[Cite as *In re A.C.*, 2023-Ohio-836.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: [A.C. et al.,	:	
	:	No. 22AP-243 (C.P.C. No. 17JU-12433)
T.C., Father, Appellant,	:	
	:	No. 22AP-244 (C.P.C. No. 17JU-12437)
	:	(REGULAR CALENDAR)
In re: [A.S. et al.,	:	
	:	No. 22AP-255 (C.P.C. No. 18JU-5587)
H.S., Mother, Appellant].	:	No. 22AP-256 (C.P.C. No. 17JU-12437)
	:	
	:	No. 22AP-257 (C.P.C. No. 17JU-12433)
	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on March 16, 2023

On brief: *William T. Cramer*, for appellant, T.C., father.

On brief: *Campbell Law, LLC,* and *April F. Campbell*, for the appellant, H.S., mother.

On brief: *Robert J. McClaren*, and *Jessica M. Ismond*, for appellee, Franklin County Children Services.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch

MENTEL, J.

{¶ 1} Appellant, H.S., mother, appeals from the March 28, 2022 decision and judgment entries of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating her parental rights and granting permanent custody of the minor children, Al.C., An.C., Ad.C., Aj.C., and A.S. ("children"), to appellee, Franklin County Children Services ("FCCS"). Appellant, T.C., father, also appeals from the decision and judgment entries terminating his parental rights with respect to Al.C., An.C., Ad.C., and Aj.C.

{¶ 2} For the reasons that follow, we affirm in part, and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} H.S. is the mother of the five minor children at issue in this case, Al.C. (d.o.b. 02/03/2011), Ad.C. (d.o.b. 08/15/2014), An.C. (d.o.b. 08/15/2014), Aj.C. (d.o.b. 07/01/2016), and A.S. (d.o.b. 01/22/2018).[1] T.C. is the father of minor children Al.C., Ad.C, An.C., and Aj.C. In 2016, FCCS started working with H.S. and T.C. on a voluntary basis after receiving concerns about lack of stable housing and that the older children were not enrolled in school. FCCS worked with the family for eight months on a voluntarily basis before the children were placed under the protective supervision of the agency on May 9, 2017. On October 10, 2017, FCCS filed a complaint in juvenile court asserting minor child, Al.C., was a neglected and dependent child. Also on October 10, 2017, FCCS filed a complaint alleging that Ad.C., An.C., and Aj.C. were dependent children. The complaints concerned housing instability and failure to enroll the children in school. On October 11, 2017, the juvenile court issued a temporary order of custody for the children to FCCS. On November 20, 2017, a magistrate adjudicated Al.C. neglected and dependent, as well as Ad.C., An.C., and Aj.C. dependent, and granted temporary custody of the children to FCCS until further order of the court. On September 12, 2018, FCCS filed a motion to extend temporary custody of the children, which the trial court granted on October 9, 2018.

{¶ 4} On February 21, 2018, FCCS initiated a new case involving minor child, A.S. On May 9, 2018, FCCS filed a complaint alleging that A.S. was a dependent child. The case

[1] H.S. has seven children. In addition to the children involved in this case, H.S. is the mother of A.O. (d.o.b. 08/28/2009), who has been in the legal custody of his uncle since May 30, 2018. (Dec. 13, 2021 Tr. at 18.) The youngest child, B.N. (d.o.b. 11/29/2019), is currently in the temporary custody of FCCS and placed in foster care. Neither child is at issue in this case.

concerned issues involving substance abuse by the parents and housing instability. On June 28, 2018, a magistrate with the juvenile court adjudicated A.S. a dependent child, and FCCS was granted temporary custody until further order of the court.

{¶ 5} A case plan was adopted for H.S. and T.C. on December 1, 2017. The case plan required H.S. to participate in random drug screens; ensure for basic needs of the children; find safe and stable housing; complete an AOD assessment and follow recommendations; receive services on effective parenting; sign releases of information for any and all service providers; provide verification of a stable source of income or other means to provide children's basic needs; participate in a trauma focused counseling program; ensure children attend school on daily basis; develop a safety plan with her children; and comply with the terms of probation.

{¶ 6} The case plan for T.C. included visitation with the children on a consistent basis; respectful interaction with H.S.; link with community services to benefit the family; meet with caseworker at least once every 30 days; sign release of information as needed for any and all service providers; ensure basic needs of the children; safe and stable housing and employment; submit to drug screens; and complete an AOD assessment and follow recommendations from assessment. T.C. had the additional requirement to participate in mental health services and take medication as prescribed.

{¶ 7} On March 8, 2019, FCCS filed motions for permanent custody of Al.C., Ad.C., An.C., and Aj.C. FCCS filed a motion for permanent custody of A.S. on August 21, 2019. On June 15, 2020, FCCS filed an amended motion for permanent custody of Al.C., Ad.C., An.C., and Aj.C. After several continuances, a review and dispositional hearing commenced in this case on December 13, 2021. The following evidence was adduced at the hearing.

{¶ 8} FCCS first called H.S. to testify under cross-examination. (Dec. 13, 2021 Tr. at 14.) H.S. is the mother to seven children, five at issue in this case. (Tr. at 17.) In the fall of 2016, H.S., T.C., and the children were staying in the basement of the Simmons family. During that time, A.O. and Al.C. were not enrolled in school. (Tr. at 21.) H.S. made contact with FCCS and agreed to work voluntarily with the agency for the first six months. (Tr. at 20.) H.S. acknowledged that when the children were removed from her care, she was dealing with drug addiction and housing instability.

{¶ 9} H.S. testified that she was provided a case plan. (Tr. at 23.) H.S. completed two drug assessments consistent with the case plan. According to H.S., she was asked to complete a second assessment because the caseworker did not think she was being truthful in the initial assessment. (Tr. at 24.) In November 2019, B.N. was born and testified positive for cocaine. (Tr. at 32.) In the fall of 2020, H.S. tested positive at various points for oxycodone, cocaine, and marijuana. (Tr. at 26.) H.S. also testified that she has had problems with alcohol and an unprescribed use of suboxone. (Tr. at 29.) Of note, H.S. was discharged from a sober living facility for unprescribed use of suboxone in February 2021. (Tr. at 29.) According to H.S., her aunt provided her suboxone in toiletry supplies that were delivered to the sober living facility. H.S. was also referred to a treatment program at Southeast Mental Health, which she did not complete. (Tr. at 31.)

{¶ 10} In February 2020, H.S. started participating in the Family Recovery Court Program ("Recovery Court"). (Tr. at 34.)[2] After beginning Recovery Court, H.S. returned to Southeast Mental Health for an outpatient AOD assessment where H.S. continued to test positive for cocaine and opiates. (Tr. at 36.) In August 2020, H.S. started a 30-day inpatient treatment program at Harbor House. (Tr. at 37.) According to H.S., she left the program early after becoming homesick. (Tr. at 37.) H.S. testified that she then went into treatment at an outpatient program, Base Camp Recovery, before completing treatment with Recovery Works. (Tr. at 39.)

{¶ 11} Ultimately, H.S. completed a 30-day inpatient treatment program at Joshua Treatment Center in July 2021. (Tr. at 39.) Since completing treatment at Joshua Treatment Center, H.S. participated in AOD treatment with Ohio Guidestone. (Tr. at 41.) H.S. was initially in their intensive outpatient program but switched to two groups a week through teleconference when the pandemic "got bad." (Tr. at 41.) H.S. conceded that she has not gone to all her groups during this period, but she is still participating in the program. (Tr. at 42.) H.S. graduated from IOP two months before trial and is currently in phase two of Recovery Court. (Tr. at 43, 46.) H.S. testified that since October 2016 to the date of trial, she has experienced her longest period of sobriety. (Tr. at 47.)

[2] H.S. officially signed up for Recovery Court on June 30, 2020. (Tr. at 35.)

{¶ 12} H.S. separated from her ex-boyfriend, B.N.'s father, shortly after she got out of treatment at the Joshua Treatment Center. (Tr. at 45.) According to H.S., B.N.'s father moved out of her home in July 2021. H.S. admitted she has not always been truthful with FCCS about her relationship with B.N.'s father. When asked if it would surprise her if B.N.'s father refused to provide an address to FCCS, H.S. responded, "[i]t wouldn't surprise me at all. He's a loser." (Tr. at 47.) H.S. denied that she refused to allow the caseworker, Teresa Babb, into the residence, but she claimed it was more their "timing was off" during that period. (Tr. at 47-48.) According to H.S., B.N.'s father had dogs that would urinate on the couch and floors. H.S. testified that she was embarrassed and did not want the caseworker to see the ruined carpet. (Tr. at 48.)

{¶ 13} H.S. testified that she completed the parenting course at Ohio Guidestone ("Guidestone"). (Tr. at 51.) While H.S. had prior issues with co-sleeping with Aj.C., she has since learned about the dangers of co-sleeping with her baby in parenting classes. (Tr. at 50.) "Babies are supposed to be in their crib, with no blankets, no stuffed animals, no nothing." (Tr. at 50.) H.S. testified that she has had an opportunity to apply the lessons from the program during visits with her children. H.S. described redirecting the children when they were arguing during the visit. (Tr. at 52-53.) H.S. acknowledged that all of her children are aware of her substance abuse issues. (Tr. at 56.) In September 2018, H.S. brought B.N.'s father and his ex-girlfriend's daughter on a visit, which she admitted was a mistake. B.N.'s father was prevented from subsequent visits. (Tr. at 58.) H.S. believes she is still bonded with her children, but she admitted that the amount of time the children have been with FCCS has impacted their relationship. (Tr. at 65.)

{¶ 14} H.S. has lived in her current residence for over a year. H.S. and B.N.'s father had previously lived at the house across the street. (Tr. at 59.) According to H.S., she is the only person listed on the lease and is responsible for paying the rent. H.S. testified her brother and sister-in-law told her that if she left B.N.'s father, they would help with the rent. (Tr. at 63.) At the time of trial, H.S. was current with her rental obligations. (Tr. at 63.) While H.S. has paid for her housing in the past, H.S.'s brother and sister-in-law have covered the rent since B.N.'s father left the residence. H.S. testified that she is about to start a job at Save-A-Lot making $10 per hour. "I'm looking for as many hours as I can get right

now." (Tr. at 61.) H.S. admitted, however, that until recently she has been financially dependent on B.N. (Tr. at 62.)

{¶ 15} H.S. testified that she is aware of the mental health diagnoses of the children. H.S. also understands that some of the children are in counseling and some are receiving medication. H.S. stated that she would work with services to make sure they get the correct care. (Tr. at 68.) In 2017, H.S. was convicted of a criminal offense involving children, to wit, endangering children in violation of R.C. 2929.22(A), a misdemeanor of the first degree. The complaint in that case, entered into the record as Exhibit 2, stated that the offense involved "not having child in any restraint while in a moving vehicle." (Dec. 13, 2021 Trial tr. Ex 2 at 1.) Also in 2017, H.S. was arrested for domestic violence and assault involving an incident with T.C. (Tr. at 74.) On August 23, 2017, H.S. pleaded guilty to the amended charge of criminal mischief, a misdemeanor of the third degree. (Tr. at 76.) The remaining charge was dismissed nolle prosequi.

{¶ 16} T.C. testified that he is the father of four of the children in this case, Al.C., Ad.C, An.C., and Aj.C. T.C. conceded that he does not know any of the children's birthdays. (Tr. at 78.) In October 2016, T.C. was living with the children and H.S. in the basement of the Simmons family. (Tr. at 80.) T.C. acknowledged that the house was "lived in" and three other people were residing in the home. According to T.C., the children were taken away because the children were not in school and the youngest children told the neighbors that they were hungry. T.C. stated that the last time the children lived with him was August 2017. (Tr. at 79.)

{¶ 17} T.C. testified to the case plan in this case. T.C. admitted that he has a history of impaired driving and pleaded guilty to OVI in 1995 and 2010. (Tr. at 84-85.) According to T.C., he was under the influence of "mental health medication" at the time of those offenses. (Tr. at 85.) During the life of the case, T.C. tested positive for cocaine and pleaded guilty to possession of counterfeit controlled substances. (Tr. at 86-87.) T.C. stated that the counterfeit controlled substance at issue was methamphetamine or "ice." (Tr. at 85-86.) While T.C. claimed that he is not a drug user, he admitted to smoking marijuana the morning of trial. (Tr. at 88.) In November 2019, T.C completed an AOD assessment with

Southeast Mental Health, which recommended outpatient AOD treatment. (Tr. at 92.)[3] While T.C. does not recall the last time he went for AOD treatment at Southeast Mental Health, he has gone there in the past for his mental health treatment. (Tr. at 93.) T.C. has also received services at North Central Community Counseling for depression, sleep disorder, psychosis, anxiety, and a mood disorder. (Tr. at 100.) T.C. was prescribed Zoloft and Vistaril but stopped taking those medications in August 2019. (Tr. at 101.) While T.C. stated that he completed the AOD treatment at Southeast Mental Health, he provided no documentation of completion to his caseworker. (Tr. at 94.) T.C. was referred for random drug screens as part of his case plan but admitted that he has not completed a drug screen since August 2019. (Tr. at 96.) T.C. stated his failure to complete drug screens was because of his mental health. (Tr. at 102.) According to T.C., his anxiety was too strong to get on a bus to complete a drug screen. (Tr. at 102.)

{¶ 18} T.C. has lived at his current residence for the last two years with his sister, her two children, and grandchildren. (Tr. at 104.) The residence is rented by his sister and includes three bedrooms. According to T.C., his sister pays the rent and utilities at the home. (Tr. at 104-05.) T.C. lives in the unfinished basement and does not know what the living arrangements are in the upstairs area of the house. "I don't bother myself with the upstairs." (Tr. at 105.) T.C. does not recall telling the caseworker that there were other adults in his sister's home that used drugs. T.C. acknowledged that he does not have any beds in the residence for the children at this time. (Tr. at 106.)

{¶ 19} T.C. is on Social Security Disability for an injury to his back and has been unemployed for several years. (Tr. at 106, 108.) According to T.C., he is waiting on a check from Social Security and plans on buying a property. (Tr. at 105.)

{¶ 20} T.C. has participated in weekly visits with the children since the case's inception. T.C. admitted that the staff at FCCS has had to redirect him for using vulgar language around the children on several occasions. (Tr. at 110.) T.C. also admitted that he showed up for a visit with the children four days after testing positive for COVID-19. (Tr. at 112.) T.C. does not believe Ad.C. and Aj.C. have behavioral issues. While T.C. knows that

[3] According to T.C, he has completed at total of six AOD assessments. (Tr. at 90-92.)

three of the children have been in therapeutic treatment, he is not sure any of the children are still on medications. (Tr. at 114.)

{¶ 21} On direct-examination, T.C. testified his family is willing to help him financially if the children are returned home. (Tr. at 115.) T.C. testified that he completed AOD assessments and received certificates of completion for those assessments. T.C. does not recall being referred for follow-up treatment. T.C. stated that he has consistently participated in visitation, and he is still bonded with the children. (Tr. at 118.) T.C. testified that he has been sober for about 15 years, but he admitted that he drinks occasionally on holidays. (Tr. at 119.) T.C. is not taking medications for his mental health conditions at the present time but plans to go reengage with treatment. (Tr. at 120.)

{¶ 22} Teresa Babb testified that she has been a caseworker for FCCS for five years. Babb started working with H.S. and T.C. in November 2016. (Tr. at 130.) According to Babb, FCCS received concerns about H.S. and T.C. from its Intake Department, and the agency offered to provide voluntary services. FCCS provides voluntary services with families to "prevent us from having to file for them to work with [the] Agency through court orders." (Tr. at 130-31.) Babb provided voluntary services for H.S. and T.C. for approximately eight months. During this period, Babb developed concerns about the parents as to the lack of stable housing and that the older children were not enrolled in school.

{¶ 23} Babb testified that the initial complaints for the children were filed in May 2017. FCCS received custody of the children in the fall of 2017. (Tr. at 134.)[4] FCCS received temporary court commitment and a case plan was adopted in this case. (Tr. at 135.)[5] According to Babb, since temporary custody was established, all the children have remained continuously in the care of FCCS. (Tr. at 137.) Babb testified that Ad.C., An.C., Aj.C., and A.S. are in a family foster care home in Minster, Ohio. Al.C. and the youngest child, B.N., are in a second foster care home in Minster, Ohio. (Tr. at 137.) During the life of the case, FCCS reached out to family members to determine if they were interested in custody of the children. While there was some initial interest, FCCS could not ultimately approve any of those homes. (Tr. at 138.)

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[4] FCCS received temporary custody of A.S. in February 2018.

[5] While not part of the instant case, B.S. was adjudicated abused on February 25, 2020. The complaint alleged that B.S.'s cord blood tested positive for cocaine. FCCS received temporary custody at that time. (Tr. at 137.)

{¶ 24} Babb testified that she participated in the preparation of the case plans for H.S. and T.C. (Tr. at 139.) When asked if reunification was the goal of the case plan, Babb responded, "[a]bsolutely." (Tr. at 139.) While both parents had similar case plans, T.C. also had an additional mental health component. According to Babb, she provided both parents different resources to where they could complete AOD assessments. (Tr. at 141.) Babb testified that she provided this information to both parents on at least ten occasions. (Tr. at 143.) Babb has had "pretty much monthly contact with both of the parents in this case." (Tr. at 143) According to Babb, H.S. followed through and completed an AOD assessment at Southeast Mental Health in April 2019. (Tr. at 144.) Based on the initial AOD assessment, Babb asked H.S. to complete a second assessment, which she completed. Babb testified that while H.S. has gone through "numerous outpatient and inpatient" programs, H.S. "participated in individual counseling and group counseling. And successfully completed both of those." (Tr. at 144.) According to Babb, H.S. has also participated in a parenting course through Guidestone, which she successfully completed. "[H.S.] was very successful with that. In that, * * * she's very compliant * * * the counselors all informed me as to how well she participates and enjoyed her - - her time there." (Tr. at 145.) Babb testified, "I think [H.S.] has participated in more than one round of parenting classes through Guidestone. She does very well with group involvements and - - and talking in her individual counseling sessions." (Tr.at 152.) As for T.C., Babb stated he was referred to Guidestone, but he has refused to sign a release of information. Consequently, Babb does not know if T.C. completed the parenting classes.

{¶ 25} Babb testified, after the birth of B.N., H.S. connected with Recovery Court and participated in four or five different programs. Babb stated that H.S. is in ongoing treatment at this time participating in two groups per week with individual outpatient program for medication purposes. (Tr. at 145-46.) Babb testified that H.S. is prescribed suboxone and an antidepressant. (Tr. at 146.) Babb has ongoing concerns about H.S.'s substance abuse based on her use of suboxone for over one year. (Tr. at 146.) Babb remarked that H.S. was anxious at one point about running out of the antidepressant. (Tr. at 146.) Babb also noted that H.S. had a positive drug screen for marijuana in November 2021. (Tr. at 146.)

{¶ 26} According to Babb, T.C. completed an AOD assessment through North Community Mental Health ("North Community") and another through Southeast Mental Health. (Tr. at 146-47.) T.C. continued with treatment at North Community, but in August 2019, T.C. stopped following their recommendations and was discharged from the program. (Tr. at 147.) Babb has concerns about T.C.'s drug use because he has refused to participate in random drug screens as part of his case plan. (Tr. at 148.)

{¶ 27} Babb testified that, since starting Recovery Court, H.S. has maintained a relationship with Recovery Court and has been "very vigilant about her drug screens." (Tr. at 149.) Babb stated that there was a "time early part -- at the early part of her children being removed that I had lost some contact with her and so she did have some lapses attending random screens." (Tr. at 149.) When asked if H.S. has "improved since her participating in Recovery Court[]", Babb responded "[a]bsolutely." (Tr. at 149.) Babb testified that T.C. has not been consistent with the drug tests, and she is not sure if he "ever was compliant with the random drug screens." (Tr. at 150.) T.C. was engaged in mental health treatment at North Community from 2016 to August 2019 (Tr. at 151.) According to Babb, T.C. told her that he did not think he needed mental health treatment, but he plans to restart his counseling services. Babb testified that T.C. has also never been able to provide stable housing. T.C.'s residence has limited bedrooms, and she has not approved the home "due to our past involvement with the family." (Tr. at 153.) Babb also referenced drug abuse in the home, which T.C. denied. According to Babb, she last visited T.C.'s residence in September 2021. Babb noted that there have been times where T.C. has refused to come out of the basement. (Tr. at 155.)

{¶ 28} Babb testified that, prior to H.S.'s current residence, she lived in a variety of other living situations with relatives and shelters. Babb said she last visited H.S.'s current home the Friday evening before trial. Prior to that visit, Babb stated that she had been denied entry since July 2021. (Tr. at 156.) Babb did note that she was out for several weeks for personal reasons in November. (Tr. at 157.) "And so, she did call me and suggested that I visit her on Friday evening." (Tr. at 157.) Babb testified that B.N.'s father has previously lived at the residence. Babb testified as to her fear of B.N.'s father based on several inappropriate phone calls. Babb has not been able to independently verify B.N.'s current residence. (Tr. at 159.) In 2019, H.S. provided Babb receipts of her work as a janitor as well

as receipts of rental payments. (Tr. at 159, 161.) Babb knows that H.S.'s brother and sister-in-law have helped pay the rent, but she has not been able to verify that information. (Tr. at 159-60.) Babb has ongoing concerns about H.S.'s ability to financially support herself without the financial assistance of B.N's father. (Tr. at 160.) According to Babb, during her last meeting with H.S., "[s]he is hopeful that she will have employment starting on Wednesday, but we have been discussing for a long time that she needed to become gainfully employed and to support herself. And she told me that she'd be making $10 an hour and we agreed that she would be eligible for food stamps and for medical insurance for the children." (Tr. at 161.) As for T.C., Babb testified that T.C. has never provided employment verification because he has always worked "under the table." (Tr. at 162.) T.C. last reported employment in 2019. (Tr. at 162-63.)

{¶ 29} The parents have been permitted to visit the children for one hour once a week. Babb has monitored the parents during the visits 6-10 times, but she cautioned that it is difficult to gauge how the parents are operating since the children are distracted. After H.S. completed drug court, H.S. was permitted two hours per visit. (Tr. at 163.) T.C. had consistently visited the children but, over the last year, has started missing visits. Babb asked T.C. to call ahead if he planned to miss the visit so the children did not drive 2.5 hours to FCCS. (Tr. at 165.)

{¶ 30} According to Babb, in 2017, "at the onset of [FCCS] receiving temporary custody," H.S.'s visitation was sporadic. (Tr. at 164.) Recently, Babb has been "impressed though at times [during visitation] when I have seen [H.S.] be attentive to the children's needs." (Tr. at 168.) H.S. has brought them food and taken them to the restroom when necessary. (Tr. at 168.) According to Babb, when the children are disruptive, H.S. will redirect. Babb testified that she believes the children are bonded with H.S. (Tr. at 169.) "The children tell me that they like to visit with their mother. The children have shown me pictures that they have drawn for their mother. They have provided homemade cards for her. They will give her hugs." (Tr. at 169.) The children will greet both parents in loving ways. Babb does have concerns about the bond between T.C. and the younger children. Babb noted that T.C. does not have the same bond with Al.C. According to Babb, Al.C. has told her that "she would like to quit visiting with [T.C.]," and she is fearful of him because he demands she take care of the younger children. (Tr. at 170.)

{¶ 31} Babb testified that FCCS attempted to place all the children together but could not identify one foster home that was suitable. FCCS moved them to five or six foster homes. Al.C. has been residing in a foster home with the youngest child, B.N., for the past six months. (Tr. at 171.) Prior to that placement, they were in another foster home for 18 months. Al.C. and B.N. were moved at the request of the foster parents because of Al.C.'s behavior. (Tr. at 172.) Ad.C., An.C., Aj.C., and A.S. have lived together in the same foster home for the last three years. (Tr. at 172.)

{¶ 32} According to Babb, Al.C. does not have any special needs but has participated in counseling in the past. (Tr. at 173.) Al.C. has a prior diagnosis of ADHD but there has not been much evidence of that in her current placement. Al.C. has been able to perform in school without medication, and her current foster parents do not think she needs it at this time. (Tr. at 174.) While Al.C. seems relaxed in her current placement, she does not have a strong bond with the foster parents. Ad.C. and Aj.C. are both diagnosed with reactive attachment disorder and PTSD. Ad.C. is also diagnosed with depression. (Tr. at 174.) All the girls have done virtual counseling once a week with Nationwide Children's Hospital. (Tr. at 174.) The twins have had some behavioral issues such as being uncooperative and running away from home. (Tr. at 175.) Babb stated the foster family has several boys of their own, and they interact just like a "typical family." (Tr. at 179.) Babb testified all the children, with the exception of Al.C., are bonded with their foster parents and are in potentially adoptive homes. (Tr. at 179.)

{¶ 33} Babb recommended terminating parental rights for H.S. and T.C. as it would be in the best interest of the children. Babb acknowledged this is a difficult recommendation. (Tr. at 180.) Babb explained that T.C. does not have income or stable housing for the children. "I don't think that [T.C.] is capable of meeting their mental health and physical needs." (Tr. at 180.) As for H.S., Babb is still "highly concerned" about her drug abuse and does not think H.S "is willing to support herself and to live independently." (Tr. at 181.)

{¶ 34} Babb acknowledged that H.S. has been cooperative throughout the case. Babb stated there have been times where she has disappeared in the past, but she "has been better in the last year or so." (Tr. at 186.) When asked if she has noticed a difference in H.S. since starting Recovery Court, Babb responded, "[a]bsolutely." (Tr. at 186.) Babb conceded

that H.S. has pursued referrals and signed all necessary release of information for different providers. (Tr. at 187.) Babb, however, did say H.S. tested positive for marijuana in November. Babb conceded that it is very common for people with addiction issues to relapse. Babb acknowledged that H.S. has consistently tested negative since July 2021. (Tr. at 188.)

{¶ 35} As for housing, Babb testified that H.S. has lived at the same residence for over a year. H.S. informed FCCS that B.N.'s father moved out around a year ago. (Tr. at 190.) Babb acknowledged that the last time she visited the residence, "[she] did not see any evidence [B.N.'s father was] living there." (Tr. at 190-91.) Babb testified that she had conversations with a male that claimed to be H.S.'s brother, but she could not verify this information. As to H.S.'s efforts with Guidestone, Babb stated that "[H.S.] has never refused and has always been very cooperative and even wanted even more interaction with professionals [at Guidestone]." (Tr. at 192.)

{¶ 36} Thomas Waldeck is the guardian ad litem ("GAL") for the children. (Dec. 14, 2021 Tr. at 11.). Waldeck testified that he has met with the children in their foster placement on numerous occasions. (Tr. at 12-13.) While Waldeck met with H.S. at her residence, his interaction with T.C. has been limited. (Tr. at 13, 31.) Waldeck characterized T.C.'s prior residence as "grossly inadequate from a space perspective to [meet] the needs of the kids." (Tr. at 13.) Waldeck said he has not met with T.C. in his current residence because "[T.C.] is so deficient in completing case plan objectives, that placing the children with [T.C.] * * * as a long-term disposition was never realistic." (Tr. at 13.) Waldeck testified that he visited H.S. in her residence the Saturday before trial. (Tr. at 31.) According to Waldeck, H.S.'s residence is clean, well-stocked with food, and appropriate in size. "I think the house is adequate or could be made adequate with a little bit of work." (Tr. at 33.) Waldeck stated that while the residence lacks bedding, "if the children were going to be there, I mean, that's a problem that could be solved." (Tr. at 14.) According to Waldeck, H.S. told him the weekend before trial that B.N.'s father no longer resides in her home. "I have no specific evidence or information that he does, but I certainly, on the other hand couldn't rule out the possibility that he does." (Tr. at 15.)

{¶ 37} Waldeck testified that Al.C. was initially "extremely out of control" and the foster parents had a "real battle" in dealing with her behaviors. (Tr. at 16.) Al.C.'s recent

physical and mental maturity has been "really remarkable." (Tr. at 16.) Waldeck testified that Al.C. has really grown up and her behavior has settled. According to Waldeck, Al.C. is old enough to understand what is happening and form an opinion about returning home. (Tr. at 20.) Waldeck stated that the twins might not appreciate the "idea of permanence," but they understand that "something is happening" that involves where they are going to reside. (Tr. at 20.) While Ad.C. and An.C. lack maturity, Waldeck believes that "the kids are more stable than they have been in the past." (Tr. at 19.) Recently, the twins wanted to "go home and so we got counsel appointed." (Tr. at 19.) Aj.C. and A.S. are too young to appreciate the situation or express their wishes as to the outcome of the case. (Tr. at 21.)

{¶ 38} Waldeck testified that he has observed H.S. with the children and described the interaction as "appropriate." Waldeck believed there is strong emotional bond between H.S. and the children. (Tr. at 22.) According to Waldeck, T.C. also acted appropriately with the children and there is an emotional bond. (Tr. at 22.) Waldeck filed a recommendation regarding the permanency of the children. Waldeck opined, "I think this is a hard case. It isn't as clearcut as lot of the cases that - - that I'm involved in either." (Tr. at 23.) Waldeck explained:

> Mom is making progress, you know, through Recovery Court. Recovery Court does great work. You know, how substantial that progress is I think is - - question of your point of view. To me the, you know, the question is, is what is - - is the progress that she's made over the last six, eight months, you know, is that progress does it reflect a fundamental change in behavior that might signal at least the reasonable possibility of - - of long-term sobriety * * * or by contrast is this simply an interlude of sobriety within the context of a long - - of a long, long, long term lifestyle of addition. And - - and the only way to answer that question is really the passage of time, but time is the one thing that in this process today we don't have. And so I just don't know.

(Tr. at -23-24.)

{¶ 39} Waldeck was most concerned with H.S.'s ability to be financially independent. While H.S. is starting a job, Waldeck said H.S. has not worked independently in the past. Waldeck also believes B.N.'s father is "a very destructive force." (Tr. at 24.) If things become desperate, Waldeck thinks H.S. could allow B.N.'s father back into her

"household to provide some stability." (Tr. at 25.) Waldeck concluded that "if the children stayed where they are on a permanent basis, I think that would be -- would be an acceptable outcome. If the children went home to [H.S.], and she was able to be stable and independent and stay clean and rear of the children, I think that would be an acceptable outcome." (Tr. at 25.) Waldeck feared the "worst outcome" would be if the children returned home and the situation deteriorated to where the children had to be removed based on H.S. returning to her past behavior. (Tr. at 26.) Waldeck thinks the progress H.S. has made is "substantial and noteworthy, but it's not enough from [his] perspective to allay [his] concerns that these children would go home and then in some period of time later, they would again be removed, again placed in foster care and the cycle would begin again." (Tr. at 26.) Waldeck concluded that he would grant the motion for permanent custody as to both parents. (Tr. at 27.)

{¶ 40} On cross-examination, Waldeck testified that Al.C. initially wanted to return home, then wanted to be adopted, and since leaving her initial placement, wants to return to H.S. Waldeck stated, after discussions with counsel, that Al.C. might have again changed her mind, and she might want to be adopted. (Tr. at 28-29.) Ad.C. had wanted to live with T.C. first, then H.S., but recently the twins wanted to live with H.S. (Tr. at 29.) "They've vacillated a lot, but boy * * * this is a hard case." (Tr. at 29.) When asked if he would be surprised if An.C. now wanted to first live with T.C. then H.S., Waldeck said that he would not be surprised. "The kids have vacillated a lot." (Tr. at 29-30.) Waldeck testified that there is "strong interest" in adopting Ad.C., An.C., Aj.C., and A.S. but whether Al.C. is in an adoptive home is "a question that I don't know the answer to." (Tr. at 30-31.) Waldeck commented that H.S.'s progress has been "notable." (Tr. at 31.)

{¶ 41} Waldeck attempted four unannounced visits, two in the daytime and two at night. Waldeck said that, despite there being lights on upstairs, no one answered the door. (Tr. at 33.) On one occasion, a man answered the door "in a bathrobe." (Tr. at 33.) The man said H.S. was out to the store with her brothers but would return. (Tr. at 33-34.) Waldeck did note that H.S. has been nothing but "courteous and nice to me." (Tr. at 34.) Waldeck stated he has never had any problems with H.S., and she has "always been compliant" and "respectful." (Tr. at 32.) Waldeck stated that H.S. is "reasonably bright" and "has the capacity to utilize resources." (Tr. at 34.)

{¶ 42} H.S. was recalled to provide additional testimony. H.S. testified that she has provided two AOD assessments near the time she enrolled in Recovery Court. (Tr. at 41.) H.S. testified that she joined Recovery Court because she "really wanted to change." (Tr. at 42.) H.S. testified as to her treatment history and stated her last program at Joshua Treatment Center was completed on July 1, 2021. (Tr. at 45.) H.S. also graduated from IOP two months before trial. (Tr. at 46.) H.S. is currently participating in individual counseling and two groups per week. H.S. uses "all of the outside resources as much as I can." (Tr. at 46.) As far as drug testing, H.S. has been completing random drug screens through Averhealth and weekly testing through the suboxone doctor at Milestone Addiction and Counseling. (Tr. at 46.) H.S. stated that she has had negative screens since completing treatment at Joshua Treatment Center. (Tr. at 46.) According to H.S., she has been sober for six months, one week, and four days. (Tr. at 47.)

{¶ 43} According to H.S., her brother and sister-in-law currently pay her rent. H.S. stated that she starts her job at Save-A-Lot the day after trial. (Tr. at 50.) H.S. believes the new job will allow her to financially support her children, but her family is still able to provide financial resources if needed. (Tr. at 55.) According to H.S., B.N.'s father moved out of the residence over a year ago. (Tr. at 51.) H.S. last saw B.N.'s father when she ran into him at the store while he was with another woman and her children. (Tr. at 62.) H.S. is also receiving PUA and is eligible for food stamps. (Tr. at 52.) H.S. admitted to having some toxic relationships in the past, but she has learned to move forward through counseling. While H.S. conceded that she has had some criminal offenses, she has not had any criminal cases in the last three years. (Tr. at 53.) H.S. stated she would comply with additional treatment and counseling services regardless of whether the children are returned home. (Tr. at 56.) H.S. believed she has substantially complied with the case plan and would utilize outside resources if the children were returned. (Tr. at 54.)

{¶ 44} H.S. explained the man in her home when Waldeck made an unannounced visit was a friend from high school, C.H., that she has known for several years. (Tr. at 64, 68.) H.S. had asked him to watch her home while she went to the store with her brother and sister-in-law. (Tr. at 64.) H.S. noted that she has had clean screens since July, but there was a positive screen for THC on November 20, 2021, which she attributed to being near her ex-fiancé that was smoking marijuana in her vicinity. (Tr. at 65.)

{¶ 45} Annamerinda Eaton has been the Franklin County Family Recovery Court Coordinator since June 2021. According to Eaton, while H.S. had a difficult start to Recovery Court, Eaton described H.S.'s progress as follows:

> Since I have been on the case, [H.S.] has done very well for herself. She's made incredible progress. She completed her in-patient treatment. When she got out, she hit the ground running. She had not missed a urine screen from the day she got out on July 1st till currently. Obviously, she did miss her screen yesterday, but we were - - she was in trial the whole day, so it was excused. She has not missed a urine screen. She has met with her counsels for - - for individual; her groups. They reported that she has made fantastic progress. She has dropped down from IOP treatment. [H.S.] is only in out-patient treatment. [H.S.] does her check-ins with me weekly. She actually exceeds her check-ins. She checks in more than any other client currently on the caseload. She's just had tremendous progress and she's had nothing, no barriers since getting out of treatment.

(Tr. at 79.)

{¶ 46} Eaton testified that H.S. will move to the next phase in Recovery Court in January 2022. According to Eaton, H.S. has not missed a drug screen. H.S. has been testing two to three times per week since June, all of which have been negative except for the positive for THC on November 20, 2021. Eaton provided the following context for the positive drug screen: "the cutoff level is 2.9 and she was at a 2. So we reached out to the lab to find out, if, you know, obviously, if that was accurate. * * * It did return positive for a very low level of marijuana. She had been negative the screen prior to that and then she was negative after that." (Tr. at 82.) According to Eaton, marijuana typically stays in your system for 30 days but with low levels it will stay in the system for 3-4 days. Eaton stated that they reached out to the lab because H.S.'s screens were negative before and after the positive test. Eaton testified that it was potentially a false positive stating "the lab says a positive is a positive, but they agreed that it - - that it did not seem right." (Tr. at 84.) Eaton stated that H.S. uses resources in the community "very well," and if H.S. ever needed housing, she could utilize Guidestone. (Tr. at 82.) H.S. could also get help setting up bills and a financial plan for the children if they were to return. (Tr. at 83.) Eaton stated H.S.

could remain in contact with Guidestone after she graduates for sober support. Eaton noted that all the progress reports for H.S. have been "great reports." (Tr. at 87.)[6]

{¶ 47} On March 28, 2022, the trial court awarded FCCS permanent custody of the children and divested H.S. and T.C. of their parental rights. H.S. and T.C. filed timely appeals on April 19 and April 25, 2022, respectively. The matters were consolidated for the purposes of appeal.

II. ASSIGNMENTS OF ERROR

{¶ 48} H.S. submits the following assignment of error:

> [1.] The juvenile court's decision to grant permanent custody of [H.S.'s] children to Franklin County Children Services should be reversed.
>
> T.C. submits the following assignment of error:
>
> [1.] The weight of the evidence does not support the award of permanent custody.

III. LEGAL ANALYSIS

A. Appellants' Assignments of Error

{¶ 49} Both H.S. and T.C. contend that the juvenile court's judgments terminating parental rights and awarding permanent custody to FCCS were not supported by the weight of the evidence. For harmony of analysis, we will address both assignments of error together.

{¶ 50} The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16, of the Ohio Constitution protect an individual's right to parent one's child. *In re T.N.*, 10th Dist. No. 21AP-429, 2022-Ohio-2784, ¶ 45, citing *In re H.S.*, 10th Dist. No. 21AP-190, 2022-Ohio-506, ¶ 47, citing *In re L.W.*, 10th Dist. No. 17AP-586, 2018-Ohio-2099, ¶ 6. The Supreme Court of Ohio has found that it is an essential and basic right of a parent to raise their own child. *In re K.R.*, 10th Dist. No. 22AP-51, 2023-Ohio-359, ¶ 11, citing *In re Murray*, 52 Ohio St.3d 155, 157 (1990). "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' * * * Therefore, parents 'must be afforded every procedural and substantive

[6] There was also some testimony that clarified a prior report that H.S. was only sporadically attending meetings. Eaton testified that the statement in the report that H.S. missed meetings was incorrect, but it was too late to correct the report. (Tr. at 87-88.)

protection the law allows.' " *In re Hayes*, 79 Ohio St.3d 46, 48 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16 (6th Dist.1991).

{¶ 51} The right of a parent to raise their own child, however, is not absolute and is subject to the ultimate welfare of the child. *K.R.* at ¶ 11, citing *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979). The state has broad authority to intercede to protect a child from abuse and neglect. *T.N.* at ¶ 45, citing *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28, citing R.C. 2151.01. "In certain circumstances, therefore, the state may terminate the parental rights of natural parents when such termination is in the best interest of the child." *K.R.* at ¶ 11, citing *In re H.D.*, 10th Dist. No. 13AP-707, 2014-Ohio-228, ¶ 10. (Further citation omitted.)

{¶ 52} As set forth in R.C. 2151.414(B)(1), a juvenile court may grant permanent custody of a child to a public children services agency "if the court determines * * *, by clear and convincing evidence, that it is in the best interest of the child to grant" the agency's motion for permanent custody of the child and that any one of the circumstances set forth in R.C. 2151.414(B)(1)(a) through (e) are applicable.[7] R.C. 2151.414(B)(1)(a) through (e) provides:

> (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.

[7] " 'Clear 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.' "*In re L.B.*, 10th Dist. No. 19AP-644, 2020-Ohio-3045, ¶ 24, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

> (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.
>
> (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.

{¶ 53} If the juvenile court concludes that one of the above circumstances is applicable to the case at hand, the court must then examine R.C. 2151.414(D)(1) to determine whether granting permanent custody is in the best interest of the child. When resolving whether granting a motion for permanent custody is in the child's best interest, the juvenile 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 * * *;
>
> (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.[8]

[8] R.C. 2151.414(E)(7) through (11) provide additional factors such as:

R.C. 2151.414(D)(1)(a) through (e).

{¶ 54} While a trial court is not required to expressly examine each R.C. 2151.414(D)(1) factor, it must make some indication on the record that all the factors were considered in its analysis. *In re T.W.*, 10th Dist. No. 19AP-700, 2020-Ohio-4712, ¶ 12, quoting *In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 53. Under the statute, no one factor is entitled to more weight than the other factors. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶ 56.

{¶ 55} A juvenile court's finding that it is in the best interest of the children to grant a motion for permanent custody will not be reversed by a reviewing court absent a determination that the decision is against the manifest weight of the evidence. *In re J.J.*, 10th Dist. No. 21AP-166, 2022-Ohio-907, ¶ 18, citing *In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622, ¶ 4. " '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. * * * Weight is not a question of mathematics, but depends on [the evidence's] effect in inducing belief." ' " (Emphasis omitted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting

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(7) The parent has been convicted of or pleaded guilty to one of [a list of criminal offenses].

(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.

Black's Law Dictionary 1594 (6th Ed.1990). A juvenile court's grant of permanent custody is not against the manifest weight of the evidence if all material elements are supported by competent, credible evidence. *J.J.* at ¶ 18, quoting *In re J.T.*, 10th Dist. No. 11AP-1056, 2012-Ohio-2818, ¶ 9.

1. R.C. 2151.414(B)(1)(a) through (e)

{¶ 56} As an initial matter, the parents do not contest that there is clear and convincing evidence that the children have been in the custody of FCCS for a period longer than 12 months of a consecutive 22-month period. R.C. 2151.414(B)(1)(d).[9] Accordingly, we will focus our analysis on whether there was competent, credible evidence that the grant of permanent custody was in the best interest of the children.[10] In reaching this determination, we review the trial court's findings of all relevant factors, including the five enumerated factors set forth in R.C. 2151.414(D)(1)(a) through (e).

2. Best Interest Analysis for H.S.

{¶ 57} In H.S.'s sole assignment of error, she argues that the trial court's judgments are against the manifest weight of the evidence as its factual findings, which it incorporated by reference in its R.C. 2151.414(D)(1) best interest analysis, were not supported by the record.

{¶ 58} The March 28, 2022 decision is organized in several well delineated sections. The trial court utilized Section I of the decision to set out "relevant background and procedural history," and Section II of the decision for "relevant findings pursuant to statute." (Capitalization removed.) *Id.* at 6-7. While the trial court identified the R.C. 2151.414(D)(1) factors in the decision, it provided little to no discussion of each factor as part of its best interest analysis. Instead, the trial court elected to incorporate by reference the phrase, "[p]lease see Sections I and II" below each factor of the decision. Because of the trial court's repeated references to "Section I and II" in its discussion of the best interest factors in lieu of additional analysis, the two parts of the decision are inextricably linked.

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[9] The trial court also found that the children should not or could not be returned to the parents in a reasonable time under R.C. 2151.414(B)(1)(a); (e). While T.C. disputes this conclusion, he conceded in his brief that the trial court's finding as to R.C. 2151.414(B)(1)(d) make it irrelevant. We agree. Accordingly, we decline to examine the issue and will focus our analysis on the best interest factors under R.C. 2151.414(D)(1).

[10] The trial court also found that T.G., the father to A.S., abandoned the child as T.G. failed to visit or have meaningful contact with A.S. for more than 90 days. R.C. 2151.414(B)(1)(b). Because T.G. did not file an appeal in this case, we decline to examine the issue in this decision.

Relevant to the R.C. 2151.414(D)(1) analysis, the trial court concluded, "Mother failed to comply with the Case Plan as it related to her drug abuse, mental health, domestic violence, and housing instability." (Mar. 28, 2021 Decision & Jgmt. Entry at 8.) The trial court also found that H.S. failed to complete case objectives related to her "parenting practices." *Id.* As we will discuss below, the trial court made several obvious factual errors as part of her best interest analysis.

{¶ 59} First, the trial court made a significant factual error as to H.S.'s criminal record. The trial court concluded that "[u]ntil August of 2019, Mother was on non-reporting Probation as a result of a guilty plea to a reduced charge of Domestic Violence." (Mar. 28, 2022 Decision & Jgmt. Entry at 8.) There is no evidence in the record that H.S. was convicted of domestic violence. In August 2017, H.S. was *charged* with misdemeanor domestic violence and assault from an altercation involving T.C. On August 23, 2017, H.S. entered a guilty plea to the amended charge of criminal mischief, a misdemeanor of the third degree. (Dec. 13, 2021 Trial Tr. Ex. 3 at 1.) The remaining charge was dismissed nolle prosequi.

{¶ 60} The social views of domestic violence have evolved over the last few decades. "Society's view of domestic violence and the reach of its ill effects has changed over the past 30 years, and rightfully so." *Cyran v. Cyran*, 152 Ohio St.3d 484, 2018-Ohio-24, ¶ 31 (Kennedy, J., dissenting), citing Adrine & Ruden, *Ohio Domestic Violence Law*, Section 1:1, at 10-12 (2016). To keep pace with these societal changes, the General Assembly has enacted laws to provide "harsher criminal penalties for acts of domestic violence." *Id.*, citing *Felton v. Felton*, 79 Ohio St.3d 34, 37 (1997). These legislative changes reflect the often-disproportionate treatment of a domestic violence conviction versus convictions for other comparable violent offenses. As one legal scholar put it:

> The law is not "neutral" with respect to domestic violence; it now articulates the presumption that domestic violence is worse than other kinds of violence. This evolution in the law has not been accompanied by the development of a theory to explain why we have an enhanced, rather than neutral, law of domestic violence. Only when we answer the fundamental question of why domestic violence is worse than comparable violence outside the domestic sphere will we begin to answer the question of how the law should define domestic violence.

Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 Wm. & Mary L. Rev. 1841, 1882-83 (2006).

{¶ 61} To be sure, all criminal convictions carry an inherent social stigma. *U.S. v. Combs*, 36 F.4th 502, 507 (4th Cir.2022), quoting *Ball v. United States*, 470 U.S. 856, 865 (1985) (writing there is a " 'societal stigma accompanying any criminal conviction' "). However, in recent years Ohio courts, as well as other state courts, have recognized the particular stigma associated with a domestic violence conviction is unique to other comparable violent offenses. *See, e.g., Schussheim v. Schussheim*, 12th Dist. No. CA2011-07-078, 2012-Ohio-2573, ¶ 26 (Piper J., dissenting), *majority rev'd,* 137 Ohio St.3d 133, 2013-Ohio-4529 ("Society does not condone violence in general and violence within the family unit is particularly disturbing. * * * There is no denying that the stigma of such allegations can be damaging and onerous); *see also Piper v. Layman*, 125 Md. App. 745, 753 (Ct. of Special App. 1999) (writing that a "stigma that is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act"). The stigma is especially prevalent in cases involving parental custody because a conviction of domestic violence involves a willingness to engage in violence against family members or individuals living in the home. Here, the trial court included the erroneous domestic violence conviction in its section titled, "relevant findings pursuant to statute." (Capitalization removed.) (Mar. 28, 2022 Decision & Jgmt. Entry at 7.) Based on the trial court's inclusion of the erroneous conviction as a "relevant finding," as well as the stigma associated with all domestic violence convictions, most notably in the domestic relations context, it is apparent the trial court's erroneous consideration of this evidence factored into its best interest analysis.

{¶ 62} This court reached a similar result in *In re D.R.*, 10th Dist. No. 21AP-697, 2023-Ohio-539. A brief review is instructive.

{¶ 63} In *D.R.*, the trial court granted FCCS' motion for permanent custody and terminated the parental rights of the father. As part of its best interest analysis in support of its decision to grant permanent custody, the trial court found it " 'relevant that Father has criminal convictions in Franklin County, Ohio for burglary, kidnapping, gross sexual imposition, escape, and failure to register as a sex offender. He has a conviction in Union County for attempted felonious assault.' " *D.R.* at ¶ 29, quoting Decision at 13. The trial

court also " '[found] it relevant' " that the father lived with a man named I.K. who " 'ha[d] a criminal record.' " *Id.* at ¶ 29, quoting Decision at 12-13.

{¶ 64} In its February 23, 2023 decision, this court reversed and remanded the trial court's judgment finding it was against the manifest weight of the evidence, and not supported by clear and convincing evidence, because the trial court relied on erroneous facts regarding the father's criminal convictions in its best interest analysis. The *D.R.* court found that while the father had previously been charged with kidnapping and aggravated burglary in 2009, the kidnapping charge was dismissed when the father pleaded guilty to burglary. *Id.* at ¶ 31. The father also had a 2012 conviction for attempted felonious assault. *Id.* However, there was no evidence in the record that the father was convicted of kidnapping, gross sexual imposition, escape, and failure to register as a sex offender. *Id.* at ¶ 30. This court also found that while I.K. had stayed with the father on a few occasions, he had not lived with the father as the mother testified at trial. *Id.* FCCS argued that, even if you excluded the erroneous factual findings, the evidence supports permanent custody being in the best interest of the child.[11] The *D.R.* court rejected FCCS' argument finding that a reviewing court cannot make factual findings in the first instance. *Id.* at ¶ 37. The case was remanded for the trial court to reanalyze the R.C. 2151.414(D)(1) factors.

{¶ 65} We find that the facts in *D.R.* are analogous to the instant case in several important ways. First, in both cases the trial court erroneously found that the parent at issue was convicted of a criminal offense that was not supported in the record. Not only was there an error in the trial court's statement of the facts, but in both cases, it expressly relied on those facts in their analysis. In *D.R.,* the trial court found the erroneous convictions "relevant" in its best interest analysis. *Id.* at ¶ 35. Similarly, the trial court in this case

[11] In its November 29, 2021 decision, the trial court cited several other grounds for concluding that a grant of permanent custody was in the child's best interest. The trial court summarized its findings as follows:

> The Court finds that Father has failed to prove that he is able to provide a safe and stable home environment by failing to obtain and maintain stable housing; failing to obtain and maintain verifiable employment; failing to obtain and maintain a parental relationship with [D.R.]; and failing to maintain a consistent schedule, including failing to regularly attend court hearing as scheduled, failing to attend parental visitation as scheduled, and failing to attend mental health and drug screen appointments as scheduled. Father has struggled to attend drug screens, counseling appointments and visits. This inability to maintain a schedule will significantly affect his ability to get [D.R.] to school, medical appointments, and counseling appointments.

Id. at 14.

included the erroneous conviction of domestic violence in the section titled "relevant findings pursuant to statute." (Capitalization removed.) (Mar. 28, 2022 Decision & Jgmt. Entry at 7.) Finally, both cases concern unique offenses that are particularly disturbing in a domestic relations context.

{¶ 66} Other factual errors pervade the trial court's analysis. First, the trial court's conclusion that H.S. failed to comply with the mental health component of the case plan is not based on any evidence in the record. The December 1, 2017 case plans indicate that H.S. and T.C. generally have the same basic requirements. However, T.C., unlike H.S., had the additional requirement to participate in mental health services and take medication as prescribed.[12] H.S. had no such requirement.[13] While H.S. testified that she has been diagnosed with various mental health conditions, FCCS elected not to include mental health treatment or medication requirements in the case plan.[14] (Tr. at 68.) Accordingly, it is factually erroneous for the trial court to conclude that H.S. failed to comply with the mental health component of the case plan as no such requirement was in place. The trial court's conclusion on this point is problematic to say the least. H.S. sought her own medical treatment for various mental health diagnoses outside the requirements of the case plan. H.S.'s actions should be lauded and not constitute a tacit incorporation of additional terms in the case plan. The trial court effectively failed H.S. for a test that she did not know she was taking.

{¶ 67} Regarding H.S.'s compliance with the case plan as to securing stable housing, the trial court wrote, "the GAL attempted multiple visits but was unable to inspect the inside of the Mother's home." (Mar. 28, 2022 Decision & Jgmt. Entry at 8.) The record demonstrates that there is no evidentiary basis for this conclusion. The GAL, Thomas

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[12] When asked if there was "anything in the case plan regarding mental health treatment for [T.C.] that wasn't included for [H.S.]?" Babb responded, "Yes ma'am, because [T.C.] had identified to us that he had a relationship prior to our agency's involvement and so we asked him to continue with his mental health program." (Tr. at 140.)

[13] We note that H.S.'s case plan for A.S., filed on July 10, 2018, also does not include a mental health component..

[14]This is in stark contrast to T.C.'s battle with mental health during the course of this case. While T.C. participated in mental health counseling and services for several years, he stopped engaging in treatment in August 2019 (Tr. at 151.) Since that time, T.C. missed several drug screens and visits with the children. T.C. explained that his failure to complete drug screens was the result of his mental health issues. (Tr. at 102.) T.C. also testified that his anxiety has become so severe that he cannot get on a bus to complete a drug screen. (Tr. at 102.)

Waldeck, testified that he last visited the residence the Saturday before trial. (Tr. at 31.) According to Waldeck, the residence is clean, well-stocked with food, and appropriate in size. "I think the house is adequate or could be made adequate with a little bit of work." (Tr. at 33.) Waldeck stated that while the residence lacked bedding, "if the children were going to be there, I mean, that's a problem that could be solved." (Tr. at 14.) Waldeck did testify that there were four occasions where he attempted to visit H.S. at her residence and no one answered the door. However, Waldeck testified that these visits were unannounced. (Tr. at 33.) There was no evidence or testimony at the hearing by the GAL that H.S. refused to allow him in the home. To the contrary, Waldeck stated he has never had any problems with H.S., and she has "always been compliant" and "respectful." (Tr. at 32.)[15]

{¶ 68} Finally, the record is devoid of evidence to support the trial court's conclusion that H.S. failed to comply with the parenting component of the case plan. The trial court wrote that "[a]lthough Mother and Father completed parenting classes neither demonstrated that they learned any skills indicative of a change in parenting methods." (Mar. 28, 2022 Decision & Jgmt. Entry at 9.) In addition to H.S.'s testimony as to the skills she learned in parenting classes (*see* Dec. 13, 2021 Tr. at 50-53), the trial court's finding is in direct conflict with the caseworker's testimony in the case. Babb testified that H.S. provided documentation that she completed parenting classes at Guidestone, and H.S. even "participated in more than one round of parenting classes through Guidestone. [H.S.] does very well with group involvements and - - and talking in her individual counseling sessions." (Tr. at 152.) Babb went on to state, "I did have conversations with her Guidestone parent mentor throughout the years and * * * [H.S.] has never refused and has always been very cooperative and even wanted even more interaction with professionals." (Tr. at 192.) Babb also testified that she observed H.S. apply these new parenting skills during her visitation with the children. Babb stated that when one of the children was disruptive, H.S. would try to redirect. (Tr. at 168.) Babb concluded, "[H.S.] agreed to participate in parenting through Guidestone and was very successful with that. In that, * * * she's very compliant * * * the

[15] Waldeck also testified that H.S. has been nothing but "courteous and nice to [him]." (Tr. at 34.)

counselors all informed me as to how well she participates and enjoyed her—her time there." (Tr. at 145.)[16]

a. Conclusion

{¶ 69} The trial court's examination of the R.C. 2151.414(D)(1) factors is a balancing test that considers all factors equally without greater weight to any one factor. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28. The trial court's decision as to H.S. relied on several erroneous factual findings in its best interest analysis. This court has previously found that erroneous factual findings in the best interest analysis can cause "concern regarding the negative impact the findings at issue may have had on the court's analysis." *D.R.* at ¶ 36; *see also id.*, quoting *Santosky v. Kramer,* 455 U.S. 745, 759 (1982), quoting *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 27 (1981) (" ' "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is * * * a commanding one." ' ").

{¶ 70} In the present case, there is no doubt that there are issues as to H.S.'s compliance with the case plan worthy of examination. However, a grant of permanent custody to FCCS results in such a severe, permanent severance of rights, parents " 'must be afforded every procedural and substantive protection the law allows.' " *In re Hayes*, 79 Ohio St.3d 46, 48 (1997), quoting *In re Smith*, 77 Ohio App.3d 1, 16 (6th Dist.1991). It is apparent from the record and the trial court's final decision in this case that the court relied on these facts when weighing the best interest factors. As set forth previously, the erroneous finding that H.S. was convicted of a reduced charge of domestic violence holds a great deal of weight in domestic relations cases. It is also unclear, but no less concerning, whether this finding would play a role in any subsequent proceeding involving B.N. Moreover, the additional erroneous findings by the trial court as to H.S.'s failure to comply with the mental health component of the case plan—that did not exist—, conclusion that the GAL was refused entry into the residence—in contrast to the GAL's[17] testimony—, or finding that H.S. failed to

[16] While correctly stated in another section of the decision, the trial court also erroneously concluded that the "[C.] children were adjudicated neglected and dependent." (Mar. 28, 2022 Decision & Jgmt. Entry at 6.) While Al.C. was adjudicated a neglected and dependent child, the remaining C. children, as well as A.S., were adjudicated solely as dependent minors. This court's analysis in *D.R.* made a similar finding as part of its justification in reversing the trial court's decision on manifest weight grounds.

[17] We note the GAL concluded that the home was generally suitable for the family. Waldeck testified, "I think the house is adequate or could be made adequate with a little bit of work." (Tr. at 33.)

complete the parenting component of the case plan—in contravention to the case worker's testimony that she had successfully completed parenting classes and implemented the strategies she had learned during her visits with the children—only compound the potential prejudice to H.S. in the best interest analysis. Because of the pervasiveness of the trial court's erroneous factual findings, which were explicitly incorporated into the court's best interest analysis as "relevant findings pursuant to statute," it is impossible for our court to simply excise the errors and reweigh the evidence. (Capitalization removed.) (Mar. 28, 2022 Decision & Jgmt. Entry at 7.) A reviewing court should not reweigh the best interest factors and make factual findings in the first instance. *D.R.* at ¶ 37, citing *In re D.K.*, 9th Dist. No. 26272, 2012-Ohio-2605, ¶ 11 (finding that a reviewing court could not enter a new finding under R.C. 2151.414(B)(1) as this would "exceed our jurisdiction as an appellate court").

{¶ 71} For the foregoing reasons, the trial court's erroneous factual findings in its best interest analysis, as set forth in this decision, were against the manifest weight of the evidence. Given the gravity of the juvenile court's decision regarding the permanent termination of H.S.'s parental rights, we find the factual errors in the trial court's decision demonstrate that the judgment was not supported by clear and convincing evidence. As such, we sustain H.S.'s sole assignment of error. The judgment is reversed, and the case remanded to the trial court to reanalyze the R.C. 2151.414(D)(1) best interest factors in accordance with the evidence as set forth in the record.

3. Best Interest Analysis for T.C.[18]

a. Children's Interactions and Relationships (R.C. 2151.414(D)(1)(a))

{¶ 72} Pursuant to R.C. 2151.414(D)(1)(a), the first factor in determining whether permanent custody is in the children's best interest requires the court to examine the children's interactions and relationships with the parents, siblings, foster caregivers, and others. The juvenile court in this case concluded that T.C. is unable to care for the children. (Mar. 28, 2022 Decision & Jgmt. Entry at 17.) The trial court found the children were all

[18] While this section is limited to T.C., we acknowledge that much of our best interest analysis could also apply to H.S. However, because we conclude the trial court must reanalyze the R.C. 2151.414(D)(1) best interest factors in accordance with the evidence in the record, we decline to engage in a full discussion of these factors with respect to H.S. as it would require a reweighing of the evidence.

doing well in placement and had established a bond with their foster parents. "Overall, [the children] are thriving and interact well with their Foster Parents." *Id.*

{¶ 73} Babb testified that the children are all bonded to some extent with T.C. (Tr. at 9.) Babb did note she has some concerns about the extent of the bond between T.C. and the younger children. The most discussion on parental bond focused on the relationship between T.C. and Al.C. According to Babb, T.C. and Al.C. do not have the same bond as the other older children. Babb testified that Al.C. is fearful of T.C. because he demands she take care of her younger siblings. (Tr. at 170.)

{¶ 74} T.C. had generally gone on weekly visits with the children, but he has recently started missing visits with some frequency. Babb began to ask T.C. to call ahead if he planned to miss the visit so the children did not travel 2.5 hours to FCCS. (Tr. at 165.) Babb testified that FCCS has provided transportation to T.C. to assist with visitation. (Tr. at 167.) During the visits, T.C.'s behavior has generally been appropriate, but the staff at FCCS has had to redirect him for using vulgar language with the children on several occasions. (Tr. at 110.) T.C. also conceded that he showed up for a visit with the children four days after testing positive for COVID-19. (Tr. at 112.)

{¶ 75} An.C. and Ad.C. are both diagnosed with reactive attachment disorder and PTSD. Ad.C. is also diagnosed with depression. According to Babb, Aj.C. has started to demonstrate some of the same traits. (Tr. at 174.) The twins have also demonstrated some behavioral issues such as running away from the foster home. (Tr. at 175.) All the girls have done virtual counseling once a week with Nationwide Children's Hospital and through SAFY foster care agency. (Tr. at 174.) Waldeck stated, "the kids are more stable than they have been in the past, but there are still a lot of challenges with these kids." (Tr. at 19.)

{¶ 76} Al.C. does not have any special needs but has previously participated in counseling. (Tr. at 173.) Al.C. has a prior diagnosis of ADHD but there has not been much evidence of that in her current placement. Al.C. has been able to perform in school without medication, and her current foster parents do not think she needs medication at this time. (Tr. at 174.) There have been some concerns with Al.C.'s behavior in foster care. Al.C. was removed from her initial placement based on a claim of theft by the foster parents. Both Babb and Waldeck described a breakdown in trust, which resulted in Al.C.'s removal from the home. (Tr. at 172.) According to Babb, Al.C. seems relaxed around her current foster

parents. (Tr. at 177.) Waldeck described Al.C. as initially "extremely out of control," and the foster parents having a "real battle" in dealing with her behavior. (Tr. at 16.) Waldeck testified that Al.C.'s recent physical and mental maturity, however, has been "really remarkable." (Tr. at 16.) Babb testified that A.S. does not have any identified special needs at this time. (Tr. at 176.)

{¶ 77} During the life of the case, several family members explored the idea of seeking custody of the children. While there was some initial interest, FCCS could not ultimately approve any of those homes. (Tr. at 138.) Al.C. has been placed with the youngest child, B.N., for the past six months. (Tr. at 171.) The two children were initially placed in another foster home for 18 months before being moved because of Al.C.'s behavior. (Tr. at 172.) Ad.C., An.C., Aj.C., and A.S. have lived together in the same foster home for nearly three years. (Tr. at 172.) According to Babb, FCCS attempted to place all the children together but could not identify one foster home that was suitable. An.C., Ad.C., Aj.C., and A.S. seem relaxed at their current foster home. Babb stated that the foster family has several boys of their own, and all the children interact just like a "typical family." (Tr. at 179.) Babb believes that, with the exception of Al.C., all the children are bonded with their foster parents. Waldeck testified that there is "strong interest" in adopting An.C., Ad.C., Aj.C., and A.S., but whether the foster home for Al.C. is an adoptive home is "a question that I don't know the answer to." (Tr. at 31.)

b. Children's Wishes (R.C. 2151.414(D)(1)(b))

{¶ 78} Next, we consider the custodial wishes of the children. The children have repeatedly wavered between returning to the care of the parents and staying in their current foster homes. Waldeck testified that he recently met with Ad.C. and An.C., and both children wanted to "go home and so we got counsel appointed." (Tr. at 19.) However, in response to whether Waldeck would be surprised if An.C. now wanted to first live with T.C. then H.S., Waldeck said, "I wouldn't be stunned. The kids have vacillated a lot." (Tr. at 29-30.) Similarly, Babb was asked if it would surprise her that, as of two weeks ago, Ad.C. wanted to remain in the foster home, which she replied "[n]o, that would not surprise me at all." (Tr. at 182.) As to Al.C., Waldeck testified that she initially wanted to return home, then wanted to be adopted, and since leaving her initial placement, now wants to return to H.S. "They've vacillated a lot * * * this is a hard case." (Tr. at 29.) According to Waldeck, the

younger children, Aj.C. and A.S., are not mature enough to express an opinion about the outcome of these proceedings. (Tr. at 20-21.)

{¶ 79} At the conclusion of the hearing, counsel for Ad.C. stated that her client wished to remain in her foster home. (Tr. at 97.) Counsel for An.C. stated that his client wished to go home with T.C. then, if that was not possible, to go home with H.S., but she does not want to remain in her foster home. (Tr. at 97.) Counsel on behalf of Al.C. stated that her client would like to return to the care of H.S. (Tr. at 98.)

c. Custodial History (R.C. 2151.414(D)(1)(c))

{¶ 80} The third factor in determining the children's best interest is examining the children's custodial history. Here, the trial court concluded, and we agree, the children have been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. R.C. 2151.414(D)(1)(c). Babb testified that since temporary custody was established, all the children have remained continuously in the care of FCCS. (Tr. at 137.) T.C. has also conceded that the children have been in the custody of FCCS more than 12 months of a consecutive 22-month period. (Appellant T.C.'s Brief at 34.)

d. The Children's Need for a Legally Secure Permanent Placement (R.C. 2151.414(D)(1)(d)).

{¶ 81} The fourth factor considers the children's need for legally secure placement and whether the type of placement can be achieved without granting permanent custody to FCCS. The trial court found that the children were in desperate need of secure placement and that the evidence supports the agency's claim that a secure placement could not be achieved without granting permanent custody to FCCS. The trial court wrote, "[T.C.] has failed to utilize medical, psychiatric, psychological, or other resources that were made available to him to allow him to resume parental duties. He also failed to provide for any basic necessities for his children since the time of their removal. Father failed to timely engage and complete his Case Plan objectives as it relates to his mental health or parenting practices. He did not engage in random screens, domestic violence services nor parenting classes." (Mar. 28, 2022 Decision & Jgmt. Entry at 9.)

{¶ 82} After a careful review of the evidence in the record, we conclude T.C. has failed to substantially comply with the case plan. While T.C. completed an AOD assessment, he has consistently refused to participate in random drug screens. (Tr. at 148.) According

to T.C., he has not been compliant with the random drug screens because his anxiety does not permit him to ride the bus. (Tr. at 27.) While T.C. participated in mental health treatment from 2016 to August 2019, he has stopped engaging in treatment. (Tr. at 151.) While T.C. stated he is not a drug user, he admitted to smoking marijuana the morning of the trial. (Tr. at 88.) T.C. has also missed multiple visits with the children over the last year. While T.C. claims to have completed the parenting classes, Babb stated that T.C. has refused to sign a release of information. Consequently, Babb could not confirm if T.C. completed the parenting classes.

{¶ 83} T.C. has also failed to demonstrate that he can provide the children stable housing. Babb testified that she last visited T.C.'s residence in September 2021 and concluded it was not an approved home. Babb also referenced drug abuse going on in the home, which T.C. denied. T.C. acknowledged that his sister pays the rent and utilities on the home. (Tr. at 104-05.) As for employment, T.C. is currently on disability benefits and last reported working in 2019. Babb concluded that T.C. is not capable of "meeting [the children's] mental health and physical needs." (Tr. at 180.) The GAL reached a similar conclusion stating, "[T.C.] is so deficient in completing case plan objectives, that placing the children with [T.C.] * * * as a long term disposition was never realistic." (Tr. at 13.) This factor favors FCCS and the termination of T.C.'s parental rights.

e. Conclusion of Best Interest Analysis for T.C.

{¶ 84} After careful review of the evidence and testimony presented at the hearing, there was competent, credible evidence to support the juvenile court's conclusion that terminating T.C.'s parental rights was in the children's best interest. While there is a bond between T.C. and his children, T.C. has failed to comply with significant portions of the case plan and has made minimal effort to demonstrate that he can provide stability to the children. "The 'overriding concern' in any child custody case is to reach a disposition that is in the child's best interests." *In re B.B.*, 10th Dist. No. 20AP-488, 2021-Ohio-2299 at ¶ 69, citing *In re Hitchcock*, 120 Ohio App.3d 88, 102 (8th Dist.1996). Accordingly, we cannot find that the juvenile court's determination was against the manifest weight of the evidence.

{¶ 85} For the forgoing reasons, T.C.'s sole assignment of error is overruled.

IV. CONCLUSION

{¶ 86} Having sustained H.S.'s sole assignment of error, we reverse and remand this matter to the trial court to reanalyze the R.C. 2151.414(D)(1) best interest factors in accordance with the evidence as set forth in the record. Having overruled T.C.'s sole assignment of error, we affirm the judgment of the juvenile court as to the termination of his parental rights and permanently divesting him of any and all parental rights, privileges, and obligations.

Judgment affirmed in part;
reversed and remanded in part.

EDELSTEIN, J. concur.

LUPER SCHUSTER, J. concurs in part and dissents in part.

LUPER SCHUSTER, J., dissenting

{¶ 87} I agree with the majority that there was competent, credible evidence to support the trial court's determination that termination of father's parental rights was in the best interest of the children. However, because I would additionally find there was competent, credible evidence to support the trial court's determination that termination of mother's parental rights was in the best interest of the children, I would affirm the entirety of the trial court's decision granting the motion for permanent custody. Accordingly, I respectfully concur in part and dissent in part.

{¶ 88} The majority relies on this court's decision in *In re D.R.*, 10th Dist. No. 21AP-697, 2023-Ohio-539, for the proposition that an appellate court reviewing a permanent custody case will not, in the first instance, make factual findings relative to the best interest of the child analysis. *D.R.* at ¶ 37. Though I agree with that general principle, I would not find a review of the trial court's decision here to require this court to make the best interest determination in the first instance. Instead, based on the record before the trial court and the factual findings articulated by the trial court, I would find there is competent, credible evidence to support the trial court's determination that granting FCCS's motion for permanent custody is in the best interest of the children.

{¶ 89} In relying on this court's decision in *D.R.*, the majority finds the present case to be factually analogous. I would find *D.R.* to be readily distinguishable. In *D.R.*, the trial court erroneously found that the father had been convicted of criminal sexual offenses involving a minor. The record in *D.R.* indicated that it was a friend of the father's who had the relevant criminal history, meaning the trial court attributed the criminal history to the entirely wrong person. The trial court then explicitly stated its erroneous finding was relevant in determining the best interest of the child.

{¶ 90} Here, however, I do not agree with the majority that the trial court made an analogous erroneous factual finding related to mother's criminal history. In reciting the pertinent facts, the trial court noted that mother had been convicted of a reduced charge of domestic violence. The evidence at trial demonstrated that mother was arrested for domestic violence and assault in 2017 and ultimately entered a plea to the amended charge of criminal mischief. Thus, the trial court's statement "a reduced charge in domestic violence in 2017" provides the context of the procedural history of the criminal case leading up to the plea, and does not, as the majority contends, represent a factual error as to her actual conviction. (Mar. 28, 2022 Decision & Entry at 9.) Though the trial court's language may be inartful, I would not go so far as to construe it as erroneous. This critical distinction differentiates this case from this court's decision in *D.R.*, and I do not agree with the majority's position that this case is factually analogous with *D.R.*

{¶ 91} Additionally, the trial court in *D.R.* expressly linked its erroneous factual determination related to the father's criminal history to its discussion of the best interest factors, stating "[t]he court finds it relevant that Father has criminal convictions * * * for burglary, kidnapping, gross sexual imposition, escape, and failure to register as a sex offender." *D.R.* at ¶ 29. It was precisely because the trial court stated the factual finding was relevant to its best interest determination that this court determined on appeal that we could not simply disregard the erroneous finding and review the best interest determination anew. Here, by contrast, to the extent we can even construe the recitation of mother's criminal history to be a factual error, that statement was confined to the trial court's recitation of the evidence at trial. The trial court's best interest determination was not dependent on mother's criminal history, and instead hinged on the trial court's findings that mother is unable to care for the children, that the children are thriving in their foster

care placements, the custodial history of the children, the children's need for a legally secure placement that mother is unable to provide, and the opinions of the GAL and the FCCS caseworker.

{¶ 92} Further, I would not find the additional examples of what the majority categorizes as factual errors in the trial court's decision to be so significant as to render the decision against the manifest weight of the evidence. Though the majority is correct that the GAL was ultimately able to inspect the inside of mother's home, I would additionally note the GAL testified he was unable to access the home until the weekend before the trial and that he had attempted four unannounced visits without success prior to that time. Moreover, the caseworker testified that although mother allowed her into the front room of the home in July 2021, mother did not allow the caseworker back into the home for approximately five months thereafter until the Friday before trial, providing context to the trial court's finding related to mother's efforts to make her home available for inspection. These are not the types of errors at issue in *D.R.* where the factual findings were so erroneous as to make review of the best interest determination untenable.

{¶ 93} While the majority asserts the trial court erroneously found mother failed to comply with mental health treatment and parenting components of her case plan, there is no indication the trial court relied on mother's case plan progress in making the best interest determination. The majority also gives significant consideration to mother's compliance with her case plan, including discussions of her participation in the drug court program and overall cooperation with the caseworker and other individuals associated with the case. While mother's participation in the drug court program may signal a positive change in her life, I am nonetheless mindful that compliance with a case plan is not, in and of itself, dispositive of the issue of permanent custody. *In re E.S.*, 10th Dist. No. 20AP-194, 2021-Ohio-955, ¶ 28 (" ' "R.C. 2151.414(D) does not require courts to deny a children services agency's motion for permanent custody solely by virtue of a parent's substantial compliance with the case plan" ' "), quoting *In re S.T.*, 10th Dist. No. 19AP-24, 2019-Ohio-4341, ¶ 26, quoting *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887, ¶ 62. Instead, the proper focus for the trial court is whether permanent custody is in the best interest of the children, and the trial court has discretion to decide the weight to give evidence of a parent's compliance with the case plan. *Id.* ("it was within the discretion of the trial court,

as part of its best interest analysis, to decide the weight to give evidence of father's compliance with the case plan").

{¶ 94} Here, I would find that to the extent the trial court's decision contains misstatements related to mother's case plan, they are not so significant as to preclude meaningful review of the trial court's best interest determination, and our review of this matter does not require, as the majority suggests, that we impermissibly undertake the best interest analysis in the first instance. Instead, I would conclude the trial court's determination that permanent custody was in the best interest of the children was not against the manifest weight of the evidence.

{¶ 95} The critical issue here is whether mother is able to provide for and care for the children, including maintaining suitable housing. None of the alleged factual errors the majority identifies are relevant to the fundamental issues of the case. Instead, I would note the following relevant facts: mother has a more than 16-year history of substance abuse, including giving birth to a child, two years after the commencement of this action and two years prior to the final hearing date, who tested positive for cocaine at birth. While the majority states mother experienced her longest period of sobriety since 2016 when FCCS first became involved with the children, by mother's own admission her longest stretch of abstaining from drugs was six months, she was discharged from a sober living facility in February 2021 for unprescribed use of suboxone, and she tested positive for marijuana in November 2021, the month prior to trial.

{¶ 96} Despite mother's hopefulness that she would begin employment soon after the trial, the caseworker noted mother had not established or maintained stable employment during the pendency of the case. Although mother testified that her ex-boyfriend no longer lived with her, the caseworker was unable to verify whether that was true and expressed concern that mother was still financially dependent on her ex-boyfriend. Though mother testified her brother helped her pay the rent, the caseworker could not verify this was true. Specifically, the caseworker called the number given to her by mother attempting to reach her brother, but no one answered. When a male voice called her from a different number purporting to be mother's brother, the caseworker asked if he would come to court to verify that he was paying mother's rent, the person hung up on the caseworker. Mother testified that B.N.'s father is listed on and pays the utility bills for the

home. Mother's stated explanation for refusing the caseworker entry to the home was that B.N's father's dogs had urinated and defecated throughout the home, undermining mother's assertion that B.N.'s father no longer lived with her. The caseworker testified that throughout the case, mother has only had one home of her own, and that was for a short time in the spring of 2017. Additionally, the caseworker testified she believed mother was still in a relationship with B.N.'s father, and that she did not believe mother was willing to support herself and live independently.

{¶ 97} Thus, despite mother's more recent positive progress related to her substance abuse issues, mother ultimately did not demonstrate an ability to care for the children during the more than four-year pendency of this case. Mother's efforts at cooperation do not preclude a finding that permanent custody is in the best interest of the children. Instead, I would conclude there was ample competent, credible evidence in the record supporting the trial court's determination that it was in the best interest of the children to grant the motion for permanent custody.

{¶ 98} The trial court appropriately considered the factors in R.C. 2151.415(B)(1) related to the best interest of the children, and there was competent, credible evidence in the record to support the trial court's findings, including that mother is unable to care for the children, that the children are thriving in their foster care placements, the custodial history of the children, the children's need for a legally secure placement that mother is unable to provide, and the opinions of the GAL and the FCCS caseworker. Because I would find the trial court's decision to grant permanent custody was not against the manifest weight of the evidence, I would overrule mother's sole assignment of error. Therefore, I respectfully concur in part and dissent in part.