[Cite as *In re K.P.*, 2017-Ohio-4264.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: K.P.	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
IN THE MATTER OF: M.P.	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
	:	
	:	Case Nos. 17-CA-3
	:	17-CA-4
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case Nos. 2014-AB-162 and 2014-AB-163
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 7, 2017

APPEARANCES:

For Appellant

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For Father

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Wise, Earle, J.

{¶ 1} Appellant-Mother, C.L., appeals the January 5, 2017 judgment entries/orders of the Court of Common Pleas of Fairfield County, Ohio, Juvenile Division, denying her objections and upholding the magistrate's decision granting appellee, Fairfield County Child Protective Services, permanent custody of her children.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 8, 2014, appellee filed two separate complaints, one alleging K.P., born February 10, 2012, and one alleging M.P., born November 13, 2013, to be abused, neglected, and/or dependent children. Mother of the children is appellant herein; father is K.P. The children were placed in appellee's temporary custody and case plans were filed. By agreed judgment entries filed December 22, 2014, the children were found to be dependent and appellee's temporary custody was continued.

{¶ 3} On September 14, 2015, appellee filed motions for permanent custody of the children because neither parent had complied with the case plans. Hearings before a magistrate were held on April 12 and 13, 2016. By decisions filed May 10, 2016, the magistrate terminated appellant's parental rights and granted permanent custody of the children to appellee. Appellant filed objections, arguing the magistrate's decisions were against the manifest weight and sufficiency of the evidence, were an abuse of discretion, and appellee failed to comply with the federal Indian Child Welfare Act. Appellant indicated a memorandum in support would be submitted after completion of the trial transcript. Appellant also requested an oral hearing on the objections and that the trial court take additional testimony on matters that occurred before trial but were not

discovered until after the trial. Appellant's requests were denied by orders filed May 24, 2016.

{¶ 4} Transcripts of the magistrate's hearings were filed on June 30, 2016. By judgment entries/orders filed July 5, 2016, the trial court overruled the objections, finding the objections were broad and failed to state an objection with specificity. The trial court upheld the magistrate's decisions without considering the merits of the objections.

{¶ 5} Appellant filed an appeal in each case. This court reversed the trial court's decisions, finding the trial court erred in finding the objections were not stated with particularity and in not conducting an independent review of the magistrate's decisions pursuant to Juv.R. 40(D)(4)(d). *In the Matter of K.P.,* 5th Dist. Fairfield No. 16-CA-25, 2016-Ohio-8242; *In the Matter of M.P.,* 5th Dist. Fairfield No. 16-CA-26, 2016-Ohio-8243. This court remanded the matter to the trial court for further proceedings.

{¶ 6} By judgment entries/orders filed January 5, 2017, the trial court determined it would not hear additional evidence, conducted an independent review, overruled the objections, and upheld the magistrate's decisions.

{¶ 7} Appellant filed two appeals, one for each child, and this matter is now before this court for consideration. Assignments of error are identical in each case and are as follows:

I

{¶ 8} "THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE APPELLANT WITH AN INDEPENDENT REVIEW OF THE MAGISTRATE'S DECISION IN VIOLATION OF JUVENILE RULE 40(D)(4)(d)."

II

{¶ 9} "THE TRIAL COURT ERRED IN THE APPLICATION OF JUVENILE RULE 40(D)(4) IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, AND THE DUE PROCESS CLAUSE OF THE OHIO CONSTITUTION."

III

{¶ 10} "THE TRIAL COURT ERRED IN FAILING TO HEAR ADDITIONAL EVIDENCE FROM THE APPELLANT IN VIOLATION OF JUVENILE RULE 40(D)(4)(d)."

IV

{¶ 11} "THE TRIAL COURT ERRED IN NOT FINDING THAT THE (SIC) THERE WAS INSUFFICIENT EVIDENCE TO AWARD TO FAIRFIELD COUNTY CHILD PROTECTIVE SERVICES THE PERMANENT CUSTODY OF THE CHILDREN OF THE APPELLANT MOTHER."

I, II

{¶ 12} In assignments of error one and two, appellant claims the trial court failed to conduct an independent review of the magistrate's decisions in violation of Juv.R. 40(D)(4)(d) and failed to properly apply the rule, thereby violating her due process rights. We disagree.

{¶ 13} Juv.R. 40(D)(4)(d) states the following:

> If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court

> shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

{¶ 14} Appellant argues the trial court failed to make an independent review. In its judgment entries filed January 5, 2017, the trial court acknowledged this court's "directive was for the Court to conduct an independent review of the magistrate's factual findings and application of the law in this matter. Therefore, the court has conducted said independent review and issues this decision as a result of said review." The trial court indicated it conducted an independent review of the transcript of the magistrate's hearings and the facts presented, and "will consider manifest weight and insufficient evidence in one analysis of insufficient evidence." The trial court set forth the burden of proof as "clear and convincing evidence," reviewed the application of the law, and entered findings. The trial court concluded at 2, "the State presented sufficient evidence to support the granting of its motion for permanent custody by clear and convincing evidence."

{¶ 15} Appellant takes issue with this statement, arguing the trial court applied "an appellate standard rather than an independent review." Appellant's Briefs at 4. Appellant argues the trial court's "function when making an independent review is

anything but determining whether there is sufficient evidence which can be discerned from the record to support the burden of proof." Appellant's Briefs at 5.

{¶ 16} Appellant is correct that a trial court must conduct an independent review and the standard is clear and convincing evidence. R.C. 2151.414(B) and (E). A review of the trial court's judgment entries/orders establishes that although the trial court conflated "manifest weight" with "insufficient evidence," the trial court specifically stated at Findings No. 7: "The Court finds that the state has proven its motion for Permanent Custody by clear and convincing evidence." Therefore, the trial court found clear and convincing evidence to grant appellee permanent custody of the children.

{¶ 17} Upon review, we find the trial court conducted an independent review and followed the dictates of Juv.R. 40(D)(4), and do not find a violation of appellant's due process rights.

{¶ 18} Assignments of Error I and II are denied.

III

{¶ 19} In assignment of error three, appellant claims the trial court erred in failing to hear additional evidence from the time of the last hearing until at least December 2016, thereby violating her due process rights. We disagree.

{¶ 20} As cited above, Juv.R. 40(D)(4)(d) permits a trial court to "hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Whether to entertain additional evidence is within the trial court's discretion. *Parrish v. Parrish,* 5th Dist. Knox No. 15CA4, 2015-Ohio-4560. In order to find an abuse of discretion, we must determine the trial court's decision was

unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 21} On May 20, 2016, appellant filed motions requesting an oral hearing on the objections and that the trial court take additional testimony "regarding matters that occurred before trial but were not, despite reasonable diligence, discovered until after the trial on the matter." By orders filed May 24, 2016, the trial court denied the motions.

{¶ 22} Upon review, we find appellant did not identify the evidence to be presented and did not demonstrate how she could not have "produced that evidence for consideration by the magistrate" pursuant to Juv.R. 40(D)(4)(d).

{¶ 23} In her appellate briefs at 5, appellant now argues the trial court should have reopened the matter to hear additional evidence from April 2016 (time of the hearings) to at least December 2016 (reversal and remand).

{¶ 24} This court remanded the matter to the trial court on December 19, 2016. The trial court conducted its independent review and filed judgment entries/orders on January 5, 2017. At no time following the remand did appellant request the trial court to hear additional evidence from the April 2016 hearing dates forward.

{¶ 25} Upon review, we find the trial court did not abuse its discretion in not reopening the matter to hear additional evidence.

{¶ 26} Assignment of Error III is denied.

IV

{¶ 27} In assignment of error four, appellant claims the trial court erred in not finding there was insufficient evidence to award appellee permanent custody of the children. We disagree.

{¶ 28} As stated by this court in *In the Matter of: S.W.,* 5th Dist. Stark No. 2016CA00221, 2017-Ohio-807, ¶ 12:

> "[T]he right to raise a child is an 'essential' and 'basic' civil right." *In re Murray,* 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), quoting *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). A parent's interest in the care, custody and management of his or her child is "fundamental." Id.; *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The permanent termination of a parent's rights has been described as, "* * * the family law equivalent to the death penalty in a criminal case." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (6th Dist. 1991). Therefore, parents "must be afforded every procedural and substantive protection the law allows." Id.

{¶ 29} R.C.2151.414(B)(1) states permanent custody may be granted if the trial court determines, by clear and convincing evidence, that it is in the best interest of the child and:

> (a) The child is not abandoned or orphaned***and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.
>
> (b) The child is abandoned.

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

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

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

{¶ 30} R.C. 2151.414(E) sets out the factors relevant to determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Said section states in pertinent part the following:

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be

placed with either parent within a reasonable time or should not be placed with either parent:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(16) Any other factor the court considers relevant.

{¶ 31} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. *See In re Adoption of Holcomb,* 18 Ohio St.3d 361, 481 N.E.2d

613 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross* at 477. Sufficiency of the evidence "is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict [decision] is a question of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).[1]

{¶ 32} R.C. 2151.414(D)(1) sets forth the factors a trial court shall consider in determining the best interest of a child:

> (D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:
>
> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

[1]In its appellate briefs at 5, appellee states this court "reviews a trial court's decision in a child custody matter for abuse of discretion." This is true of child custody matters in divorce cases; it is inapplicable to permanent custody cases.

(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 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶ 33} In its January 5, 2017 judgment entries/orders granting appellee permanent custody of the children, the trial court found R.C. 2151.414(E)(1), (4), and (16) applied to appellant and therefore the children "could not or should not be returned to either parent." R.C. 2151.414(B)(1)(a). *See* Findings Nos. 4 and 6.

{¶ 34} In the complaints filed October 8, 2014, appellee alleged concerns about appellant's failure to follow through with mental health services, her involvement in domestic violence incidents with the children's father, her refusal to work with her alcohol and drug counselor, and her positive drug test for marijuana the day after an

incident on September 10, 2014, wherein appellant was stopped for speeding, and moonshine and marijuana were found in the vehicle. The children were in the vehicle. Appellant was charged with OVI and child endangering. The latter charge was eventually dismissed.

{¶ 35} Following the filing of the complaints, case plans were filed. Appellant was required to maintain stable housing and employment, complete parent education, undergo alcohol and drug assessments and follow any recommendations, and continue her counseling and medication as recommended by her therapists.

{¶ 36} Hearings before a magistrate were held on April 12 and 13, 2016. The magistrate heard from nine witnesses. In her appellate briefs at 6, appellant argues "the record is devoid of any evidence linking the frailties of the mother and her care of the children."

{¶ 37} Lancaster Police Officer Morgan Leberth testified on March 15, 2016, he responded to a possible domestic violence call involving appellant and the children's father. T. at 28. Appellant had called the police. T. at 31-32. She told Officer Leberth she and father had had an argument and father struck her in the side of the head with a coffee pot. T. at 29. Appellant did not want to press charges. T. at 30-31. She told Officer Leberth she permitted father to come over because they had children in common. T. at 38. No children were in the residence at the time. *Id*. Because appellant had an outstanding warrant against her out of Hocking County, she was placed under arrest. T. at 35. The warrant "was for drug and under suspension" related to a 2014 OVI. T. at 63, 65.

{¶ 38} Lancaster Police Officer Eric Eggleston testified on March 22, 2016, he responded to a possible domestic violence call involving appellant and the children's father. T. at 14-15. After making a forced entry, father was found in the home in the upstairs bedroom. T. at 17. Appellant told the police when she repeatedly attempted to let the officers in, father pulled her into a closet and told her to stay there. T. at 17-18. Officer Eggleston observed marks on appellant's arms "indicative of someone grabbing on to her and possibly pulling her down or at least holding on to her." T. at 18. Appellant agreed to press charges against father for unlawful restraint. *Id.* No children were in the residence at the time. T. at 20.

{¶ 39} Sharon Bankes, appellant's counselor at New Horizons Mental Health Services, started working with appellant in April 2014. T. at 139-140. Appellant sought counseling on her own. T. at 47, 140. Ms. Bankes testified during appellant's original assessment by her psychiatrist, she "was diagnosed with PTSD, bipolar, and ADHD." T. at 140-141. Appellant's treatment goals included "work on some self-esteem issues, impulse control, depressive symptoms, anxiety symptoms. Substance abuse came in a little later, but trying to manage all of that." T. at 141. Ms. Bankes stated throughout a two year time period, appellant's attendance with counseling was "about 59 percent," but recently, in September 2015, "it went up to about 72, 73 percent, which is fairly good for counseling." T. at 144. Ms. Bankes opined appellant has progressed in treatment with better decision making, re-engaging with support groups, and following through with counseling "homework." T. at 145-146.

{¶ 40} Sarah Hurst, appellant's counselor at The Recovery Center, started working with appellant in October 2015. T. at 87. Ms. Hurst testified she focused on

counseling appellant on drug and alcohol abuse, with treatment goals "to maintain sobriety and to develop relapse prevention skills, cooperate with probation, mental health court, and the legal system." T. at 89. Appellant was engaged in counseling "most of the time," except for times when "she was not able to stay awake." T. at 95. Appellant was not working at the time. T. at 111.

{¶ 41} Ms. Hurst stated, "[t]here's been three or four instances where she reported to me that she'd relapsed." T. at 98. She agreed substance abuse is a lifelong disease, and agreed that appellant acknowledging she was an addict was a "good thing." T. at 106. Ms. Hurst has seen some progress with appellant, but would like to see her "get more community sober supports, have more sustained, longer periods of sobriety, and to lessen her criminal behavior, no new legal charges" before terminating counseling. T. at 101-102. She agreed appellant was cooperative in counseling, participated in setting goals, and has made some progress toward her goals. T. at 106-107. However, Ms. Hurst recommended to appellant a women's treatment group and appellant attended some sessions, then stopped because "it wasn't Court-ordered by mental health court." T. at 113. Ms. Hurst opined appellant "has not been compliant" with the program because she slept through two sessions with her. T. at 120-121.

{¶ 42} Heather Stoneburner, appellee's caseworker assigned to appellant's case, started working with appellant around March 2015, although appellee has been involved with appellant since September/October 2014. T. at 161-162. The case plans required appellant to "[m]aintain stable housing and employment, parent education, and alcohol and drug assessment, and follow recommendations - - a psych eval, and follow

recommendations, be involved with the kids' services, and continue her counseling and medication as recommended by her therapist * * *." T. at 176.

{¶ 43} From December 2014 to November 2015, appellant tested positive for marijuana six times and missed thirty-five drug screening tests. T. at 177. In December 2015, appellant was charged with OVI. T. at 62-63, 103. Appellant's blood work "did not reach the level for a charge." T. at 114. Appellant expected the charge to be dismissed. T. at 78. However, her probation was revoked and as a result, she spent ten days in jail. T. at 362-363. On December 30, 2015, and March 24, 2016, appellant tested positive for marijuana. T. at 178, 370-371. Although appellant denied using marijuana in March, she stated she was around others that were using, which was a concern. T. at 181, 286-288. Ms. Stoneburner stated she was concerned that appellant "hasn't consistently screened to demonstrate that she's clean and sober. She has a recent positive screen. I'm concerned she was not doing all of the recovery services that were recommended to help her maintain her sobriety. I'm concerned that she's surrounding herself with persons who use." T. at 186.

{¶ 44} Appellant completed a mental health evaluation and has been compliant with the psychological portion of her case plans. T. at 188-189. Appellant has obtained housing, but on occasion, has permitted the children's father to stay with her even though there is a history of domestic violence between the two and a protection order was in place. T. at 190-191, 203-204. Ms. Stoneburner expressed her concern to appellant about father being in the home and exposing the children to violence. T. at 203. She stated appellant indicated to her "if the kids were there, she wouldn't let him in, but that she does let him in because he's their father and he needs to be a part of

their life." *Id.* Appellant told Ms. Stoneburner "she would go for a full protection order if that would help her be reunified with her kids." T. at 204. However, the two incidents in March 2016 where the police were called concerned Ms. Stoneburner. T. at 205. She was also concerned about appellant permitting "unsafe persons into her home," one with an extensive criminal record, and about appellant's ability to protect herself and her children. T. at 205-206, 253.

{¶ 45} Appellant has had several jobs during the past year and was currently employed, but Ms. Stoneburner did not consider appellant's employment to be stable. T. at 191-192. Appellant has complied with parenting education, and has participated in the services for the children. T. at 197-198, 200-201. Ms. Stoneburner's concern is "that the things that she says to them are not age appropriate. Making promises that they get to come live with her." T. at 198. Otherwise, she has no concerns about the interactions between appellant and the children. *Id.* Appellant's supervised visitations have gone well, are appropriate, and her and the children appear to be bonded to each other. T. at 206-208. The children scream for her and are excited to see her. T. at 247. She tells them she loves them, kisses them, plays with them, brings them food, interacts with them the whole time, and helps get them in and out of their car seats. *Id.* At the end of the visits, the children want to stay with appellant. T. at 250. Unsupervised visitation was discussed, but then incidents with other people and father in appellant's home "and she is not honest about people residing" there caused a concern about knowing who would be around the children. T. at 207. Appellant stated she would rather have supervised visitations so she could see her children more often

which Ms. Stoneburner agreed was not a bad thing, but explained appellant would have more time with the children if the visitations were unsupervised. T. at 244-245, 259.

{¶ 46} Ms. Stoneburner agreed she has seen a change in appellant ever since she re-engaged in services. T. at 228-229. However, there are the remaining concerns of the OVI charge in December 2015 and the recent missed and positive drug screens. T. at 229. Ms. Stoneburner agreed appellant was working hard to do everything she needed to do and was a good mother. T. at 238, 242, 248.

{¶ 47} Appellant admitted that she has had "a few slip-ups," that she relapsed back in December, and has been "clean" for about four months. T. at 44-45. Other than the slip-up in December, she had been clean for seven months. T. at 45. She admitted to being "a recovering addict, and I'm not perfect. I don't have the desire to get high anymore, but sometimes life is overwhelming." *Id.* She was working with New Horizons, The Recovery Center, and other groups to learn "new coping skills on how to handle my stress and occurrences that have happened to me as a child." *Id.* She felt like relapsing "getting closer to the trial," but she did not. T. at 499. She is using different coping skills to prevent relapse. T. at 507. She admitted to being "high" around the children, but stated she never smoked marijuana in front of them. T. at 46. She did not feel "marijuana prevented me from my mothering skills. I feel like I was a functioning addict." T. at 47. Appellant agreed she needed to avoid being around people using drugs. T. at 49. However, she admitted three weeks prior to the April hearings, she had tested positive for marijuana, "[b]ut it was just for one day * * * I tested clean before that, and then I tested clean right after that." T. at 50-51. She

claimed she did not use marijuana then, as she was in a vehicle with others who were smoking. T. at 286-288, 371.

{¶ 48} At the time of the April hearings, appellant's driver's license had been suspended and she relied on caseworkers for rides; she was employed for three weeks and had stable housing for about three and one-half months. T. at 65-66, 70-72, 76. She worked "6 p.m. to 6 a.m., which is why I'm a little groggy right now," to the point of stating "I'm falling asleep over here" while on the witness stand. T. at 71, 81. Prior to obtaining stable housing, she was homeless. T. at 80. Appellant stated she did not believe she could protect her children from father because men are physically stronger, but she understood "the importance more now than ever, the fact that I have to choose between the two. And I would choose them all day." T. at 278, 299. If anything were to happen with father, she would immediately call the police. T. at 299. She understood that father would leave the state and stay away if she had the children because he wants what is best for them. T. at 501. Appellant stated she would continue her services and counseling if the children were returned to her. T. at 283. Appellant explained she has "matured a lot" (T. at 285):

> I have become understanding with a lot more, that, really, pot is illegal, and I shouldn't be smoking it. Before, when I first lost the kids, I thought that it was nonsense. I thought that I was a functioning addict that could take care of my kids, but now I understand the situations that could be - - they could be brought into with me as far as having people over or being high around them. I don't want them to grow up like I did.

{¶ 49} Appellant acknowledged the children were removed on October 8, 2014, and it was not until September 2015 that she changed her attitude. She explained, "I was still using, so I had a different mindset. I wanted them home right away. But after losing them, I became more depressed, and it took me a while to be able to suck it up and try to work the program." T. at 508. Appellant stated she was getting into a new group at New Horizons for domestic violence, and was going to be going to Lighthouse for counseling, "[s]o I believe with their help, I can learn even more tools to build my self-esteem back up and realize that I deserve better." T. at 290-291. Instances of domestic violence never occurred in front of the children. T. at 483-484. She stated although she wanted her children back, she understood she needed to work on "accepting the fact that their dad needs to get out of the picture. But other than that, I believe I've done and showed that I will continue services with whatever they want me to do." T. at 295, 305. When asked what she would do if appellee was no longer "standing over, watching" her, she stated, "I would still have the same mindset that I have right now. I don't believe that's going to change." T. at 297. She planned on continuing her services with New Horizons and elsewhere, as she was permitted to do so for as long as she wanted. T. at 281. She explained, "[t]here comes a time in life where you have to choose between someone you love and your children. And my mom didn't make that decision for me, and I won't do that to them." T. at 300. She has a very good support network around her made up of counselors and people from her church. T. at 298.

{¶ 50} Dani Anderson, a social worker with New Horizons, provides support to appellant, helping her with appointments, housing, employment, coping skills, and the "whole custody case." T. at 327-328. Ms. Anderson helped appellant secure housing. T. at 329. Appellant keeps it maintained and is a "pretty clean person." *Id.* She has stable housing which is appropriate for children. T. at 329-330. Ms. Anderson opined appellant has progressed "significantly" from day one. T. at 300. Appellant's attitude has been "a lot more positive," her drug use has "definitely decreased," she's been compliant with the counseling group, and has been on time for appointments which was not always the case in the past. T. at 330-331. Appellant completed an anger management group and even though "she was finished with it, she continued to go longer just because she * * * was benefitting from it, and she enjoyed the group and got a lot of positive feedback." T. at 333. Ms. Anderson has observed appellant with her children and opined their interaction is positive. T. at 335. Appellant provides love and care to the children, and makes sure their needs are met. *Id.* Ms. Anderson stated, "[w]hen they see her, it's like - - it just lights up the whole room. I mean, they're so excited to see her and vice versa." *Id.* The children and appellant have a "very strong emotional bond." T. at 338. Ms. Anderson opined appellant was a good mother and she parents the children. T. at 337, 339.

{¶ 51} Jan Spitzer, a mental health probation officer for Fairfield County Municipal Court, has worked with appellant for approximately seven months prior to the date of the hearing. T. at 357. She had almost daily contact with her. T. at 358. Ms. Spitzer stated appellant started "out bumpy," but has been "steadily improving" and progressing "in her attitude with everybody in the court, progress of her actually making

her appointments, being on time." T. at 359-360, 377-378. Appellant is engaging in treatment and working her program. T. at 360. Ms. Spitzer did not have any concerns about appellant's continued cooperation with the program. *Id.* Appellant was moving in the right direction and was compliant. *Id.* Ms. Spitzer explained if appellant had a relapse, she was honest about it and did not avoid the consequences. T. at 362-363. Out of forty drug screens, appellant tested positive for alcohol in November 2015 and marijuana in December 2015 and on March 24, 2016. T. at 370-371, 387. Ms. Spitzer stated she has observed appellant with the children and they interacted well, she was very attentive to them, and they accepted direction from her. T. at 366-368.

{¶ 52} Sarah Rahter, the guardian ad litem assigned to the case, testified "[m]y recommendation is the children be placed in the permanent custody of the agency." T. at 443. Ms. Rahter agrees that appellant has made "significant strides in engaging and participating in her counseling," but opined she has not "made significant progress in all areas" of her case plans. T. at 444-445. Ms. Rahter is concerned about appellant being voluntarily around father, about appellant being lonely and reaching out to unhealthy individuals, and about appellant making choices which could cause her to lose her housing, all concerns which could impact her ability to effectively parent the children. T. at 473-475.

{¶ 53} Father has been incarcerated on two occasions and has not been consistent with his case plans. T. at 165-175. He has not completed case plan services and has not remedied the initial concerns. T. at 175. At the time of the hearings, appellant was incarcerated. *Id.*

{¶ 54} As for best interests, Ms. Stoneburner opined the children needed permanency in their lives "to know where they're going to be and have a safe and stable environment." T. at 208. The children currently reside together with foster parents, and all their needs are being met. T. at 210. The children are bonded to each other and to the foster parents. T. at 210-211. However, the children are also bonded to appellant. T. at 206-208, 338. The foster parents would consider adopting the children "if it came to that point." T. at 421-422. Because the children are two and four, their counsel stated, "I take no position as to permanent custody in this matter because they're unable to tell me exactly their wishes." T. at 516.

{¶ 55} As explained by our brethren from the Second District in *In re A.J.S. & R.S.,* 2d Dist. Miami No. 2007CA2, 2007-Ohio-3433, ¶ 22:

> Accordingly, issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. In this regard, "[t]he underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."*Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Finally, an appellate court must adhere to every reasonable presumption in favor of the trial court's judgment and findings of fact. *In re Brodbeck,* 97 Ohio App.3d 652, 659, 647 N.E.2d 240, citing

Gerijo, Inc. v. Fairfield (1994), 70 Ohio St.3d 223, 226, 1994-Ohio-432, 638 N.E.2d 533.

{¶ 56} Further, " 'the discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *In re Mauzy Children,* 5th Dist. Stark No. 2000CA00244, 2000 WL 1700073, *2 (Nov. 13, 2000), quoting *In re Awkal,* 95 Ohio App.3d 309, 316, 642 N.E.2d 424 (8th Dist.1994).

{¶ 57} There is no doubt appellant loves her children, has worked very hard at improving herself and her life, has completed many aspects of the case plan, has cooperated, and has demonstrated the ability to succeed. However, appellant made few attempts to complete the case plan between the time the children were placed in appellee's temporary custody, October 2014, and the filing of the motion for permanent custody in September 2015. Between December 2014 and November 2015, appellant tested positive for marijuana six times and missed or was late to appointments with counselors. It took spending ten days in jail in December 2015 for appellant to become serious about the case plan. In December 2015, she was charged with OVI and tested positive for marijuana. Then one month before the hearings, appellant was involved in two domestic violence incidents with the children's father.

{¶ 58} With these facts, it is impossible for this court to second guess the trial court. As stated above, credibility, reliability, and forthrightness are within the province of the trier of fact.

{¶ 59} Upon review, we find sufficient clear and convincing evidence to support the trial court's decision to grant appellee permanent custody of the children.

{¶ 60} Assignment of Error IV is denied.

{¶ 61} The judgment of the Court of Common Pleas of Fairfield County, Ohio, Juvenile Division is hereby affirmed.

By Wise, Earle, J.

Delaney, P.J. and

Baldwin, J. concur.

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