

in adopting the magistrate's finding that the children's best interests will be better served if they continue to reside with their grandmother. We affirm.

{¶2} At some point prior to 2011, appellant and Jessica Blankenship lived together at his home in Cuyahoga County, Ohio. During their relationship, they had two children: D.R., born January 16, 2011, and G.R., born December 18, 2012. In 2012, appellant moved to California and worked there for about one year. Jessica and the children remained living in his home, and he provided financial support. During that year, appellant visited the children on a few occasions.

{¶3} Early in 2013, appellant returned to Ohio and resumed living with Jessica and the children. After only a few months, though, the couple separated. Jessica and both children moved into her mother's residence in Portage County, Ohio. Despite separation, appellant continued to see the children on a regular basis over the next six months.

{¶4} In March 2014, the children were temporarily removed from Jessica's custody on the grounds that while the children were passengers, Jessica operated a motor vehicle while under the influence of an illegal substance. One month later, the Portage County Department of Jobs and Family Services ("PCJFS") filed a complaint alleging the two children to be neglected, abused, and dependent. The complaint also alleged that Jessica was a heroin addict and that appellant had a history of illegal drug use.

{¶5} In May 2014, the trial court made an initial determination that both children were dependent based upon both parents' continuing drug use. Under the original case plan, appellant was required, inter alia, to submit to random drug tests and complete a

drug treatment program. As to the children, he was given two hours of supervised visitation each week.

{¶6} At first, the trial court allowed Jessica to retain custody of the two children under the PCJFS's protective supervision. However, within fifty days of the issuance of the original case plan, PCJFS moved to modify the custody order based upon Jessica's continuing drug use. The trial court granted this motion, giving temporary legal custody of both children to PCJFS. In turn, PCJFS placed the children with Jessica's mother, Cathleen Lindon. Thus, the children continued to reside with their grandmother, as they already had for approximately one year.

{¶7} Throughout the pendency of the juvenile action, appellant was required to take a number of drug tests. In July 2014, he tested positive for cocaine and marijuana. Two months later, he again tested positive for marijuana. But, from October 2014 until February 2015, the results of appellant's five oral swab tests were negative. Since an "oral swab" test can only detect drug use that has occurred within two to four days of the test, PCJFS moved to amend the case plan to require appellant to submit to a hair follicle drug test. The motion was granted in May 2015.

{¶8} As to the treatment requirement, appellant took three assessments over a nine-month period. The first assessment was performed at a church treatment facility in August 2014, but no recommendations were made regarding treatment. As a result, he participated in a second assessment at a local medical center in February 2015. The medical center made treatment recommendations, but appellant chose not to complete the program. The third assessment was performed in May 2015 by a private company, Options Center. It recommended that appellant be treated in an outpatient program.

According to Options Center, appellant completed its program within two months. However, PCJFS later challenged Options Center's legitimacy.

{¶9} Appellant's visitation with the children remained supervised until February 2015 when, as a result of his negative drug tests, the trial court changed visitation to four unsupervised hours each week. At approximately the same time, temporary custody of the children was transferred from PCJFS to Lindon, with PCJFS exercising protective supervision. Over the ensuing months, Lindon allowed appellant to keep the children at his home overnight each weekend, strengthening the bond between appellant and the children. The children developed a relationship with appellant's new wife and her children.

{¶10} In June 2015, Jessica moved to award permanent custody of the children to Lindon, and terminate the juvenile proceeding. PCJFS immediately filed a separate motion agreeing that Lindon should be given permanent custody. While these motions were pending, appellant, as required, went for a follicle drug test, but his hair was too short for the test to be performed properly. Appellant was alternatively required to submit to a finger nail drug test. However, the nail samples were too short for the test to be done properly. Subsequently, appellant submitted to another nail sample test.

{¶11} An evidentiary hearing on the two custody motions was scheduled for late August 2015. Two days before the scheduled date, Jessica died of a heroin overdose. As a result, the trial court dismissed both custody motions. One week later, appellant filed a motion for legal custody of the children and termination of the juvenile action. In response, PCJFS renewed its motion to award legal custody to Lindon. The trial court appointed Lindon counsel, and she filed her motion for legal custody.

{¶12} A court magistrate held an evidentiary hearing on the legal custody motions on October 6 and November 17, 2015. Immediately before the first hearing, the drug test on the second finger nail sample was completed. During the hearing, PCJFS presented testimony of a caseworker, who stated appellant's results were positive for marijuana and cocaine. In response, appellant presented the affidavit of a toxicologist employed by the company that performed the test. The toxicologist stated that, although the test results showed that appellant consumed marijuana at some point four to six months ago, the amount of cocaine in the samples was only sufficient to establish that he was environmentally exposed to that drug.

{¶13} After the second evidentiary hearing, the magistrate issued a decision. He did not make a finding on whether the second finger nail drug test conclusively established that appellant had used cocaine during the prior six months. The magistrate further stated that he could not conclusively find that appellant intentionally tried to avoid taking random drug tests. Based in part upon the foregoing, the magistrate granted appellant's motion to extend the case for another six months so that he could comply with the case plan before final disposition. The trial court immediately adopted this decision.

{¶14} During the extension period, appellant submitted to a number of drug tests, including a third finger nail drug test in March 2016. The results of all these tests were negative. However, a dispute developed regarding whether appellant purposefully avoided a drug test. In April 2016, a caseworker with PCJFS testified that on February 16 and 17, he and another caseworker contacted appellant to schedule an immediate drug test. Appellant responded he could not take the test on either of those days

because he was working. The caseworker also presented records from appellant's employer which, according to the caseworker, established that he only worked 2.5 hours on those days.

{¶15} In response, appellant testified that if he was not working for his primary employer on the two days at issue, he would have been working side jobs that often came his way. He further testified that although he worked both days, he offered to schedule a time in the evening for the caseworker to come to his home to administer the drug test.

{¶16} Following this hearing, the magistrate found appellant's explanation as to why he did not comply with the February 2016 test request not believable. The magistrate also found that, since the children moved into Lindon's home in August 2014, she had brought stability to their lives and had been primarily responsible for their education and health care. Based upon this, the magistrate recommended that it would be in the children's best interests if Lindon were awarded legal custody.

{¶17} Appellant objected, asserting that the magistrate's factual findings to be against the manifest weight of the evidence. Appellant noted that his testimony demonstrated that he texted the caseworker on one of the at issue dates, stating that he was willing to take the drug test so long as the caseworker came to his home. He further asserted that not taking the requested drug test was inconsequential, since his subsequent drug tests were negative. In addition, appellant emphasized there is no evidence that he failed to properly care for the children while exercising his visitation rights.

{¶18} After a separate hearing on the objections, the trial court issued its final

judgment overruling the objections and adopting the magistrate's finding as to the best interests of the children. The trial court awarded legal custody of both children to Lindon and terminated the juvenile proceeding.

{¶19} In challenging the custody determination, appellant raises one assignment of error for our review:

{¶20} "The trial court erred, and abused its discretion, in affirming the magistrate decision to deny Father's motion for legal custody and order legal custody to the maternal grandmother."

{¶21} Appellant submits that legal custody of the children should have been awarded to him because the evidence before the magistrate showed that he satisfied the primary requirement of his case plan. Specifically, he asserts there was no dispute that he had changed his lifestyle and stopped taking illegal drugs. Based upon this, appellant maintains the trial court should have afforded significant weight to the fact that he was the natural father of both children and had a close relationship with them.

{¶22} "The Ohio Supreme Court has recognized that 'parents who are suitable persons have a "paramount" right to the custody of their minor children.' *In re Murray* (1990), 52 Ohio St.3d 155, 157 (citations omitted). However, '[a] juvenile court adjudication of abuse, neglect, or dependency is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parent.' *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, paragraph two of the syllabus. Accordingly, 'the *fundamental or primary* inquiry at the dispositional phase of * * * 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 the child [that] are of paramount importance.’ *In re Cunningham* (1979), 59 Ohio St.2d 100, 106 (emphasis sic); *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, at ¶11 (“[o]nce the case reaches the disposition phase, the best interests of the child controls’).” *In re J.F.*, 11th Dist. Trumbull No. 2010-T-0029, 2011-Ohio-3295, ¶39.

{¶23} No specific test or set of criteria has been delineated to guide the juvenile court in determining a child’s best interests as it relates to an award of custody under R.C. 2151.353. *In re Memic*, 11th Dist. Lake Nos. 2006-L-049, 2006-L-050, and 2006-L-051, 2006-Ohio-6346, ¶26. As a result, the juvenile court “‘should consider the totality of the circumstances, including, to the extent they are applicable, the best interest factors set forth in R.C. 3109.04(F).” *Id.*, quoting *In re Pryor*, 86 Ohio App.3d 327, 336, 620 N.E.2d 973 (1993).

{¶24} As in this instance, an award of legal custody to a nonparent under R.C. 2151.353 does not result in the termination of all rights a parent has in his child. Thus, it is not necessary for the juvenile court to find by clear and convincing evidence that legal custody should not be given to the parent. Instead, the governing burden of proof is by a preponderance of the evidence. *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001).

{¶25} A juvenile court’s custody determination will only be reversed on appeal when an abuse of discretion has been demonstrated. *Memic*, 2006-Ohio-6346, at ¶25. “The term ‘abuse of discretion’ is one of art, ‘connoting judgment exercised by a court, which does not comport with reason or the record.’” *In re V.M.B.*, 11th Dist. Portage No. 2012-P-0112, 2013-Ohio-4298, ¶26, quoting *State v. Underwood*, 11th Dist. Lake No.

2008-L-113, 2009-Ohio-2089, ¶30.

{¶26} In this case, there is no dispute that after the two children were found to be dependent, appellant exercised his visitation rights and maintained a strong relationship with them. There is also no dispute that when he had visitation at his residence, he provided a safe environment. Instead, the magistrate's decision to deny appellant's custody motion came down to one issue: was appellant still using illegal drugs and engaging in associated behavior?

{¶27} In his second decision, the magistrate noted that appellant had passed all of the drug tests that he was required to take during the six-month extension period. To this extent, the evidence before the magistrate established that appellant had not tested positive for any drug since September 2015, when marijuana was found in his system. Therefore, the magistrate's decision to deny custody to appellant was predicated upon the finding that appellant lied to the caseworker regarding whether he was available to take a random drug test on February 16 or 17, 2016.

{¶28} In challenging the magistrate's finding on this issue, appellant raises two points. First, he notes that he presented evidence showing he texted the caseworker on one of the disputed dates, stating he would be willing to take the test at his home if another caseworker could come in the evening. However, even though there was some evidence that PCJFS had agreed to take the drug tests at his home so that he was not required to drive from Cuyahoga County to Portage County, there is nothing to indicate that this agreement applied to all drug tests, especially if appellant was not working full time. Second, appellant notes that, according to his testimony, if he was not working full time for his primary employer on the disputed days, then it was likely that he was doing

a side job for someone else. Yet, since it was also established that appellant had never informed PCJFS that he also earned money working side jobs, the magistrate justifiably concluded that his entire testimony on the point lacked credibility.

{¶29} In relation to this issue, appellant also argues that regardless of whether he actually lied to the caseworker, that point should not affect the outcome because one month later he took another drug test which was negative. However, under the magistrate's analysis, the key point was not whether appellant was trying to hide the fact that he had illegal drugs in his system. Rather, the key point is that he had lied to the caseworker and was not cooperating fully with PCJFS. In turn, this behavior supports the inference that, notwithstanding the fact that appellant had not tested positive for any illegal drugs since September 2015, his attitude toward drugs had not really changed, and that it was likely that he would resume taking drugs once he had custody of the children.

{¶30} The record shows that appellant had a lengthy history with illegal drugs. In 2007, he was convicted of multiple drug charges, including trafficking in cocaine. At trial, appellant also admitted that in a prior juvenile proceeding in Summit County, Ohio, he tried to pass a drug test by submitting "fake" urine, instead of his own, and that this deception was needed because he would have tested positive for marijuana. Despite this history, appellant was still using cocaine and marijuana at the outset of the underlying case in 2014, and still had marijuana in his system as late as September 2015. When combined with the false statement appellant made to the caseworker in February 2016, this history supports the inference that appellant had no intention of changing his attitude toward the use of illegal drugs, and that his compliance with the

requirements of the case pan was merely temporary.

{¶31} Concerning his drug use, appellant contends there was no evidence that his drug use had an adverse effect upon the children. The record does not support this contention. Lindon testified that, in returning the children to her after weekend visit in late July 2015, appellant smelled strongly of marijuana when he exited his vehicle. In addition, this event occurred after appellant had completed his drug treatment program.

{¶32} Finally, appellant submits the magistrate erred in not finding that Lindon's behavior posed a threat to the children's safety. According to him, the magistrate should have found that Lindon had a history of illegal drug use, and that she often allowed a friend to assist her in caring for the children, notwithstanding the fact that the friend had a prior drug conviction and had recently been arrested for driving while under the influence. As to both of these points, the magistrate was not required to believe appellant's uncorroborated testimony.

{¶33} The magistrate's factual findings are not against the manifest weight of the evidence. Moreover, these findings support the conclusion that appellant will continue to use illegal drugs in the future. To this extent, the judgment of the magistrate and trial court comport with both the record and sound legal reasoning.

{¶34} Appellant's sole assignment lacks merit, and the judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.