

[Cite as *In re Myers*, 2004-Ohio-539.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

**IN THE MATTER OF:**

**CASE NUMBER 13-03-61**

**JEREMIAH MYERS  
A DEPENDENT CHILD**

**OPINION**

**(DAVID A. MYERS, SR., FATHER-  
APPELLANT)**

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**IN THE MATTER OF:**

**CASE NUMBER 13-03-62**

**ANGELA HUFFMAN MYERS  
A DEPENDENT CHILD**

**OPINION**

**(DAVID A. MYERS, SR., FATHER-  
APPELLANT)**

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**IN THE MATTER OF:**

**CASE NUMBER 13-03-63**

**DAVID A. MYERS, JR.  
A DEPENDENT CHILD**

**OPINION**

**(DAVID A. MYERS, SR., FATHER-  
APPELLANT)**

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**IN THE MATTER OF:**

**CASE NUMBER 13-03-64**

**JESSE MYERS  
A DEPENDENT CHILD**

**OPINION**

**(DAVID A. MYERS, SR., FATHER-  
APPELLANT)**

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**IN THE MATTER OF:**

**CASE NUMBER 13-03-65**

**MARY BETH MYERS  
A DEPENDENT CHILD**

**OPINION**

**(DAVID A. MYERS, SR., FATHER-  
APPELLANT)**

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

**JUDGMENTS: Judgments affirmed.**

**DATE OF JUDGMENT ENTRIES: February 9, 2004.**

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**BRYANT, J.**

{¶1} Father-appellant David A. Myers, Sr. (“Myers”) brings this appeal from the judgment of the Common Pleas Court of Seneca County, Juvenile Division, granting permanent custody of the children to the Seneca County Department of Job and Family Services (“the agency”).

{¶2} On October 19, 2000, a Fremont Police Officer found an infant girl alone on a picnic bench. In conducting an investigation as to the child’s identity, the officer learned that the child was Jesse Myers (“Jesse”), d.o.b. July 24, 2000. The police then went to Myers’ home where Myers identified the child as his son. The police had to remind Myers that the child was a girl. As a result, the child was removed from the home for approximately one month. Myers and his significant other, Lorra Huffman (“Huffman”), also had three other children residing with them: Jeremiah Myers (“Jeremiah”), d.o.b. May 27, 1997, Angela Huffman (“Angela”), d.o.b. April 23, 1998, and David Myers, Jr. (“David”), d.o.b. August 8, 1999. The agency then became involved with the family and attempted to work with Myers and Huffman on parenting skills, budgeting, and employment.

{¶3} On April 24, 2001, all of the children were removed from the home. This resulted from complaints that Huffman was residing in a homeless shelter and that the medical needs of the children were not being met. On July 18, 2001, Huffman and Myers admitted that the children were dependant and continued to work on the case plan. The children were returned to the parents on September 6, 2001.

{¶4} In October 2001, the children were once again removed from the home. The children were suffering from ringworm, bottle rot, impetigo, and lice. The agency then amended the case plan to reflect the changes in circumstances. Myers was ordered to address his parenting issues, to receive individual counseling for stress, complete an anger management program, maintain employment, participate in budget counseling, and complete a drug and alcohol assessment. Myers was repeatedly informed that he needed to follow the case plan to have his children returned to him. Visitations were set up at Patch Works House in Tiffin. Myers made one visit in 2001, and five visits in 2002. The visitation was discontinued because Myers was serving a sentence in jail unrelated to these proceedings.

{¶5} On February 14, 2002, Mary Beth Myers (“Mary Beth”) was born to Myers and Huffman. Mary Beth was removed from the home upon birth and a complaint was filed that day. The case plan was subsequently amended to reflect her birth. Myers completed two one-day parenting classes through Patch Works

House. He enrolled in six other classes. Myers failed to attend five of those classes and did not complete the sixth.

{¶6} In January 2003, Myers was again in jail as a result of driving under suspension and possession of drugs. In anticipation of Myers' release, the case plan was amended on January 8, 2003, but contained the same requirements for Myers. Myers signed this case plan. Although Myers was released from the Crawford County jail in February, 2003, he was immediately transported to the Seneca County jail for a probation violation. On February 10, 2003, the agency filed a motion for permanent custody as to all five children. In March 2003, Myers was sentenced to two years in prison and eleven months in prison, to be served concurrently, on the probation violation. Myers was placed in the Richland Correctional Institution.

{¶7} In May 2003, Myers' caseworker attempted to meet with Myers at the prison. Myers dismissed the caseworker when she came and did not ask about the children or services. Myers also did not attempt to enroll in any of the classes offered by the prison that would fulfill the caseplan until approximately three weeks prior to the permanent custody hearing. On May 5, 2003, Huffman voluntarily surrendered her parental rights to all of the children. On August 21, and August 25, 2003, a permanent custody hearing was held. Myers had not completed any of the required classes by those dates. The trial court granted the agency's motion for permanent custody. It is from these judgments that Myers appeals and raises the following assignments of error.

**The trial court committed prejudicial error by improperly cross-examining [Myers] (sic).**

**The trial court's decision was against the manifest weight of the evidence.**

**The trial court erred in finding by clear and convincing evidence that [Myers] will not be available to care for his children because [Myers] is eligible for judicial release on September 14, 2003 and would be released September 14, 2004, within the eighteen month timeframe set forth in R.C. 2151.414(E)(12).**

**The trial court erred in finding by clear and convincing evidence that [Myers] is repeatedly incarcerated under R.C. 2151.414(E)(13) since [Myers] has been incarcerated continuously on those sentences.**

{¶8} In the first assignment of error Myers argues that the trial court improperly questioned a witness proffered by the agency.<sup>1</sup> At the hearing, the agency proffered the witness and Myers' had the opportunity to cross-examine the witness. The trial court then asked some questions of the witness. Myers objected to the questioning by the court indicating that the questions were ones which the agency should have asked, not the court. However, a trial court is permitted to question witnesses called by a party as long as the questions are relevant and the questioning is done impartially. Evid.R. 614(B). A review of the record indicates that the trial court focused on the circumstances of the children when they arrived at the foster home and what the current circumstances were. The trial court also questioned Myers when he took the stand. Although the answers to the trial court's questions were beneficial to the agency's case, that

alone does not make the questioning biased. *State v. Hamilton*, 11<sup>th</sup> Dist. No. 2000-L-003, 2002-Ohio-1681, at ¶13. Absent a showing of bias or prodding of the witnesses, the questioning will be presumed to be proper. *Id.*

{¶9} In this case, the questions asked by the trial court are relevant to the case before the trial court. Although the answers to the questions were damaging to Myers' case, there is no allegation that the statements were anything other than the truth. The questions asked called for factual answers, not opinions. Thus, the trial court did not abuse its discretion by asking the questions. The first assignment of error is overruled.

{¶10} The second assignment of error addresses whether the judgment is supported by the manifest weight of the evidence. The standard for termination of parental rights is set forth in R.C. 2151.414.

**(B)(1) \* \* \* [T]he 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:**

\* \* \*

**(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.**

\* \* \*

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<sup>1</sup> This court notes that the assignment of error raises the trial court's questioning of Myers. However the argument set forth in the brief focuses on the questioning of another witness and does not mention the questioning of Myers.

**(E) In determining at a hearing \* \* \* whether a child cannot be placed with either parent within a reasonable time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, \* \* \* that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:**

**(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. 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.**

**\* \* \***

**(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;**

R.C. 2151.414.

{¶11} In this case, the record reveals that the last time the children were removed from the home was in October of 2001. The children remained in the temporary custody of the agency until the time of the permanent custody hearing in August of 2003. More than a year had passed by the time the agency filed its motion for permanent custody on February 10, 2003. Thus, the trial court could

have terminated Myers' parental rights based on that fact alone. However, the trial court also considered the factors set forth in R.C. 2151.414(E).

{¶12} The first factor set forth in R.C. 2151.414(E) is that the parent did not fulfill the requirements of the case plan. The record reveals that the case plan set forth in April of 2001, as well as all subsequent case plans required Myers to attend various parenting, anger control, and drug and alcohol treatment programs. For more than two years Myers did very little to comply with the case plan. He did not seek treatment for his chemical dependency and he did not complete the parenting and anger management classes. The agency diligently attempted to assist Myers in completing the case plan and even met with him in prison to try and help him enroll in classes there. The agency delayed filing the motion for permanent custody to give Myers more time to comply with the case plan upon his release from prison. However, Myers was not released from prison, but received an additional sentence in March of 2003 for a probation violation. Myers did enroll in an anger management class and a self-esteem class at the prison three weeks prior to the hearing. Prior to that, he did not make any attempt to complete the case plan set forth in 2001. Given this testimony, the trial court did not abuse its discretion in finding that for more than two years Myers had failed to remedy the circumstances causing the removal from the home even though he was given numerous opportunities to do so.

{¶13} The fourth factor set forth in R.C. 2151.414(E) is that the parent has failed to communicate with or support his child. In this case, Barb Miller

(“Miller”), the foster mother, testified that she had been with the children since the October 2001 removal. During the 22 months that the children were in Miller’s care, there had been no cards, letters, presents, or any other type of support from Myers. Miller testified that Huffman had frequently called, had come to see the children at Miller’s home, and had gone to the doctor’s office with Miller. Myers did not ever attempt to contact Miller to arrange extra visits and rarely made the scheduled visits. Miller also testified that Myers had never attempted to phone the children. Given this testimony, the trial court could find that Myers had shown a lack of commitment to the children by his failure to attempt to communicate with them for more than a year.

{¶14} The record in this case indicates that the trial court could have terminated Myers’ parental rights because of the length of time that the children were in the temporary custody of the agency. The record also indicates that the trial court was required to terminate Myers’ parental rights because he had failed to follow the case plan and had shown a lack of commitment to the children. R.C. 2151.414(E). The evidence was clear that at least two statutory factors requiring the termination of parental rights were present. Since the trial court specifically found that those factors were present and the evidence supports the findings, the trial court’s judgment is not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶15} In the third assignment of error Myers argues that the trial court erred by finding that he would not be released from prison within 18 months of the hearing.

**The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.**

R.C. 2151.414(E)(12). Myers argues that he would have been eligible for judicial release in September of 2003, less than one month after the hearing. However, judicial release is not guaranteed. Thus, the trial court could only use the date of the actual completion of the sentence when calculating the time. That date was September 14, 2004. This date is more than 18 months after the filing of the motion for permanent custody, but is only 13 months after the hearing. Because the statute permits either date to be used, all ambiguities in a statute must be interpreted against the state. *State v. Jordan*, 89 Ohio St.3d 488, 2000-Ohio-225, 733 N.E.2d 601. Thus the later of the two dates must be used. Since Myers will be available within the 18 month time period, the trial court could not and did not find that he would be unavailable. Instead, the trial court used the length of Myers' incarceration as a relevant factor in the determination of the best interests of the children. As discussed above, there were other factors that would require the termination of parental rights. Since the trial court did not make the finding claimed as error, the third assignment of error is overruled.

{¶16} Finally, Myers claims that the trial court erred by finding that Myers had been repeatedly incarcerated. Myers argues that he was only incarcerated once, although there were separate sentences. In this case, the trial court made the following findings of facts.

**David Myers, Sr. has been incarcerated for all of 2003. He was incarcerated in Crawford County Jail in January, 2003 until February 16, 2003 when he was transferred to the Seneca County Jail. On February 24, 2003, David Myers, Sr. was transferred to Lorain Correctional. Thereafter on April 21, 2003, he was transferred to Richland Correctional.**

\* \* \*

**David Myers, Sr. was convicted on November 7, 2001 of Burglary (Felony of the Third Degree) and Domestic Violence (Felony of the Fifth Degree). He was sentenced on January 28, 2002 for these offenses and was placed on community control for a three year term. David Myers, Sr. recalls that he violated community control on March 26, 2002, May 4, 2002, June 4, 2002, and June 5, 2002. His violations for community control were for: Positive cocaine result in urine test on May 4, 2002; Positive cocaine and opiate result in urine test on June 4, 2002. He does not recall the reasons for the violations of community control on March 26, 2002 and June 5, 2002. He also had a violation of community control on July 5, 2002 for charges of Driving under the influence of alcohol, Driving under suspension, and possession of drugs. The mother of all children, Lorra Huffman was the victim of this felony domestic violence.**

**On March 11, 2003 David Myers Sr.'s community control was revoked and he was sentenced to prison for the term of two years for the Burglary, and 11 months for the felony Domestic Violence. Said sentences to run concurrent.**

\* \* \*

**In 2001 while these actions were pending, David Myers, Sr. had one visit with his children at Patchworks House. The schedule is as follows:**

\* \* \*

**June 12, 2001 – cancelled per agency, David in jail.**

**In 2002 while this action was pending visits at Patchworks House show 5 completed 2 hour visits. The schedule is as follows:**

\* \* \*

**June 7, 2002 – No call to confirm. David called from jail to say he could not attend.**

\* \* \*

**No other visits by David for the rest of the year at Patchworks House because he was in jail.**

September 1, 2003, Judgment Entry, 13-16.

{¶17} Myers was sent to the Crawford County jail for an offense committed in Crawford County on July 5, 2002. Because he was on community control at the time, this offense was also a violation of the terms of his community control. Myers served his time in the Crawford County jail for the driving under suspension and drug possession charge. He then was transported to the Seneca County jail to await a hearing on the community control violation. The Common Pleas Court of Seneca County found Myers guilty of the community control violation and on March 11, 2003, sentenced Myers to prison. These are two separate incarcerations, not one as argued by Myers. In addition, Myers admitted to being in jail in 2001 and to being in the Seneca County jail, as well as the Crawford County jail in 2002. Tr. 371, 376, Thus there were repeated

incarcerations. The trial court did not err in making this finding. The fourth assignment of error is overruled.

{¶18} The judgments of the Court of Common Pleas of Seneca County, Juvenile Division, are affirmed.

Judgments affirmed.

CUPP and SHAW, JJ., concur.