

three children who are the subject of this case: T.D., the eldest child, was born on March 30, 1995. The second child, J.D., was born on January 28, 1997. The youngest child, Je.D., was born on September 28, 1999.

{¶13} Father and Mother's troubled thirteen-year marriage was marked by domestic violence, alcohol and substance abuse, and periods of separation. On March 9, 2006, the agency obtained temporary custody of the children after Mother was arrested for assaulting her boyfriend in a residence she shared with him, Father, and the children. That same day, the agency filed complaints alleging that T.D., J.D., and Je.D. were neglected/dependent children. Initially, both parents denied the allegations in the complaint. In April 2006, the agency implemented a case plan for reunifying the children with their parents.

{¶14} In a decision rendered on July 11, 2006, the juvenile court adjudicated all three children neglected/dependent after Mother changed her plea to "admit" and Father was found in default for failure to appear.¹ The court ordered that the children remain in the temporary custody of the agency. This order was repeated after a review hearing held in November 2006, which Father also did not attend.

{¶15} On March 2, 2007, the agency moved for permanent custody. Both parents objected to the motion, though Mother later consented to relinquishing her parental rights. In January 2008, Father and Mother were granted a divorce.

{¶16} Following a number of hearings, the juvenile court issued a decision on April 16, 2008 denying the agency's first permanent custody motion. While the court felt that granting permanent custody to the agency was in the children's best interests, the court was unable to find that the children could not or should not be placed with Father

1. Father was homeless at the time and had been served with notice of the hearing on the neglect/dependency complaints by publication.

within a reasonable period of time. The court allotted Father 90 days to make a serious effort to address his long history of inaction, his mental health issues, and the damage suffered by the children as a result of their unstable home life.

{¶7} On April 22, 2008, the agency moved for permanent custody a second time. Father objected to the motion. Because Mother was absent from the plea hearing, the juvenile court objected on her behalf. Mother later filed an affidavit consenting to the termination of her parental rights for all three children. On the agency's motion, the court took judicial notice of all prior permanent custody proceedings, evidence, and testimony. In a decision rendered on December 19, 2008, the juvenile court awarded permanent custody of all three children to the agency. Father timely appeals, raising a single assignment of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN FINDING THAT GRANTING PERMANENT CUSTODY WAS IN THE CHILDREN'S BEST INTEREST[.]"

{¶10} Father disputes the juvenile court's finding that it was in the best interests of the children to award permanent custody to the agency.²

{¶11} Before a natural parent's constitutionally protected liberty interest in the care and custody of his child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 769, 102 S.Ct. 1388. Appellate review of a juvenile court's decision granting permanent custody is limited to whether competent and credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. A reviewing court will reverse a

2. Because Mother voluntarily consented to the termination of her parental rights and is not a party this appeal, we address the award of permanent custody and the relevant law as it applies to Father only.

finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 519-20.

{¶12} Under R.C. 2151.414(B), a juvenile court must apply a two-part test in determining whether to terminate parental rights and award permanent custody to a public or private children services agency. Specifically, the court must find that the following two elements are supported by clear and convincing evidence: (1) the grant of permanent custody to the agency is in the best interest of the child, and (2) any one of the following applies: the child cannot be placed with either parent within a reasonable time or should not be placed with either parent; the child is abandoned; the child is orphaned; or the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. R.C. 2151.414(B)(1); *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶31-36; *In re Ebenschweiger*, Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶12.

{¶13} We shall first address the second element of the permanent custody test, which requires the juvenile court to make one of the four findings in R.C. 2151.414(B)(1)(a), (b), (c), and (d). In the present matter, the juvenile court found by clear and convincing evidence, and Father does not dispute, that all three children had been in the custody of the agency for at least 12 of 22 consecutive months (the "'12 of 22' finding"). The record contains competent and credible evidence to support this finding.

{¶14} For purposes of R.C. 2151.414(B)(1), a child is considered to have entered the temporary custody of the agency "on the earlier of the date the child is adjudicated * * * or the date that is sixty days after the removal of the child from home." R.C. 2151.414(B)(1). As stated, T.D., J.D., and Je.D. were removed from home on March 9,

2006 and adjudicated neglected/dependent on July 11, 2006. Thus, for purposes of R.C. 2151.414(B)(1), the children entered the temporary custody of the agency on May 8, 2006 (60 days after the removal date of March 9, 2006). At the time of the agency's second permanent custody motion on April 22, 2008, the children had been in the temporary custody of the agency for over 23 consecutive months. This supports the juvenile court's "'12 of 22' finding."

{¶15} Once a juvenile court makes the "'12 of 22' finding," the court may move on to the best interest analysis. *In re T.J.*, Preble App. No. CA2008-10-019, 2009-Ohio-1844, ¶14. This is because the findings contained in R.C. 2151.414(B)(1)(a), (b), (c), and (d) are alternative findings. *Id.* Only one must be met in order for the second prong of the permanent custody test to be satisfied. *Id.*

{¶16} In the case at bar, the juvenile court's "'12 of 22' finding" satisfied the second prong of the permanent custody test. *In re D.B.*, Butler App. No. CA2007-05-135, 2007-Ohio-5391, ¶18. The court was therefore not obligated to determine whether the children could or should be placed with the parents under R.C. 2151.414(B)(1)(a), and we need not address Father's argument challenging that extraneous finding. *In re R.L.*, Franklin App. No. 07AP-36, 2007-Ohio-3553, ¶11.

{¶17} Next we address the first element of the permanent custody test, which requires the juvenile court to determine that granting permanent custody to the agency is in the best interests of the children. In making this determination, R.C. 2151.414(D) requires the juvenile court to consider all relevant factors, including, but not limited to: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure permanent placement and whether that

type of placement can be achieved without granting permanent custody to the agency; and (5) whether any of the factors in R.C. 2151.414(E)(7) to (11) are applicable. R.C. 2151.414(D)(1), (2), (3), (4), and (5).³

{¶18} In challenging the juvenile court's best interest determination, Father asserts that the court improperly emphasized the children's desire to remain with their foster family, to the exclusion of the other statutory factors. While Father concedes that he abused alcohol and that his relationship with Mother was physically abusive at times, he insists that the children suffered no harm as a result. Father concludes that the best interests of the children would be served by maintaining a relationship with him, their natural parent, rather than terminating his parental rights.

{¶19} As the juvenile court noted, the fifth best interest factor, which references the factors in R.C. 2151.414(E)(7) to (11), is inapplicable. We therefore begin our analysis by examining whether there was competent and credible evidence to support any of the other four best interest factors.

{¶20} The first best interest factor is the interaction and interrelationship of the children with certain significant people in their lives, including their siblings, natural parents, and foster caregivers. Throughout the proceedings in this case, there was testimony that the children are very bonded and affectionate with one another. This observation was echoed by Joanne Beekhuizen, a licensed social worker and the children's therapist, Carol Avery, the ongoing caseworker assigned by the agency, Elaine Mullins, the court appointed special advocate (CASA), and the children's foster mother.

{¶21} The children's interaction and interrelationship with Father, on the other

3. R.C. 2151.414(D) was amended by Section 1, Sub. H.B. No. 7, effective April 7, 2009. The amendments renumbered these five factors, placing them in R.C. 2151.414(D)(1)(a), (b), (c), (d), and (e).

hand, was consistently described by witnesses as strained and hostile. Rebecca Brewer, a licensed social worker with the Children's Diagnostic Center, conducted a psychological evaluation of Father in September 2007 and observed a visit with the children in November 2007. Upon entering the room, she noted, the children immediately began reading books and were unresponsive to Father's attempts at conversation. Father then began reading a book as well, and the room was silent for the majority of the hour-long visit. Brewer opined that there was a lack of affection and bonding between the children and Father. On leaving the visit, Brewer observed that T.D. held her foster mother's hand and J.D. spoke with his foster father.

{¶22} Similarly, licensed social worker David Kuck testified about his unsuccessful attempts to foster interaction during family counseling sessions. Kuck began counseling the family in June 2007. He noted that Father seemed to have difficulty making verbal contact with the children despite genuine effort, and that the children consistently displayed a lack of bonding with Father. At an October 2008 hearing on the agency's second motion for permanent custody, Kuck testified that he was uncertain about what he could do at that point to encourage reconciliation between Father and the children.

{¶23} Therapist Beekhuizen observed two family counseling sessions in May 2008. She described the children's behavior towards Father as distant. The children confronted Father about incidents of violence in the family home, which Father claimed he did not remember or chalked up to exaggeration. According to Beekhuizen, Father's failure to acknowledge past events and his role in them angered the children a great deal. During the family sessions, Father informed the children about steps he had taken

Our decision in the case at bar refers to the version of the statute in effect at the time the juvenile court rendered its December 19, 2008 decision granting permanent custody to the agency.

to regain custody. Nonetheless, according to Beekhuizen, the children had a difficult time believing Father had changed. She opined that forcing the children to have a relationship with Father would not foster bonding.

{¶24} Caseworker Avery testified about similar interactions between the children and Father. Avery supervised off site visits (visits away from the agency) between February 2008 and August 2008. She testified that there was little or hostile communication between Father and the children during these visits. Although Father sometimes tried to engage the children, they were seldom responsive. According to Avery, the children are afraid of Father and do not trust him. CASA representative Mullins similarly testified that the children were angry and sometimes confrontational with Father when the visits first went off site, that Father's relationship with the children appeared strained, and that there appeared to be a lack of bonding between the children and Father. The children's foster mother testified that the children were distraught and happy to leave following visitation with their natural parents.

{¶25} Father testified that the children interacted with and showed affection towards him when visitation first began in March 2006, but their behavior changed shortly after the agency filed the first permanent custody motion. After that, they refused to interact with him and were disrespectful at times. Even so, Father stated that he loves the children and believes they deserve to be with a natural parent.

{¶26} The children's interaction with their foster parents stands in stark contrast to their interaction with Father. Beekhuizen, Avery, Mullins, and Brewer unanimously testified that the children appeared to be happy and well adjusted in their foster home and were bonded to their foster parents. According to testimony from these professionals, the children feel safe, respond well to discipline by the foster parents, do chores, follow a schedule, and participate in extracurricular activities. The foster

parents, who wish to adopt the children, testified that the children started calling them "mom" and "dad" without prompting.

{¶27} We find that the above evidence regarding the interaction and interrelationship of the children with the significant people in their lives supports the juvenile court's permanent custody award.

{¶28} Next we examine the second best interest factor, the wishes of the children. According to the testimony of therapist Beekhuizen, all three children have informed Father of their dissatisfaction with his belated participation in the proceedings. As discussed more in depth below, Father made almost no effort towards regaining custody of the children for a year following their removal from the home. Beekhuizen testified that, during family counseling sessions, Father clearly conveyed to the children his feeling that he had changed and his desire for a second chance. The children, on the other hand, clearly expressed their disinterest in living with Father. They have consistently held to this position throughout the proceedings. Both T.D. and J.D. indicated they would run away if returned to the natural parent's homes. Also, all three children indicated they are afraid of Father and fear that he may attempt to kidnap them.

{¶29} Father conceded that the children have told him of their desire to remain in their foster home rather than returning to live with him and their desire to move on with their lives. Similarly, CASA representative Mullins testified that the children informed her of their desire to remain in the foster home. Father's personal therapist, Mia Biran, also stated in a September 2008 letter that it was clear the children wanted to stay with the foster parents. According to testimony by the children's foster mother, the children told her of their desire to be adopted by the foster parents.

{¶30} We find that the above evidence regarding the wishes of the children clearly lends support for the permanent custody award.

{¶31} The third best interest factor is the custodial history of the children. To date, four county children services agencies have been involved with the family. These include agencies in Montgomery, Greene, Clark, and Preble counties. According to CASA representative Mullins, agency involvement with the family began around 1999. The involvement was prompted by allegations of abuse and neglect. Mother testified that one instance concerned allegations that the children were not receiving proper medical and dental care. Caseworker Avery testified that, prior to the time the children were removed from the home in March 2006, the agency had several other referrals for neglect regarding the children.

{¶32} The record reveals that the children were removed from the home a few years prior to the removal in the case at bar. This occurred when the Clark County Children Services Board was involved with the family. At that time, the children's maternal aunt retained guardianship over T.D. and two friends of the family retained guardianship over J.D. and Je.D. According to testimony by the same maternal aunt, Father was in jail and Mother was homeless and unable to properly care for the children. This placement lasted for approximately one and a half to two years, after which the children were returned to their natural parents' home.

{¶33} We find that the evidence regarding the custodial history of the children further supports the permanent custody award.

{¶34} Finally, we examine the fourth best interest factor, the children's need for a legally secure permanent placement and whether such placement could be achieved without granting permanent custody to the agency. Without a doubt, the evidence shows that the home environment provided by Mother and Father was inhospitable and unstable. Father testified that the family lived in approximately seven different places while he was married to Mother. CASA representative Mullins reported her concerns

with the parents' respective criminal histories, the history of domestic violence between them, alcohol abuse by both, substance abuse by Mother, unemployment, and the history of involvement with other children services agencies. Father has been charged with domestic violence ten times. The complainant, which appears to have been Mother most or all of the times, frequently dropped the charges. Father admitted that the incidents typically involved alcohol and arguments. He was convicted of felony domestic violence on one occasion and misdemeanor domestic violence on two occasions. Throughout their turbulent relationship, Father testified, he kept returning to Mother because she said she would change.

{¶35} Father has been charged with other offenses which involved alcohol use, including operating a vehicle while intoxicated in 1994, driving under the influence in 2001, felonious assault in 2001, and disorderly conduct in 2006. Father does not consider himself an alcoholic. When undergoing his psychological evaluation with Brewer in September 2007, Father denied having any alcohol problems. This was because, according to Father, he stopped drinking in January 2007. This assertion was contradicted by Father's girlfriend. At a February 2008 hearing, she testified that Father rarely drank but she had observed him consume alcohol since January 2007.

{¶36} Therapist Beekhuizen testified that Je.D. stated there was a lot of fighting in the family home and she was scared when she lived there. Je.D. specifically remembered Mother hitting her boyfriend with a crowbar. Biran, Father's psychologist, opined that the domestic violence observed by the children between their parents was not that damaging considering how well the children are currently functioning.

{¶37} As stated, Father's participation in the case was virtually non-existent from the time the children were removed from the home in March 2006 until March 2007. A case plan for reunification was implemented when the children were removed. The plan

required the parents to attend counseling, parenting classes, anger management classes, and drug and alcohol treatment, and to maintain legal employment and a safe home. Between March 2006 and March 2007, Father admits that he was aware the children were in foster care and that there was a case plan. Father also concedes he did not perform any of the case plan objectives in that year, and that he attended only ten out of 48 possible visits in that time. There were numerous extended periods of absence between these visitations, the longest being 113 days.

{¶38} According to the testimony of Mark Carli, one of Father's therapists, Father explained that his absence during the first year of the proceedings was due to the fact that he was dealing with his anger, relationship, and alcohol issues. According to Father's testimony, another reason he did not participate in the case plan the first year was because he thought Mother was taking care of things. By March 2007, CASA representative Mullins was concerned about Father's lack of participation and recommended suspension of visitation. The agency filed its first motion for permanent custody that month. Shortly thereafter, Father commenced efforts on the case plan.

{¶39} Father has indeed made progress in his life. As stated, he and Mother divorced in January 2008. In the months following the filing of the first permanent custody motion, Father completed many of the case plan objectives. He attended counseling, parenting classes, anger management classes, and an alcohol treatment program. Father has been residing with his current girlfriend and her preteen daughter since his release from prison around March 2007. The residence is a three-bedroom, brick ranch owned by Father's girlfriend. Although Father's employment history was previously erratic, Father obtained legal employment in the fall of 2007. He works full time as a building grounds assistant at Miami University, a job which provides him with health and dental insurance and possible tuition remission for himself and his children.

Father also now has a valid driver's license, a car, and car insurance.

{¶40} Father also seems to have made some progress psychologically. This appears to be due, in part, to his current girlfriend, who Father testified is loving and supportive. Father has also undergone family and individual counseling. Therapist Carli conducted weekly sessions with Father starting in June 2007. In his testimony, Carli opined that Father was not a threat to the children and was capable of parenting. He also stated that Father needed to practice anxiety coping skills, particularly in communicating with children, and recommended that Father continue therapy. Biran, another of Father's therapists, testified that Father was very devoted to the idea of raising his children. Biran was impressed with Father's progress in getting his life together. She opined that Father is somewhat controlled about his feelings, but is a capable person.

{¶41} Despite Father's progress, his complacency and lack of insight remain a common theme and a serious concern. When caseworker Avery first met with Father after the children were removed in March 2006, Father said he needed his driver's license and claimed he did not have any other problems. Avery testified in August 2007 that she was worried Father had not really changed.

{¶42} Brewer similarly noted Father's self-satisfaction. While conducting the psychological evaluation in September 2007, she observed that there were discrepancies in how Father described himself and his history. For example, Father told Brewer he stopped drinking in January 2007 and had no legal problems or incidents of violence associated with his drinking. This is contrary to his criminal record. Father stated that he interacts and plays well with the children and is a good teacher and disciplinarian. This is contrary to the reports of hostility and silence during visits observed by a number of witnesses. Father also told Brewer that he avoids conflict, is

unassertive, has difficulty standing up for himself, and has well-developed coping skills to manage his anger. Again, this is contrary to his criminal and personal history.

{¶43} After conducting psychological tests, Brewer opined that Father minimized his faults and weaknesses. She testified about her concerns with the poor communication between Father and the children, as well as Father's history of aggression, lack of coping skills, need for control, satisfaction with himself, and lack of insight into himself. During the evaluation, Father told Brewer he had a close relationship with his two living parents and three siblings, but would not permit Brewer to speak with anyone besides his current girlfriend. He later explained this by testifying that custody of his children was "his issue to deal with." Father also indicated to Brewer that he is not as close to his family as he used to be because of problems with Mother. Brewer noted that Father frequently blamed the agency and the foster parents for the lack of bonding between him and the children.

{¶44} Beekhuizen, the children's therapist, expressed similar concern with Father's strong tendency to blame others, especially Mother, for any past neglect of the children, Father's record of violence, his alcohol abuse, and his anger problems. This concerned Beekhuizen because it demonstrated Father's refusal to acknowledge his role in the marriage and weakened his credibility.

{¶45} This self-satisfied manner was toned down, but not absent, when Father testified at an October 2008 hearing on the agency's second permanent custody motion. Father admitted that he shared some ownership in the problems with his children and ex-wife. He also admitted that his absence for much of the first year the children were in custody was his fault. However, he reiterated his belief that he had not been given a fair opportunity to reunite with the children. Father argued that he deserved more visitation and that further progress could have been made at the family counseling sessions if the

therapist had been more proactive. He also testified about his belief that the children had been manipulated by the foster parents and by CASA representative Mullins.

{¶46} Finally, a number of witnesses opined that an award of permanent custody to the agency would be in the children's best interests. During hearings on the first permanent custody motion, Mullins advocated an award of permanent custody to the agency due to the parents' failure to complete the case plan in timely manner, Father's lack of visitation with the children, the lack of a stable environment with the parents, and the history of domestic violence and substance abuse. By contrast, the foster home is loving and stable. During hearings on the second permanent custody motion, Mullins renewed her support for the motion and reiterated her belief that it was in the children's best interests to remain in the foster home. Even though Father began working on the case plan in March 2007 and completed it, Mullins still recommended the agency's motion be granted because Father did not complete the case plan in a timely manner and because he had not convinced the children he had changed.

{¶47} Caseworker Avery opined that it was in the children's best in interests for permanent custody to be granted because the children need a safe and secure environment and are very well adjusted in their foster home. Mother, who consented to terminate her own parental rights, also felt that the children should be able to stay in their foster home and be adopted by their foster parents. Mother opined that the children should not be with Father because they have witnessed enough violence and alcohol abuse.

{¶48} Father testified about his belief that it is in the best interests of the children to have a natural parent involved in their lives. He stressed that he has a lot to offer them now. Therapist Biran advocated in favor of Father. She testified about her belief that the children would have a better psychological life if they are raised by a natural

parent. Biran feels the children may be traumatized if they are separated from Father. Based upon her sessions with Father, Biran opined that he had greatly changed and that the children would not be harmed by being returned to his custody. Biran has never met the children.

{¶49} We find that the above evidence regarding the children's need for legally secure permanent placement provides additional support for the permanent custody award.

{¶50} After thoroughly reviewing the record, we conclude that there was competent and credible evidence to support the juvenile court's finding that a grant of permanent custody to the agency served the best interests of the children. Thus, the juvenile court did not err in granting permanent custody of T.D., J.D., and Je.D. to the agency.

{¶51} Father's single assignment of error is overruled.

{¶52} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.