[Cite as *In re M.B.*, 2004-Ohio-597.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: M.B.

C.A. No. 21760

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DN 01 01 020

DECISION AND JOURNAL ENTRY

Dated: February 11, 2004

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

Per Curiam.

{¶1} Appellant, Michele B. ("Michele"), has appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to one of her minor children and placed that child in the permanent custody of Summit County Children Services Board ("CSB"). This Court reverses and remands.

I

{¶2} Michele is the mother of four minor children. M.B., born February 27, 2000, is the only child at issue in this appeal. CSB first took custody of M.B. and her two older siblings after a call from the school counselor of one of the siblings.[1] M.B. and her older siblings were adjudicated dependent children. This Court affirmed that decision on appeal. See *In re Bassette* (Mar. 27, 2002), 9th Dist. No. 20751.

{¶3} The older siblings, who do not have the same father as M.B., were placed with relatives. CSB eventually moved for permanent custody of M.B. On September 4, 2003, following a hearing, the trial court granted CSB's motion and placed M.B. in the permanent custody of CSB.

{¶4} Michele has timely appealed, raising two assignments of error.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED BY FAILING TO FIND THAT PERMANENT CUSTODY WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE[] AND THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} Through her first assignment of error, Michele has asserted that the trial court erred in granting CSB's motion for permanent custody. Before a juvenile court can terminate parental rights and award permanent custody of a

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[1] Michele's youngest child was not yet born.

child to a proper moving agency, it must determine by clear and convincing evidence that both prongs of the permanent custody test are satisfied: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least twelve months of the prior twenty-two 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) and 2151.414(B)(2). The trial court must explicitly state on the record its findings on each prong of the permanent custody test. See *In re Baker* (Jan. 16, 2001), 12th Dist. Nos. CA2000-04-010 and CA2000-04-011, 2001 Ohio App. LEXIS, at *14, quoting *In re Brown* (1994), 98 Ohio App.3d 337, 343.

{¶6} This Court must emphasize that a parent has a "fundamental right to care for and have custody of his or her child." *In re Willis*, 3rd Dist. No. 1-02-17, 2002-Ohio-4942, ¶9, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. The termination of parental rights has been described as "'the family law equivalent of the death penalty in a criminal case.'" *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, ¶14, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Due to the substantial nature of the right, parents must be afforded "every procedural and substantive protection the law allows." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith*, 77 Ohio App.3d at 16.

{¶7} Michele has asserted, among other things, that the trial court failed to make the requisite findings on both prongs of the permanent custody test. This Court agrees in part.

{¶8} Although Michele has asserted that the trial court failed to make a finding on either prong of the test, the trial court did explicitly find that the first prong of the permanent custody test was satisfied because M.B. had been in the temporary custody of CSB for more than twelve of the twenty-two months prior to the hearing. Consequently, it did make the requisite finding on the first prong of the test.

{¶9} As to the best interest prong of the permanent custody test, however, the judgment entry includes no such finding by the trial court. Although one might conclude that such a finding is implicit in the trial court's judgment, this Court should not speculate as to what the trial court found or did not find. This is an unusual situation as this Court cannot recall any prior cases in which the permanent custody judgment entry did not include, at a minimum, the requisite findings on each prong of the permanent custody test. Without such findings, we are essentially asked to speculate as to what the trial court did determine and, in that process, we are forced to exceed our jurisdiction as an appellate court. If we are put in the situation of making the best interest finding in the first instance, our role as an appellate court is essentially transformed into that of a trial court. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360 (holding that even where an appellate court's standard of review is de novo, it is a reviewing court and

cannot consider evidence that was not considered by the trial court; otherwise it exceeds its role and in effect becomes a trial court); Section 3(B)(2), Article IV, Ohio Constitution (defining the jurisdiction of Ohio appellate courts).

{¶10} It is not the role of this Court to act as a fact finder. We do not conduct an initial weighing of the evidence or reach initial legal conclusions. Instead, our role is limited to determine whether the trial court's conclusions are against the manifest weight of the evidence presented at the permanent custody hearing. See *In re Richardson*, 5th Dist. No. 03CA16, 2003-Ohio-5164, ¶27. Because the trial court failed to make the requisite statutory findings, this case must be reversed and remanded to the trial court to make such findings.

{¶11} Moreover, in addition to making explicit findings on each prong of the permanent custody test, the trial court should detail some of the reasoning supporting its findings on each prong of the permanent custody test. Although such detailed reasoning may not be statutorily mandated, it is very useful to the reviewing court. An appellate court needs sufficient information to "review" the trial court's decision, else we are put in the position of speculating as to the evidence supporting the trial court's decision, making our own factual findings, and even judging the credibility of witnesses.

{¶12} The first assignment of error is sustained insofar as it challenges the trial court's failure to make the requisite findings on the best interest prong of the permanent custody test.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN GRANTING PERMANENT CUSTODY AS PERMANENT CUSTODY WAS [NOT] NECESSARY TO PROVIDE THE CHILD WITH A LEGALLY SECURE PLACEMENT AND WAS NOT IN THE BEST INTEREST OF THE CHILD."

{¶13} Because this Court reverses and remands this case to the trial court based on Michele's first assignment of error, the merits of this assignment of error have been rendered moot and will not be reached. See App.R. 12(A)(1)(c).

III

{¶14} Michele's first assignment of error is sustained in part. The judgment of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

DONNA J. CARR
FOR THE COURT

CARR, P.J.
BATCHELDER, J.
CONCUR

WHITMORE, J., CONCURS IN PART
AND DISSENTS IN PART, SAYING:

{¶15} I respectfully dissent from the majority's holding that the trial court erred in failing to enter an explicit finding in its judgment entry on the best interest prong of the permanent custody test. Although, as the majority notes, some courts

may have held that this determination must be stated on the record, R.C. 2151.414 imposes no such requirement on the trial court.

{¶16} R.C. 2151.414(B)(1) authorizes the trial court to grant an agency's motion for permanent custody if it "determines" by clear and convincing evidence that permanent custody is in the best interest of the child and that the other prong of the permanent custody test is satisfied. There is no language in the statute requiring the court to enter an explicit finding in its judgment entry on either prong of the test. In fact, R.C. 2151.414(C) further provides that "[i]f the court grants permanent custody of a child to a movant under this division, the court, *upon the request of any party*, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding." (Emphasis added.) Absent such a request, and there was none in this case, the trial court is not required to explicitly state its findings of fact or conclusions of law on either prong of the permanent custody test. Had Michele wanted more detailed findings from the trial court, she should have requested findings of fact and conclusions of law.

{¶17} Moreover, when R.C. 2151.414 is compared to R.C. 2151.28, a related statute that governs the adjudication of dependency, it is further apparent that R.C. 2151.414(B)(1) does not require the trial court to articulate findings in its judgment entry. R.C. 2151.28(L) provides that if the court "determines" that the child is a dependent child,

> "*the court shall incorporate that determination into written findings of fact and conclusions of law and enter those findings of fact and conclusions of law in the record of the case.* The court shall include in

> those findings of fact and conclusions of law specific findings as to the existence of any danger to the child and any underlying family problems that are the basis for the court's determination that the child is a dependent child." (Emphasis added.)

{¶18} A comparison of the language of R.C. 2151.28(L) and R.C. 2151.414(B)(1) leads to the obvious conclusion that the legislature intended that when a court "determines" a child to be dependent, it must also enter a finding to that effect in its judgment entry. Consequently, in R.C. 2151.28(L), unlike R.C. 2151.414(B)(1), the legislature added an explicit requirement that, after the court "determines" that a child is dependent, it must "incorporate that determination into written findings of fact and conclusions of law and enter those findings of fact and conclusions of law in the record of the case." Had the legislature also intended to require the trial court to enter explicit findings in its permanent custody judgment entry under R.C. 2151.414(B)(1), it would have done so, as it did in R.C. 2151.28(L). Consequently, absent such an explicit requirement and coupled with the fact that R.C. 2151.414(C) provides for supplemental findings of fact and conclusions of law at either party's request, I believe the majority is incorrect in its holding that R.C. 2151.414(B)(1) requires the trial court to incorporate into its judgment entry its determinations on each prong of the permanent custody test.

{¶19} Unlike the majority, I would have reached the merits of Michele's challenge that the trial court's judgment was not supported by the weight of the evidence. A thorough review of the evidence presented at the permanent custody hearing reveals that the manifest weight of the evidence supported the trial court's

implicit determination that permanent custody was in the best interest of M.B. Consequently, I would affirm the trial court's judgment.

{¶20} Had the trial court more thoroughly detailed the reasoning behind its decision, however, our review of the record would have been facilitated. I concur in the portion of the majority opinion that addresses the usefulness to a reviewing court of a more detailed trial court judgment entry in this type of case. Although the trial court may not have a statutory mandate to provide detailed reasoning for its decision to grant an agency's motion for permanent custody, an appellate court is better equipped to perform its role as a reviewing court if the trial court provides it with some insight into the reasoning behind its decision.

APPEARANCES:

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