

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

**IN THE MATTER OF:**

<b>AUTUMN FRANKLIN,</b>	<b>CASE NO. 9-06-12</b>
<b>[JUSTIN KNIPP - FATHER-APPELLANT],</b>	
<b>[STACY ALLEN - MOTHER-APPELLANT].</b>	<b>O P I N I O N</b>

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**IN THE MATTER OF:**

<b>CHELSEY ALLEN,</b>	<b>CASE NO. 9-06-13</b>
<b>[STACY ALLEN - MOTHER-APPELLANT].</b>	<b>O P I N I O N</b>

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

**JUDGMENTS: Judgment Affirmed**

**DATE OF JUDGMENT ENTRIES: September 18, 2006**

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**SHAW, J.**

{¶1} Appellants, Stacy Allen (“Stacy”) and Justin Knipp (“Justin”), appeal the March 13, 2006 Judgment of the Court of Common Pleas of Marion County, Ohio granting permanent custody of Chelsey Allen and Autumn Franklin to the Marion County Children Services Board (MCCS).

{¶2} On October 21, 2003, MCCS received reports that Chelsey had been abused by Anthony Almendinger, Stacy’s half brother and boyfriend. On October 22, 2003, MCCS obtained a court order prohibiting contact between Anthony and the children. On November 5, 2003, MCCS received a phone call from the

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children's babysitter reporting that Autumn had bruises on her face. As a result of this incident, the children were removed from Stacy's residence on November 5, 2003 and placed with Angel Houseworth, a family friend.

{¶3} On March 4, 2004, Justin contacted the M CCS caseworker because he had heard from his sister that the children had been removed from Stacy's residence. He stated that he had not been served with a complaint regarding the removal of the children and was interested in custody of the two children. On March 23, 2004, Angel informed M CCS that she could no longer care for the children. Therefore, the children were placed with M CCS in foster care on March 23, 2004.

{¶4} At the beginning of April 2004, M CCS allowed Justin to begin weekly visitation with the children at the agency under the supervision of a caseworker. The visits then became unsupervised and eventually lead to overnight visits with Justin. However, these visits ceased after the children's visit on the weekend of July 4, 2004 because Justin was incarcerated. In August 2004, he plead guilty to a domestic violence, misdemeanor in the first degree, and attempted abduction, a felony in the fourth degree. The complaintant was Teresa Robinson, the mother of two of Justin's other children. Justin was in jail for these incidents until September 13, 2004 at which time he was released on probation. In

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the spring of 2005, he violated his community control sanctions and was incarcerated until September 13, 2005.

{¶5} On March 16, 2004, Stacy was found guilty as to one count of tampering with evidence, a felony of the third degree; three counts of obstructing justice; felonies in the third degree; and two counts of felony child endangering, felonies in the third degree. On May 19, 2004, the Court of Common Pleas of Marion County, Ohio sentenced Stacy to four years in prison for the above mentioned charges. Stacy was incarcerated until May of 2005 and then she went to Foundations Treatment Center in Marion, Ohio which is similar to a half-way house. After a short stay at Foundations Treatment Center, she was accused of having a relationship while in the program and was required to leave. She then went to the Worth Center in Lima, Ohio which is a community based treatment facility. Stacy was released from the Worth Center sometime prior to March 2006.

{¶6} On June 11, 2004, two complaints were filed by MCCS alleging (1) that Chelsey, DOB 1/14/95 was an abused and dependent child as defined by R.C. 2151.031 and 2151.04, and (2) that Autumn, DOB 6/27/00 was a dependent child as defined by R.C. 2151.04. The complaints alleged that Anthony Almendinger, Stacy's half brother and boyfriend, had abused Chelsey. On July 22, 2004, the children were found to be neglected and dependent. Furthermore, the trial court

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ordered that the children be temporarily committed to the custody of MCCA with visitation to the parents arranged by MCCA.

{¶7} On January 18, 2005, MCCA filed a motion requesting modification of temporary commitment to permanent commitment. Three hearings were held regarding MCCA's motion requesting permanent custody of the children. On March 13, 2006, the trial court filed its judgment entry granting permanent custody of the children to MCCA.

{¶8} On March 29, 2006, Stacy filed a notice of appeal raising the following assignments of error:

*Stacy's First Assignment of Error*

**THE TRIAL COURT ERRED IN DETERMINING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT IT WAS IN THE BEST INTEREST OF THE CHILDREN TO GRANT PERMANENT CUSTODY TO THE MOVANT.**

*Stacy's Second Assignment of Error*

**THE TRIAL COURT ERRED IN GRANTING PERMANENT CUSTODY TO MOVANT, AS THE SITUATION THAT CREATED THE REMOVAL AND CAUSED HARM TO THE CHILDREN HAS BEEN REMEDIED.**

*Stacy's Third Assignment of Error*

**THE TRIAL COURT ERRED IN CONCLUDING THAT THE CHILDREN HAD BEEN IN THE CARE AND CUSTODY OF MARION COUNTY CHILDREN SERVICES FOR OVER TWELVE OF THE PRIOR TWENTY-TWO MONTHS.**

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Also, on March 29, 2006, Justin filed a notice of appeal raising the following assignments of error:

*Justin's First Assignment of Error*

**THE FAMILY COURT'S DECISION TO TERMINATE THE PARENTAL-CHILD RELATIONSHIP BETWEEN AUTUMN AND HER FATHER IS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE AND CONTRARY TO LAW.**

*Justin's Second Assignment of Error*

**THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO PROVE CLEARLY AND CONVINCINGLY THAT IT WAS IN AUTUMN'S BEST INTERESTS TO BE PLACED IN APPELLEE'S PERMANENT CUSTODY, AND THAT SHE COULD NOT BE PLACED WITH HER FATHER WITHIN A REASONABLE TIME.**

{¶9} In our review of a grant of permanent custody we shall note that “[i]t is well recognized that the right to raise a child is an ‘essential’ and ‘basic’ civil right.” *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169. “A parent’s right to the custody of his or her child has been deemed ‘paramount’” when a parent is a suitable person. *In re Hayes, supra; In re Murray, supra*. The Supreme Court of Ohio has held that a parent “must be afforded every procedural and substantive protection the law allows.” *In re Hayes, supra*, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E. 2d 45.

{¶10} In addition, trial courts are vested with broad discretion in determining the allocation of parental rights and responsibilities for the care of minor children. *Blacker v. Wilhelm*, 6th Dist. No. WD-04-003, 2005-Ohio-317, at ¶ 9, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Therefore, absent an abuse of that discretion a trial court’s decision regarding the allocation of parental rights and responsibilities for a minor child must be upheld. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85, 630 N.E.2d 665. The term “abuse of discretion” connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Thus, it is within these constructs that we now examine Stacy and Justin’s assignments of error.

{¶11} Seeing that Stacy and Justin raise some of the same assignments of error we shall consider the assignments of error together when necessary to simplify this Court’s analysis. First, we shall consider Stacy’s first assignment of error and Justin’s second assignment of error which both assert that the trial court erred in determining that there was clear and convincing evidence to establish that it was in the best interest of the children to grant permanent custody to MCCS. Next, we shall address Stacy’s third assignment of error and Justin’s first assignment of error regarding the claim that the trial court erred in concluding that

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the children had been in the care and custody of MCCS for over twelve of the prior twenty-two months.

{¶12} The Ohio Revised Code sets out a two-pronged test to be applied when considering a motion for permanent custody. Under this test, the trial court must determine, by clear and convincing evidence, (1) that a grant of permanent custody to MCCS is in the best interest of the child and (2) that one of four enumerated factors applies. R.C. 2151.414(B)(1). Specifically, these factors include that “the child [was] abandoned” or “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.” R.C. 2151.414(B)(1)(b) and (d).

{¶13} The Supreme Court of Ohio has held:

**Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.**

*Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118, citing *Merrick v. Ditzler* (1915), 91 Ohio St. 256, 110 N.E. 493. In addition, when “the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient

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evidence before it to satisfy the requisite degree of proof.” *Cross, supra* (citations omitted). Thus, we are required to determine whether the evidence was sufficient for the trial court to make its findings by a clear and convincing degree of proof.

{¶14} Applying the test laid out in R.C. 2151.414(B)(1), the trial court properly found under the second part of the test that the children were abandoned. R.C. 2151.414(B)(1)(b). Specifically, the trial court states in its findings of fact in its March 13, 2006 Judgment Entry that “The Court finds from the evidence that both mother and father have abandoned the children and have demonstrated a lack of commitment to the children.” March 13, 2006 Judgment Entry, p. 4.

{¶15} However, it is true that the trial court did improperly find that “Chelsey \*\*\* and Autumn \*\*\* have been in the care and custody of MCCA since March 2004, to the date of this hearing, which is more than twelve of the last twenty-two months.” In this case, Chelsey and Autumn were placed in temporary custody with MCCA on March 23, 2004. On July 22, 2004, the children were found to be neglected and dependent children. On January 18, 2005, MCCA filed a motion for permanent custody. It is true that at the time the motion was filed Chelsey and Autumn had been in temporary custody for approximately 10 months. Thus, we determine that this finding was erroneous due to the Supreme Court of Ohio’s decision in *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, in which the Court held that the period of time between the filing of the motion for permanent

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custody and the permanent custody hearing could not be included in this calculation. *Id.* at ¶ 26. Consequently, the trial court improperly found that the children had been in the care and custody of MCCS more than twelve of the last twenty-two months according to R.C. 2151.414(B)(1)(d).

{¶16} Yet, it is clear that the trial court was merely trying to establish that one of the four additional factors necessary to provide permanent custody did apply. The trial court did provide findings on two separate (B)(1) findings. Though the finding of fact pursuant to R.C. 2151.414(B)(1)(d) was improper, the trial court merely created a harmless error by considering R.C. 2151.414(B)(1)(d) because the adjudication should have been based on R.C. 2151.414(B)(1)(b) alone.

{¶17} R.C. 2151.414(B)(1) also requires the trial court to find by clear and convincing evidence that granting permanent custody to MCCS is in the children's best interests. In making this determination, the trial court should look at all relevant factors, including those listed in R.C. 2151.414(D).

{¶18} In this case, the record supports the trial court's findings that granting permanent custody to MCCS is in the children's best interests. Specifically, the trial court stated the following in the findings of fact within the March 13, 2006 Judgment Entry:

**Mother was convicted in November 2003, of child endangering and obstruction of justice. She was sentenced to a four year term and expected to be incarcerated for at least 18 months.**

**She was released in May 2005, to a community based correction facility.**

**Mother's boyfriend, Anthony Almendinger, physically abused the children while mother was present and after mother was court ordered not to allow her children to have contact with him. Mother lied to the police and MCCS regarding Almendinger's residing with her in violation of the no contact order. Mr. Almendinger is mother's half brother.**

**Officer Brian Liston, Marion City Police Department, testified as to the abuse of Chelsey Allen. He filed Domestic Violence charges on Almendinger.**

**Detective Tim Rowe, Marion City Police Department, testified that he saw the bruises on the child's face and the different shades indicating the child had been abused.**

**While Mr. Almendinger initially denied he abused the child, he admitted, under polygraph examination, to abusing the child, breaking her arm and bruising the child. \*\*\***

**Julie Daiber, MCCS ongoing caseworker, testified she wrote the case plan in November 2003 and Justin Knipp was added after he contacted Ms. Daiber and asked about his child. Mr. Knipp was given unsupervised visits every other weekend until July 2004, when he was incarcerated. Ms. Daiber testified she never met Matt Thorbeck, father of Chelsey and he had never visited or had meaningful contact with Chelsey.**

**Ms. Daiber testified that neither Stacy Allen nor Justin Knipp completed the case plan. She further testified about her concerns that Stacy and Mr. Almendinger would get together again, exposing the children to potential abuse again.**

**Jessica Kaufman, the child's counselor from the Enrichment Center, testified as to the child's need for permanency and continued counseling. The child has separation issues and is sometimes angry. Chelsey is concerned about her safety if she went with mom and is afraid abuse might happen again. The**

**counselor talked about the child's issues regarding maintaining personal space and separation from her mother. The counselor said she believes the child needs structure and she needs to continue her counseling.**

**The father, Justin Knipp, testified as to his numerous convictions and incarcerations. He also recited the names and ages of his illegitimate children and where they lived since he had custody of none of them. He also tried to explain his charges and conviction for domestic violence against his current paramour with whom he was living at the time of the hearing. He did not know the date of Autumn's birthday. He testified he did not complete domestic violence counseling and he visited only a few months.**

**\*\*\***

**Mother testified that she cannot do anything for the children in the immediate future. She has to complete her counseling before she will be released from probation. She admitted she had not seen the children for two years.**

{¶19} Based on the foregoing, the grant of permanent custody was not against the manifest weight of the evidence. There was sufficient evidence for the trial court to make its findings by a clear and convincing degree of proof. Therefore, Stacy's first and third assignments of error and Justin's first and second assignments of error are overruled.

{¶20} Stacy alleges in her second assignment of error that the trial court erred in granting permanent custody to MCCS, as the situation that created the removal and caused harm to her children had been remedied.

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{¶21} The decision of a trier of fact relating to a motion for permanent custody of children will not be overturned, so long as the record contains competent credible evidence from which the trial court could have formed a firm belief or conviction that the essential statutory elements have been established. *In the Matter of Lawson/Reid Children* (April 18, 1997), Clark App. No. 96-CA-0010. Furthermore, it must be noted that this Court must defer to “the trial court’s findings of fact and rely on its ability to evaluate the credibility of the witnesses.” *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034.

{¶22} Pursuant to R.C. 2151.414(E)(1),

**In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.**

{¶23} In this case, the trial court made the following findings of fact in the March 13, 2006 Judgment Entry:

**Mother has failed to substantially remedy the conditions which led to the removal of the children. The mother has made no progress on the case plan and has not visited her children since her incarceration at Marysville Reformatory for Women. Mother has not expressed a desire to visit with her children since her release from Marysville Reformatory and placement at the Worth Center.**

In addition, the trial court emphasized in its findings that Stacy had permitted Anthony, who had physically abused her children, to remain at her residence even

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after she had a court order to not allow her children to have contact with him. Furthermore, the trial court stated that Julie Daiber, the MCCS caseworker, had testified about her concerns that Stacy and Anthony would get together again and would expose the children to potential abuse again.

{¶24} Therefore, upon review of the record and the trial court's findings of fact in the March 13, 2006 Judgment Entry, there is clear and convincing evidence to support the finding that Stacy did not substantially remedy the conditions which led to the removal of her children. Accordingly, Stacy's second assignment of error is overruled.

{¶25} Thus, the March 13, 2006 Judgment Entry of the Court of Common Pleas of Marion County, Ohio are affirmed.

*Judgment Affirmed.*

**ROGERS and CUPP, J.J., concur.**

/jlr