[Cite as *In re B. D.*, 2009-Ohio-6079.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: B. D. T. K.	C.A. Nos. 24792 24793 24802
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. DN 09-02-0083 DN 08-01-0055

DECISION AND JOURNAL ENTRY

Dated: November 18, 2009

MOORE, Presiding Judge.

{¶1} Appellants, Loara Quattrocchi ("Mother"), and Christopher K. ("Father"), appeal from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated their parental rights to their two minor children and placed the children in the permanent custody of Summit County Children Services Board ("CSB"). This Court affirms.

I.

{¶2} Mother and Father are the natural parents of B.D., born January 17, 2008, and T.K., born February 5, 2009. Several years earlier, the juvenile court adjudicated Mother's older child, K.D., an abused and dependent child, following an incident in which Mother broke the five-month-old child's leg. Mother was convicted of child endangering as a result of the incident. Through its involvement with Mother in K.D.'s case, CSB learned that Mother's parenting ability was hampered by unresolved anger management and mental health issues and

her low level of intellectual functioning. Mother did not resolve her parenting problems during K.D.'s case and the juvenile court eventually placed the child in the legal custody of paternal relatives. Mother has had no contact with K.D. since that time.

{¶3} Shortly after B.D. was born several years later, CSB received a referral about Mother's limited ability to care for him. B.D. was removed from the home within the next week. When T.K. was born approximately one year later, CSB filed a dependency complaint shortly after his birth and requested an initial disposition of permanent custody. Mother did not have either child in her custody for more than a few days.

{¶4} CSB's concerns about Mother focused on her limited intellectual functioning, mental health and anger management problems, and her history of being unable to resolve those problems several years earlier after K.D. was removed from her care. The case plan required Mother to regularly attend counseling and complete an anger management program, but Mother failed to comply with either requirement.

{¶5} Father and Mother lived together throughout this case. Although Mother apparently looked to Father for parenting support, Father had a long history of domestic violence, drug abuse, and criminal convictions stemming from his illegal drug activity. Consequently, the case plan required him to attend counseling and anger management classes and to submit urine samples for regular drug screening. Father did not attend drug counseling, however, nor did he submit urine samples as required. Moreover, the few urine samples that he did submit tested positive for multiple drugs. Although Father claimed that he had been taking pain medication for an old back injury, he was not able to provide proof to CSB that his medication had been legitimately prescribed.

{¶6} On April 16 and 17, 2009, the trial court held a hearing on CSB's motions for permanent custody, motions for legal custody from Mother and a paternal aunt, as well as alternative motions from both parents for an extension of temporary custody. The trial court found that the children could not be placed with either parent within a reasonable time or should not be placed with them and that permanent custody was in their best interests. Consequently, it terminated parental rights and placed B.D. and T.K. in the permanent custody of CSB.

{¶7} Mother and Father separately appealed and the appeals were later consolidated. In lieu of a merit brief, Father's appellate counsel filed a brief in accordance with *Anders v. California* (1967), 386 U.S. 738, in which he asserted that there were no meritorious issues to raise on Father's behalf and that an appeal would be frivolous. Counsel moved the Court to accept the *Anders* Brief in lieu of a merit brief and to permit him to withdraw from the case. Mother's appellate counsel raised two assignments of error on the merits, however. Because Mother's appeal challenges the merits of the trial court's judgment and Father's does not, this Court will address their appeals separately.

II.

Mother's Appeal

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN FINDING THAT PERMANENT CUSTODY WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THE GRANT OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} Mother's first assignment of error is that the evidence did not support the trial court's permanent custody decision. 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) and 2151.414(B)(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 because the children could not be placed with either parent within a reasonable time or should not be placed with either parent. See R.C. 2151.414(E). Specifically pertaining to Mother, the trial court found that CSB had proven the conditions set forth in R.C. 2151.414(E)(1), R.C. 2151.414(E)(2), and R.C. 2151.414(E)(7). Because R.C. 2151.414(E) mandates that the trial court enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with them if one of the enumerated conditions exists, any of the trial court's three findings would support its decision on the first prong of the permanent custody test. See *In re J.E.*, 9th Dist. No. 23865, 2008-Ohio-412, at ¶14. This Court will confine its review to the trial court's finding under R.C. 2151.414(E)(7).

{¶10} R.C. 2151.414(E)(7) requires the trial court to find that the children cannot be placed with either parent within a reasonable time or should not be placed with them if it finds that the parent has been convicted of one of several enumerated offenses including child endangering under R.C. 2919.22(B)(2) and the victim of the offense was the child, a sibling, or another child who lived in the parent's household at the time of the offense.

{¶11} CSB presented a certified journal entry that Mother was convicted of child endangering under R.C. 2919.22(B)(2) on September 14, 2001. Although Mother had been

charged with a more serious crime, she entered a plea of guilty to the lesser charge of child endangering. Through the testimony of witnesses, CSB established that the victim of the crime was Mother's then-infant child, K.D, an older half-sibling of B.D. and T.K. K.D. had been removed from Mother's custody at Akron Children's Hospital pursuant to Juv.R. 6 because the child had sustained a spiral fracture of her left leg and doctors concluded that the only logical explanation was abuse. K.D. was later adjudicated a dependent and abused child. Because Mother never completed the reunification goals of the case plan, K.D. was eventually placed in the legal custody of paternal relatives. Mother has not had contact with K.D. since that time.

{¶12} Although CSB moved for permanent custody on this ground, as well as other grounds under R.C. 2151.414(E), Mother did not argue to the trial court that it should not consider her prior conviction in its determination of whether the children should be returned to her care. For the first time on appeal, Mother contends that the trial court should not have relied on her 2001 child endangering conviction as a basis for permanent custody because it had occurred more than seven years earlier. In addition to her failure to preserve this issue for appellate review, Mother has failed to cite any legal authority to support her argument. R.C. 2151.414(E)(7) includes no time restrictions, nor did this Court find any case law that has interpreted this provision to be confined to convictions that have occurred within a certain period of time. Mother's challenge to the first prong of the permanent custody test is without merit.

{¶13} After the trial court found that CSB had established the first prong of the permanent custody test, it was required to decide whether permanent custody was in the best interests of B.D. and T.K. 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. R.C. 2151.414(D) also required the trial court to consider "whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶14} Mother's interaction with her children had been limited to weekly, closely supervised visitation at the visitation center. Although Mother attended visits regularly, CSB had never decreased the level of supervision due to Mother's lack of compliance with the case plan and the agency's continued concern about her ability to care for the children without assistance. Testing revealed that Mother's overall intellectual functioning fell well below the average range. Both the caseworker and the guardian ad litem testified that Mother tended to sit and either hold or watch her children and did not engage in activities or play with them or otherwise attempt to stimulate them in any way. Despite repeated prompting by one of the case aides for Mother to become more actively involved with the children during the visits, her lack of interaction with them did not improve over time.

{¶15} CSB had placed the children in the same foster home where they had developed a bond with each other and with the foster family. The guardian ad litem believed that the foster parents would be interested in adopting both children.

{¶16} The guardian ad litem spoke on behalf of the children, who were too young to express their wishes to the trial court. She opined that permanent custody was in the best interests of both children because, in her opinion, the parents would not be able to resolve their parenting problems anytime in the foreseeable future.

{¶17} The custodial history of these children had been spent outside of their mother's care. Each child had been removed from Mother's custody shortly after birth and their only relationship with Mother had been through weekly, supervised visits.

{¶18} Given that the children had been living in temporary placements throughout their young lives, the trial court reasonably concluded that they were in need of a legally secure permanent placement. CSB presented evidence that it had investigated possible relative placements for the children, but was unable to find any suitable relatives who were willing and able to provide a permanent home. Consequently, the trial court concluded that a legally secure permanent placement could only be achieved through a grant of permanent custody to CSB.

{¶19} Finally, the trial court was required to consider whether any of the factors under R.C. 2151.414(E)(7) through (11) apply in this case. See R.C. 2151.414(D). The trial court found that R.C. 2151.414(E)(7) applied because Mother had been convicted of child endangering on September 14, 2001, because she broke the leg of an older half-sibling of B.D. and T.K. when the child was five months old. Mother lost custody of that child and has not maintained any type of parental relationship with her.

{¶20} Although there was no evidence that Mother ever abused either of these children, she had not had been permitted to have custody of either child for more than a few days after their birth. Mother had done little to appease CSB's concerns that she would potentially abuse these children because she had not completed an anger management program, nor had she attended counseling on a consistent basis. B.D. and T.K. were each removed from Mother's custody due to CSB's ongoing concern about her ability to provide suitable care for her children.

{¶21} The trial court had ample evidence before it to support its conclusion that permanent custody was in the best interests of B.D. and T.K. Mother's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED TO THE PREJUDICE OF MOTHER BY ALLOWING A NON-EXPERT TO GIVE OPINION TESTIMONY RESERVED FOR EXPERTS."

{¶22} Mother maintains that the trial court erred by allowing expert testimony from a witness whom she had refused to qualify as an expert. The witness at issue was Corinne Mannino, a psychology post-doctoral trainee at Summit Psychological Associates. Although the witness held a Ph.D. in clinical psychology, she had not yet been licensed as a psychologist by the state of Ohio. Mother repeatedly asserted at the hearing that this witness was not qualified to testify as an expert.

{¶23} Mother apparently misunderstands the trial court's ultimate ruling on this evidentiary issue, however. Although the trial judge initially refused to qualify the witness as an expert, the issue was revisited repeatedly during the witness's testimony. The trial judge eventually agreed with CSB's attorney that the witness was qualified to testify about the psychological tests that she administered to Mother.

{¶24} The determination of whether to admit expert testimony is within the trial court's sound discretion. *State v. Williams* (1983), 4 Ohio St.3d 53, syllabus. Evid. R. 702 authorizes the trial court to allow a witness to testify as an expert if the proposed testimony relates to matters beyond the knowledge of lay people; the witness has specialized knowledge, skill, experience or training about the subject matter; and the witness' testimony is based on reliable information.

{¶25} Mother maintains that, because the witness was required to work under the supervision of a licensed psychologist, she was not qualified to give expert testimony about the psychological tests that she administered to Mother. She cites no authority to support her apparent position that a psychologist must be licensed by the state to be qualified as an expert under Evid.R. 702. To qualify as an expert witness, a potential witness does not have to be the most knowledgeable or the best witness regarding the topic at hand. *Scott v. Yates* (1994), 71 Ohio St.3d 219, 221. "The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." *State v. Hartman* (2001), 93 Ohio St.3d 274, 285, citing *State v. Baston* (1999), 85 Ohio St.3d 418, 423 and *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191.

{¶26} Dr. Mannino, who had completed all of her doctoral training, testified about psychological tests that she administered to Mother. She explained how each test was administered and that she had been trained to administer, score, and interpret each of the tests. She further testified that she had experience administering these tests many times over the past several years and that, as a teaching assistant during her training, she had taught other students how to administer some of these tests.

{¶27} Mother has failed to convince this Court that the trial court erred in allowing the witness to testify about the psychological tests that she administered to Mother. See *In re G.K.*, 9th Dist Nos. 24276 and 24278, 2008-Ohio-5442, at ¶8-10 (holding that the trial court did not abuse its discretion in allowing a doctoral trainee to give expert testimony at the permanent custody hearing about the psychological assessment that he administered to both parents); see,

also *In re Buck*, 4th Dist. No. 06CA3123, 2007-Ohio-1491, at ¶14. Mother's second assignment of error is overruled.

Father's Appeal

POSSIBLE ISSUE FOR REVIEW

> "THE TRIAL COURT ERRED IN FINDING THAT PERMANENT CUSTODY WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE; AND THE GRANT OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶28} In his appellate brief, Father's counsel has presented one potential issue for review but has concluded that there is no merit to it. After a thorough review of the evidence before the trial court, this Court agrees.

{¶29} The trial court found that the first prong of the permanent custody test was satisfied because the children could not be placed with either parent within a reasonable time or should not be placed with them. Specifically pertaining to Father, the trial court found that CSB had proven the conditions set forth in R.C. 2151.414(E)(1), R.C. 2151.414(E)(2), R.C. 2151.414(E)(4), and R.C. 2151.414(E)(16). As explained above, any one of these findings was sufficient to support the trial court's finding under R.C. 2151.414(E). This Court will confine its analysis to R.C. 2151.414(E)(1), which required the trial court to find that Father had failed to substantially remedy the conditions that caused the children's placement outside the home.

{¶30} CSB's primary concern about Father was his long-term addiction to drugs and a history of domestic violence. Father apparently became addicted to prescription pain medication more than ten years earlier after injuring his back in an automobile accident. Although Father had told CSB that he had prescriptions for the medications that he was taking, he had been unable to establish that he was under a doctor's care. Father also had numerous criminal convictions stemming from his illegal drug use, including deception to obtain a dangerous drug

and marijuana possession and trafficking. Father had two prior domestic violence convictions due to his acts of violence against his former wife. There was also evidence that his former wife had obtained a no contact order that also prevented him from having any contact with his four children from that marriage.

{¶31} Consequently, the primary goals of the case plan focused on resolving these parenting problems. Father was required to obtain a drug assessment, attend drug treatment, and regularly submit urine samples for drug screening. He was also required to complete an anger management program. During the next year, however, Father did little to comply with any of these goals.

{¶32} Father had not participated in drug treatment and continued to deny that he had a drug problem. He did not even obtain a drug assessment until shortly before the permanent custody hearing because, according to his own testimony, he had been "lazy," "didn't care" and "was worried about me at the time[.]" Father had not submitted urine samples as required and those that he had submitted had tested positive for multiple drugs.

{¶33} Father admitted that he had not completed an anger management program despite having a long history of domestic violence, including two prior convictions and a no contact order that had led to him having no contact with his four children from a prior relationship.

{¶34} There was ample evidence before the trial court to support its finding that Father had failed to substantially remedy the conditions that caused the children to be placed outside the home. After the trial court found that CSB had established the first prong of the permanent custody test, it was required to decide whether permanent custody was in the best interests of B.D. and T.K.

{¶35} As explained above, the trial court's best interest determination focuses on several factors including 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.*, supra.

{¶36} The trial court's application of the best interest factors was essentially the same for Father as it was for Mother, except that, unlike Mother, Father had demonstrated little motivation to be reunited with his children until shortly before the hearing.

{¶37} Father's interaction with the children was less involved than Mother's. He did not visit with the children at the beginning of the case. After he eventually began attending visits, like Mother, he tended to simply watch the children rather than play with them or otherwise interact with them.

{¶38} Several witnesses expressed concern about Father's parenting ability, particularly due to his long-term, untreated drug use. There was also concern that Father had no contact with his four older children from a prior relationship due to domestic violence convictions that predated this case, yet he still had not taken the necessary steps to complete an anger management program.

{¶39} The trial court had ample evidence to support its conclusion that permanent custody was in the best interest of these children. The possible issue for review presented by Father's counsel lacks merit. Moreover, this Court has carefully reviewed the entire record and concludes that the evidence clearly and convincingly supports the judgment of the trial court. There do not appear to be any issues which support a reversal of the judgment of the trial court.

{¶40} Father's appeal is without merit and frivolous under *Anders v. California* (1967), 386 U.S. 738. The request by Father's attorney for permission to withdraw is granted.

III.

{¶41} Mother's assignments of error are overruled and Father's appeal is without merit. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

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 Summit, 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.

CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

MARTHA HOM, Attorney at Law, for Appellant.

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

JOE KERNAN, Attorney at Law, for CASA/GAL.