[Cite as *In re N.K.*, 2015-Ohio-1790.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

In re N.K., M.K.

Court of Appeals Nos. S-14-040
S-14-041

Trial Court Nos. 21330015
21330016

DECISION AND JUDGMENT

Decided: May 8, 2015

* * * * *

John A. Brikmanis, for appellant.

Cindy A. Bilby, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, mother, appeals the October 6, 2014 judgment of the Sandusky County Court of Common Pleas, Juvenile Division, which terminated her parental rights with respect to N.K. and M.K., and awarded permanent custody to Sandusky County Department of Job & Family Services (SCJFS). The father has not appealed the trial court's judgment. For the reasons set forth herein, we affirm.

{¶ 2} On January 25, 2013, following an oral motion, temporary custody of twins, N.K. and M.K., born January 2013, and alleged to be dependent and neglected, was granted to SCJFS. The complaint in neglect and dependency was filed on January 28, 2013, and further alleged that in April 2012, appellant lost legal custody of her five other children who were placed with relatives. As to those children, the complaint alleged that appellant had failed to make progress on her case plan goals, failed to visit the children, and continued to use illegal drugs. After giving birth to the twins in January 2013, there was no relative placement available.

{¶ 3} On February 20, 2013, the initial case plan with a goal of reunification was filed naming appellant and father, J.K. Appellant was referred for a medication evaluation and therapeutic services and a drug and alcohol assessment. Appellant was also ordered to submit to random drug urinalysis and to visit the children regularly. The court also ordered appellant to pay child support.

{¶ 4} On March 5, 2014, father was indicted of various drug charges; he entered guilty pleas on May 8, 2014, and remained jailed for the duration of the proceedings.

{¶ 5} On March 21, 2014, SCJFS filed a motion for permanent custody of the children. The motion argued that permanent custody of the children should be awarded to SCJFS due to the children being in agency care for 12 or more months of a 22-month period, the parents failing to remedy the conditions which caused the children's removal, chemical dependency issues, a lack of commitment to the children, and a child

endangerment conviction. The complaint further stated that father abandoned the children.

{¶ 6} The permanent custody hearing was held over five dates and six weeks, and the following relevant evidence was presented. SCJFS investigator, Christina Cook, testified that she investigates allegations of abuse, neglect, and dependency. Cook testified that she first had contact with appellant in 2010, when she observed appellant's then one-year-old child alone and outside in a diaper. After contacting the agency, Cook was made aware that they were already involved with the family. Cook was also able to ascertain that neither appellant nor her mother who was also in the house was watching the child. There were three additional children in the home.

{¶ 7} As to the children at issue, Cook stated that SCJFS opened their investigation on January 17, 2013, and that the infant boy had tested positive for cocaine and the girl had tested positive for cocaine and marijuana. The children were removed and placed in foster care after appropriate relative care could not be found.

{¶ 8} During cross-examination, Cook acknowledged that the infants' meconium was tested and that there were no drugs found. The children were born addicted to methadone because appellant was prescribed and had been taking the drug for chronic back pain. The children were gradually weaned from the medication.

{¶ 9} Kelly Beeker, caseworker for SCJFS, testified that she was a co-caseworker on appellant's case from January through September 2013. Beeker described the case-plan services offered to appellant; she noted that appellant successfully completed the

11 drug and alcohol and psychotherapy sessions that she was referred to. Beeker noted that appellant did not complete all the random urinalysis testing. Regarding visitation, Beeker stated that appellant missed 14 out of the 56 scheduled times.

{¶ 10} Beeker testified that appellant testified positive for drugs on four occasions; one in February 2013, and three in June of 2013. Two of the tests were positive for cocaine; two were for dilute. Beeker explained that a dilute is a substance taken in order to flush out your system prior to a drug test.

{¶ 11} Krista Hovis, from Sandusky County Child Support, testified that appellant was ordered to pay child support in the sum of $141.49 per month, per child, plus 20 percent on arrears. Hovis stated that since March 2014, the agency had been receiving approximately $23 to $25 per week, per child. Prior to the current payments, appellant had been employed and making payments from May through June 2013, and then another employer from August through September 2013. Appellant owed arrearages of approximately $1,600 for each child.

{¶ 12} Steven Hubbard at Firelands Counseling & Recovery Services testified regarding its chemical dependency program. An individual begins with the Stepping Into Recovery program and then progresses to the Intensive Outpatient Program (IOP). In April 2014, appellant was enrolled in the IOP which required nine hours a week of counseling. Enrollees were permitted four absences and would be terminated on the fifth absence. Hubbard stated that appellant never finished the program due to a positive urine screen and her refusal to start over with Stepping Into Recovery.

{¶ 13} Tiffin Police Detective Shawn Vallery testified that on January 9, 2014, Tiffin Police executed a search warrant at father's address and that appellant was present at the time. The warrant was based on several controlled crack cocaine buys from father. Criminal tools and some buy money were recovered from the home.

{¶ 14} Karen LaFountain, chemical dependency counselor with Treatment Alternatives to Street Crimes (T.A.S.C.) testified that on March 12, 2013, appellant received a referral to have an assessment done at T.A.S.C. Her first appointment was scheduled for May 2, 2013; LaFountain testified that appellant did not appear but came in on May 3, voluntarily, to provide a urine sample. She missed her assessment rescheduled for May 21, 2013. Appellant appeared at the next appointment scheduled for June 21, 2013, during which she also completed a drug urine test which came back positive for cocaine. LaFountain stated that appellant tested positive a total of three out of 23 tests. She was unsuccessfully discharged from T.A.S.C. on August 6, 2013, due to her failure to attend meetings and treatment. LaFountain was also questioned about creatinine levels in the body and how much fluid would be necessary to get a "dilute" reading. LaFountain was not certain.

{¶ 15} LaFountain stated that appellant got a referral to reenroll at T.A.S.C. on December 10, 2013. She was scheduled for an assessment but failed to appear. Her next assessment was cancelled due to a Level 3 snow emergency. Appellant never rescheduled for an assessment.

{¶ 16} SCJFS children services unit employee, Melanie Allen, testified that she supervises foster care and adoption placements including the application and home-study process. Allen stated that during permanent custody proceedings, relatives may come forward and express an interest in adoption. In this case, Allen stated that a home study request was made by relatives L.L. and A.L. but that they withdrew their request once they believed that the home sleeping arrangements would not be approved. Allen stated that as to the couple there were two prior home studies, in 2010 and 2011, regarding appellant's other children which were never completed. The first was withdrawn at their request and the second was closed because the children were placed with other family members.

{¶ 17} Dawn Ohms, also of the SCJFS Children Services Unit, testified that she conducted a home study of L.L. and A.L.'s home in September 2010, for two of appellant's other children. The couple had six children of their own. Over the course of the study, the fire department informed the couple that they needed two smoke detectors. L.L. and A.L. were also informed that they needed to buy additional beds. Fingerprints and a financial statement also had not been completed. At this point, they withdrew their request. In 2011, they expressed interest in taking one of appellant's children but the home study process never officially commenced.

{¶ 18} Ohms stated that she had the opportunity to visit appellant at her home approximately ten times. Ohms stated that, based on what she had observed, she had

concerns regarding appellant's ability to supervise the children. Ohms stated that she saw two of the young children in the street and one with a knife.

{¶ 19} Rebecca Serrick, Eastern Region Director for Lutheran Social Services, testified that in 2013, appellant was assessed and recommenced to attend relapse prevention, a 20-week group process. Serrick stated that appellant did the relapse prevention individually with an intern; she saw appellant 11 times (the program calls for 20 sessions of treatment). Serrick testified that the intern did not keep good notes and did not work for the agency any longer. Only one note mentioned a discussion regarding drugs or alcohol.

{¶ 20} Serrick was questioned about appellant's June 11, 2013 completion of the program which was listed as "highly successful." Serrick acknowledged that but noted appellant's June 18, 2013 positive drug test which indicated that she did not learn from the program and that the agency should have encouraged her to come back to treatment.

{¶ 21} Serrick testified that appellant had made two subsequent contacts with the agency. First, she requested a copy of all her records because she believed that the intern exaggerated the amount of her drug use; she intended to, but never filed a grievance. On June 5, 2014, Serrick did an intake assessment and testified that the case was still open because after appellant's third session she had to confront her about the multiple, positive drug tests. Notably, appellant failed to inform Serrick of a positive test for cocaine on May 6, 2014. According to Serrick, appellant believed that someone was adulterating the samples. Appellant then terminated her counselling.

{¶ 22} Serrick was thoroughly cross-examined regarding appellant's cocaine use. Serrick admitted that the June 9, 2014 dipstick positive drug test was incorrect. Serrick also stated that dipstick tests are unreliable and that a lab test is necessary. Serrick stressed that appellant kept denying her cocaine use.

{¶ 23} The children's foster mother and potential adoptive mother, B.A., testified next. B.A. stated that the children were placed with her family on January 25, 2013, directly from the hospital. B.A. is married and at the time of the hearing, her children were 13, 15, and 17 years old. B.A. stated that both children were tongue tied and had surgery in October 2013, to have their tongues clipped. Appellant was made aware of the surgery but did not attend.

{¶ 24} B.A. stated that she had been supervising visits between the children and appellant two times per week for one hour; father's visitation was also for one hour, the visits were back-to-back. B.A. testified that from September 13 through December 3, 2013, appellant did not attend any visits and they were put on "hold." They implemented a call-ahead policy; appellant would call to schedule a visit.

{¶ 25} When the visits resumed, B.A. stated that she initially had to stay in the room because the children were unsure and upset. She encouraged them to interact with appellant. B.A. stated that appellant always acted appropriately during visitation.

{¶ 26} Tami Ward of SCCS testified that she is the investigation supervisor and records custodian. Ward stated that they first began investigating appellant in April 2006, regarding her oldest two children, then three and two, because there was an

allegation that they were outside and unsupervised. That investigation was closed as unsubstantiated. In August 2008, an investigation was opened regarding three children and allegations that appellant and father were smoking crack in front of the children and that they were unsupervised and wandering around a motel. Because appellant then resided in Hancock County, they conducted a "courtesy interview," reported no concerns, and the investigation was closed. In February 2008, a third referral was made with concerns that appellant, pregnant with her fourth child, was using methadone, Percocet, Vicodin, and Darvocet. A fourth call was made in July 2009, stating that the oldest two children were wandering outside unsupervised; the children were never found outside and the investigation was closed. Two more wandering investigations were conducted and closed.

{¶ 27} In May 2010, appellant was convicted of child endangering after Fremont Police found her then three and one-year-old outside unsupervised. Appellant had been asleep in the house. In June 2010, children's services offered appellant a voluntary case which she accepted.

{¶ 28} Ward testified that the case was closed on June 22, 2010, due to a new investigation regarding the older two children unsupervised and in the road. A complaint was filed on July 14, 2010. Following another incident where the one year old was outside unsupervised, SCJFS removed the four children from the home and placed them with a family friend. A new dependency case was filed following the birth of appellant's fifth child. According to Ward, there were additional allegations of children being

unsupervised, sexual abuse by a neighbor, and allowing the children to see a part of a pornographic film.

{¶ 29} Late in her pregnancy with the twins, the agency received a call that appellant was in the hospital with abdominal pains and had tested positive for cocaine. In December 2012, appellant was arrested for OVI; Ward later admitted that appellant was in court for an OVI but Ward was not sure of the date of the offense. Ward stated that after the twins were born, two new investigations were opened.

{¶ 30} Licensed social worker and Firelands counselor Katelyn Hopkins testified that appellant became her client in January 2014, and that she diagnosed her with stimulant use disorder. Appellant was placed into Hopkins' Stepping Into Recovery group which goes 8 to 12 sessions. Appellant had some absences but completed the program in approximately two months. Appellant then began the IOP program but relapsed and was required to repeat the Stepping Into Recovery component. Appellant opted to close her case; it was closed on May 29, 2014.

{¶ 31} Lisa Mullholand, SCCS caseworker, testified that she was assigned to the family in July 2010. At that time, appellant maintained custody but her four children were voluntarily placed with a family member; eventually three of the children were moved to another family member. In September 2011, two of the children were moved to agency custody.

{¶ 32} Appellant's case plan included counseling, maintaining proper supervision of her children, and working with in-home services to organize her home. Mullholand

stated that the agency began to "phase" the children back into the home. In December 2010, all the children were back in appellant's home. Appellant had given birth to her fifth child, prematurely, in October.

{¶ 33} Mullholand stated that by April 2011, appellant had missed several appointments for the children. An order to show cause was filed due to appellant failing to attend counseling, failing to get one child to school and address his speech delays, failing to get the newborn to his doctor appointments, failing to get treatment for another child's eczema, and failing to use protective daycare.

{¶ 34} Mullholand stated that appellant tested positive for cocaine in 2011. In May 2011, the children were again removed from the home and placed in foster care due to an allegation that one of the children was outside and unsupervised. Three of the children eventually were placed with appellant's stepmother, B.G. The other two went to B.H., maternal grandmother of one of the children and her husband, J.H., in Toledo. Mullholand stated that A.L. and L.L. were considered for placement on two occasions. The first time, they decided that they were unable to take the children and the second time they only wanted to take one child.

{¶ 35} In January 2013, following the birth of the twins, the agency opened an investigation. A case plan was filed on February 20, 2013, and stated that appellant was to undergo a drug and alcohol assessment, submit to random urinalysis, visit the children consistently, attend all of the children's scheduled medical appointments, and follow all the recommendations of the service providers. Appellant missed the first two agency

visits; she claimed she was in Columbus looking for housing. Despite being asked, no documentation was provided to substantiate her claim. Mulholland then testified regarding a visitation attendance form which was admitted into evidence. Mulholland stated that there was an 83-day window where appellant did not visit, from September 10 until December 3, 2013. Appellant did not visit again until December 20. Her next visit was February 3, 2014. Appellant's visits then became more regular.

{¶ 36} Mullholand next testified regarding the prescribed medications appellant was taking and that appellant stated that they made her sleep more. Regarding placement of the children, Mullholand stated that appellant did not give her L.L.'s name until November 2013. Mullholand stated that she went to L.L. and A.L.'s home in February 2014, as part of the home study. According to Mullholand, the size of the home could not accommodate the twins and the couples' six children. There were inadequate smoke alarms, and their income was insufficient. Mullholand also stated that they discussed the frequent moves and domestic issues between the parties. They also discussed L.L.'s treatment for depression and anxiety. The two had separated for periods in 2012 and 2013. There were also allegations of abuse and neglect when the family lived in Kentucky.

{¶ 37} Mullholand testified that L.L. and A.L. offered to move their bedroom to the dining room to allow more room for the twins. Mullholand stated that that would not be allowed because the dining room is in the middle of the house and you walk through it

to get to the dining room and the children's bedrooms. At that point, L.L. asked to withdraw their application.

{¶ 38} Mullholand acknowledged that L.L. and A.L. could have reapplied for a new home study. She stated that the pair gave no indication that they wished to move and, in fact, stated that their lease ran through October 2014. As of the date of the hearing, Mullholand had heard nothing further from them. At the end of June or early July 2014, the court-appointed special advocate (CASA), pursuant to an agency discovery request, provided L.L.'s daycare certificate and records regarding their Kentucky children services' involvement. Mullholand stated that even if the couple moved to a bigger home, she still would not place the children with them due to the other issues to which she testified.

{¶ 39} Mullholand stated that she recommends that SCJFS receive permanent custody of the children. Her recommendation was based on the fact that they had been in foster care for 18 months and are doing well, appellant and father did not even complete half of the case plan requirements, and appellant's home is not safe for the children. Mullholand stated that at the time of her June 2014 visit, the home was in the process of a remodel and had no railings on the stairway and the only working toilet was in the dimly-lit basement.

{¶ 40} Mullholand was questioned as to why if the main issue was appellant's failure to properly supervise the children, the focus appeared to be appellant's cocaine use. Mullholand stated that part of the problem was appellant's failure to provide random

urine samples. Mullholand would call her and she would not answer her phone or appellant would say that she would come to the agency and then she would not follow through.

{¶ 41} Mullholand agreed that appellant had been employed since February 2014, and had been paying child support. Mullholand also agreed that the twins were not removed from appellant's custody due to positive drugs tests. She stated that they were removed due to prior concerns that had not been addressed.

{¶ 42} Mullholand was questioned about the agency's refusal to place the twins with L.L. and A.L.; specifically, why the agency appeared to be punishing the couple for not requesting custody sooner. Mullholand stated that they should have tried to get custody 18 months prior and that she was not informed that gaining custody of the twins was the reason the family moved back to Ohio. Mullholand also acknowledged that the Kentucky abuse claims were unsubstantiated. She further acknowledged that the Kentucky agency received the call from A.L.'s ex-wife and that he had custody of two of their children.

{¶ 43} During redirect examination, Mullholand was able to testify, after reviewing the full report from Kentucky children services (which was not provided by L.L. or A.L.), that the investigation was never completed because the family moved back to Ohio. SCJFS then rested.

{¶ 44} Appellant's first witness, L.L., testified that she lives with her husband, A.L., and six biological and stepchildren, four boys and two girls. L.L. testified that she

is appellant's half-sister on her father's side. L.L. stated that A.L. is employed full-time and that she is a state certified home childcare provider.

{¶ 45} L.L. testified that she lived in Toledo, Ohio, with A.L. and her family for three years and then in 2012, after she became employed, moved to Kentucky. L.L. testified that she and A.L. separated due to the stress of the move and living with family members. A few months later they reunited. L.L. further stated that she takes medication for depression and anxiety but has not been diagnosed with clinical depression. L.L. testified that neither she nor A.L. have a history of drug or alcohol abuse or a criminal record. A.L. was honorably discharged from the navy.

{¶ 46} L.L. testified that the family moved back to Ohio in July 2013, and that she originally contacted SCJFS in November 2013, about placement of the twins in her home. L.L. stated that she spoke with Mullholand and she agreed to conduct a home study. L.L. stated that she withdrew the request because Mullholand stated that her home was not large enough for eight children.

{¶ 47} L.L. stated that since withdrawing her request in March 2014, her income had doubled and they were about to purchase a larger home on a land contract. L.L. testified that her mother currently has custody of three of appellant's children and that if she got custody of the twins, they would be able to see their full siblings.

{¶ 48} L.L. testified regarding their contact with children's services in Kentucky. She stated that she requested the records in order to facilitate the placement of the twins in their home. L.L. stated that the agency was contacted by the mother of her

stepchildren over alleged abuse; they interviewed her and closed the case as unsubstantiated. L.L. stated that she generally uses time-outs for punishment but on occasion will spank with her hand. She denied ever abusing the children. L.L. stated that she believed that SCJFS never wanted to place the children with her and A.L. L.L. did state that if permanent custody was awarded to SCJFS, she and her husband would be willing to adopt.

{¶ 49} Following a six-week break in the hearing, L.L. continued her testimony by stating that they had, in fact, moved into the larger home and that she has met with adoptive counselors for an adoptive home study. They were working on the voluminous paperwork. L.L. stated that visitation was sometimes difficult to schedule because SCJFS required that it be supervised. L.L. testified that they were taking classes required for foster or adoptive parents and had attended 20 of the 36 hours.

{¶ 50} L.L.'s husband, A.L., testified next. He stated that he was in the Navy from 2001 to 2005, and now is employed full-time as a maintenance technician at a manufacturing company. A.L. testified that he has no criminal convictions. A.L. was married in 2002, and had two boys, now ages 11 and 12. He divorced in 2006.

{¶ 51} A.L. testified that he and L.L. met in high school and reconnected in the fall of 2005. They were married in 2008. A.L. indicated that he enjoys having all the children in the home. A.L. stated that he has finished the two bedrooms in the basement of their new house for their four boys and that the two girls would share a bedroom and the twins would be upstairs across from their room. Appellant then rested.

{¶ 52} CASA then presented its case. CASA volunteer, Angela Goodin, testified next. The parties stipulated to her CASA reports and recommendations filed with the court. As to L.L. and A.L., Goodin stated that she first met them while observing the home study. Goodin agreed that the old home was too small and stated that she had been to the new home on August 26, September 3, and September 10, 2014, for visits with the twins. Goodin stated that the house was "beautiful" and "spacious" and that it was great that they had prepared a room for the twins. Goodin did note that the visits which included the daycare children were chaotic and that changes would have to be made for more one-on-one time with the twins. She did note that over the course of the visitations, the children were becoming more comfortable with L.L.

{¶ 53} Goodin testified that she believes that permanent custody in favor of SCJFS was in the best interests of the children because appellant and the father have not been there for them. Appellant, specifically, had failed to address the issues which caused removal of the children.

{¶ 54} During cross-examination, Goodin acknowledged the twins were her first case. Goodin was questioned about whether L.L. and A.L.'s children wanted the twins to live with them. Goodin stated that the children responded negatively, noting that there were already enough of them. Goodin did state that if L.L. and A.L. continued through the adoption process and bonded with the children, she would consider them for adoptive placement.

{¶ 55} CASA program coordinator, Angela Hofacker, testified that since July 11, 2014, she observed three visitations between L.L. and A.L. and the twins. On August 13, 2014, Hofacker attended a visitation at a McDonalds with a Playland. L.L. had three daycare children with her and Hofacker noted that it was a little difficult for the two to focus on the twins with the additional children. Hofacker acknowledged that L.L. and A.L. were doing a good job trying to interact with the twins and redirecting them when they would try and get to their foster mother.

{¶ 56} On August 20, 2014, the visitation was at a park. Hofacker stated that there were several children present and that 35-40 minutes of the visit was spent sitting at a picnic table. Hofacker stated that L.L. and A.L. played with the twins on the slide and that they really enjoyed it. Regarding bonding, Hofacker stated that L.L. is very gentle and gives the twins space; A.L. is more standoffish.

{¶ 57} Hofacker testified that she supervised the third visit which was at L.L. and A.L.'s home. Hofacker stated that when she arrived there were six daycare children and one biological child. She testified that during the visit the other children began coming home from school. Hofacker stated that by around 4:15 p.m. there was a total of 14 children in the home. Hofacker testified that it was loud and chaotic and that the twins were clinging to their foster mother. Hofacker did feel that they were getting more comfortable with L.L. and A.L. Hofacker stated her main concern is that L.L. and A.L. are unable to care for more children. She stated that it was in the best interests of the children to award permanent custody to SCJFS.

{¶ 58} Hofacker explained that although she did not feel that legal custody should have been awarded to L.L. and A.L., there is an opportunity for some of the concerns to be remedied and they be considered for adoptive placement.

{¶ 59} On rebuttal, SCJFS called Melanie Allen to update her prior testimony with events from July 11, 2014 through September 11, 2014. Allen stated that on August 7, 2014, they received a completed adoption application from L.L. and A.L. Some training certificates were still needed, as well as references and personal and family interviews.

{¶ 60} Allen testified that the preferential order for adoptive placement puts adult relatives at the top and current foster caregivers next. Prior foster parents would be third and last would be any approved foster family in the state of Ohio. Once all the paperwork is completed agency personnel meet and complete an 18 page matching document which aids in determining which family is most suitable for the children.

{¶ 61} Lisa Mullholand was also recalled as a witness. Mullholand clarified that when L.L. and A.L. filed a motion for legal custody there was no approved home study. Further, when SCJFS filed its motion for permanent custody there was still no approved home study. Mullholand did acknowledge that based on the changes she has seen, L.L. and A.L. could be a good adoptive match.

{¶ 62} On October 6, 2014, the trial court issued its findings of fact and conclusions of law. The court concluded that the children had been in the temporary custody of SCJFS for 12 or more months of a consecutive 22-month time period, and that they cannot be placed with either parent within a reasonable period of time. The court

specifically found that the children had been abandoned by their father. The court based its conclusions on its findings that appellant and father had demonstrated a lack of commitment to the children by failing to provide food, clothing and shelter and failing to provide financial support. The court further noted chronic mental and emotional illness and chemical dependency and that each had a prior child endangerment conviction. The court noted that the children had done very well in their foster home and were in need of permanent, stable placement whether it be with a family member or other interested families. Finally, the court found that SCJFS had made reasonable efforts to reunify the family.

{¶ 63} As to L.L. and A.L., the court determined that under a totality of the circumstances granting legal custody to them was not in the children's best interests. This appeal followed.

{¶ 64} Appellant now raises three assignments or error for our consideration:

> I. The clear and convincing standard as applied in Ohio is unconstitutional in permanent custody proceedings.
>
> II. The trial court erred as a matter of law when L.[s] were not made a party to the case.
>
> III. The court's decision was contrary to the evidence as the agency did not meet its burden to prove by clear and convincing evidence.

{¶ 65} In her first assignment of error, appellant contends that the clear and convincing standard of review used in permanent custody proceedings in Ohio is

unconstitutional. Appellant's argument is based on the lack of privilege between parents and service providers under R.C. 2317.02(B)(1)(b), which she claims requires a beyond a reasonable doubt standard to provide due process of law. Appellant argues that the service providers' testimony regarding a parent's treatment during the permanent custody hearing effectively uses the information provided during treatment against them.

{¶ 66} We note that the appropriate standard of review is statutory. R.C. 2151.414(B)(1) provides that "the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody * * *." Further, it has been held to be constitutional. *See In re Schmidt*, 25 Ohio St.3d 331, 335, 496 N.E.2d 952 (1986), following *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This standard, both before and after the enactment of R.C. 2317.02(B)(1)(b), has repeatedly been followed by Ohio courts, including this court. *See In re Tiffany Y.*, 6th Dist. Sandusky No. S-03-004, 2003-Ohio-6203, ¶ 11-12; *In re Christopher G.*, 6th Dist. Lucas No. L-06-1188, 2006-Ohio-6294, ¶ 14-15.

{¶ 67} The Supreme Court of Ohio has examined R.C. 2317.02(B)(1)(b) in relation to permanent custody proceedings and held that statements made to a psychologist or social worker are not privileged communications where they are made during the course of an examination ordered by a court in order to assist in "determining facts or making conclusions of law." *In re Jones*, 99 Ohio St.3d 203, 2003-Ohio-3182,

790 N.E.2d 321, paragraphs one and two of the syllabus. We note that appellant did not object to the testimony during the course of the proceedings. Moreover, the testimony presented by the drug and alcohol counselors was mainly objective in nature. It related to the urinalysis test results, the medications prescribed to appellant, and appellant's attendance in various programs. Further, appellant has failed to make any specific arguments as to how the information testified to in conjunction with the clear and convincing standard of review, denied her of due process of law.

{¶ 68} Based on the foregoing, we find that the use of the proper standard of review and the admission of evidence in accordance to law did not result in constitutional error. Appellant's first assignment of error is not well-taken.

{¶ 69} In her second assignment of error, appellant argues that the trial court erred when it denied L.L. and A.L.'s motion to be made parties to the case. This error, appellant argues, contravenes R.C. 2151.414(D)(2) which provides:

> (2) If all of the following apply, permanent custody is in the best interest of the child, and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency:
>
> (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.

{¶ 70} Essentially, appellant contends that because not all of the (D)(2) factors, specifically (D)(2)(d) were met, permanent custody should not have been awarded to SCJFS. The factors in R.C. 2151.414(D)(2) have been held to be an alternative to reaching the best interest determination through the factors in R.C. 2151.414(D)(1). *In re K.H.*, 2d Dist. Clark No. 2009-CA-80, 2010-Ohio-1609. In *In re K.H.*, the court noted that as to (D)(2):

if all of the facts enumerated therein apply, then an award of permanent custody is in the child's best interest, and the trial court need not perform the weighing specified in division (D)(1). But if it is not the case that all of the facts enumerated in division (D)(2) exist; that is, if any one of the facts enumerated in division (D)(2) does not exist, then the trial court must

> proceed to the weighing of factors set forth in division (D)(1) to determine the child's best interest. *Id*. at ¶ 54.

{¶ 71} L.L. and A.L.'s motion to intervene and motion for legal custody were both filed on June 30, 2014, approximately one week prior to the hearing. Denying the motion, the court noted it was

> going to leave pending the motion to place the children with the maternal aunt, which leaves open the Court being able to consider as Attorney Fiegl argued all placement options that are before the court that might be in the children's best interest or be the least restrictive, and the other matters the Court has to consider, so the motion to place the children with the aunt will stay pending. The Court will consider that motion simultaneously with the hearing that is scheduled for the Permanent Custody, and that will be an option that the Court will remain open to as a possibility depending on the testimony that we hear throughout the hearing.

{¶ 72} Reviewing the hearing transcript, it is clear that L.L. and A.L.'s motion for legal custody was thoroughly examined. Both testified regarding their desire to have legal custody of the children. Several witnesses testified as to visits to their home and visitation between L.L. and A.L. and the children. In fact, looking at the entirety of the hearing, the focus was on their wishes and progress in the legal custody and adoption process. Accordingly, even if we were to say that the court should have added them as a

party, there was no prejudice demonstrated by not granting the motion to intervene. Appellant's second assignment of error is not well-taken.

{¶ 73} Appellant's third and final assignment of error argues that the trial court's award of permanent custody to SCJFS was not supported by clear and convincing evidence. Pursuant to R.C. 2151.414(B), after a child is adjudicated dependent and temporary custody is granted to a public agency, a court may grant the public agency's motion for permanent custody "if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody" and that any of the listed factors apply. The court specifically found that the children had been in agency custody for more than 12 of the past 22 months and that the children could not or should not be placed with either parent within a reasonable time. R.C. 2151.353(A)(4), 2151.414(B)(1)(a). The court further found that, under R.C. 2151.414(E)(1), (4), and (13), the parents had failed to remedy the conditions which caused the removal, that the parents demonstrated a lack of commitment to the children, and that father was incarcerated. The court then concluded that it was in the children's best interests to award permanent custody to SCJFS.

{¶ 74} Upon review of the record in this case, we conclude that the above findings were supported by clear and convincing evidence. Accordingly, we find that the trial court did not abuse its discretion in awarding permanent custody of the children to SCJFS. Appellant's third assignment of error is not well-taken.

{¶ 75} On consideration whereof, we find that substantial justice has been done the party complaining and the judgment of the Sandusky County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE