

[Cite as *In re Allbery*, 2005-Ohio-6529.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

In the Matter of:

Josiah Allbery (D.O.B. 8-28-1993)

Faith McGiffin (D.O.B. 7-21-1999)

Hope McGiffin (D.O.B. 11-8-2002)¹

Dalton McGiffin (D.O.B. 3-21-2003)

Grace McGiffin (D.O.B. 3-27-2004)

:
:
:

Case No. 05CA12

DECISION AND

JUDGMENT ENTRY

File-Stamped Date: 12-6-05

APPEARANCES:

Leann R. Deeter, RAINA D. CORNELL & ASSOCIATES, Lancaster, Ohio, for appellant.

Larry E. Beal, Prosecuting Attorney, and David A. Sams, Assistant Prosecuting Attorney, Logan, Ohio, for appellee.

Kline, J.:

{¶1} Celeste Allbery (hereinafter “Mother”) appeals the judgment of the Hocking County Court of Common Pleas, Juvenile Division, granting the permanent custody of her five minor children to Hocking County Children Services (hereinafter “HCCS”). Mother argues that the trial court’s judgment is against the manifest weight of the evidence. Because we find that the trial court

¹ We note that Hope McGiffin’s birth date, as listed here, is likely incorrect. According to these dates, Hope and Dalton were born within four and a half months of one another. However, the complaint, judgment entry, and notices of appeal state the birth dates as we have recited them here.

did not do an analysis of R.C. 2151.414(D)-(E), we are unable to provide meaningful review and sustain this assigned error. Mother next argues that the trial court erred by granting the motion for permanent custody when HCCS failed to timely file a case plan, as required by R.C. 2151.412(C). Because the trial court's judgment entry is not sufficiently detailed, we are unable to provide meaningful review and sustain the assigned error. Finally, Mother argues that the trial court erred when it permanently terminated her parental rights by failing to conduct a timely hearing as required by R.C. 2151.414(A)(2). Because R.C. 2151.414(A)(2) does not provide a basis on which a party can attack the validity of the trial court's dispositional order, we disagree. Accordingly, we affirm in part, reverse in part, and remand this cause for further proceedings consistent with this opinion.

I.

{¶2} In September 2004, HCCS received a referral from Licking County Children Services (hereinafter "LCCS") that Mother and her minor children were currently residing in Hocking County, in the home of Robyn White. HCCS caseworkers visited White's home, wherein they found White, her boyfriend, and the five minor children. White informed the caseworkers that Mother was also in the home, but hiding. Eventually Mother appeared, spoke with a caseworker, and

admitted to abusing drugs and being unable to care for her children. HCCS requested that Mother submit to a drug test, which she did. The drug test results were positive for cocaine.

{¶3} HCCS filed for emergency temporary custody, which the trial court granted. After a shelter care hearing, which Mother attended, four of the children—Faith, Hope, Dalton, and Grace McGiffin (hereinafter “the McGiffin children”)—were placed in the temporary custody of HCCS, and Josiah Allbery was placed in the temporary custody of Robyn White, his paternal step-grandmother, with HCCS providing protective supervision.

{¶4} HCCS filed complaints alleging that the children were dependent pursuant to R.C. 2151.04(C) and requesting orders for permanent custody as the initial disposition. The trial court set the original hearing on the matter for December 20, 2004. However, the trial court continued that hearing until February 7-9, 2005 due to the following paternity issue: Mother was married to Eric Gallagher, the father of her sixth child², during the time she gave birth to each of the McGiffin children, making him their putative father.³ However, Chris McGiffin (hereinafter “Father”), Mother’s paramour, claimed paternity for these children. The trial court ordered paternity tests, which were set for December 29,

² The sixth child, Dillon Gallagher, is not relevant to this case. He was born after Josiah Allbery, but before Faith McGiffin. His paternal grandmother is now his legal custodian.

³ Mother is still married to Eric Gallagher.

2004. Accordingly, HCCS moved to continue the hearing until after completion of the paternity tests in order to allow it to determine the proper parties for the action. The trial court granted this motion, without objection. The paternity tests later confirmed that Father was the biological parent of Faith, Hope, and Dalton McGiffin, but excluded any possibility that he fathered Grace McGiffin.⁴

{¶5} On February 4, 2005, HCCS filed a case plan, well after the time period prescribed in R.C. 2151.412(C). Mother did not enter a formal objection to this failure, but did cross-examine HCCS employees about it. HCCS admitted that there was no valid excuse for this failure, but argued it was harmless error because reunification was not a goal.

{¶6} The trial court held hearings on this matter on February 7-9, 2005; April 19, 2005; and May 6, 2005. On February 9, the trial court ordered the hearing adjourned and continued because one of the attorneys in the matter fell ill and had to be hospitalized.⁵ None of the parties objected to this continuance, and the hearing continued on April 19, 2005. The record does not reveal why the final hearing date did not occur until May 6, 2005. Mother failed to attend the hearing

⁴ It was later determined that Corey Tucker, Mother's brother-in-law, is Grace's biological father and he voluntarily and permanently relinquished his parental rights. The record also reflects that Josiah Allbery's biological father is John White, who is currently serving an eleven-year prison term in Texas.

⁵ The record does not reveal the name of the attorney, or which party the attorney represented.

on February 7-9, 2005, but did attend the April and May hearings. Despite her absence in February, she was represented by counsel at those hearings.

{¶7} On June 16, 2005, the trial court permanently terminated Mother's parental rights and granted permanent custody of the children to HCCS. The journal entry recites the trial court's factual findings from the testimony and evidence presented at the hearing, but fails to identify the statutory basis for its order. On July 14, 2005, the trial court issued another journal entry finding that HCCS engaged in reasonable efforts of reunification and that an order for permanent custody was in the children's best interest. However, the trial court again did not identify the statutory basis for its best interest finding.

{¶8} Mother appeals and raises the following assignments of error: "1. The failure of Hocking County Children's Services (HCCS) to satisfy the time-period requirements set forth in ORC § 2151.412(C) resulted in prejudice to Appellant at trial. 2. The failure of HCCS to conduct a hearing on its Motion for Permanent Custody within the time period set forth in ORC § 2151.414(A)(2) unfairly prejudiced Appellant at trial. 3. The State failed to prove by clear and convincing evidence the statutory requirements set forth in ORC § 2151.414(B)(1)(a-d)."

II.

{¶9} In the interest of clarity, we examine Mother’s three assignments of error out of order. In her third assignment of error, Mother argues that clear and convincing evidence does not support the trial court’s judgment granting permanent custody of the five minor children to HCCS. We agree, but on the basis that the trial court’s judgment entry does not show that it considered the statutory factors required for a valid order granting permanent custody.

{¶10} Ohio law provides for two means by which an authorized agency may seek to obtain permanent custody of a child. The agency may first obtain temporary custody and then subsequently file a motion for permanent custody, or the agency may request permanent custody as part of its original abuse, neglect, or dependency complaint. See R.C. 2151.413, R.C. 2151.27(C), and R.C. 2151.353(A)(4). In order to grant permanent custody in its initial disposition, the trial court must determine that permanent custody is in the best interest of the child pursuant to R.C. 2151.414(D), and that the child cannot be placed with either of his or her parents within a reasonable time for at least one of the reasons enumerated in R.C. 2151.414(E).

{¶11} R.C. 2151.414(D) sets forth five factors that a trial court must consider in determining a child’s best interest. That section provides: “In determining the best interest of a child * * * 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 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, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999; (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 child."

{¶12} R.C. 2151.414(E) sets forth sixteen factors that the trial court must consider in determining whether a child can be placed with his or her parents within a reasonable time, or should not be placed with either parent. A trial court need only find one of these factors in order to award permanent custody to an authorized agency. See R.C. 2151.414(E).

{¶13} We acknowledge that a court is not required to expressly recite the factual findings relating to each statutory factor in its judgment entry. See *In re*

Myers, Athens App. No. 02CA50, 2003-Ohio-2776, ¶23, citing *In re Malone* (May 11, 1994), Scioto App. No. 93CA2165; *In re Dyal*, Hocking App. No. 01CA12, 2001-Ohio-2542, fn. 3, quoting *In re Day* (Feb. 15, 2001), Franklin App. No. 00AP-1191. However, it is axiomatic that the trial court’s judgment entry must show that it considered the appropriate factors and engaged in the appropriate analysis. See *In re Smith*, Ashtabula App. No. 2002-A-0098, 2003-Ohio-800, ¶13 (“There must be some indication in the record that the magistrate or juvenile court considered all five factors found in R.C. 2151.414(D) before making its decision”), citing *In re Jacobs* (Aug. 25, 2000), 11th Dist. No. 99-G-2231. This is true for the factors contained in both R.C. 2151.414(D) and (E).

{¶14} Here, the trial court did not, in relation to Mother, engage in the best interest of the child analysis or consider the factors codified in R.C. 2151.414(D). In its judgment entry, the trial court does note that Father’s behavior “during the past seven years developed a pattern that requires a legally secure permanent placement that cannot be achieved without a granting of permanent custody”, but that finding is only in relation to the children’s best interest as it involves placement with their Father. Nothing in the judgment entry indicates that the trial court engaged in a wide-range best interest analysis as it pertains to the children’s placement with Mother. Without any evidence that the trial court engaged in the

proper analysis for an award of permanent custody, the judgment cannot withstand scrutiny as we cannot conduct a meaningful review.

{¶15} The record reveals that the trial court filed an additional judgment entry on July 15, 2005, which expressly found that an award of permanent custody is in the children's best interest. Neither party has acknowledged that this entry exists. Nevertheless, because that entry addresses the best interest factor, we will address it.

{¶16} We find that the July 2005 entry does not serve as a nunc pro tunc entry. In *Keller v. Keller*, Jackson App. No. 03CA3, 2003-Ohio-6462, ¶30, we held that "[t]he purpose of a nunc pro tunc entry is to correct an omission in a prior judgment so as to enter upon the record a judicial action taken but erroneously omitted from the record. It is not made to show what the court might or should have decided, or intended to decide, but what it actually did decide. A nunc pro tunc judgment should be used only to change clerical errors and should not be used to change something which was deliberately done." (Citations omitted.) Here, the July 2005 entry is not labeled as a nunc pro tunc entry, and its language does not indicate that it intends to serve as a corrective entry. Rather, its language indicates that it intends to serve as a supplemental entry to the June 2005 final appealable order. The entry did not correct a clerical error, but a legal error that the trial court

either should have decided, or perhaps intended to decide. Nevertheless, the entry does not serve as a corrective entry to an issue the trial court actually decided in its final appealable order.

{¶17} Having found that the July 2005 entry was not a valid nunc pro tunc order, we find its issuance to be analogous to cases in which a party moves for reconsideration after the trial court issues a final appealable order. A motion for reconsideration of a final appealable order is a nullity, and any judgment entered on such a motion is also a nullity. *Pitts v. Ohio Dept. of Trans.* (1981), 67 Ohio St.2d 378, 379; *Kauder v. Kauder* (1974), 38 Ohio St.2d 265, 267. Appellate courts are without jurisdiction to review judgments that are nullities. Here, the July 2005 entry is a nullity, and we are without jurisdiction to review it.

{¶18} Even if the July 2005 judgment entry was merely a nunc pro tunc entry, and hence not a nullity, it still did not mention the applicable statutory provisions for a best interest finding. Therefore, we still cannot determine whether the trial court engaged in a proper analysis to support its order.

{¶19} The trial court also did not engage in an analysis of the factors contained in R.C. 2151.414(E). The judgment entry does reflect the trial court's factual findings as they relate to Mother, but it fails to identify R.C. 2151.414(E), as is required for a valid order that permanently terminates parental rights. The

trial court's judgment entry reflects that it was aware of the requisite statutory analysis, as it made a finding pursuant to R.C. 2151.414(E)(12) in relation to Josiah Allbery's natural father. But that finding is not applicable to Mother, and the remaining language in the judgment entry is devoid of any indication that the trial court engaged in the required analysis in relation to Mother. Without any evidence that the trial court engaged in the proper analysis for an award of permanent custody, the judgment cannot withstand scrutiny as we are unable to provide meaningful review.

{¶20} Accordingly, we find that the trial court's order was not sufficiently detailed to allow this court to conduct a meaningful review of the order and sustain Mother's third assignment of error.

III.

{¶21} In her first assignment of error, Mother argues that the trial court erred when it awarded permanent custody to HCCS despite the fact that HCCS failed to timely file a case plan as required by R.C. 2151.412(C). Mother contends that this failure prejudiced her by not informing her of the corrective actions necessary to achieve reunification with her children.

{¶22} R.C. 2151.412(C) provides, in pertinent part: "Each public children services agency and private child placing agency that is required by division (A) of

this section to maintain a case plan shall file the case plan with the court prior to the child’s adjudicatory hearing but no later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care.”

{¶23} Here, the date on which the children were first placed into shelter care and when HCCS filed the complaint coincide—September 30, 2005. Pursuant to R.C. 2151.412(C), HCCS had thirty days from that date in which to file a case plan. On appeal, Appellee admits that it failed to follow the time requirement set forth by that provision, but argues that any such error is harmless because adoption, rather than reunification, was the goal from the outset. Appellee further argues that a case plan was only required if it predicated the complaint upon R.C. 2151.414(E)(1).

{¶24} We have previously held that the children services agencies do not have a duty to continue reunification efforts after filing the complaint for permanent custody. See *In re Ward* (Aug. 2, 2000), Scioto App. No. 99CA2677; *In re Lewis*, Athens App. No. 03CA12, 2003-Ohio-5262. In *Ward*, we noted that “[i]t is axiomatic that a parent’s statutory right to a reunification plan does not apply in the context of actions seeking permanent custody.” *Id.*, quoting *In re Cooperman* (Jan. 19, 1995), Cuyahoga App. No. 67239, citing *In re Pachin* (1988),

50 Ohio App.3d 44, 47-48. Thus, a trial court “can award permanent custody to a children services agency even though little or no efforts are made to return the child to his or her home if the evidence supports a finding that it is in the child’s best interest and that the child should not be returned to the parents.” *Id.*, citing *In re Scott* (Aug. 22, 1997), Marion App. No. 9-97-N, citing *In re Kwanza Lee Stevens* (July 16, 1993), Montgomery App. No. 13523. However, if “R.C. 2151.414(E)(1) is a basis for granting permanent custody as the initial disposition, an agency must have given the parent a case plan and an opportunity to correct the situation that caused the removal.” *Id.*, citing *In the Matter of James C., et al.* (Aug. 20, 1999), Lucas App. No. L-98-1258.

{¶25} Because HCCS sought an award of permanent custody as the initial disposition, it was not required to file a case plan aimed at reunification, unless the basis for the award was predicated upon R.C. 2151.414(E)(1). Here, the trial court did not even identify the factors prescribed in R.C. 2151.414(E) as the basis for its final order. Therefore, the trial court’s judgment entry is not sufficiently detailed to allow this court to conduct a meaningful review of this assigned error. Accordingly, we sustain Mother’s first assignment of error.

IV.

{¶26} In Mother’s second assignment of error, she argues that the trial court erred when it permitted the hearing to be continued beyond the statutorily prescribed time period contained in R.C. 2151.414(A)(2). For the following reasons, we disagree.

{¶27} R.C. 2151.414(A)(2) provides: “The court shall hold the [permanent custody hearing] not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.” That provision goes on to state: “The failure of a court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.”

{¶28} Even if the trial court erred by permitting the hearing to occur beyond the time period set forth in R.C. 2151.414(A)(2), that error is not reversible. R.C. 2151.414(A)(2) expressly states that failure to meet the one hundred and twenty

day deadline “does not provide a basis for attacking the jurisdiction of the court or the validity of any order of the court.” *Id.* See generally, *In re B.L.*, Franklin App. No. 04AP-1108, 2005-Ohio-1151; *In re James*, Franklin App. No. 03AP-373, 2003-Ohio-5208; *In re Joseph P.*, Lucas App. No. L-02-1385, 2003-Ohio-2217; *In re Thompson*, Franklin App. No. 02AP-557, 2003-Ohio-580; *In re Hare* (Mar. 2, 1998), Scioto App. No. 97CA2532. For this reason, we overrule Appellant’s second assignment of error.

V.

{¶29} In conclusion, the trial court did not show, in its judgment entry, that it engaged in the requisite statutory analysis. Absent, we cannot provide meaningful review to Appellant’s argument that the trial court’s judgment is against the manifest weight of the evidence, or that it erred by not requiring HCCS to timely file a case plan. Finally, we find that the trial court’s failure to ensure that the hearing occurred within the time period prescribed by R.C. 2151.414(A)(2) is not reversible error. Accordingly, we affirm in part, reverse in part, and remand this cause for further proceedings consistent with this opinion.

**JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and cause remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issued out of this Court directing the Hocking County Court of Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.