

[Cite as *In re AR.S.*, 2021-Ohio-1958.]

**COURT OF APPEALS OF OHIO**  
**EIGHTH APPELLATE DISTRICT**  
**COUNTY OF CUYAHOGA**

IN RE AR.S., ET AL.	:	
	:	No. 110028
Minor Children	:	
	:	
[Appeal by A.S., Mother]	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: REVERSED**  
**RELEASED AND JOURNALIZED: June 10, 2021**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case Nos. AD-17913395 and AD-17913396

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***Appearances:***

Valore & Gordillo, L.L.P., and Matthew O. Williams, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Joseph C. Young, Assistant Prosecuting Attorney, *for appellee* Cuyahoga County Department of Children and Family Services.

## ON RECONSIDERATION<sup>1</sup>

EMANUELLA D. GROVES, J.:

{¶ 1} Appellant-Mother, A.S. (“Mother”), appeals from the judgment of the juvenile court awarding permanent custody of her children, Ar.S. (d.o.b. June 9, 2008) and G.S. (d.o.b. Oct. 16, 2010), to the Cuyahoga County Department of Children and Family Services (“CCDCFS” or “the agency”).<sup>2</sup> For the reasons set forth below, we reverse the decision awarding permanent custody to the agency.

### **Procedural History**

{¶ 2} On September 1, 2017, CCDCFS filed a complaint and motion for predispositional temporary custody, alleging the minor children were abused and neglected. The complaint alleged that on August 27, 2017, Mother overdosed on heroin with the children in the home; that Mother had a substance abuse problem that prevented her from providing safe and adequate care for the children; that she had previously participated in substance abuse treatment, but failed to maintain sobriety. In addition, the complaint alleged that Mother needed mental health treatment.

{¶ 3} Further, CCDCFS requested predispositional temporary custody to G.S., the children’s father (“Father”),<sup>3</sup> who, at the time, appeared ready, willing, and

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<sup>1</sup> The original announcement of decision, *In re Ar.S.*, 8th Dist. Cuyahoga No. 110028, 2021-Ohio-1200, released April 8, 2021, is hereby vacated. This opinion, issued upon reconsideration, is the court’s journalized decision in this appeal. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

<sup>2</sup> The trial court issued two judgment entries: one for each child.

<sup>3</sup> Father’s parental rights were also terminated. He is not a party to this appeal, however, and will therefore only be minimally discussed.

able to provide care for the children. Following a hearing on November 1, 2017, the juvenile court committed the children to the predispositional custody of Father.

{¶ 4} On December 27, 2017, CCDCFs filed a motion to modify dispositional prayer of legal custody to Father and terminate the prior order of emergency temporary custody.

{¶ 5} On January 4, 2018, after an adjudicatory hearing, wherein Father stipulated to the allegations of the complaint, the juvenile court found the children to be neglected. Mother was not present for the hearing.

{¶ 6} On March 13, 2018, CCDCFs filed a motion to terminate the prior order of emergency custody to Father. On April 6, 2018, after a dispositional hearing, wherein Father was absent, due to incarceration, the juvenile court removed the children from the predispositional temporary custody of Father and committed them to the temporary custody of CCDCFs.

{¶ 7} On August 22, 2018, CCDCFs filed a motion to modify temporary custody of the children to permanent custody. In the supporting brief, CCDCFs stated that a case plan had been approved by the juvenile court, which required, among other things, that Mother maintain a sober lifestyle, obtain stable housing, and maintain mental and emotional stability.

{¶ 8} CCDCFs stated that Mother had completed substance abuse and mental assessments, but missed nine out of twenty treatment sessions. Mother

continued to test positive for drugs and, on August 3, 2018, delivered a child,<sup>4</sup> who tested positive for cocaine. Father was incarcerated and serving a three-year sentence for domestic violence. Finally, CCDCFS stated that there were no relatives willing or appropriate to take legal custody of the children.

{¶ 9} On April 3, 2019, a maternal aunt, S.S. filed a motion to intervene and a motion for legal custody of the children. Both motions were later dismissed for failure to serve all parties. On August 17, 2020, Mother filed a motion to terminate temporary custody and to grant legal custody to S.S. After a dispositional hearing on August 28, 2020, the juvenile court terminated Mother's parental rights and committed the children to the permanent custody of CCDCFS.

### **Dispositional Hearing**

{¶ 10} At the dispositional hearing, CCDCFS presented the testimony of social worker, Joyce Butler ("Butler"), who was assigned to Mother in September 2017, shortly after the children were removed from the home. Butler testified that CCDCFS presented Mother with a case plan that addressed substance abuse, mental health care, parenting, and housing. Despite CCDCFS's attempts, between September 2017 and April 2018, Mother had no contact with Butler and did not visit the children.

{¶ 11} Mother resurfaced toward the end of April 2018, and expressed to Butler that she wanted to start engaging in the planned services and that she wanted

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<sup>4</sup> Mother agreed to have the infant placed in the permanent custody of CCDCFS, and this child is not part of the instant appeal.

to start visiting the children. Butler established a visitation schedule, but Mother's attendance was sporadic. Mother missed approximately half of the scheduled visits with the children, leaving Butler to opine that the children were negatively affected when Mother failed to attend. Butler characterized some of the visits that Mother attended as chaotic, due in large part to the number of family members present.

{¶ 12} Butler eventually became concerned for her own safety, when one family member attended a visit carrying a firearm. Thereafter, the juvenile court restricted the scheduled visitation to the Mother and the children's aunt S.S. and also ordered that the visits take place at an agency building. After the imposed limitation, Mother's attendance improved, but she would often arrive late, causing the children to sit and wait.

{¶ 13} Butler testified that although it was evident that Mother loved the children, Mother did not complete the objectives of her case plan. Mother continued to test positive for illegal substances and Butler noted that at one of the scheduled visits, in October 2019, Mother fell to the ground, where she laid unconscious, presumably from the use of illicit drugs. Mother still lacked suitable housing and when CCDCFS asked her to reengage in the planned services, Mother refused.

{¶ 14} Butler testified that CCDCFS attempted to identify appropriate relatives, who might provide care for the children. Several relatives, including the maternal grandmother and another aunt, C.S., as well as S.S., were considered. Ultimately, none were approved. As it relates to the consideration of S.S., Butler testified that CCDCFS expended great efforts in investigating her as a possible

candidate. Butler noted that S.S. had a history with CCDCFS. Due to the history, S.S. was required to complete a Rehabilitation Standard Form. S.S. did not complete the form.

{¶ 15} CCDCFS was also concerned with S.S.'s criminal history, which Butler initially indicated was ten years old, but that was later established to have been twenty years old. Butler testified on direct examination that S.S. did not get fingerprinted, which would have allowed CCDCFS to complete their background investigation, but it was later established that S.S. did eventually complete fingerprinting. Testifying on rebuttal, Butler stated that she did not receive any verification that S.S. had completed the fingerprinting, but was aware that S.S.'s kinship care ("KCAR")<sup>5</sup> request had been denied in June 2019, because CCDCFS did not receive the Rehabilitation Standard Form.

{¶ 16} On cross-examination, Mother's attorney questioned Butler regarding CCDCFS's denial of S.S.'s candidacy. The exchange is as follows:

Q. Miss Butler, [S.S.] was denied because the KCAR rehabilitation form was not complete, that was your testimony?

A. Yes, sir.

Q. And the rehabilitation form has to do with SACWIS history and explaining why things may have changed, right?

A. Yes, sir.

Q. Okay. And the SACWIS history for [S.S.] was over 20 years old?

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<sup>5</sup> CCDCFS requires applicants to complete a KCAR investigation, as well as those individuals living in the applicant's home. The KCAR investigation entails evaluating applicant's fingerprints in the BCI and FBI databases.

A. Correct.

Q. 20 years old?

A. Yes.

Q. And one form?

A. Correct.

Q. And that's why she was denied, right?

A. There may have been numerous reasons, but that form -- and I can pull it up on my phone -- that form asked specific questions, and even if she got into some type of trouble after that, it asked for specific questions, so that information has to be placed on that form.

Q. Right. But your testimony was you looked at it and the reason for the denial was the rehabilitation form was not completed?

A. Correct. Yes, sir.

Q. Okay. Again, one form for history over 20 years ago, that's the reason?

A. The Agency makes no distinction. Whatever the form says, that's what I have to do.

Tr. 185-186.

{¶ 17} Butler further testified that S.S. levied a series of baseless accusations against her including, that she had filed fraudulent tax returns using the children's information; that the children's foster mother was her sister; and that she had used derogatory language about the children and their father. Butler testified that when CCDCFS investigated the unfounded allegations, even the children's Mother appeared on her behalf. Around the time of these allegations, Mother repeatedly indicated that she did not want S.S. to get custody of the children.

{¶ 18} Finally, Butler testified that ten days before the hearing, the 12-year-old confided that his cousin, R.S. told him that he needed to say that he wanted to go to S.S. The cousin, who is the son of S.S., told the 12-year-old that he should also say the same thing to the attorney appointed to represent the children.

{¶ 19} S.S. testified that she loves the children and has been a part of their lives since they were born. S.S. has three adult children: one in college, another a chef, and the third that had recently started a business. S.S. has a three-bedroom home that she stated CCDCFS and the GAL deemed suitable for the children.

{¶ 20} At the hearing, S.S. was asked about her criminal history and she testified as follows:

Q. Okay. And is there any criminal history with you?

A. I have issues from 20 years ago. There's not a lot. I brought my background check directly from Probate Court which stated my record. I never tried to hide my record. I am not able to --

Q. Is it fair to say that there was a Felonious Assault 20 years ago?

A. Yes. It was attempted.

Q. Attempted. It was filed as an Attempted Felonious Assault?

A. It was attempted, yes. It was not actual.

Q. And was there a drug possession from 2010, over ten years ago?

A. I don't think there was a possession charge that I can recall, but whatever is on my record, I have not had any sort of issues or anything on my record in 20 years. I can't go back and apologize for things that have taken place, and I paid whatever price or whatever I had to go through for whatever took place, so how can I be held accountable for the past?

Q. Speaking of the past, did you ever have any involvement with Children and Family Services as far as being involved with CFS previously?

A. They have a supposedly a sealed record, and from my understanding, anything that is completely sealed I don't have to discuss due to legal ramifications, because they say that there is still a record. I don't know.

Tr. 123-124.

{¶ 21} S.S. testified that she understood that the children's parents were struggling with their personal issues and that they may fail and not be presently available for the children, but she did not think the situation was unsalvageable.

{¶ 22} In a written report, filed July 16, 2020, the GAL, Dean Colovas ("Colovas"), opined that permanent custody was in the best interest of the children. In the report, Colovas noted that CCDCFS had already procured legal custody for the children's infant sibling through another filing. Colovas noted that Father was indicted on charges of felonious assault in January 2020, but Father never appeared for his arraignment. A warrant was issued for Father's arrest and the warrant was active at the time of the hearing. Father had not seen the children since January 2020. Colovas noted that Mother remained unfit for placement because her substance abuse issues persisted. Mother had not seen the children since prior to the COVID-19 Pandemic, but occasionally spoke with them by phone.

{¶ 23} Colovas noted that S.S. was interested in pursuing custody of the children, and they wanted very much to be placed with their aunt. Colovas noted that S.S. did not meet the approval of CCDCFS because she had a SACWIS history from twenty years ago. Colovas did not believe S.S. complied with CCDCFS in

allowing them to complete their investigation or ever addressed the issues that gave CCDCFS concern. Colovas noted that the children had not spoken with S.S. in several months. Colovas opined that S.S. no longer appeared to be a viable option for placement, noting that she had not obtained counsel and had not filed an active motion seeking custody.

{¶ 24} Colovas noted the children were thriving in their current foster placement, where they have resided for approximately two to three years. G.S. was preparing to enter the third grade and Ar.S. was preparing to enter the seventh grade. Colovas noted the children were very pleasant, well-bonded with each other and more mature than either parent. Colovas noted that although they were very young, they understood that staying with family no longer appeared to be a viable option. Colovas opined that it appears the children were exhausted in “fighting the fight” to remain with family. Finally, Colovas noted that it appeared that all placement options have been pursued by CCDCFS.

{¶ 25} At the conclusion of the testimony, Colovas gave an oral report in which he amended his written report and recommended that the juvenile court give legal custody to S.S. The juvenile court had a lengthy conversation with Colovas regarding the change in recommendation, which we will discuss below. Following the hearing, the juvenile court granted CCDCFS’s motion for permanent custody of the children.

{¶ 26} Mother now appeals, assigning the following error for review:

### **Assignment of Error**

The trial court's award of permanent custody and termination of appellant's parental rights is against the manifest weight of the evidence.

{¶ 27} It is well established that a parent has a fundamental right to raise and care for his or her child. *In re L.M.*, 8th Dist. Cuyahoga No. 106072, 2018-Ohio-963, citing *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 28; *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 40. We recognize that termination of parental rights is “the family law equivalent of the death penalty in a criminal case.” *In re V.C.*, 8th Dist. Cuyahoga Nos. 102903, 103061, and 103367, 2015-Ohio-4991, citing *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14.

{¶ 28} An appellate court will not reverse a juvenile court's decision awarding permanent custody to an agency if the judgment is supported by clear and convincing evidence. *In re J.M-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 28. “Clear and convincing evidence” is that measure or degree of proof that is more than a “preponderance of the evidence,” but does not rise to the level of certainty required by the “beyond a reasonable doubt” standard in criminal cases. *In re K.S.*, 8th Dist. Cuyahoga No. 109928, 2021-Ohio-694, ¶ 15, citing *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 8, citing *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), citing *Lansdowne v. Beacon*

*Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987). It “produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” *In re K.S.*, 8th Dist. Cuyahoga No. 109928, 2021-Ohio-694, ¶ 15, citing *In re M.S.* at ¶ 18.

{¶ 29} The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, ¶ 22. R.C. 2151.414 sets forth a two-part test courts must apply when deciding whether to award permanent custody to a public services agency.

**First Prong: R.C. 2151.414(B)(1)(a)-(e)**

{¶ 30} Under the first prong, the juvenile court must find by clear and convincing evidence one of the following five factors:

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

(b) The child is abandoned.

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

(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more

months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

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

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

**{¶ 31}** Only one of the factors must be present for the first prong of the permanent custody analysis to be satisfied. *In re S.S.*, 8th Dist. Cuyahoga No. 109356, 2020-Ohio-3039, ¶ 28, citing *In re L.W.*, 8th Dist. Cuyahoga No. 104881, 2017-Ohio-657, ¶ 28.

**{¶ 32}** In this instance, the juvenile court determined that subsection (b) was satisfied and specifically that the children were abandoned by Father. The juvenile court also found that returning the children to the home of the Mother would be contrary to their best interest. The juvenile court further found that despite developing a reunification plan with relevant services provided, Mother did not engage in the services and did not complete any of her case plan.

**{¶ 33}** Here, there is no dispute that the children cannot be placed with either parent. Mother has not challenged the trial court's finding under the first prong and our review demonstrates that the findings are supported by some competent, credible evidence. Finding no error with the juvenile court's findings under the first prong, we consider the court's finding under the second prong.

### **Second Prong: R.C. 2151.414(D)**

{¶ 34} The second prong also requires the juvenile court to find by clear and convincing evidence, that granting permanent custody to the agency is in the best interest of the children. We review a trial court’s best-interest determination under R.C. 2151.414(D) for an abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. In this regard, “[a] trial court’s failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion.” *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 60. “A court abuses its discretion when a legal rule entrusts a decision to a judge’s discretion, and the judge’s exercise of that discretion is outside of the legally permissible range of choices.” *In re Z.R.*, 8th Dist. Cuyahoga No. 110146, 2021-Ohio-1494, ¶ 30, quoting *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699, ¶ 19.

{¶ 35} R.C. 2151.414(D)(1) sets forth best-interest factors that the court must consider when making the best-interest determination under R.C. 2151.414(D)(1), including:

- (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 \* \* \*;
- (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) apply in relation to the parents and child.

**{¶ 36}** The juvenile court has considerable discretion in weighing these factors. *In re D.A. at id.* Although a trial court is required to consider each relevant factor under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, “there is not one element that is given greater weight than the others pursuant to the statute.” *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56.

**{¶ 37}** As previously stated, Mother does not dispute that the first prong of the permanent custody analysis was present. Instead, Mother argues the juvenile court’s best interest determination is not supported by clear and convincing evidence and is against the manifest weight of the evidence.

**{¶ 38}** We will review Mother’s claim alongside the juvenile court’s consideration of the relevant factors under R.C. 2151.414(D)(1).

**{¶ 39}** Under subsection (a), the interaction and interrelationship of the child with the child’s parents, siblings, relatives, and foster parents, the juvenile court found: “[t]he child is well bonded with his sibling, who is in the same placement with him. According to the GAL report, the child is thriving in his current foster placement, where he has been for over two years.”

**{¶ 40}** However, the record reflects the children are also well bonded with their aunt, who has known them and has been a part of their lives since birth. The aunt indicated she stands ready, willing, and able to care for and continue this bond

with the children. Although the dispositional testimony suggests aunt's relationship with the social worker was strained, the social worker testified that the aunt engaged with the children and helped to provide for them. The record reflects that a large number of family members would attend the scheduled visits Mother had with the children, evincing a strong family bond or interest.

**{¶ 41}** Under subsection (b), the wishes of the child, the juvenile court found: “[t]he Court conducted two in camera interviews with the child and is aware of the child’s wishes, with due regard for the maturity of the child.”

**{¶ 42}** However, the GAL indicated the children never wavered in expressing their desire to remain with family. Even despite testimony that suggested that the children had been coached to tell the juvenile court they wanted to remain with family, the GAL testified that the children were consistent in their desire to remain with family.

**{¶ 43}** Under subsection (c), the custodial history of the child, including whether the child has been in the temporary custody of a public children services agency or private child placing agency under one or more separate order of disposition for twelve or more months of a twenty-two-month period, the juvenile court found: “[t]he child has been in the Agency custody since November 2017, almost 3 years and in temporary custody of the Agency since April 2018.”

**{¶ 44}** The record supports the juvenile court’s finding, in this respect, but does not conclusively show that permanent custody to the agency was proper.

**{¶ 45}** Under subsection (d), the child’s need for a legally secure placement and whether that could be achieved without a grant of permanent custody, the juvenile court found:

The child deserves a safe, secure and stable environment where his basic needs can be met and he can thrive. This cannot be achieved with Mother, as she has not engaged in or completed any case plan services and had not remedied the cause for the removal of the child from the home. This cannot be achieved with Father as his whereabouts are unknown and he has not had contact with the Agency or his attorney for the past nine months and he has not benefitted from case plan services. Additionally, based on the testimony and evidence presented, the Court does not find as though this can be achieved with Maternal Aunt, [S.S.].

**{¶ 46}** However, based on the record, it is this factor that clearly militates against granting permanent custody to CCDCFS. The aunt wants custody of the children; the aunt has raised three successful children; the aunt believes the children should remain with family; the aunt is willing to facilitate the children’s contact with their mother. Also, the aunt has a suitable home for the children; the home has been inspected and approved by the Agency; the aunt’s fiancé is employed and stands ready to assist with the children.

**{¶ 47}** Under subsection (e), whether any of the factors in divisions R.C. 2151.414(E)(7) to (11) apply, the juvenile court found that (E)(10) and (11) applied. In those respects, the juvenile court stated: “Mother had not seen the child from September, 2017 to March, 2018. Father was incarcerated during the pendency of this matter, and he has not had contact with the child since January 2020.” Mother cannot reasonably challenge the juvenile court’s findings related to this subsection.

{¶ 48} The juvenile court determined that R.C. 2151.414(E)(16) applied, which provides that a juvenile court may consider “[a]ny other factor the court considers relevant.” Here, the juvenile court found:

[T]he motion for legal custody to maternal aunt, [S.S.], filed by attorney Besenyei did not include a Statement of Understanding required by ORC 2151.353(A)(3) and the testimony and evidence at trial in support of the Motion did not address any, or all, of the requirements of ORC 2151.353. Additionally, despite the GAL’s recommendation following the testimony at trial, the Court *does not* find that it would be in the child’s best interest to be placed in the legal custody of maternal aunt.

{¶ 49} Our discussion on what the record established in response to the juvenile court’s findings in subsection (D) is reincorporated by reference as a response to the juvenile court’s findings relative to R.C. 2151.414(E)(16) and need not be repeated.

{¶ 50} Not long ago, in *In re T.H.*, 8th Dist. Cuyahoga No. 107947, 2019-Ohio-3045, we addressed the father’s claim that permanent custody was not in the child’s best interest because there was a legally secure placement of the child with a paternal aunt who was willing to be the child’s legal custodian. There, we rejected the father’s claim because the juvenile court found, among other things, that the child was bonded with her biological sibling, foster mother, and in the foster home, which was the only home that the child had really known. The record also revealed that two weeks after the child’s birth, the agency placed the child with foster mother because she previously adopted the child’s four-year-old half-brother after serving as his foster mother for three years. *Id.* at ¶ 21-22.

{¶ 51} This case can be distinguished from *In re T.H.* Here, we have an aunt that is not only willing, ready, and able to provide a secure placement for the children, but we also have children ages 12 and 9, at the time of the hearing, who expressed their desire to live with their aunt. The aunt testified that she had been a part of the children's lives since they were born. Although the children had been in the foster home for almost three years, unlike *In re T.H.*, these children had been with their mother and around biological family for the preceding nine and six years respectively, during which they developed the bond that is driving their expressed desire to remain with family.

{¶ 52} This case can also be distinguished from *In re E.C.*, 8th Dist. Cuyahoga No. 103968, 20016-Ohio-4870, where a father argued the Agency failed to prove permanent custody was in the best interest of the children where the maternal grandfather expressed a desire to have legal custody of the children.

{¶ 53} In *In re E.C.*, in finding the grandfather unsuitable, the juvenile court found that the grandfather filed a belated request for custody, 18 months after the children were removed from the home. At the time, the grandfather was serving three years of probation for domestic violence against his daughter, the children's mother. In addition, the juvenile court noted that when the grandfather was asked about his ability to care for his grandchildren, he responded that his grandchildren loved him, a response which reflected a lack of the necessary full comprehension of the permanent nature and most significant and sacred responsibilities of legal custody.

{¶ 54} Here, unlike *In re E.C.*, although the aunt did not timely complete the Statement of Understanding, we have an individual who has expressed an interest in the children from the beginning of the proceedings and remained substantially active in the process and never wavered in her desire to have the children remain with their family. As previously stated, the aunt has successfully raised three adult children, thus would comprehend the permanent nature and sacred responsibility of legal custody. We are mindful that the aunt had a felony conviction, but unlike *In re E.C.*, it was over 20 years prior to the hearing.

{¶ 55} In addition, this case can also be distinguished from *In re S.C.*, 8th Dist. Cuyahoga No. 106701, 2018-Ohio-2523, where a mother argued legal custody should have been granted to the children's paternal grandmother, C.C.

{¶ 56} In *In re S.C.*, when the Agency took temporary custody of three siblings, a boy and two girls, as result of sexual acting out behavior with each other, they were not placed together. The girls were placed in separate foster homes, and their brother in an inpatient residential treatment facility, where they remained at the time of the permanent custody hearing. Although we noted that the paternal grandmother expressed and maintained an interest in caring for the children from the time that the custody proceedings were initiated in October 2015, including making the nine-hour drive from Vermont to attend custody hearings and to visit the children once per month, we concluded that clear and convincing evidence supported the juvenile court's determination that awarding permanent custody to the Agency was in the children's best interest.

{¶ 57} There, we observed,

The children's GAL described the sexual abuse in this case as being the most severe that he has seen in his 28-year career. He recommended granting permanent custody to CCDCFS rather than granting legal custody to C.C. based on the children's conditions, issues, and need for counseling services. The GAL opined that B.C.'s issues are more severe than M.C.'s or S.C.'s issues, and explained that B.C. is "nowhere near able to be returned to any relatives or anyone other than somebody with a lot of training for him." Regarding M.C., the GAL could not see how M.C. could reunify with her siblings or a relative based on the fact that she is unable to talk about her body parts or anything that took place while she lived with her family. The GAL stated that M.C. needs ongoing treatment and believed that it would be difficult for her to adjust to a new therapist. He testified that M.C. is certainly not ready to be with S.C. at this point, as she continues to have issues regarding sexualized behaviors. Regarding S.C., the GAL explained that her issues are the least severe of the three children. However, he explained, "I have a hard time separating the girls out of states, taking one girl and leave the other girl [in Cuyahoga County] (Tr. 338.)

The GAL acknowledged that he did not know whether C.C. was able to provide for the children's basic needs. However, he explained that basic needs was not the "central issue." (Tr. 342.) Rather, he opined that the primary issue was the present condition of the children, the significant issues the children were having as a result of the sexual abuse, and their need for ongoing treatment. Based on the information he received from Long, the GAL questioned C.C.'s ability to protect the children in the future.

*Id.* at ¶ 55-56.

{¶ 58} Here, like *In re S.C.*, we have a relative who has expressed an interest in the children from the beginning and who is also willing to care for the children. However, unlike *In re S.C.*, absent is the central issue of the sexual abuse and the children's need for ongoing treatment to address this trauma.

{¶ 59} Further, the facts of this case can be distinguished from *Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, where a parent argued the juvenile court should have granted legal custody to the child's paternal grandfather.

{¶ 60} Here, unlike *Schaefer*, where the child was placed in foster care at birth and had bonded with the foster parents, the record reflects the children are well bonded with their aunt, who has known them and has been a part of their lives since birth.

{¶ 61} In the preceding four cases that we have just distinguished, the GALs all recommended that permanent custody should be granted to the Agency. Here, as previously stated, the GAL initially recommended in his written report that the juvenile court grant permanent custody to CCDCFS. However, after hearing the aunt testify at the permanent custody hearing, the GAL orally reversed his written recommendation and instead strongly argued for a grant of legal custody to the aunt. A lengthy conversation ensued, wherein the GAL acknowledged that it was unfortunate that the aunt did not immediately follow through with the Rehabilitation Standard Form.

{¶ 62} The GAL continued as follows:

[B]ut I'm asking myself, do I want the fate of my wards to be determined by somebody failing to submit a letter apologizing for something that happened 20 years ago? I wish she had done it. I implored her at the time to do it. Subsequent to that time the father's candidacy became viable and the father messed up.

But at this point, your Honor, I just can't rip apart from myself the fact that we have family members who love these children and one family

member who does have the capacity to provide for their needs, and it's a capacity that has a proven track record.

And there was a lot I heard today that just as I process it, because my opinion is swayed throughout this case and I do recommend at this point that there be with protective supervision legal custody to [S.S.] or to see if in fact that's something that would be successful, but with the caveat that [S.S.] has to understand that should that occur, that cooperation with the Agency is imperative.

Tr. 191-192.

**{¶ 63}** Here, after considering all the statutory factors, and the totality of the circumstances, we conclude, the juvenile court's best interest decision awarding permanent custody to CCDCFS was not supported by clear and convincing evidence. "Clear and convincing evidence' is that quantum of evidence that instills in the trier of fact a firm belief or conviction as to the allegations sought to be established." *In re T.S.*, 8th Dist. Cuyahoga No. 109957, 2021-Ohio-214, ¶ 23, quoting *In re Y.V.*, 8th Dist. Cuyahoga No. 96061, 2011-Ohio-2409, ¶ 13, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118. The first prong of the two-part test under R.C. 2151.414, which courts must apply when deciding whether to award permanent custody to a public services agency, was satisfied, but the second prong was not. As a result, we are constrained to find the juvenile court abused its discretion by awarding permanent custody of the children to CCDCFS.

**{¶ 64}** Accordingly, we sustain Mother's sole assignment of error. The juvenile court is instructed to give the S.S. another opportunity to complete the Statement of Understanding, required by R.C. 2151.353(A)(3), and the Rehabilitation Standard Form, so that legal custody to aunt can be effectuated.

{¶ 65} Judgment reversed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

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

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EMANUELLA D. GROVES, JUDGE

ANITA LASTER MAYS, P.J., CONCURS;  
EILEEN A. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION

EILEEN A. GALLAGHER, J., DISSENTING:

{¶ 66} I respectfully dissent.

{¶ 67} A juvenile court's decision in a custody proceeding will not be reversed absent a showing of an abuse of discretion. *In re A.J.*, 148 Ohio St.3d 218, 2016-Ohio-8196, 69 N.E.3d 733.

{¶ 68} Pursuant to R.C. 2151.414, a trial court may grant custody of a child to an agency if, after a hearing, the court determines by clear and convincing evidence that one of the factors enumerated in R.C. 2151.414 (B)(1)(a) through (e) applies, and that an award of permanent custody is in the child's best interest. "Clear and convincing evidence" is evidence that "will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *In re*

*C.B.*, 8th Dist. Cuyahoga No. 92775, 2011-Ohio-5491, citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). *In re T.H.*, 8th Dist. Cuyahoga No. 107947.

I find that the trial court found, by clear and convincing evidence, that it is in the children's best interest that the parental rights of the parents in this case are hereby terminated and that permanent custody be awarded to the Cuyahoga County Division of Children and Family Services. Further, that the trial court did not abuse its discretion in making those determinations.