[Cite as *In re Anthony/Bentley Children*, 2001-Ohio-1384]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
IN THE MATTER OF	:	**Hon. Julie A. Edwards, P. J.**
	:	**Hon. John W. Wise, J.**
	:	**Hon. John F. Boggins, J.**
	:	
ANTHONY/BENTLEY CHILDREN	:	**Case No. 2001CA00185**
	:	
MINOR CHILDREN	:	**O P I N I O N**

CHARACTER OF PROCEEDING:	**Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. JU111856**
JUDGMENT:	**Affirmed**
DATE OF JUDGMENT ENTRY:	**September 24, 2001**

APPEARANCES:

For Appellant	**For Appellee**
RALPH S. LACKI **306 North Market Avenue** **Suite 808** **Canton, Ohio 44702**	**QUAY D. COMPTON** **STARK COUNTY DEPT. OF JFS** **220 East Tuscarawas Street** **Canton, Ohio 44702**

Appellant Anthony Bentley appeals the decision of the Stark County Court of Common Pleas, Juvenile Division, that granted permanent custody of his four minor children to Appellee Stark County Department of Job and Family Services ("Department".) The following facts give rise to this appeal.

On April 19, 2000, the Department filed a complaint alleging the neglect of Sweetness Anthony, Lazarus Bentley, Heavenly Bentley and Anthony Bentley. The trial court awarded the Department temporary custody of the children, following a shelter care hearing, on April 20, 2000. The trial court conducted an adjudicatory hearing on July 11, 2000. At this hearing, the Department amended its complaint to seek temporary custody of the four children rather than permanent custody. The trial court awarded temporary custody of the four children to the Department.

The Citizen Review Board conducted a dispositional review hearing on October 19, 2000. The Department continued with temporary custody of the four children. On February 12, 2001, the Department again filed a complaint for permanent custody. The trial court conducted an annual review hearing on March 16, 2001. Following a continuance, the trial court conducted the permanent custody trial on May 15, 2001. On May 18, 2001, the trial court granted permanent custody of appellant's four children to the Department.

Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

> **I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING PERMANENT CUSTODY TO THE DEPARTMENT OF JOB AND FAMILY SERVICES WHEN THERE WAS**

NO CLEAR AND CONVINCING EVIDENCE TO SUPPORT SUCH A FINDING.

II. THE DEPARTMENT FAILED TO ENGAGE IN "A GOOD FAITH DILIGENT EFFORT FOR REASONABLE CASE PLANNING" AS TO APPELLANT'S CASE.

I

Appellant contends, in his First Assignment of Error, the trial court abused its discretion when it awarded permanent custody of his four children to the Department because there was no clear and convincing evidence to support such a finding. We disagree.

Appellant's First Assignment of Error claims the trial court's decision to grant permanent custody to the Department is against the manifest weight of the evidence. In applying the manifest weight standard of review, our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, unreported. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 281. It is based on this standard that we review appellant's First Assignment of Error.

Under R.C. 2151.414(B)(1),

> *** * * the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the**

child to grant permanent custody of the child to the agency that filed the motion for 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 the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(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 child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

In determining best interest of a child, R.C. 2151.414(D) provides:

*** * * 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 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 division (E)(7) to (11) of this section apply in relation to the parents and child.**

In the case *sub judice*, under R.C. 2151.414(B)(1)(d), the trial court found the children had been in the custody of the Department continuously for the past thirteen months and, under R.C. 2151.414(B)(1)(b), that appellant had abandoned the children by virtue of his lack of contact and bonding with them and his failure to attempt any form of reunification. Findings of Fact and Conclusions of Law, May 18, 2001, at 5. Our review of the record indicates the trial court incorrectly relied upon R.C. 2151.414(B)(1)(d). However, there is sufficient evidence contained in the record to support the trial court's finding under R.C. 2151.414(B)(1)(b) concerning abandonment.

If the trial court finds that a child has been abandoned, there is no requirement, under R.C. 2151.414(B), that the trial court also find that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. Even if this court determined that the trial court was required to make that finding, there was clear and convincing evidence supporting such finding.

The Department established the following goals for appellant: (1) obtain a psychological evaluation and follow through with any recommendations; (2) obtain an assessment from the HOPE program and follow any recommendations; and (3) complete Goodwill Parenting classes.

Beth Wengerd, the Department's ongoing family service worker, testified about appellant's efforts under the case plan. Appellant has been incarcerated for a drug related offense since the beginning of this case. Tr. at 16. Although Ms. Wengerd mailed appellant a copy of the case plan, Appellant made no attempt to contact Ms. Wengerd by telephone or otherwise. *Id*. at 7, 16-17. Appellant also has not provided any gifts or cards to the children throughout the time period they have been in the temporary custody of the Department. *Id*. at 8. Ms. Wengerd testified that she did not believe appellant would be able to provide food, shelter and clothing for the children due to his incarceration. *Id*. at 9-10. The record does not indicate that appellant completed any of the above goals in his case plan. In its Findings of Fact and Conclusions of Law, the trial court also noted that appellant has been in and out of prison and has had little contact with his children during much of their lives. Findings of Fact and Conclusions of Law, May 18, 2001, at 3.

Under R.C. 2151.414(B)(1)(a), the trial court must also consider certain factors, under R.C. 2151.414(E), in determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. The trial court did do this analysis and found the following factors present:

> **(1) 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. * * * ;**
>
> **(2) Chronic 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 after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 * * * of the Revised Code;**
>
> *** * ***
>
> **(4) The 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;**
>
> *** * ***
>
> **(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child;**
>
> **(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.**

Based upon the evidence contained in the record and the findings made by the trial court, we conclude clear and convincing evidence exists to support the trial court's finding to grant permanent custody to the Agency. The trial court's decision is not against the manifest weight of the evidence.

Appellant's First Assignment of Error is overruled.

II

In his Second Assignment of Error, appellant maintains the trial court failed to engage in a good faith diligent effort for reasonable case planning as it pertained to his case. We disagree.

Appellant appeared at the trial and testified that he submitted a letter, to the trial court, in which he requested a continuance until August 13, 2001, and appointment of counsel. Tr. at 60. Appellant also testified that while incarcerated he completed some schooling and was working on his drug issues. *Id*. at 53. Appellant contends the Department took no further steps to assist him with his case plan by either checking on his progress or determining what programs were available at the prison that would be compatible with his case plan.

We believe that once the Department provided appellant with a copy of the case plan, appellant had to take the initiative to express his interest in working toward reunification after his release from prison. We reviewed the letter appellant sent to the trial court judge. Although appellant requested appointment of an attorney and a continuance until he was released from prison, the letter made no mention of his efforts toward completing the case plan. Nor did appellant request any assistance in completing the case plan. We conclude the Department engaged in a good faith, diligent effort to assist appellant with his case plan.

Appellant's Second Assignment of Error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Boggins, J., concur.

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JUDGES

JWW/d 831

[Cite as *In re Anthony/Bentley Children*, 2001-Ohio-1384]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
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ANTHONY/BENTLEY CHILDREN	:	**JUDGMENT ENTRY**
	:	
	:	
MINOR CHILDREN	:	**CASE NO. 2001CA00183**

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

Pursuant to App.R. 24(A)(2), appellant shall pay costs in this matter.

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JUDGES