[Cite as *In re B.M.*, 2020-Ohio-1376.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

IN THE MATTER OF:	:	
	:	
B.M., K.M., AND B.M.	:	
	:	Case No. 19CA3897
	:	
	:	
	:	DECISION AND JUDGMENT
	:	ENTRY

APPEARANCES:

Richard W. Campbell, Portsmouth, Ohio, for Appellant.

David M. Huddleston, New Boston, Ohio, for Appellee.

Smith, P.J.

{¶1} G.M. appeals the trial court's judgment that granted Scioto County Children Services Board ("the agency") permanent custody of his three biological children: (1) seven-year-old B.M.; (2) three-year-old K.M.; and (3) two-year-old B.M.1. G.M. raises two assignments of error.

First Assignment of Error:

> The trial court's order granting permanent custody to SCCSB was not based upon sufficient clear and convincing evidence, was against the manifest weight of the evidence, and it erred in finding permanent custody to be in the best interest of the children.

Second Assignment of Error:

> Ohio Revised Code 2151.414(B)(1)(d) denies procedural due process to both parents and children in violation of the United States Constitution and the Ohio Constitution.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In September 2017, the agency learned that B.M.1. had been born and that at birth, the newborn child tested positive for marijuana. The newborn child also experienced withdrawal symptoms. Shortly thereafter, the agency filed complaints that alleged all three children are neglected and dependent children. The agency sought ex parte temporary emergency custody of the children. The trial court granted the agency ex parte temporary emergency custody and later continued the order pending adjudication.

{¶3} On December 22, 2017, the court adjudicated the children neglected and dependent. The court also found that the agency had made reasonable efforts to prevent the children's removal from the home. The parties agreed to waive a separate dispositional hearing, and the court then placed the children in the agency's temporary custody.

{¶4} On March 1, 2019, the agency filed permanent custody motions. The agency asserted that neither parent has successfully completed a drug

treatment program, that the parents have not obtained suitable housing and remain homeless, and that the children have been in the agency's temporary custody for more than twelve of the past twenty-two consecutive months.

{¶5} On October 2, 2019, the trial court held a hearing to consider the agency's permanent custody motions. At the start, the court noted that G.M. was not present. G.M.'s counsel indicated that he had been in touch with G.M. and that G.M. stated he was unaware that the hearing had been scheduled for that day. G.M. also informed counsel that G.M. was at work and could not leave without risking his job.

{¶6} The court additionally noted that although the mother was present, she had arrived over an hour late. The mother explained that she thought the hearing started at 9:30 a.m. The court advised the mother that even if so, the mother still arrived thirty minutes late. The court then proceeded with the hearing.

{¶7} Caseworker Angie Kemper testified that she has been the caseworker since the children's September 2017 removal. She stated that the children have lived in the current foster home since May 2019, and that the foster parents would like to adopt the children. Kemper believes that the children are doing well in the foster home.

{¶8} Kemper explained that in January 2018, the mother completed a drug treatment program and that the children were placed with her for a trial visit. Kemper stated that on April 26, 2018, the mother was arrested for drug possession, and the children were removed.

{¶9} Kemper reported that in March 2019, after the agency had filed its permanent custody motions, the mother entered another drug treatment program. Kemper testified that the mother completed the program on August 1, 2019, and that the provider recommended outpatient treatment. Kemper related that the mother did not follow up with outpatient treatment.

{¶10} Kemper stated that the mother currently lives with a friend. Kemper explained that the other adult living in the home had submitted to a criminal background check, but Kemper had not received an FBI background check.

{¶11} Kemper indicated that in October 2017, G.M. entered an inpatient drug treatment program and that in January 2018, he completed the program. She related that upon discharge, the drug counseling center referred G.M. to outpatient services. Kemper stated that G.M. did not follow up with outpatient services. Instead, he was arrested. Kemper explained that she had heard that after G.M.'s release from jail, G.M. completed another drug treatment program. Kemper, however, was unable to verify

that the father had completed this second program. Kemper further testified that G.M. reported that he had attended a third program starting in early 2019. Kemper stated that when she called the provider to verify G.M.'s report, the provider stated that G.M. had been a client but that he had been discharged for not attending in April. Kemper reported she learned that since April G.M. had been arrested and was convicted of aggravated possession of drugs. She further stated that G.M. is supposed to begin STAR the week after the hearing concludes.

{¶12} Kemper explained that she is uncertain how many times G.M. has visited the children over the past six months and that G.M. has "been incarcerated a good portion of the time." Kemper testified that G.M.'s counsel reported that G.M. is "staying on Robinson Avenue."

{¶13} Kemper stated that neither parent has continuously complied with the case plan requirements. She agreed that the parents "had periods of compliance" but that the parents remain unable "to provide care and supervision for all the children."

{¶14} The guardian ad litem recommended that the court grant the agency permanent custody of the children.

{¶15} On November 1, 2019, the trial court granted the agency permanent custody of the children. The court found that the children have

been in the agency's temporary custody for more than twelve of the past twenty-two consecutive months and that placing the children in the agency's permanent custody would serve their best interests. The court determined that although the mother visited the children, the relationship is "detrimental to the children." The court also concluded that the father's relationship with the children is "detrimental to the children." The court found that the children have a positive relationship with the foster family and noted that the foster parents would like to adopt the children.

{¶16} The court did not consider the children's direct wishes due to their young ages, but the court noted that it relied upon the guardian ad litem's recommendation.

{¶17} The court considered the children's custodial history and observed that until their September 2017 removal, the children (except the newborn) had lived with their parents.

{¶18} The court further determined that the children need a legally secure permanent placement and that they cannot achieve this type of placement without granting the agency permanent custody. The court found that neither parent completed the case plan requirements. The court also noted that the "parents continue to struggle with drug usage and poor choices." The court concluded that "the parents' drug addictions and

inabilities to conquer those addictions continue to be barriers to providing the children with a safe, stable and secure home environment." The court thus found that placing the children in the agency's permanent custody would serve their best interests.

{¶19} The court also determined that the agency used reasonable efforts.

{¶20} Consequently, the court granted the agency permanent custody of the children. This appeal followed.

II. ANALYSIS

A. SECOND ASSIGNMENT OF ERROR

{¶21} For ease of discussion, we first consider G.M.'s second assignment of error.

{¶22} In his second assignment of error, G.M. contends that R.C. 2151.414(B)(1)(d) denies parents and children due process of law. He claims that R.C. 2151.414(B)(1)(d) conflicts with the United States Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.E.2d 599 (1982), by creating "an irrebuttable presumption of parental unfitness." G.M. alleges that the statute is "a blatant violation of the Due Process clause." G.M. also asserts that the statute unconstitutionally shifts

the burden of proof from the agency to a parent and that the statute is impermissibly vague and overbroad.

{¶23} We first note that G.M. did not object to the constitutionality of the statute during the trial court proceedings. Appellate courts ordinarily " 'will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Awan,* 22 Ohio St.3d 120, 122, 489 N.E.2d 277, (1986) (citations omitted), quoting *State v. Childs,* 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus; *accord State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15. We may, however, exercise our discretion and review whether the trial court plainly erred by failing to conclude that the statute is unconstitutional. *In re C.P.*, 4th Dist. Athens No. 12CA18, 2013-Ohio-889, 2013 WL 967898, ¶ 10, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *accord Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27; *Quarterman* at ¶ 16; *In re F.L.S.*, 4th Dist. Washington No. 09CA24, 2009-Ohio-6958, 2009 WL 5174111, ¶ 9.

{¶24} "To prevail under the plain-error standard, a[n appellant] must show that an error occurred, that it was obvious, and that it affected his substantial rights," *i.e.*, the trial court's error must have affected the outcome of the proceeding. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Appellate courts "take '[n]otice of plain error * * * with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Obermiller* at ¶ 62, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). "Reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001).

{¶25} In the case at bar, G.M. did not recognize that he failed to object to the constitutionality of the statute during the trial court proceedings, and thus, he does not formulate a plain-error analysis in his appellate brief. This court ordinarily refrains from crafting a plain-error argument when a party has failed to do so. *In re J.A.*, 4th Dist. Scioto No. 19CA3878, 2019-Ohio-4116, 2019 WL 4911093, ¶¶ 11-13, citing *In re K.W.*, 111 N.E.3d 368, 2018-Ohio-1933, ¶ 94 (4th Dist.). We nevertheless will briefly consider G.M.'s argument.

{¶26} We do not believe that any error regarding the constitutionality of the statute is a plain, or an obvious, error. G.M. has not pointed to any Ohio cases that have concluded that R.C. 2151.414(B)(1)(d) unconstitutionally infringes upon a parent's or a child's due process rights. In fact, the Ohio Supreme Court has determined that R.C. Chapter 2151 and the permanent custody procedure set forth in R.C. 2151.414 "comport with due process." *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 27. Moreover, we previously rejected a similar constitutional challenge to the statute. *In re Workman*, 4th Dist. Vinton No. 02CA574, 2003-Ohio-2220, 2003 WL 2012574; *accord In re E.C.*, 10th Dist. Franklin No. 18AP-878, 2019-Ohio-3791, 2019 WL 4534519; *In re A.J.P.-H.*, 11th Dist. Lake No. 2017-L-019, 2017-Ohio-5515, 2017 WL 2735778. We therefore reject any argument that the trial court plainly erred by failing to recognize R.C. 2151.414(B)(1)(d) as unconstitutional.

{¶27} Accordingly, based upon the foregoing reasons, we overrule G.M.'s second assignment of error.

B. FIRST ASSIGNMENT OF ERROR

{¶28} In his first assignment of error, G.M. asserts that the trial court's decision to grant the agency permanent custody of the children is against the manifest weight of the evidence. Although the text of G.M.'s

first assignment of error suggests that he challenges the trial court's best-interest determination, we observe that his appellate brief does not contain any analysis of the children's best interests. Instead, G.M.'s argument questions whether the agency offered him adequate assistance in obtaining a suitable home. He additionally asserts that he "made some efforts to complete the requirements set forth in the case plan." G.M. reports that he completed and participated in several drug treatment programs.

STANDARD OF REVIEW

{¶29} A reviewing court generally will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 53 (4th Dist.). When an appellate court reviews whether a trial court's permanent custody decision is against the manifest weight of the evidence, the court " ' " 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.' " ' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001), quoting *State v.*

Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶30} In a permanent custody case, the ultimate question for a reviewing court is "whether the juvenile court's findings * * * were supported by clear and convincing evidence." *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 43. In determining whether a trial court based its decision upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). "Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court's decision is not against the manifest weight of the evidence." *R.M.* at ¶ 55.

{¶31} Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, " 'clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.' " *Thompkins* at 387, 678 N.E.2d 541, quoting *Martin* at 175, 485 N.E.2d 717. A reviewing court should find a trial court's

permanent custody decision against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the [decision].' " *Id.*, quoting *Martin* at 175, 485 N.E.2d 717.

PERMANENT CUSTODY PRINCIPLES

{¶32} A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *Santosky*, 455 U.S. at 753; *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990); *accord In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶¶ 8-9. A parent's rights, however, are not absolute. *D.A.* at ¶ 11. Rather, " 'it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.' " *In re Cunningham*, 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting *In re R.J.C.*, 300 So.2d 54, 58 (Fla.App.1974). Thus, the State may terminate parental rights when a child's best interest demands such termination. *D.A.* at ¶ 11.

PERMANENT CUSTODY FRAMEWORK

{¶33} R.C. 2151.414(B)(1) specifies that a trial court may grant a children services agency permanent custody of a child if the court finds, by clear and convincing evidence, that (1) the child's best interest would be

served by the award of permanent custody, and (2) any of the following conditions applies:

> (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.

The statute further states:

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

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

{¶34} In the case at bar, the trial court found that the children had been in the agency's temporary custody for more than twelve months of a consecutive twenty-two-month period, and thus, that R.C. 2151.414(B)(1)(d) applies. Although G.M. asserts that R.C. 2151.414(B)(1)(d) is unconstitutional, we rejected that argument. G.M. does not challenge the factual correctness of the court's finding. Therefore, we do not address the issue. We simply note that the evidence in the record demonstrates that the children have been in the agency's temporary custody for well over twelve months of a consecutive twenty-two-month period.

{¶35} R.C. 2151.414(D)(1) requires a trial court to consider all relevant, as well as specific, factors to determine whether a child's best interest will be served by granting a children services agency permanent custody. The specific factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (4) 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; and (5) whether any factors listed under R.C. 2151.414(E)(7) to (11) apply.

{¶36} Determining whether granting permanent custody to a children services agency will promote a child's best interest involves a delicate balancing of "all relevant [best interest] factors," as well as the "five enumerated statutory factors." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 57, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56; *accord In re C.G.*, 9th Dist. Summit Nos. 24097 and 24099, 2008-Ohio-3773, 2008 WL 2906526, ¶ 28; *In re N.W.*, 10th Dist. Franklin Nos. 07AP–590 and 07AP-591, 2008-Ohio-297, 2008 WL 224356, ¶ 19. However, none of the best interest factors requires a court to give it "greater weight or heightened significance." *C.F.* at ¶ 57. Instead, the trial court considers the totality of the circumstances when making its best interest determination. *In re K.M.S.*, 3d Dist. Marion Nos. 9-15-37, 9-15-38, and 9-15-39, 2017-Ohio-142, 2017 WL 168864, ¶ 24; *In re A.C.*, 9th Dist. Summit No. 27328, 2014-Ohio-4918, 2014 WL 5690571, ¶ 46. In general, "[a] child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security." *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916,

2016 WL 915012, ¶ 66, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

ANALYSIS OF BEST INTEREST FACTORS

{¶37} In the case at bar, G.M. has not raised a specific argument regarding the best interest factors. Instead, G.M. focuses upon his efforts to comply with the case plan and upon the agency's failure to provide adequate assistance in obtaining suitable housing. Because G.M. has not presented any analysis based upon the best interest factors, we will not create this analysis for him. We simply note that the evidence in the record amply shows that placing the children in the agency's permanent custody will serve their best interests.

{¶38} To the extent G.M. believes that his partial compliance with the case plan shows that placing the children in the agency's permanent custody is not in the children's best interests, we note that a parent's case plan compliance may be a relevant, but not necessarily conclusive, factor when a court considers a permanent custody motion. *E.g., In re K.M.*, 4th Dist. Ross No. 19CA3677, 2019-Ohio-4252, 2019 WL 5213026, ¶ 70, citing *In re W.C.J.,* 4th Dist. Jackson No. 14CA3, 2014-Ohio-5841, ¶ 46 (stating that "[s]ubstantial compliance with a case plan is not necessarily dispositive on the issue of reunification and does not preclude a grant of permanent custody

to a children's services agency"); *see In re S.S.*, 4th Dist. Jackson No. 16CA7 and 16CA8, 2017-Ohio-2938, ¶ 164; *In re M.B.*, 4th Dist. Highland No. 15CA19, 2016-Ohio-793, ¶ 59; *In re N.L.,* 9th Dist. Summit No. 27784, 2015-Ohio-4165, ¶ 35 (stating that substantial compliance with a case plan, in and of itself, does not establish that a grant of permanent custody to an agency is erroneous"); *In re S.C.,* 8th Dist. Cuyahoga No. 102349, 2015-Ohio-2280, ¶ 40 ("Compliance with a case plan is not, in and of itself, dispositive of the issue of reunification."); *In re West,* 4th Dist. Athens No. 03CA20, 2003-Ohio-6299, ¶ 19. "Indeed, because the trial court's primary focus in a permanent custody proceeding is the child's best interest, 'it is entirely possible that a parent could complete all of his/her case plan goals and the trial court still appropriately terminate his/her parental rights.' " *W.C.J.* at ¶ 46, quoting *In re Gomer*, 3d Dist. Wyandot Nos. 16-03-19, 16-03-20, and 16-03-21, 2004-Ohio-1723, ¶ 36.

{¶39} In the case at bar, G.M. did not substantially comply with the case plan. Although G.M. engaged in several different drug treatment programs, none apparently succeeded in helping G.M. remain drug-free.

Indeed, at the time of the permanent custody hearing, he had been convicted of aggravated possession of drugs and was waiting to report to STAR.[1]

{¶40} Furthermore, G.M. had not obtained adequate housing. While G.M. faults the agency for failing to provide adequate assistance locating a suitable home, the caseworker explained that the agency typically offers help once the circumstances suggest that the children may be placed in the home. The caseworker stated that neither the mother nor G.M. reached a level where the agency felt that the children could be returned to their care.

{¶41} Consequently, we do not agree with the father that his partial compliance with the case plan shows that the trial court's best interest determination is against the manifest weight of the evidence. Instead, the father's partial case plan compliance is a factor that the court might have chosen to consider when reviewing the options that would serve the children's best interests.

{¶42} We further note that G.M. did not appear for the final permanent custody hearing. Moreover, G.M. has not presented any compelling reason this court should find that the trial court's best-interest determination is against the manifest weight of the evidence.

[1] The record does not contain any additional information regarding the nature of STAR. However, we note that STAR Community Justice Center, a minimum security correctional facility, is located in Franklin Furnace, Ohio.

{¶43} Accordingly, based upon the foregoing reasons, we overrule G.M.'s first assignment of error.

CONCLUSION

{¶44} Having overruled G.M.'s two assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court, Probate-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.

Abele, J. & Hess, J.: concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.