed with either parent within a reasonable time and should not be placed with the parents."

{¶ 61} The L.C.C.S. caseworker testified at trial as to concerns raised by the telephone, email and text records disclosing that mother had not terminated contacts with father:

{¶ 62} "There were many concerns. You know, one being ongoing contact between her and the father going so far as to forward him her work schedule in December of last year. The most concerning – there were two that were most concerning, one where she was looking for plane tickets to go to Phoenix, which is where he is, and the other one was inquiring about apartments. And she stated for her and her husband because her and her family are looking to move within the next year. So those told me, again, no intention of protecting. Still, despite a solid year and then some counseling, no progress made on the issues of protection, and that said a lot."

{¶ 63} Jeremiah A. Hoffer, an attorney, was the guardian ad litem of B.K. He testified at trial. He recommended that permanent custody of B.K. be granted L.C.C.S. Hoffer testified:

{¶ 64} "I feel that were * * * [mother] * * * to get back with the dad, that she would be totally subservient to him and that she's not learned the necessary self esteem to

be able to stand up for her son. She may be able to do that with the general public, but I think anything that the father said that she would just go along with. I can't see her – I mean, let's put it like this. After seeing the emails and everything else, I think she just totally 100 percent gives in to the father. And if * * * [B.K.] * * * were returned, then he would be back with the father who is – has had no services at all."

{¶ 65} Mother argues that continued contact with father does not present a basis to terminate parental rights. Mother argues that "any threat presented by the father of the child is obviated by his demonstrated lack of interest in the child and the sheer physical distance between himself and the child." In response, L.C.C.S. contends that this case presents an issue of child protection where a parent is unwilling to sever a relationship with a person who "presents a danger to their child."

{¶ 66} The Supreme Court of Ohio in the case of *In re K.H.* recognized that among the protections a parent must afford his or her child is protection from sexual abuse. The court considered the issue under R.C. 2151.414(E)(14). *In re K.H.* at ¶ 47. R.C. 2151.414(E)(14) provides:

{¶ 67} "(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect."

{¶ 68} In that case the Ohio Supreme Court considered the father's lack of significant progress in the treatment of his pedophilia, the inability of the mother to protect their children from the father, and the possibility of the father reoffending. *In re*

K.H. at ¶ 53. As here, the parents in the case established separate living arrangements only as a means to gain reunification, always planning to resume living together. *In re K.H.* at ¶ 55.

{¶ 69} The Ohio Supreme Court recognized in the *In re K.H.* decision that the right to marry and the right to have custody of one's children are not absolute. "The state has the right to intervene when the exercise of * * * [a mother's rights] * * * presents a safety or health hazard to her children." *In re K.H.* at ¶ 54.

{¶ 70} We find competent credible evidence in the record supports the trial court's determination by clear and convincing evidence of the existence of a risk of sexual abuse to B.K. through mother's continued relationship with father, an untreated sexual offender, given father's refusal to seek sex offender treatment, his dominance of their relationship, and mother's questionable ability either to recognize the risk of sex abuse to B.K. from father or to protect B.K. from it. Accordingly, whether denominated as a finding under R.C. 2151.414(E)(14) or the catchall provision of R.C. 2151.414(E)(16), we find the trial court's determination that these facts constitute a basis under R.C. 2151.414(E) to conclude that B.K. "cannot be placed with either parent within a reasonable time and should not be placed with the parents" is supported by competent credible evidence in the record.

{¶ 71} R.C. 2151.414(E) analysis requires consideration of the suitability of both parents. As to father, the trial court also made findings under R.C. 2151.414(E)(4) and (10) supporting a determination that B.K. cannot be placed with either parent within a

reasonable time or should not be placed with the parents.³ R.C. 2151.414(E)(4) applies where "[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."

{¶ 72} The record establishes that father moved from Ohio in May 2008. The court found that since that time father had not visited B.K. The court found that the father failed to regularly support, visit, or communicate with B.K. when able to do so and that father failed to follow through with mental health services as recommended by mental health assessments, including a failure to pursue sex offender treatment. The court also found that father failed to maintain contact with B.K. after leaving Ohio, failed to maintain regular contact with the L.C.C.S. caseworker, and when last in contact with the caseworker showed no interest in the child.

{¶ 73} R.C. 2151.414(E)(10) applies where "[t]he parent has abandoned the child." The trial court found "that the father has presumptively abandoned the child by failing to visit or maintain contact with the child for more than ninety days, and no evidence was presented to rebut the presumption." The rebuttable presumption is based upon R.C. 2151.011(C). See *In the Matter of Jonathon B.*, 6th Dist. No. WD-06-026, 2006-Ohio-6182, ¶ 19-21.

{¶ 74} Mother has not disputed the trial court's findings under R.C. 2151.414(E)(4) and (10) with respect to the father. We find competent credible evidence

³Father has not appealed the determination of his parental unsuitability.

in the record supporting the trial court's determinations under R.C. 2151.414(E) of parental unsuitability of father.

Best Interest of the Child

{¶ 75} The trial court considered R.C. 2151.414(D)(10)(a)-(e) factors in determining whether the award of permanent custody to L.C.C.S. is in B.K.'s best interests as required under R.C. 2151.414(B)(1).

{¶ 76} The trial court concluded mother loves her son, B.K., and that she has visited him regularly. The court found that "mother cannot provide a safe environment for the child" and that a permanent placement can only be achieved through an award of permanent custody to L.C.C.S. The court found that B.K. has been in foster care for over two years and is in need of permanent placement.

{¶ 77} The court also found that B.K. "bonded to his foster caregivers, interacts and relates to them well." B.K. has been in the temporary custody of L.C.C.S., except for a 24 hour period, from the day he left the hospital after his birth.

{¶ 78} The trial court also found that father has abandoned B.K., that an adoptive home had been identified, and that the prospect of adoption is excellent. The court found that B.K. has done well in foster placement and that his needs, including special needs have been met.

{¶ 79} The court found that B.K. is too young to directly express his wishes as to placement. The guardian ad litem recommended permanent custody, concluding that it is in the child's best interests.

{¶ 80} Upon review of the record, we find that the trial court's determinations by clear and convincing evidence that permanent placement of B.K. with L.C.C.S. is in the best interests of the child and that B.K. cannot be placed with either of his parents or should not be placed with his parents are supported by competent, credible evidence in the record. Accordingly, we find mother's Assignment of Error B not well-taken.

Claimed Unconstitutionality of 2151.414(B)(1)(d)

{¶ 81} Under Assignment of Error C, mother argues that she has been denied her constitutional right to due process of law, asserting that the trial court judgment was not based upon a determination that she was an unfit parent. Mother argues that the judgment was alternatively based upon a finding that B.K. had been in the temporary custody of a public children's services agency for more than 12 months in a 22 month consecutive period pursuant to R.C. 2151.414(B)(1)(d).

{¶ 82} We decline to reach this issue as it is not necessary to render judgment in this appeal. The trial court determined the award of permanent custody both under full R.C. 2151.414(E) analysis inquiring into the fitness of mother as a parent as well as alternatively under R.C. 2151.414(B)(1)(d). As we have upheld the judgment under R.C. 2151.414(E) grounds, we do not render an opinion on the constitutionality of the alternative holding under R.C. 2151.414(B)(1)(d). See *Greenhills Home Owners Corp. v. Village of Greenhills* (1966), 5 Ohio St.2d 207, paragraph one of the syllabus; *In the Matter of Travin H.*, 6th Dist. Nos. H-08-024 and H-08-025, 2009-Ohio-991, ¶ 33. Appellant's Assignment of Error C is not well-taken.

{¶ 83} On consideration whereof, the court finds that substantial justice was done the party complaining. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.