

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

In re:	:	
[B.W.	:	No. 15AP-38
	:	(C.P.C. No. 10JU-08639)
J.W., Sr.,	:	
	:	(REGULAR CALENDAR)
Appellant].	:	
In re:	:	
[J.W.	:	No. 15AP-39
	:	(C.P.C. No. 10JU-08640)
J.W., Sr.,	:	
	:	(REGULAR CALENDAR)
Appellant].	:	

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D E C I S I O N

Rendered on June 11, 2015

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

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

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

SADLER, J.

{¶ 1} Appellant, J.W., Sr., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, granting appellee's, Franklin County Children Services ("FCCS"), motion for permanent custody of J.W. and B.W. for purposes of adoption. For the following reasons, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} This case concerns legal custody of two minor children born to appellant's current wife, A.T. On October 17, 2008, A.T. gave birth to a baby girl, B.W., and on

January 19, 2010, A.T. gave birth to a baby boy, J.W. Both B.W. and J.W. lived in a home with A.T. and appellant.<sup>1</sup> On June 12, 2010, J.W. became ill while in his mother's care, and he was taken for emergency care to Children's Hospital with Level 1 trauma. At the hospital, J.W. tested positive for cocaine. J.W. received treatment and he recovered.

{¶ 3} On June 14, 2010, FCCS filed a complaint for custody and obtained an emergency care order. On August 18, 2010, both J.W. and B.W. were adjudged "dependent" children by the trial court, and temporary custody was awarded to FCCS. The trial court extended the temporary custody order on June 13, 2011. FCCS eventually arranged for temporary placement of the children in the home of appellant's sister, S.G.

{¶ 4} On September 13, 2011, the trial court found that appellant was not the biological father of the two children based on the results of a DNA profile. On October 19, 2011, FCCS filed a motion, pursuant to R.C. 2151.413 and 2151.414, seeking permanent custody of the two children. On December 7, 2011, a court magistrate issued an order removing appellant as a party to the action, and on March 6, 2012, the trial court adopted the magistrate's decision. Appellant filed a motion seeking legal custody of the two children on June 4, 2012. Following an evidentiary hearing on the competing motions for custody, the trial court issued a decision and judgment entry on July 24, 2012 committing the two children to the permanent custody of FCCS for purposes of adoption. The trial court denied appellant's motion to be added as a party, as well as his motion for legal custody.

{¶ 5} Appellant filed an appeal to this court from the judgment of the trial court. On August 21, 2012, this court reversed the judgment and remanded the case to the trial court for further proceedings. *In re J.W.*, 10th Dist. No. 12AP-696, 2013-Ohio-468. The decision of this court provides, in relevant part, as follows:

We find under the facts of this case that [appellant] should have been considered in loco parentis and therefore entitled to counsel.

\* \* \*

Because we find [appellant] should have had appointed counsel to assist him in addressing the motions he filed for

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<sup>1</sup> According to appellant, he and A.T. were married in July 2010.

custody of the children, we vacate the trial court's granting of permanent custody to FCCS. We remand the case to the juvenile court for trial counsel to be appointed and for the opportunity of [appellant] to have his motions for custody further considered. We do not reinstate the rights of the natural mother of the children, who chose to have the issue uncontested as to her. We also do not reinstate any rights of the biological fathers of the children. *The issue on remand is limited to the merits of [appellant's] request to be the custodian of the children once he has had the opportunity, with the assistance of counsel, to develop the facts supporting his motion for custody.*

(Emphasis added.) *Id.* at ¶ 9, 23.

{¶ 6} On March 1, 2013, the trial court appointed counsel for appellant and reinstated him as a party to the action. In August 2013, appellant commenced supervised visitation with the two children at FCCS for a period of one hour per week. The trial court subsequently held an evidentiary hearing on July 16, 2014, at which time appellant appeared with counsel and gave testimony in support of his motion for legal custody. At the start of the hearing, FCCS moved the court to dismiss appellant's custody motion on grounds that appellant was barred from obtaining legal custody of the two children due to his prior conviction for cocaine possession.

{¶ 7} On August 13, 2014, the trial court denied the motion to dismiss and awarded appellant unsupervised visitation with the two children "outside the agency and for up to four hours a visit, to allow the guardian ad litem to observe." (Aug. 13, 2014 Decision, 2.) The trial court decision does not contain a ruling on the pending motions for custody. The decision states only that appellant's motion will be "set for a full hearing." (Aug. 13, 2014 Decision, 2.)

{¶ 8} On September 5, 2014, FCCS filed a notice of appeal to this court from the August 13, 2014 judgment. However, on November 10, 2014, the trial court issued an "Agreed Entry" that provides, in relevant part, as follows:

All parties hereby agree that a full trial was held on the merits of the motions on July 16, 2014 and all relevant witnesses, testimony, and evidence was presented at this time. Therefore, the Court shall vacate its' Judgment Entry of August 13, 2014 and issue a full decision considering the evidence presented at trial on July 16, 2014.

{¶ 9} As a result of the appeal by FCCS and the subsequent agreed entry, appellant did not exercise his expanded right of visitation under the August 13, 2014 judgment. Rather, the trial court determined the pending motions for custody based on the evidence presented at the July 16, 2014 hearing.

{¶ 10} On January 9, 2015, the trial court issued a decision and judgment entry committing J.W. and B.W. to the permanent custody of FCCS for purposes of adoption and denying appellant's motion for legal custody. Appellant timely appealed to this court on January 16, 2015.

## II. ASSIGNMENTS OF ERROR

{¶ 11} Appellant assigns the following as error:

1. The Juvenile Court based its decision to deny Appellant's motion for legal custody upon a misinterpretation of Ohio Adm. Code 5101:2-42-18(H).
2. The Juvenile Court erred by favoring adoption via permanent custody (probably by total strangers) over legal custody with the children's step-parent *in loco parentis*, despite the fact that parental rights had been terminated.
3. The Juvenile Court erred by denying Appellant's motion for legal custody.

## III. STANDARD OF REVIEW

{¶ 12} "A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence." *In re D.S.*, 10th Dist. No. 07AP-479, 2007-Ohio-6781, ¶ 7, citing *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶ 28. " 'An appellate court will not overturn a permanent custody order when it is supported by competent, credible evidence.' " *In re A.E.*, 10th Dist. No. 07AP-685, 2008-Ohio-1375, ¶ 11, quoting *In re Siders*, 10th Dist. No. 96APF04-413 (Oct. 29, 1996).

{¶ 13} Furthermore, in reviewing a judgment granting permanent custody to FCCS, an appellate court "must make every reasonable presumption in favor of the judgment and the trial court's findings of facts." *In re P.G.*, 10th Dist. No. 11AP-574, 2012-Ohio-469, ¶ 37, citing *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887, ¶ 59. " '[I]f the evidence is susceptible of more than one construction, we must give it that

interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment.' " *Brooks* at ¶ 59, quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19 (1988).

#### IV. DISCUSSION

{¶ 14} Of appellant's three assignments of error, only appellant's second assignment of error specifically challenges the trial court decision to commit J.W. and B.W. to the permanent custody of FCCS for purposes of adoption. Accordingly, we will begin our discussion with appellant's second assignment of error.

##### A. Second Assignment of Error

{¶ 15} In appellant's second assignment of error, appellant contends that the trial court erred when it awarded permanent custody to FCCS. We disagree.

{¶ 16} R.C. 2151.414 governs the procedure for granting permanent custody of a child to a public agency such as FCCS. *In re J.T.*, 10th Dist. No. 11AP-1056, 2012-Ohio-2818, ¶ 9. Pursuant to R.C. 2151.414(B)(1), a trial court may grant permanent custody if, after a hearing, it determines by clear and convincing evidence that (1) any of the circumstances in R.C. 2151.414(B)(1)(a) through (d) exist, and (2) *such relief is in the best interest of the child*. Clear and convincing evidence means the measure of proof that produces " ' "a firm belief or conviction as to the facts sought to be established." ' " *Id.* at ¶ 9, quoting *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, ¶ 42, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 17} There is no dispute that the circumstances in R.C. 2151.414(B)(1)(d) exist inasmuch as J.W. and B.W. have been in the temporary custody of FCCS since June 2010.<sup>2</sup> There is also no dispute that the trial court has terminated parental rights to J.W. and B.W. Thus, the dispositive question facing the trial court was whether the commitment of the children to the permanent custody of FCCS for purposes of adoption was in the best interest of the children. In determining the best interest of the children,

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<sup>2</sup>R.C. 2151.414(B)(1) provides, in relevant part: "Except as provided in division (B)(2) of this section, the 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."

for purposes of a permanent custody motion, R.C. 2151.414(D)(1) requires the court to consider all relevant factors, including:

- (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
- (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
- (c) The custodial history of the child, including whether 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, 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 and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
- (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency.

{¶ 18} FCCS caseworker Luann Layman testified that she has been assigned to this case since March 2013. She has personally observed appellant's interactions with the children during his weekly visitation at FCCS. She has also visited the children at S.G.'s home and observed her interactions with the children. Layman is also the only witness who has observed the children in their current placement with new foster parents.

{¶ 19} Layman testified that the children were placed in S.G.'s care in June 2010 and that they remained in her care and custody until July 2014. According to Layman, FCCS removed the children from S.G.'s care because S.G. had become ill and because J.W.'s behavioral issues had escalated since December 2013. Layman testified that the children are now in a more structured setting with other foster parents. According to Layman, the children's current placement is in a "foster to adopt" status, just as it had been with S.G. (Tr. 56.) Layman stated that S.G. is still interested in adopting the

children and that an adoption by S.G. remains a "definite possibility" provided S.G. is willing to accept new "treatment processes." (Tr. 54.) Layman opined that, unless S.G. makes the recommended changes, returning the children to S.G. is not in their best interest.

{¶ 20} Layman testified that appellant has completed parenting classes required of him by the case plan and that he has faithfully attended each of his scheduled weekly visits with the children at FCCS. She stated that the visits have generally gone well. While she has heard appellant yell at the children and she has seen him handle them aggressively in the past, she acknowledged that appellant has responded positively to criticism and has improved his parenting skills.

{¶ 21} Layman testified that a great deal of structure and consistent follow-through is required to properly parent these two special needs children. Layman stated that B.W. has been diagnosed with attention deficit disorder and "sleeping issues." (Tr. 48.) B.W. is currently taking medication to treat her condition, and Layman believes the medication is having a positive affect on B.W.'s behavior. Layman testified that B.W. has attended "special needs" classes in the past, but that she will begin kindergarten in fall 2014. (Tr. 49.) According to Layman, J.W. has been diagnosed with attention deficit disorder, and he suffers from an additional undiagnosed mental health issue. Layman stated that J.W. needs to be raised in a very structured environment and that parenting J.W. is "extremely challenging." (Tr. 49.) Layman opined that a permanent commitment to FCCS for purposes of adoption is in the best interest of the two children.

{¶ 22} The children's guardian ad litem, Jacob Ort, testified at the July 16, 2014 trial and filed a report. He has personally observed appellant during some of his weekly visits with the children at FCCS, and he has visited appellant's new home. According to Ort, appellant's interaction with the children in a controlled setting has been appropriate, and his current living arrangements are suitable for raising two small children. Ort stated that the children had formed a bond with appellant.

{¶ 23} Ort related that J.W. occasionally exhibits "explosive behavior" and that he engages in extended tantrums which have resulted in minor injuries to himself and his sister. (Tr. 68.) According to Ort, even professional child care providers have struggled with J.W. At trial, Ort testified that the children also have mental health issues "that

prevent them from having a normal sibling relationship." (Tr. 69.) According to Ort, the children know appellant's sister, S.G., as "mom." (Tr. 64.)

{¶ 24} Ort was of the opinion that J.W. and B.W. do not have a sufficient level of maturity to express their desires regarding custody. *See* R.C. 2151.414(D)(2). Although Ort did not rule out the possibility of an adoption by appellant, in his opinion, permanent custody with FCCS for purposes of adoption is in the best interest of the two children.

{¶ 25} Appellant testified that he earns approximately \$1,300 per month from various sources including \$814 per month in Social Security benefits, \$300 per month from donating his blood plasma, and \$50 to \$75 dollars per week working in a cleaning business. Appellant testified that he was married to A.T. in July 2010 but that he has not seen her for two or three years. Appellant stated that he intends to dissolve his marriage to A.T. but that he has been unable to afford the fees. Appellant testified that he has never met A.T.'s youngest child and that he is not the biological father of that child. Appellant asserted that he intends to pursue adoption if the court does not award him legal custody. Appellant believes that his sister, S.G., will also pursue adoption of the two children. He testified that his relationship with his sister is "fairly good." (Tr. 33.) He claims that he has not been allowed in S.G.'s house to visit the children "because of [his] background." (Tr. 34.)

{¶ 26} Appellant is currently a client of Southeast Mental Health due to his issues with depression and anxiety. Appellant takes the prescription drugs Paxil and Seroquel to treat his conditions and to help him sleep. Appellant acknowledged since April 2013, he has been required to submit to drug screenings as part of the case plan. Appellant acknowledged that he has had 1 positive test, 42 negative tests, and he has missed 48 appointments. Appellant attributed the missed drug screenings to his inability to obtain transportation.

{¶ 27} Although appellant maintains that he is the only father the children have known, the evidence shows that FCCS removed J.W. from appellant's home in June 2010 when he was six months old. At that time, the oldest child, B.W., was 20 months old. Appellant testified that he did not visit the children while they were in S.G.'s custody, and he did not begin weekly visitation with the children at FCCS until August 2013, more than three years later. While the guardian ad litem acknowledged that appellant has bonded



with the children and that they exhibit mutual affection, he stated in his report that the children do not have normal boundaries with adults and that they have no fear or concern about seeking affection and attention from people they barely know.

{¶ 28} As noted above, in reviewing a judgment granting permanent custody to FCCS, an appellate court "must make every reasonable presumption in favor of the judgment and the trial court's findings of facts." *P.G.* at ¶ 37, citing *Brooks* at ¶ 59. " '[I]f the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment.' " *Brooks* at ¶ 59, quoting *Karches* at 19. The evidence in the record supports the findings of the trial court.

{¶ 29} In reaching its conclusions regarding custody, the trial court was clearly persuaded by the opinion testimony of the children's guardian ad litem and their caseworker. Both Layman and Ort believed that the children's need for a legally secure and permanent placement could not be achieved without an award of permanent custody to FCCS for purposes of adoption. R.C. 2151.414(D)(4). The testimony in the record shows that both J.W. and B.W. have special needs and that safely raising these two children requires an extraordinary level of consistency and structure. In fact, even though appellant's sister, S.G., had proven to be a suitable custodian for the children for more than four years, FCCS removed the children from S.G.'s home because she became ill and because of J.W.'s escalating behavioral issues.

{¶ 30} Our review of the trial court's decision reveals that the trial court considered the relevant factors set forth in R.C. 2151.414(D)(1), (3), and (4) and that there is sufficient competent and credible evidence in the record to support the trial court's findings. The weight of the evidence supports a firm belief or conviction that the best option for J.W. and B.W. is a commitment to the permanent custody of FCCS for purposes of adoption.

{¶ 31} Furthermore, to the extent that appellant argues the trial court should have given him priority over FCCS in making the custody determination due to his status as the children's stepfather and former custodian, the law does not support his position. In making the custody determination, once the trial court determines that one of the conditions under R.C. 2151.414(B)(1)(a) through (d) exists, the trial court must determine a permanent placement that is in the best interest of the children, regardless of the

identity of the parties competing for custody. *See A.E.* at ¶ 38 (under R.C. 2151.414, once a determination has been made, pursuant to R.C. 2151.414(B)(1)(a) through (d), a juvenile court must find the best option for a child but it is not required to find by clear and convincing evidence that no suitable relative is available for placement); *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶ 63-64 (the availability of a placement that would not require a termination of parental rights is not an "all-controlling factor" under the statute); *In re J.C.*, 10th Dist. No. 09AP-1112, 2010-Ohio-2422, ¶ 17, citing *In re Zorns*, 10th Dist. No. 02AP-1297, 2003-Ohio-5664 ("a trial court is not required to consider placement with a relative before granting PCC").

{¶ 32} In this instance, the trial court examined the factors relevant to the custody determination and chose the best option for J.W. and B.W. The record contains sufficient competent and credible evidence to support a firm belief or conviction on the part of the trial court that the best option for J.W. and B.W. is a commitment to the permanent custody of FCCS for purposes of adoption.

{¶ 33} For the foregoing reasons, appellant's second assignment of error is overruled.

### **B. First Assignment of Error**

{¶ 34} In his first assignment of error, appellant argues that the trial court based its decision to deny his motion for legal custody on a misinterpretation of Ohio Adm.Code 5101:2-42-18. We disagree.

{¶ 35} Ohio Adm.Code 5101:2-42-18, pertaining to approval of agency placements with substitute caregivers, provides, in relevant part, as follows:

(H) The PCSA or PCPA shall not approve the placement if the relative or nonrelative or other adults residing within the home have been convicted of or pleaded guilty to any offense listed in paragraph (I)(1) of this rule:

\* \* \*

(2) Except as provided in paragraph (H)(3) of this rule, where the offense was a felony, at least ten years have elapsed since the person was fully discharged from imprisonment or probation.

\* \* \*

(I) Except as provided in paragraph (H) of this rule, a relative or nonrelative caregiver or other adult residing in the home shall not have been convicted of or pleaded guilty to, any of the following offenses:

(1) A violation of section \* \* \* 2925.11 of the Revised Code that is not a minor drug possession offense.<sup>3</sup>

{¶ 36} Under Chapter 2925 of the Revised Code, pertaining to drug offenses, the term "[m]inor drug possession offense" is defined as "[a] violation of section 2925.11 of the Revised Code as it exists on and after July 1, 1996, that is a misdemeanor or *a felony of the fifth degree*." (Emphasis added.) R.C. 2925.01(E)(2). In its decision, the trial court made the following findings regarding appellant's prior conviction:

Other impediments to [appellant's] quest for custody exist. [Appellant] pled guilty to a Felony 5 charge of possession of cocaine in June 2007. He was placed on probation for two years and probation was extended for an additional year on July 29, 2009 for [appellant's] failure to find employment and pay court costs. Probation terminated on July 26, 2010. As a result, FCCS is bound by the Ohio Administrative Code, in particular Ohio Admin. Code 5101:2-42-18, and was forbidden to place the children in [appellant's] home until July 30, 2019.

(Jan. 9, 2015 Decision, 4.)

{¶ 37} Appellant's 2007 drug conviction fits the statutory definition of a "[m]inor drug possession offense." Consequently, Ohio Adm.Code 5101:2-42-18 did not preclude FCCS from placing the children with appellant pending a final custody determination. Nevertheless, it is clear from the trial court decision that the trial court did not treat appellant's conviction as a legal impediment to an award of custody in his favor. Rather, the trial court treated the evidence of appellant's prior conviction as a relevant factor to be considered in conducting its best interest analysis. The trial court stated:

While the court is not governed by [Ohio Adm.Code 5101:2-42-18], it is relevant to explain why FCCS could not go forward with placement in [appellant's] home. It is true the offense occurred over seven years ago. It was a drug offense and [appellant] has still not substantially complied with his

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<sup>3</sup> PCSA is a public children services agency, and a PCPA is a private child placing agency. Ohio Adm.Code 5101:2-42-18(A).

drug screening case plan requirements. It is therefore unclear whether [appellant] has solved his drug use problem.

(Jan. 9, 2015 Decision, 4.)

{¶ 38} The trial court found that appellant had "unresolved physical health, mental health and domestic violence issues" that weighed against his motion for custody. (Jan. 9, 2015 Decision, 3.) Evidence in support of the trial court's finding includes the record of appellant's prior conviction for drug possession and the numerous missed drug screenings. Additionally, the report of the guardian ad litem states that appellant admitted to him that he had been charged with domestic violence in the past. The trial court was also critical of appellant's failure to complete the anger management classes mandated as part of the FCCS case plan, even though appellant had four years in which to do so. Appellant admitted that he has not completed the anger management classes required by the case plan.

{¶ 39} The record also shows that appellant is still married to A.T. and that A.T. gave birth to a third child, I.T., after losing custody of J.W. and B.W. Because I.T. was born to A.T. during her marriage to appellant, appellant is presumed to be the biological father of the child. R.C. 3111.03(A)(1). FCCS removed I.T. from A.T.'s custody, and the trial court subsequently terminated appellant's parental rights to I.T. Appellant testified that financial concerns prevented him from seeking dissolution of his marriage to A.T. and that he is certain he is not I.T.'s biological father. Appellant admitted, however, that he missed a scheduled paternity test that could have proven his denial of paternity. While the probative value of this evidence is debatable, R.C. 2151.414(D) requires the court to "consider all relevant factors" in determining an award of permanent custody to FCCS. Appellant's legal relationship to A.T. is arguably relevant to the custody determination, and we cannot say that the trial court erred in considering this evidence in determining the best interests of the two children.

{¶ 40} We note that in its August 13, 2014 decision and judgment entry, the trial court expressly stated that the "placement restrictions" in the Ohio Administrative Code "do not apply to a court." (Aug. 13, 2014 Decision, 1.) In that judgment entry, the trial court awarded appellant unsupervised visitation outside the agency even though the trial court knew appellant had a prior conviction for drug possession. Thus, while the trial

court may have been mistaken in its belief that Ohio Adm.Code 5101:2-42-18 precluded FCCS from temporarily placing the children in appellant's home pending a final custody determination, the trial court did not believe that the placement restrictions were binding on the court either in the award of visitation or the determination of his motion for legal custody.

{¶ 41} Moreover, as previously discussed, the record contains clear and convincing evidence in support of the trial court's award of permanent custody to FCCS for purposes of adoption. The testimony of the guardian ad litem and the primary caseworker speak to the extraordinary level of commitment and structure that is necessary in order to safely raise these two children. Both the guardian ad litem and the caseworker recommended commitment of J.W. and B.W. to the permanent custody of FCCS for purposes of adoption. The trial court specifically stated that it is "problematic" that appellant presented no evidence that he would have support from family or friends in parenting these two "very active siblings with special needs and behaviors." (Jan. 9, 2015 Decision, 4.) The trial court noted that the guardian ad litem expressed similar concerns.<sup>4</sup>

{¶ 42} For the foregoing reasons, we find that appellant has not demonstrated reversible error on the part of the trial court in denying his motion for legal custody, and we overrule appellant's first assignment of error.

### **C. Third Assignment of Error**

{¶ 43} In his third assignment of error, appellant contends that the trial court erred when it prematurely ruled on his motion for permanent custody without first providing him with a full and fair opportunity to produce evidence that he is a suitable custodian. We disagree.

In our decision in appellant's prior appeal, we remanded the case to the trial court for the limited purpose of "the merits of [appellant's] request to be the custodian of the children once he has had the opportunity, with the assistance of counsel, to develop the facts supporting his motion for custody." *J.W.* at ¶ 23. Following our remand, the

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<sup>4</sup> In his report, the guardian ad litem states: "[T]he minor children should only be placed in a therapeutic home that has history with working with challenging children with similar issues to these minor children to ensure that the safety and well-being of the minor children is provided for by their permanent caregivers." (July 9, 2014 Recommendation of Guardian ad Litem, 5.)

trial court appointed trial counsel to represent appellant and reinstated appellant as a party to the case. Following an evidentiary hearing, the trial court, on August 13, 2014, issued a judgment entry denying FCCS' motion to dismiss appellant's application for legal custody and awarding appellant unsupervised visitation with the children "outside the agency and for up to four hours a visit, to allow the guardian ad litem to observe." (Aug. 13, 2014 Decision, 2.) With regard to appellant's motion for legal custody, the judgment provided that appellant's "motion be set for a full hearing." (Aug. 13, 2014 Decision, 2.) Thus, the trial court's judgment entry clearly contemplates a second evidentiary hearing on appellant's motion for legal custody.

{¶ 44} However, before visitation commenced under the August 13, 2014 order, FCCS initiated an appeal to this court. The parties subsequently submitted an agreed judgment entry vacating the August 13, 2014 judgment. The agreed entry expressly authorized the trial court to issue a final order regarding the competing motions for custody based on the evidence presented on July 16, 2014. Though appellant now contends that the trial court erred by considering the competing motions for custody without providing him a full and fair opportunity to produce evidence that he is able to care for the children in his own home, appellant previously agreed that there was sufficient evidence in the record to support a valid final custody determination. Appellant's disagreement with the trial court's custody decision does not alter that fact.<sup>5</sup>

{¶ 45} Moreover, as set forth above, we find that the evidence is sufficient to support a firm belief or conviction on the part of the trial court that the best option for these two children is a commitment to permanent custody of FCCS for purposes of adoption. Our review of the evidence in the record and the trial court's decision convinces us that the denial of appellant's motion for legal custody was based primarily on the need for a legally secure permanent placement for these two special needs children that could not be achieved without a grant of permanent custody to FCCS, rather than a lack of proof

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<sup>5</sup> For the same reason, this case is distinguishable from *In re Needom*, 1st Dist. No. C-080107, 2008-Ohio-2196 (Juvenile court award of permanent custody to the agency reversed and the cause remanded where grandparents were unable to produce evidence in support of their custody motion. Agency erroneously terminated the home study due to a mistaken belief that the grandfather's assault conviction precluded placement in the home.). *Id.* at ¶ 24.

regarding appellant's parenting skills. The question whether appellant is a suitable adoptive parent for these two children is a question that has not yet been determined.

{¶ 46} For the foregoing reasons, we hold that the trial court did not err when it denied appellant's motion for legal custody, and we overrule appellant's third assignment of error.

## **V. CONCLUSION**

{¶ 47} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

*Judgment affirmed.*

BROWN, P.J., and LUPER SCHUSTER, J., concur.

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