

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**IN THE MATTER OF:**

**CASE NO. 9-2000-23**

**WESLEY KELLEY**

**OPINION**

**(CARMEN KELLY, APPELLANT)**

---

---

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court, Juvenile Division.**

**JUDGEMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: August 15, 2000**

---

---

**ATTORNEYS:**

**KEITH KOCHHEISER  
Attorney at Law  
Reg. #0015213  
132 South Main Street  
Marion, Ohio 43302  
For Appellant**

**JAMES P. LUTON  
Marion County Children's Services Board  
Reg. #0024854  
1680 Marion Waldo Road  
Marion, Ohio 43302  
For Appellee**

**BRENT YAGER  
Attorney at Law  
Reg. #33906  
383 South Main Street  
Marion, Ohio 43302  
Guardian Ad Litem**

**HADLEY, P.J.** The appellant, Carmen Kelley (“appellant”), appeals the judgment of the Marion County Court of Common Pleas granting permanent custody of her son to Marion County Children Services (“Children Services”). For the following reasons, we affirm the judgment of the trial court.

The pertinent facts and procedural history in this matter are as follows. Wesley Kelley was born to the appellant on August 4, 1988. On March 20, 1998, Children Services filed a complaint alleging that Wesley was a neglected and dependent child. The child was removed from the appellant’s care during a drug raid conducted at her home and placed in foster care. In May of 1998, the parties stipulated that Wesley was a dependent child and Children Services was granted temporary care and custody.

A case plan was filed in this matter with the objective of reunifying the appellant and her son. The case plan required the appellant to participate in drug and alcohol treatment, to attend parenting classes, to participate in joint counseling sessions with Wesley, and to maintain employment and adequate and stable housing.

On June 22, 1999, Children Services filed a motion for permanent custody of Wesley. Children Services stated that as the appellant had failed to substantially comply with the case plan, it would be in the best interest of the child to be permanently placed in its custody. A hearing in this matter was held on

February 17, 2000 and on March 15, 2000, the trial court filed a judgment entry granting Children Services custody of Wesley. It is from this judgment that the appellant now appeals, asserting two assignments of error.

**Assignment of Error No. 1**

**The trial court committed reversible error by failing to enter a finding that the child cannot be placed with the parent within a reasonable time or should not be placed with his parent as required by Revised Code 2151.414(E), nor the requisite determination of what is in the child's best interest pursuant to Revised Code 2151.414(D).**

A trial court conducting a hearing on a motion for permanent custody must follow the guidelines set forth in R.C. 2151.414. Pursuant to R.C. 2151.414(B), the court may grant such a motion if two determinations are made. The court must determine by clear and convincing evidence, after a child has been found by the court to be neglected, dependent, or abused, that it is in the best interest of the child to grant the movant permanent custody "and that any of the following apply:

- (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 his parents within a reasonable time or should not be placed with his parents;**
- (b) The child is abandoned and the parents cannot be located;**
- (c) The child is orphaned and there are no relatives of the child who are able to take permanent custody.**

**(d) The child has been in the temporary custody of one or more public children services agencies or private placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.”**

R.C. 2151.414(B)(a) through (d).

R.C. 2151.414(D) sets forth the factors that a court must consider in order to determine whether granting permanent custody to a public agency would be in the best interest of child. This statute states in relevant part:

**(D) In determining the best interest of a child at a hearing [on the issue of permanent custody] \* \* \* the court shall 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 parents 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, including whether the child has been in the temporary custody of one or more public services agencies or private placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 8, 1999;**

**(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.**

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

Case No. 9-2000-23

The factors set forth in R.C. 2151.414(E)(7) to (11) include whether the parents have been convicted of or pleaded guilty to various criminal offenses; whether medical treatment or food has been withheld from the child; whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse; and whether the parent has rejected treatment for an alcohol or drug problem. *In the Matter of Weatherholt* (Feb. 4, 2000), Seneca App. Nos. 13-99-31 and 13-99-32, unreported.

A reviewing court may not reverse a trial court's judgment based on the weight of the evidence presented, since the judge, when acting as the trier of facts, is in the best position to weigh the evidence and evaluate the testimony. *In re Brown* (1994), 98 Ohio App.3d 337, 342. Pursuant to R.C. 2151.414, a permanent custody determination must be supported by clear and convincing evidence. *Id.*, see e.g., *In re Davis* (June 3, 1994), Defiance App. Nos. 4-93-25 through 4-93-27, unreported; *In the Matter of Haywood* (May 9, 2000), Allen App. Nos. 1-99-93 through 1-99-95, unreported. Clear and convincing evidence is more than a mere preponderance of the evidence. Rather, a petitioner must prove each of its allegations, clearly and convincingly, producing "in the mind of the trier of facts a firm belief of conviction as to the facts sought to be established." *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469.

The appellant contends that the trial court erred because the judgment entry does not specify that the court found that the child cannot be placed with either of his parents within a reasonable time or should not be placed with his parents. In support of this argument, the appellant relies on this court's decision in *In re Brown* (1994), 98 Ohio App.3d 337. In *Brown*, we stated that parental rights should not be terminated by a vague judgment entry, in which the trial court fails to state that it considered specific statutory factors. However, in holding that the trial court's failure to produce a more specific judgment entry constituted reversible error, we distinguished *Brown* from the previous opinion of *In the Matter of Kyle Hart* (Mar. 9, 1993), Marion App. No. 9-92-47, unreported; see also *In the Matter of Weatherholt* (Feb. 4, 2000), Seneca App. Nos. 13-99-31 and 13-99-32, unreported, where we concluded that the failure to cite a specific statute was not prejudicial when the judgment entry clearly sets forth the facts supporting the decision. We find the case *sub judice* more analogous to *Hart* and *Weatherholt* than *Brown*.

The judgment entry issued by the trial court specifically states that the court found that there was clear and convincing evidence that the child should be placed in the permanent care of the Marion County Children Services Board. The court then cites to various factors under R.C. 2151.414(E) to support this conclusion. Specifically, the court found that the appellant had failed to remedy the conditions

that caused the child to be placed outside the home, R.C. 2151.414(E)(1); had demonstrated a lack of commitment to the child, R.C. 2151.414(E)(4); had refused to participate in drug and alcohol treatment, R.C. 2151.414(E)(9); as well as other factors the court considered relevant, R.C. 2151.414(E)(16).

The detailed judgment entry clearly supports the court's decision that it would be in the best interest of the child for permanent custody to be granted to Children Services. While the court did not specifically state that the "child cannot be placed with either parents within a reasonable period of time or should not be placed with the parents," it is clear from the court's detailed judgment entry that that was the court's findings. A thorough review of the record and the findings and conclusions of the trial court clearly reveals that the court considered all relevant statutory factors in rendering its judgment. The express purpose of a R.C. 2151.414 hearing is to determine whether a child can or should be placed with either of his parents within a reasonable time after consideration of specific statutory factors. *In the Matter of Hart* (Mar. 9, 1993), Marion App. No. 9-92-47, unreported. The court's explicit findings under R.C. 2151.414(E) are an implicit conclusion by the court that one of the situations under section 2151.414(B) was applicable. Therefore, the court's failure to reproduce the exact statutory language cannot be considered prejudicial to the appellant.<sup>1</sup> *Id.*

---

<sup>1</sup> It must also be noted the R.C. 2151.414(B)(1)(d) also applies in this matter, as the child had been in the temporary custody of Children Services for more than twelve months.

Accordingly, the appellant's first assignment of error is overruled.

**Assignment of Error No. 2**

**It is error for the court to grant permanent custody to Marion County Children Services Board when the Service Board does not use reasonable Case Planning and diligent efforts to reunify the child with the parent.**

The appellant alleges that Children Services did not use diligent efforts to make reunification between her and her son possible. For the following reasons, we find the appellant's allegation unfounded.

The trial court specifically found that the appellant had failed to comply with the case plan in place in this matter. The evidence reveals that the appellant continually refused to comply with the provisions of the case plan despite the repeated efforts of Children Services. The child was initially removed from the appellant's care because she was renting her house to known drug dealers and allowing them to conduct their business out of the home where she resided with the child. It was determined that the appellant had an alcohol problem, yet she failed to utilize the counseling and treatment programs recommended by Children Services. She testified that she had attended AA meetings, however, she was unable to provide the court with any proof of attendance. In August of 1998, the appellant was arrested for DUI, with three children in the car, including Wesley. It was determined that the appellant had a blood alcohol level of .122. In January of 1999, the appellant moved to Georgia without notifying her caseworker. She

lived in Georgia for six months and only returned once to visit the child, a visit that lasted only thirty minutes. The appellant repeatedly missed appointments and visitations with the child. She stated that she was working too hard and did not have time to complete the case plan.

It is clear from the evidence in this matter that the appellant was the only party who failed to use diligent efforts toward the reunification of her and her child. The child had been in the temporary care of Children Services for almost two years at the time of the trial. The appellant had only minimally complied with the requirements of the case plan.<sup>2</sup> The record reveals that Children Services provided the appellant with many opportunities and programs over the course of their involvement. The appellant failed to take advantage of these programs and exhibited little to no effort towards the reunification process. The trial court's decision in this matter is clearly supported by the evidence.

Accordingly, the appellant's second assignment of error is without merit.

Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

***Judgment affirmed.***

**SHAW and BRYANT, JJ., concur.**

**/jlr**

---

<sup>2</sup> The appellant had completed a parenting education class and no longer resided in the "drug house." However, the apartment she now lives in, with her boyfriend, is not large enough for three people.