

[Cite as *In re B. L.*, 2009-Ohio-3649.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF WAYNE        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: B. L. and J. L.

C.A. Nos.     09CA0016  
                  09CA0017

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF WAYNE, OHIO  
CASE Nos.    07-0108-AND  
                  08-0717-PCU

DECISION AND JOURNAL ENTRY

Dated: July 27, 2009

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WHITMORE, Judge.

{¶1} Appellants, Carrie L. (“Mother”) and Phillip L. (“Father”), appeal from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated their parental rights and placed their two minor children in the permanent custody of Wayne County Children Services Board (“CSB”). This Court affirms.

I

{¶2} Mother and Father are the natural parents of B.L., born February 25, 1999, and J.L., born December 10, 2001. The family was already involved with CSB through a voluntary case plan to address B.L.’s poor school attendance when CSB filed this involuntary case in January 2007. Police removed both children from the home pursuant to Juv.R. 6 after receiving a call from B.L. that she and her brother had been left in the care of Father, who was in the home in violation of a protective order and was under the influence of alcohol and drugs. Although the

details of the protective order are not clear from the record, Father was prohibited from having contact with Mother or the children, apparently due to an incident of domestic violence. Mother and Father were still married at that time, but they obtained a divorce during the pendency of this case.

{¶3} After the children were taken into custody, CSB learned that they had been exposed to their parents' long history of domestic violence and alcohol abuse and Mother's serious mental illness. CSB was also concerned that the parents had neglected their children's medical and dental needs. J.L.'s baby teeth were so badly decayed that he had to have all of them pulled. The decay was so extensive that it had also damaged J.L.'s permanent teeth, and his dentist had not yet determined whether the permanent teeth could be saved.

{¶4} The goals for reunification focused primarily on the parents' need to resolve their problems with drug and alcohol abuse, domestic violence, and Mother's need to receive treatment for her mental illness. The parents were also required to attend parenting classes, visit their children regularly, and provide for their basic needs. During the first year that the children were in agency custody, however, the parents made minimal progress toward any of these goals. Father made some progress during the second year, but Mother did not seek treatment for her mental illness and became involved in criminal activity that led to her incarceration.<sup>1</sup>

{¶5} After a brief stay in a foster home, the children were placed together in the home of an aunt and uncle. Although B.L. adjusted well to living there, J.L. exhibited unacceptable behavior that his aunt and uncle were unable to control. J.L. would frequently threaten others in the home, swear at his aunt, and act out sexually toward his sister and cousins. J.L. was moved

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<sup>1</sup> No further details about Mother's conviction are set forth in the record.

to a foster home, but his inappropriate behavior again led to his removal from that home. J.L. was later placed in the home of another foster family where he apparently adjusted well to living with the foster parents and their four children.

{¶6} On June 30, 2008, CSB moved for permanent custody of J.L. and moved for B.L. to be placed in the legal custody of her aunt and uncle. Following a hearing on those motions as well as the parents' oral request for an extension of temporary custody, the trial court placed J.L. in the permanent custody of CSB and placed B.L. in the legal custody of her aunt and uncle.

{¶7} Mother and Father separately appealed and this Court later consolidated the two appeals. Mother and Father each raise two assignments of error.

## II

### Mother's Assignment of Error Number One

“THE JUVENILE COURT ERRED BY GRANTING PERMANENT CUSTODY OF [J.L.] TO [CSB], BECAUSE THE ORDER WAS NOT SHOWN BY CLEAR AND CONVINCING EVIDENCE TO BE IN [J.L.'S] BEST INTEREST AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

### Father's Assignment of Error Number One

“THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY OF J.L TO [CSB] AND LEGAL CUSTODY OF B.L. TO RELATIVES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE AGENCY FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUCH A DISPOSITION WAS IN THE BEST INTEREST OF THE CHILDREN.”

{¶8} This Court will address Mother's and Father's first assignments of error together because they are closely related. Each parent has maintained that the evidence did not support the trial court's decision to terminate their parental rights to J.L. Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12

months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1)-(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99.

{¶9} The trial court found that the first prong of the permanent custody test was satisfied for several reasons, including that J.L. had been in the temporary custody of CSB for more than 12 of the prior 22 months. Neither parent has challenged that finding. Although Mother challenges the trial court's alternate findings under R.C. 2151.414(E), any error in those findings would not constitute reversible error. To demonstrate reversible error, Mother has the burden to demonstrate error as well as prejudice resulting from that error. *Lowry v. Lowry* (1988), 48 Ohio App.3d 184, 190, citing *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 28. "A prejudicial error is defined as one which affects or presumptively affects the final results of the trial." *Miller v. Miller*, 5th Dist. No. 06CA3, 2006-Ohio-7019, at ¶12. Mother has not disputed that the trial court's "12 of 22" finding under R.C. 2151.414(B)(1)(d) was supported by the evidence, which satisfied the first prong of the permanent custody test, so she cannot demonstrate reversible error.

{¶10} Mother and Father both challenge the best interest prong of the permanent custody test. When determining whether a grant of permanent custody is in the children's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives. See *In re S.N.*, 9th Dist. No. 23571, 2007-Ohio-2196, at ¶27.

{¶11} Father further maintains that the trial court erred in placing B.L. in the legal custody of relatives. The juvenile court’s disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead “leaves intact ‘residual parental rights, privileges, and responsibilities.’” *In re Shepherd* (Mar. 26, 2001), 4th Dist. No. 00CA12, at \*7, quoting R.C. 2151.011(B)(17). “Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child.” *In re N.P.*, 9th Dist. No. 21707, 2004-Ohio-110, at ¶23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶11.

{¶12} For ease of discussing the best interests of both children, because this appeal involves challenges to the trial court’s dispositions of legal custody of one child and permanent custody of the other, this Court will apply the permanent custody best interest factors set forth in R.C. 2151.414(D). Although this Court has recognized that other best interest factors may apply to a legal custody determination, it has also held that the best interest factors set forth in R.C. 2151.414(D) “provide guidance in determining whether a grant of legal custody is in the best interest of the [child.]” *In re T.A.*, 9th Dist. No. 22954, 2006-Ohio-4468, at ¶17; see, also, *In re B.G.*, 9th Dist. No. 24187, 2008-Ohio-5003, at ¶11.

{¶13} During the almost two-year pendency of this case, the parents had limited interaction with their children. Father had no interaction with the children during the first year of this case, primarily due to the protection order that was in place. During the second year of the case, Father visited his children on a weekly basis, except during the several weeks that he was either incarcerated or hospitalized. Father’s interaction was never expanded beyond weekly,

supervised visitation because he failed to resolve his long-term drinking problem or his anger management issues.

{¶14} For well over a year after the children were removed from the home, Father kept abusing alcohol and his alcohol abuse continued to cause serious problems in his life. For example, during August 2007, Father stumbled into a bonfire while he was intoxicated and suffered burns that were severe enough to require hospitalization in the Akron Children's Hospital burn unit. During February 2008, although Father had started an anger management program, he assaulted the fifteen-year-old son of a friend while he was intoxicated. Although the original charge of assault was reduced, Father was criminally convicted as a result of the incident. One week after he was released from jail, he was admitted to a hospital psychiatric ward due to an emotional breakdown. Father entered an alcohol treatment program shortly afterward, where he remained at the time of the hearing, but admitted that he had done so because he would be able to avoid eight months' incarceration on criminal charges if he completed the program.<sup>2</sup>

{¶15} Mother's interaction with her children was also limited to weekly supervised visitation, but Mother did not attend visits on a regular basis. Mother missed many visits and, because she usually had called CSB to confirm that she would be attending, the children often sat and waited for her and were disappointed by her failure to show. At the time of the permanent custody hearing, Mother was having no interaction with her children because she was incarcerated.

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<sup>2</sup> CSB again failed to present evidence about the nature of the criminal charges connected to the potential eight months of incarceration.

{¶16} When Mother did visit with the children, according to the psychologist who observed a family visit, the children seemed to lack emotional closeness to her. The psychologist explained that the children repeatedly went to the case aide rather than Mother for direction or praise. This psychologist, who had also evaluated Mother individually, testified that she had diagnosed Mother with bipolar disorder and delusional disorder and that the degree to which Mother suffered from those disorders made it difficult for her to parent her children. The psychologist had also diagnosed Mother with borderline intellectual functioning due to her IQ of 70. The psychologist further explained that Mother was very dependent on others, had very little sense of self, tended to project blame onto others, and lacked any insight into why CSB was involved with her family.

{¶17} Due to their long-term exposure to their parents' serious problems, J.L. and B.L. worried about their parents and felt the need to protect or take care of them. B.L., because she was older than J.L., had also assumed the role of her brother's caretaker. The children's counselors expressed concern about B.L. and J.L. feeling the need to protect and care for others in their family and explained that these feelings were not normal or healthy for such young children.

{¶18} There was evidence that both children were well cared for in their current placements. J.L. had been living in the same foster home for almost a year and had adjusted well to living there. The foster parents had been working with him to provide structure and consistency and to address his academic delays. J.L. had become bonded to the foster parents and their children, and the foster parents expressed an interest in adopting J.L.

{¶19} B.L. was likewise doing well in her placement with her aunt and uncle. B.L. had become involved in cheerleading and softball for the first time and was enjoying these new

activities. The aunt testified that she and her husband were prepared to provide B.L. with a permanent home.

{¶20} Several witnesses testified that there was a bond between J.L. and B.L. and that this was a bond that should be maintained. Although the parties expressed concern about placing the children in different homes, there was also evidence that J.L.'s foster parents and B.L.'s aunt and uncle were willing to work together to maintain a relationship between the two siblings.

{¶21} Each of the children had expressed their wishes in counseling. J.L., who was seven years old at the time of the hearing, had told his counselor that he would like his parents, who had divorced during the pendency of this case, to get back together and to live with him. Such a placement was not possible and, therefore, was not an option for the court. J.L. also told his counselor that he was happy living with his foster family and was bonded with that family.

{¶22} B.L., who was nine years old, told her counselor that she enjoyed living with her aunt and that she would like to stay there. The counselor further explained that B.L. had adjusted well to living with her aunt and uncle, was doing well in school, and had many friends. On the other hand, the counselor testified that B.L. was afraid to return to her father's home and that she preferred to stay with her aunt.

{¶23} The guardian ad litem expressed her opinion that permanent custody was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. She emphasized the unresolved problems of the parents and that Father, the only parent who was working on the goals of the case plan, had failed to make any progress until he was court ordered to do so.



{¶24} The custodial history of these children included almost 21 months spent in the temporary custody of CSB. As already detailed, the parents did not make substantial progress toward reunification during this prolonged period.

{¶25} After nearly two years living in temporary placements, both children were in need of a legally secure permanent placement. The evidence was clear that neither parent was in a position to provide the children with a suitable home. Mother had serious mental health issues and had failed to comply with the mental health component of the case plan. Moreover, at the time of the hearing, Mother was incarcerated.

{¶26} Father had failed to adequately address his long history of drug and alcohol problems. Father's counselor testified that Father needed to become sober to parent his children appropriately. Although he had been maintaining sobriety at the time of the hearing, he was in a controlled alcohol treatment program. More than one witness explained that remaining sober while in a controlled treatment environment was not sufficient to demonstrate an ability to remain sober. The psychologist who evaluated Father testified that she would want to see Father maintain sobriety outside a controlled environment for at least 8 to 12 months for him to demonstrate his sobriety.

{¶27} Although Father suggested at the hearing that the agency had not given him enough time to demonstrate sobriety, he was the one who waited nearly 15 months to start a treatment program that he was able to stick with. Moreover, Father admitted that he had entered and stayed in the treatment program because it was an alternative to serving eight months' incarceration on a criminal conviction.

{¶28} Permanent custody was not the only permanent placement option for B.L. CSB had been able to find a less drastic permanent placement for B.L. in the legal custody of relatives. She had been living in the home of her aunt and uncle and was doing well there.

{¶29} On the other hand, although J.L. initially had been placed in the home of his aunt and uncle, his behavior was uncontrollable and he posed a threat to the other children living there. The aunt and uncle testified that they were willing to help maintain a relationship between J.L. and B.L., but that they were unable to provide a permanent home for J.L.

{¶30} CSB had been unable to find any other suitable relative placement for J.L. J.L. had been adjusting well to the foster home where he had been living for almost a year, and the foster parents had expressed an interest in adopting him. Therefore, the trial court reasonably concluded that a legally secure permanent placement could only be achieved by granting permanent custody of J.L. to CSB.

{¶31} There was ample evidence before the trial court to support its conclusion that permanent custody to CSB was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. Mother's and Father's first assignments of error are overruled.

#### Mother's Assignment of Error Number Two

“THE JUVENILE COURT ERRED IN ITS INTERPRETATION OF CASE LAW ON THE ISSUE OF THE NATURE OR SCOPE OF ITS AUTHORITY TO EXTEND TEMPORARY CUSTODY BEYOND THE STATUTORY SUNSET DATE.”

{¶32} Mother contends that the trial court erred in concluding that it lacked authority to extend temporary custody beyond the so-called two-year “sunset date” or two years after CSB filed its complaint. See R.C. 2151.415(D)(4). At the hearing, the trial court had several motions pending before it, including the parents' request that it extend temporary custody for another six

months. Because the two-year sunset date was approaching, however, the parties discussed and briefed in writing the legal issue of whether the trial court had authority to extend temporary custody beyond the two-year period.

{¶33} At issue was R.C. 2151.415(D)(4), which at the time of the hearing provided, in relevant part:

“No court shall grant an agency more than two extensions of temporary custody \*\*\* and the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier[.]”

{¶34} Although the statutory language seems to indicate that a trial court has no authority to extend temporary custody beyond the sunset date, Mother cites authority from another appellate district that held otherwise. See *In re N.B.*, 8th District No. 81392, 2003-Ohio-3656, at ¶11-13. This Court need not determine whether the trial court had authority to extend temporary custody beyond the sunset date, however, because that issue is not raised by this appeal. In its judgment entry, although the trial court briefly discussed the lack of binding legal authority on this question, it did not take a position on the issue. Instead, the court explained that even if it had authority to extend temporary custody any further, its decision would be guided by the best interests of the children. The court then explained why an extension of temporary custody was not in the best interests of these children. The trial court had explained in a previous section of its judgment entry that permanent custody was in the best interest of J.L. and legal custody to relatives was in the best interest of B.L.

{¶35} Because this Court found no merit in the parents' first assignments of error regarding the best interests of the children, Mother has failed to demonstrate any error. Mother's second assignment of error is overruled.

Father's Assignment of Error Number Two

“THE TRIAL COURT DENIED [FATHER] AND THE CHILDREN THEIR DUE PROCESS RIGHTS BY FAILING TO APPOINT SEPARATE COUNSEL FOR THE CHILDREN DESPITE THE CONFLICT OF INTEREST OF THE GUARDIAN AD LITEM IN EXPRESSING THE ‘BEST INTEREST’ OF THE CHILD WHICH WAS CONTRARY TO THE WISHES OF THE CHILD.”

{¶36} Father contends that the trial court erred by failing to appoint independent counsel for the children. None of the parties raised this issue at any time in the trial court, but Father raises it for the first time on appeal to this Court. As this Court has repeatedly stated, ““where no request was made in the trial court for counsel to be appointed for the children, the issue will not be addressed for the first time on appeal.”” *In re T.E.*, 9th Dist. No. 22835, 2006-Ohio-254, ¶7, quoting *In re K.H.*, 9th Dist. No. 22765, 2005-Ohio-6323, at ¶41, citing *In re B.B.*, 9th Dist. No. 21447, 2003-Ohio-3314, at ¶7. Other appellate districts have also held that this issue must be raised in the trial court to preserve it for appellate review. See, e.g., *In re Graham*, 4th Dist. No. 01CA57, 2002-Ohio-4411, at ¶31-33; *In re Brittany T.* (Dec. 21, 2001), 6th Dist. No. L-01-1369, at \*6.

{¶37} Father has not asserted that the trial court committed plain error, nor has he explained why this Court should delve into this issue for the first time on appeal. In *In re T.E.*, this Court explained its rationale for not addressing this issue when a parent raised it for the first time on appeal:

“Although some courts have held that a parent cannot waive the issue of the children’s right to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 7th Dist. No. 04-BE-9, 2004-Ohio-4544, at ¶31, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother’s appeal of the termination of her own parental rights and she has standing to raise the issue of her children’s right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1, 13.

“The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children’s due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion.” *In re T.E.*, at ¶8-9.

{¶38} Because Father did not timely raise this issue in the trial court, this Court will not reach the merits of his challenge. Father’s second assignment of error is overruled.

### III

{¶39} The assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

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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 Appellants.

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BETH WHITMORE  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

CONRAD OLSON, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

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