

IN THE SUPREME COURT OF OHIO

In Re Z.C.

CASE NO. 2022-1251

On appeal from the Ashtabula
County Court of Appeals,
Eleventh Appellate District,
Case No. 2022-A-0014

MERIT BRIEF OF APPELLEE,
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When reviewing a trial court's decision to terminate parental rights, is the appellate standard of review abuse of discretion, manifest weight of the evidence, clear and convincing evidence, or sufficiency of the evidence?

A. The appropriate standard of review of a trial court's decision to terminate parental rights is abuse of discretion as the other enumerated concepts will not suffice because manifest weight is not an appropriate standard of review, clear and convincing evidence is a burden of proof and sufficiency of the evidence is an evidentiary determination.

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STATEMENT OF FACTS

This is an appeal from a certified question from the Court of Appeals for Ashtabula County, Eleventh Appellate District. In the instant case below, the majority in the case certified the following conflict *sua sponte*:

When reviewing a trial court's decision to terminate parental rights, is the appellate standard of review abuse of discretion, manifest weight of the evidence, clear and convincing evidence, or sufficiency of the evidence?

In re Z.C., Case No. 2022-A-0014, 2022-Ohio-3199 ¶ 23. The Court of Appeals listed the cases in conflict in its opinion.

{¶19} We recognize that by applying an abuse of discretion standard of review our decision is in conflict with the judgment of the Sixth District Court of Appeals in *In re S.V.*, 6th Dist. Wood No. WD-13-060, 2014-Ohio-422; the Fifth District Court of Appeals in *Matter of Y.M.*, 5th Dist. Tuscarawas Nos. 2021 AP 09 0020 through 0023, 2022-Ohio677; and the Fourth District Court of Appeals in *Matter of Ca.S.*, 4th Dist. Pickaway Nos. 21CA9 and 21CA10, 2021-Ohio-3874, ¶44, which apply a manifest weight of the evidence standard, and the First District in *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C110402, 2011-Ohio-4912, which applies a clear and convincing evidence standard, and the Twelfth District in *In re R.B.*, 12th Dist. Butler Nos. CA2022-01-003 and CA2022-01- 004, 2022-Ohio-1705, which applies a sufficiency of the evidence standard.

Id., ¶ 19.

The Appellant duly filed a notice of certified conflict with the Court on October 7, 2022. This Court agreed a conflict existed and certified the case. *In re Z.C.*, Case No. 2022-1251, order of February 22, 2023. In spite of the certification, the Court of Appeals affirmed the decision of the trial court terminating parental rights of the Appellant. *Id.*, ¶ 24.

The Appellant, D.C. is the father of four children in the proceedings below of eight children that were the subject of the litigation. He had not resided with the children while the Appellee, Ashtabula County Children Services Board (ACCSB) was handling this matter. This case only

applied to one of these children, Z.C. *Id.*, ¶ 2. Z.C. was placed with a foster family since March 2020. This family wishes to adopt the child. *Id.* ¶ 3.

D.C. had been involved in this case since March 2019. When he left prison in April 2020 he became involved in this case. He did not want to be in the case plan for this child, but filed for legal custody. The Appellee filed to modify temporary custody to permanent custody in August 2020. After a hearing, the trial court granted the Appellee's motion to modify custody and awarded Appellee permanent custody of Z.C. D.C. filed objections to this award which were overruled. *Id.*, ¶ 4.

The Court of Appeals applied the two prong test in R.C. 2151.414 (B) and found the Appellee proved the first prong of the test that the minor child was in the temporary custody of the Appellee for at least 12 months of a consecutive 22 month period. *Id.* ¶ 12.

Though father contended the Appellee should have “done more to help” him, since the other custodians of the eight children desired to keep the children “connected to each other” and the guardian ad litem did not recommend permanent custody to the Appellee. Father contends permanent custody was not in the child’s best interest. *Id.*, ¶ 13. However, D.C. did not have sufficient lodgings for all of his children and had little contact with them for the three previous years. Father eventually moved to a home where renovation was not completed. He had some contact with some of his children. One of his sons declined to talk with his Father. He refused to have contact with Z.C. because the activity would be supervised. Father also failed to keep appointments with case workers. Z.C. developed close bonds with his foster family which includes a half-brother. *Id.*, ¶ 15. Though the GAL did not recommend permanent custody against D.C, he also did not recommend placement with the Appellant. *Id.*, ¶ 16.

The Court of Appeals found the trial court did not abuse its discretion when it adopted its magistrate's decision. *Id.*, ¶ 18. Nevertheless, the Court of Appeals also found its application of an abuse of discretion standard of review was in conflict with the Fourth, Fifth and Sixth District of Appeals which applied a manifest weight of evidence standard of review, the First District which employed a clear and convincing evidence standard and the Twelfth District which applied a sufficiency of the evidence standard of review. *Id.*, ¶ 19.

The cases in conflict cited in *In re Z.C.*, ¶ 19 involved reviewing courts that affirmed judgments terminating parental rights of natural children. The standard of review in *In re S.V.*, 6th Dist. Wood No. WD-13-060, 2014-Ohio-422; *In Matter of Y.M.*, 5th Dist. Tuscarawas Nos. 2021 AP 09 0020 through 0023, 2022-Ohio-677; *Matter of Ca. S.*, 4th Dist. No. Pickaway Nos. 21 CA9 and 21 CA10, 2021-Ohio-3874 was manifest weight of the evidence. Focusing on the facts and reweighing the evidence in each case, the reviewing courts in each case affirmed the trial court below indicating there was competent, credible evidence to sustain the judgment to terminate parental rights of these parties. The reasons for terminating the parental rights in the aforementioned cases varied including a child being in foster care since her seventh week of life, a father who was challenging the permanent custody motion but who had little interaction with the child. *In re. S.V.*, *supra*, ¶ 20. Most of these cases had guardian ad litem recommendations consistent with terminating parental rights and had positive bonding with new foster families. *In re. Y.M.*, ¶ 21; some children indicated they did not want to live with their parents. *In re. Y.M.*, ¶ 21. All of the courts held that there was “some competent, credible evidence” to sustain permanent custody and that the judgments were not against the manifest weight of the evidence. *In re S.V.*, *supra*, ¶ 25; *In re Y.M.*, *supra*, ¶ 69; *Ca.S.*, *supra*, ¶ 73.

In re W.W., 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, while employing clear and convincing evidence upheld a juvenile court's granting of a permanent custody motion. The appeals court wrote

[a]s an appellate court, we do not review the juvenile court's decision under an abuse-of-discretion standard; rather, we must examine the record and determine if the juvenile court had sufficient evidence before it to satisfy the statutory clear-and-convincing standard. We will not substitute our own judgment for that of the trial court applying a clear-and-convincing standard where some competent and credible evidence supports the trial court's determinations.

Id., ¶ 46. After reviewing the record, this court, under a lower standard than abuse of discretion, and giving a generous deference, still found there was competent and credible evidence to sustain permanent custody. *W.W.* also gave deference to the rights of parents:

[w]e are fully aware that suitable parents have a "paramount" right to the custody of their minor children and that "the permanent termination of parental rights is the family law equivalent of the death penalty in the criminal case." But the parents' fundamental interest is not absolute and, at the dispositional phase, the parents' interest takes a back seat to the best interest of the child.

Id., ¶ 105, quoting *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829.

Even *In re R.B.*, 12th Dist. Butler Nos. CA2022-01-003 and CA2022-01-004, 2022-Ohio-1705, a sufficiency standard was insufficient to defeat a permanent custody motion. *R.B.*, *supra*, explained how it would analyze under a sufficiency standard

[a]n appellate court's review of a juvenile court's decision granting permanent custody is generally limited to considering whether sufficient credible evidence exists to support the juvenile court's determination." *In re D.P.*, 12th Dist. Butler No. CA2020-07-074, 2020-Ohio-6663, ¶ 13, citing *In re M.B.*, 12th Dist. Butler Nos. CA2014-06-130 and CA2014-06-131, 2014-Ohio-5009, ¶ 6; and *In re A.S.*, 12th Dist. Butler Nos. CA2019-05-071, CA2019-05-072, and CA2019-05-073, 2019-Ohio-4127, ¶ 19. "This court will therefore reverse a juvenile court's decision to grant permanent custody only if there is a sufficient conflict in the evidence presented." *In re L.S.*, 12th Dist. Brown Nos. CA2019-03-001 and CA2019-03-002, 2019-Ohio-3143, ¶ 17, citing *In re K.A.*, 12th Dist. Butler No. CA2016-07-140, 2016-Ohio-7911, ¶ 10. "However, even if the juvenile court's decision is supported by sufficient evidence, 'an appellate court may nevertheless conclude that the judgment is 16 against the manifest weight of the evidence.'" *In re C.S.*, 12th Dist.

Clinton No. CA2020-04-006, 2020-Ohio-4414, ¶ 15, quoting *In re T.P.*, 12th Dist. Butler No. CA2015-08-164, 2016-Ohio-72, ¶ 19.

Id., ¶ 28. *R.B.* also held a reviewing court will presume in favor of the findings entered below.

If the evidence can be construed two different ways, the reviewing court would defer to the original judgment. *Id.*, ¶ 29.

ARGUMENT

PROPOSITION OF LAW NO. 1

A. THE APPROPRIATE STANDARD OF REVIEW OF A TRIAL COURT'S DECISION TO TERMINATE PARENTAL RIGHTS IS ABUSE OF DISCRETION.

The certification this Court granted, based on the Court of Appeals *sua sponte* certification and the Appellant's filing in this Court, employs four legal terms though not all of them are considered standards of review.

When reviewing a trial court's decision to terminate parental rights, is the appellate standard of review abuse of discretion, manifest weight of the evidence, clear and convincing evidence, or sufficiency of the evidence?

Before we can discuss the four concepts in the certified question, we have to define what is a standard of review as opposed to a burden of proof. Abuse of discretion and manifest weight of the evidence are recognized standards of review though manifest weight is limited in its use by the Ohio Constitution. The burden of proof in a case has been defined as a “composite burden that encompasses two different aspects of proof: the burden of going forward with evidence, or burden of production, and the burden of persuasion.” *Welsh-Huggins v. Jefferson County Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 337.

Standards of review are quite different. They “are drawn from the limited role of the appellate court in a multi-tiered judicial system.” Rugg, *Identifying and Understanding Standards of Review*, The Writing Center at GULC, 1. The trial court judge resolves factual disputes and assesses credibility issues of witness testimony “because they see and hear the witnesses testify.” *Id.* A court of appeals sits in a panel of three “on the theory that three more judges, acting as a unit, are less likely to make an error in judgment than one judge sitting alone.” *Id.* Since the functions of a trial and appellate court are different, the appellate court “accord varying degrees of

deference to trial judges' rulings depending on the type of ruling that is being reviewed." *Id.*, 1-2. These levels are the standard of review. The standards of review comprise a continuum where an appeals court gives no deference (de novo review) to a high deference where a reviewing court will only reverse for an abuse of discretion reposing deference to a trial court especially on factual findings. *Id.*, 1-5.¹

Other documented standards of review, not all used in Ohio, are taken from Professor Martha S. Davis *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469 (1988).

De novo- applied during a question of law; no deference is given

Clearly erroneous- essentially a question of fact, minimal deference is given

Reasonableness/Substantial evidence- applied from jury decision, some deference given

Arbitrary and capricious- normally agency decisions, more deference is given

Abuse of discretion- discretionary decisions, most deference to the trial court

No review- some agency decision such as decisions not to prosecute, complete deference²

Though all of these standards of review are not used in Ohio, this list demonstrates the continuum of deference given to the trial court based on the type of case and the question arising from a trial court judgment or decision.

The trial court in this case uses the clear and convincing burden of proof because it is prescribed by statute, R.C. 2151.414 (B) (1). Clear and convincing evidence is burden of proof used in civil cases where more than a preponderance of evidence is required. These cases generally involve issues such as fraud, or invalidating or setting aside instruments of law such as deeds, wills or contracts. In this matter, clear and convincing evidence is prescribed by statute because a state

¹ Rugg's article adapts concepts on standards of review from Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469 (1988).

² Cited by

agency is seeking to intervene in a constitutionally protected relationship of parents and children. The clear and convincing evidence standard is an intermediate burden of proof and not a standard of review for a reviewing court. The definition of clear and convincing evidence is listed in *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), syllabus three, which holds:

[c]lear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

This burden of proof was later used by this Court in *In re Adoption of Holcomb*, 18 Ohio St. 3d 361, 368, 481 N.E.2d 613 (1985).

A standard of review is more encompassing than a burden of proof standard because it evaluates how the trial court applies the law and questions of law to the facts of a case and dictates the amount of deference given to the trial court by the appellate panel. The standard of review encompasses the whole case including motions and briefs. The terms in the certified question seem to conflate standards of review employed by courts of appeal and burdens of proof used by trial courts.

An inescapable point here is that this case turns on a mixed question of law and fact. The United States Supreme Court has held these cases as "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard ***." *Id.*, 5; *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982); *Ornelas v. United States*, 517 U.S. 690 (1996). These cases can be reviewed under different standards depending on whether the case is resolved primarily on the facts or the law. *U.S. Bank, N.A.v. Village of Lakeridge, LLC*, 583 U.S. ___, 138 S.Ct. 960, 967, 200 L.Ed2d 218 (2018). In *U.S. Bank, N.A.*, *supra*, the Court held that fact specific cases where evidence is weighed or credibility

is assessed are reviewed with deference. Needless to say, a mixed question of law and fact will not lead to a precise conclusion. *United States v. McConney*, 728 F.2d 1195, (9th Cir. 1984.)

In mixed standards cases, this Court in 2012 decided in *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, a reviewing court should employ an abuse of discretion standard in a declaratory judgment action involving a trust first deciding the issue of justiciability which is foundational and a *de novo* standard of review on legal issues arising after justiciability is present. Another example of mixed use was decided in 2021 when *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304 held the abuse of discretion standard applies in determining the meaning of an evidence rule when determining whether an expert had sufficient clinical practice to opine in his professional area as an expert.

Abuse of Discretion.

Abuse of discretion is one of the largest standards of review for appellate error. It has been considered “ubiquitous.” Painter and Pollis, *Ohio Appellate Practice*, App. G-5.³ The reason for this ubiquity is that it is generally applied to cases where judicial discretion is employed, statutes with permissive language, cases involving appraisal of evidence conferring deference to a trier of fact who had access to the witnesses and can best view their credibility. *Id.*, App. G-5-6.

Abuse of discretion has almost universally been described as “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). The abuse of discretion standard of review is the least forgiving especially in cases like the instant which is so fact specific as most permanent custody cases are.

³ Painter and Pollis is arguably the best one volume synthesis of Ohio appellate law and includes a chapter on standards of review in Appendix G of the treatise which a good portion of the argument comes from.

The abuse of discretion standard of review is used in cases where a trial court's discretion is employed especially when statutes use the word "may" as opposed to "shall." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528 (2012); *State v. Mitchell*, 11th Dist. Portage No 2019-P-0105, 2020-Ohio-3417.

Except as provided in division (B) (2) of this section, 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 ***:

R.C. 2151.414 (B) (1).

Cases where trial courts and appellate court judges evaluate evidence also employ this standard of review because reviewing courts will defer to a trial court's findings who heard and saw the testimony as opposed to reviewing a record. Custody proceedings generally use an abuse of discretion standard of review because the issues are fact specific and require a court's equity power and discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988); *In re E.N.*, 1st Dist. No. C-170172, 2018-Ohio-3919, *Shendel v. Graham*, 11th Dist. Lake No. 2017-L-131, 2018-Ohio-2894; *Clifford v. Skaggs*, 4th Dist. No. 17CA6, 2017-Ohio-8597. These cases may be a mixture of law and fact, but the facts predominate the discussion and the legal issues concern the application of the statute, such as R.C. 2151.414 which provide the framework on how to determine if custody should become permanent.

Because the type of action is so fact specific, deference to the court, sitting as a trier of fact in addition to a trier of law, is very important in decision making even where a reviewing judge will affirm even though he or she may "have reached a different conclusion" than the trial court judge. *Lorain City School Dist. Bd. of Edn v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988). Markus, A Better Standard for Reviewing Discretion, 2004 Utah L. Rev. 1279 (2004).

Manifest weight of the evidence.

Manifest weight of the evidence is a standard of review, but it is rather limited because the application involves reversing on a factual basis and requires a unanimous verdict of an appellate panel. It is an exception to the general rule that Courts of Appeal do not reweigh evidence which such limitation was contained in Ohio Constitution, Art. IV (B) (3). *Ohio Appellate Practice*, App. G-4. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264 (2007). This standard of review is rather limited. Painter and Pollis call this standard a “narrow exception.” *Ohio Appellate Practice*, Ch. 7:22. Here, the Court of Appeals sits as a “thirteenth juror”. The Court of Appeals has to find the jury lost its way or the trier of fact “made the wrong call.” *Id.*, App. G-4. Manifest weight is most often determined to be an evidentiary standard, but is considered an evidentiary standard, but is considered a standard of review due to its designation in the Ohio Constitution. Ohio Constitution, Art. IV, (B) (3).

Reviewing courts will usually defer to trial courts because the trier of fact had the ability to view the evidence and the demeanor of the witnesses. As this Court held in *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81; 461 N.E.2d 1273 (1984). *Seasons, supra*, held “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *Id.* “A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court.” *Id.* So long as evidence is in the record covering all the elements of a plaintiff’s case, a reviewing court will usually overrule an assignment of error based on manifest weight.

Sufficiency of the evidence.

Sufficiency of the evidence is not a standard of review so much that it is evidentiary standard where the standard of review is usually applied *de novo*. It is a legal argument demonstrating the facts are not present to convict or find someone liable as a matter of law.

Sufficiency of the evidence is discussed in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *State v. Robinson* (1955), 162 Ohio St. 486. 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*."

Thompkins, supra, 387. (Emphasis added.) citing Black's Law Dictionary, (6th ed. 1990) 1594.

"The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *Thompkins, supra*, 386. The key to a sufficiency argument is whether the evidence was legally sufficient to support a verdict as opposed to a factual discussion.

Thompkins, supra, also provides:

With respect to sufficiency of the evidence, "sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." Black's Law Dictionary (6 Ed. 1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), [162](#)

Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

In the civil sector, similar reasoning is found in *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 23 Ohio Op.3d 115, 430 N.E.2d 935 (1982). The standard of review for sufficiency arguments is de novo. In a de novo review, a court of appeals is free to decide the legal question anew. *Office of Consumer's Counsel v. Pub. Utils. Comm.*, 58 Ohio St.2d 108, 12 Ohio Op.3d 115, 388 N.E.2d 1370 (1979). No deference is accorded to the trier of fact. *Raceway Video & Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals*, 118 Ohio App.3d 264, 692 N.E.2d 656 (8th Dist. Cuyahoga County 1997), appeal denied, 79 Ohio St.3d 1417, 680 N.E.2d 155 (1997).

The Z.C. concurrence

The concurrence in *In re Z.C., supra*, is arguably one of the best explications of procedure for a permanent custody motion. ¶¶ 25-36. A termination of parental custody action is the civil equivalent of the death penalty in criminal law. *In re Perales*, 52 Ohio St. 89, 97, 369 N.E.2d 1047 (1977). In *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the United States Supreme Court found the right to raise a child is an essential and basic civil right.” This Court cited this precept in *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997); quoting *In re Murray*, 52 Ohio St.3d 155, 157, 566 N.E.2d 1169 (1990).

Terminating parental custody of a minor is governed by statute. R.C. 2151.414 provides for the procedural and substantive issues to be afforded. The statute employs a two prong analysis to determine if permanent custody should be awarded to the Appellee or similar agency. R.C. 2151.414 (A) (1) provides for notice that a motion for permanent custody is filed against a parent as well as scheduling a hearing. . *Id.*, ¶ 27 After a hearing, the juvenile court has the power to grant permanent custody to the Appellee if, by clear and convincing evidence, the court determines

that it is in the best interest of the child and that either one of the four circumstances in R.C. 2151.414 (B)(1)(a) apply.⁴ ¶ 28. If the trial court can establish one of the four circumstances, then the first prong is fulfilled.

If the first prong is proved, the trial court must review the evidence to see if it is in the best interest of the child to modify custody from temporary to permanent terminating a parent's rights.

In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D)(1) mandates that the juvenile court must consider all relevant factors, including but not limited to, the following: (a) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (b) 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; (c) the custodial history of the child (d) 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; and (e) whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

Id., ¶ 30.

After review of the evidence, the trial court can only grant permanent custody to an agency if it finds by clear and convincing evidence it is in the best interest of the child to grant permanent custody to an agency and one of the four provisions of R.C. 2151.414 (B)(1)(a)-(d) exist. Cf. *Holcomb, supra*, 368; *In re Z.C.* ¶ 31.

But, burden of proof and standard of review are different legal concepts. The burden of proof is employed by the trier of fact and the standard of review is applied by the Court of Appeals. As *Holcomb, supra*, held, the clear and convincing burden of proof is a heightened standard "to be applied in cases that may involve the termination of fundamental parental rights ****." *Id.*, 368; *In re Z.C.* ¶ 34. In fact, it is the highest burden of proof in civil matters. But a standard of review

⁴ In this case, that circumstance is located in sub division "(d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ****.

is different from a burden of proof. A standard of proof is employed by a panel of three appellate judges “where we ‘examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof,’” which we will not overturn unless it is unsupported by clear and convincing evidence.”” *Holcomb, supra*, 368; *In re Z.C.*, ¶ 35.

Family law litigation are causes of actions based in equity and involve highly emotional issues such as terminating parental rights. They are generally decided by judges, not juries. A reviewing court would give deference to a judge trying a case because he or she would have experience with the legal issues coming before him or her. One such deference given in abuse of discretion review is the precept that the trier of fact findings will not generally be disturbed because he or she heard the testimony, viewed the witnesses and could judge their credibility better than a reviewing bench.

CONCLUSION

The Appellee requests this Court uphold the decision of the Court of Appeals for Ashtabula County in all respects. If this Court should reverse the judgment of the Court of Appeals for Ashtabula County, then the Appellee requests that this Court, in the interest of time due to this being a case involving parental rights, that the Court decide this case along the new standard of review announced and in favor of the Appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing entry of appearance was sent by email service to the following counsel who have entered an appearance on this case:

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APPENDIX

Article IV, Section 3 | Organization and jurisdiction of court of appeals

Ohio Constitution Article IV Judicial

Effective:
1994

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment.

Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article.

No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

R.C. 2151.414

(A)(1) Upon the filing of a motion pursuant to section [2151.413](#) of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section [2151.29](#) of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section [2151.314](#) of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section [2151.35](#) of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section [2151.353](#) of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section [2151.413](#) of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section [2151.35](#) of the Revised Code. If the court issues an order pursuant to section [2151.353](#) of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section [2151.413](#) of the Revised Code.

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B)(1) Except as provided in division (B)(2) of this section, 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 and that any of the following apply:

(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section [2151.413](#) of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

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

(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section [2151.413](#) of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

(e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section [2151.28](#) of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section [2151.413](#) of the Revised Code, the court shall grant permanent custody of the child to the movant if the court determines

in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section [2151.353](#) of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section [2151.35](#) of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section [2151.353](#) or division (C) of section [2151.415](#) of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

- (a) 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;
- (b) 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;
- (c) 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, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section [2151.413](#) of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
- (d) 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;
- (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

For the purposes of division (D)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section [2151.28](#) of the Revised Code or the date that is sixty days after the removal of the child from home.

(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.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section [2151.353](#) of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section [2151.353](#) of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(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.

(2) Chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section [2151.353](#) of the Revised Code;

(3) The parent committed any abuse as described in section [2151.031](#) of the Revised Code against the child, caused the child to suffer any neglect as described in section [2151.03](#) of the Revised Code, or allowed the child to suffer any neglect as described in section [2151.03](#) of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, or 3716.11 of the Revised Code, and the child or a sibling of the child was a victim of the offense, or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(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 [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 parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

(15) The parent has committed abuse as described in section [2151.031](#) of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section [2151.03](#) of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in [R.C. 1.52\(B\)](#) that amendments are to be harmonized if reasonably capable of simultaneous operation.