[Cite as *In re H.D.D.*, 2012-Ohio-6160.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
H.D.D.,	:	No. 12AP-134 (C.P.C. No. 10JU-8298)
(M.D.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
A.D.,	:	No. 12AP-135 (C.P.C. No. 09JU-1230)
(M.D.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
S.D. & D.D.,	:	No. 12AP-136 (C.P.C. No. 03JU-13773)
(M.D.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	No. 12AP-137 (C.P.C. No. 03JU-13775)
M.E.,	:	
(M.D.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
H.D.D.,	:	No. 12AP-146 (C.P.C. No. 10JU-8298)
(A.E.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
A.D.,	:	No. 12AP-147 (C.P.C. No. 09JU-1230)

(A.E.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
S.D. & D.D.,	:	No. 12AP-148 (C.P.C. No. 03JU-13773)
(A.E.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
M.E.,	:	No. 12AP-149 (C.P.C. No. 03JU-13775)
(A.E.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on December 27, 2012

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant A.E.

Axelrod Todd Laliberte LLP, and *Zachary M. Swisher*, for appellant M.D.

Robert J. McClaren, for appellee Franklin County Children Services.

Ron O'Brien, Prosecuting Attorney, and *Jeanne M. Newkirk*, for appellee State of Ohio.

APPEALS from the Franklin County Court of Common Pleas.
Division of Domestic Relations, Juvenile Branch

DORRIAN, J.

{¶ 1} Appellants, A.E. ("Mother") and M.D. ("Father") (collectively "parents"), are the parents of five children whose custody is at issue in this consolidated appeal from judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations,

Juvenile Branch, entered in four cases.[1] Mother and Father, who are not married and live separately, have each filed appeals in all four cases.

{¶ 2} In its judgments, the juvenile court adopted identical magistrate decisions issued in each of the cases. The magistrate adjudicated the youngest of the children, H.D.D., as an abused, neglected, and dependent child, and awarded temporary custody of him to appellee Franklin County Children Services ("FCCS"). The magistrate also awarded temporary custody of the four older children to FCCS. We consolidated the parents' appeals for briefing and oral argument, and both FCCS and the State of Ohio have filed appellee briefs. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} Appellants' five children as relevant to this appeal[2] are:

- M.E., a boy born November 6, 2001, who was adjudicated to be a dependent child on December 2, 2008;
- S.D. and D.D., twin girls born August 9, 2003, who were adjudicated to be dependent children on December 2, 2008;
- A.D., a boy born September 16, 2006, who was adjudicated to be a dependent child in February 2009; and
- H.D.D., a boy born June 16, 2009, who was adjudicated to be an abused, neglected, and dependent child on September 7, 2010.

{¶ 4} The adjudications of the four older children as dependent are final. As to them, the sole issue in this appeal is whether the trial court erred in awarding temporary custody to FCCS. As to the youngest child, H.D.D., the parents challenge the court's order adjudicating him to be an abused, neglected, and dependent child, as well as its order of temporary custody to FCCS.

Case histories of the four older children, M.E., S.D., D.D., and A.D.

{¶ 5} We begin by addressing the facts concerning the four older children.

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[1] Five children are the subject of only four cases, as the legal status of the twin girls was determined in a single case.

[2] The record reflects that A.E. was the mother of two other children, one born on November 8, 2004 and one born after H.D.D. Neither of these children are directly affected by this appeal.

{¶ 6} On September 10, 2003, FCCS filed a complaint alleging that M.E., then one year of age, was an abused, neglected or dependent child. On that date, FCCS filed a separate complaint alleging that the one-month-old twin girls, S.D. and D.D., were abused, neglected or dependent children. The agency alleged that it had been involved with the family since 2002; that Mother had a diagnosed mental health history; that Mother had not been compliant with recommended mental health services; and that Mother had a criminal history involving the misuse of drugs and alcohol. It further alleged that it had received reports that Mother failed to secure recommended services for the twins to assure their growth and development.

{¶ 7} In the years that followed, the children[3] cycled between living with Mother while under the protective supervision of FCCS and living in foster care pursuant to orders of emergency custody and temporary custody to FCCS. This was the result of FCCS receiving repeated referrals concerning the family, followed by temporary removal of the children, followed once again by return of the children to Mother. Among the referrals received by FCCS were the following: (1) the oldest child, M.E., then two, was observed to be barefoot in a Meijer store, and one of the twins, then five months of age, had been left home alone at the time, resulting in Mother being charged with two counts of child endangering (January 2004); (2) police had stopped Mother for erratic driving while M.E. was in the car and had taken the child to FCCS (January 2005); (3) Mother, accompanied by M.E., had been arrested in an adult entertainment club after appearing there only partially dressed and intoxicated (October 2005); (4) one of the twins, then two years of age, was observed alone in the street and was returned to the parents, who hadn't realized she was missing (June 2006); (5) Mother had, while in a Kohl's department store, asked an associate to take the twins, then three years of age, to the restroom and then left the store for approximately 15 minutes and, on her return, Mother appeared to be under the influence of an unknown substance (January 2007); (6) police were called after a report that one of the twins had been observed outside, unsupervised, and that a physical altercation had ensued between Mother and the person who contacted police (January

[3] A.D. was born on September 16, 2006, and the first complaint alleging that A.D. was abused, neglected or dependent was filed on January 24, 2007. In this decision, the term "the children" includes A.D. as to events that occurred after January 24, 2007.

2007); (7) Mother entered a church with the twins and asked for money—witnesses characterized her as being disoriented and smelling of alcohol and observed her putting the children into the car without car seats (May 2008); (8) Mother was allegedly arrested for child endangerment on that same day after asking a store worker to take her children to the restroom and then leaving the store with her children inside (May 2008); and (9) both parents were leaving their children unsupervised daily for one to two hours and locking them out of the home—later that day police were called to the home due to a report that the parents were outside drinking and fighting in front of the children (August 2008). The agency also received reports that Mother had used illegal substances, and possibly crack cocaine, while with her children.

{¶ 8} During this period of court involvement, FCCS and an associated managed care contractor, the Ohio Youth Advocate Program[4] ("OYAP"), prepared and filed with the court numerous case plans and other documents describing steps the parents were required to take to ensure the safety and welfare of their children. For example, upon adjudicating M.E. and the twins dependent in December 2003, the court left the children in the custody of their Mother but issued court orders of protective services to FCCS. It ordered Mother to undergo four random urine drug tests; to undergo a mental health assessment and follow through with resulting recommendations; to participate in an alcohol and drug assessment and follow through with resulting recommendations; to ensure that her children were protected against abuse and neglect while in her care; to attend parenting classes; to allow an infant protocol nurse to assess the twins and to follow any recommendations the nurse might make; and to only use the drugs that were prescribed to her and to take the recommended dosage.

{¶ 9} In June and again in July 2006, the parents agreed to follow safety plans stating that the children would be supervised at all times and not be allowed to play in the street. Similarly, on February 15, 2007, the parents executed a memorandum of agreement

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[4] In November 2006, the court recognized OYAP as a party in the proceedings. OYAP, sometimes referred to in the record as "NYAP" (National Youth Advocate Program), is a managed care provider that had contracted with FCCS to provide services to Franklin County families. including the family in this case. OYAP and FCCS thereafter jointly filed many of the pleadings in the children's cases. In this decision, the term "the agency" refers to either or both organizations collectively as appropriate in context.

in which they agreed, inter alia, that the children would remain in the immediate physical presence and control, i.e., within immediate eyesight and sound, of a parent or grandmother when away from the residential property. The parents also agreed to enroll the three older children in Head Start within 21 days. The court approved and adopted the memorandum of agreement as a court order. On November 4, 2008, a magistrate of the court ordered Mother to undergo a psychiatric evaluation at the agency's cost.

{¶ 10} On April 24, 2009, after granting multiple continuances, the court held a hearing on pending motions for temporary custody that had been filed by the agency in August and November of 2008. At the hearing, however, FCCS agreed to withdraw their motions for temporary custody based on the parents' agreement to comply with yet another amended case plan. The parents agreed to follow recommendations made after alcohol and drug assessments were completed on February 2, 2009. Specifically, Mother agreed to be linked to level IA, non-intensive drug counseling; attend at least four 12-step meetings weekly until that treatment was facilitated; and allow the agency's case manager to contact her physicians regarding her prescribed medications and drug levels. The case plan required both Mother and Father to take random urine screens upon request of the agency.

{¶ 11} In addition, the parents once again agreed to provide for the children's basic needs, protect them from abuse and neglect, and supervise them in a manner described in the plan. More specifically, the parents agreed that the children, while away from their residence, would remain in the immediate physical presence and control of a parent or the maternal or paternal grandmother and could play in their fenced backyard if they were under direct supervision and within sight and sound of a parent or other adult relative. In addition, the parents agreed to cooperate with the agency's caseworkers, participate in all recommended services, and work to address concerns relative to the home environment. The agency agreed to provide a home-based worker on a biweekly basis. Moreover, the plan called for the three older children to participate in family counseling and receive mental-health assessments, and for the parents to follow the recommendations that followed. Based on the parents' agreement to comply with these conditions, the children remained in Mother's home under the protective supervision of the agency.

June 16, 2009 Birth of H.D.D.

{¶ 12} On June 16, 2009, approximately two months after the four older children were once again returned to Mother, the fifth child at issue in this appeal, H.D.D., was born. Upon arriving at the hospital, Mother provided a medical history that reflected inadequate prenatal care. Mother tested positive in the hospital for cocaine, barbiturates, and opiates. After H.D.D.'s birth, hospital staff ordered tests of the baby's urine and meconium and sent H.D.D. to the hospital's special-care nursery for evaluation of possible intrauterine drug exposure. H.D.D.'s urine tested positive for cocaine and barbiturates. His meconium tested negative for cocaine but positive for opiates. H.D.D. was treated for drug withdrawal and remained in the hospital approximately 30 days until July 17, 2009.

Legal Proceedings After Birth of H.D.D.

{¶ 13} On June 19, 2009, three days after H.D.D.'s birth, the agency moved the court to grant temporary custody of the four older children to FCCS. On June 25, 2009, the magistrate issued a temporary order of temporary custody to FCCS, which thereafter placed the four older children in foster care.

{¶ 14} On July 17, 2009, contemporaneously with H.D.D.'s release from the hospital, FCCS filed a complaint alleging that H.D.D. was an abused, neglected, and/or dependent child. On that same day, the magistrate issued an emergency care order authorizing FCCS to place the baby in the home of either a relative or non-relative, and H.D.D. was placed in foster care. On July 20, 2009, the magistrate replaced the emergency order with a temporary order of temporary custody of H.D.D. to FCCS.

The Evidentiary Hearing—June-July, 2010

{¶ 15} The magistrate conducted an evidentiary hearing on eight days in June and July, 2010. The hearing encompassed both the pending temporary custody motions as to the older children and the complaint alleging that H.D.D. was an abused, neglected, and/or dependent child.

{¶ 16} The family's caseworker since January 2009 testified. He stated that he had reviewed the agency's records concerning the family dating back to 2004 and that the parents had not complied with all of the requirements of the court-ordered case plans. Specifically, Mother had never participated in a drug and alcohol treatment program, although she had consulted with a psychologist, Dr. William Friday. Mother had, at one

point, met with a drug counselor at the agency's request but became extremely argumentative and refused treatment.

{¶ 17} The caseworker testified that he asked Mother to undergo urine drug tests on 58 occasions between March 31, 2009 and June 4, 2010. Mother failed to appear for the tests 30 times. Of the 28 times she did provide samples, she tested positive for opiates or morphine 23 times. She tested negative five times. The caseworker described the Mother's cooperation with him as "minimal." Mother had not enrolled her children in Head Start, participated in family counseling, nor obtained psychiatric services.

{¶ 18} The caseworker further acknowledged that Mother had provided him with copies of prescriptions for morphine, oxycodone, and diazepam issued to her between 2008 and 2010. He stated that he was aware that, in January 2009, Mother had been prescribed oxycodone, an opiate. He testified that it alarmed him that some of Mother's test results were negative for opiates, as Mother had reported that she had been prescribed a regular regimen of opiates, and a negative test result would therefore be inconsistent with the Mother taking her medications as prescribed. The caseworker testified that Mother had informed him that she had undergone psychological and psychiatric evaluations, but she had not provided him with written reports of those evaluations.

{¶ 19} The caseworker requested that Father undergo urine drug testing 48 times. The Father took tests 12 times, producing two results that were positive for marijuana. He further testified that, based on the parents' failure to comply with the case plan, FCCS continued to have concerns regarding the adequacy of the parents' supervision of the children.

{¶ 20} An FCCS intake worker testified that the agency had been contacted on June 18, 2009 by staff members of the hospital where H.D.D. was born, reporting that Mother had told the staff that she had not received prenatal care. The hospital also advised FCCS that Mother had tested positive for drugs and that the baby had tested positive for cocaine and barbiturates. The FCCS worker testified that she interviewed Mother in the hospital and that Mother admitted that she had not received prenatal care but denied having used cocaine during her pregnancy.

{¶ 21} H.D.D.'s treating physician, neonatologist and certified pediatrician Dr. Erehab Ahmed, testified at the hearing. He described H.D.D. in his first days of life as

"sweating like crazy"; being jumpy and irritable; experiencing tremors; having mottled skin; consistently crying even when held; and "really suffering." He stated that the baby scored high on the Finnegan Scoring System, an established medical scoring system for determining neonatal abstinence syndrome. Dr. Ahmed further testified that H.D.D.'s physical withdrawal symptoms were consistent with drug abuse by the Mother during her pregnancy.

{¶ 22} Dr. Ahmed had "no doubt" that H.D.D. was in withdrawal based on the Mother's positive drug test results for both illegal and prescription drugs; the baby's positive test results for cocaine and barbiturates; Mother's admitted history of inadequate prenatal care; and the baby's physical symptoms. Dr. Ahmed described neonatal abstinence syndrome as being a very serious condition, potentially leading to severe convulsion, seizures or even death. The doctor prescribed methadone treatment of H.D.D. in the hospital over the course of the next 29 days to wean the baby from the addictive effects of the drugs in his system.

{¶ 23} Dr. Ahmed further testified that prescription drugs such as Vicodin and Percocet are opiates and that their use while Mother was pregnant could negatively affect the baby. He also opined that a doctor monitoring the prenatal care of a pregnant woman who was taking prescription opiates for pain might be able to treat the mother's pain in a manner that would reduce the baby's risk of experiencing withdrawal at birth.

{¶ 24} Dr. Ahmed acknowledged that the drug test of H.D.D.'s meconium produced a negative test result for cocaine. But the fact that only the urine test produced a positive result for cocaine did not affect Dr. Ahmed's determination that the baby needed to be treated for withdrawal, and he did not believe that the test results were inconsistent. He testified that it was very unlikely that the baby's positive urine test result for cocaine was a false positive as false negative drug test results are more common than false positives. He further testified that a positive result from a test of a baby's urine reflects drugs or medications used by the mother within the last two to three days before administration of the test and that the meconium test might reflect drug use by the mother during a different period of time.

{¶ 25} Mother testified at the hearing. She stated that Father did not live in her home but was present every day to help in parenting the children when they were in her

custody. She stated that she had a long history of severe spinal problems, including multiple herniated discs that caused her severe pain. She testified that she had been prescribed, at various times, Vicodin, Percocet, Valium, and morphine sulfate to treat her pain. She testified that she had been prescribed Vicodin when she was pregnant with H.D.D. and had been told to take it once every four hours. She instead took Vicodin when she "really need[ed] it," and tried to suffer through her pain, taking her medicine three times a day rather than four. (June 22 Tr. 26.) She stated that the last time she had taken a Vicodin was four days prior to giving birth. She further testified that she did not know how cocaine, opiates, and barbiturates could have been in H.D.D.'s urine and meconium. She acknowledged, however, that several weeks after H.D.D.'s birth she had told her caseworker that she believed the baby's positive test for cocaine might have been caused by her drinking the energy drink Red Bull a few days prior to giving birth.

{¶ 26} Mother testified that she suffered from anxiety disorder. She acknowledged that prior case plans had required her to undergo a psychological evaluation and to participate in recommended services after that evaluation. She testified that she did undergo an evaluation in August 2008 by Clinical Psychologist Dr. Grady Baccus at the agency's request. She acknowledged that she was aware of Dr. Baccus's report, which stated his belief that Mother suffered from bipolar disorder and had experienced long episodes of mania, and included a recommendation that Mother receive a psychiatric consultation regarding the advisability of medication to control her disordered mood and thought processes. Mother testified, however, that she "basically * * * blew that off" and instead consulted psychologist Dr. Friday, who provided her with drug and alcohol counseling, family counseling, parenting counseling, and individual counseling. (June 24 Tr. 56.) Mother denied that she suffered from bipolar disorder.

{¶ 27} Dr. Friday, however, testified that Mother had only been an irregular client of his since 2004. He testified that he consulted with Mother "a little more than once a month" during 2007 and not "very much in 2008." (July 14 Tr. 16.) Dr. Friday met with Mother four times in 2009, twice after H.D.D. was removed from the home, and twice in 2010. His most recent consultation with Mother took place on February 1, 2010, approximately five months prior to his testimony. He described Mother as suffering from anxiety and depression and suggested that accountability was "very, very hard for her."

(July 14 Tr. 29.) He agreed that the primary focus of his counseling with Mother was to address her anxiety and that he did not counsel either Mother or Father about drug use or strategies to improve their parenting skills, including supervision of the children. He testified that Mother had told him she had taken "hundreds of drug tests" and that they had all produced negative results. (July 14 Tr. 37.) Dr. Friday acknowledged that seeing Mother a total of six times in 2009 and 2010 was not enough. He further acknowledged that he was aware that, in the drug testing community, missed screens are considered positive screens.

{¶ 28} At the conclusion of the hearing, the appointed guardian ad litem advised the court of her belief that H.D.D. was an abused, neglected, and dependent child and that the children should not be returned to the parents. On September 29, 2009, the guardian ad litem for all five children filed a written report, again recommending that the children remain in foster care.

The Magistrate's Decisions

{¶ 29} On September 7 and 8, 2010, the magistrate filed an identical written decision in each of the four cases. He concluded that the agency had "proven by clear and convincing evidence that it is in the best interests of the [four older] children to grant their motion requesting temporary custody." (Mag. Dec., at 5.) He therefore ordered, effective July 14, 2010, temporary custody of those children to the agency.

{¶ 30} In addition, the magistrate found by clear and convincing evidence that H.D.D., the youngest child, was "an abused minor as defined in section 2151.031(C)(D)[sic] of the Ohio Revised Code"; a neglected minor, as defined in R.C. 2151.03(A)(2); and a dependent minor, as defined in R.C. 2151.04(C). (Mag. Dec., at 6.) The magistrate committed H.D.D. to the temporary custody of FCCS until further order of the court.

{¶ 31} In his decision, the magistrate referenced Mother's failure to comply with the April 2009 case plan, e.g., her failure to complete non-intensive drug counseling and attend individual counseling; her failure to complete approximately 30 requested drug screens; and her failure to demonstrate that she had been issued current prescriptions for the medications reflected in her positive drug screens. He cited Dr. Ahmed's testimony that H.D.D.'s addiction and suffering as a result of drug withdrawal could have been avoided had Mother obtained proper prenatal care. He concluded that neither Mother nor Father had complied with the obligations imposed by the court-ordered case plan concerning drug

and individual counseling, nor were they compliant with the agency's requests for random urine screens. He noted that the limited counseling Mother had received from Dr. Friday focused on her own stress, rather than on improvement of her abilities to appropriately parent and supervise her children. The magistrate concluded that the agency had made reasonable efforts to prevent or eliminate the need for removal of the children and that placement of the children in Mother's home would be contrary to their welfare and best interests.

The Juvenile Court Decision

{¶ 32} The juvenile court conducted a hearing on the parents' objections to the magistrate's decision, after which, on January 23, 2012, it entered in each case a nine-page written judgment entry adopting the magistrate's decision as its own. In so doing, the court made final the adjudication of H.D.D. as an abused, neglected, and dependent child, as well as the magistrate's orders awarding temporary custody of all five children to FCCS.

II. LEGAL ANALYSIS OF ASSIGNMENTS OF ERROR

{¶ 33} Mother and Father have raised multiple assignments of error, which we summarize and enumerate as follows:

> 1. The magistrate erred in admitting hearsay evidence, specifically: (1) toxicology reports concerning drug testing of H.D.D.'s urine and meconium; (2) hearsay testimony of Dr. Ahmed; and (3) Father's positive marijuana tests.
>
> 2. The magistrate erred in not granting a continuance to allow the parents to obtain a second toxicologist as an expert witness, when their intended toxicologist could not testify due to health issues.
>
> 3. The parents did not receive effective assistance of counsel.
>
> 4. The court erred in finding that H.D.D. was abused, neglected, and dependent.
>
> 5. The magistrate should not have consolidated into a single hearing: (1) adjudication of H.D.D., i.e., whether he was an abused, neglected, or dependent child; and (2) determination of the agency's motion to terminate Mother's legal custody of the four older children and replace it with an order of temporary custody to FCCS.

> 6. The court erred in awarding temporary custody of the five children to FCCS.
>
> 7. The court failed to make factual findings consistent with the requirements of R.C. 2151.419(B)(1).
>
> 8. The juvenile court improperly deferred to the magistrate rather than performing the requisite independent review of the evidence.

{¶ 34} We address each of these arguments below.

Alleged Evidentiary Error

{¶ 35} The parents assert that the magistrate erred in admitting into evidence: (1) toxicology reports reporting that H.D.D. tested positive for cocaine, barbiturates and opiates; (2) testimony by Dr. Ahmed that Mother had tested positive for drugs and lacked prenatal care; and (3) testimony by the caseworker that Father had twice tested positive for marijuana.

{¶ 36} In considering this assignment of error, we are guided by the well-established principle that "[t]he admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion. [Citation omitted.] To warrant reversal, therefore, the trial court's discretionary evidentiary ruling must be unreasonable, arbitrary, or unconscionable." *Jefferson v. CareWorks of Ohio, Ltd.*, 193 Ohio App.3d 615, 2011-Ohio-1940, ¶ 6 (10th Dist.).

H.D.D. Toxicology Reports

{¶ 37} Admissibility of H.D.D.'s toxicology test reports is dependent upon those records having been both (1) properly authenticated and (2) admissible as nonviolative of the rule against hearsay.

{¶ 38} Mother has conceded in her brief that the parties stipulated as to the authenticity of the test results. She nevertheless argues that the laboratory test results were not admissible as business records falling within the exception to the hearsay rule established by Evid.R. 803(6).

{¶ 39} This court has found, however, that laboratory test results contained in authenticated records do fall within the business records exception to the hearsay rule when supported by testimony that the laboratory report was kept in the course of regularly

conducted business and where the challenger to the test results failed to present substantial credible evidence that the laboratory procedures and results were untrustworthy. *Belcher v. Ohio State Racing Comm.*, 10th Dist. No. 03AP-786, 2004-Ohio-1278, ¶ 12 (positive laboratory test results for narcotic Dilaudid held to be admissible).

{¶ 40} Similarly, the Sixth District Court of Appeals has considered a temporary custody case similar to that now before us where both the urine and meconium of a newborn were tested, and a positive result for illegal drugs was obtained in only one of the two tests. *In re Kenn B., III*, 6th Dist. No. OT-08-006, 2008-Ohio-5033. The court observed that, "[p]ursuant to Evid.R. 803(6), records that are normally considered inadmissible hearsay may be entered into evidence if it is 'shown by the custodian or other qualified witness or as provided by Rule 901(B)(10)' that it was kept during the course of a regularly conducted business activity." *Id.* at ¶ 26. In *In re Kenn B.*, a neonatal nurse practitioner provided the necessary attestations referenced in Evid.R. 803(6). The court concluded not only that the medical record was properly authenticated and admissible but also that, "[p]ursuant to *In re Baby Boy Blackshear*, [90 Ohio St.3d 197 (2000)], the only evidence necessary to a finding that Kenn was, per se, an abused child was the result of the toxicology screen." *Id.* at ¶ 28.

{¶ 41} Additionally, Father argues that the magistrate should not have admitted H.D.D.'s test results without testimony from a toxicologist who could explain possible reasons for the fact that the baby's urine produced a positive result for cocaine, while its meconium produced a negative result for cocaine. But, as established in *Belcher,* once the appellees provided testimony that the laboratory report was kept in the course of regularly conducted business, the burden of producing substantial credible evidence that the laboratory procedures and results were untrustworthy was on the parents. The parents failed to offer, or even proffer, any evidence that the test results were wrong. Significantly, as observed in *In re Kenn B.*, the admission of even one test result showing the presence of illegal drugs within a newborn's system justifies the trial court's adjudication of H.D.D. as a per se abused child. *See In re Blackshear*, at syllabus *("*When a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of R.C. 2151.031(D), *per se* an abused child."); *In re Kenn B.*

{¶ 42} In the case before us, Dr. Ahmed, a neonatologist and certified pediatrician,

testified that he and other members of the neonatal unit routinely relied upon drug test results kept in a patient's chart, including H.D.D.'s test results. In so doing, he provided the required testimony that H.D.D.'s drug test results were kept in the ordinary course of the hospital's activities. Accordingly, we reject the appellants' contention that the trial court abused its discretion in admitting those results into evidence. The trial court properly admitted them as business records.

Dr. Ahmed's Testimony

{¶ 43} Mother argues that the magistrate erred in allowing Dr. Ahmed to testify that Mother had failed to obtain adequate prenatal care and had taken illegal drugs while pregnant. Mother concedes that this testimony was admissible as non-hearsay to explain why he made the treatment decisions he did concerning H.D.D. but contends that it was not admissible for the purpose of proving that Mother had, in fact, failed to obtain adequate prenatal care and had taken illegal drugs while pregnant.

{¶ 44} Mother does not, however, explain how this alleged error prejudiced her. A trial court sitting as the finder of fact in a criminal case is presumed to have considered only relevant, material, and competent evidence in weighing evidence and making findings of fact, unless it affirmatively appears to the contrary. *State v. Abdullah*, 10th Dist. No. 05AP-1316, 2006-Ohio-5412, ¶ 38. The same presumption applies in cases in which a juvenile court finds facts in cases involving alleged abused, neglected or abandoned children. *In re W.R. II*, 12th Dist. No. CA2011-08-016, 2012-Ohio-382, ¶ 16, citing *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, and *In re Adoption of Linder*, 3d Dist. No. 11-04-07, 2004-Ohio-6962, ¶ 6.

{¶ 45} Moreover, "the erroneous admission or exclusion of hearsay, cumulative to properly admitted testimony, constitutes harmless error." *State v. Hogg*, 10th Dist. No. 11AP-50, 2011-Ohio-6454, ¶ 46. In this case, the agency's intake worker testified that Mother had admitted to her in the hospital that she had not received prenatal care. That statement by Mother was admissible. *See In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 35 (pursuant to Evid.R. 801(D)(2)(a), prior statements made by a party do not constitute hearsay and may be offered against the party at trial). Dr. Ahmed's testimony was cumulative to that of the FCCS worker. Further, the trial court could reasonably infer that Mother had used cocaine during her pregnancy from the fact that H.D.D. tested

positive for cocaine, particularly in light of Dr. Ahmed's additional testimony that the presence of drugs in H.D.D. could only have resulted from ingestion of the drugs by Mother.

{¶ 46} Accordingly, we reject Mother's contention that the trial court abused its discretion in allowing Dr. Ahmed to testify that Mother had not received prenatal care and had used cocaine during pregnancy.

Caseworker's Testimony

{¶ 47} Mother further argues that the trial court erred in allowing the caseworker to testify that Father twice tested positive for marijuana. But again, that testimony was cumulative to Father's own testimony that he had "smoked it since [he] was twelve," had in the past smoked it "[m]aybe once a month or every couple months," and had chosen to give it up "the last time [he] tested dirty for marijuana." (June 30 Tr. 91.) As such, the admission of similar testimony by the caseworker was harmless.

{¶ 48} Accordingly, we reject Mother's contention that the trial court's judgment should be reversed based on trial court error in allowing the caseworker to testify that Father had tested positive for marijuana.

Alleged Error in Denying Continuance

{¶ 49} Mother moved for a continuance on the last day of trial on the grounds that an intended expert witness, toxicologist Dr. Staubus, was unavailable to testify, as he was recovering from surgery and would not be available for three to four weeks. The magistrate denied the motion. The trial court overruled Mother's objection asserting that a continuance should have been granted.

{¶ 50} As this court stated in *Foley v. Foley*, 10th Dist. No 05AP-242, 2006-Ohio-946, ¶ 15:

> [T]he decision to grant or deny a continuance lies within the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. Thus, the decision of a trial court regarding a motion for a continuance will not be reversed on appeal unless the trial court has abused its discretion. *Fiocca v. Fiocca*, 10th Dist. No. 04AP-962, 2005-Ohio-2199, at ¶ 6. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140,

> 1142. In determining whether a trial court has abused its discretion, a court of appeals may not substitute its judgment for that of the trial court. Id.

{¶ 51} In deciding a motion for a continuance, a court should consider, among other relevant considerations, the length of the delay requested; whether other continuances have been requested and received; the inconveniences to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful or contrived; and whether the defendant contributed to the circumstances which give rise to the request for a continuance. *Id.* at ¶ 16.

{¶ 52} The court observed in this case that Mother's trial counsel had been aware of the expert's medical condition for some time yet never provided an expert witness report to any party or proffered one to the court. It noted that counsel did not specify the length of continuance it was requesting but, instead, urged the court to hold the record open indefinitely. The court further noted that H.D.D.'s case had been dismissed and re-filed a number of times and that numerous continuances had already been granted. Moreover, Mother's counsel made the motion after the trial had been ongoing for almost one month.

{¶ 53} In light of these circumstances, we reject Mother's contention that the trial court abused its discretion in concluding the evidentiary hearing rather than indefinitely continuing it.

Alleged Deprivation of Effective Assistance of Counsel

{¶ 54} Mother argues that the failure of her counsel to produce Dr. Staubus or another expert toxicologist constituted ineffective assistance of counsel. She contends that, faced with the unavailability of Dr. Staubus, her counsel should have either: (1) retained another expert to testify; (2) obtained an expert report from Dr. Staubus to proffer at trial; (3) prepared a video deposition of Dr. Staubus to be played at trial; or (4) sought a continuance earlier than the final day of trial. Mother contends that counsel thereby deprived her of expert testimony concerning the "most significant and most contested issue in the case," presumably the validity of the results of H.D.D.'s urine test. (Mother's brief, at 23.)

{¶ 55} A parent who is a party in juvenile court proceedings has a right to effective assistance of counsel. R.C. 2151.352; Juv.R. 4(A); *In re C.P.*, 10th Dist. No. 08AP-1128,

2009-Ohio-2760, ¶ 56. The applicable test for the effectiveness of counsel for a parent in a juvenile custody case is the same test applied in determining whether a criminal defendant was provided effective assistance of counsel, i.e., the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re C.P.* at ¶ 58 (permanent custody); *In re Graves*, 11th Dist. No. 99-G-2219 (June 23, 2000) (temporary custody); *In re B.M.*, 9th Dist. No. 12CA0009, 2012-Ohio-4093, ¶ 14-15 (temporary custody).

{¶ 56} " 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.' " *In re C.P.* at ¶ 58, quoting *Strickland* at 686. Moreover, the " 'burden of showing ineffective assistance of counsel is on the party asserting it.' " *Id.* at ¶ 57, quoting *State v. Smith*, 17 Ohio St.3d 98 (1985). " 'Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance.' " *Id.*, quoting *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998).

{¶ 57} To succeed on her claim of ineffective assistance of counsel, Mother must therefore satisfy the two-pronged test established in *Strickland*. She must first demonstrate that her trial counsel's performance was deficient. *In re C.P.* at ¶ 58. If she can show deficient performance, she must next also demonstrate that there exists a reasonable probability that, but for her counsel's errors, the result of the trial would have been different.

{¶ 58} Mother has not provided any information either in the trial court, or in this court, as to what Dr. Staubus's testimony might have been. Accordingly, there is no basis to conclude that Dr. Staubus would have offered testimony that invalidated the positive cocaine result of H.D.D.'s urine test, or that would otherwise have changed the results of this case. It is true that the urine test produced a positive result for cocaine, while the meconium test did not. But Dr. Ahmed testified that such a circumstance did not cause him to doubt that the urine test was accurate. Mother has produced in this appeal nothing to rebut that testimony or to support the conclusion that Dr. Staubus, or another toxicologist, might have testified otherwise.

{¶ 59} Mother has accordingly failed to satisfy her burden of showing prejudice as a result of her counsel's failure to produce the testimony of a toxicologist and has not

overcome the presumption that her counsel afforded her effective representation. *Compare In re Graves* ("Appellant fails to demonstrate either by suggestion or through the record what favorable evidence existed which was not presented by counsel. She, therefore, can not establish the second prong of the *Strickland* test, to wit: that the juvenile court would not have granted temporary custody * * * absent any alleged inefficacy on the part of her counsel.").

{¶ 60} We therefore reject Mother's contention that she was deprived of the effective assistance of counsel, as she has failed to satisfy her burden of showing that the results of the trial would have been different had an expert toxicologist testified.

Adjudication of H.D.D. as Abused, Neglected, and Dependent

{¶ 61} Mother and Father both acknowledge that the controlling standard the trial court must apply in determining whether a child is abused, neglected or dependent is whether the record contains clear and convincing evidence of that status. *Accord* R.C. 2151.35; *In re N.P.*, 10th Dist. No. 07AP-797, 2008-Ohio-1727, ¶ 7. Clear and convincing evidence is more than a mere preponderance but is "that quantum of evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Id*. On review, we must affirm the trial court if competent, credible evidence going to all the essential elements of the case supports the trial court. *Id*.

{¶ 62} Mother and Father both argue that the record lacked clear and convincing evidence that H.D.D. was an abused, neglected, and dependent child. They contend that there is substantial doubt as to the accuracy of H.D.D.'s urine test, which produced a positive result for cocaine and barbiturates, pointing to the fact that his meconium test results did not produce results positive for cocaine. They argue that the record does not support the conclusion that H.D.D. was born with cocaine in his system.

{¶ 63} As discussed above, however, the Supreme Court of Ohio has held that, "[w]hen a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of R.C. 2151.031(D), *per se* an abused child." *In re Blackshear*, syllabus. *In re Blackshear* is dispositive of the question of whether H.D.D. was an abused child—the toxicology screen showing a positive result for cocaine established that he was. *Accord In re Kenn B.* Counsel suggests that one of the two tests must have been incorrect, but the parents failed to produce or proffer any evidence

justifying the conclusion that the urine test result was inaccurate. Moreover, the only evidence on that issue was that provided by Dr. Ahmed. He testified that it was, in fact, possible for the urine test and the meconium tests to produce different results concerning the presence of cocaine.

{¶ 64} Under the controlling precedent of *In re Blackshear*, the trial court did not err in adjudicating H.D.D. to be an abused child as defined in R.C. 2151.031(D), i.e., a child who, "[b]ecause of the act of his parent[] * * * suffer[ed] physical or mental injury that harm[ed] or threaten[ed] to harm the child's health or welfare." Additionally, even without application of *In re Blackshear*, the testimony of Dr. Ahmed provided competent, credible evidence that Mother's drug use caused H.D.D. to suffer physical injury and harm after his birth, warranting the conclusion that H.D.D. was an abused child.

{¶ 65} In addition to entering judgment that H.D.D. was abused, the juvenile court also adjudicated H.D.D. to be both neglected and dependent. Pursuant to R.C. 2151.03, a child is neglected if he or she "lacks adequate parental care because of the faults or habits of the child's parents, guardian, or custodian." Pursuant to R.C. 2151.04, a child is dependent if he or she "lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian."

{¶ 66} Having found H.D.D.'s adjudication as an abused child to have been appropriate pursuant to *In re Blackshear*, it is unnecessary for us to review the further findings of the court that H.D.D. was dependent and also neglected. H.D.D.'s adjudication as abused independently supports the court's dispositional order concerning him, as well as its exercise of continued jurisdiction over him.

{¶ 67} We note, however, that the Fourth District Court of Appeals has held that a record containing evidence that a mother received no prenatal care and that her baby tested positive for illegal drugs at birth is a record that contains some competent, credible evidence sufficient to affirm a baby's adjudication by the trial court as both neglected and dependent. *In re Barnhart*, 4th Dist. No. 05CA8, 2005-Ohio-2692, ¶ 21.

{¶ 68} Accordingly, we affirm the trial court's judgment finding H.D.D. to be an abused child and find moot issues relative to his further adjudication as both neglected and dependent.

Alleged Error in Conducting a Single Hearing

{¶ 69} Father argues that the magistrate erred in trying the issues of whether H.D.D. was abused, neglected or dependent at the same hearing at which he heard evidence in support of the agency's motions to change the custodial status of the four older children. He contends that this procedure allowed the court to hear evidence that would not otherwise have been admissible in H.D.D.'s adjudicatory hearing. But he fails to identify any such nonadmissible evidence.

{¶ 70} It is true that a wider range of evidence is admissible in a dispositional hearing than in an adjudication hearing. "There must be strict adherence to the Rules of Evidence at the adjudicatory stage." *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 233 (1985).[5] In contrast, at the dispositional stage, "any evidence that is material and relevant, including hearsay, opinion and documentary evidence," is admissible, pursuant to Juv.R. 34(B)(2). *Id*. A review of the record in this case, however, shows that the magistrate repeatedly entertained and ruled on objections to the introduction of evidence based on the rules of evidence. Accordingly, the error, if any, of which Father complains, was not prejudicial.

{¶ 71} Moreover, it is also well-established that, in the absence of plain error, failure to draw the trial court's attention to possible error at a time at which the error could have been corrected results in a waiver of the issue for purposes of appeal. *In re Moore*, 10th Dist. No. 04AP-229, 2005-Ohio-747, ¶ 8. In a civil proceeding, "plain error involves those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material, adverse effect on the character of, and public confidence in, judicial proceedings." *Id*. at ¶ 8, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997).

{¶ 72} In this case, the magistrate reiterated to the parties on the first day of trial that he intended to hear the agency's motions for temporary custody of the four older children simultaneously with the hearing on FCCS's complaint concerning H.D.D. Counsel for OYAP specifically asked the magistrate whether the complaint concerning H.D.D.

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[5] We note, however, that Juv.R. 34(B)(2) provides that hearsay may be admitted in dispositional hearings, "[e]xcept as provided by division (I) of this rule." Juv.R. 34(I) provides that "[t]he Rules of Evidence shall apply in hearings on motions for permanent custody."

would be tried separately from the temporary custody motions concerning the four older children. The magistrate responded that all pending matters were related and would be tried together. OYAP's attorney responded "that's fine." No other attorneys responded or voiced objection to the magistrate's decision to proceed on all pending matters in a combined evidentiary hearing.

{¶ 73} In this case, the agency did not seek and the court did not award permanent custody, thereby terminating parental rights; the parties did not object to the magistrate's intended procedure, despite having a clear opportunity to object; and the court adjudicated the child's status as a per se abused child under the *In re Blackshear* doctrine. Under the circumstances, the magistrate's decision to hear both the complaint concerning H.D.D. and the motions to award temporary custody of the older children to FCCS did not have a material, adverse effect on the character of, and public confidence in, the judicial proceedings and did not therefore constitute plain error. Father waived any error inherent in that procedure by not objecting at the time of trial.

{¶ 74} We therefore reject Father's contention that the holding of a consolidated hearing in this case constituted reversible error.

Alleged Error in Awarding Temporary Custody

{¶ 75} R.C. 2151.353(A) provides that, after adjudicating a child as abused, neglected or dependent, a juvenile court may choose among several dispositional alternatives. One of those alternatives is committing the child to the temporary custody of a public children services agency. R.C. 2151.353(A)(2).

{¶ 76} In determining an appropriate disposition, the court must exercise a sound discretion. *In re M.D.*, 10th Dist. No. 07AP-954, 2008-Ohio-4259, ¶ 21. Also, the court "must also consider which situation will best promote the care, protection, and mental and physical development of the child with the understanding that the court should separate a child from his family environment only when necessary for the child's welfare or in the interest of public safety." *In re T.P.*, 12th Dist. No. CA2012-02-004, 2012-Ohio-4614, ¶ 7, citing R.C. 2151.01(A); *In re Decker*, 12th Dist. No. CA94-12-220 (Sept. 5, 1995); and *In re L.C.*, 2d Dist. No. 2010 CA 90, 2011-Ohio-2066, ¶ 13.

{¶ 77} Accordingly, this court may not reverse a juvenile court's choice of dispositional alternatives in the absence of a finding that the court abused its discretion,

i.e., acted unreasonably, arbitrarily or unconscionably. *In re M.D.* at ¶ 22. We reverse its choice of disposition only where a juvenile court's decision regarding a child's best interest is not supported by competent, credible evidence and is unreasonable. The same abuse-of-discretion standard applies in reviewing an order changing the disposition of an abused, neglected or dependent child.

{¶ 78} In the case before us, the trial court awarded temporary custody of all five children to FCCS. This court has recognized that an award of "legal custody where parental rights are not terminated is not as drastic a remedy as permanent custody." *In re N.F.*, 10th Dist. No. 08AP-1038, 2009-Ohio-2986, ¶ 9. An award of temporary custody does not permanently deprive appellants of their parental rights, and parents whose children are in the temporary custody of an agency or other person may petition the court for modification of the custody award. *In re M.D.* at ¶ 16. *See also* R.C. 2151.353(E)(2) (providing that the court may amend a dispositional order at any time upon its own motion or upon the motion of any interested party) and R.C. 2151.42(A) (providing that, in determining whether to return the child to the child's parents upon the filing of a motion so requesting, the court shall consider whether it is in the best interest of the child). Accordingly, the juvenile court may award legal custody of a child to a non-parent where a preponderance of the evidence supports the conclusion that such an award is in the best interest of the child. *In re N.F.* This contrasts with an award of permanent custody, which must be supported by clear and convincing evidence. *Id.* Further, "preponderance of the evidence" means evidence that is more probable, more persuasive, or of greater probative value. *Id.*

{¶ 79} In this case, the trial court did not abuse its discretion in awarding temporary custody to FCCS. This court has previously recognized that "[v]arious sections of the Revised Code refer to the agency's duty to make reasonable efforts to preserve or reunify the family unit." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28-29. But the long history of this case clearly demonstrates that both the agency and the court repeatedly provided opportunities and offered services to Mother and Father to enable them to establish a safe environment for their children. The parents repeatedly failed to comply with the responsibilities imposed on them in numerous court-ordered case plans dating back to at least 2003.

{¶ 80} We recognize that a "parent's failure to complete all aspects of a case plan is not *per se* grounds for finding that a parent has failed to remedy the conditions causing the child's removal from the home." *In re Hogle*, 10th Dist. No. 99AP-944 (June 27, 2000). Thus, for purposes of determining a motion for permanent custody determination based on R.C. 2151.414(E)(1), "the relevant inquiry is not simply whether the parents complied with all aspects of the case plan but whether they complied with the terms and objectives of a case plan related to the conditions causing the child's removal." *Id*.

{¶ 81} In this temporary custody case, however, there is ample evidence that the parents have consistently failed to comply with the obligations imposed upon them by court-ordered case plans—many of which they expressly agreed to satisfy—including the obligations to participate in family and drug and alcohol counseling and to obtain mental-health evaluation and treatment. The record supported the agency's contentions that the parents had not addressed the conditions that caused the children's repeated removals, e.g., failure to assure their basic safety through adequate supervision.

{¶ 82} Moreover, the fact that H.D.D. was addicted to drugs at birth is evidence of Mother's unwillingness or inability to either properly manage her use of prescription drugs or avoid the use of illegal drugs, or both. "A child does not first have to be put into a particular environment before the court can determine that the environment is unhealthy or unsafe." *In re Barnhart* at ¶ 24, citing *In re Bishop*, 36 Ohio App.3d 123, 124 (5th Dist.1987). "The unfitness of the parent, guardian or custodian can be predicted by past history." *In re Bishop* at 126.

{¶ 83} In short, the trial court did not abuse its discretion or act unreasonably in finding that the best interests of the children were served by placement other than in Mother's home. Accordingly, we affirm the trial court's judgment awarding temporary custody of the children to FCCS.

R.C. 2151.419(B)(1) Factual Findings

{¶ 84} Subsection (A)(1) of R.C. 2151.419[6] requires that a juvenile court considering whether to continue a child's removal from his or her home determine whether the child protective services agency made reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child or make the child's return home possible. Subsection (B)(1) requires that the court describe in written findings of facts the relevant services provided by the agency to the family and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home. Mother argues that the magistrate did not comply with these requirements in that he failed to include in his decision specific findings describing the relevant services provided by the agency and why the agency could not return the children to Mother's home.

{¶ 85} In this case, the magistrate observed in his decision that "[e]ven with home based services in the home, the agency was unable to allay concerns regarding the supervision of the children, the use of illicit and non prescribed drugs, and compliance with the case plan which was ordered by the court." (Mag. Dec., at 4.) He noted that neither parent had followed the recommendations of a psychologist following a court-ordered examination; nor had they followed though with drug and alcohol counseling nor individual and family counseling as they had agreed to do. He concluded that "continuation in the [children's] own home would be contrary to [their] welfare and reasonable efforts have been made to prevent or eliminate the need for removal[.] * * * [P]lacement and caseworker services were provided by the agency to the family of the [children], but the removal of [the

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[6] R.C. 2151.419 provides:

> (A)(1) [A]t any hearing held pursuant to section 2151.28, * * * or 2151.353 of the Revised Code at which the court * * * continues the removal of a child from the child's home, the court shall determine whether the public children services agency or private child placing agency that * * * removed the child from home, * * * has made reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home.
> * * *
> (B)(1) A court that is required to make a determination as described in division (A)(1) or (2) of this section shall issue written findings of fact setting forth the reasons supporting its determination. If the court makes a written determination under division (A)(1) of this section, it *shall briefly describe in the findings of fact the relevant services provided by the agency* to the family of the child *and why those services did not* prevent the removal of the child from the child's home or *enable the child to return safely home.*

(Emphasis added.)

children] from home continues to be necessary because * * * the circumstances giving rise to the original filing have not been sufficiently alleviated." (Mag. Dec., at 5.)

{¶ 86} The magistrate thereby specifically referenced in his written decision that the agency had provided home-based services, placement, and caseworker services to the family. He noted the failure or inability of the parents to comply with the requirements of the case plan and stated that the concerns that originally prompted agency involvement had not been ameliorated.

{¶ 87} In a recent legal custody case, the Fifth District Court of Appeals determined that a magistrate's decision it described as "vague"[7] met the minimum statutory mandate of R.C. 2151.419 based on its recognition that, "under our limited plain error review, appellant has not demonstrated any undue prejudice or manifest injustice." *Stull v. Richland Cty. Children Servs.*, 5th Dist. No. 11CA47, 2012-Ohio-738, ¶ 13, 18. In the case before us, the magistrate's decision included references to the agency's efforts that were more specific than those found acceptable to the court in *Stull.* As did the Fifth District, we find no prejudice to the parents based on the magistrate's degree of compliance with R.C. 2151.419.

{¶ 88} Further, Mother did not challenge the magistrate's compliance with R.C. 2151.419 in her objections to the magistrate's decision. Her failure to include the argument in her objections constitutes a waiver of the issue.

{¶ 89} Accordingly, on both substantive and procedural grounds, we reject Mother's assignment of error challenging the trial court's judgment based on alleged non-compliance with R.C. 2151.419.

Independent Review by Juvenile Court

{¶ 90} A trial court considering a party's objections to a magistrate's decision must independently assess the facts and conclusions contained in the magistrate's decision, thereby undertaking the equivalent of a de novo determination in light of any filed objections. Juv.R. 40(E)(4)(b); *In re A.W.*, 10th Dist. No. 08AP-442, 2008-Ohio-6312, ¶ 5.

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[7] In *Stull,* the court quoted the magistrate's discussion on this issue as follows: " 'The Court finds, based on the evidence presented, that Children Services has made reasonable efforts to return said child in the home of said child's mother and that it is in said child's best interests not to return in said mother's home and/or the care and custody of said mother at this time. The Court further finds that it is in said child's best interests that said child remain placed out of the home of said child's mother at this time.' " *Id.* at ¶ 14.

{¶ 91} Mother argues that the juvenile court did not conduct the required de novo review but, instead, improperly deferred to the magistrate. In support, Mother points to certain statements in the court's decision, e.g., "the evidence was sufficient to support the Magistrate's findings, and thus he did not abuse his discretion"; "the Magistrate was on strong footing in finding [noncompliance with the case plan] by a preponderance of the evidence"; and "[t]he evidence presented at trial was sufficient to support the Magistrate's findings, and thus he did not abuse his discretion in finding that [H.D.D.] was an abused, neglected and dependent child." Accordingly, Mother argues that we should summarily reverse the trial court's judgment.

{¶ 92} In response, appellee State of Ohio observes that the trial court clearly acknowledged the appropriate de novo standard of review and noted its obligations to refrain from deferring to the magistrate and to conduct a de novo review. Moreover, the state correctly notes that the judgment entry includes numerous references to facts relied upon by the trial court in adopting the magistrate's decision that were not cited by the magistrate in its decision. The state concludes that, "while the trial court may have used terminology that could suggest otherwise, a review of the January 23, 2012 Judgment Entry makes clear that the trial court both cited the correct standard of review and conducted an independent assessment of the evidence and testimony presented." (Appellee State of Ohio's brief, at 8-9.) We agree.

{¶ 93} On review of a trial court's ruling on objections to a magistrate's decision "[a]n appellate court presumes that a trial court performed an independent analysis of a magistrate's decision." *Jones v. Smith*, 187 Ohio App.3d 145, 2010-Ohio-131, ¶ 10 (4th Dist.); *see also Alessio v. Alessio*, 10th Dist. No. 05AP-988, 2006-Ohio-2447, ¶ 36. Therefore, a party asserting error must affirmatively demonstrate that the trial court failed to conduct the independent analysis. *Id*. Further, simply because a trial court adopted a magistrate's decision does not mean that the court failed to exercise independent judgment. *Id*.

{¶ 94} The excerpts quoted above from the trial court's written decision do not overcome the presumption of regularity to which the trial court is entitled. We read those excerpts not as statements of *deference to* the magistrate but, rather, as statements of *concurrence with* the magistrate. The court stated, for instance, that it "*agree*[*d*] that the

Magistrate was on strong footing in finding, by a preponderance of the evidence, that the parents had failed to substantially comply with the objectives of the case plan"; and that the "evidence presented at trial was sufficient to support the Magistrate's findings." (Emphasis sic.) (Jan. 23, 2011 Entry at 4, 6.) Moreover, in the concluding paragraph of its decision, the trial court specifically stated that its rejection of the parents' objections was "[b]ased on the foregoing *de novo* review of facts and law." (Entry, at 9.)

{¶ 95} We therefore overrule Mother's argument contending that the trial court failed to conduct an independent de novo review.

III. CONCLUSION

{¶ 96} For the foregoing reasons, all of the assignments of error raised by the appellants are overruled, and the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, are affirmed.

Judgments affirmed.

KLATT and CONNOR, JJ., concur.
