

[Cite as *In re A.A.*, 2015-Ohio-1962.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN THE MATTER OF: :

A.A. and N.A., : CASE NO. 14CA38
14CA39
: 14CA40

Adjudicated Dependent :
Children. : DECISION AND JUDGMENT ENTRY

:
:

APPEARANCES:

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-28-15
ABELE, J.

{¶ 1} This is a consolidated appeal from an Athens County Common Pleas Court, Juvenile Division, judgment that awarded Athens County Children Services (ACCS) permanent custody of A.A. and N.A.

Appellant, A.D. (the child's biological mother), raises the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

“ATHENS COUNTY CHILDREN SERVICES FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MOTHER FAILED TO SUBSTANTIALLY REMEDY THE REASON THE CHILDREN WERE PLACED IN THE CUSTODY OF ATHENS COUNTY CHILDREN SERVICES AND THAT HER CHILDREN COULD NOT BE PLACED WITH HER IN A REASONABLE AMOUNT OF TIME.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT'S FINDING THAT IT IS IN THE CHILDREN'S BEST INTEREST THAT HER PARENTAL RIGHTS BE TERMINATED AND THAT ATHENS COUNTY CHILDREN SERVICES RECEIVE PERMANENT CUSTODY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

Appellant, M.A. (the children's biological father), raises the following assignment of error:

“THE TRIAL COURT DID NOT ADEQUATELY CONSIDER ALL RELEVANT FACTORS IN DETERMINING THE CHILDREN'S BEST INTERESTS. FATHER'S MOTION FOR LEGAL CUSTODY PRESENTED A VIABLE ALTERNATIVE TO TERMINATION OF PARENTAL RIGHTS.”

{¶ 2} On February 25, 2013, appellee requested emergency custody of three-year-old A.A. and two-year-old N.A. Appellee alleged that on February 22, 2013, appellee received a report that the mother hit and cursed at her children while in a public location. Athens City Police officers also were notified and responded. Numerous witnesses informed the officers that

the mother cursed at her children and threatened to “beat the shit out of [them],” if they did not stop crying. Witnesses also stated that the mother picked the children up off the floor by grabbing the front of their coats. Witnesses further observed the mother throw A.A. into a chair, smack A.A. in the face, and smack N.A. in the leg. Law enforcement officers arrested the mother and she was charged with felony child endangerment. The court subsequently granted appellee emergency custody of the two children. Also on February 25, 2013, appellee filed an abuse, neglect, and dependency complaint concerning A.A. and N.A. Appellee requested temporary custody of the children.

{¶ 3} Appellee later developed a case plan that required, among other things, the mother to (1) provide a safe and stable home free of domestic violence and physical punishment, (2) undergo a mental health assessment and to follow treatment recommendations, (3) work with a parent mentor and to follow recommendations, and (4) work with Help Me Grow to ensure that the children meet development milestones. The case plan also required the father to establish a relationship with the children, to consistently attend visitation, and to maintain a safe and stable home. The case plan also addressed concerns regarding the mother’s husband, H.D. The case plan noted both children appeared to be afraid of H.D. The case plan thus required H.D. to develop appropriate parenting skills and to provide a safe and stable home free of domestic violence.

{¶ 4} On April 9, 2013, the trial court adjudicated the children dependent and placed the children in ACCS’s temporary custody.

{¶ 5} On January 30, 2014, appellee filed a semi-annual review. In it, appellee asserted that the children had reported to the foster mother that H.D. is “mean” and is “mean” to their

mother. Appellee also noted that the mother reported domestic violence between herself and H.D. Appellee stated that the father visits with the children once per month and that the visits go well. Appellee further reported that the father does not have independent housing and continues to live with his grandparents who do not want the children to live in their home.

{¶ 6} Appellee advised that the mother works with a parent mentor, but stated that the mother fails to implement the skills taught without prompting. Appellee summarized the case progress as follows:

“[The mother] continues to struggle with her mental health and ability to care for two small children. She has a stable home but there are concerns about the safety of the home based on [the mother]’s past disclosure of domestic violence and the children’s fear of their step father. [The mother] has no family in the area to help her with the children or her own mental health. She continues to attend counseling but has a difficult time implementing the skills she learns in counseling to real life situations. [A.A.] also attends counseling at Hopewell Health Center. [The children] are attending school. They are both doing great in regards to socialization with other children and verbal ability.”

{¶ 7} On May 1, 2014, appellee filed a motion to modify the disposition to permanent custody. Appellee alleged that the children have been in temporary custody for twelve of the past twenty-two months, and that the children cannot, or should not, be returned to either parent within a reasonable time.

{¶ 8} On May 5, 2014, the father filed a request for legal custody.

{¶ 9} On July 29, 2014 and continuing on August 22, 2014, the trial court held a hearing to consider appellee’s permanent custody motion. The July 29, 2014 hearing was unable to be

transcribed, but the parties submitted the following witness summaries in App.R. 9(C) statements.¹

{¶ 10} Jordan Vincent, a counselor at a domestic violence shelter (My Sister's Place), testified that the mother stayed at the shelter three times while the case was pending. Vincent also stated that the mother did not attend all required counseling while staying at the shelter, and that she did not engage in services when living outside the shelter.

{¶ 11} The children's foster mother testified that the children have been in her care since February 2013. She stated that when the children first arrived in her home, neither would talk and that they were afraid of everyone. The foster mother further explained that the children initially had trouble sleeping through the night, had temper tantrums, and refused to eat food other than chicken nuggets, hot dogs and junk food. The foster mother testified that the foregoing issues have been resolved since the children have been in her care.

{¶ 12} The foster mother stated that the children did not want to visit with their mother if their step-father was present. She explained that the children were generally upset after visitations, but that their reactions were worse after visitations that included their step-father. The foster mother testified that after the children visited with the mother and their step-father, A.A. had "toileting accidents," both children had disrupted sleep, and both would wake up crying. She further stated that the children's behaviors improved once H.D. stopped attending visitations.

¹ The trial court found that all of the parties' summaries accurately reflect the testimony at the July 29, 2014 hearing.

{¶ 13} The foster mother stated that the children did not talk about, or ask about, their biological father, M.A. She also testified that A.A. indicated that he wanted to live with his mother, while N.A. stated that she wanted to stay with the foster mother.

{¶ 14} The children's biological mother testified that even though H.D. has two prior domestic violence convictions—one involving his own child—she is not concerned about her children's safety or her own. She denied accusations that H.D. hit her or forced her to engage in sexual intercourse. The mother admitted, however, that things got “a little bit physical” with him. The mother also testified that she left the home that she shared with H.D. three times while case was pending and stayed at a domestic violence shelter. At the shelter, appellant received exit strategy and safety planning counseling, but did not develop any strategies or plans. Appellant related her belief that the ACCS caseworker pushed her into the shelter because the caseworker did not like H.D. and that the caseworker blew the incidents out of proportion.

{¶ 15} The mother stated that her visits with the children went well, even though the children frequently had temper tantrums, ran away from her, and generally did not behave. The mother acknowledged that the children claimed to be frightened of H.D. and exhibited regressive behaviors after visits when H.D. was present. The mother insisted, however, that the children are not afraid of H.D. and that ACCS and the foster parents created the fear.

{¶ 16} The mother further stated that in November 2011, she left the children's biological father and initially did not tell him where she and the children were living. The mother eventually allowed the father to have telephone and Skype conversations with the children and told him where they lived. However, the father did not visit the children. Rather, he started to visit the children after ACCS became involved. The mother testified that she

started to attend counseling, but did not continue. She has been diagnosed with Borderline Personality Disorder, Anxiety, Depression, and PTSD. The mother admitted that she does not have independent income, independent housing, employment, or a driver's license.

{¶ 17} ACCS Family Support Caseworker and Parent Mentor Jennifer Pinney testified that the mother's visitations generally were chaotic and did not go well. Pinney explained that the children had severe melt downs and did not behave. Pinney stated that the mother had difficulty coping with the children's behaviors and seemed unable to re-direct and appropriately intervene. She also testified that the mother became agitated, had difficulty remaining calm, and followed prompts, but was unable to implement the techniques. Pinney discussed A.A.'s development assessment with the mother and during visitations suggested implementations, but the mother failed to follow through with any of the recommendations.

{¶ 18} Pinney testified that the father visited with the children once per month, but did not take advantage of other visitation opportunities. Pinney stated that the father's visits were fine, but seemed more like a "play date" than parenting time.

{¶ 19} ACCS Family Support Caseworker Mandi Knowlton stated that the children often were totally out of control, but did occasionally behave appropriately. Knowlton testified that the mother could not control the children. She, like Pinney, stated that the children's visits with their father were more like "play dates" than parenting time.

{¶ 20} ACCS Caseworker Tara Carsey testified that the father visited with the children once a month and attended one appointment with the children's counselors in Athens, which was scheduled to occur the same day as the permanent custody hearing. Carsey stated that she offered and encouraged additional visitation, but the father stated that he would not attend

additional visits. Carsey further explained that she offered to work around the father's work schedule, but he was unable or unwilling to do so. Carsey referred the father to Cuyahoga County Children Services, but stated that he refused to work with a caseworker because "he wouldn't work with anyone with that last name."

{¶ 21} Carsey testified that the father (1) had not successfully completed his case plan, (2) did not re-establish a relationship with the children, (3) did not visit the children during the fifteen months before ACCS became involved and after ACCS's involvement; rather, the father only visited the children once per month. Carsey recognized that the round-trip travel time between the father's home and Athens is eight to nine hours and that the father had difficulty taking time off work to visit more than one day per month. Carsey stated that ACCS considered arranging visits in a more convenient location, but was unable to do so.

{¶ 22} Carsey further stated that the father's lack of housing and lack of relationship with the children are impediments to placing the children in his custody, but his lack of housing is the biggest impediment. She testified that the father lacked knowledge of the children's special needs, and did not attend their therapy, counseling, or medical appointments. Carsey stated that the father had scheduled to attend one of the children's appointments, but not until the same date as the permanent custody hearing.

{¶ 23} Carsey also testified that the mother (1) did not successfully complete her case plan, (2) did not have independent means to support the children, (3) did not have safe and stable housing, and (4) did not develop adequate parenting skills to safely care for the children.

{¶ 24} The father testified that he did not see the children for approximately fifteen months after the mother left him. ACCS's counsel asked him about the counseling session that

he attended with the children on August 22, 2014 (the day of the permanent custody hearing), and he stated that it was the first he attended, even though he was aware of other sessions and even though appellee had asked him to attend other sessions.

{¶ 25} The father testified that he lives with his grandparents, but his grandparents have consistently informed him that the children cannot live there. The father stated that he recently contacted subsidized housing authorities in his area and had his first appointment scheduled the next day. He explained that he is on a waiting list and expects to receive housing in two to three months.

{¶ 26} On September 17, 2014, the trial court awarded appellee permanent custody of the children. The trial court found that the children had been in appellee's custody for twelve or more months of a consecutive twenty-two month period pursuant to R.C. 2151.414(B)(1)(d), and that awarding appellee permanent custody is in the children's best interests.

{¶ 27} The trial court also considered the children's interactions and interrelationships. The court found that the children's relationship and interaction with their mother "is somewhat difficult to assess due to their ages and developmental delays, but there is clear and convincing evidence supporting the finding that mother's mental illness and related personality disorders prohibit her from properly raising her children."

{¶ 28} The court further noted that during the fifteen months before ACCS requested permanent custody, the father had not visited the children in person, but had communicated with them via Skype or telephone. Once appellee became involved, the father started to visit the children in person, but only visited once per month. The court found validity to the father's concerns regarding the time and expense associated with traveling from the Cleveland to visit the

children in Athens, but nevertheless concluded that the father's fifteen-month absence from the children's "young lives is troubling" and his efforts since appellee's involvement have "been far too insignificant * * * toward rebuilding whatever bond may have existed before the parents separated in 2011." The court further observed that the caseworkers who observed visits between the father and the children described them as "play dates," rather than parent-child interaction.

{¶ 29} The trial court found that "[t]he foster care provided to date has been extremely effective and nurturing, and the children demonstrate significant developmental strides."

{¶ 30} The court also considered the children's wishes and determined that "they are too young to clearly express any meaningful wishes regarding their custody." The court noted that the children do, however, "demonstrate affection toward each biological parent."

{¶ 31} The trial court examined the children's custodial history and found that from birth through November 2011, the children lived with the mother and the father. In November 2011, the mother took the children and moved away from the father. From November 2011 until February 2013, the children lived with their mother in various locations. Appellee received emergency custody of the children on February 22, 2013, and the children have remained in appellee's temporary custody since that time.

{¶ 32} With respect to the children's need for a legally secure permanent placement, the trial court explained:

"These children need and deserve a legally secure placement which can only be achieved with a grant of permanent custody to the agency. The children have developmental issues, and in the case of A.A., behavioral difficulties. All evidence suggests that special time and attention, including that of trained professionals will be necessary for their proper upbringing. Mother's significant

(and only sporadically addressed) mental health issues stand between her and any realistic chance of parenting these children. Even with the intervention of numerous social services, mother would not utilize the information and skills provided to her.

Biological father's initial appearance in this case seemed to present a possible alternative to avoid an ultimate result of permanent custody. He is and has continuously been employed and expresses a love and desire for his children. However, the fifteen month period without even visiting his children between the parents' separation is quite telling. Likewise, his inability to now see the children any more than two hours a month speaks volumes as to the actual time he would have to parent them even if granted custody. To his credit he appears to be a reliable worker making his own way in life. His multiple jobs and varying shifts also add to the unrealisticness [sic] of his plan for custody. He lives with his own grandparents and the children would not be able to live there. More than a year has passed with this case plan and nothing has changed to make his request for custody feasible."

The court additionally discussed the mother's failure to address the concerns that led to the children's removal. The court explained:

"Mother's mental health issues and general parenting shortcomings caused this case to be opened. Since then she has not stabilized enough for even one overnight visit. She has no income * * * and no driver's license. Three separate times during this case she has fled her living arrangements and gone to domestic violence shelters for time periods totaling nearly eight months. She has again returned to her husband's home and clearly minimizes her domestic violence experiences. There have been at least two suicide attempts by mother who self reports diagnoses of Borderline Personality Disorder, Depression, Anxiety and Post Traumatic Stress Disorder with a history of psychotropic medication."

The court thus determined that awarding appellee permanent custody of the two children serves their best interests. The court thus granted appellee permanent custody and terminated the mother's and father's parental rights. These appeals followed.

{¶ 33} The mother and the father both challenge the trial court’s decision to award appellee permanent custody of the two children. Because the same standard of review applies to all of their assignments of error, we begin by defining that standard.

A

STANDARD OF REVIEW

{¶ 34} A reviewing court generally will not disturb a trial court’s permanent custody decision unless the decision is against the manifest weight of the evidence. E.g., In re B.E., 4th Dist. Highland No. 13CA26, 2014–Ohio–3178, ¶27; In re R.S., 4th Dist. Highland No. 13CA22, 2013–Ohio–5569, ¶29.

“‘Weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.”’”

Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶12, quoting State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting Black’s Law Dictionary 1594 (6th ed. 1990).

{¶ 35} When an appellate court reviews whether a trial court’s permanent custody decision is against the manifest weight of the evidence, the court “““weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.”’” Eastley at ¶20, quoting Tewarson v. Simon, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001),

quoting Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Accord In re Pittman, 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶23–24.

{¶ 36} The question that we must resolve when reviewing a permanent custody decision under the manifest weight of the evidence standard is “whether the juvenile court’s findings * * * were supported by clear and convincing evidence.” In re K.H., 119 Ohio St.3d 538, 2008–Ohio–4825, 895 N.E.2d 809, ¶43. “Clear and convincing evidence” is:

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

In re Estate of Haynes, 25 Ohio St.3d 101, 103–04, 495 N.E.2d 23 (1986). In determining whether a trial court based its decision upon clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” State v. Schiebel, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). Accord In re Holcomb, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954) (“Once the clear and convincing standard has been met to the satisfaction of the [trial] court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof.”). Accord In re Adoption of Lay, 25 Ohio St.3d 41, 42–43, 495 N.E.2d 9 (1986). Cf. In re Adoption of Masa, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986) (stating that whether a fact has been “proven by clear and convincing evidence in a particular case is a determination for the

[trial] court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence”). Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court’s decision is not against the manifest weight of the evidence. In re R.M., 4th Dist. Athens Nos. 12CA43 and 12CA44, 2013–Ohio–3588, ¶62; In re R.L., 2nd Dist. Greene Nos. 2012CA32 and 2012CA33, 2012–Ohio–6049, ¶17, quoting In re A.U., 2nd Dist. Montgomery No. 22287, 2008–Ohio–187, ¶9 (“A reviewing court will not overturn a court’s grant of permanent custody to the state as being contrary to the manifest weight of the evidence ‘if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements * * * have been established.’”). Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, “‘clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.’” Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court should find a trial court’s permanent custody decision against the manifest weight of the evidence only in the “‘exceptional case in which the evidence weighs heavily against the [decision].’” Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio App.3d at 175; accord State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 37} Furthermore, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. Eastley at ¶21. As the Eastley court explained:

“‘[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *

If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.’”

Id., quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984),

fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶ 38} Moreover, as this court explained in State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31:

“It is the trier of fact’s role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.”

Accord Bugg v. Fancher, 4th Dist. Highland No. 06CA12, 2007–Ohio–2019, ¶9. Deferring to the trial court on matters of credibility is “crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does not translate to the record well (Emphasis sic).” Davis v. Flickinger, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997).

Accord In re Christian, 4th Dist. Athens No. 04CA10, 2004–Ohio–3146, ¶7. As the Ohio Supreme Court long-ago explained:

“In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through

independent investigation can not be conveyed to a reviewing court by printed record.”

Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). Furthermore, unlike an ordinary civil proceeding in which a jury has no contact with the parties before a trial, in a permanent custody case a trial court judge may have significant contact with the parties before a permanent custody motion is even filed. In such a situation, it is not unreasonable to presume that the trial court judge had far more opportunities to evaluate the credibility, demeanor, attitude, etc., of the parties than this court ever could from a mere reading of the permanent custody hearing transcript.

B

PERMANENT CUSTODY PRINCIPLES

{¶ 39} A parent has a “fundamental liberty interest” in the care, custody, and management of his or her child and an “essential” and “basic civil right” to raise his or her children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Murray, 52 Ohio St.3d 155, 156, 556 N.E.2d 1169 (1990); accord In re D.A., 113 Ohio St.3d 88, 2007–Ohio–1105, 862 N.E.2d 829. A parent’s rights, however, are not absolute. D.A. at ¶11. Rather, “it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the pole star or controlling principle to be observed.” In re Cunningham, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting In re R.J.C., 300 So.2d 54, 58 (Fla.App.1974). Thus, the state may terminate parental rights when a child’s best interest demands such termination. D.A. at ¶11.

{¶ 40} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child's best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. R.C. 2151.414(A)(1). Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying principles of R.C. Chapter 2151:

(A) To provide for the care, protection, and mental and physical development of children * * *;
* * *

(B) To achieve the foregoing purpose[], whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety.

C

PERMANENT CUSTODY FRAMEWORK

{¶ 41} R.C. 2151.414(B)(1)² permits a trial court to grant permanent custody of a child to a children services agency if the court determines, by clear and convincing evidence, that the child's best interest would be served by the award of permanent custody and that:

(a) The child is not abandoned or orphaned or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

² R.C. 2151.414(B)(1) was recently amended to include division (e), which states: "The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state."

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶ 42} Thus, before a trial court may award a children services agency permanent custody, it must find (1) that one of the circumstances described in R.C. 2151.414(B)(1) applies, and (2) that awarding the children services agency permanent custody would further the child's best interests.

II

MOTHER'S APPEAL

A

R.C. 2151.414(B)(1)

{¶ 43} In her first assignment of error, the mother contends that the trial court's decision to award appellee permanent custody is against the manifest weight of the evidence. More specifically, the mother argues that the evidence does not establish that she failed to substantially remedy the conditions that caused the children's removal and that her children could not be placed with her within a reasonable time.

{¶ 44} R.C. 2151.414(B)(1)(a) permits a trial court to award a children services agency permanent custody if the court finds that the child cannot or should not be returned to either parent within a reasonable time and if permanent custody serves the child's best interest. R.C. 2151.414(E) states that if the court finds the existence of any of the specified factors, then it shall

enter a finding that the child cannot or should not be returned to either parent within a reasonable time. As relevant in the case at bar, R.C. 2151.414(E)(1) states:

Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

In addition to R.C. 2151.414(B)(1)(a), R.C. 2151.414(B)(1)(d) allows a court to award a children services agency permanent custody of a child who has been in its or another children services agency's temporary custody for twelve or more months of a consecutive twenty-two month period.

{¶ 45} In the case at bar, the trial court specifically found that R.C. 2151.414(B)(1)(d) applies. We have recognized multiple times that R.C. 2151.414(B)(1) requires the trial court to find the existence of only one of the enumerated factors. B.E. at ¶37; In re J.P.B., 4th Dist. Washington No. 12CA34, 2013–Ohio–787, ¶33, citing In re W.W., 1st Dist. Hamilton Nos. C–110363 and C–110402, 2011–Ohio–4912, ¶54 (observing that if one of R.C. 2151.414(B)(1) factors exists, court need not find that other (B)(1) factors apply). Consequently, when considering a R.C. 2151.414(B)(1)(d) permanent custody motion, a trial need not also find that R.C. 2151.414(B)(1)(a) or any of the other enumerated factors apply. In re C.W., 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1176, ¶21.

{¶ 46} In the case sub judice, the mother did not challenge the trial court’s R.C. 2151.414(B)(1)(d) finding. Because the court’s R.C. 2151.414(B)(1)(d) finding demonstrates the existence of one of the R.C. 2151.414(B)(1) findings, any alleged error associated with the court’s alternate R.C. 2151.414(B)(1)(a) finding did not prejudice appellant’s substantial rights, and we must disregard the alleged error. B.E. at ¶38, citing Civ.R. 61 (stating that “[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties”); In re A.H., 9th Dist. Lorain No. 13CA010454, 2014–Ohio–552, ¶9 (“Because the “12 of 22” finding was sufficient to support the first prong of the permanent custody test, any error in the trial court’s alternate finding under R.C. 2151.414(E) would not constitute reversible error because it did not result in any prejudice to Father.”). E.g., In re J.V–M.P., 4th Dist. Washington No. 13CA37, 2014–Ohio–486, ¶22; In re H.D., 10th Dist. Franklin No. 13AP–707, 2014–Ohio–228, ¶15 (declining to consider argument relating to R.C. 2151.414(B)(1)(a) when R.C. 2151.414(B)(1)(d) clearly applied); In re A.B., 8th Dist. Cuyahoga No. 99836, 2013–Ohio–3818, ¶8 (“Because R.C. 2151.414(B)(1)(d) was plainly satisfied, R.C. 2151.414(B)(1)(a) was inapplicable and the trial court’s findings under that provision were unnecessary.”); In re Keckler, 3rd Dist. Logan No. 8–08–08, 2008–Ohio–4642, ¶8 (stating that once a trial court finds that R.C. 2151.414(B)(1)(d) applies, “any finding under R.C.2151.414(B)(1)(a) is unnecessary and, if against the manifest weight of the evidence, is harmless error”). See R.S. at ¶34 (recognizing that when trial court found R.C. 2151.414(B)(1)(d) applied, any error associated with its R.C. 2151.414(B)(1)(b) abandonment finding would not constitute reversible error). We therefore need not consider appellant’s challenge to the court’s finding that the children cannot or should not be returned to her within a

reasonable time due to her failure to substantially remedy the conditions that caused the children's removal.

{¶ 47} Accordingly, we hereby overrule the mother's first assignment of error.

B

BEST INTEREST

{¶ 48} In her second assignment of error, the mother asserts that the trial court's finding that permanent custody serves the children's best interests is against the manifest weight of the evidence.

{¶ 49} R.C. 2151.414(D) requires a trial court to consider specific factors to determine whether a child's best interests will be served by granting a children services agency permanent custody. The factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (4) 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; and (5) whether any factors listed under R.C. 2151.414(E)(7) to (11) apply. We note that "the best interest determination focuses on the child, not the parent" and that "R.C. 2151.414(C) expressly prohibits the court from considering the effect the granting of permanent custody to a children services agency would have upon the parents." In re D.A., 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶51.

{¶ 50} In the case at bar, we believe that clear and convincing evidence supports the trial court's finding that permanent custody serves the children's best interests. With respect to the children's interactions and interrelationships, as the court noted, the children lacked a significant relationship with their father due to his absence from their lives during the fifteen months that preceded the permanent custody motion. The father did re-enter the children's lives once appellee became involved, but did not visit the children more than once per month. Thus, the children had little interaction with their father and did not develop a significant relationship with him. Even though the father's visits went well, the caseworkers found that they were more similar to "play dates" than to a parent-child interaction.

{¶ 51} The children visited with the mother, but she experienced difficulty controlling the children and she did not follow recommendations. Moreover, the children were afraid to visit mother if their step-father was present. Obviously, the children did not have a positive relationship with the step-father. The children did, however, adjust well to the foster home.

{¶ 52} Regarding the children's wishes, the trial court found that the children are too young to express their own wishes. The court noted, however, that the children appear to enjoy their mother's company. Although the court did not indicate whether it considered the children's wishes as expressed through their guardian ad litem, we observe that the guardian ad litem recommended that the court award appellee permanent custody.

{¶ 53} With respect to the children's custodial history, the evidence shows that they lived with both their mother and father from birth until November 2011. Thus, A.A. lived with both his mother and father for approximately two and one-half years, and N.A. lived with both her mother and father for approximately one year. From November 2011 through February 2013,

the children lived with their mother at various locations. From February 2013 through the permanent custody hearing, the children were in appellee's temporary custody and had not spent any time in their mother's or father's home.

{¶ 54} Regarding the children's need for a legally secure permanent placement and whether that type of placement can be achieved without granting appellee permanent custody, unfortunately the evidence shows that the mother is unable, or unwilling, to provide the children with a legally secure permanent placement. She (1) lives with a man whom her children fear, (2) minimizes her husband's prior domestic violence convictions, (3) denies that she has experienced any domestic violence with him, (4) has mental health issues and failed to adequately address them, and (5) does not employ appropriate parenting techniques. The evidence reveals that the mother's actions have demonstrated that she is unable or unwilling to provide the children with a safe home.

{¶ 55} The children's father also is unable to provide the children with a legally secure permanent placement. At the time of the permanent custody hearing, he lived with his grandparents. However, the children cannot live in his grandparents' home. The father did not have other housing available at the time of the permanent custody hearing and, thus, lacked a legally secure permanent placement for the children.

{¶ 56} Consequently, clear and convincing evidence supports the trial court's finding that the children need a legally secure permanent placement that cannot be achieved without granting appellee permanent custody.

{¶ 57} Based upon the foregoing circumstances, the trial court could have formed a firm belief that awarding appellee permanent custody would serve the children’s best interests. Thus, the court’s best interests finding is not against the manifest weight of the evidence.

{¶ 58} We observe that the mother’s second assignment of error focuses upon her situation. Nowhere in her assignment of error does she discuss the statutory best interest factors.

Instead, she discusses why she is the most suitable placement for the children. The mother argues that (1) her mental health issues do not prevent her from appropriately caring for the children, (2) the evidence fails to show that she did not protect her children, (3) she would be able to obtain appropriate treatment to address the children’s special needs, and (4) she has appropriate housing for the children and provides them with proper care. The best interest factors, however, focus upon the child, not upon the parent. D.A., *supra*, 2007–Ohio–1105, ¶11. (“Once the case reaches the disposition phase, the best interest of the child controls.”); In re N.B., 8th Dist. Cuyahoga No. 101390, 2015–Ohio–314, ¶59; *see In re W.C.J.*, 4th Dist. Washington No. 14CA3, 2014–Ohio–5841, ¶46 (4th Dist.), quoting In re Gomer, 3rd Dist. Wyandot Nos. 16–03–19, 16–03–20, and 16–03–21, 2004–Ohio–1723, ¶36 (noting that “because the trial court’s primary focus in a permanent custody proceeding is the child’s best interest, ‘it is entirely possible that a parent could complete all of his/her case plan goals and the trial court still appropriately terminate his/her parental rights’”). Moreover, this court has recognized:

“‘* * * [A] child should not have to endure the inevitable to its great detriment and harm in order to give the * * * [parent] an opportunity to prove her suitability. To anticipate the future, however, is at most, a difficult basis for a judicial determination. The child’s present condition and environment is the subject for decision not the expected or anticipated behavior of unsuitability or unfitness of the * * * [parent]. * * * The law does not require the court to experiment with the child’s welfare to see if he will suffer great detriment or harm.’”

W.C.J. at ¶48, quoting In re Bishop, 36 Ohio App.3d 123, 126, 521 N.E.2d 838 (5th Dist.1987), quoting In re East, 32 Ohio Misc. 65, 69, 288 N.E.2d 343, 346 (1972). Thus, the trial court had no obligation to experiment with the children's welfare.

{¶ 59} Accordingly, based upon the foregoing reasons, we hereby overrule the mother's second assignment of error.

III

THE FATHER'S APPEAL

{¶ 60} In his sole assignment of error, the father argues that the trial court failed to consider all relevant best interest factors. He further asserts that the court should have awarded him legal custody of the children and that placing the children with him is a "viable" option. Thus, father argues that clear and convincing evidence does not support the court's decision to award appellee permanent custody.

{¶ 61} Initially, we observe that "[i]f permanent custody is in the child's best interest, legal custody or placement with [a parent or other relative] necessarily is not." In re K.M., 9th Dist. Medina No. 14CA0025-M, 2014-Ohio-4268, ¶9. Furthermore,

"the fundamental or primary inquiry at the dispositional phase * * * is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit. The mere fact that a natural parent is fit, though it is certainly one factor that may enter into judicial consideration, does not automatically entitle the natural parent to custody of his child since the best interests and welfare of that child are of paramount importance. Parental interests must be subordinated to the child's interest in determining an appropriate disposition of any petition to terminate parental rights."

In re Cunningham, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034, 1038 (1979) (citations omitted).

{¶ 62} In the case sub judice, we discussed the trial court's best interest finding in our discussion of the mother's second assignment of error. That same analysis applies here. Because the evidence supports the trial court's best interest finding, it also necessarily supports the court's decision to overrule the father's motion for legal custody.

{¶ 63} We emphasize that even though we do not doubt the fact that the father loves the children and desires to have legal custody, his desires do not take precedence over the children's best interests. "[F]amily unity and 'blood relationship'" may be "important factors to consider, [but] neither is controlling." In re J.B., 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013-Ohio-1703, ¶31. "[N]eglected and dependent children are entitled to stable, secure, nurturing and permanent homes in the near term * * * and their best interest is the pivotal factor in permanency cases." In re T.S., 8th Dist. No. 92816, 2009-Ohio-5496, at ¶35. In the case at bar, the father had in excess of one year to establish a safe and stable home, but at the time of the permanent custody hearing he lived with his grandparents. The trial court is not required to wait an undetermined amount of time to see if the father obtained appropriate housing.

{¶ 64} Additionally, the father had over one year to establish a bond with the children. He visited with the children only once per month, however. Furthermore, ACCS Caseworker Carsey testified that she offered and encouraged additional visitation, but the father did not take advantage of other visitation opportunities. She offered to work around the father's schedule, but he was either unable or unwilling to do so.

{¶ 65} Thus, the evidence reveals that the father lacked both housing and an established bond with the children at the time of the permanent custody hearing, despite having over one year to fulfill both goals. The children need a legally secure, stable permanent placement and the

father did not have one available at the time of the hearing. Moreover, by failing to visit the children more frequently, the father failed to establish a bond with the children. By failing to take advantage of other visitation opportunities, the father demonstrated a lack of commitment to the children.

{¶ 66} Consequently, the trial court's decision to award appellee permanent custody is not against the manifest weight of the evidence.

{¶ 67} Accordingly, based upon the foregoing reasons, we hereby overrule the father's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

{¶ 68} I concur in rejecting the mother's appeal but dissent from the same result for the father. Given the difficult logistics faced by the father and his commendable work history, I believe he should have additional time to reestablish a more meaningful parent-child relationship with his children.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee shall recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, A.J.: Concurs in Judgment & Opinion

Harsha, J.: Dissents in part & Concurs in part with Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.