[Cite as *In re Pittman*, 2002-Ohio-2208.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: DEAIRE PITTMAN	C.A. No. 20894
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DN 00 3 174

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

{¶1} Appellant, Michelle Woodall, has appealed from the judgment of the Summit County Court of Common Pleas, Juvenile Division, terminating her parental rights and granting permanent custody of her child, Deaire Pittman, to the Summit County Children's Services Board ("CSB"). This Court affirms.

I

{¶2} Deaire Pittman was born March 2, 2000, to Appellant.[1] The newborn was released from the hospital to the mother's care on March 4, 2000. Upon release, Appellant had agreed to participate in Summa's Home Care Services and made two home appointments. Subsequently, Appellant refused the services and canceled the appointments. When that occurred, the hospital called to inform CSB.

{¶3} CSB, in turn, filed a sworn complaint on March 8, 2000, alleging that the child was neglected and dependent. Specifically, CSB alleged that Appellant: (1) had five other children in the temporary custody of CSB, (2) had not completed her objectives regarding the case plan for those children, (3) had an active warrant relating to probation violations on child endangering charges for the siblings, (4) denied she was pregnant until February 16 and then maintained that she had been receiving prenatal care, (5) kept only one prenatal appointment, and (6) cancelled two medical appointments for the newborn.

[1] The father of the child is unknown. Appellant identified James Pittman as the father, but subsequent genetic testing determined that there is a zero percent possibility that he could be the father of this child. Appellant has not named anyone else as a potential father. Service by publication was made upon John Doe.

{¶4} Upon hearing the complaint, the court placed Deaire in the emergency temporary custody of CSB and the matter was set for a shelter care hearing. At that time, CSB explained that they had requested notification by the hospital when Appellant came in to deliver the infant. They requested notification because the mother had not been complying with her case plan in regard to her other children and the agency was concerned about Appellant's ability to care for a newborn. The magistrate found that CSB had established probable cause that it was in the best interest of the child to continue in the emergency temporary custody of CSB. The magistrate also found that CSB had made reasonable efforts to prevent the continued removal of the child from the parents. Counsel was appointed for Appellant and a guardian ad litem was appointed for the child.

{¶5} At the adjudication hearing, CSB indicated that it was in the process of filing for permanent custody of the five older siblings and was considering immediately seeking permanent custody of this child as well. The guardian ad litem also expressed great concern for the well-being of the child, stated a preference that Deaire be considered for permanent placement at the same time as the older children, and stated agreement with placing the child in the temporary custody of CSB only if the case plan required "very measurable results" and "clear objectives."

{¶6} Ultimately, the parties stipulated to the facts alleged in the original complaint as stated above and a finding of dependency. The parties also agreed to a disposition of temporary custody in CSB. The magistrate found that placement of the child in the custody of Appellant at this time would be contrary to the child's best interests and also found that CSB demonstrated reasonable efforts to prevent the continued removal of the child. In regard to those efforts, the court cited services provided to the older siblings and the agency's present agreement to provide Appellant with additional time and services to attempt to allow her to have Deaire returned to her care.

{¶7} The magistrate adopted the case plan currently on file with the court and ordered the parties to comply with the objectives stated therein. The case plan addressed the following concerns: (1) behavioral problems of the children, (2) history of assaultive behavior toward other adults, (3) parenting skills and knowledge, (4) history of abuse and neglect as a child, (5) protection of the child, and (6) substance abuse.

{¶8} In order to address these concerns, it was recommended that Appellant: (1) obtain psychological and psychiatric evaluations, (2) participate in counseling in order to understand the cycle of neglect and/or abuse that existed in Appellant's childhood and how it impacts her own children, (3) participate in counseling to control and manage her anger effectively, (4) comply with all aspects of her probation, (5) receive a drug and alcohol assessment, (6) submit to

urine screens, (7) maintain legal, stable employment, (8) participate in services necessary to address the behavioral and developmental problems of the children in order to meet their needs and also to demonstrate insight into their problems, and (9) determine paternity for Deaire and involve the father in the child's life. The stated behavioral goal was to provide a stable home environment and lifestyle free from drugs, alcohol, or criminal activity, with no verbally or physically assaultive behaviors, and to meet and understand the needs of the children.

{¶9} Periodic review hearings were conducted, at which it was determined that continuing temporary custody in CSB was in the best interest of the child. On December 13, 2000, CSB filed a motion for the permanent custody of Deaire. In response, Appellant moved that the child be returned to her legal custody or, alternatively, be placed in the legal custody of a relative. Lisa Woodall and Richelle Woodall, sisters of Appellant, each filed handwritten letters requesting custody of Deaire on February 20, 2001. A hearing on all motions was conducted before a magistrate of the juvenile court on April 10 and 12, 2001. The magistrate entered her decision on May 23, 2001, terminating Appellant's parental rights, denying the motions for legal custody, and placing permanent custody of the child in CSB. Appellant filed objections, the prosecutor responded, and the court ruled on the objections. The court entered judgment in accordance with the decision of the magistrate on November 13, 2001. Appellant has appealed from that order and assigned three errors for review.

II

{¶10} Assignment of Error Number One

{¶11} The trial court erred in determining that CSB was not required to make reasonable efforts for reunification between appellant and the minor child because the basis for this reasonable efforts bypass, to wit: the judicial determination that the siblings of the minor child were placed in permanent custody of CSB, was on appeal at the time of the trial court's determination.

{¶12} Through her first assignment of error, Appellant has contended that the juvenile court erred in determining that CSB was not required to make reasonable efforts for reunification between herself and her child. She has contended that the finding was erroneous for two reasons. First, Appellant has maintained that CSB should not be excused from making reasonable efforts toward reunification because the termination of her parental rights as to her other children was on appeal at the time of CSB's motion and was, therefore, not "final." Second, Appellant has argued in her reply brief that the ruling expedited the hearing process, deprived her of time necessary to comply with the case plan objectives, and relieved CSB of its obligation to facilitate reunification. For the following reasons, the argument is overruled.

{¶13} Generally, a court that removes a child or continues the removal of a child from the child's home, must determine whether the agency that filed the complaint, removed the child, or has custody of the child has made reasonable efforts to prevent the removal of the child, to eliminate the continued removal of

the child, or to make it possible for the child to return safely home. R.C. 2151.419(A)(1). However, R.C. 2151.419(A)(2)(e), the so-called "reasonable efforts bypass," excuses such a determination when the parent has had parental rights involuntarily terminated with respect to a sibling of the child. On November 27, 2000, CSB filed a motion pursuant to the "reasonable efforts bypass," requesting that it be excused from making reasonable efforts to assist Appellant in reunification because Appellant had her parental rights involuntarily terminated with regard to Deaire's siblings. The motion was heard the following day during a review hearing.

{¶14} By journal entry, dated December 7, 2000, the magistrate granted CSB's motion. The court adopted the decision of the magistrate on the same date subject to the filing of written objections within fourteen days, pursuant to Juv.R. 40. No written objections were filed within fourteen days of the decision of the magistrate. Hence, Appellant is barred from assigning the court's adoption of this finding as error on appeal. See Juv.R. 40(E)(3)(b). While Appellant may have objected verbally at the hearing on the motion or in writing after the issuance of the magistrate's final decision in this case, such objections are not in compliance with the clear directives of Juv.R. 40. Absent specific compliance with the rule, Appellant is prevented from assigning this matter as error on appeal.

{¶15} Moreover, even if we were to consider Appellant's arguments, any error must be deemed harmless. A review of the record reveals that the juvenile

court entered several findings in the course of these proceedings that reasonable efforts towards reunification had been made by CSB. The court entered such findings following the March, 2000 shelter care hearing; the May, 2000 adjudicatory and dispositional hearings; the August, 2000 review hearing; the November, 2000 review hearing; the May 23, 2001 permanent custody decision by the magistrate; and the November 13, 2001 final order of the juvenile court. The juvenile court entered findings that reasonable efforts toward reunification had been made at every hearing at which R.C. 2151.419(A) would require it to do so. The record also indicates that services continued to be provided to Appellant by CSB as late as May, 2001.

{¶16} Appellant has contended that the existence of a pending appeal of the prior termination prohibits application of the "reasonable efforts bypass" of R.C. 2151.419(A)(2)(e). Assuming, arguendo, that such application was in some way premature because of the pending appeal, we find no prejudice upon the facts of the present case. As demonstrated above, the juvenile court made several findings that reasonable efforts had, in fact, been made by CSB both before and after the "reasonable efforts bypass" ruling. Furthermore, CSB continued providing services to Appellant even after the ruling, and the pending appeal of the previous termination was affirmed by this Court on review. *In re Woodall* (June 13, 2001), 9th Dist. App. Nos. 20346, 20436.

{¶17} Appellant has also claimed that the "reasonable efforts bypass" ruling expedited the proceedings, but there is no evidence of that in the record. Nor has Appellant offered any legitimate basis to support a conclusion that a few more weeks would have made a difference, or any authority suggesting that she was entitled to a prescribed amount of time before CSB might file a motion for permanent custody. In fact, given the numerous findings of reasonable efforts throughout this proceeding, CSB could have filed its motion for permanent custody notwithstanding the "reasonable efforts bypass" ruling. Indeed, the record discloses that, at the time the child was initially taken into custody, both CSB and the guardian ad litem seriously considered immediately filing for permanent custody or seeking to consolidate the proceedings regarding Deaire with the permanent custody proceedings involving his siblings.

{¶18} Accordingly, Appellant's first assignment of error is overruled.

{¶19} Assignment of Error Number Two

> **{¶20} The trial court erred in granting CSB's motion for permanent custody based on a finding that permanent custody is in the minor child's best interest as the prosecution failed to meet its burden of proof requiring clear and convincing evidence; the trial court findings were against the manifest weight of the evidence; appellant substantially complied with her case plan; and CSB failed to use reasonable and diligent efforts to assist appellant in remedying the problems that initially cause [sic] the minor child's removal.**

{¶21} Appellant has made several arguments within this assignment of error. She has challenged the finding that it was in the child's best interest to

award permanent custody to CSB, and has also asserted that the decision of the juvenile court was against the weight of the evidence. In addition, Appellant has asserted that she substantially complied with her case plan and that CSB failed to use reasonable and diligent efforts to assist her in remedying the problems that initially caused the child's removal. The Court will address each argument in due course.

{¶22} Standard of Review

{¶23} When evaluating whether a judgment is against the manifest weight of the evidence in a juvenile court, the standard of review is the same as that in the criminal context. *In re Ozmun* (Apr. 14, 1999), 9th Dist. App. No. 18983, at 3. In determining whether a criminal conviction is against the manifest weight of the evidence:

> **{¶24}** "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

State v. Thompkins (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *State v. Otten* (1986), 33 Ohio App.3d 339, 340. Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the juvenile court]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, citing *Seasons Coal Co. v. Cleveland*

(1984), 10 Ohio St.3d 77. Furthermore, "if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment." *Karches*, 38 Ohio St.3d at 19.

{¶25} In this regard, we are particularly mindful of the words of the Ohio Supreme Court:

> **{¶26}** In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.

Trickey v. Trickey (1952), 158 Ohio St. 9, 13. The juvenile court has had the opportunity to view the witnesses and observe demeanor, gestures and voice inflections in order to aid in weighing the credibility of the testimony that comes to us on a printed page. See *In re Awkal* (1994), 95 Ohio App.3d 309, 316. Accordingly, before an appellate court will reverse a judgment as being against the manifest weight of the evidence in this context, the court must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice.

{¶27} The termination of parental rights is governed by R.C. 2151.414. Before a juvenile court may terminate parental rights with regard to a child who is neither abandoned nor orphaned, it must apply a two-prong test measured by clear and convincing evidence. First, the court must determine that it is in the best

interest of the child to be placed in the permanent custody of the petitioning agency, based on an analysis under R.C. 2151.414(D). Second, the court must determine either that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E), or determine that the child has been in the temporary custody of one or more public children services agencies for more than 12 of the last 22 months. See R.C. 2151.414(B); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99. Clear and convincing evidence is that which will produce in the trier of fact '"a firm belief or conviction as to the facts sought to be established.'" *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶28} Manifest Weight of the Evidence

{¶29} 1. Best Interest of the Child

{¶30} Appellant has argued that the evidence does not clearly and convincingly establish that it is in the child's best interest to grant permanent custody to CSB. In determining what is in the best interests of the child under R.C. 2151.414(D), the court should consider all relevant factors, including, but not limited to, the following statutory factors:

> **{¶31}** (1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

> **{¶32}** (2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
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> **{¶33}** (3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;
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> **{¶34}** (4) The child's need for legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
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> **{¶35}** (5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶36} The juvenile court found that it was in the best interest of the child that he be placed in the permanent custody of CSB. In regard to the first factor, evidence was presented regarding the interaction and interrelationship of the child with other individuals in his life. Appellant offered testimony from two CSB employees who supervised her visits and a third who taught Appellant's parenting class and also saw her at the visitation center. The witnesses all stated that Appellant attended visitations and parenting classes regularly. All three testified that Appellant was affectionate with Deaire and interacted appropriately. She was said to apply what she learned in her parenting class and that the child was very responsive. The supervisors indicated no concerns regarding Appellant's parenting, and the parenting teacher did not believe Appellant needed more parenting classes. The supervisors indicated that their comments were based, appropriately, only on what they observed of Appellant during visitations with this

child. The parenting teacher indicated, however, that she "probably would have some concerns outside of CSB."

{¶37} CSB caseworker, Christina Miller, testified regarding her experience in observing Appellant with Deaire as well as with her other five children. She testified that while Appellant interacts well with babies, her parenting skills are not appropriate in dealing with older children. She occasionally discusses adult issues with the older children, becomes frustrated with them, fails to set limits, and fails to discern inappropriate behavior and correct it. Further, Ms. Miller testified that she would have concerns for the health and safety of the child if he were returned to Appellant's custody because of substance abuse issues, lack of involvement in mental health counseling, and Appellant's continual denial of events in over two years of involvement with CSB.

{¶38} There was no evidence presented that any other member of the child's family regularly visited or had a relationship with the child. Lisa Woodall, Appellant's sister, visited him once, but has not developed a relationship with the child. James Pittman was identified as the biological father of the child by Appellant, but after preclusive genetic testing, was found to not be the father. Appellant has not identified anyone else as a potential father and continues to maintain that James Pittman is the father.

{¶39} The second enumerated factor in the best interest test is the wishes of the child as expressed directly by the child or through the child's guardian ad

litem. Except that he was said to be responsive to Appellant during visitations, the child is too young to express an opinion directly on this question. The guardian ad litem reported that she had worked with Appellant for over two years, but that she has not been cooperative, is very confrontational, and has no one in her life that is a good influence. While she believes Appellant does love babies, that is not the issue. She reported that she had several concerns. First, Appellant had sought minimal prenatal care. Second, Appellant has had six months of house arrest and two warrants issued during the time of this case. Third, Appellant tested positive for drugs during this case, and she has been a drug user in the past, as has the man she identified as the father. Fourth, Deaire has deficits that will require outside service providers and his parents will have to keep appointments and work with people in order to care for him. The guardian ad litem, concluded that she views Appellant's home as having the same problems that existed at the time the other children were with her. She believes that it is in the best interest of the child to be placed in the permanent custody of CSB.

{¶40} Evidence regarding the third factor, the custodial history of the child, reveals that Deaire was born on March 2, 2000, and remained in the custody of Appellant until March 8, 2000. The record reveals that Appellant kept only one prenatal appointment and cancelled two post-release appointments for the newborn. Furthermore, though she took the stand to testify in her own behalf,

Appellant offered no explanation or reason as to why she did not keep those appointments.

{¶41} While the child was in the temporary custody of CSB, Appellant attended visitations with the child. She attended regularly and participated actively with the child. She was initially permitted one two-hour session of visitation per week, but that was expanded to two two-hour sessions because of the positive manner in which she conducted herself. However, at the same time, a decision to reduce the level of supervision at the visitations to a "monitor" status had to be reversed because Appellant was seen giving the eight-month-old child Cheetos and candy and also removed the infant from CSB property without permission.

{¶42} The fourth factor in the best interest test is the child's need for a legally secure placement and whether that can be achieved without a grant of permanent custody to the agency. Evidence was presented at the hearing suggesting that the child had speech and developmental delays. He will require outside service providers and special care that benefit from a grant of permanent custody.

{¶43} In terms of a secure placement, evidence was presented that raises questions about the stability of Appellant's housing and employment. Process servers and caseworkers attempted to go to Appellant's present home, but it appeared to them to be vacant. Appellant herself reported that the neighborhood

was infested with mice and rats and that the roof leaked. While Appellant stated on direct examination that the utility bills were paid, she explained more fully on cross-examination that the utility bills were only paid up enough that they would not be shut off. Over the course of two years, Appellant has had five or six different jobs, frequently ending in terminations.

{¶44} As to the fifth factor, the court considered the fact that Appellant has had her parental rights involuntarily terminated with respect to five siblings of Deaire. See R.C. 2151.414(E)(11).

{¶45} Upon review, we find significant evidence in support of the judgment that it was in the best interest of the child to place him in the permanent custody of CSB. The juvenile court did not err in so finding. Furthermore, the record indicates that each of the above factors weighed in favor of termination.

{¶46} 2. Placement with a Parent within a Reasonable Time

{¶47} In considering whether the children can or should be placed with a parent within a reasonable time, the court is to consider all relevant evidence. R.C. 2151.414(E). R.C. 2151.414(E) also contains several enumerated factors, the presence of any one of which requires the court, upon proof by clear and convincing evidence, to enter a finding that the child cannot or should not be placed with a parent within a reasonable time.

{¶48} In this case, the juvenile court entered findings based upon the first and eleventh factors, which provide as follows:

> **{¶49}** (1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.
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> **{¶50}** (11) The parent has had parental rights involuntarily terminated pursuant to this section or section 2151.353 or 2151.415 of the Revised Code with respect to a sibling of the child.

R.C. 2151.414(E).

{¶51} The court considered that Appellant has significant mental health issues. She was diagnosed with a narcissistic personality disorder with a high level of paranoid features. While Rick Kohut, her mental health counselor, testified that this disorder does not, per se, prohibit parenting, he also stated that it could cause Appellant to mistrust others, create anger, and result in opposition in her attitude, resentment and unwillingness to cooperate. The condition is not inborn, but develops over time and would only change "over time." It is necessary first to develop a therapeutic trust and relationship, he explained, and that could require a lengthy period of time.

{¶52} Mr. Kohut testified that in June of 2000 he recommended weekly counseling sessions for Appellant, but that she attended only thirteen sessions

from that time until the present, a period of approximately nine months. Therefore, she was not in compliance with his recommendations and he has not been able to address the issues she presented through testing, including a recommended anger management program. Mr. Kohut blames Appellant's lack of progress on her lack of attendance. The lack of attendance also resulted in an inability to determine how her disorder will affect her parenting. He was not able to predict exactly how long it might take Appellant to address the issues she presented.

{¶53} Appellant attempts to lay blame on CSB for her sporadic attendance at counseling. The record indicates that at their November 6, 2000 session, Mr. Kohut explained to Appellant that her Medicaid eligibility had expired. Mr. Kohut told her he would call CSB to determine whether they would pick up the payments. CSB reported that they would not be able to assume those payments and that it is not their policy to do so. Appellant did not return for her next two scheduled appointments on November 29th or December 18th and, therefore, Mr. Kohut was not able to discuss the option of a sliding fee scale with Appellant. She did not return until March 8, 2001 at which time Mr. Kohut was able to discuss this option with Appellant. During the permanent custody hearing one month later, Appellant claimed that she was participating in mental health counseling, but admitted that she had not been back to see Mr. Kohut since March 8, 2001 because she had been busy.

{¶54} Evidence regarding Appellant's difficulties with anger management and threatening behavior came from several sources. The caseworker described Appellant's behavior at meetings as hostile. She testified that Appellant would pound on the table, get up, shake her finger, yell, become very loud, cry, point her finger, and "get in my face." Appellant admitted that she posted signs from juvenile court to CSB, saying things such as "Christina Miller [the caseworker] has harmed the children of the Children's Services Board," "Save the children," listing the six childrens' names, "MaryAnn Freedman [the guardian ad litem] harmed the children," and "CSB has harmed the children."

{¶55} Another example came at the August, 2000 review hearing. The magistrate observed that Appellant's visitation time had been increased from two hours per week to four hours per week as a result of Appellant being able to interact with the infant in a positive, non-aggressive manner. The magistrate reported, however, that Appellant expressed anger and displeasure at the fact that visitations were not further expanded. She had difficulty controlling her temper and argued her position with the court directly, rather than allowing her attorney to do so. The court reported that it found it necessary to utilize the assistance of security in order that the hearing could progress. The court raised its own concerns regarding the home atmosphere and surroundings to which the baby would be subjected. On another occasion, during cross-examination of Appellant

in the permanent custody hearing, the magistrate had to ask the witness to calm down and not to gesture with her fist and her hands close to the prosecutor.

{¶56} An additional mental health-related factor is that the mother has engaged in the use of illegal drugs. While Appellant participated in substance abuse programs in the past, she admitted that she is not in drug counseling presently. Appellant tested positive for marijuana on three recent occasions, February 26, March 5, and March 8, followed by two "no-shows." She claimed that these results were the consequence of a single "celebration" on her January birthday. The court indicated that it could not evaluate how extensive her problem is because she has failed to provide urine screens on a regular basis. The CSB caseworker testified that Appellant stopped presenting urine screens as well as ending participation in the Exodus program in September, 2000. Therefore, the caseworker reported a continuing concern for substance abuse based upon this history, a prior conviction for drug trafficking, and using marijuana so close in time to the final custody hearing.

{¶57} In sum, while Appellant has made sporadic efforts to comply with her case plan and verbalizes the goal of accomplishing the objectives set out for her, she has not been able to demonstrate a drug-free life style, has not been consistent in submitting urine screens, has not participated in regular mental health counseling and has not accomplished the stated objectives. Her employment is erratic and her behavior continues to be verbally and physically assaultive. Upon

review of the record, we find that the juvenile court did not err in finding that the child cannot or should not be placed with his parent within a reasonable time. Furthermore, the weight of the evidence also supports such a finding. Therefore, it is unnecessary for this Court to address the question of whether a previous termination of parental rights as to siblings of the child which is pending on appeal would also mandate this result. See R.C. 2151.414(E)(11).

{¶58} Case Plan Compliance

{¶59} Appellant has also contended that the granting of permanent custody to CSB was erroneous because she had substantially complied with her case plan. The argument is without merit for two reasons. First, substantial compliance with a case plan, in and of itself, does not prove that a grant of permanent custody to an agency is erroneous. *In re Watkins v. Harris* (Aug. 30, 1995), 9th Dist. No. 17068, at 9. The termination of parental rights is governed by R.C. 2151.414 and the standards set forth therein. That statute does not mandate such a result.

{¶60} Second, the dispositive issue is not whether the parent has substantially complied with the case plan, but rather, whether the parent has substantially remedied the conditions that caused the child's removal. See, *e.g.*, *In re McKenzie* (Oct. 18, 1995), 9th Dist. No. 95CA0015, at 7-8. This issue is relevant to the circumstances listed in R.C. 2151.414(E)(1) which, if found to exist, eliminate the court's discretion to conclude that the children can be placed with either of their parents. In this case, the juvenile court did enter a finding,

pursuant to R.C. 2151.414(E)(1), that Appellant did not remedy the conditions that caused the child's removal. That finding is supported by the evidence of record, as stated above.

{¶61} Reasonable and Diligent Efforts

{¶62} Finally, Appellant has argued that CSB failed to use reasonable and diligent efforts to assist Appellant in remedying the problems that initially caused the child's removal. In making this claim, Appellant relies upon the language of R.C. 2151.414(E)(1). However, this Court has previously held that while that statute refers to "reasonable case planning and diligent efforts by the agency," it addresses those efforts within the context of the parent's failure to remedy the circumstances causing the child's removal from the home. *In re Thompson* (Jan. 10, 2001), 9th Dist. No. 20201, at 11-12. R.C. 2151.414(E)(1) places no duty on the agency to prove that it exerted reasonable and diligent efforts toward reunification. *Thompson*, supra, at 12, citing *In re Moore* (Dec. 15. 1999), 9th Dist. Nos. 19202 and 19217.

{¶63} As this court noted in *Thompson*, supra:

> **{¶64}** Instead, it is R.C. 2151.419 that requires the agency to prove to the trial court "at any hearing held pursuant to [the statutes providing for the child's removal from the home]" that it made reasonable efforts to prevent removal of the children and to work toward reunification.

(Alterations in original.) Id. at 12.

{¶65} The record in the case at bar indicates that, on June 5, 2000, when the juvenile court adjudicated the child dependent and placed him in the temporary custody of CSB, it approved and adopted a finding by the magistrate that CSB demonstrated reasonable efforts to prevent the continued removal of the child. That order was a final appealable order, but Appellant failed to timely appeal it. See *In re Murray* (1990), 52 Ohio St.3d 155, syllabus. Consequently, this court is without jurisdiction to revisit the issues determined at that time. Furthermore, since it was a magistrate who made the initial finding that CSB had demonstrated reasonable efforts, any challenge to that finding must meet the requirements of Juv.R. 40(E)(3)(b). That rule provides that, absent a timely objection to the magistrate's finding, the party will have failed to preserve the issue for appellate review. Because Appellant failed to raise a timely objection to the magistrate's finding, she failed to preserve the issue for appellate review.

{¶66} Appellant's second assignment of error is overruled.

{¶67} Assignment of Error Number Three

{¶68} The trial court erred in denying the motion to place the minor child into the legal custody of his maternal aunt, Lisa Woodall.

{¶69} In her third assignment of error, Appellant has asserted that the juvenile court erred in denying the motion to place the child in the legal custody of the child's maternal aunt, Lisa Woodall.

{¶70} This Court has held that a parent has standing to challenge the juvenile court's failure to grant a motion for legal custody of a child to a relative, where the court's denial of that motion led to a grant of permanent custody to the children services agency and impacted the residual rights of the parent. See *In re Evens* (Feb. 2, 2000), 9th Dist. No. 19489, at 4-5, citing *In re Hiatt* (1993), 86 Ohio App.3d 716. However, the parent is limited to challenging only how the court's decision impacted the parent's rights and not the rights of the relative. A parent has no standing to assert that the court abused its discretion by failing to give the aunt legal custody; rather, the challenge is limited to whether the court's decision to terminate parental rights was proper. See *Evens*, supra.

{¶71} Appellant has argued that CSB failed to fully consider and assess Ms. Woodall as a potential custodian. In support of her position that Ms. Woodall is a viable custodian, Appellant offers the fact that Ms. Woodall is employed, owns stable housing, has no history with CSB regarding her own children, has no criminal record, and expressed a desire to obtain custody of Deaire.

{¶72} The willingness of a relative to care for a child does not alter what a court considers in determining permanent custody. *In re Mastin* (Dec. 17, 1997), 9th Dist. Nos. 97CA006743 and 97CA006746, at 7. In a dispositional hearing, the juvenile court has the discretion to award legal custody to either parent or any other person who files a motion requesting legal custody. See R.C. 2151.353(A)(3). However, the juvenile court is not required to consider

placement with a relative before granting permanent custody to CSB. *In re Knight* (Mar. 22, 2000), 9th Dist. Nos. 98CA007258 and 98CA007266, at 7. The juvenile court, therefore, was not required to find by clear and convincing evidence that Ms. Woodall was an unsuitable placement option. Rather, it was within the discretion of the juvenile court to determine whether to place the child with Ms. Woodall. A reviewing court will not reverse the judgment of a juvenile court absent an abuse of discretion. *In re Pieper Children* (1993), 85 Ohio App.3d 318, 330. In order to constitute an abuse of discretion, a trial court's action must have been arbitrary, unreasonable, or unconscionable. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St. 3d 467, 469.

{¶73} Lisa Woodall is a 24-year-old single parent with four children, ranging in age from one to 12 years, and earning $8.10 per hour. She receives no support from any of the fathers of her children. CSB opposed placing the children with Ms. Woodall. The agency had already rejected Ms. Woodall as a potential custodian of Appellant's other children during the previous proceedings. Further, having placed Appellant's children with other relatives on two separate occasions during the prior proceedings and having to bring those placements to an end because of the Appellant's involvement, CSB had no reason to believe the result

would be any different if it placed the children with yet another local relative.[2]

{¶74} Appellant has argued that those placements did not involve Ms. Woodall, but other relatives. However, the placements are similar in that they would involve Appellant and a relative to whom Appellant would have access. The record in this case includes evidence of unauthorized visits to foster placements and removing the children without the permission of the custodian. CSB expressed concern as to whether any child of Appellant would have a safe, stable home environment if placed in the home of one of her relatives.

{¶75} The guardian ad litem also recommended against placing the child in the custody of Lisa Woodall. She stated that Appellant and her sister, Lisa Woodall, grew up in the same neglectful and abusive home. The guardian ad litem also expressed concern that Appellant had made unauthorized visits to foster placements as well as the two prior relative placements.

{¶a} [2] In March 1999, CSB placed the five older children with the maternal great-grandmother because Appellant was incarcerated at the time. The custodian understood that, upon Appellant's release, she was not to be left alone with the children and could not take the children unless an appropriate adult was with her. Nevertheless, the great-grandmother permitted Appellant to baby-sit the children while she worked. The relative did not want to deal with the conflict created between CSB and Appellant on the one hand, and her job on the other, so she requested that the children be removed. Therefore, the children were placed with Pam Woodall, a sister of Appellant, in June 1999.

{¶b} The second relative placement lasted from June to August of 1999. It was ended because Appellant was visiting at the home while both CSB and the relative asked that her visits be conducted at CSB. The relative could not deal with the disruption to the lives of her own children or Appellant's children and requested that Appellant's children be removed.

{¶76} Ms. Woodall testified that her first expression of interest in obtaining custody of Deaire was with the filing of an affidavit on February 20, 2001. She reported visiting Deaire only once, on his birthday, though she cannot recall the date. There was no evidence of any bonding or positive relationship between the two. When asked if the child appeared to know her, the witness replied: "He just looks at me. He just stares." On cross-examination, Ms. Woodall admitted to becoming agitated while waiting to testify and calling the prosecuting attorney a "bitch" several times "just because."

{¶77} Upon review of the record, we do not find that the decision of the juvenile court denying Ms. Woodall's request for legal custody of the child was arbitrary, unreasonable, or unconscionable. The third assignment of error is overruled.

III

{¶78} Appellant's three assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

BAIRD, P. J.
CONCURS

CARR, J.
DISSENTS SAYING:

{¶79} I respectfully dissent. The instant case is but a continuation of the saga that began with Appellant's five other children. See *In re Woodall* (June 13, 2001), 9th Dist. Nos. 20346, 20436, (Carr, J. dissenting). This case cannot be looked at in a vacuum. After Appellant's five other children were placed in the temporary custody of CSB, that agency made the decision to remove this child as

soon as he was born. Therefore, I dissent based on the same rationale I expressed in Appellant's prior appeal. See id.

{¶80} Moreover, I am troubled by specific issues involved in this case. One concern is this Court's failure to address several of Appellant's arguments on the basis of procedural errors in not adequately preserving the arguments for appeal.

{¶81} As Judge William O'Neill of the Eleventh Appellate District said:

> **{¶82}** In permanent custody proceedings the fundamental liberty interests of the parents, the child, and the family as a unit are all in play. These interests are constitutionally protected. *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 71 L.Ed.2d 599, 102 S.Ct. 1388. Parents are afforded every procedural and substantive protection allowed by law because the termination of parental rights is "the family law equivalent of the death penalty in a criminal case." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, quoting *In re Smith* (1991), 77 Ohio App. 3d 1, 16, 601 N.E.2d 45; * * * See, also, *Santosky*, supra.
>
> **{¶83}** In a death penalty case, certainly no one would suggest that all reviewing courts should defer to all the factual findings of a magistrate without review simply because the condemned person failed to follow procedure. * * *
>
> **{¶84}** It is the province of the courts to insure that the fundamental rights of the parties to termination of parental rights proceedings are protected. Because an emphasis on quick resolution inures to an extent against accurate and well-considered resolution, it is only appropriate that reviewing courts heighten the scrutiny of the procedures employed. Review can never be truly adequate when all factual questions are permanently resolved and placed beyond question after an initial hearing before a magistrate. That is not judicial review. That is judicial acquiescence.

In re Wright (Feb. 23, 2001), 11th Dist. No. 2000-T-0108, (O'Neill, P.J., dissenting).

{¶85} I share these same concerns and conclude that the failure to object to a possible procedural error in a permanent custody case should be analyzed under a "plain error" analysis in order to protect the fundamental interests involved and protect the integrity of the judicial process for such a grave, solemn proceeding. See, e.g., *In re Morris* (Oct. 16, 2000), 12th Dist. No. CA2000-01-001; *In re Johnson* (Dec. 11, 2000), 12th Dist. Nos. CA2000-03-041 and CA2000-05-073.

{¶86} Also, I am troubled by the juvenile court's specific finding in this case that the child had been in the custody of CSB for 12 of 22 months. The child was removed from the home on March 8, 2000. The adjudication of dependency and disposition was entered on June 5, 2000. The motion for permanent custody was filed on December 13, 2000 and the hearing on the motion was conducted on April 10 and April 12, 2001. The final judgment was entered on November 13, 2001.

{¶87} For these purposes, a child is considered to have entered the temporary custody of an agency on the earlier of the date of adjudication or sixty days after the removal of the child from the home. R.C. 2151.414(B)(1)(d). Measuring from May 8, 2000, the child was not in CSB custody for 12 months until a date subsequent to the hearing on the motion for permanent custody. I do not believe that the 12-month period of custody described in R.C.

2151.414(B)(1)(d) was meant to include the time after the hearing on a motion for permanent custody. If that were so, the fact could not be introduced into evidence at the hearing and a court could control this result by the timing of the issuance of its opinion. While the majority does not rely upon this factor in reaching its conclusion, this erroneous finding by the juvenile court, in my view, is nevertheless disturbing and merits mention in order to avoid a repetition of the error.

{¶88} Because a parent's right to the companionship, custody and management of his or her children is viewed by the United States Supreme Court as a fundamental interest that "undeniably warrants * * * protection," it follows that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Dept. of Soc. Serv. of Durham Cty.* (1981), 452 U.S. 18, 27, 68 L.Ed.2d 640. Accordingly, I dissent.

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