[Cite as *In re M.B.*, 2016-Ohio-793.]

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

IN THE MATTER OF	:	
	:	
M.B. AND A.B.,	:	Case No. 15CA19
	:	
ADJUDICATED DEPENDENT CHILDREN.	:	DECISION AND JUDGMENT ENTRY
	:	
	:	RELEASED 02/08/2016

APPEARANCES:

Lee D. Koogler, Hillsboro, Ohio, for Appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, and Molly Bolek, Highland County Assistant Prosecuting Attorney, Hillsboro, Ohio, for Appellee.

Hoover, J.

{¶1} Appellant D.B., natural father of M.B. and A.B., appeals the judgment of the Highland County Common Pleas Court. The trial court awarded appellee, Highland County Children Services (HCCS), permanent custody of nine-year-old M.B. and seven-year-old A.B. For the reasons that follow, we affirm the trial court's judgment.

I. Facts

{¶2} On September 30, 2013, HCCS filed an abuse, neglect, and dependency complaint concerning M.B. and A.B. The complaint alleged that (1) the children were living in a home that did not have water or electricity; (2) the children came to school hungry and dirty; and (3) the children did not regularly attend school. The complaint further alleged that on September 27, 2013, D.B. was arrested for contributing to the delinquency of a minor for failing to send the children to school. The complaint asserted

that when D.B. was arrested during the evening hours at a local fast-food restaurant, the children were still wearing their pajamas, were not wearing shoes, and were dirty. HCCS requested the court to grant it temporary custody of the children. The court subsequently granted HCCS emergency custody of the children.

{¶3} On October 25, 2013, HCCS filed a case plan aimed at reunification. The case plan required appellant (1) to provide a safe, stable home for the children; (2) "to appropriately deal with his behaviors and * * * be able to cope with the stress of being a single parent to children with some behavioral issues;" (3) to attend and complete a drug and alcohol assessment and follow any recommendations; (4) to abstain from drug and alcohol use; (5) to attend and complete a parenting class and apply learned skills; (6) to attend and complete a mental health assessment and follow recommendations; and (7) to attend and complete a full psychological evaluation.

{¶4} On December 2, 2013, the trial court adjudicated the children dependent and dismissed the abuse and neglect allegations. The trial court granted HCCS temporary custody of the children for six months.

{¶5} On February 24, 2014, HCCS filed a motion to modify the disposition to permanent custody. HCCS alleged that the mother abandoned the children and they could not be placed with either parent within a reasonable period of time or should not be placed with either parent. HCCS alleged that the mother had not had any contact with the children since September 27, 2013, refused to sign a case plan, and did not even contact HCCS until February 14, 2014. HCCS further asserted that D.B. had not initiated any of the case plan services. HCCS indicated that it did not believe that it would be able to place the children with either parent, if the court extended the temporary custody order.

{¶6} On April 9, 2014, HCCS filed a motion to withdraw permanent custody motion and a motion to extend temporary custody. The court subsequently extended the temporary custody order for an additional six months. On October 28, 2014, the court granted an additional six-month extension of its temporary custody order.

{¶7} On February 23, 2015, HCCS filed a motion to modify the disposition to permanent custody. HCCS alleged that the children had been in its custody for more than twelve months out of the past twenty-two and that the children were abandoned. HCCS further asserted that awarding it permanent custody would be in the children's best interests. HCCS argued that (1) D.B. had not completed all case plan goals; (2) D.B. lived in at least three different residences since the children's removal; (3) D.B. did not follow up with recommended mental health counseling; and (4) D.B. exercised only about one-half of his visitation opportunities. HCCS contended that the mother had not completed any of the case plan goals and had not visited the children since their removal.

{¶8} On April 8, 2015, HCCS filed an amended case plan that changed the permanency goal to adoption. The case plan noted that D.B. completed psychological and mental health assessments but stated that he needs to receive individual counseling. The case plan indicated that D.B. needed to display the following behaviors in order to reduce the risk to the children: (1) provide a safe, stable home for the children; (2) "appropriately deal with his behaviors"; and (3) cope with the stress of being a single parent to children with behavioral issues.

{¶9} On July 23, 2015, the court held a hearing to consider HCCS's permanent custody motion. HCCS caseworker Seth Queen testified that the case plan required appellant (1) to apply the parenting skills he learned in parenting classes, (2) to complete

a psychological evaluation and a mental health examination, (3) to maintain employment, and (4) and to maintain safe, stable housing. Queen stated that D.B. complied with some of the case plan goals: he completed parenting classes; he completed a psychological evaluation and a mental health examination; he lived in a stable residence; and he had been employed for at least six months. Queen explained that D.B. lived with his eighteen-year-old girlfriend and a married couple who had a prior children services history. Queen testified that although D.B. completed a psychological evaluation and a mental health assessment, he had not engaged in the recommended counseling services. Queen indicated that he spoke with D.B. about the recommended counseling and asked him to set up an appointment; however, D.B. did not do so.

{¶10} Queen testified that the children were doing well in their foster homes and received therapy due to "significant cognitive delays." Queen explained that the children initially were placed in the same foster home but "had to be separated due to sexually acting out with each other." Queen stated that A.B. is "very bonded" to his foster mother and "seems to be fitting in well at the home." Queen further testified that M.B. is "very bonded to both foster parents."

{¶11} HCCS Family Advocacy Center Coordinator Melissa Wheaton testified that D.B. attended thirty-four of the seventy-eight visits that appellee offered. Wheaton stated that although D.B. did not exercise all of his visitation, that D.B. and the children nevertheless shared a bond. Wheaton further explained that (1) the children were happy to see their father; (2) D.B. displayed affection; and (3) D.B. had nurturing interactions with the children. Wheaton also testified that the children have "a lot of specific special needs." Wheaton stated that D.B. denied that the children had problems and failed to

understand the children's needs. Lastly, Wheaton testified that the mother did not attend any visits.

{¶12} M.B.'s foster mother testified that M.B. has been in her home since February 9, 2015. The foster mother explained the following about M.B.: (1) M.B. is developmentally delayed; (2) M.B. has been diagnosed with ADHD and PTSD; (3) M.B. takes three medications per day; (4) M.B. is entering third grade but developmentally is at a kindergarten level; (5) M.B. has an Individualized Education Program and needs special services at school; (6) M.B. receives speech and occupational therapy; and (7) M.B. has "defiant disorder," meaning she can be violent and act out with aggression. The foster mother stated that since M.B. was placed in her home, M.B.'s behaviors have improved and she has "done really well with school." The foster mother further stated that M.B. participates in dance and swim classes. The foster mother described M.B. as "very caring and compassionate" and stated that M.B. gets along well with the other members of her household. The foster mother testified that she and her husband are interested in adopting M.B.

{¶13} A.B.'s foster mother testified that A.B. has lived in her home for almost two years. The foster mother stated that A.B. was diagnosed as "MR" and ADHD. She explained that although A.B. is seven years old, he acts like a three-year-old or four-year-old. The foster mother stated that A.B. shows aggressive behaviors at school, can display poor behavior at her home with the other children, has displayed inappropriate sexual behaviors, and requires constant supervision. She explained that A.B. receives treatment, counseling, and occupational and physical therapy to help address his issues. She believes that A.B.'s behavior has improved a little since he has been in her care. The foster

mother further stated that after A.B. visits his father, A.B. becomes "very aggressive." She testified that even though she and her husband will not adopt A.B., she will continue to care for him until he is adopted.

{¶14} D.B., who is thirty years of age, testified that he lives in a four-bedroom home with his eighteen-year-old girlfriend, Shane Vance, and Tammy Vance. Shane Vance and Tammy Vance are D.B.'s girlfriend's cousins. D.B. stated that he and his girlfriend have a newborn child together. D.B. explained that his previous job required him to travel out-of-state frequently and that he recently changed jobs so that he could work closer to home. D.B. also stated that he completed most of the case plan objectives. He admitted that he still has not completed the recommended counseling; however, he explained that his failure to do so was primarily due to his out-of-state travels. D.B. testified that he believes he could be completely compliant with the case plan within six months. He stated that his mother and girlfriend will help care for the children when he is at work.

{¶15} On July 27, 2015, the trial court terminated the mother's, but not D.B.'s, parental rights. The court found that the children have been in the custody of HCCS for twelve or more months of a consecutive twenty-two month period under R.C. 2151.414(B)(1)(d), and that the mother abandoned the children. The court noted that the mother chose not to have any contact with the children during the pendency of the case.

{¶16} In reviewing the best interest factors, the trial court found that both children have adapted to their foster homes and appear to interact appropriately with the foster family. The court further found that D.B. shares a bond with the children and interacts appropriately. The court observed that the guardian ad litem reported that both

children would like to live with their father; but, she also indicated that neither child has sufficient reasoning ability to make an informed decision. The court additionally found that the children have been in the temporary custody of HCCS since September 30, 2013. Further findings of the trial court include the following: (1) no suitable relatives exist for placement; (2) the mother has not engaged in any case plan services; and (3) the mother abandoned the children. The trial court thus found clear and convincing evidence to terminate the mother's parental rights.

{¶17} The trial court noted that D.B. had completed most of the case plan goals but had not engaged in the necessary mental health services. The court found that the children were happy to visit with their father; that D.B. was able to re-direct them as needed; and that both children are bonded to their father. The court noted that both children were in therapeutic foster homes and needed close supervision, due in part to their developmental disabilities. The court expressed concerns about whether D.B. would be able to meet all of the various needs of his children. However, the court decided terminating D.B.'s parental rights without affording him additional time to complete all of the case plan goals would not be in the children's best interests. The trial court thus dismissed HCCS's permanent custody motion and continued the children in its temporary custody until September 30, 2015.[1] The court specifically stated that it was granting D.B.

[1] We point out that although the trial court's July 27, 2015 judgment terminated the mother's parental rights, it did not grant HCCS permanent custody. In *In re Sims*, 7th Dist. Jefferson No. 02-JE-2, 2002-Ohio-3458, the court determined that the permanent custody statutes do not permit a juvenile court to terminate parental rights without also granting permanent custody to a children services agency or other individual. The court explained:

> Neither R.C. § 2151.353 nor R.C. § 2151.414 provides a mechanism for the juvenile court merely to terminate parental rights. The statutes permit the court to transfer permanent custody to a children's services agency or another person. The *effect* of that transfer is to permanently divest the parents of their parental rights. *In re Fassinger* (1975), 42 Ohio St.2d 505, 330 N.E.2d 431, syllabus. Thus, where the juvenile court terminated parental rights without explicitly granting permanent custody to another

"a limited amount of additional time to reunify with his children." The trial court expected D.B. to take advantage of all his parenting time and complete his case plan within that limited time period.

{¶18} On September 4, 2015, HCCS filed a motion to modify the disposition to permanent custody. HCCS alleged that the children had been in its custody for twelve or more months of a consecutive twenty-two month period and that permanent custody was in the children's best interest. HCCS argued that D.B. had not completed all aspects of the case plan. HCCS asserted that D.B. had lived in three different residences since the case began and that he currently resides with a couple who have a history with children services. HCCS contended that D.B. only recently started complying with the case plan requirement to obtain mental health counseling, even though he completed the assessment in February 2014 and was informed that he needed individual counseling. HCCS argued that D.B. needed to attend counseling in order to demonstrate an understanding of his children's special cognitive and behavioral needs, as well as skills to

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> person or agency, it is an ultra vires act by the court, as it is not provided for in the juvenile statutes.

(Emphasis sic.) *Id.* at ¶ 43. *Accord* R.C. 2151.011(A)(32) (" 'Permanent custody' " means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations."); R.C. 2151.414(A)(1) (stating that "the granting of permanent custody permanently divests the parents of their parental rights").

In the case at bar, even if the trial court's judgment that merely terminated the mother's parental rights without also granting appellee permanent custody was improper, the court did eventually grant HCCS permanent custody. Thus, any error does not affect the ultimate outcome of this appeal. *See generally In re D.P.*, 9th Dist. Summit No. 22257, 2004-Ohio-7173, ¶ 44 (determining that *Sims* did not apply when trial court first terminated mother's parental rights and later entered judgment awarding children services permanent custody and stating that "while separate orders may not represent the best practice by which to terminate parental rights and place a child in permanent custody, there is no demonstrated prejudice to [the mother]").

manage their daily care. HCCS asserted that D.B. seemed to believe that the children would outgrow their disabilities.

{¶19} HCCS further contended that D.B. demonstrated a lack of commitment to the children by failing to exercise the majority of his visitation opportunities. HCCS alleged that between the children's November 2013 removal and the July, 23 2015 permanent custody hearing, D.B. attended only one half of the visitations offered; and between the July 2015 permanent custody hearing and September 4, 2015, D.B. attended only one of the three visits available.

{¶20} HCCS also argued that awarding it permanent custody of the children was in their best interests. HCCS asserted that "M.B. is thriving in her placement and her foster parents have expressed an interest in providing a permanent home for M.B. if the Agency is granted permanent custody." HCCS stated that "A.B. is attending counseling to address significant cognitive delays and intellectual disabilities. A.B. is engaged in developmental disability services, which include physical, occupational, and speech therapy. A.B. requires a lot of behavioral management by his caregivers."

{¶21} On October 28, 2015, the trial court held a hearing to consider HCCS's permanent custody motion. Scioto Paint Valley Mental Health Outpatient Counselor Karen Chambers testified that D.B. was referred to her in August 2015 for individual counseling so that she could help D.B. understand what appropriate parenting skills would be for his two special needs children. Chambers stated that the counseling sessions occurred every other week and that D.B. attended sessions on August 10 and September 1, 2015. Chamber testified that during the September 1 session, D.B. indicated that he did not believe he would have any issues parenting the children. Chambers explained that

D.B. cancelled the September 15 session, allegedly due to transportation issues. Although the session was rescheduled for September 22, D.B. failed to appear for the rescheduled session. Chambers testified that she had no further contact with D.B..

{¶22} Melissa Wheaton testified that since the July 23, 2015 permanent custody hearing, HCCS offered appellant seven, four-hour visits. Wheaton stated that D.B. did not even confirm the August 2 and August 16 visits; and of course, failed to appear for the visits. D.B. attended a full, four-hour visit on August 30; yet, he cancelled the September 13 visit because his other child was sick. D.B. then confirmed a visit for October 11 but failed to appear. As for the October 25 visit, D.B. failed to confirm the visit and failed to appear for it. Wheaton explained that on September 27, D.B. visited with the children, but only for two out of the four-hours that had been scheduled. Wheaton stated that D.B. indicated that he left the visit after only two hours because he had to work early that day.

{¶23} Family Advocacy Center visitation monitor Frances Cochran stated that the children were brought to the visitation center for the October 11 visit. When the children were told that the visit would not occur, neither child showed any emotion.

{¶24} Seth Queen testified that D.B. had maintained the same home since the last hearing. Apparently, Shane Vance had moved out of the home as a result of HCCS's concerns regarding the prior children services history of the Vances. He explained that the prior children services history involved sexual abuse of D.B.'s girlfriend. Queen stated, however, that HCCS still had concerns regarding Tammy Vance. Queen thus indicated that the home would not be suitable due to Tammy Vance's presence.

{¶25} Queen stated that he left messages for D.B. with the name of A.B.'s therapist. Queen testified that he spoke with Karen Chambers, and gave both her and the child's therapist information so they could collaborate and make a plan for D.B. Queen stated that the goal of the counseling was to ensure that D.B. fully understood the specific cognitive and behavioral needs of the children. Queen explained that D.B. believed that the children would outgrow their disabilities.

{¶26} In addition, Queen testified that A.B. had a mild intellectual disability, ADHD, oppositional defiance disorder, and was in a behavioral class at school. Queen stated that A.B. was comfortable in his foster home. Queen testified that M.B. likewise "is very relaxed" in her foster home and refers to her foster mother as "Mom." Queen explained that although the children initially were placed together, they were separated due to "some very inappropriate sexualized [sic] behaviors." He stated that the children's behaviors have improved since removal.

{¶27} M.B.'s foster father testified that M.B. received counseling every other week, visited a psychiatrist monthly, took three medications per day, and required near constant supervision. The foster father stated that M.B.'s father had not attended any of the child's counseling sessions. The foster father testified that M.B. had become "one of the family" and he and his wife would adopt the child if the opportunity presented itself. He further explained that the child developed friendships within the neighborhood and had become less defiant.

{¶28} D.B. stated that he lived in a four-bedroom home with his girlfriend, their five-month-old son, and Tammy Vance. He testified that if the children were returned to

him, that they would each have a bedroom. D.B. stated that his girlfriend would care for the children when he worked and that his mother was also available to help.

{¶29} D.B. explained that he was unable to contact Chambers to reschedule his missed September 22 counseling session because he did not have a phone. Further, D.B. claimed that he missed the September 22 date because he "completely forgot" about it.

{¶30} D.B. also testified that he failed to attend the confirmed October 11 visit with the children because he "got a flat tire." He stated that he "swear[s he] called." When questioned how he called if he did not have a phone, D.B. stated that he used the neighbor's phone.

{¶31} D.B. explained that he did not understand that Tammy and Shane Vance were a barrier to returning the children to him and believed the house was appropriate. D.B. stated that he understood that the children have been "labeled" with "developmental disabilities", but he does not agree with that determination. In D.B.'s opinion, A.B. suffers from autism. D.B. also indicated that he understands the concerns about sexual abuse between the two children, but stated that he would watch them.

{¶32} D.B. stated that he understands the children need counseling. HCCS's counsel asked D.B. how he would ensure the children would attend their counseling if he could not attend his own. D.B. claimed that his counselor told him that she needed additional information before she could fully engage in services with D.B. HCCS's counsel then inquired whether the counselor possibly received additional information, but D.B. never discovered this because he failed to follow-up with the counselor and missed his appointments. D.B. stated, "That's a possibility, yes."

{¶33} On October 30, 2015, the trial court granted HCCS permanent custody. The trial court found that the children had been in HCCS's temporary custody for more than twelve of the past twenty-two consecutive months. The court noted that the children were placed in HCCS's temporary custody on September 30, 2013, and have remained in its custody since that date. The court further determined that awarding appellee permanent custody would serve the children's best interests. The trial court stated:

> Both children have adapted well to their respective foster homes and appear to interact appropriately with their foster families. Both children are in therapeutic foster homes and need close supervision due to developmental disabilities. The Court has concern as to whether or not the father will be able to meet the various special needs of the children without proper training and counseling.

{¶34} The trial court found that D.B. interacted appropriately with the children and that they appeared bonded to one another. The court further noted, however, that when appellant failed to appear for an October 11, 2015 visit, the children did not show any emotion when they were advised that their father failed to appear.

{¶35} Regarding the children's wishes, the court relied upon the guardian ad litem's assessment that the children lacked sufficient reasoning ability to express their wishes or to make an informed decision.

{¶36} The trial court found that both children needed a legally secure permanent placement and that this type of placement could not be achieved without granting HCCS permanent custody.

{¶37} Additionally, the trial court stated that it had previously cautioned D.B. that "he had a limited time to reunify with his children." Even after being cautioned, D.B. failed to complete the case plan, visited with the children only two times for a total of six hours, and attended only two sessions with Scioto Paint Valley Mental Health Center. Also, D.B. had not met with his counselor since September 1, 2015; D.B. continued to reside in a home with Tammy Vance who had a children services history; and D.B. had chosen to have minimal contact with Caseworker Queen. The trial court continued:

> The Court is of the opinion the Scioto Paint Valley Mental Health Center counseling was critical in order for the father to have the ability to address appropriately all of the special needs of his children. The father unfortunately elected not to engage in that counselling. He admitted on direct examination that he would benefit from counseling. Furthermore[,] there is no excuse for the father to visit with his children only two times for a total of six hours since July 23, 2015.
>
> The Court finds that for now over two years [HCCS] has attempted to assist the father in every conceivable manner to regain custody of his children. However[,] the father has not taken advantage of that assistance and it is inconceivable to this Court that the father after being warned by the Court on July 23, 2015, elected not to attend the counseling at Scioto Paint Valley Mental Health or visit his children for more than six hours. His actions, or inaction, speak far louder than his testimony.

{¶38} The trial court also noted that the guardian ad litem recommended that the court award HCCS permanent custody of the children.

{¶39} The trial court additionally found that all requirements set forth in R.C. 2151.414(D)(2) had been met: (1) D.B. displayed a lack of commitment by failing to regularly visit the children (he visited the children only two times for a total of six hours since July 23, 2015, and chose to visit only thirty-four out of a possible seventy-eight visits before July 23, 2015); (2) the children had been in HCCS's care for over two years; (3) neither child met requirements for a PPLA; and (4) no relative or other person requested legal custody of the children. The trial court thus granted HCCS permanent custody of the two children. This appeal followed.

II. Assignment of Error

{¶40} Appellant D.B. raises one assignment of error.

> THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY TO THE AGENCY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS CLEAR AND CONVINCING EVIDENCE DID NOT EXIST TO SUPPORT THE TRIAL COURT'S FINDING THAT GRANTING PERMANENT CUSTODY TO THE AGENCY WAS IN THE BEST INTEREST OF THE CHILDREN.

III. Analysis

{¶41} In his sole assignment of error, D.B. asserts that the record does not contain clear and convincing evidence to support the trial court's finding that awarding HCCS permanent custody is in the children's best interests. D.B. does not dispute that the children have been in HCCS's custody for twelve of the past twenty-two months.

Instead, D.B. argues that he "made strides toward improving his own life" and completed the great majority of the case plan goals. D.B. asserts that he obtained stable housing and employment and completed a parenting course, a psychological evaluation, and a mental health assessment. Therefore, D.B. claims that his actions show that he was "preparing to someday regain custody of his children." D.B. admits that he did not complete counseling services, but alleges he had transportation and communication difficulties. D.B. contends that he will be able to complete the counseling requirement, if permitted additional time to engage in counseling. D.B. further recognizes that he did not attend all visits with his children, but claims that some of his missed visits were due to out-of-state travel required by his employment. D.B. additionally asserts that he and the children share a bond and that the children wish to live with him.

A. Standard of Review

{¶42} 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. *In re R.M.*, 2013–Ohio–3588, 997 N.E.2d 169, ¶ 53 (4th Dist).

> "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).

{¶43} 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* 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.

{¶44} In a permanent custody case, the ultimate question for a reviewing court 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: "[T]he 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, 104, 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), *overruled on other grounds by statute*, 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."). "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." *R.M.*at ¶ 55.

{¶45} 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, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. 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].' " *Id.*, quoting *Martin* at 175; *accord State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶46} 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. As the *Eastley* court explained:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable

> presumption 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."

Eastley, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 21, 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).

B. Permanent Custody Principles

{¶47} 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, 157, 556 N.E.2d 1169 (1990); *accord In re D.A.*, 113 Ohio St.3d 88, 2007–Ohio–1105, 862 N.E.2d 829, ¶¶ 8-9. A parent's rights, however, are not absolute. *In re 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 polestar 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. *In re D.A.* at ¶ 11.

{¶48} Before a court may award a children services agency permanent custody of a child, the court must hold a hearing. R.C. 2151.414(A)(1). 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. *Id.* Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying purposes of R.C. Chapter 2151, as set forth in R.C. 2151.01:

> (A) To provide for the care, protection, and mental and physical development of children * * * whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;
>
> (B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

C. Permanent Custody Framework

{¶49} R.C. 2151.414(B)(1) 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 any of the following apply:

> (a) The child is not abandoned or orphaned, 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, 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 if, as

> described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, 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.
>
> (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, 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 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.
>
> (e) 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.

{¶50} 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. In the case at bar, D.B. does not challenge the trial court's R.C. 2151.414(B)(1)(d) finding. Instead, he disputes the court's finding that granting appellee permanent custody is in the children's best interests. We limit our review accordingly.

D. Best Interest

{¶51} R.C. 2151.414(D) requires a trial court to consider specific factors to determine whether a child's best interest 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. "In a best-interest analysis under R.C. 2151.414(D), a court must consider 'all relevant factors,' including five enumerated statutory factors * * *. No one element is given greater weight or heightened significance." *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶ 57, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, ¶ 56.

{¶52} Additionally, R.C. 2151.414(D)(2) states that if all of the following factors apply, granting permanent custody to a children services agency is in the best interest of the child:

> (a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.
>
> (b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.
>
> (c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.
>
> (d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

{¶53} In the case at bar, clear and convincing evidence supports the trial court's determination that awarding HCCS is in the children's best interests. With respect to the children's interactions and interrelationships, the evidence shows that they share a bond with their father; their father displays affection when he visits with them; and he interacts appropriately with the children. However, D.B. did not exercise all of his visitation opportunities. He visited the children only approximately thirty-six times since the children were removed in September 2013. That equates to roughly one and one-half visits per month. Due to D.B.'s failure to exercise all of his visitation opportunities, he has not had much interaction with the children since HCCS removed them from the home. Instead, most of the children's interactions and interrelationships over the past two years occurred and developed in their respective foster homes. M.B. has bonded to her

foster family—she calls the foster mother, "Mom"—and has developed friendships in the neighborhood. A.B. also has bonded to his foster family. Both children's behaviors have improved while in their foster homes.

{¶54} Regarding the children's wishes, the trial court determined that the children lack sufficient reasoning ability to express their wishes and relied upon the guardian ad litem's recommendation that the court award HCCS permanent custody. The guardian ad litem further reported that the children expressed that they would like to live with their father.

{¶55} With respect to the children's custodial history, the evidence shows that the children have been in HCCS's temporary custody since September 2013. A.B. has lived in the same foster home throughout the proceedings. M.B. has lived in her foster home since February 2015. The children initially were placed in the same foster home but were separated due to inappropriate sexual behaviors.

{¶56} Additionally, the evidence supports a finding that the children need a legally secure permanent placement and that this type of placement cannot be achieved without granting HCCS permanent custody. Although the Ohio Revised Code does not define the term, "legally secure permanent placement," this court and others have generally interpreted the phrase to mean a safe, stable, consistent environment where a child's needs will be met. *In re Dyal*, 4th Dist. Hocking No. 01CA12, 2001 WL 925423, *9 (Aug. 9, 2001) (implying that "legally secure permanent placement" means a "stable, safe, and nurturing environment"); *see also In re K.M.*, 10th Dist. Franklin Nos. 15AP-64 and 15AP-66, 2015-Ohio-4682, ¶ 28 (observing that legally secure permanent placement requires more than stable home and income but also requires environment that will

provide for child's needs); *In re J.H.*, 11th Dist. Lake No. 2012-L-126, 2013-Ohio-1293, ¶ 95 (stating that mother unable to provide legally secure permanent placement when she lacked physical and emotional stability and that father unable to do so when he lacked grasp of parenting concepts); *In re J.W.*, 171 Ohio App.3d 248, 2007-Ohio-2007, 870 N.E.2d 245, ¶ 34 (10th Dist.) (Sadler, J., dissenting) (stating that a legally secure permanent placement means "a placement that is stable and consistent"). A legally secure permanent placement is more than a house with four walls. Rather, it generally encompasses a stable environment where a child will live in safety with one or more dependable adults who will provide for the child's needs.

{¶57} In the case sub judice, it is abundantly clear that the mother will not provide the children with a legally secure permanent placement. Although D.B. has made great strides towards improving his life in an attempt to provide the children with a legally secure permanent placement, the trial court determined that his efforts fell short of demonstrating that he would provide the children with a secure and permanent home. The court noted D.B.'s lack of commitment to visiting his children, his failure to engage in the counseling services that would help him learn to properly parent his two special needs children, and his failure to heed the court's July 2015 warning that he fully comply with the case plan and exercise all of his visitation opportunities. The evidence clearly supports the court's findings. If D.B. lacks a commitment to his children and lacks an understanding of their special needs, his willingness to provide for their needs becomes questionable.

{¶58} The evidence demonstrates that the children have some significant developmental delays and behavioral issues. They require near-constant supervision and

receive many services to help them address their issues. D.B.'s lack of commitment to visiting his children and to engaging in counseling services suggests that he would not ensure that the children receive the services they need to address their developmental and behavioral issues. Moreover, D.B. denies that his children have developmental issues, claiming instead that A.B. is autistic. His failure to gain even a basic understanding of his children's needs raises serious questions regarding his willingness to help the children obtain the services they need. His failures thus show that he is not dependable and not willing to provide the children with consistent and appropriate care. His lack of commitment to both visitations and counseling when given a second opportunity, raises doubts about his dependability and, hence, his willingness to provide for the children. *See In re M.B.*, 10th Dist. Franklin No. 04AP755, 2005-Ohio-986, ¶ 23 (stating that parent's "failure to comply with the specific directives of the case plan and the magistrate, who gave appellant a second chance when she was not required to do so, demonstrates a lack of commitment to [the child]"). Because the foregoing adequately supports the trial court's best interest finding, we do not address its alternate findings under R.C. 2151.414(D)(2).

{¶59} D.B. nevertheless asserts that he has complied with most parts of the case plan; and, thus, the children should be returned to him. However, a parent's case plan compliance, while it may be relevant to a best interest analysis, does not automatically override a trial court's decision regarding what is in a child's best interests. *In re N.L.*, 9th Dist. Summit No. 27784, 2015-Ohio-4165, ¶ 35 (stating that "substantial compliance with a case plan, in and of itself, does not establish that a grant of permanent custody to an agency is erroneous"); *In re S.C.*, 8th Dist. Cuyahoga No. 102349, 2015-Ohio-2280, ¶

40 ("Compliance with a case plan is not, in and of itself, dispositive of the issue of reunification."). As we have previously recognized, "[s]ubstantial compliance with a case plan is not necessarily dispositive on the issue of reunification and does not preclude a grant of permanent custody to a children's services agency." *In re W.C.J.*, 4th Dist. Jackson No. 14CA3, 2014-Ohio-5841, ¶ 46, citing *In re C.C.*, 187 Ohio App.3d 365, 2010–Ohio–780, 932 N.E.2d 360, ¶ 25 (8th Dist.), and *In re West,* 4th Dist. Athens No. 03CA20, 2003–Ohio–6299, ¶ 19. "Indeed, 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.' " *Id.*, quoting *In re Gomer,* 3rd Dist. Wyandot Nos. 16–03–19, 16–03–20, and 16–03–21, 2004–Ohio–1723, ¶ 36.

{¶60} While we commend D.B.'s efforts to obtain stable employment, to live in the same residence for more than six months, to complete a parenting course, and to complete a mental health assessment, he did not use those same efforts to visit the children and to complete counseling in an effort to understand the children's special needs. Therefore, even if appellant complied with most aspects of the case plan, the trial court had no obligation to deny HCCS permanent custody. *See In re W.A.J.*, 8th Dist. Cuyahoga No. 99813, 2014–Ohio–604, ¶ 21 (observing that "mother's completion of parenting skills courses did not mean that she proved her competency to parent").

{¶61} D.B. additionally argues that if given more time to obtain counseling, he will do so. However, the trial court already granted D.B. one additional opportunity to prove that he would obtain the necessary counseling; and D.B. failed to do so. D.B. does not adequately explain why a second opportunity would produce a different outcome.

D.B. failed to take advantage of the first opportunity. *See In re D.W.*, 4th Dist. Highland No. 15CA7, 2015-Ohio-3532, ¶ 31 (rejecting parent's argument that court should have afforded parent a second opportunity to obtain suitable housing).

{¶62} Moreover, as this court has frequently noted:

> "* * * [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 (1972). Thus, the trial court had no obligation to further experiment with the children's welfare. *In re A.A.*, 4th Dist. Athens No. 14CA38, 2015-Ohio-1962, ¶ 60.

{¶63} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay 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 Highland County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

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

Harsha, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, 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.