[Cite as *In re A.J.*, 2010-Ohio-4553.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF: A.J. AND S.M.	**:**	**O P I N I O N**
	:	**CASE NO. 2010-T-0041**
	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2003 JC 523.

Judgment: Affirmed in part and reversed in part.

Carlo A. Ciccone, Ciccone Law Office, L.L.C., 8255 South Avenue, Ste. A, Boardman, OH 44512 (For Appellant-Pauline Meeker).

Craig H. Neuman and *Tammy Richardson*, Trumbull County Childrens Services Board, 2282 Reeves Road, N.E., Warren, OH 44483 (Appellee).

Susan E. Rudnicki, 410 Mahoning Avenue, N.W., P.O. Box 1429, Warren, OH 44482 (Guardian ad litem for A.J. and S.M.).

Frank E. Platenak, Jr., 724 Youngstown-Warren Road, #21-A, P.O. Box 267, Niles, OH 44446 (Counsel for Minor, A.J.).

DIANE V. GRENDELL, J.

{¶1} Appellant, Pauline Meeker, appeals from the judgment of the Trumbull County Court of Common Pleas, Juvenile Division, awarding permanent custody of her children, A.J. and S.M., to Trumbull County Children Services Board (TCCSB). For the following reasons, we affirm in part, and reverse in part the decision of the trial court.

{¶2} Mrs. Meeker is the biological mother of five children. These children are J.C., born on January 11, 1997, A.J., born on September 11, 1999, S.M., born on November 30, 2000, and twins R.M. and N.M., born on October 16, 2003. J.C. has little contact with his biological father, while A.J.'s biological father is unknown. On October 31, 2000, Mrs. Meeker married her current husband, Robert Meeker, who is the father of S.M. and the twins.

{¶3} On November 19, 2002, J.C., A.J., and S.M. were adjudicated dependent in Mahoning County, Ohio, because the living conditions in the Meeker home were below minimum standards of safety and cleanliness. The family relocated to Trumbull County in August of 2003, and the case was transferred to TCCSB under a protective supervision order (PSO) because the Meekers had met some of the standards in their case plan but failed to maintain a safe home environment.

{¶4} On January 14, 2004, TCCSB caseworker, Lynn Alderman, visited the family's residence and found it to be significantly cluttered and in an unsafe condition. Alderman took pictures of the home showing clutter throughout various rooms. The clutter included clothes, toys, and other items. Mrs. Meeker received assistance from social services, her caseworker, and family support workers, in an attempt to keep the home in a safe and clean condition. After the visit on January 14, the Meekers cleaned the home but in March of 2004, TCCSB found the residence to be cluttered again. However, the children were allowed to remain in the home, subject to the PSO.

{¶5} On August 26, 2004, the Meekers voluntarily released J.C. and the twins into the temporary custody of TCCSB. The Meekers indicated that they surrendered temporary custody of J.C. because they had difficulty managing his behavior, as he was

diagnosed with Attention Deficit and Hyperactivity Disorder and Oppositional Defiant Disorder. A.J. was also diagnosed with these conditions. Temporary custody of the twins was given to TCCSB due to concerns about their health and because of their young age. J.C. and the twins were placed into foster care. On September 23, 2004, these three children were adjudicated dependent by the Trumbull County Juvenile Court.

{¶6} The Meekers continued their effort to improve their home environment. TCCSB provided supervised recreational programs to A.J. to help decrease stress on the Meekers. However, TCCSB determined that the Meekers were unable to consistently maintain their parenting skills and adequate home conditions. TCCSB filed a complaint, requesting that A.J. and S.M. be found dependent. A.J. and S.M. were adjudicated dependent by the court on November 17, 2004. The two children were allowed to remain with the Meekers, subject to a protective supervision order (PSO).

{¶7} Subsequently, the Meekers greatly improved the condition of their home, according to caseworker Alderman. TCCSB moved the juvenile court to terminate temporary custody of the twins and J.C. and return custody to the Meekers, subject to a PSO.

{¶8} During a review hearing that took place on July 20, 2005, the magistrate determined that the Meekers had failed to maintain adequate home conditions and determined that TCCSB should retain temporary custody of J.C. and the twins and place them into foster care. This decision was adopted by the juvenile court.

{¶9} After this decision, the Meekers worked to clean the home and were again successful. Another review hearing was held on October of 2005, during which the

juvenile court determined that the residence was suitable to allow J.C. to return to living with the Meekers, again subject to a PSO.

{¶10} The Meekers moved from their trailer and into a home around February of 2006. In February, Alderman determined that the home was in an unsafe condition and requested that the Meekers remedy the problem by the following day. The Meekers failed to clean the house by time Alderman returned the next day. Alderman also stated that the family was keeping pets inside of the home, in violation of the PSO.

{¶11} On March 1, 2006, TCCSB moved the juvenile court for six-month extensions of the PSO for J.C., A.J., and S.M. The court held a hearing on this matter on March 2, 2006, and granted the extensions. The court determined that the Meekers still had problems maintaining the cleanliness of their home.

{¶12} TCCSB filed a motion for permanent custody of the twins on July 18, 2006. On July 26, 2006, TCCSB filed a separate motion for permanent custody of J.C., A.J., and S.M.

{¶13} In August of 2006, a trial was held on the matter of permanent custody. Testimony of Mrs. Meeker and her friend, Sherri Lynn Gutierrez, indicated that Mrs. Meeker performed various parenting tasks, such as scheduling activities with her children and preparing them for school. Gutierrez also indicated that Mrs. Meeker's discipline procedures for her children typically were appropriate. She felt that the house was often cluttered but not unsafe for children.

{¶14} Testimony of a former friend of Mrs. Meeker, Julie Morris, indicated that two adult third parties were living in the Meeker home, in violation of the PSO. Morris also stated that Mrs. Meeker had trouble giving the proper dosage of medicines to her

sons and that the Meekers had physically mistreated their sons. Mrs. Meeker indicated that she always gave her children the doses as prescribed by their doctor and that she and her husband did not abuse the children.

{¶15} On October 20, 2006, the court held an emergency shelter care hearing. The magistrate issued an emergency order, removing J.C., A.J., and S.M. from the Meekers home and placing them in foster care. The juvenile court adopted this decision on October 23, 2006.

{¶16} A dispositional review hearing was held on December 1, 2006, on TCCSB's motion for temporary custody of J.C., A.J., and S.M. The magistrate awarded temporary custody of the three children to TCCSB. The juvenile court adopted this decision on December 29, 2006.

{¶17} Throughout this time period, the trial on the matter of permanent custody continued. Evidence showed that the Meekers were making progress in creating a safe and clean environment for the children. TCCSB caseworker, Lynn Alderman, testified that at various times throughout the period that TCCSB was involved with the family, the home was cluttered but upon request of TCCSB, the home was typically cleaned to meet the minimal standards of cleanliness required. There was also a discussion about a Domestic Violence incident that occurred between Mr. and Mrs. Meeker. Mr. Meeker was charged with Domestic Violence but ultimately pled guilty to Disorderly Conduct and was not convicted of Domestic Violence. He has since received alcohol treatment and no other incidents have occurred.

{¶18} The guardian ad litem for J.C., A.J., and S.M., Susan Rudnicki, testified that the boys had significant bonds with the Meekers. She recommended that the

Meekers retain custody of the children, conditioned upon creating a more stringent PSO. Attorney Pat Perry, the guardian ad litem for the twins, determined that the twins' strongest bond was with their foster family, as they had lived with the foster family for the majority of their lives. He testified that awarding permanent custody to TCCSB would be in the twins' best interest.

{¶19} The court awarded permanent custody of the twins to TCCSB. The court did not terminate the Meekers' parental rights to J.C., A.J., and S.M., but ordered the boys to remain in foster care until the Meekers were able to maintain a clean and healthy environment within their home. Mrs. Meeker appealed the decision to this court in *In re Chicase*, 11th Dist. No. 2007-T-0119, 2008-Ohio-1999. This court affirmed the trial court's decision and held that it was in the twins' best interest to grant TCCSB permanent custody.

{¶20} TCCSB again filed a motion for permanent custody of A.J. and S.M. on October 20, 2008. The court held a hearing on this matter on November 30, 2009. The sole witness at this hearing was a TCCSB caseworker, Heather Bentley. Bentley had been assigned to the Meekers' case in November of 2008.

{¶21} Presented at trial was evidence that A.J. had weekly, supervised visits with the Meekers. Bentley testified that A.J.'s mother was the most important person in his life and he was bonded most significantly with her. A.J. also has a strong relationship with Mr. Meeker. A.J. stated that he wanted stability and would prefer to live with his parents. While visiting with Mrs. Meeker, A.J. often did not want her to leave. He frequently stated to his foster family that he wanted to be with his mother.

A.J. also has had problems in his foster placements and has lived with several different foster families.

{¶22} Evidence showed that S.M. ceased visitation with the Meekers in January of 2008 because he did not want to continue seeing the Meekers. Additional evidence presented showed that S.M. had stated that he wanted to be adopted by his foster family and that he had the most significant bonds with his foster family. He had lived with this foster family for almost two years. Bentley testified that S.M. feels comfortable in his foster home. S.M. informed the court that he wanted to be adopted and no longer wanted to see his mom.

{¶23} Regarding the Meekers' compliance with TCCSB's case plan and recommendations, Bentley testified that Mr. Meeker completed parenting classes but had not completed anger management or marital counseling.

{¶24} Bentley also testified that Mrs. Meeker had met many of the goals set forth in the case plan. Mrs. Meeker began attending Trumbull Business School, training to become a medical transcriptionist, in order to provide additional income to the household. Additionally, Mrs. Meeker had completed parenting classes and voluntarily began attending counseling. The reports from Mrs. Meeker's counselor indicated that she was making "positive progress" in her treatment. Bentley stated that Mrs. Meeker's counseling had helped her mood and that Mrs. Meeker had developed a calmer demeanor around her children and others. Additionally, Mrs. Meeker has no criminal record or history of drug or alcohol abuse.

{¶25} Bentley testified that Mrs. Meeker was unwilling to take responsibility for the problems which led to the removal of her children and had not "taken ownership" of

the problems. However, Bentley admitted that the Meekers had recently been "cooperative [and] willing to admit there was a problem." Additionally, Mrs. Meeker told Bentley that she was willing to do whatever was necessary to regain custody of her children.

{¶26} Bentley explained that A.J. and S.M. were removed from the home because of problems with the condition and the cleanliness of the home. Bentley testified that the Meekers have trouble maintaining the condition of their home. Bentley further stated that the conditions of the home had improved since the time she had been assigned to the case and that any clutter in the home at the present time did not pose a significant danger to the children. She testified that among her concerns were "dirty dishes" and flies in the house during the summer.

{¶27} Bentley testified that the Meekers also had obtained several pets, including fish, five ferrets, and an outdoor dog. She stated that she did not see any animal feces in the home and that the animals were not a concern. Additionally, because the children were no longer living in the home, the condition in the PSO that required the Meekers to have no pets in their home was not applicable.

{¶28} Bentley primarily focused on the cleanliness of the home as the reason that the agency had removed the children. However, she also explained that the children had behavioral issues, that the family did not have a consistent routine, and that the parents had trouble maintaining employment. However, the record also indicates that Mr. Meeker has maintained consistent employment as a full-time truck driver throughout this case, except for a period of a few months during which he was

injured. Mrs. Meeker is currently obtaining training as a medical transcriptionist in order to obtain employment.

{¶29} Regarding concerns with the children's behavioral issues, A.J. has oppositional-defiant disorder and receives medication which has been beneficial in helping to treat this disorder. Additionally, S.M. has had problems interacting with his parents. He would experience "explosive behavior," described as crying and being frustrated when visiting with his parents. Visitation between S.M. and his parents caused him great distress and "affect[ed] his ability to cope with everyday life." Guardian ad litem Rudnicki concluded that the Meekers would not be able to adequately meet S.M. or A.J.'s emotional needs.

{¶30} Bentley explained that the Meekers had made progress in managing their household and have established some consistency in their daily lifestyle. She also stated that they have established a level of stability since the children have been removed from the household. However, she testified that she did not believe that the stability could continue if the children were returned to the home. She felt that the change was not significant enough to warrant reunification with the children. She expressed concern that the Meekers often achieve stability but are unable to maintain this progress.

{¶31} Bentley concluded that given the Meekers history of instability and the lack of progress made by the Meekers in improving their living conditions, the court should grant permanent custody of both children to TCCSB. In her written report, Rudnicki also concluded that permanent custody of both children should be granted to TCCSB.

{¶32} On December 3, 2009, the magistrate filed findings of fact and conclusions of law. The magistrate considered the necessary statutory factors and concluded that TCCSB should be granted permanent custody of A.J. and S.M. Mrs. Meeker filed objections to the magistrate's decision on December 11, 2009, asserting that the magistrate's decision was against the manifest weight of the evidence. The court overruled these objections on February 16, 2010. On March 1, 2010, the court issued a judgment adopting the magistrate's decision.

{¶33} Mrs. Meeker timely appeals and raises the following assignments of error:

{¶34} "[1.] R.C. 2151.414(B)(1)(d) imposes a statutory presumption of parental unfitness if a Trial Court finds that a child has been in temporary custody of Children Services for twelve or more months of a twenty-two month period and violates a parent's substantive and procedural due process rights as guaranteed under the Ohio and United States Constitutions.

{¶35} "[2.] The Trial Court's award of permanent custody to Trumbull County Children Services is not supported by sufficient credible evidence meeting the burden of clear and convincing evidence that permanent custody of the minor children should not have been placed with the children's parents.

{¶36} "[3.] The Magistrate's Decision granting permanent custody to Trumbull County Children Services is based on suppositions and conclusions contradictory to the manifest weight of the evidence."

{¶37} "[I]t is well established that a parent's right to raise a child is an essential and basic civil right." *In re Phillips,* 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, at ¶22, citing *In re Hayes* (1997), 79 Ohio St.3d 46, 48. It has often been remarked that

"parents who are suitable persons have a 'paramount' right to the custody of their minor children" and that the "[p]ermanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.'" *In re Johnston*, 11th Dist. No. 2008-A-0015, 2008-Ohio-3603, at ¶33, citing *In re D.A.,* 113 Ohio St.3d 88, 2007-Ohio-1105, at ¶10.

{¶38} "[S]uch an extreme disposition is nevertheless expressly sanctioned *** when it is necessary for the 'welfare' of the child." *In re Cunningham* (1979), 59 Ohio St.2d 100, 105; *In re Williams,* 11th Dist. Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, at ¶35 (citation omitted). "[T]he *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings is not whether the parents of a previously adjudicated 'dependent' child are either fit or unfit," rather, it is "the best interests and welfare of that child [that] are of paramount importance." *Cunningham* (1979), 59 Ohio St.2d at 106 (emphasis sic). "Parental interests must be subordinated to the child's interest in determining an appropriate disposition of any petition to terminate parental rights." Id.

{¶39} In her first assignment of error, Mrs. Meeker asserts that R.C. 2151.414(B)(1)(d) is unconstitutional under the Due Process Clauses of the United States and Ohio Constitutions because it creates a presumption of parental unfitness. She asserts that, apart from A.J. being abandoned by his biological father, the only other reason she had permanent custody taken away was that her children were in the temporary custody of TCCSB for twelve or more months out of the prior twenty-two month period.

{¶40} Prior to the hearing on this matter, Mrs. Meeker moved to dismiss the case based on the unconstitutionality of R.C. 2151.414, with the motion being overruled by the magistrate. Mrs. Meeker failed to raise this issue again in her objections to the magistrate's decision. Failure to object to the magistrate's decision with specificity operates as a waiver of the right to assign as error that aspect of the court's adoption of the magistrate's decision. Juv.R. 40(D)(3)(6)(iv). Such a failure to file an objection to the magistrate's decision on this issue waives all but plain error. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Heerlein v. Farinacci*, 11th Dist. No. 2008-G-2818, 2008-Ohio-4979, at ¶17, citing *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 1997-Ohio-401, at syllabus.

{¶41} Mrs. Meeker's argument has been addressed by many appellate districts in the state of Ohio. See *In re C.R.*, 7th Dist. No. 06BE53, 2007-Ohio-3179, at ¶49; *In re Workman*, 4th Dist. No. 02CA574, 2003-Ohio-2220, at ¶40; *In re Bray,* 10th Dist. No. 04AP-842, 2005-Ohio-1540, ¶7-9; *In re Fricke,* 3rd Dist. Nos. 1-02-75, 1-02-76, and 1-02-77, 2003-Ohio-1116, at ¶9.

{¶42} "Contrary to appellant's assertion, we believe that inherent within R.C. 2151.414(B)(1)(d) rests the finding that the parent is unable, unsuitable, or unfit to care for the child. If the child has been placed in a children services agency's temporary custody for at least twelve months of the prior twenty-two months, some reason must exist why the child has not been in the parent's care. The reason normally would be

because the parent has been unable to demonstrate that the parent is able, suitable, or fit to care for the child." *Workman*, 2003-Ohio-2220, at ¶39.

{¶43} Therefore, 2151.414(B)(1)(d) does not create an unjustified presumption of parental unfitness. "Prior to instituting a permanent custody proceeding under R.C. 2151.414(B)(1)(d), the parent has twelve months to demonstrate that the parent is able, suitable, or fit to care for the child. Thus, the parent is not deprived of the ability to be reunified with the child or to demonstrate the parent's ability, suitability, or fitness to care for the child." *In re Gomer*, 3rd Dist. No. 16-03-19, 2004-Ohio-1723, at ¶31, citing *Workman*, 2003-Ohio-2220, at ¶40.

{¶44} "[T]he legislature in Ohio has made the best interest of the child the touchstone of all proceedings addressing a permanent commitment to custody. The legislature has also recognized, however, that when the state seeks to terminate parental custody, parents are entitled to strict due process guarantees under the Fourteenth Amendment to the United States Constitution, including a hearing upon adequate notice, assistance of counsel, and (under most circumstances) the right to be present at the hearing itself. Ohio has accordingly incorporated appropriate due process requirements in the statutes and rules governing juvenile adjudications and dispositions, which are reflected in the extensive and rather intricate statutory framework expressed in R.C. 2151.413 and 2151.414." *Bray*, 2005-Ohio-1540, at ¶6, citing *In re Thompson*, 10th Dist. No. 00AP-1358, 2001 Ohio App. LEXIS 1890, at *18-19

{¶45} In *In re Stillman*, 155 Ohio App.3d 333, 2003-Ohio-6228, this court approved the analysis offered in the *Workman* court's decision. In *Stillman*, this court

stated that the "twelve/twenty-two" criterion provides a parent with ample opportunity to demonstrate his or her parenting fitness. Id. at ¶56. Although the court was not presented with the issue of whether R.C. 2151.414(B)(1)(d) was unconstitutional in that case, the court determined that the criterion allowed parents twelve months to demonstrate that they are fit to care for their child.

{¶46} We hold that a parent's fundamental interest in the care and custody of their children is not violated by the "twelve/twenty-two" criterion as it is set forth in R.C. 2151.414(B)(1)(d). If a child is placed into the temporary custody of a children's services board, parents are provided with resources and opportunities from the agency to make changes necessary to reunite with their children. If the parents fail to do so within the twenty-two month period, the parent can be seen as unfit without a violation of the parent's rights.

{¶47} Mrs. Meeker also argues that R.C. 2151.414(B)(1) is unconstitutional because it allows a court to terminate parental rights upon a singular finding that a child has been in the custody of the agency for twelve or more months in a consecutive twenty-two month period. Once the court makes a determination that the parents fall under the "twelve/twenty two" criterion of R.C. 2151.414(B)(1), the court must also consider factors to determine whether terminating parental rights is in the child's best interest. One of these factors is whether the child has been in agency custody for twelve or more months of a consecutive twenty-two month period. Mrs. Meeker contends that the statute violates due process because this sets forth an arbitrary numerical equation which could be sufficient to divest a parent of his or her parental

rights. In other words, courts could rely solely on the "twelve/twenty-two" criterion without any further consideration of a child's best interest.

{¶48} However, in this case, the court did not merely engage in analysis of whether the children were in custody for twelve months of a consecutive twenty-two month period. The Judgment Entry shows that the court weighed all best interest factors in reaching its decision. A litigant who is attempting to challenge the constitutionality of a statute must demonstrate standing. "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *State v. Grate*, 11th Dist. No. 2008-T-0058, 2009-Ohio-4452, at ¶39, citing *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, at syllabus.

{¶49} As the court engaged in an analysis of more than just the "twelve/twenty-two" criterion in this case, there was no violation of Mrs. Meeker's constitutional rights. Because Mrs. Meeker's constitutional rights were not affected, she does not have standing and we cannot consider whether this argument has merit.

{¶50} The first assignment of error is without merit.

{¶51} Since assignments of error two and three consider the sufficiency and weight of the evidence, they will be considered together.

{¶52} "Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re T.B.*, 11th Dist. No. 2008-L-055, 2008-Ohio-4415, at ¶35 (citation omitted). "The standard of review for weight of

the evidence issues, even where the burden of proof is 'clear and convincing,' retains its focus upon the existence of some competent, credible evidence. In other words, when reviewing awards of permanent custody to public children services agencies, judgments supported by some competent, credible evidence must be affirmed. If the record shows some competent, credible evidence supporting the trial court's grant of permanent custody to the county, *** we must affirm that court's decision, regardless of the weight we might have chosen to put on the evidence." *In re S.M.*, 11th Dist. No. 2008-G-2858, 2009-Ohio-91, at ¶21, quoting *In re Kangas*, 11th Dist. No. 2006-A-0084, 2007-Ohio-1921, at ¶85 (citations omitted). "Every reasonable presumption must be made in favor of the judgment and the findings of fact of the juvenile court." *Kangas*, 2007-Ohio-1921, at ¶86, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶53} "When reviewing the juvenile court's findings, this court applies the civil manifest-weight-of-the-evidence standard. *In re Lay* (1986), 25 Ohio St.3d 41, 42 (citation omitted). 'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' [*State v.*] *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, at syllabus. 'A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.' Id., quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81." *In re T.F.*, 11th Dist. No. 2009-A-0039, 2010-Ohio-590, at ¶53.

{¶54} R.C. 2151.414(B)(1) is the applicable standard that a trial court must apply to determine the outcome of a motion for permanent custody. The statute provides:

{¶55} "(B)(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

"(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 [2151.41.3] 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.

{¶56} "(b) The child is abandoned.

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

{¶58} "(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 [2151.41.3] of the Revised Code, the

child was previously in the temporary custody of an equivalent agency in another state." R.C. 2151.414(B)(1)(a)-(d).

{¶59} "(D)(1) In determining the best interest of a child *** the court shall consider all relevant factors, including, but not limited to, the following:

{¶60} "(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;

{¶61} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶62} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶63} "(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." R.C. 2151.414(D)(1)(a)-(d).

{¶64} Here, the trial court found that pursuant to R.C. 2151.414(B)(1), A.J. had been abandoned by his unknown father. R.C. 2151.414(B)(1)(b). The court also found that both A.J. and S.M. have been in the custody of TCCSB for twelve or more months

out of the past twenty-two month period and that they cannot or should not be placed with either parent within a reasonable time. R.C. 2151.414(B)(1)(a) and (d). The court also considered each best interest factor under R.C. 2151.414(D)(1) and determined that each factor was relevant in this case.

{¶65} Regarding the sufficiency of the evidence, Mrs. Meeker argues that there was not sufficient evidence presented at trial to show that she is unfit as a parent or that her children cannot or should not be returned to her home. Additionally, she argues that there is not sufficient evidence to grant permanent custody of her children to TCCSB in light of the evidence that she has made great efforts in complying with TCCSB's case plan. We agree with Mrs. Meeker as to A.J., but not S.M.

{¶66} We first note that a child should not be removed from a parent's custody unless there is clear evidence that the parent is unable to care for his or her child. As discussed above, parents have an essential and protected right to raise their own children. Parents should be denied permanent custody only when it is necessary for the welfare of a child. See *In re Perales* (1977), 52 Ohio St.2d 89, 98 (parents may be denied custody where the evidence indicates a "total inability to provide care or support"); *In re Fry*, 3rd Dist. Nos. 9-02-14, 9-02-15, and 9-02-16, 2002-Ohio-3935, at ¶8 ("the permanent removal of a child may be condoned only where there is demonstrated an incapacity on the part of the parent to provide adequate parental care").

{¶67} While the court did consider the appropriate statutory factors in this case, regarding A.J., there is a lack of credible evidence sufficient to meet the burden of clear and convincing evidence that permanent custody of A.J. should be given to TCCSB.

There was not sufficient evidence presented that Mrs. Meeker is unable to provide adequate care or support to A.J.

{¶68} First, there is a lack of evidence to support the court's conclusion that the Meekers' home was unsuitable. After being questioned numerous times during the trial on this matter, TCCSB failed to present any substantial or dangerous problems with the living conditions in the Meekers' home, even though the home conditions were presented as one of the foremost reasons A.J. was removed from the Meekers' home. Bentley testified that the home contained a "significant amount of clutter" that "*could have* blocked exits" if a fire occurred. However, TCCSB failed to provide any additional evidence as to how the condition of the home had actually been harmful to the children. Bentley admitted at trial that the "clutter" had never risen to the level that the Department of Health had to be called or that the home conditions ever caused harm to any of the children.

{¶69} The only other problems with the Meekers' home that could be identified by Bentley were "dirty dishes" and flies in the house. Bentley admitted that flies were in the house during the summer months when the Meekers, who did not have air conditioning, would likely have had their windows open. Additionally, Bentley was concerned with dishes that were dirty and had particles of food on them. However, TCCSB did not present any evidence that a sink with dirty dishes causes any harm or danger to children.

{¶70} In addition to the fact that there was insufficient evidence to show that the household is unsafe, there are several important best interest factors that weigh against granting TCCSB permanent custody of A.J., including his relationship with his parents

and his wishes as to where he should live. See R.C. 2151.414(D)(1)(a) and (b). The evidence strongly shows that A.J. wishes to live with his mother and has a close bond with her. A.J. stated that he wants to return to the Meekers and specifically, to his mother. He has stated on several occasions while in foster care that he wants his mother. He has also had difficulty settling in with any foster family placement. Bentley testified that A.J. has "very significant bonds with his mother" and that he looks forward to visitation with her. Bentley also testified that A.J. has a strong relationship with Mr. Meeker.

{¶71} A trial court should consider the "foreseeable impact on [a child's] emotional and social well-being" before removing a child from a parent if the child has a profound connection with that parent. *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, at ¶110. Removing A.J. from the Meekers would be damaging to him, especially when considering how often he has expressed a desire to see and live with his mother. See *In re A.W.*, 9th Dist. No. 09CA009631, 2010-Ohio-817, at ¶18 (In reversing the trial court's decision to grant permanent custody to children services, the trial court stated: "Significantly lacking in [Children Services'] evidence pertaining to [the child's] relationship with Mother was any evidence to explain how terminating this relationship would impact [the child]. Given that [the child] was an already disturbed and emotionally fragile child, who loved Mother and was bonded to her, the impact of terminating their 12-year relationship could potentially be devastating to this child. Evidence of [the child's] likely emotional reaction to the termination was another critical piece of information that should have been considered by the trial court in its best interest determination.").

{¶72} Regarding Mrs. Meeker's manifest weight argument, she argues that the trial court erred in adopting the magistrate's decision because the evidence in the record did not support a termination of parental rights.

{¶73} Although the court may consider a parent's history with the child in determining the child's best interest, the court should also consider whether the parent has improved and made changes to benefit the child. If the parent has made great strides and improvements, her past activity is not conclusive as to whether the parent is currently fit to retain permanent custody of her child. Mrs. Meeker has made great progress over the past few years. Although she may have made some errors in the past, the purpose of TCCSB creating a case plan is to assist parents in taking better care of their children.

{¶74} Additionally, remedying conditions which led to the removal of children from their parents' home supports a conclusion allowing the parents to retain permanent custody of their children. See *Williams*, 2003-Ohio-3550, at ¶43 ("[g]iven that appellant had substantially remedied the conditions within her power that led to the removal of the children ***, the juvenile court erred in finding that the children could not be placed with their mother within a reasonable time"); *In re Hughley*, 8th Dist. No. 77052, 2000 Ohio App. LEXIS 4952, at *11 (A mother with a drug problem who made efforts to comply with treatment cannot be denied permanent custody.); *In re S.C.*, 4th Dist. Nos. 09CA798, and 09CA799, 2010-Ohio-3394, at ¶31 (The court took into account when determining whether to terminate a father's parental rights that he "successfully complied with his case plan by continuing to seek treatment for his depression and alcoholism. Though not required to do so under the case plan, [he] also successfully

completed a parenting class. Further, in an attempt to provide better housing for his children, [he] has twice moved into larger homes. And though clutter and cleanliness has been a recurring issue, the children's guardian ad litem testified that since May 2008 [father] has maintained an adequate residence.")

{¶75} Mrs. Meeker's improvement has been similar to the father in *In re S.C.* Mrs. Meeker substantially completed the requirements of TCCSB's case plan. She also started attending Trumbull Business College to help obtain a job, cleaned the house, and attended parenting classes as required by the case plan. She voluntarily sought out counseling, not required by TCCSB's case plan. Bentley testified that Mrs. Meeker had benefitted from the counseling and that she had developed a "calmness" and a "more cooperative attitude." Bentley also testified that the counseling agency reported that Mrs. Meeker was making "positive progress in treatment." Mrs. Meeker had stated that she was "willing to do what is necessary to reunify [the] family." Bentley also confirmed that the conditions within the home had improved and that the Meekers were "doing better with the cleanliness" of the home. Although clutter has been a recurring problem, the evidence shows that Mrs. Meeker has recently been maintaining an adequate residence that is safe for a child.

{¶76} "A decision based on clear and convincing evidence requires overwhelming facts, not the mere calculation of future probabilities. *** While the evidence presented raises the possibility of a future removal, it does not create the firm conviction that such future removal is inevitable to the extent necessary to satisfy the clear and convincing evidentiary standard." *Williams*, 2003-Ohio-3550, at ¶45.

{¶77} TCCSB's case seems to be based mostly on what may happen in the future, instead of what is occurring now. Mrs. Meeker has improved the home conditions and they have been determined to be safe for the children. The court is concerned that the home conditions may again deteriorate, but this is simply a future probability. Thus, it does not satisfy the clear and convincing evidence standard.

{¶78} Regarding the manifest weight of the evidence, Mrs. Meeker asserts that the trial court's judgment was based on inconsistent, ambiguous, and unsupported evidence. Mrs. Meeker challenges the trial court's reasons that the children could not be returned home. The trial court found that, pursuant to R.C. 2151.414(E)(1), the children could not be returned home for the following reasons:

{¶79} "(a) Home conditions are variable and can be dangerously cluttered. Recently, this has improved but it is still cluttered.

{¶80} "(b) Animals are still around the house . . . five ferrets, fish, and a dog. Animal feces are not seen on visits. These animals caused problems before, and because of housekeeping problems, cannot be present if the children are there.

{¶81} "(c) [S.M.] is oppositional defiant. [A.J.] also can be acting out. Parenting has not improved. The boys struggle after visits. There has not been enough parental growth to handle the boys. Both have special needs. Father has not gone to parenting classes to completion. Both boys report severe discipline from their parents.

{¶82} "(d) The parents have financial problems. Mrs. Meeker still has no job.

{¶83} "(e) Mental health counseling was recommended and not used until October, 2008. It is still ongoing. [S.M.'s] father has not begun his own counseling on his own childhood issues as reported by the Guardian Ad Litem.

{¶84} "(f) The Domestic Violence issues between the parties have not been addressed. There is no record of Mr. Meeker's attendance at anger management, individual counseling for himself, or new releases of information signed by him to show he has addressed these issues. There were issues noted by the Court of Appeals in its Decision of April 23, 2008. See ¶66 of that opinion."

{¶85} Regarding the home conditions, as explained above, TCCSB failed to provide evidence that the home conditions posed a danger to the children. TCCSB never determined that the "clutter" rose to the level that it should be reported as a fire hazard. Bentley noted that the conditions in the home did not pose a danger to the family at this time. The trial court even stated that the conditions had gotten better than they had been in the past. Although the court noted that at times the home can be cluttered, that is not the case presently.

{¶86} Regarding the issue of the animals, Mrs. Meeker points out that the animals were not loose or able to roam through the house. Bentley also testified that they posed no problem. We agree. Having an outdoor dog, a fish that lives in a tank, and ferrets that live in a cage, poses no danger to children. The major problem that TCCSB had with the Meekers' possession of pets was that animal feces may be on the floor in the house. As this problem is not present with the animals currently residing in the home, the animals pose no threat to the children.

{¶87} The trial court stated that the Meekers' parenting has not improved. The evidence presented at trial shows otherwise. Mrs. Meeker completed parenting classes and voluntarily attends counseling. Her counselor noted that she made "positive progress." Additionally, Bentley testified that Mrs. Meeker has an improved and calmer

attitude around her children. According to the case plan, Mrs. Meeker has become better able to manage the children's behavior. Overall, Mrs. Meeker has worked hard to improve her parenting skills and attitude.

{¶88} The trial court also stated that the Meekers have financial problems and that Mrs. Meeker "still has no job," indicating that Mrs. Meeker is unwilling to find a job. "[T]he term 'unwilling' is not synonymous with 'inability.'" *In re Cassandra*, 6th Dist. No. WD-05-097, 2006-Ohio-2767, at ¶25 (citation omitted). Mrs. Meeker does not appear to be unwilling to get a job. She has begun attending Trumbull Business College in an attempt to obtain a job and alleviate any financial problems. Additionally, Mr. Meeker has consistently held a full-time job throughout the majority of the time that the Meekers have been involved with TCCSB. Although the Meekers may have had some past problems with bills, they have always managed to provide a home for their children.

{¶89} Finally, the court takes issue with the fact that the Meekers have had domestic violence issues in the past. However, as Mrs. Meeker asserts, Mr. Meeker has never been convicted of Domestic Violence, although he was charged. Mr. Meeker also attended alcohol abuse classes to help alleviate any alcohol issues that may have caused domestic problems.

{¶90} Although there was evidence presented that the Meekers' progress moves in up and down cycles, that is not the case presently. In the past, the Meekers have made improvements, such as cleaning the house, and then had problems with clutter a few months later. However, the Meekers appear to have made great strides in the recent past. Mrs. Meeker is much more serious about maintaining their home and continuing treatment and counseling than she has been in the past.

{¶91} The weight of the competent, credible evidence shows that, presently, Mrs. Meeker has a suitable home and the ability to care for A.J. TCCSB did not present credible evidence showing that the Meekers were unsuitable parents or unable to take care of A.J. As much of the evidence shows that there have been many changes within the Meeker household, the home currently is not unsafe, and that A.J. wishes to live with his mother, we hold that the court's ruling as to A.J. was against the manifest weight of the evidence, as well as unsupported by sufficient evidence. The Meekers should retain permanent custody of A.J. at this time.

{¶92} Although the record shows that significant progress has been made in remedying the house conditions and in complying with the case plan and there is not sufficient evidence to show that denying Mrs. Meeker permanent custody of A.J. is in his best interest, the same is not true of S.M. Although the home conditions may be safe, S.M's case involves additional factors that support the lower court's ruling as to S.M. Specifically, S.M. has developed a strong connection with his foster family and does not want to return to his mother's custody. Several of the best interest factors concerning S.M.'s connection with his foster family and lack of connection with the Meekers weigh heavily in favor of granting permanent custody of S.M. to TCCSB. Therefore, there was clear and convincing evidence to support a determination that granting permanent custody of S.M. to TCCSB was in S.M.'s best interest.

{¶93} The first relevant best interest factor involves "[t]he 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."

R.C. 2151.414(D)(1)(a). This factor is "highly significant" as it "focuses on a critical component of the permanent custody test: whether there is a family relationship that should be preserved." *In re C.M.*, 9th Dist. No. 21372, 2003-Ohio-5040, at ¶11. The second factor addresses "[t]he wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child." R.C. 2151.414(D)(1)(b).

{¶94} Although the conditions of the home may be such that it is safe for S.M. to return, these two factors support the conclusion that it is in S.M.'s best interest for custody to be granted to TCCSB. Regarding S.M.'s relationship with both the Meekers and S.M.'s foster family, Bentley testified that S.M. is most attached to his foster family. S.M. has lived with this foster family for approximately two years. S.M. has not lived with the Meekers since October of 2006. Additionally, S.M. has not visited with the Meekers or his brothers since January of 2008, nor has he expressed a desire to do so. S.M.'s sole interactions with parental figures in the past two years have been with his foster parents.

{¶95} Concerning S.M.'s wishes, S.M. feels comfortable with his foster family and has stated that he wishes to continue living with them. Prior to the termination of visitation with the Meekers, S.M. expressed that he was upset during visits by the behavior of Mr. Meeker and of his siblings. S.M is currently nine years old and nothing in the record indicates that he was incapable of expressing his wishes about whether he would like to live with Mrs. Meeker. As S.M. does not wish to remain with the Meekers and has become attached to his foster family, it would be detrimental to him emotionally

to return to Mrs. Meeker. It is in S.M.'s best interest for permanent custody to be granted to TCCSB.

{¶96} The second and third assignments of error are with merit to the extent discussed above.

{¶97} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Juvenile Division, awarding permanent custody of Mrs. Meeker's children, A.J. and S.M., to TCCSB, is affirmed as to S.M. and reversed as to A.J. Costs to be taxed against the parties equally.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion,

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion,

{¶98} I concur with the majority's disposition regarding A.J. However, I dissent regarding its disposition regarding S.M., as I would reverse the grant of permanent custody of him to TCCSB.

{¶99} In support of its motion for permanent custody, TCCSB, relied on the report of the GAL, and the testimony of one caseworker, who had only been appointed to the boys' case a year prior to the hearing. TCCSB did not call any prior caseworker; it did not file any testimony from prior hearings. The trial court, in rendering its decision,

relied on evidence from a prior, unsuccessful permanent custody proceeding. I do not find that the trial court's judgment in this case was supported by sufficient, competent evidence reaching the requisite clear and convincing standard. On that basis, I find merit in both the second and third assignments of error, and would reverse.

{¶100} As this court stated in *In re Roque*, 11th Dist. No. 2005-T-0138, 2006-Ohio-7007, at ¶7:

{¶101} "*** the termination of parental rights is '(***) the family law equivalent of the death penalty (***).' *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, at ¶22, citing *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, at ¶14, ***. See, also, *In re Murray* (1990), 52 Ohio St.3d 155, 157, *** (parents have a 'fundamental liberty interest' in the care, custody, and management of their children, and an 'essential' and 'basic civil right' to raise them). Accordingly, when the state initiates a permanent custody proceeding, parents must be provided with fundamentally fair procedures in accordance with the due process provisions of the Fourteenth Amendment to the United States Constitution, and Section 16, Article I of the Ohio Constitution. *In re Sheffey*, 167 Ohio App.3d 141, 2006-Ohio-619, at ¶21, ***." (Parallel citations omitted.)

{¶102} Fundamentally, I would not find that the hearing provided in this case comports with due process.

{¶103} I respectfully concur in part, and dissent in part.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with a Dissenting Opinion.

{¶104} While I agree with the majority's disposition of appellant's first assignment of error as well as its conclusion that the TCCSB be awarded permanent custody of S.M., I disagree with the majority's conclusion that A.J. should remain in the temporary custody of the agency. For the reasons that follow, I would hold that the trial court did not err in awarding TCCSB permanent custody of A.J.

{¶105} In this case, the trial court found, pursuant to R.C. 2151.414(B)(1), that A.J. had been abandoned by his unknown father, R.C. 2151.414(B)(1)(b), *and* that A.J. had been in the custody of TCCSB for 12 or more months since being adjudicated dependent out of the past 22 month period, and neither child can be placed with either parent within a reasonable time or should not be placed with their parents. R.C. 2151.414(B)(1)(a) and (d). The court additionally considered the relevant factors under R.C. 2151.414(E) to support its determination that A.J. could not be placed with his parents within a reasonable period of time or should not be placed with the parents. Finally, the court determined each best-interest factor under R.C. 2151.414(D)(1) was relevant to the instant case and gave each factor due consideration. The foregoing demonstrates the trial court possessed adequate evidence to meet its statutory obligation. As a result, appellant's sufficiency argument should be overruled.

{¶106} I also believe appellant's manifest weight argument should fail. Appellant asserts the trial court erred in adopting the magistrate's decision because the record evidence before the court did not militate in favor of terminating her parental rights. Appellant first points out that she had made great strides in following her case plan,

including the completion of parenting classes, completing mental health counseling, maintaining regular visits with A.J., and making progress improving the conditions of the home. Bentley nevertheless recommended termination because of appellant's "historical behavior." Appellant argues adopting such a recommendation unjustly prejudices her rights because it presumes she did not learn from her past errors.

{¶107} Appellant is correct that the evidence indicated she was making some progress in addressing the concerns TCCSB had with her lifestyle and ability to maintain her household. The record, however, viewed as a whole, also reveals a cycle of minimal gains followed by regressive declines, *particularly* when the children have returned to the home. Appellant's cyclical patterns of progression and regression are clearly relevant to the children's best interests as well as whether the children could be placed with appellant within a reasonable time. In *In re Vaugn* (Dec. 6, 2000), 4th Dist. No. 00CA692, 2000 Ohio App. LEXIS 5938, *19-*20, the court underscored:

{¶108} "*** [U]nder R.C. 2151.414 (D) and (E), the court is required to look at *all relevant evidence* in determining whether permanent custody is in the children's best interests and whether the children cannot be placed with their parents within a reasonable time period or should not be placed with their parents. To further the interests of the children, the court must consider any evidence available to it, including a parent's pattern of conduct. Some of the most reliable evidence for the court to consider is the past history of the children and the parents." (Emphasis sic.)

{¶109} While appellant urges this court that her historical inability to maintain consistency and stability in her lifestyle does not necessarily predict the future, it is undeniably germane to the trial court's ultimate decision. I therefore do not believe the

trial court was unfair in considering the uncontroverted case history in adopting the magistrate's decision. Indeed, to the extent it was relevant to the children's best interests, the court was required to consider such history in arriving at a thorough and informed conclusion on the issue of permanent custody. See R.C. 2151.414(D) (statutorily, in determining the best interest of a child, the trial court shall consider "all relevant factors."); see, also, *In re Vaughn*, supra; *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, 2009 Ohio App. LEXIS 2373, *56 (trial court must consider all relevant evidence related to the history of a case in ruling on a motion for permanent custody.); *In re West*, 4th Dist. No. 05CA4, 2005-Ohio-2977, at ¶50 (trial court properly considered mother's case history with agency in concluding parental rights should be terminated.)

{¶110} Furthermore, despite appellant's progress, the trial court was required to analyze the facts in light of Mr. Meeker's lack of progress. Although appellant, standing alone, was dedicating more effort to meeting the goals of her case plan, her efforts were not matched by her husband. The record indicates Mr. Meeker, whether through apathy or intentional omission, has done virtually nothing to meet the goals the agency and the court had previously set for him. Mr. Meeker's absence from the permanent custody hearing (without some indication that he was unavoidably prevented from attending) is also a reflection of his apparent indifference towards the children's custodial future.

{¶111} Further, the GAL report, as well as the record at large, indicates Mr. Meeker has a tendency to be emotionally and physically abusive toward the children. Mr. Meeker, on at least one occasion, was removed from the family home on a domestic violence charge in which he allegedly choked appellant and threatened her as

well as the children's lives. See *In re Chicase*, 11th Dist. No. 2007-T-0119, 2008-Ohio-1999, at ¶11.[1] Notwithstanding these critical problems, Mr. Meeker has failed to initiate individual counseling to help manage his emotions and the manner in which he responds to stresses he may experience.

{¶112} Finally, appellant and Mr. Meeker are married and live under the same roof. In February 2009, a case plan review occurred. During that review, Bentley commented that the Meekers had failed to make progress in establishing a permanent, stable, safe home for the children that would meet their basic emotional needs. One recommendation to meet this goal was for appellant to relocate herself "to a supervised living situation such as Beatitude House and commit herself to the program." Appellant did not choose this option. Despite her decision to remain in the home, however, there was no evidence introduced at the hearing that would suggest the Meekers have made any progress towards achieving the stability necessary to meet, for example, A.J.'s unique emotional needs. And given Mr. Meeker's problems and his apparent disinterest in addressing those problems, it would be unreasonable to conclude such progress is forthcoming.

{¶113} "While a parent undeniably has certain rights concerning his or her child, the focus of a permanent custody hearing and decision is not the parent's rights but the child's best interests." *In re West*, supra, at ¶49. Indeed, a child's best interests have been described as "the touchstone" of permanent custody proceedings. *In re Gomer*, 3d Dist. Nos 16-03-19, 16-03-20, and 16-03-21, 2004-Ohio-1723, at ¶31; *In re Thompson* (Apr. 26, 2001), 10th Dist. Nos. 00AP-1358 and 00AP-1359, 2001 Ohio App. LEXIS 1890, *18. In considering a child's best interests, therefore, a trial court must

1. Although the GAL report was unsworn, there were no objections to its content.

make its decision in light of all relevant factors. *In re B.D.*, supra; *In re Vaughn*, supra. Even though appellant has made progress since November 2008, that progress cannot be viewed in a vacuum; according to Bentley, appellant's progress, viewed objectively, has been insufficient and has required keeping the eight-year-old case open. A.J. has bounced from foster home to foster home for nearly four straight years and, as Bentley testified, he is in need of a legally secure, permanent placement. Both historical case record and recent evaluations of the Meekers' lifestyle demonstrate that they are unable to offer a stable, secure, and healthy living environment in which A.J.'s basic needs can be met. Given the context of the case, I would hold the trial court's decision is supported by clear and convincing evidence.

{¶114} Appellant, however, additionally points out that the trial court's judgment was based upon inconsistent, ambiguous, and unsupported evidence. I disagree with her position and believe each of the findings appellant challenges offers additional support for the trial court's decision. First of all, it is important to point out that each of appellant's arguments relate to the trial court's application of R.C. 2151.414(E) to the underlying case. R.C. 2151.414(E) is relevant to determining whether it is possible for the children to be placed with the parents within a reasonable period of time or whether they simply should not be placed with the parents at all, a necessary finding under R.C. 2151.414(B)(1)(a). A court is required to consider "all relevant evidence" in determining whether a child can be placed with either parent within a reasonable time under R.C. 2151.414(E). See, e.g., *In re A.B. and K.B.*, 5th Dist. No. 10 AP 04 013, 2010-Ohio-3569, at ¶20.

{¶115} Pursuant to R.C. 2151.414(E)(1), the trial court found the children could not be returned to the home for the following reasons, all of which appellant challenges:

{¶116} "(a) Home conditions are variable and can be dangerously cluttered. Recently, this has improved but it is still cluttered.

{¶117} "(b) Animals are still around the house … five ferrets, fish, and a dog. Animal feces are not seen on visits. These animals caused problems before, and because of housekeeping problems, cannot be present if the children are there.

{¶118} "(c) [A.J.] is oppositional defiant. [S.M.] also can be acting out. Parenting has not improved. The boys struggle after visits. There has not been enough parental growth to handle the boys. Both have special needs. Father has not gone to parenting classes to completion. Both boys report severe discipline from their parents.

{¶119} "(d) The parents have financial problems. Mrs. Meeker still has no job.

{¶120} "(e) Mental health counseling was recommended and not used until October, 2008. It is still ongoing. [S.M.'s] father has not begun his own counseling on his own childhood issues as reported by the Guardian Ad Litem.

{¶121} "(f) The Domestic Violence issues between the parties have not been addressed. There is no record of Mr. Meeker's attendance at anger management, individual counseling for himself, or new releases of information signed by him to show he has addressed these issues. These were noted by the Court of Appeals in its Decision of April 23, 2008. See ¶66 of that opinion."

{¶122} Appellant first points out that the trial court accepted Bentley's testimony that appellant's home was "dangerously cluttered" without any photographs to confirm the quality of Bentley's observation. While photos would have been helpful, they were

not necessary. Bentley testified that although the Mrs. Meeker was making progress, there was still an unacceptable amount of garbage, laundry, food, and dirty dishes strewn about their home. She also testified she observed an excess of flies in the home. On cross-examination, Bentley conceded she was not an expert in the health hazards that may or may not exist as a result of allowing such debris to accumulate; the trial court, however, was allowed to draw its own conclusions on whether such an environment would be safe and suitable for children to live. I do not believe the trial court's finding was premised upon insufficient evidence.

{¶123} Appellant next points out that the trial court's judgment includes a reference to animals being in the home, even though the animals at issue were not loose and, according to Bentley, they posed no problem. Regardless of these points, the trial court rightly emphasized one of the reasons that caused the children to be removed previously was the presence of pets. Although pets may not be a problem with only adults living in the house, the existence of pets in the home may be reasonably seen as counterproductive to appellant's desire for reunification. The prior protective order was entered because the family was unable to maintain a clean and sanitary household with both pets and children. By undertaking the obligation to care for five pets, appellant has seemingly ignored the court's previous, reasonable concern. I see nothing problematic with the trial court's emphasis of the current presence of pets in the home.

{¶124} Appellant next takes issue with the trial court's sweeping conclusion that "[p]arenting has not improved." Appellant asserts that this finding was improper because she has been unable to demonstrate her parenting skills as visitation was

never expanded. Appellant makes a reasonable point. Nevertheless, the evidence indicated that both she and her husband, at the time of the hearing, still failed to appreciate that the children's removal was a result of *their* deficiencies. Instead, according to Bentley, they viewed the removal as a conspiracy, engineered by TCCSB, to steal their children. Such a viewpoint demonstrates a lack of maturity reflecting poorly on appellant's ability to understand that her parenting style/skill was a primary reason for A.J.'s and S.M.'s removal. These points in conjunction with Mr. Meeker's failure to initiate counseling are sufficient to provide prima facie support for the trial court's finding.

{¶125} Next, appellant argues the trial court's finding that she had no job was a gratuitous criticism because she is currently enrolled in school. Although appellant may see the court's finding in a pejorative light, it is nevertheless factually true. In any event, it was not unreasonable for the court to comment on appellant's employment status since she never disputed that the family regularly experiences financial problems. Given that the issue of maintaining employment was a goal of appellant's case plan, the court's finding was not inappropriate. Moreover, it is important to underscore that the court's observation was made in an effort to support its conclusion that the children could not be returned to the parents "at this time." Because financial problems will most certainly affect the stability of a household, the court's statement regarding appellant's employment status was not only supported by the evidence, but proper.

{¶126} Appellant also argues that the trial court improperly emphasized the Meekers' failure to address "domestic violence issues" when, in fact, neither appellant nor Mr. Meeker has been convicted of domestic violence. Given the case history, it is

necessary to point out that this finding pertains more to Mr. Meeker than appellant. With this in mind, even though Mr. Meeker may not have been convicted of domestic violence, he was arrested on this charge and spent a weekend in jail as a result of the arrest. The facts supporting the arrest, in conjunction with other unseemly and violent acts directed at appellant and the children, precipitated the recommendation that Mr. Meeker seek help via appropriate counseling. At the time of the hearing, the record indicated Mr. Meeker has failed to follow through with this recommendation. The court was not wrong in highlighting the issue of domestic violence as a reason for its decision that the children could not be returned to the parents as of the date of the judgment entry. Accordingly, I discern no problems or inconsistencies with the trial court's R.C. 2151.414(E) findings.

{¶127} Appellant finally argues that if reunification was truly TCCSB's goal in this case, a wider array of evidence should have been introduced and the matter scrutinized with greater care. Although I sympathize with appellant's frustration, the court not only considered the testimony introduced by Bentley at the hearing, but also the entire, lengthy history of the Meekers' case. Perhaps more evidence could have been introduced to support TCCSB's most recent motion but, under the circumstances, the testimony of the case worker in addition to the GAL report and the lengthy case history provided sufficient evidence for the court to draw the conclusion it did.

{¶128} The record, when reviewed in its entirety, reveals a near eight-year history of appellant's inability to maintain her household at minimal standards of cleanliness and safety when she had custody of the children. While Bentley testified appellant had made progress, that progress must be measured in its proper context, i.e., *without*

children living in the home. Bentley testified that, in her view, "[t]he underlying conditions still exist regarding the safety of the children, and the change in the parents is not significant enough to warrant any kind of reunification at this time."

{¶129} Further, the condition of the home has always moved in cycles. When standards of adequacy were met and the children returned, the condition of the home would invariably deteriorate, sometimes into a state of dangerous disarray. Given these points, Bentley testified TCCSB has taken a more cautious approach towards reunification, keeping in mind both the potential emotional and physical impact on the children of attempting to reunify:

{¶130} "Due to the fact that [the children] were reunified at one point, removed again, and put back into foster care, any chance at all that that can happen again is just too great of a risk to their safety ***."

{¶131} Appellant's failure to maintain appropriate home conditions over the course of the case history, including a poor evaluation as recently as February 2009, and the uncontroverted evidence that the household has regularly deteriorated when the children were members of the household both support Bentley's conclusion.

{¶132} I acknowledge that this is a very difficult case. In the end, however, A.J. has been in the custody of TCCSB since October 2006, nearly four consecutive years. Over the course of this time, he has been placed in seven different foster homes and, according to Bentley, because of his behavioral issues is in need of stability and permanency. Although A.J. has stated he would like to again reside with appellant, the GAL report indicates he also wants stability; hence, the GAL reported that if reunification was not possible, he nevertheless desires a "permanent living

arrangement." These wishes were confirmed during the court's in-camera interview with the children.

{¶133} I understand and appreciate appellant's arguments. As a parent, she possesses a fundamental right to care for and raise her children This right, however, as with any fundamental right, is not unconditional and, in proceedings such as these, her rights must yield to the best interests of her children. In this case, the court's findings and analysis reflect A.J.'s best interests would be ultimately served by awarding permanent custody to the TCCSB. The overall lack of stability of appellant's household and general lack of commitment to the children's well-being exhibited by appellant throughout the course of the near eight-year history of the case cause me to agree with the lower court's conclusion. After careful review of the record in this case, I would hold the determination to grant permanent custody to TCCSB is supported by clear and convincing evidence and affirm the trial court's adoption of the magistrate's decision.

{¶134} For the foregoing reasons, I respectfully dissent.