

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

|              |   |                         |
|--------------|---|-------------------------|
| IN RE:       | : |                         |
|              | : | CASE NOS. CA2011-01-014 |
| J.P., et al. | : | CA2011-02-031           |
|              | : | CA2011-04-071           |
|              | : |                         |
|              | : | <u>OPINION</u>          |
|              | : | 7/1/2011                |
|              | : |                         |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case Nos. JN2008-0013; JN2008-0207

Fran Sweeney, 7723 Tylers Place Boulevard, #129, West Chester, Ohio 45069, guardian ad litem

Legal Aid of Southwest Ohio, Debra Rothstein, 10 Journal Square, 3<sup>rd</sup> Floor, Hamilton, Ohio 45011, for the children

Traci Combs-Valero, 240 East State Street, Trenton, Ohio 45069, for appellant, J.C.

Heather A. Fellerski, P.O. Box 181342, Fairfield, Ohio 45018, for appellant, E.P.

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**HUTZEL, J.**

{¶1} Appellant, E.P. (Mother), appeals the decision of the Butler County Court of Common Pleas, Juvenile Division, granting permanent custody of her son J.P. (born in

August 2003) and her daughter D.L. (born in August 2004) to the Butler County Department of Job and Family Services (the Agency). Appellants, J.C. (J.P.'s biological father), the children's attorney, and the children's guardian ad litem (GAL), also appeal the grant of permanent custody to the Agency. D.L., the biological father of D.L., is not a party to this appeal. For the reasons set forth in this opinion, we affirm in part and reverse in part the decision of the juvenile court.

{¶2} On May 31, 2008, Mother was driving with J.P. and D.L. when she was pulled over for not having a windshield. Mother was subsequently arrested for driving with the children while intoxicated. She was charged with DUI and child endangerment as a result of the incident.

{¶3} On June 6, 2008, the Agency filed a complaint alleging that four-year-old J.P. and three-year-old D.L. were neglected, abused, and dependent. All of the allegations in the complaint were against Mother. There were no allegations of abuse, neglect, or dependency against either J.P.'s father or D.L.'s father.

{¶4} On November 12, 2008, the juvenile court adjudicated J.P. and D.L. abused and dependent and awarded temporary custody to the Agency. A case plan was implemented to reunify Mother with the children. The case plan called for J.P.'s father and D.L.'s father to contact the Agency if either father wanted to reunify with his respective child. Initially, D.L.'s father told the Agency he wanted to exercise visitation with the children but that he was supportive of Mother's efforts to reunify with the children. However, once he realized the children would not be returned to Mother's custody, D.L.'s father told the Agency he wanted an opportunity to reunify with the children and to participate in the case plan services. D.L.'s father was added to the case plan in August 2009. D.L.'s father has known Mother since J.P. was about three or four months old.

{¶5} J.P.'s father lives in Watertown, New York. When the complaint was filed, his address was unknown which resulted in his being found in default at the adjudicatory hearing in November 2008. On October 15, 2009, the Agency moved for permanent custody of J.P. and D.L. In December 2009, the children's maternal grandmother contacted J.P.'s father and told him about the permanent custody proceedings. J.P.'s father contacted the Agency; he was formally served with the permanent custody motion in January 2010. Hearings on the motion were held between March and July 2010. Because of transportation problems, J.P.'s father did not attend the permanent custody hearings but was represented by an attorney.

{¶6} In her post-hearings report, the GAL recommended that the motion for permanent custody be overruled. She further recommended that the children stay in the temporary custody of the Agency so that the home of J.P.'s father could be explored as a possible placement option for either J.P. or both children. The GAL also recommended that pending further engagement of D.L.'s father in substance abuse services, visits between D.L.'s father and the children include unsupervised visits at his home so as to explore his home as a possible placement option for the children.

{¶7} On November 5, 2010, the magistrate issued two decisions (one per child) in which he found by clear and convincing evidence that (1) J.P. and D.L. had been in the temporary custody of the Agency for 12 or more months of a consecutive 22-month period; (2) it was in the best interest of J.P. and D.L. to grant permanent custody to the Agency; and (3) J.P. and D.L. could not, within a reasonable period of time, and should not be placed with Mother, their respective fathers, or other relatives. Mother, J.P.'s father, D.L.'s father, the children's attorney, and the GAL all filed objections to the magistrate's decisions. On January 18, 2011, the juvenile court overruled the objections

and affirmed the magistrate's decisions in their entirety.

{¶8} Mother, J.P.'s father, the children's attorney, and the GAL appealed the juvenile court's decisions. Mother raises one assignment of error; J.P.'s father raises three assignments of error; and the GAL and children's attorney jointly raise one assignment of error as follows.

{¶9} Mother's Assignment of Error No. 1:

{¶10} "THE TRIAL COURT'S DECISION AND ORDER GRANTING PERMANENT CUSTODY OF THE CHILDREN TO BUTLER COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES (BCDJFS) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} J.P.'s father's Assignment of Error No. 1:

{¶12} "THE TRIAL COURT'S DECISION AND ORDER GRANTING PERMANENT CUSTODY OF J.P. TO THE BUTLER COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES (BCDJFS) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} J.P.'s father's Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED WHEN IT FOUND, BY CLEAR AND CONVINCING EVIDENCE, THAT GRANTING PERMANENT CUSTODY OF J.P. TO BCDJFS WAS NOT [SIC] IN THE BEST INTEREST OF THE CHILD, J.P."

{¶15} J.P.'s father's Assignment of Error No. 3:

{¶16} "THE TRIAL COURT ERRED WHEN IT FOUND BY DECISION AND ORDER THAT J.P. COULD NOT BE PLACED WITH J.P.'S FATHER [ ]."

{¶17} The GAL and children's attorney's Joint Assignment of Error No. 1:

{¶18} "THE TRIAL COURT'S DECISION AND ORDER GRANTING PERMANENT CUSTODY OF THE CHILDREN TO THE BUTLER COUNTY DEPARTMENT OF JOB

AND FAMILY SERVICES (BCDJFS) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶19} We first address the juvenile court's decision granting permanent custody of J.P. to the Agency.

{¶20} Mother, J.P.'s father, the GAL, and the children's attorney ("appellants" for purposes of our analysis regarding J.P.) argue that the juvenile court's decision granting permanent custody of J.P. to the Agency was against the manifest weight of the evidence. Specifically, appellants dispute the juvenile court's findings that it was in the best interest of J.P. to award permanent custody to the Agency, and that J.P. could not and should not be placed with his father. We find we cannot address appellants' arguments for the following reasons.

{¶21} The record shows that on August 29, 2007, J.P.'s father was granted sole custody of J.P. in the Family Court of Jefferson County, New York (Family File #7874, Docket No. V-03647-06). A caseworker for the Agency testified J.P.'s father told her about the New York court order when he contacted her in December 2009. The caseworker then contacted the New York court and verified it was a valid order. In his decision, the magistrate briefly referred to the New York court order and found that "such limited evidence [was] insufficient as a basis for the court to make a finding that Father is an appropriate alternative to permanent custody." The juvenile court never addressed whether it properly had subject-matter jurisdiction in the case at bar in light of the New York court order.

{¶22} Subject-matter jurisdiction connotes the power to hear and adjudicate the merits of a case; it can never be waived and may be challenged at any time. *Rosen v. Celebreeze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶45; *In re J.J.*, 111 Ohio St.3d 205,

2006-Ohio-5484, ¶11.

{¶23} Under Ohio law, a juvenile court has exclusive, original jurisdiction concerning matters involving an abused, neglected, or dependent child. R.C. 2151.23(A)(1); *In re J.J.*, 2006-Ohio-5484 at ¶11. However, R.C. 2151.23(F)(1) requires a juvenile court to exercise its jurisdiction in child custody matters in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as codified in R.C. 3127.01 to 3127.53.

{¶24} The primary purpose of the UCCJEA is to avoid jurisdictional competition and conflict with courts of other jurisdictions in custody matters. *In re B.P.*, Trumbull App. No. 2011-T-0032, 2011-Ohio-2334, ¶37. The Ohio's UCCJEA "sets forth a series of standards and definitions for determining when an Ohio court has jurisdiction, as opposed to a court of another state, to issue a child custody decision." *Id.* Under Ohio's UCCJEA, Ohio courts must give full faith and credit to valid custody determinations of sister states. R.C. 3127.33(A); *Ashburn v. Roth*, Butler App. Nos. CA2006-03-054 and CA2006-03-070, 2007-Ohio-2995, ¶12. A trial court has discretion to assume or divest itself of jurisdiction over a case under the UCCJEA. *In re M.T.*, 178 Ohio App.3d 546, 2008-Ohio-5174, ¶29. We note that New York has adopted the UCCJEA. See Article 5-A of the Domestic Relations Law; *G.S. v. A.S.* (2011), 31 Misc.3d 1233(A), \_\_ N.Y.S.2d \_\_. UCCJEA claims cannot be waived. *Rosen*, 2008-Ohio-853 at ¶45.

{¶25} As stated earlier, the juvenile court never addressed whether it properly had subject-matter jurisdiction in the case at bar in light of the 2007 New York court order. Rather, it simply continued to assume jurisdiction over the case. This was error. The existence of the New York court order granting sole custody of J.P. to his father necessarily has an impact on which portions of the UCCJEA, if any, apply. See, for

example, R.C. 3127.33 (enforcement of determination made in another state), 3127.17 (when Ohio court may modify determination made in another state), and 3127.18 (temporary emergency jurisdiction of Ohio court).

{¶26} We regret any further delay in the custody proceeding for J.P. However, given the 2007 New York court order granting sole custody of J.P. to his father, the mandate in R.C. 2151.23(F)(1), and the UCCJEA, we hold that the juvenile court must first determine whether it has subject-matter jurisdiction over J.P.'s case before it can proceed with the custody proceedings for J.P.

{¶27} The judgment of the juvenile court granting permanent custody of J.P. to the Agency is accordingly reversed and this case is remanded to the juvenile court to conduct a determination of its jurisdiction over J.P.'s case consistent with the law and to proceed accordingly.

{¶28} As a result, J.P.'s father's three assignments of error are moot. Likewise, the arguments raised by Mother and the GAL and children's attorney in their respective assignment of error, which challenge the grant of permanent custody of J.P. to the Agency, are moot. See *In re A.G.M.*, Warren App. No. CA2010-02-016, 2010-Ohio-4565.

{¶29} We now address the juvenile court's decision granting permanent custody of D.L. to the Agency and terminating the parental rights of Mother and D.L.'s father.

{¶30} Mother, the GAL, and the children's attorney ("appellants" for purposes of our analysis regarding D.L.) argue that the juvenile court's decision granting permanent custody of D.L. to the Agency was against the manifest weight of the evidence. Specifically, appellants dispute the juvenile court's findings that it was in the best interest of D.L. to award permanent custody to the Agency, and that D.L. could not and should not be placed with her father.

{¶31} "Natural parents have a constitutionally protected liberty interest in the care and custody of their children. A motion by the state for permanent custody seeks not merely to infringe upon that fundamental liberty interest, but to end it. In order to satisfy due process, the state is required to prove by clear and convincing evidence that the statutory standards have been met." *In re Knuckles*, Butler App. Nos. CA2003-01-004 and CA2003-01-005, 2003-Ohio-4418, ¶10, citing *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision regarding permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16.

{¶32} Under R.C. 2151.414(B)(1), a juvenile court must apply a two-part test in determining whether to terminate parental rights and award permanent custody to a children services agency. First, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors set forth in R.C. 2151.414(D). Second, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or, where the preceding factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a), (b), (c), and (d); *In re E.B.*, Warren App. Nos. CA2009-10-139 and CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶33} The juvenile court found by clear and convincing evidence, and appellants do not dispute, that when the Agency moved for permanent custody of D.L. on October 15, 2009, D.L. had been in the temporary custody of the Agency for more than 12 months of a consecutive 22-month period (the "'12 of 22' finding"). The record contains competent credible evidence supporting this finding.



{¶34} Once a juvenile court makes the "'12 of 22' finding," the court may move on to the best interest prong under R.C. 2151.414(B)(1). *In re T.D.*, Preble App. No. CA2009-01-002, 2009-Ohio-4680, ¶15. This is because the findings in R.C. 2151.414(B)(1)(a), (b), (c), and (d) are alternative findings. *Id.* Only one of those findings must be met for the second prong of the permanent custody test to be satisfied. *Id.*

{¶35} In the case at bar, the juvenile court's "'12 of 22' finding" regarding D.L. satisfied the second prong of the permanent custody test. *Id.* at ¶16. The juvenile court was therefore not obligated to determine whether D.L. could or should be placed with either of her parents under R.C. 2151.414(B)(1)(a), and we need not address appellants' arguments challenging that extraneous finding. *Id.* See, also, *In re J.C.*, Adams App. No. 07CA834, 2007-Ohio-3783; *In re R.L.*, Franklin App. No. 07AP-36, 2007-Ohio-3553.

{¶36} Appellants, however, also dispute the juvenile court's finding that granting permanent custody of D.L. to the Agency was in the child's best interest.

{¶37} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, the juvenile court must consider all relevant factors, including, but not limited to: (a) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-town 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; (c) the custodial history of the child, including whether the child has been in the temporary custody of a children services agency for 12 or more months of a consecutive 22-month period; (d) the child's need for a legally secured permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (e) whether any of the factors in R.C. 2151.414(E)(7) to (11) apply in relation to the parents

and child.

{¶38} With respect to R.C. 2151.414(D)(1)(e), the juvenile court found, and Mother does not dispute, that Mother had pled guilty to two counts of child endangerment in July 2008 (thus meeting the factor in R.C. 2151.414[E][7]), and that she had abandoned D.L. when she did not visit the child for more than 90 days between October 2009 and January 2010 (thus meeting the factor in R.C. 2151.414[E][10]). Competent credible evidence supports these findings. The juvenile court did not make any findings regarding D.L.'s father with respect to R.C. 2151.414(D)(1)(e).

{¶39} In challenging the termination of her parental rights, Mother solely disputes a statement made by the juvenile court regarding Mother's treatment with an agency. The juvenile court made the statement while discussing the evidence with respect to R.C. 2151.414(D)(1)(d). Mother also challenges findings made by the juvenile court under R.C. 2151.414(D)(1) regarding D.L.'s father. Because Mother's arguments regarding D.L.'s father are identical to the arguments raised by the children's attorney and GAL regarding D.L.'s father, her arguments will be incorporated into and addressed as the children's attorney's and GAL's arguments.

{¶40} The original case plan filed in November 2008 required Mother to obtain stable housing, complete a psychological evaluation and follow all recommendations, and complete a drug and alcohol assessment and follow all recommendations. Mother completed the drug and alcohol assessment and started treatment at Sojourner in the fall of 2008. However, Mother was discharged from the program due to her cognitive limitations and need for mental health treatment. Mother never completed a substance abuse program. Although she denied having an alcohol problem, Mother admitted turning to alcohol when she is stressed and does not have medication to calm her nerves.

{¶41} Before she completed her psychological evaluation in January 2009, Mother started mental health therapy with Hamilton Counseling Center in October 2008. Although the therapist had recommended weekly therapy sessions, Mother was only willing to attend therapy once or twice a month. Mother's therapy sessions were terminated by the counseling center in September 2009 because of her missed appointments and her failure to re-initiate therapy with the center as requested by the center.

{¶42} Mother testified she had a "mental breakdown" in the fall of 2009 after the Agency told her it had filed for permanent custody of J.P. and D.L. Mother stopped individual counseling and stopped visiting the children. In early January 2010, Mother resumed visitation with the children, and on her own, sought counseling at Transitional Living Center (TLC). In discussing Mother's involvement with TLC, the juvenile court noted that as of the March 15, 2010 permanent custody hearing, Mother had not yet seen a psychiatrist for medication and was on a waiting list for a therapist. The court further stated, "the primary service offered by this agency is education to provide basic skills and to provide temporary housing."

{¶43} Mother asserts that in making the foregoing statement, the juvenile court "mischaracterized the purpose of [her] treatment with Transitional Living" since her TLC case manager "clearly testified that Transitional Living provided mental health services and that [Mother] was on a waiting list to see the agency's psychiatrist and a therapist with the agency[.]"

{¶44} Jacob Hornberger, Mother's case manager at TLC, testified that TLC provides mental health services, limited transportation, and temporary housing via a residential program where clients learn basic living skills. TLC also helps clients be aware

of their housing options and their eligibility regarding financial and medical benefits. Hornberger testified that Mother was assessed at the center on January 20, 2010, started services with him on February 24, 2010, and was on a waiting list for individual therapy and to see a psychiatrist for medication.

{¶45} The juvenile court's description of what TLC provides in terms of services was arguably incomplete. Nonetheless, competent credible evidence supports the court's decision to terminate Mother's parental rights regarding D.L. In addition to the evidence discussed above, testimony during the permanent custody hearings revealed the following.

{¶46} Mother's psychological evaluation found that her "testing is rather serious and indicates \*\*\* prominent feelings of helplessness, worthlessness, hopelessness, and personal failure. \*\*\* The combination of her hopelessness, agitation, confusion, and level of stress place her at risk for increased problems with self-harm." The evaluation also indicated that while Mother recognized the need for mental health treatment, "her low energy level, passivity, and tendency to withdraw make it difficult for her to engage in mental health treatment."

{¶47} Mother testified she has been hospitalized four times for mental health issues; she was 13 years old when she was hospitalized the first time. She also testified she tried to commit suicide on several occasions, the most recent being one to two weeks before the March 8, 2010 permanent custody hearing.

{¶48} Mother was never able to obtain stable permanent housing. Between June 2008 and July 2009, she lived at several different locations, including under a tent in the backyard of a friend's house. In March 2010, she testified she was living with her sister in a house with no working utilities. Employment wise, Mother worked for a month at a fast

food restaurant but was terminated because she "wasn't a happy enough person." Mother has not held a job since January 2009; she has, at times, donated blood in exchange for money. At the permanent custody hearings, Mother acknowledged she was not in a position to take care of her children as she needed a stable home and counseling.

{¶49} In light of the foregoing, we find that the juvenile court did not err in terminating Mother's parental rights regarding D.L.. Mother's assignment of error is overruled.

{¶50} We now turn to the juvenile court's termination of D.L.'s father's parental rights. The juvenile court made several findings in its determination that permanent custody was in D.L.'s best interest under the R.C. 2151.414(D) factors. The children's attorney and GAL dispute several of the findings and challenge the juvenile court's failure to address D.L.'s wishes and the court's overemphasis on D.L.'s father's marijuana use.

{¶51} With respect to R.C. 2151.414(D)(1)(a), which addresses the child's interaction and interrelationship with the child's parents, siblings, relatives, and foster caregivers, the juvenile court noted that D.L. has been out of Mother's home since June 6, 2008, is currently living in her second foster home with J.P., is bonded to her father, and is bonded to J.P. The court noted that while D.L. and J.P. are bonded to one another, they are also very competitive and often get into arguments, and behave better when they are not together. The court also noted that D.L. and her father have weekly supervised visits for two hours. At times, the girlfriend of D.L.'s father and D.L.'s paternal grandmother have participated in the visits. The visits by all three adults have always been appropriate. Finally, the court noted that D.L. is attached to her foster family; however, the foster family is not interested in adopting D.L. but will keep her as long as necessary.

{¶52} Competent credible evidence supports the foregoing findings. We note that

the record also shows that while Mother remained at Level 1 in her visits with the children (supervision at all times), D.L.'s father's visits with the children eventually went to Level 3 (supervision every 30 minutes). A former case aid and the parties' current caseworker both testified that D.L.'s father's visits could increase to Level 4 (no supervision). The caseworker also testified that D.L.'s father has taken the children on supervised errands without any problem and that she would be agreeable to unsupervised visitations at his home. Once D.L.'s father started visiting D.L. without Mother, his visits became more consistent. The record shows that D.L.'s father visits D.L. and J.P. together and treats them equally. D.L. is bonded to her father's girlfriend.

{¶53} D.L.'s father testified he was out of town with his father when D.L. was removed from Mother's home. As noted earlier, the allegations in the complaint filed by the Agency were against Mother, and not against D.L.'s father. The child's father testified he tried to get D.L. as soon as he was back in town but was denied by the Agency. He also testified he lived with Mother and D.L. for a year and one-half. When Mother went to live in New York for about ten months, D.L.'s father did not see his daughter; however, he remained in contact with her by talking to her on the phone every other day. Once Mother returned to Ohio, D.L.'s father regularly saw D.L. He further testified he loves D.L. very much and the two are bonded.

{¶54} The foster parents testified they were considering retiring from foster care in light of their age (the foster father is 70 years old).

{¶55} R.C. 2151.414(D)(1)(b) requires a juvenile court to consider the wishes of the child as expressed directly by the child or through the child's GAL. In addressing this factor, the juvenile court stated it had not interviewed D.L. The court then noted the GAL's recommendation that "the motion for permanent custody be overruled and the child

continue to be placed in the temporary custody of the agency with Father having unsupervised in-home visits pending further engagement of Father in services." In contrast to the court's cursory consideration of R.C. 2151.414(D)(1)(b), however, the record shows that D.L. deeply wants to live with her father, as testified to by her psychologist and as expressed by the GAL. Despite D.L.'s clear wishes, the juvenile court never addressed them. See *In re D.H.*, Marion App. No. 9-06-57, 2007-Ohio-1762 (reversing a permanent custody award to a children services agency in part because of the juvenile court's failure to address the child's wishes).

{¶56} With respect to R.C. 2151.414(D)(1)(c), the juvenile court found, and it is not disputed, that when the Agency moved for permanent custody of D.L. on October 15, 2009, D.L. had been in the temporary custody of the Agency for more than 12 months of a consecutive 22-month period.

{¶57} R.C. 2151.414(D)(1)(d) addresses a 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 a children services agency. In addressing this factor, the juvenile court noted that after D.L.'s father was added to the case plan in August 2009 at his request, he was required to obtain stable housing and income and complete a substance abuse assessment and follow all recommendations.

{¶58} With regard to housing and employment, the juvenile court noted that D.L.'s father currently lives in his mother's house with his mother and his girlfriend of three years. The house is converted so that the paternal grandmother lives downstairs and D.L.'s father and his girlfriend live upstairs, sharing the kitchen and the bathroom. The juvenile court noted that D.L.'s father does not see the need to obtain his own home, in part because his mother needs assistance. A home visit by the Agency in late February

2010 found the home to be appropriate physically. The juvenile court also noted that D.L.'s father is not employed regularly, earns money from "odd jobs," and has not had a regular job since the summer of 2009; his girlfriend is the main provider.

{¶59} With regard to substance abuse, the juvenile court noted that D.L.'s father uses marijuana, believes marijuana use is acceptable "on your own," and drinks occasionally. Throughout the proceedings, the Agency was concerned by D.L.'s father's marijuana use, his dirty urine screens (between June 2009 and January 2010), his failure to participate in a substance abuse assessment, and his criminal record. The juvenile court noted that despite three referrals from the Agency for a substance abuse assessment (in September 2009 and February and March 2010), D.L.'s father had not participated in the assessment as of the last permanent custody hearing in May 2010.

{¶60} The foregoing findings are supported by competent credible evidence. Nonetheless, after a thorough review of the entire record, we do not agree with the juvenile court that the record supports a finding by clear and convincing evidence that D.L.'s father could not provide a legally secure permanent for D.L. in his home, and thus, that permanent custody of D.L. to the Agency is in the best interest of the child.

{¶61} At the outset, we note that as of the date of the last permanent custody hearing, no one had expressed an interest in adopting D.L. Because the foster family is not interested in adopting D.L., granting permanent custody to the Agency will result in cutting D.L.'s ties to her father and eventually her ties to the foster family as well. See *In re J.W.*, 171 Ohio App.3d 248, 2007-Ohio-2007(reversing juvenile court's finding that termination of father's parental rights was in the best interest of the child).

{¶62} With regard to housing, D.L.'s father testified he hoped to finish dividing his mother's house into two apartments once he had the means to build a new bathroom.



The current caseworker visited the home in February 2010 and found it to be "very appropriate."

{¶63} With regard to employment, D.L.'s father testified he has worked in construction and roofing since he was a teenager. He had been working for a painting company for eight months when he was involved in a car accident in the summer of 2008. As a result of the accident, he suffered injuries in his left shoulder which inhibit him from raising his arm above his head for extended periods of time. He will require surgery but currently has no insurance. He performs any "odd jobs" (construction, painting, drywall) he can with his injury but there are times when he cannot physically raise his left arm. He testified he intends to meet D.L.'s needs any way he can. His girlfriend works full time for a fast food restaurant and was slated to be promoted to a managerial position.

{¶64} With regard to substance abuse, the record shows that D.L.'s father was convicted of drug abuse in October 2006 and January 2008, before D.L.'s removal from Mother's home in June 2008. Throughout the proceedings, D.L.'s father tested positive for marijuana six times, three of them after he was added to the case plan in August 2009.

{¶65} D.L.'s father testified he declined the substance abuse assessment in 2008 following the removal of the children from Mother's home, and again in early 2009 because he wanted to give Mother a chance to reunify with the children. Once he realized it would not happen, he stepped forward and asked to participate in the case plan services. He was added to the case plan in August 2009 which required him to complete a substance abuse assessment.

{¶66} On September 25, 2009, the Agency mailed him a referral for a substance abuse assessment. This was less than a month before the Agency moved for permanent custody. The assessment was never returned. During her home visit at his house on

February 26, 2010, the caseworker talked to D.L.'s father about the assessment. She did not give him a referral that day but later, on March 1, 2010. The caseworker testified D.L.'s father filled out the referral and returned it that day. As of May 2010, D.L.'s father had not participated in the assessment.

{¶67} D.L.'s father testified he drinks a beer only occasionally and smokes marijuana weekly or bi-weekly. He testified that marijuana use, if done at home and "without important things to do or other responsibilities," is not a problem. He also testified he has quit marijuana for jobs and that responsibilities "overrule" marijuana use. He further testified he would give up anything, including marijuana, to get his daughter.

{¶68} We find no clear evidence in the record that marijuana use affected D.L.'s father's ability to provide a legally secure home for D.L. A former case aid who supervised D.L.'s visits with her father testified D.L.'s father never appeared under the influence of alcohol or drug during his visits. D.L.'s father testified that while he occasionally and recreationally smokes marijuana, responsibilities take precedence. The current caseworker testified she would be agreeable to unsupervised visitations at D.L.'s father's home.

{¶69} In her post-hearings report, the GAL recommended that the motion for permanent custody of D.L. be overruled. The GAL further recommended that in order to explore D.L.'s father's home as a possible placement option, D.L.'s father "undergo a \*\*\* drug and alcohol assessment and follow those recommendations. Should [he] test negative for all illegal substances in two random drug screens, visits between [D.L.] and her father should occur in his home unsupervised so long as either [he] or his significant other are present at all times." In granting permanent custody of D.L. to the Agency, the juvenile court never addressed the foregoing recommendations. "[W]hile the weight to be

given to a guardian ad litem report is always within the prerogative of the trial court, when the trial court renders a decision which goes against the specific recommendation of the guardian ad litem, the trial court must at least address the reasons for doing so." *In re D.H.*, 2007-Ohio-1762 at ¶22 (reversing a permanent custody award to a children services agency in part because of the juvenile court's failure to give its reasons for going against the GAL's recommendations).

{¶70} We find that the record fails to show that D.L.'s father was unable to provide D.L. with a legally secure placement in his home. Based on our above analysis, we further find the juvenile court's decision that there is clear and convincing evidence in the record that permanent custody of D.L. is in the child's best interest to be in error. See *In re Knuckles*, 2003-Ohio-4418. The juvenile court's decision is not supported by the record. The evidence in the record does not meet the "clear and convincing" standard outlined in *Santosky*, 455 U.S. at 753.

{¶71} Accordingly, we reverse the juvenile court's decision terminating the parental rights of D.L.'s father and granting permanent custody of D.L. to the Agency. The children's attorney and GAL's assignment of error is sustained in part.

{¶72} Judgment affirmed in part, reversed in part and remanded for further proceedings.

POWELL, P.J., and RINGLAND, J., concur.