**[Cite as *In re C.M.*, 2017-Ohio-9037.]**

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

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| In re C.M. (aka C.B.) | : | Case Nos. 17CA16 |
| Adjudicated Dependent Child. | : | 17CA17 |
| In re J.B. | : | |
| Adjudicated Abused and | : | DECISION AND JUDGMENT |
| Dependent Child. | : | ENTRY |
| | : | |
| | : | **Released: 12/08/17** |

APPEARANCES:

Krista Gieske, Cincinnati, Ohio, for Appellant Mother.

Frank A. Lavelle, Athens, Ohio, for Appellant Father.

Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

McFarland, J.

**{¶1}** V.M. and J.B. appeal the trial court's judgment that awarded Appellee, Athens County Children Services, permanent custody of their two biological children: four-year-old C.M. and two-and-one-half-year-old J.B. V.M., the children's mother, asserts that the trial court erred (1) by denying her motion to continue the permanent custody hearing in order to secure her presence, (2) by denying the maternal grandmother's motion to intervene, and (3) by overruling the maternal grandmother's motion for custody of the children. Because the trial court employed alternate means to allow the

mother to review the first day of the permanent custody hearing, we are unable to conclude that the court abused its discretion by overruling the mother's motion to continue the permanent custody hearing. However, even if the mother has standing to challenge the trial court's decision to deny the grandmother's motion to intervene, the mother cannot show that the court abused its discretion. Additionally, even if the trial court erred in either of the foregoing two respects, the mother cannot demonstrate a prejudicial effect requiring reversal. We further disagree with the mother that the trial court erred by overruling the grandmother's motion for custody. The record contains ample evidence to support the court's determination that placing the children in Appellee's permanent custody is in their best interest. Therefore, placing them in the grandmother's custody is not.

**{¶2}** J.B., the children's father, challenges the trial court's finding that placing the children in Appellee's permanent custody is in their best interest. The father additionally asserts that Appellee failed to comply with R.C. 2151.412 and chose the least restrictive placement for the children during the pendency of the case. Neither of the father's arguments have merit. The evidence in the record fully supports the trial court's decision to grant Appellee permanent custody of the children. Moreover, R.C. 2151.412

sets forth guidelines for case plans and is inapplicable at the permanent custody hearing stage.

**{¶3}** Accordingly, we overrule all of the assignments of error and affirm the trial court's judgment.

## I. FACTS

**{¶4}** On November 16, 2015, Appellee filed motions that requested temporary emergency custody of the two children. The motions alleged the following circumstances warranted a grant of temporary emergency custody. On November 12, 2015, fifteen-month-old J.B. presented to O'Bleness Memorial Hospital with swelling and redness of his arm. The mother claimed that J.B. had fallen off the bed, but then later stated that he had fallen off the couch. The mother did not provide a time of injury. O'Bleness diagnosed J.B. with a spiral fracture of the left humerus and transferred him to Nationwide Children's Hospital. A subsequent body scan revealed multiple fractures in various states of healing on both his arms and legs: (1) bilateral humerus fractures in both of his arms with significant tenderness; (2) bilateral distal humerus fractures that occurred within the last week to ten days; (3) bilateral proximal tibia fractures in both legs that were in the healing process; and (4) bilateral distal femur fractures in both legs that were in the end stages of healing. Additionally, the right side of J.B.'s

face was bruised, and he had bite marks on his right arm. Medical personnel found J.B.'s injuries highly concerning for child abuse, and neither parent offered an adequate explanation for J.B.'s injuries. The trial court granted Appellee's motions.

**{¶5}** Appellee also filed an abuse, neglect, and dependency complaint concerning J.B. and a dependency complaint concerning C.M. that reiterated the foregoing facts. Appellee requested temporary custody of the children.

**{¶6}** Appellee developed case plans for the family. The case plan required (1) the mother to continue substance abuse counseling at Health Recovery Services (HRS); (2) the father to schedule a substance abuse evaluation at HRS within thirty days of adjudication, attend the appointment, and follow treatment recommendations; (3) the parents to submit to drug screens; and (4) the parents to work with a parent mentor to learn about child development and milestones.

**{¶7}** On March 16, 2016, the parents admitted that C.M. is a dependent child based upon the unexplained injuries to J.B. and that J.B. is an abused child based upon his unexplained injuries. The court thus adjudicated C.M. a dependent child and J.B. an abused child. The court dismissed J.B.'s neglect and dependency allegations.

**{¶8}** A May 2016 Semiannual Administrative Review (SAR) indicated that the parents made insufficient progress regarding their case plan requirements. The SAR states that (1) the father did not complete an evaluation at HRS and he was terminated from the program; (2) the mother is minimally compliant with HRS and at least one of her drug screens did not show suboxone that she is prescribed; (3) the parents were charged with third-degree felonies as a result of J.B.'s injuries; and (4) the parents have participated with the parent mentor on a very minimal level.

**{¶9}** The SAR noted that Appellee started a home study for the maternal grandmother, but due to the grandmother's lack of independent housing, the home study could not be completed.

**{¶10}** On September 16, 2016, Appellee filed a motion to modify the disposition to permanent custody. Appellee alleged that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent and that placing the children in its permanent custody is in their best interest. Appellee asserted that although the parents have complied with some aspects of the case plan, they have not explained the major concern—how J.B. sustained multiple fractures throughout his extremities. Appellee additionally alleged that the mother has not completely complied with her substance abuse treatment and is in danger of

losing her suboxone prescription due to her minimal compliance with treatment. Appellee asserted that the father contacted HRS and attended one appointment, but he did not complete a substance abuse evaluation and was terminated due to noncompliance. Appellee further asserted that placing the children in its permanent custody is in their best interest.

**{¶11}** On January 3, 2017, the maternal grandmother filed a pro se motion that requested the court to join her as a party to the case. She also filed a pro se motion for custody of the children.

**{¶12}** On February 10, 2017, the father filed a motion to continue the permanent custody hearing. He alternatively requested the court to continue the temporary custody order so that he may demonstrate that he can provide proper care for the children and demonstrate compliance with the case plan.

**{¶13}** On February 17, 2017, the court held a permanent custody hearing. At the start, the court noted that the Sheriff's Office had failed to execute the warrant to convey the mother from prison to the court for the permanent custody hearing. The mother's attorney requested a continuance in order to secure her presence. The court further allowed the father's attorney to state his reasons for requesting a continuance. The court decided to take both continuance motions under advisement and to proceed with the hearing, "with the understanding that any and all witnesses called today

would be subject to recall if something is presented today that, for example, [the mother's attorney] does not believe that without consulting with his client he would be in a position to fully get through cross-examination." The court further noted that it would schedule another hearing date in order to secure the mother's presence.

**{¶14}** The court also considered the maternal grandmother's pro se motion for custody and motion to intervene. The court took her motions under advisement.

**{¶15}** ACCS caseworker Tara Carsey testified that the parents did not complete all aspects of the case plan. She stated that the father did not comply with the substance abuse requirements of the case plan. Ms. Carsey related that the father bought suboxone off the street to treat his drug habit. She explained that the father completed a couple of intakes with HRS, but he did not follow through and was discharged from the program. She reported that the father re-entered the program after Appellee filed its permanent custody motion. Ms. Carsey additionally testified that the father did not complete a mental health assessment.

**{¶16}** Ms. Carsey stated that the mother was "minimally compliant or non compliant" with HRS. She further related that Appellee had domestic violence concerns, but until November 2016, the mother denied domestic

violence occurred. Ms. Carsey testified that in November 2016, the mother finally admitted that domestic violence had occurred throughout her relationship with the father.

**{¶17}** Ms. Carsey reported that although both parents entered guilty pleas to charges arising out of J.B.'s injuries, they could not explain how J.B.'s injuries occurred. Ms. Carsey stated that the mother pleaded guilty to two third-degree felonies—child endangering and permitting child abuse—and was sentenced to serve three years in prison. She indicated that the father pleaded guilty to third-degree felony child endangering and was sentenced to four years of community control.

**{¶18}** Ms. Carsey testified that she believes permanent custody is in the children's best interests, because Appellee still does not know who caused J.B.'s injuries, how they were caused, or when they were caused. She indicated that her "primary concern is safety and not knowing how [J.B.] sustained 12 broken bones." She also stated that the father has not shown that he has the ability to provide care for the children.

**{¶19}** ACCS caseworker Stephanie Blaine testified that she investigated several relative placements throughout the case. Ms. Blaine related that Appellee completed a home study for the maternal grandmother, but it was denied. She explained that Appellee denied the maternal

grandmother's home study because she "lived in a couple of different places," and "the safety audit did occur in a couple of different homes." However, Ms. Blaine stated that the primary reason Appellee denied the home study resulted from the family's failure to offer an adequate explanation for J.B.'s broken bones. Ms. Blaine explained that J.B. spent some time in the grandmother's care when visiting with her and Appellee had no knowledge who perpetrated the abuse upon J.B.

**{¶20}** Ms. Blaine reported that even though J.B.'s parents were convicted in relation to the abuse, Appellee still had concerns about placing the children with the grandmother. She explained that when the mother is released from prison, Appellee would be concerned about the grandmother's ability and willingness to protect the children from their mother. Ms. Blaine stated that she informed the grandmother that if Appellee placed the children in her home, the mother could not have any contact with the children. Ms. Blaine related that the grandmother responded that "it would be hard," but that "she would enforce no contact." Ms. Blaine indicated that she found the grandmother's statement dubious, and she thought keeping the mother from the children would "be very difficult for [the grandmother] to do." Ms. Blaine additionally explained that the grandmother does not believe that her daughter—the children's mother—committed abuse.

**{¶21}** The children's foster mother testified that the children have been in her home for the past fifteen months. She stated that when J.B. entered her home, he had casts on both of his arms. She also related that J.B.—at fifteen months of age—was not walking, and that he did not start walking until a few months later. The foster mother explained that when J.B. first entered her care, she did not have any concerns about his behavior, but in the past six months or so, he has displayed some concerning behavior. She stated that J.B. "screams a lot," is "getting more * * * aggressive towards the other children," and "throws food a lot." The foster mother believes that J.B.'s problems appear "more intense" after visits with his parents. She related that in the car after a visitation, J.B. "screams at the top of his lungs most of the way home," and sometimes "he'll do the screaming on the way [to visits] also." She indicated that she has pulled the vehicle to the side of the road because sometimes both J.B. and C.M. start screaming and it gets "pretty loud."

**{¶22}** The foster mother indicated that when C.M. entered her home, he did not speak for the first five or six months. She explained: "[h]e was absolutely non verbal except for the screaming." The foster mother additionally reported that C.M. did not sleep "at all" when he first entered

her home. She stated that C.M. currently receives speech, physical, and occupational therapy and is making progress.

**{¶23}** She stated that both children need constant supervision and that she is unable to leave them unattended. The foster mother reported that supervising J.B. and C.M. "is very difficult." She explained that she does "not leave the room that the boys are in at all." The foster mother related that C.M. is aggressive, and that C.M. directs some of his aggression towards J.B.

**{¶24}** The father testified that in November 2015, J.B. went to the doctor and he received some shots. A few days later, he and the mother noticed that J.B.'s arm was red and swollen. They believed that the shots caused it. A day or so later, he and the mother got into an argument about whether to take J.B. to the hospital. He claimed that the mother did not want to take J.B. to the hospital "because she was worried of Children Services getting involved." The father stated that he convinced the mother to take the child to the hospital. The father related that when a nurse informed him and the mother that J.B. had multiple fractures, he and the mother were in disbelief. He explained that J.B. had been completely mobile and had not appeared to be in any pain. The father indicated that he thought C.M. may have caused J.B.'s injuries. The father explained that C.M. did "a lot of

mean things to [J.B.]. * * * [H]e'll get in the crib with him. He'll jump on him. He'll pull down the hallway before we can even get to him." He agreed that the doctors informed him that C.M. could not have possibly caused J.B.'s injuries, but he "still don't [sic] believe that." The father testified that he does not have any idea how J.B. sustained the injuries. He agreed that the only people who provided care for J.B. were the mother, the maternal grandmother, and himself, but he still did not know how J.B. sustained the injuries. He related that J.B.'s injuries were "a huge shock" and he "can't get over how it could happen."

**{¶25}** The maternal grandmother testified and stated that she believes keeping the children in the family would be in their best interest. She related that she has a good relationship with the children and that she has helped care for them since they were born. The grandmother stated that she would keep the mother away from the children, if the court placed them in her custody.

**{¶26}** On cross-examination, the grandmother indicated that she did not believe J.B. was injured. She stated that she did not believe it, "because [she] was with [J.B.]" and he "did not seem like he was hurt at all ever." The grandmother explained that the mother informed her that J.B. fell from the couch, but other than that, she did not believe J.B. was injured.

**{¶27}** The mother testified that the week before she took J.B. to the hospital, J.B. had a doctor's appointment, and the doctor did not mention that J.B. exhibited any signs of injury. The mother stated she also did not notice any signs to indicate J.B. was injured or in pain. She explained that a few days later, J.B. fell off the couch. The mother stated that J.B. started crying, but after a few moments, he seemed fine. She indicated that the next morning, his arm appeared swollen but he did not seem to be in much pain. However, later in the day he started crying and she thought that "something else was wrong." The mother stated that the father was at work, and she waited for him to return home before deciding whether to take J.B. to the hospital. She explained that she wanted to ask him "if he thought it was that serious." The mother testified that when the father returned home, they discussed it and she took J.B. to the hospital. She related that when the doctors told her that J.B. had several fractures she "was in shock." The mother stated that she had no prior indication that J.B. had other fractures, because "he never really showed" any signs of injury. The mother testified that she entered guilty pleas to permitting child abuse and endangering children and was sentenced to serve three years in prison.

**{¶28}** The children's guardian ad litem testified that he believes placing the children in Appellee's permanent custody is in their best interest.

He explained that he did not understand how J.B. had multiple fractures throughout his body, yet neither the parents nor the grandmother—all of whom helped care for the child—seemed to notice that J.B. was injured, but instead, all described the child as "perfectly happy and pain free." The guardian ad litem stated that the child "had 12 broken bones, and some of them were fairly severe, and that nature of these bones based on the discovery if there are spiral fractures, you know, which there is that take a certain amount of force to produce that kind of a fracture. [sic]" He stated that his principal concern is that no one noticed the child acting unusual, even though he had twelve broken bones. The guardian ad litem explained: "nobody, from any of the testimony nobody has any idea how these injuries occurred. Who caused them, and uh, in light of that profound ignorance with respect to the safety of the children[,] I don't see how I could recommend that they be returned."

**{¶29}** On March 23, 2017, the trial court granted appellee permanent custody of the two children. The court also denied the mother's request for a continuance, the grandmother's motion to intervene, the grandmother's motion for custody, and the father's request to extend the temporary custody order so that he may have additional time to prove that he can provide proper care for the children.

**{¶30}** In denying the mother's motion to continue, the court pointed out that the Sheriff's Office failed to transport the mother for the first day of the hearing, even though the court had issued a warrant to convey. The court indicated that it nonetheless chose to proceed with the hearing and indicated that any witnesses would be subject to recall and that a recording of the hearing would be delivered to the mother. The court determined that the lack of a continuance did not prejudice the mother.

**{¶31}** The court allowed the maternal grandmother to be present throughout the hearings, but denied her motions. The court denied the father's request to extend the temporary custody order to afford him additional time to demonstrate that he can provide the children with adequate care.

**{¶32}** Turning to Appellee's permanent custody motion, the court found that J.B. is an abused child and that the parties agreed to the abuse adjudication, as well as C.M.'s dependency allegation. The court additionally noted that the parents were convicted of felony charges for their roles in the abuse, the mother is serving a prison term, and the father is on community control. The court stated that although the exact perpetrator of the abuse is unknown, the parents and their family members were the only individuals who had custody or control of the children before their removal.

**{¶33}** The court found that the children "are experiencing and exhibiting serious behavioral problems that currently require nearly constant line of sight supervision." J.B. "often finds himself the victim of physical violence by [C.M.], and is now demonstrating physical aggression of his own in addition to his vocal outbursts, and general control issues." The court stated that the children "deserve a real chance to grow and mature in a nurturing environment."

**{¶34}** The court found that R.C. 2151.414(E)(5), (6), and (16) apply, and thus, that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent. The court noted that the mother is in prison for felony child endangering and permitting abuse, with J.B. as the victim, and that the father is on community control for child endangering.

**{¶35}** The court also considered the children's best interest. With respect to their interactions and interrelationships, the court found that C.M. "is openly hostile and physically aggressive," especially with J.B., and that "[t]here is very little positive bonding." The court observed that the foster mother stated she "has to attempt to maintain an actual 'line of sight' to feel comfortable supervising these boys."

**{¶36}** With respect to the children's wishes, the court determined that the children are unable to directly express their own wishes.

**{¶37}** The court considered the children's custodial history and found that until their November 2015 removal, the children lived with their parents. The court also examined the children's need for a legally secure permanent placement and whether they can achieve it without granting Appellee permanent custody. The court determined that neither parent could provide the children with a legally secure permanent placement. The court noted that both parents entered guilty pleas to endangering children, and that the mother pleaded guilty to permitting child abuse. The court found it significant that "neither parent presented any testimony or evidence * * * even attempting to explain away those pleas and convictions." The court noted the grandmother's interest in obtaining custody of the children, but further recognized that the mother's return to the area after her release from prison could jeopardize the children's safety. Therefore, the court determined that placing the children in Appellee's permanent custody is in their best interest. The court thus granted Appellee's motions for permanent custody of the children.

## II. ASSIGNMENTS OF ERROR

**{¶38}** The mother raises three assignments of error.

> First Assignment of Error:
> The trial court committed prejudicial error and deprived mother of her constitutional rights to confrontation and due process by denying trial counsel's motion for a continuance and proceeding with the permanent custody hearing despite mother's defensible absence.
>
> Second Assignment of Error:
> The trial court erred in summarily overruling grandmother's motion to intervene in the permanent custody action.
>
> Third Assignment of Error:
> The trial court's decision summarily overruling grandmother's motion for custody of C.M. was against the manifest weight of the evidence.

The father raises two assignments of error.

> First Assignment of Error:
> The children's needs for a legally secure placement can be achieved without a grant of permanent custody to the agency. There was insufficient clear, competent and convincing evidence to warrant a finding that the children's best interests required termination of parental rights.
>
> Second Assignment of Error:
> Children Services failed to place the children in the least restrictive placement pursuant to R.C. 2151.412(G)[.] As a result, the grandparent's ability to obtain custody, the children's ability to be raised by their own relatives—and the parent's ability to retain residual parental rights—were all prejudiced.

## III. ANALYSIS

### A. Motion to Continue

**{¶39}** In her first assignment of error, the mother asserts that the trial court's decision to deny her request for a continuance deprived her of her

due process rights. In particular, she claims that refusing to continue the hearing until her presence could be secured deprived her of a meaningful opportunity to be heard and also deprived her of the opportunity to fully participate in the first day of the hearing.

**{¶40}** "The determination whether to grant a continuance is entrusted to the broad discretion of the trial court." *State v. Conway*, 108 Ohio St.3d 214, 2006–Ohio–791, 842 N.E.2d 996, ¶ 147, citing *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. Consequently, "'[a]n appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.'" *State v. Jones*, 91 Ohio St.3d 335, 342, 744 N.E.2d 1163 (2001), quoting *Unger*, 67 Ohio St.2d at 67. "'[A]buse of discretion' [means] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014–Ohio–1966, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶ 23. "An abuse of discretion includes a situation in which a trial court did not engage in a '"sound reasoning process."'" *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban*

*Redevelopment Corp.,* 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The abuse-of-discretion standard is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. *Darmond* at ¶ 34.

**{¶41}** The Supreme Court of Ohio has adopted a balancing approach that recognizes "all the competing considerations" to determine whether a trial court's denial of a motion to continue constitutes an abuse of discretion. *Unger,* 67 Ohio St.2d at 67. In exercising its discretion, a trial court should "[w]eigh[] against any potential prejudice to a defendant * * * concerns such as a court's right to control its own docket against the public's interest in the prompt and efficient dispatch of justice." *Id.* A court should also consider: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and (6) other relevant factors, depending on the unique circumstances of the case. *Id.; State v. Conway,* 108 Ohio St.3d 214, 2006–Ohio–791, 842 N.E.2d 996, ¶ 147; *State v. Jordan*, 101 Ohio St.3d 216, 2004–Ohio–783, 804 N.E.2d 1, ¶ 45.

**{¶42}** "'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" *Unger*, 67 Ohio St.2d at 67, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *accord Snyder* at ¶ 42; *State v. Broom*, 40 Ohio St.3d 277, 288, 533 N.E.2d 682, 695, 1988 WL 142656 (1988) ("Obviously, not every denial of a continuance constitutes a denial of due process."). Furthermore, "[o]n review we must look at the facts of each case and the defendant must show how he was prejudiced by the denial of the continuance before there can be a finding of prejudicial error." *Broom*, 40 Ohio St.3d at 288. Additionally, with respect to the continuance of juvenile court hearings, Juv.R. 23 provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties."

**{¶43}** Here, we do not believe that the trial court abused its discretion by overruling the mother's motion to continue the permanent custody hearing. The trial court noted its displeasure that the sheriff's office failed to execute the warrant to convey the mother for the permanent custody hearing. However, the court determined that the mother would receive fair treatment by permitting her to listen to a recording of the day's hearing and to recall

witnesses, if necessary. The court additionally scheduled a second day of the hearing in order to secure the mother's attendance. Thus, the court could have reasonably determined that a continuance was not necessary in order to secure fair treatment for the mother. We therefore do not believe that the trial court abused its discretion by overruling the mother's motion to continue the permanent custody hearing.

**{¶44}** We also observe that the mother's appellate brief fails to pinpoint the prejudice she suffered as a result of the trial court's decision to deny her motion to continue. The mother does not argue that she would have presented different evidence, that she would have questioned witnesses in a different manner, or that the outcome of the proceedings would have been different, if the trial court had granted her motion to continue. Instead, the mother appears to assert that denying her motion to continue violated her due process right to fully participate in the permanent custody hearing, which, by itself, warrants a reversal. However, the Supreme Court of Ohio clearly stated that a litigant must demonstrate that the failure to continue a matter prejudiced the litigant. *Broom*, 40 Ohio St.3d at 288. The mother has made no such showing.

**{¶45}** The mother further argues that because her request for a continuance impacted her fundamental right to parent her children, as well

as her procedural due process rights, we should independently evaluate the trial court's decision to deny her motion to continue. We reject the mother's invitation to independently evaluate the trial court's decision concerning her motion to continue. The United States Supreme Court recognized the due process implications when a party files a motion to continue, but it nevertheless applied a discretionary standard of review. *Ungar*, 376 U.S. at 589. Moreover, the Supreme Court of Ohio has consistently applied a discretionary standard of review in criminal cases—even those involving the death penalty. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶17-18 (noting defendant's due process argument and applying discretionary standard of review); *State v. Broom*, 40 Ohio St.3d 277, 288, 533 N.E.2d 682 (1988) (recognizing defendant's assertion that denial of continuance deprived him of "basic due process right," but stating that court has "repeatedly stated that it is within the sound discretion of the court whether to grant a motion for a continuance"). *Accord In re M.H.*, 2nd Dist. Montgomery No. 25084, 2012-Ohio-5216, ¶¶ 30-31; *In re C.D.D.*, 11th Dist. Portage Nos., 2011-P-0065 and 2011-P-0066, ¶¶ 36-38 (both evaluating parent's motion to continue/due process argument using discretionary standard of review). Thus, the mother's argument that we should conduct a

de novo review of the trial court's decision denying her motion to continue is without merit.

**{¶46}** Accordingly, based upon the foregoing reasons, we overrule the mother's first assignment of error.

B. Motion to Intervene

**{¶47}** In her second assignment of error, the mother contends that the trial court erred by summarily overruling the grandmother's motion to intervene. She contends that the trial court should have engaged in a more thorough analysis using the standards set forth in Civ.R. 24(A) and (B).

1. Standing

**{¶48}** We initially question whether the mother has standing to assert this assignment of error. "'Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim.'" *State ex rel. Merrill v. Ohio Dept. of Nat. Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 27, quoting *Kincaid v. Erie Ins. Co*., 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9, citing *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, and *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶22. Standing generally "relates to a party's right to make a legal claim or seek judicial enforcement of a legal duty or

right." *Albanese v. Batman*, 148 Ohio St.3d 85, 2016-Ohio-5814, 68 N.E.3d 800, ¶ 24, citing *Ohio Pyro* at ¶ 27, citing *Black's Law Dictionary* 1442 (8th Ed.2004). A party has standing when the "'party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *State ex rel. Ford v. Ruehlman*, 149 Ohio St.3d 34, 2016-Ohio-3529, 73 N.E.3d 396, ¶ 56, quoting *Davet v. Sheehan*, 8th Dist. Cuyahoga No. 101452, 2014-Ohio-5694, 2014 WL 7339212, ¶ 22. "'[A] party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.'" *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, 2015 WL 1841307, ¶ 8, quoting *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973).

**{¶49}** To have appellate standing, a party must be "aggrieved by the final order appealed from." *State ex rel. Merrill* at ¶ 28, quoting *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758 (1942), syllabus; *see also In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, 896 N.E.2d 683, ¶ 5; *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 591

N.E.2d 1203 (1992) (explaining that "the right to appeal can be exercised only by those parties who are able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment of the lower court"). "'Aggrieved means deprived of legal rights or claims.'" *Snodgrass v. Testa*, 145 Ohio St.3d 418, 2015-Ohio-5364, 50 N.E.3d 475, ¶ 27, quoting *Cononi v. Mikhail*, 2nd Dist. Montgomery No. 8161, 1984 WL 5419, *6 (Jan. 10, 1984), citing *In re Annexation in Mad River Twp., Montgomery Cty.*, 25 Ohio Misc. 175, 176, 266 N.E.2d 864 (C.P.1970); *see also Black's Law Dictionary* 80 (10th Ed.2014) (defining "aggrieved" as "having legal rights that are adversely affected"). Thus, "'"[a]ppeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant."'" *State ex rel. Winfree v. McDonald*, 147 Ohio St.3d 428, 2016-Ohio-8098, 66 N.E.3d 739, ¶ 8; *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 619, 665 N.E.2d 209 (1996), quoting *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus.

**{¶50}** Accordingly, a party ordinarily cannot appeal an alleged violation of another party's rights. However, "[a]n appealing party may complain of an error committed against a nonappealing party when the error is prejudicial to the rights of the appellant." *In re Smith*, 77 Ohio App.3d 1,

13, 601 N.E.2d 45 (6th Dist.1991); *accord In re Hiatt*, 86 Ohio App.3d 716, 721, 621 N.E.2d 1222 (4th Dist.1993). In other words, an appellant may complain of an error committed against a nonappealing party when the error injuriously affects the appellant. *Winfree* at ¶ 8.

**{¶51}** In the case at bar, we assume, for the sake of argument, that the trial court's decision to deny the grandmother's motion to intervene injuriously affected the mother and that the mother, therefore, has standing to raise this issue. *See In re S.G.*, 3rd Dist. Defiance No. 4-16-13, 2016-Ohio-8403, 2016 WL 7626204, ¶¶ 51-53 (considering father's argument that trial court erred by denying grandparent's motion to intervene in permanent custody decision to the extent that it "impacted [the father's] rights"); *In re Mourney*, 4th Dist. 02CA48, 2003-Ohio-1870, 2003 WL 1869911, ¶¶ 20-21 (pointing out that mother and grandparent interests might align when both oppose placing child in children services agency's permanent custody and assuming that mother had standing to argue trial court erred by denying grandparent's motion to intervene); *In re Hiatt*, 86 Ohio App.3d at 721-722 (determining that father had standing to argue on appeal from permanent custody decision that trial court erred by not placing children in relative's legal custody when court's decision "affected his residual parental rights"). *But see In re J.D.*, 7th Dist. Mahoning No. 14MA33, 2014-Ohio-5726, 2014

WL 7358251, ¶¶ 68-73 (determining that mother lacked standing to argue that trial court erred by denying grandparent's motion to intervene in permanent custody action); *In re D.T.*, 10th Dist. Franklin No. 07AP-853, 2008-Ohio-2287, ¶ 8 ("An appellant cannot raise issues on another's behalf, especially when that party could have appealed the issues appellant posits.").[1]

2. Plain Error

**{¶52}** During the trial court proceedings, the mother did not raise any of the intervention arguments she now raises on appeal. Neither did the grandmother. Thus, the trial court did not have an opportunity to first consider the arguments the mother now raises, and therefore, the mother failed to preserve the issues for appellate review. *See generally State v. Clinkscale,* 122 Ohio St.3d 351, 2009–Ohio–2746, 911 N.E.2d 862, ¶ 31 (stating that a party must timely object to preserve error for appeal); *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Standards and Bldg. Appeals*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975) ("Ordinarily, errors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be

[1] We observe, as did the *J.D.* court, that the grandmother could have appealed the trial court's decision denying her motion to intervene, but did not. *See generally State ex rel. N.G. v. Cuyahoga Cty. Court of Common Pleas, Juvenile Div.*, 147 Ohio St3d 432, 2016-Ohio-1519, 67 N.E.3d 728, 28 (stating that "[a]

raised upon appeal .”). Accordingly, our review is limited to ascertaining whether the trial court plainly erred by denying the grandmother’s motion to intervene.

**{¶53}** “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. Moreover, plain error does not exist unless the court’s obvious deviation from a legal rule affected the outcome of the proceeding. *E.g.*, *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

**{¶54}** As we explain below, we are unable to find that any error the trial court made by denying the grandmother’s motion to intervene constitutes an obvious defect in the proceedings. Even if we construed any error as an obvious defect, the purported error did not affect the outcome of the proceedings.

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nonparty who seeks intervention under Civ.R. 24 and is denied intervention may appeal * * * the issue of

3. Civ.R. 24: Standard of Review

**{¶55}** Appellate courts review trial court decisions regarding Civ.R. 24 motions to intervene—whether "as of right of or by permission"—using the abuse-of-discretion standard of review.[2] *State ex rel. Merrill* at ¶ 41, citing *State ex rel. First New Shiloh Baptist Church v. Meagher (1998)*, 82 Ohio St.3d 501, 503, 696 N.E.2d 1058, fn. 1.

4. Civ.R. 24

**{¶56}** Civ.R. 24 governs intervention and states:

> "(A) Intervention of right
>
> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (B) Permissive intervention
>
> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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intervention").

[2] In a 2009 decision, we indicated that the standard of review regarding Civ.R. 24(A) intervention-as-of-right motions appeared unsettled. *In re Adoption of S.R.N.E.*, 4th Dist. Adams No. 09CA885, 2009-Ohio-6959, ¶7. We noted that some courts and commentators suggested a more searching review of Civ.R. 24(A) decisions. *Id.* The Supreme Court of Ohio has since clarified that the abuse-of-discretion standard governs both Civ.R. 24(A) and (B) decisions. *State ex rel. Merrill* at ¶ 41.

**{¶57}** Here, the mother does not claim that the grandmother had an unconditional or conditional statutory right to intervene under Civ.R. 24(A)(1) or (B)(1). Instead, she asserts that the grandmother was entitled to intervene under Civ.R. 24(A)(2) or Civ.R. 24(B)(2). The mother argues that the grandmother had a right to intervene under Civ.R. 24(A)(2), because the grandmother claimed an interest "relating to the property or transaction that is the subject of the action and [she] is so situated that the disposition of the action may * * * impede [her] ability to protect that interest." Civ.R. 24(A)(2). The mother contends that intervention was proper under Civ.R. 24(A)(2) for the following reasons: (1) the grandmother has an interest in obtaining custody of the children; (2) the children were the subject of the permanent custody proceeding; and (3) disposition of the permanent custody action would impede her ability to protect her interest in obtaining custody of the children.

**{¶58}** The mother additionally contends that the court should have permitted the grandmother to intervene under Civ.R. 24(B)(2), because the grandmother's claim for custody and "the main action have a question of law or fact in common." Civ.R. 24(B)(2). The mother asserts that both the grandmother's claim for custody of the children and the permanent custody

proceeding involved the same legal and factual issues, i.e., determining which placement would serve the children's best interest.

5. Grandparent Intervention in Juvenile Proceedings

**{¶59}** "The law does not provide grandparents with inherent legal rights based simply on the family relationship." *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, 868 N.E.2d 261, ¶9, citing *In re Whitaker*, 36 Ohio St.3d 213, 215, 522 N.E.2d 563 (1988). Consequently,

> "[g]randparents possess limited legal rights in juvenile proceedings through the operation of the Juvenile Rules. Specifically, Juv.R. 2(Y) defines a "party" as "a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, *or if the parent of a child is a child, the parent of that parent*, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court." (Emphasis added.) Thus, this rule grants a child's grandparents the right to be automatically joined as necessary parties to a custody hearing if, and only if, the child's parent or parents are under the age of majority." *In re H.W.* at ¶ 10.

In addition to Juv.R. 2(Y), Civ.R. 24 allows grandparents to join in an action when they have a legal interest or right in the proceeding. *Id.* at ¶ 11.

**{¶60}** A grandparent may acquire a legal interest or right concerning a grandchild when a court grants grandparent-visitation rights under R.C. 3109.051(B)(1), 3109.11, or 3109.12 (respectively, in a divorce, dissolution, annulment, or child-support proceeding; when the child's parent is deceased; or when the child's mother is unmarried). *Id.* at ¶9. "Grandparents may also

acquire legal rights through other means, such as filing a motion for temporary or permanent custody, which would then give them standing to intervene in a custody hearing." *Id.*, citing *In re Schmidt*, 25 Ohio St.3d 331, 336, 25 OBR 386, 496 N.E.2d 952 (1986). In general, the foregoing methods "are the only avenues through which grandparents may obtain rights relative to their grandchildren." *Id.*; *accord In re B.L.*, 3rd Dist. Allen Nos. 1-15-65, 1-15-66, 1-15-67, 1-15-68, 2016-Ohio-2982, 2016 WL 2853575, ¶19. Neither a grandparent's "desire for custody or visitation" nor "concern for [the] grandchild's welfare" can" be construed as a legal right to custody or visitation" or "a legal interest that falls within the scope of Civ.R. 24(A)." *In re Schmidt*, 25 Ohio St.3d 331, 336, 496 N.E.2d 952 (1986); *See State ex rel. Merrill* at ¶ 42, quoting *State ex rel. Dispatch Printing Co. v. Columbus* (2000), 90 Ohio St.3d 39, 40, 734 N.E.2d 797, quoting *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, 496 N.E.2d 952 (observing that for party to be entitled to intervene as of right under Civ.R. 24(A)(2), the "interest must be one that is '"legally protectable"'"). .

**{¶61}** The foregoing authorities amply demonstrate that the grandmother does not possess a legal right to custody or visitation or a legal interest that falls within the scope of Civ.R. 24(A). We therefore reject the

mother's argument that pursuant to Civ.R. 24(A), the grandmother had a right to intervene in the permanent custody proceedings.

**{¶62}** Additionally, a trial court does not abuse its discretion by denying a grandparent's motion to intervene under Civ.R. 24(A) when the evidence fails to reveal that the grandparent "ever stood *in loco parentis* to [the grandchild] or that [the grandparent] ever exercised significant parental control over, or assumed any parental duties for the benefit of, the[] grand[child]." *In re Schmidt*, 25 Ohio St.3d 331, 337, 496 N.E.2d 952, (1986).

**{¶63}** Some courts have construed *Schmidt* to mean that grandparent intervention in a permanent custody proceeding is appropriate—and that a trial court abuses its discretion by denying intervention—when "'the grandparents have stood *in loco parentis* to their grandchild, or where the grandparents have exercised significant parental control over, or assumed parental duties for the benefit of, their grandchild.'" *In re E.C.*, 8th Dist. Cuyahoga No. 103968, 2016-Ohio-4870, 2016 WL 3632537, ¶ 19, quoting *In re J.W.*, 10th Dist. Franklin Nos. 06AP-864, 06AP-1062, and 06AP-875, 2007-Ohio-1419, ¶ 27; *accord In re N.M.*, 2016-Ohio-7967, 74 N.E.3d 852, 2016 WL 7014310, ¶¶ 13-14 (8th Dist.); *In re D.T.*, 10th Dist. Franklin No. 07AP-853, 2008-Ohio-2287, 2008 WL 2026024, ¶ 11; *In re C.M.*, 9th Dist.

Summit No. 21720, 2004-Ohio-1984, 2004 WL 840112, ¶ 21. These courts largely base their reasoning upon Justice Celebreeze's concurrence in *Schmidt*, in which he wrote:

> "Although R.C. Chapter 2151 does not require that grandparents be made parties to permanent custody proceedings brought by the state against the parents, I firmly believe that it is contrary to common sense, compassion and the best interests of the child to deny suitable grandparents their last meaningful opportunity to gain custody of the child.
>
> Intervention by grandparents in a permanent custody proceeding is appropriate where the grandparents have a legal right to or a legally protectible interest in custody or visitation with their grandchild, where the grandparents have stood *in loco parentis* to their grandchild, or where the grandparents have exercised significant parental control over, or assumed parental duties for the benefit of, their grandchild. Where any of these circumstances are present, it is my view that a denial of the grandparents' motion to intervene would constitute an abuse of the juvenile court's discretion." *Schmidt*, 25 Ohio St.3d at 338 (Celebreeze, J., concurring).

**{¶64}** Even if we agreed that intervention is appropriate when "the grandparents have stood in *loco parentis* to their grandchild, or where the grandparents have exercised significant parental control over, or assumed parental duties for the benefit of, their grandchild," the evidence in the case fails to show that the grandmother stood *in loco parentis* to her grandchildren, exercised significant parental control over, or assumed parental duties for the benefit of her grandchildren. Instead, the evidence shows that she simply assisted the parents as needed or as requested. She did not assume parental duties, but rather, she helped the parents by

watching the children and by providing child care. We do not discount the relationship the grandmother shared with the children, but her relationship alone—even if we presume a significant bond—does not give her a legal right sufficient to intervene in the permanent custody proceedings.

**{¶65}** Furthermore, even if the trial court abused its discretion by denying the grandmother's motion to intervene (under either Civ.R. 24(A) or (B)), the mother has not demonstrated that the alleged error constitutes prejudicial error. *See* R.C. 2501.02 (stating that appellate courts review for prejudicial error); Civ.R. 61 (stating that courts "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); App.R. 12(B) (explaining that reviewing court may reverse trial court's judgment if it finds prejudicial error). Assuming, for the sake of argument, that the trial court should have permitted the grandmother to intervene, nothing in the record indicates that the outcome of the proceedings would have been different. ACCS caseworkers repeatedly stated that Appellee would not place the children with the maternal grandmother when none of the family members could explain how J.B. sustained his broken bones and when it did not believe that the grandmother would abide by a "no contact" request with the mother, her daughter. The mother does not suggest what other evidence the grandmother would have

presented if the court had allowed her to intervene that would have alleviated Appellee's concerns about placing the children with the grandmother. Additionally, the court permitted the grandmother to remain present throughout the permanent custody hearing, the grandmother testified at the hearing, and the court was well-aware of her desire for custody of the children. The court thus considered the grandmother's interests when reaching its decision, even though it did not allow her to intervene. Consequently, even if the court erred by denying the grandmother's motion to intervene, the error did not affect the outcome of the proceedings. *See In re D.T.* at ¶¶ 8-17 (noting that even if the trial court accorded a relative party status, the outcome of the proceedings would not have been different when relative testified at trial, trial court considered whether relative would be appropriate placement, and children services investigated relative as possible placement); *In re Thompson*, 4th Dist. Jackson No. 606, 1990 WL 34242, *3 (determining that denying grandparent's motion to intervene harmless error when grandparent present throughout the hearing, when court recognized grandparent's interest, and when court considered grandparent as possible placement).

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

D. Best Interest

**{¶67}** The mother's third assignment of error and the father's first assignment of error raise related issues concerning the children's best interests. Therefore, for ease of discussion, we consider them together.

**{¶68}** In her third assignment of error, the mother argues that the trial court erred by denying the grandmother's motion for custody.[3] In particular, she contends that the court did not seriously consider whether placement with the grandmother was in the children's best interests.

**{¶69}** In his first assignment of error, the father asserts that the trial court erred by concluding that permanent custody is in the children's best interest. He claims that the trial court "did not adequately consider all of the 'best interests' factors, as a whole." The father specifically challenges the trial court's finding that the children cannot achieve a legally secure permanent placement without granting Appellee permanent custody. He contends that either he or one of the children's grandparents is capable of providing the children with a legally secure permanent placement.

[3] In accordance with our decision in *In re Hiatt*, the mother has standing to argue on appeal that the trial court erred by not granting the grandmother legal custody of the children. *Id.* at 722 (stating that "appellant has standing to assert on appeal that the trial court erred in not granting legal custody to one of his relatives rather than permanent custody, since he was prejudiced to the extent that it affected his residual parental rights").

**{¶70}** 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. Therefore, we evaluate the mother's third assignment of error by considering whether permanent custody in in the children's best interest.

1. Standard of Review

**{¶71}** A reviewing court generally will not disturb a trial court's permanent custody decision—including its determination regarding a child's best interest—unless the decision is against the manifest weight of the evidence. *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.

**{¶72}** "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).

**{¶73}** 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. 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.[1] "Clear and convincing evidence" means: "[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, 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."); *In re Adoption of Lay*, 25 Ohio St.3d 41, 4243, 495 N.E.2d 9 (1986). *Cf. In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492, 12 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 *Martin*, 20 App.3d at 175. 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.*; *accord State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000). Furthermore, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must

defer to the factfinder'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).

**{¶74}** 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." *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 Supreme Court of Ohio 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 cannot be conveyed to a reviewing court by printed record." *Trickey v. Trickey*, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952).

**{¶75}** Additionally, 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.

2. Best Interest Factors

**{¶76}** 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.[4]

[4] R.C. 2151.414(E)(7) to (11) state:

**{¶77}** Determining whether granting permanent custody to a children services agency will promote a child's best interest involves a delicate balancing of "all relevant [best interest] factors," as well as the "five enumerated statutory factors." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-

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(7) The parent has been convicted of or pleaded guilty to one of the following:

(a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;

(b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) An offense under section 2905.32, 2907.21, or 2907.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(f) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a), (d), or (e) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section Highland App. No. 16CA25 19 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the

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; *accord In re C.G.*, 9th Dist. Summit Nos. 24097 and 24099, 2008-Ohio-3773, ¶ 28; *In re N.W.*, 10th Dist. Franklin Nos. 07AP-590 and 07AP-591, 2008-Ohio-297, 2008 WL 224356, ¶ 19. However, none of the best interest factors requires a court to give it "greater weight or heightened significance." *C.F.* at ¶ 57. Instead, the trial court considers the totality of the circumstances when making its best interest determination. *In re K.M.S.*, 3rd Dist. Marion Nos. 9-15-37, 9-15-38, and 9-15-39, 2017-Ohio-142, 2017 WL 168864, ¶ 24; *In re A.C.*, 9th Dist. Summit No. 27328, 2014–Ohio–4918, ¶ 46. In general, "[a] child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security." *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916, 2016 WL 915012, ¶66, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

a. Children's Interactions and Interrelationships

**{¶78}** As the trial court noted, the children have experienced "very little positive bonding." C.M. has been physically aggressive with J.B. since early in J.B.'s life. The parents were apparently unable to put an end to C.M.'s aggressive behavior when the children were in their care, and C.M.'s

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parent can provide a legally secure permanent placement and adequate care for the health, welfare,

aggressive behavior has continued in the foster home. Now that J.B. is older, he has started to defend himself against C.M.'s aggression.

**{¶79}** The foster mother explained that supervising the children is difficult and she fears leaving them unattended for even one second. The foster mother stated that she thinks separating the children for at least a period of time might be helpful.

**{¶80}** When the children lived with their parents, the mother and C.M. seemed particularly bonded. The mother mostly stayed home to care for the children, while the father worked. The maternal grandmother also provided occasional care for the children. The testimony indicates that the parents clearly love their children, but the parents were unable to offer any plausible explanation for J.B.'s injuries. Thus, while we do not doubt that the parents (and the grandmother) love the children, they were unable to protect J.B. from harm.

b. Children's Wishes

**{¶81}** The trial court determined that the children are too young to directly express their wishes. We observe that the guardian ad litem testified that placing the children in Appellee's custody is in their best interest. *In re S.M.*, 4th Dist. Highland No. 14CA4, 2014–Ohio–2961, ¶ 32 (noting that

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and safety of the child.

R.C. 2151.414 permits court to consider child's wishes as child directly expresses or through the guardian ad litem).

c. Custodial History

**{¶82}** The children lived with their parents from birth until their November 2015 removal. Since their removal, the children have remained in the same foster home. When Appellee filed its permanent custody motion, the children had been in its temporary custody for less than twelve months.

d. Legally Secure Permanent Placement

**{¶83}** "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 M.B.*, 4th Dist. Highland No. 15CA19, 2016–Ohio–793, ¶ 56, citing *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"); Black's Law Dictionary 1354 (6th Ed.1990) (defining "secure" to mean, in part, "not exposed to danger; safe; so strong, stable or firm as to insure safety"); *Id.* at 1139 (defining "permanent" to mean, in part, "[c]ontinuing or enduring in the same state, status, place, or the like without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient"). Thus, "[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." *M.B.* at ¶ 56.

**{¶84}** Furthermore, a trial court that is evaluating a child's need for a legally secure permanent placement and whether the child can achieve that type of placement need not determine that terminating parental rights is "not only a necessary option, but also the only option." *Schaefer*, *supra*, at ¶ 64.

Rather, once the court finds the existence of any one of the R.C. 2151.414(B)(1)(a)–(e) factors, R.C. 2151.414(D)(1) requires the court to weigh "all the relevant factors * * * to find the best option for the child." *Id.* "The statute does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors." *Id.* Instead, a child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour,* 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

**{¶85}** A trial court that is evaluating a child's best interest need not determine no suitable person is available for placement. *In re Schaefer, supra*, ¶ 64. Moreover, courts are not required to favor relative placement if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody. *Id.*; *accord In re T.G.*, 4th Dist. Athens No. 15CA24, 2015–Ohio–5330, ¶ 24; *In re V.C.*, 8th Dist. Cuyahoga No. 102903, 2015–Ohio–4991, ¶ 61 (stating that relative's positive relationship with child and willingness to provide an appropriate home did not trump child's best interest). We again 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.* at ¶ 9.

**{¶86}** Furthermore, we recognize that "[f]amily unity and blood relationship" may be "vital factors" to consider, but neither is controlling. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013–Ohio–1703, ¶ 31. Indeed, "neglected 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 case." *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009–Ohio–5496, ¶ 35. Thus, while biological relationships may be important considerations, they are not controlling when ascertaining a child's best interest. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98518 and 98519, 2013–Ohio–1706, ¶ 111. Additionally, "relatives seeking custody of a child are not afforded the same presumptive rights that a natural parent receives." *In re M.H.*, 5th Dist. Muskingum No. CT2015–0061, 2016–Ohio–1509, 2016 WL 1426473, ¶ 25.

**{¶87}** Here, the evidence is clear that the mother cannot provide the children with a legally secure permanent placement—she is serving a three-year prison sentence. Moreover, the father entered a guilty plea to child endangering and is on community control. The children were under the parents' care, control, and custody when J.B. sustained his unexplained injuries, and neither recognized that he had multiple fractures throughout his arms and legs until he underwent a body scan. Thus, the parents' failure to

recognize that their child was seriously injured indicates that they are not able to provide the children with a safe environment that will promote the children's growth, stability, and safety.

**{¶88}** Appellee investigated relative placements but did not deem any appropriate for the children. Appellee indicated that it would not place the children with the maternal grandmother due to its concerns whether the grandmother would adequately protect the children from the mother, when the mother eventually is released from prison. Appellee additionally had concerns about placing the children with the grandmother due to the inability to determine who perpetrated J.B.'s injuries. Appellee noted that during the time J.B. was injured, he spent at least some time with the grandmother, yet the grandmother did not notice that he was injured or offer an adequate explanation how J.B. could have sustained multiple fractures in various stages of healing. Furthermore, the grandmother did not believe that the mother bore responsibility for J.B.'s injuries. She even expressed some doubt that J.B. actually had broken bones. Thus, the evidence supports a finding that placing the children with the grandmother would not ensure a legally secure permanent placement.

e. R.C. 2151.414(E)(7)-(11)

**{¶89}** The trial court did not find any of the R.C. 2151.414(E)(7)-(11) factors applicable.

f. Balancing

**{¶90}** Considering all of the foregoing circumstances, we do not believe that the trial court's best interest determination is against the manifest weight of the evidence. Because the court found that placing the children in Appellee's permanent custody is in their best interest, placing them in the grandmother's custody necessarily is not. Therefore, we disagree with the mother that the trial court erred by denying the grandmother's motion for custody.

**{¶91}** Additionally, the record indicates that the trial court thoroughly considered the best interest factors, including whether the children can achieve a legally secure permanent placement without granting appellee permanent custody. The evidence supports the trial court's finding that the children cannot achieve a legally secure permanent placement without granting appellee permanent custody. Based upon all of the evidence presented at the permanent custody hearing, the trial court reasonably could have formed a firm belief that permanent custody is in the children's best

interest. We disagree with the father that the trial court failed to adequately consider the best interest factors.

**{¶92}** Accordingly, based upon the foregoing reasons, we overrule the mother's third assignment of error and the father's first assignment of error.

D. R.C. 2151.412

**{¶93}** In his second assignment of error, the father argues that Appellee failed to comply with R.C. 2151.412 by refusing to place the children with relatives. The father asserts that Appellee's failure to comply with the statute deprived him his due process right to maintain a relationship his children. He claims that if Appellee had complied with R.C. 2151.412, the court would have considered the relatives to be a more viable placement option, instead of granting appellee permanent custody.

**{¶94}** R.C. 2151.412 is entitled, "Case plans," and discusses the guidelines that govern an agency's case plan implementation. R.C. 2151.412(H) indicates that "[t]he agency and the court should be guided by the following general priorities," and then lists placement options. R.C. 2151.412(H)(2) states:

> "If both parents of the child have abandoned the child, have relinquished custody of the child, have become incapable of supporting or caring for the child even with reasonable assistance, or have a detrimental effect on the health, safety, and best interest of the

> child, the child should be placed in the legal custody of a suitable member of the child's extended family."

**{¶95}** By its terms, R.C. 2151.412 applies to case plans and not to permanent custody hearings. Furthermore, the statute indicates that the child should be, not must be, placed in a suitable relative's custody. And more importantly, the statute states that the relative must be "suitable." In the case at bar, Appellee did not deem the grandmother to be a suitable placement. Additionally, the father has not cited any authority that supports his argument that the failure to comply with R.C. 2151.412 necessitates a reversal of a trial court's permanent custody decision. *See generally In re A.S.*, 4th Dist. Pike No. 16CA879, 2017-Ohio-1166, 2017 WL 1181073, ¶ 59; *In re A.R.*, 8th Dist. Cuyahoga No. 103450, 2016–Ohio–1229, ¶ 21, citing *In re C.H.*, 8th Dist. Cuyahoga No. 103171, 2016–Ohio–26, ¶ 26.

**{¶96}** Accordingly, based upon the foregoing reasons, we overrule the father's second assignment of error.

## IV. CONCLUSION

**{¶97}** After careful consideration of all of the assignments of error, we overrule them and affirm the trial court's judgment.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Harsha, J. & Hoover, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, 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.**