[Cite as *In re B.E.M.*, 2004-Ohio-4959.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN RE: B. E. M.	C.A. No. 04CA0028
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 03-1335

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

{¶1} Appellants, John and Peggy Mulidore, appeal from the judgment of the Wayne County Common Pleas Court, Juvenile Division, terminating their parental rights to their minor child, B.E.M., and placing him in the permanent custody of the Wayne County Children Services Board ("CSB"). We affirm.

{¶2} John and Peggy Mulidore are the biological parents of B.E.M., born on August 29, 2003. B.E.M. is the ninth of Peggy's nine biological children. John is the biological father of the five youngest children.

{¶3} The family has had a long history with the children services agencies of Wayne and Holmes counties. Peggy's first two children were adjudicated

neglected and placed in the custody of their biological father, Robert Benson, in September 1994. Peggy's third and fourth children were also adjudicated neglected and her parental rights were terminated on September 10, 1996. See *In re Lyons*, (June 11, 1997), 9th Dist. No. 96CA0080 (affirming the termination of parental rights). On October 29, 2001, the parental rights of John and Peggy as to her fifth, sixth, and seventh children were terminated. Finally, on May 16, 2003, John and Peggy agreed to an order placing Peggy's eighth child in the legal custody of Peggy's cousin, Roberta Fortune, following two and one-half years of agency involvement.

{¶4} In the present case, B.E.M., who was born on August 29, 2003, was removed from the home by CSB on September 5, 2003, based on allegations of dependency. That complaint was subsequently dismissed because the adjudicatory hearing could not be held within the mandated time limits. On December 3, 2003, CSB filed a new complaint, again alleging dependency, and seeking permanent custody of the child at the initial dispositional hearing. On February 25, 2004, B.E.M. was adjudicated dependent. The dispositional hearing was held on March 1 and March 2, 2004. On March 17, 2004, the trial court terminated the parental rights of John and Peggy, and placed B.E.M. in the permanent custody of CSB.

{¶5} This appeal followed, and appellants have assigned four errors for review. They will be considered together as they are related.

Assignment of Error I

"THE WAYNE COUNTY CHILDREN'S SERVICES BOARD CASE PLAN FAILED TO PROVIDE SERVICES TO ADDRESS THE REASONS FOR THE CHILD'S REMOVAL AND WAS NOT RELIEVED FROM DOING SO."

Assignment of Error II

"THE TRIAL COURT ERRED IN FINDING THAT THE PARENTS FAILED TO REMEDY THE CONDITIONS THAT CAUSED THE CHILD'S REMOVAL."

Assignment of Error III

"THE TRIAL COURT ERRED WHEN IT FOUND THAT THE CHILD COULD NOT BE PLACED WITH DEFENDANT-APPELLANTS WITHIN A REASONABLE TIME."

Assignment of Error IV

"THE TRIAL COURT ERRED IN FINDING CLEAR AND CONVINCING EVIDENCE THAT AN AWARD OF PERMANENT CUSTODY TO [WAYNE] COUNTY CHILDREN SERVICES WAS IN THE BEST INTEREST OF [THE CHILD]."

{¶6} In the third and fourth assignments of error, Appellants challenge the two central determinations necessary to a decision to terminate parental rights and award permanent custody to CSB, i.e. that the child cannot or should not be placed with a parent and that permanent custody is in the best interest of the child. See R.C. 2151.353(A)(4). In the first and second assignments of error, Appellants challenge one of the alternative findings made in support of the determination that the child cannot or should not be placed with a parent, i.e. notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that caused the removal of the child, the parents have failed

to remedy the conditions causing the child to be placed outside the home. See R.C. 2151.414(E)(1). For the reasons that follow, we find no error prejudicial to Appellants.

{¶7} A public children services agency may seek permanent custody of an abused, neglected, or dependent child in one of two ways. The agency may either request permanent custody as part of its original complaint, or it may obtain temporary custody and subsequently file a motion for permanent custody. R.C. 2151.413; R.C. 2151.27; R.C. 2151.353(A)(4). See, also, *In re Nibert*, 4th Dist. No. 03CA19, 2004-Ohio-429, at ¶13. In the case at bar, the agency requested permanent custody as part of its original complaint, to be determined in the initial disposition.

{¶8} In order to grant permanent custody in its initial disposition, the trial court must determine: (1) that the child cannot be placed with a parent within a reasonable time or should not be placed with either parent, pursuant to R.C. 2151.414(E); and (2) that permanent commitment is in the best interest of the child, pursuant to R.C. 2151.414(D). See R.C. 2151.353(A)(4). Appellants in the present case have challenged both of these determinations.

{¶9} The relevant facts must be demonstrated by clear and convincing evidence. R.C. 2151.414(E). Clear and convincing evidence is that which will cause the trier of fact to develop a firm belief or conviction as to the facts sought

to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶10} In regard to the first requirement, when determining whether a child can or should be placed with either parent, the juvenile court must find by clear and convincing evidence that at least one of the factors enumerated in R.C. 2151.414(E) exist as to each of the child's parents. R.C. 2151.414(E). See *In re William S.* (1996), 75 Ohio St.3d 95, 99. In this case, the trial judge found that the child cannot or should not be placed with either parent because: (1) the parents failed to remedy the conditions that caused the child's removal, pursuant to R.C. 2151.414(E)(1); (2) the parents' ability to properly care for the child is precluded by chronic mental health issues, pursuant to R.C. 2151.414(E)(2); (3) the parents have shown an unwillingness to provide an adequate permanent home for the child, pursuant to R.C. 2151.414(E)(4); and (4) the parents had their parental rights terminated as to a sibling of B.E.M., pursuant to R.C. 2151.414(E)(11).

{¶11} In their first and second assignments of error, Appellants challenge the trial court's finding that R.C. 2151.414(E)(1) existed so as to support a finding that B.E.M. cannot or should not be placed with a parent. R.C. 2151.414(E)(1) provides in pertinent part:

> "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."

{¶12} In their first assignment of error, Appellants track the language of R.C. 2151.414(E)(1) and argue that CSB failed to use reasonable efforts through case planning services "in remedying the condition that caused the child's removal[.]" Specifically, Appellants assert that CSB failed to provide "caseplan services that address the housing need." Appellants do not complain about a lack of services in any other regard. Then, in their second assignment of error, Appellants assert error by the trial court in its reliance on R.C. 2151.414(E)(1).

{¶13} We conclude that the trial court erred in relying on R.C. 2151.414(E)(1) to support its finding that the child cannot or should not be placed with a parent. Where R.C. 2151.414(E)(1) is the basis for granting permanent custody, the agency has a duty to use reasonable efforts to reunify the parent and child after the child's removal from the home. See *In re T.K.*, 9th Dist. No. 03CA0006, 2003-Ohio-2634, at ¶13. This is also true where the agency has sought permanent custody in the initial disposition. *In re Lewis*, 4th Dist. No. 03CA12, 2003-Ohio-5262, at ¶24. Thus, the agency must have given the parent a case plan and an opportunity to correct the situation that caused the removal of the child when it relies on R.C. 2151.414(E)(1). Id.

{¶14} Here, the agency made no effort to provide any services directed to helping Appellant's find independent housing or to provide them with housekeeping skills. In its appellate brief, CSB contends it was not required to

provide these services where it sought permanent custody in its initial complaint. This is an erroneous contention. Consequently, to the extent that CSB failed to provide services to correct the problems related to their housing need and that the trial court relied on such problems in its decision, there is merit in Appellant's argument.[1]

{¶15} However, the trial court also relied on other grounds, grounds that we ultimately find to be supported by the evidence. Only one of the factors enumerated in R.C. 2151.414(E) must exist before a court shall find that the child cannot or should not be placed with the parents. Consequently, the trial court's reliance upon R.C. 2151.414(E)(1) is harmless error. See *In re Lewis*, 2003-Ohio-5262, at ¶24-¶25; *In re Ward* (Aug. 2, 2000), 4th Dist. No. 99CA2677.

{¶16} We next consider the third and fourth assignments of error as against the remaining findings of the trial court. Those findings reflect that the child cannot or should not be placed with a parent because: (1) the parents had their parental rights involuntarily terminated as to siblings of the child, R.C. 2151.414(E)(11); (2) the parents suffered from chronic mental health issues that precluded the parents from offering proper care for the child, R.C. 2151.414(E)(2);

[1] Despite the fact that Appellants had had their parental rights involuntarily terminated as to siblings of B.E.M., CSB did not request a determination that it was not required to make reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child, or to make it possible for the child to return safely home, nor did the court make such a determination. See R.C. 2151.419(A) and 2151.419(A)(2)(e).

and (3) the parents demonstrated an unwillingness to provide an adequate permanent home for the child, R.C. 2151.414(E)(4).

{¶17} First, the record supports a finding that both parents had their parental rights involuntarily terminated as to siblings of B.E.M. See 2151.414(E)(11). Peggy had her parental rights involuntarily terminated as to five children, and John, as the biological father of three of them, had his parental rights involuntarily terminated as to those three children. Pursuant to R.C. 2151.414(E), this finding alone requires the trial court to enter a determination that B.E.M. cannot or should not be placed with a parent, in satisfaction of the first part of the test for permanent custody. Appellants have not disputed this finding.

{¶18} In addition, the trial judge also found the existence of mental health issues, including chronic emotional illness that precludes both parents from offering proper care to their child. See R.C. 2151.414(E)(2). At the dispositional hearing, Dr. Marianne Bowden testified regarding the psychological evaluations she conducted with both John and Peggy in September 2001. At that time, Dr. Bowden diagnosed Peggy with a major depressive disorder. She also found Peggy to have a dependent personality disorder and an avoidant personality disorder. Dr. Bowden diagnosed John with a major depressive disorder. She also diagnosed him with a personality disorder with prominent dependent and avoidant traits. Dr. Bowden concluded that Peggy was likely to defer to John's needs over the needs of the child, and to have difficulty making decisions.

{¶19} Dr. Bowden also indicated that she reviewed the more recent findings of Dr. Becker from an assessment conducted in October 2003. She testified that his findings and concerns were essentially the same as her own.

{¶20} Dr. Bowden stated that the conditions of Peggy and John were treatable. However, neither has been consistent in seeking the recommended treatment. For example, Peggy's counselor reported that Peggy had been in and out of counseling since 1995. John's counselor indicated that John had attended only nine out of 16 sessions. Dr. Becker observed that because John had been inconsistent in obtaining counseling services, he had not gained any insight into the reasons why the child was removed. Dr. Bowden noted that the family had been involved with CSB for ten years. In conclusion, Dr. Bowden found that both John and Peggy had chronic emotional illness and continued to demonstrate severe difficulties in personality functioning. The finding of the trial judge on this point is therefore supported by the evidence.

{¶21} Third, the trial judge also found that the parents showed an unwillingness to provide an adequate permanent home for the child. See R.C. 2151.414(E)(4). The evidence shows that John was occasionally reluctant to hold his infant son, that Peggy may not have pursued employment as vigorously as she should have, and that they had been inconsistent in addressing their counseling requirements. But the evidence also reveals that the parents attended visitation regularly, that Peggy interacted very well with her child, that John had two jobs

and walked 45 minutes to reach one of them, and that Peggy walked three miles to take her child to his first medical examination and to obtain formula for him.

{¶22} We cannot conclude that the evidence in this case clearly and convincingly demonstrates that the parents are *unwilling* to provide an adequate permanent home for the child. However, because the evidence does establish the existence of two other R.C. 2151.414(E) factors, any error on this point is harmless.

{¶23} Upon review, we conclude that the determination that the child cannot be placed with a parent within a reasonable time or should not be placed with a parent is supported by clear and convincing evidence that the parents had their parental rights involuntarily terminated as to siblings of B.E.M. and that the parents suffer from chronic emotional illness that precludes their ability to properly care for the child. R.C. 2151.414(E)(11) and 2151.414(E)(2).

{¶24} As to the second prong of the permanent custody test, the juvenile court found that permanent custody was in the best interest of the child. See R.C. 2151.414(D). In making this determination, the juvenile court was required to consider all relevant factors, including, but not limited to, the following: (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; (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; (3) the custodial history of the child; (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; and (5) whether any of the factors in R.C. 2151.414(E)(7) through (11) apply in relation to the parents and child. R.C. 2151.414(D). R.C. 2151.414(E)(11) becomes a factor for consideration because the parents have had their parental rights involuntarily terminated as to a sibling of the child.

{¶25} "Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors." *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711, at 4. See, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002-Ohio-5606, at ¶24.

{¶26} The first factor deals with personal interactions and interrelationships. Appellants expressed their love for their child, regularly visit with him, and are appropriate during visitations. While Peggy interacted lovingly and actively with the child, John was said to be somewhat reluctant to hold the infant. Caseworker Mark Woods testified that both Peggy and Roberta Fortune demonstrated love and affection for the child. Caseworker Carol Watkins observed good interaction and a secure bond between the child and Roberta Fortune.

{¶27} The record also reveals that Fortune is Peggy's cousin and that she obtained legal custody of another of Appellants' children, following a voluntary

surrender by Appellants. B.E.M, therefore, has been able to develop a positive relationship with his birth sister. Appellants have participated in frequent visitations – two or three time a week – at the Fortune home with both of their children. Fortune has stated that she would permit continued visitations with Appellants if she were able to adopt B.E.M.

{¶28} The second factor concerns the wishes of the child. Because the child was only six months old, the wishes of the child were expressed by Gladene Hershberger, the guardian ad litem. Hershberger explained that the child had bonded to his foster mother and his birth sister. Hershberger found the foster home to be clean and furnished with appropriate equipment and toys. She reported that the foster parents are willing to parent both children. She stated that she had been the guardian ad litem for Peggy's first four children and found the same problems that existed at that time. She believes Peggy and John are not capable of properly parenting B.E.M. and the best interest of the child is to place him in the permanent custody of CSB.

{¶29} The third factor concerns the custodial history of the child. B.E.M. has been living with Fortune and her husband for six months, nearly his entire life.

{¶30} The fourth factor is the child's need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency. Roberta Fortune is willing to adopt B.E.M. She expressed love for her cousin, but also concern that Appellants would not be able to provide

for the child's needs or his safety. Both caseworkers also indicated that that they would have concern for the child's safety in Appellants' home. Caseworker Woods also questioned the judgment of the parents in terms of their ability to make decisions regarding the needs of the child. Two attempts to reunite Peggy's eighth child with the family had been made, but those efforts were unsuccessful. Appellants have lived at least five different places over the course of the last two and one-half years. They neither possess nor provide any of the necessary equipment and supplies for the child and are behind in child support payments. Robert Benson, the father and custodian of Peggy's first two children testified in support of Appellants – stating that Peggy was loving, caring, and that she offered a safe and secure home, but admitted that he does not permit his children to remain overnight at Peggy's home. Caseworker Woods and caseworker Watkins both opined that the best interest of the child was to be placed in the permanent custody of CSB.

{¶31} Fifth, the court is also required to consider the fact that the parents have had their parental rights terminated as to other siblings of the child.

{¶32} Based on a review of the record, we conclude that clear and convincing evidence supports the judgment of the trial court that it is in the best interest of the child to be placed in the permanent custody of CSB. Accordingly, Appellant's third and fourth assignments of error are overruled.

{¶33} Having overruled Appellants' four assignments of error, the judgment of the Wayne County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

EDNA J. BOYLE
FOR THE COURT

SLABY, P. J.
BATCHELDER, J.
CONCUR

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