[Cite as *In re G.D.*, 2015-Ohio-1969.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
		No. 14AP-801
[G.D.,	:	(C.P.C. No. 13JU-2960)
M.D.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-802
[M.E.,	:	(C.P.C. No. 03JU-13775)
M.D.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-803
[S.D. and D.D.,	:	(C.P.C. No. 03JU-13773)
M.D.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-804
[H.D.D.,	:	(C.P.C. No. 10JU-8298)
M.D.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-805
[A.D.,	:	(C.P.C. No. 09JU-1230)
M.D.,	:	(ACCELERATED CALENDAR)
Appellant].	:	

In the Matter of:	:	
		No. 14AP-884
[M.E.,	:	(C.P.C. No. 03JU-13775)
A.E.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-885
[G.D.,	:	(C.P.C. No. 13JU-2960)
A.E.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-886
[S.D. and D.D.,	:	(C.P.C. No. 03JU-13773)
A.E.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-887
[H.D.D.,	:	(C.P.C. No. 10JU-8298)
A.E.,	:	(ACCELERATED CALENDAR)
Appellant].	:	
In the Matter of:	:	
		No. 14AP-888
[A.D.,	:	(C.P.C. No. 09JU-1230)
A.E.,	:	(ACCELERATED CALENDAR)
Appellant].	:	

D E C I S I O N

Rendered on May 21, 2015

Peterson, Conners, Fergus & Peer LLP, and *Istvan Gajary*, for appellant M.D.

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant A.E.

Robert J. McClaren, for Franklin County Children Services.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch

BRUNNER, J.

{¶ 1} Appellants A.E. and M.D. appeal decisions of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that granted permanent custody of their biological children, M.E.,[1] S.D., D.D., A.D., H.D.D., and G.D., to Franklin County Children Services ("FCCS"). Both A.E. and M.D. argue that terminating their parental rights was not in the best interests of the children. Mother, A.E., additionally argues that the trial court should have granted a continuance when she and M.D. failed, without explanation, to appear for the final day of the hearing. She further argues that her failure to appear deprived her of the right to testify and, hence, of due process. We overrule both the mother's and father's assignments of error and affirm the trial court's decision.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} A.E. has given birth to 12 children. She can remember all their names but does not know their birthdates. In addition to the 6 children at issue in these appeals, the record reflects that A.E. has lost permanent custody of 4 other children. The record does not reflect what happened to the other 2 of her 12 children, but it is undisputed that no children live with her at present.

[1] During the course of this case DNA testing revealed that M.D. is not the biological father of M.E.

{¶ 3} These appeals concern six of her children. Court records reflect the following relevant information regarding these children: (1) M.E., a boy, was born on November 6, 2001, and the court first ordered FCCS to provide protective supervision on September 17, 2003. He was adjudicated to be a dependent child on December 2, 2003; (2) S.D. and D.D., twin girls, were born on August 9, 2003, and FCCS was first ordered to provide protective supervision on September 17, 2003. They were also adjudicated to be dependent children on December 2, 2003; (3) A.D., a boy, was born on September 15, 2006, and FCCS was first given temporary custody over him on August 20, 2008. The trial court adjudicated him to be a dependent child effective on February 27, 2009; (4) H.D.D., a boy, was born on June 16, 2009, and FCCS was first granted temporary custody over him on July 20, 2009. The trial court found H.D.D. to be an abused, neglected, and dependent minor effective on July 14, 2010; and (5) G.D., a girl, was born on June 25, 2011, and FCCS was first granted temporary custody over her on July 12, 2011. The trial court found G.D. to be an abused, neglected, and dependent minor effective on May 22, 2013.

{¶ 4} This is not the first appeal in this case, and we have previously addressed the details of this family's history. The four eldest of the six children concerned have cycled between living with their biological parents and foster care providers while under the protective supervision of FCCS. *In re H.D.D.*, 10th Dist. No. 12AP-134, 2012-Ohio-6160, ¶ 7. We recounted some of the incidents that necessitated FCCS' intervention in our prior decision:

> (1) the oldest child, M.E., then two, was observed to be barefoot in a Meijer store, and one of the twins, then five months of age, had been left home alone at the time, resulting in Mother being charged with two counts of child endangering (January 2004); (2) police had stopped Mother for erratic driving while M.E. was in the car and had taken the child to FCCS (January 2005); (3) Mother, accompanied by M.E., had been arrested in an adult entertainment club after appearing there only partially dressed and intoxicated (October 2005); (4) one of the twins, then two years of age, was observed alone in the street and was returned to the parents, who hadn't realized she was missing (June 2006); (5) Mother had, while in a Kohl's department store, asked an associate to take the twins, then three years of age, to the restroom and then left the store for approximately 15 minutes and, on her return,

> Mother appeared to be under the influence of an unknown substance (January 2007); (6) police were called after a report that one of the twins had been observed outside, unsupervised, and that a physical altercation had ensued between Mother and the person who contacted police (January 2007); (7) Mother entered a church with the twins and asked for money-witnesses characterized her as being disoriented and smelling of alcohol and observed her putting the children into the car without car seats (May 2008); (8) Mother was allegedly arrested for child endangerment on that same day after asking a store worker to take her children to the restroom and then leaving the store with her children inside (May 2008); and (9) both parents were leaving their children unsupervised daily for one to two hours and locking them out of the home—later that day police were called to the home due to a report that the parents were outside drinking and fighting in front of the children (August 2008). The agency also received reports that Mother had used illegal substances, and possibly crack cocaine, while with her children.

Id.

{¶ 5} FCCS used a number of measures over the course of several years to address the deficits in parenting skills A.E. and M.D. were displaying in an attempt to avoid long-term or permanent removal of the children from their biological parents. *Id.* at ¶ 8-11. These measures included random drug testing and counseling, parenting classes, psychological assessments and counseling/treatment, and numerous other measures. *Id.* FCCS also secured agreements from the parents to provide evidence of prescriptions for any drugs for which they might test positive. *Id.* The parents failed to meaningfully participate in these measures. A.E. and M.D. failed to follow up on counseling and psychiatric treatment. *Id.* at ¶ 9-11, 17-19. They missed more than one-half of their scheduled drug tests, and when they did submit to drug testing, they often tested positive for drugs. *Id.* at ¶ 17-19.

{¶ 6} While FCCS' ongoing attempts to address A.E.'s and M.D.'s problems were occurring, the four eldest children were living with their biological parents under FCCS supervision. Finally, when their brother, H.D.D., was born in June 2009, and both mother and baby tested positive for barbiturates, opiates, and cocaine, H.D.D. was immediately placed on Methadone treatment to ease the withdrawal he was suffering as a newborn infant. *Id.* at ¶ 12. H.D.D. remained in the hospital for treatment for

approximately 30 days after his birth. *Id*. Through a series of orders and with the aid of an evidentiary hearing (the details of which are not relevant to this appeal), the trial court ordered the four eldest children and the new baby (H.D.D.) removed from the biological parents' custody and placed in foster care. *Id*. at ¶ 13-14. Those decisions were appealed to this court, and we affirmed. *Id*. These five children together have been in the same foster home since our earlier decision.

{¶ 7} In June 2011, A.E. gave birth to her twelfth child, G.D. Like her older brother H.D.D., G.D. was born addicted to drugs and had to stay in the hospital after her birth so that doctors could safely facilitate her withdrawal from the drugs that had obviously been in her system in utero. G.D. spent less time in the hospital than her brother due to a modern treatment regimen using Morphine rather than Methadone to ease her withdrawal. On July 12, 2011, FCCS obtained a temporary custody order and placed G.D. directly from the hospital into the same foster home with her five siblings who were already there. In May 2013, the trial court held an evidentiary hearing regarding G.D.'s custodial situation.

{¶ 8} At the evidentiary hearing, A.E. testified that she does not know how often she attended prenatal care appointments for G.D. and that it was none of FCCS' business that she was pregnant. A.E. said at the hearing that she did not go to required counseling because no one called to set it up with her; she testified that she did not participate regularly in random drug testing because it was inconvenient and a waste of gas to drive to the testing location. A.E. denied using illegal drugs, but she admitted that she used prescription drugs; she was aware that G.D. had drugs in her system when she was born. A doctor also testified and confirmed that G.D. was born addicted to drugs and diagnosed with neonatal abstinence syndrome. A.E. admitted she was not aware how long G.D. was in the hospital after she was born. Despite these admissions, A.E. expressed the belief that the basis for FCCS' involvement is that someone wants her children "really bad for the money." (May 8, 2013 Tr. 13.) In addition to her substantive testimony, A.E. often interjected remarks during the proceedings such as "[t]his is bullshit," or "[t]his is fucking crazy." (May 8, 2013 Tr. 21; 28.) In fact, she was so disruptive at the hearing before the trial court that the magistrate more than once had to threaten her with contempt and jail to convince her to contain her disruptive behavior.

{¶ 9} M.D. also testified before the trial court. He expressed the belief that he could take care of his kids. However, he admitted that he cannot read or write and does not know if he has missed drug tests because A.E. was responsible for making sure he took the tests. He admitted he did not go to see his daughter, G.D., in the hospital after she was born, explaining he was busy moving motorcycle parts out of his mom's house during a foreclosure and did not get a chance.

{¶ 10} Two FCCS caseworkers testified that, despite multiple referrals for counseling, A.E. and M.D. would not engage in the programs and activities FCCS told them were necessary to improve their parenting skills; they also testified that A.E., despite needing drug abuse treatment, went to just four NA/AA meetings. Caseworkers also testified that A.E. and M.D. did not regularly participate in drug testing, and when they did, A.E. often (though not every test) tested positive for opiates. Though A.E. repeatedly insisted that she was on a valid prescription painkiller treatment regimen and had prescriptions to explain her positive drug tests, she did not submit proof of having been prescribed such drugs, and she refused to sign releases to allow FCCS to seek records to verify her claims.

{¶ 11} The magistrate concluded, effective May 22, 2013, that G.D. was an abused, neglected, and dependent minor and committed her to the custody of FCCS until further order of the court. Shortly thereafter, the trial court adopted the magistrate's decision.

{¶ 12} As the proceedings regarding temporary custody were ongoing, on August 31, 2011, FCCS filed motions for permanent custody in the cases involving the first five children concerned, M.E., S.D., D.D., A.D., and H.D.D. On March 15, 2012, FCCS renewed the motions as to M.E., S.D., D.D., A.D., and H.D.D. On November 22, 2013, FCCS filed a motion for permanent custody in G.D.'s case also.

{¶ 13} During the period of July 22 through July 24, 2014, inclusive, the trial court held a hearing to determine whether to grant permanent custody of M.E., S.D., D.D., A.D., H.D.D., and G.D. to FCCS. Because the parents, M.D. and A.E., were late for the start of the hearing, the guardian ad litem testified first.

{¶ 14} The children's guardian ad litem testified that, on the occasions when the parents appeared for visits with the children, the visits were very chaotic, and A.E. and M.D. displayed no ability to control their children's behavior. She also explained that,

sometime starting more than one year prior to the trial, the older children began to refuse to visit with A.E. and M.D. The guardian ad litem further testified that the children are very close with each other and with their foster parents, but the children are not close, however, with their biological parents; although they seem to like M.D. better than A.E.

{¶ 15} After the parents arrived at the hearing in the trial court, more than one hour late, A.E. took the stand. In support of her denial that H.D.D. and G.D. were born drug dependent, A.E. testified that she stole something out of the doctor's chart that showed that H.D.D. did not actually have drugs in his system when he was born. Similarly, A.E. maintained that the hospital mailed her tests for G.D. that showed that G.D. never had drugs in her system. Neither of these alleged documents is in the record. A.E. asserted that all the exhibits showing the historical path of the cases involving her children are lies. She also testified that she does not believe that the case plan for her children requires her to undergo mental health counseling and that, in any case, she refuses to go. She admitted that, since January 2014, she has missed 11 of 12 drug tests but explained that, if FCCS will not "meet her half way," then she feels no obligation to do anything. (July 22, 2014 Tr. 161.) A.E. also admitted that she has not been attending visits with her children lately because it is too uncomfortable for her to sit and wait at the visit. However, she said she still rides a motorcycle because, "I might have a bad back, rods in my back, but I'm not going to give my life up." (July 22, 2014 Tr. 179.) When challenged about an incident where she requested a visit with her children be rescheduled for her convenience and then failed to appear or notify anyone that she would not be there, she said "something else popped up" and that was "more important * * * than picking that telephone up to say oh, I won't be there." (July 22, 2014 Tr. 183-84.) She also explained that her "appointments" "regarding [her] bills or something" take precedence over visits with her children. (July 22, 2014 Tr. 199.) As she put it, "[m]y priorities come first. I visit my daughter, when I can visit her." (July 22, 2014 Tr. 199.) She admitted she does not know the grade levels of her children in school or in what activities they participate, and she does not have a significant connection with them. "I'm not doing nothing more," she said. (July 22, 2014 Tr. 194.)

{¶ 16} Once again, A.E.'s testimony and comments were disruptive and of such character that the judge (who was not the same person as the magistrate who held the

prior hearing) threatened her with jail for contempt concerning her outbursts. Though the court did not actually jail A.E. for contempt, her behavior at the hearing was reflected in the court's following remarks:

> Well what -- let me tell you this -- is -- is that one of the things that I'll be considering is just how reasonable or unreasonable you are as far as your behavior here I would expect to be better than usual and it's been awful.

(July 22, 2014 Tr. 164-65.)

{¶ 17} M.D. testified after A.E.'s testimony concluded. Like A.E., he admitted that he does not know his children's birthdates and ages. He admitted that he may have missed every drug test in 2014 and 17 of 28 drug tests in 2013. He also admitted to missing visits, but he testified that he would start doing drug tests and showing up for visits when his children start showing up for visits again. M.D. also explained that he lives day-to-day, cannot remember much other than what happened in the very immediate past, cannot keep track of dates, and consequently misses things. He testified that he quit smoking marijuana several years ago, but he admitted that he may have tested positive for it on April 30, 2013.

{¶ 18} In addition to A.E. and M.D., three FCCS caseworkers testified. These were the caseworkers who had been responsible for the permanent custody motion matters on behalf of FCCS from March 2012 until the time of the hearing in July 2014. The first caseworker to testify explained that the case was opened based on FCCS' concerns about A.E.'s mental health and drug use (specifically prescription drug addiction). This caseworker also testified in some detail about the requirements that the court and FCCS had imposed upon A.E. in order that she might regain custody of her children. The major features of these requirements were that A.E. be evaluated for mental health problems and follow all recommendations for treatment; she participate in individual and family counseling; she submit to treatment and counseling for drug issues; she complete all random drug tests; she attend all scheduled visitations with the children and demonstrate parenting skills therein; she maintain stable housing with all working utilities; she obtain and maintain a legal source of income; and that she cooperate with FCCS including signing releases for relevant information concerning her fulfilling these requirements. The caseworker testified that the parents never came close to meeting the requirements

for regaining their children. A.E., in particular, was uncooperative and aggressive, never provided prescription information, failed to complete drug testing and lied about it, would not discuss income information or prove that she had any, and moved without notice. The other caseworkers testified similarly about A.E. at the hearing.

{¶ 19} With respect to M.D., these same caseworkers testified that he also failed to consistently take drug tests or keep visitation appointments. For instance, one caseworker testified that "[M.D.] was to complete an updated psychological, comply with court orders, participate in family counseling, complete random urine screens, provide the caseworker with prescriptions, attend all scheduled visitation, maintain legal source of income, sign releases and have contact with the caseworker." (July 24, 2014 Tr. 180.) She testified that he did not keep in good contact with the caseworker, did not have an updated mental health evaluation, did not participate in counseling, completed less than one-half of his drug screens while she was the caseworker on the case, and appeared at only 22 of 48 scheduled visits. Another caseworker noted that, although M.D. was a nice calm fellow, he mimicked A.E. when she was around and took her lead. The evidence before the trial court was that, because M.D. lived with A.E. and exhibits a pattern of behavior of following her lead and direction, even had M.D. completed the requirements, FCCS could not have returned the children to M.D. while A.E. continued to ignore her requirements. Moreover, another caseworker testified that, due to M.D.'s cognitive deficits, she would have concerns about whether M.D. alone could parent even just G.D., let alone all six children concerned.

{¶ 20} R.G., the foster mother, also testified briefly. She said that she has fostered around 70 children over the course of her lengthy tenure as a foster parent. She has a five-bedroom home with a swimming pool and currently has two adopted children in addition to the six children concerned in this case. R.G. testified that the four eldest children have behavioral issues but are improving. She testified that the two youngest children, H.D.D. and G.D., who have never resided with A.E. or M.D., have no issues. Upon questioning, R.G. acknowledged that she receives $28 per day for each of the six fostered children and will lose income if she adopts them. However, she testified that she intends to adopt them if given the opportunity. Additionally, R.G. testified that if

permitted to adopt the six children concerned, she will not adopt or foster any more children. As she put it, "[w]e're done. We're full." (July 24, 2014 Tr. 152.)

{¶ 21} During the course of the three-day hearing, the parents' attendance was sporadic. They were late by over one hour for the first day of the hearing. When A.E. testified on the first day, at one point she remarked, "I'm not coming tomorrow." (July 22, 2014 Tr. 173.) Though she did attend some of the proceedings the next day, she was frequently absent from the courtroom during the case. On the third day of court, neither parent appeared at all or offered any explanation for their absence. A.E.'s attorney requested a continuance for A.E. to testify on a future date. The trial court never directly ruled on the motion, but the parties offered closing statements and adjourned, and no subsequent testimony was taken.

{¶ 22} On September 30, 2014, the trial court issued an entry in each of the cases granting permanent custody of M.E., S.D., D.D., A.D., H.D.D., and G.D. to FCCS. M.D. and A.E. now appeal those orders.

II. ASSIGNMENTS OF ERROR

{¶ 23} A.E. asserts two assignments of error:

> 1. The Juvenile Court erred by overruling Mother's motion for a continuance.
>
> 2. With respect to both the sufficiency of the evidence and the manifest weight of the evidence, FCCS failed to prove that terminating Mother's parental rights is in the best interests of the children.

{¶ 24} M.D. advances a single assignment of error:

> THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY OF G.D., M.E., S.E., [sic] D.E., [sic] H.D.D., AND A.D. TO FRANKLIN COUNTY CHILDREN SERVICES IS NOT IN THE BEST INTERESTS OF THE CHILDREN AND NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

We address these assignments of error out of order.

III. DISCUSSION

A. M.D.'s Single Assignment of Error and A.E.'s Second Assignment of Error – Whether Granting Permanent Custody to FCCS was in the Best Interests of the Children

{¶ 25} When determining a motion for permanent custody pursuant to R.C. 2151.414(B)(1), a trial court must undertake a two-step analysis.[2] First, the trial court must ascertain whether 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 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.
>
> (b) The child is abandoned.
>
> (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.
>
> (d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

R.C. 2151.414(B)(1)(a) through (d).

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[2] The parties do not address the fact that, at least as to A.E., the trial court may have been obliged to grant permanent custody to FCCS based on R.C. 2151.414(B)(2), 2151.413(D)(2), and 2151.419(A)(2)(e). *See also In re Patrick*, 5th Dist. No 2008 CA 00063, 2008-Ohio-3646 (holding reasonable reunification efforts not required under R.C. 2151.419(A)(2)(e) because of prior involuntary termination of parental rights with respect to half-siblings). This is neither addressed by the parties nor adopted by the trial court as the basis for any of its decisions. We point this out as a possible alternative justification for the trial court's decision, at least as to A.E., but we do not discuss this further because no party raised the issue.

{¶ 26} Once the trial court determines that one of these circumstances applies, the trial court then must find, "by clear and convincing evidence," whether the movant has shown that a grant of permanent custody is in the "best interest of the child." R.C. 2151.414(B)(1). Clear and convincing evidence is that degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the facts to be established. *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. It is more than a mere preponderance of the evidence but does not require proof beyond a reasonable doubt. *Id*.

{¶ 27} Neither A.E. nor M.D. challenge the first part of the analysis set forth in divisions (a) through (d) of R.C. 2151.414(B)(1). Therefore, our review focuses on whether the trial court found that it was "in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody." R.C. 2151.414(B)(1). R.C. 2151.414(D)(1) sets forth relevant factors to consider in determining the best interests of the children:

> (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;
>
> (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.

The additional factors referenced in R.C. 2151.414(D)(1)(e) are:

> (7) The parent has been convicted of or pleaded guilty to one of [a number of offenses apparently inapplicable in this case].
>
> (8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.
>
> (9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.
>
> (10) The parent has abandoned the child.
>
> (11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

R.C. 2151.414(E)(7) through (11).

{¶ 28} In reviewing a trial court's decision on a motion to grant permanent custody, we must affirm a trial court's determination in a permanent custody case, unless it is against the manifest weight of the evidence, understanding that the trial court was required to reach its decision based on evidentiary findings of clear and convincing

evidence. *Walker v. Wright*, 10th Dist. No. 13AP-1003, 2015-Ohio-248, ¶ 19-21; R.C. 2151.414(B)(1). In reaching our decision in *Walker*, we relied on *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, wherein the Supreme Court of Ohio noted that there is no distinction based on burden of proof between civil and criminal cases in applying a single standard on review of "manifest weight of the evidence":

> [T]he Ohio Constitution sets forth certain restrictions on an appellate court that exercises this power. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." Ohio Constitution, Article IV, Section 3(B)(3). Or stated conversely, a court of appeals panel must act unanimously to reverse a jury verdict on the weight of the evidence. *This section of the constitution does not distinguish between criminal and civil jury trials and thus applies to both.* We have held that unanimous panels are needed to reverse judgments based on civil jury verdicts on grounds that they are against the manifest weight of the evidence. *Bryan–Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, 874 N.E.2d 1198. When a trial judge, rather than a jury, has acted as the factfinder in a civil case, however, App.R. 12(C) provides that two of the three appellate judges may reverse the judgment based on the manifest weight of the evidence, but that a judgment may be reversed only once for this reason.

(Emphasis added; footnote deleted.) *Id.* at ¶ 7. In reliance on *Eastley*, we find that the standard of proof as found in R.C. 2151.414(B), "clear and convincing evidence," is not distinguishable in applying a "manifest injustice" standard of appellate review ("it does not matter that the burden of proof differs in criminal and civil cases." *Id.* at ¶ 19.). Accordingly, in the context of a review of a trial court's granting of permanent custody to a public children services agency, where the finding of "best interest of the child" is subject to a clear and convincing standard of proof, weight of the evidence "refers to a greater amount of credible evidence and relates to persuasion." *Id.* In thus reviewing the trial court's decision, we must weigh the evidence (always being mindful of the presumption in favor of the finder of fact and indulging every reasonable intendment and every reasonable presumption in favor of the trial court's judgment and the finding of facts) and all reasonable inferences (if the evidence is susceptible of more than one construction, being bound to give it that interpretation which is consistent with the trial court's findings and judgment and most favorable to sustaining its findings and judgment), consider the

credibility of witnesses and determine whether in resolving evidentiary conflicts, the trial court " 'clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.' " *Id.* at ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001). We thus review the statutory factors defining what is in the "best interest of the child" contained in R.C. 2151.414(D) as decided by the trial court under this enunciated standard of "manifest weight of the evidence."

1. R.C. 2151.414(D)(1)(a) – Relationship Between Children and Biological Parents, Siblings, and Foster Parents

{¶ 29} A.E. argues that it was error for the trial court to have found that the children had a strong relationship with the foster parents and relatively little connection with the A.E. and M.D. M.D. also makes this argument. Both M.D. and A.E. cite testimony for the proposition that there was some bond between them and the children. We note that there was testimony to this effect from a number of witnesses. Even some of the caseworkers and the guardian ad litem admitted that M.D., in particular, seemed to get along well with the children. However, the trial court also had evidence before it from the guardian ad litem (and an in camera meeting with the children) that the children did not want to see their parents and would prefer to be adopted by their foster family. Additionally, with respect to the older children, the caseworkers suggested that the children's interest in their biological parents seemed to be primarily based on food and other minor forms of bribery. On this record, it was not against the manifest weight for the trial court to have concluded by clear and convincing evidence that there was little bond between the children and their parents.

{¶ 30} The guardian ad litem and all three caseworkers each testified that the children share a strong, loving relationship with each other and with their foster parents. Even A.E. and M.D. did not testify or offer evidence in contradiction of this. A.E. admitted in her testimony that D.D. told her once that she wanted to be adopted, but A.E. characterized this as her daughter having "a little smart mouth on her." (July 22, 2014 Tr. 185.) It was not against the manifest weight for the trial court to have concluded by clear and convincing evidence that the children share a strong bond both with each other and their foster parents.

2. R.C. 2151.414(D)(1)(b) – Wishes of the Children

{¶ 31} A.E. and M.D. argue that some of the children were too young to express a wish about with whom they wanted to reside.[3] When the hearing commenced in July 2014, M.E. was 12, S.D. and D.D. were 10, A.D. was 7, H.D.D. was 5, and G.D. was 3. The guardian ad litem said that she had discussed adoption with M.E., S.D., and D.D. and all three indicated that they understood the concept of adoption, wished to be adopted by their foster parents, and did not wish to see their biological parents again. She testified that A.D. and H.D.D. were too immature to have a nuanced understanding of adoption, but they were "very firm" that they did not want to see their biological parents. (July 22, 2014 Tr. 23.) She admitted that she did not have a discussion with G.D. on the topic because G.D. was too young. However, the foster mother testified that when the FCCS transport would arrive to take G.D. to visit her biological parents, G.D. would hide, cry, throw up, and say things like, "No mommy. No." (July 24, 2014 Tr. 144.) In addition, the court conducted an in camera interview with the children and summarized that interaction as follows:

> The foster mother testified and impressed as a wonderful custodian and alternative to the parents. The children's [sic] in-camera interview with the Court, considering the foster mother's testimony and impression, indicate the children's [sic] position and attitude about their parents is very insightful by the children, free of influence of the foster mother.

(Permanent Custody Judgment Entry, 3.)

{¶ 32} While we take judicial notice that young children may have a difficult time appreciating the gravity of expressing a wish to be adopted or to return to one or more biological parents in the context of a custody case, the evidence here was clear and convincing that the evidence did not weigh in A.E.'s or M.D.'s favor. The evidence showed that the children were happier with their foster parents and preferred that living situation.

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[3] A.E. also argues that any alienation between her and her children is the result of FCCS' involvement and their separation from her. This contention is contradicted by a fact implicit in the tone of much of A.E.'s testimony. The evidence shows that A.E. suffers from untreated bipolar disorder and is "dysfunctional, drug addicted" and exhibits a "surly, ill-tempered, malevolent, and disrespectful demeanor." (Case No. 14AP-887, R. 504 Permanent Custody Judgment Entry.) Second, M.D. was subject to the same period of separation from the children, yet the testimony of the caseworkers and the guardian ad litem was consistent and clear that the children feel much more negatively about A.E. than M.D.

Further, as to G.D., who was three years old, the Fourth Appellate District noted in *In re C.T.L.A.*, 4th Dist. No. 13CA24, 2014-Ohio-1550, ¶ 18, 20, the fact that a child under three years old at the time of a custody hearing had expressed affection for the parent did not sufficiently indicate a wish to live with the parent on a permanent basis, particularly in the face of a recommendation by the guardian ad litem against giving custody to the parent. In the case under review, not only was there no evidence that G.D. expressed affection for A.E., but the child showed significant signs of unrest and dysfunction when facing the prospect of leaving her foster mother for visitation with one or more of her parents. The record in this case contains no evidence that any of the children have expressed a desire to live with A.E. and M.D., and it does contain evidence that the children wished to remain with their foster mother.[4] Under such circumstances, it was not against the manifest weight of the evidence for the trial court to have concluded by clear and convincing evidence that this second factor weighed in favor of granting permanent custody to FCCS.

3. R.C. 2151.414(D)(1)(c) – Custodial History

{¶ 33} Both A.E. and M.D. admit that the children had been "in the temporary custody of one or more public children services agencies * * * for twelve or more months of a consecutive twenty-two-month period." R.C. 2151.414(D)(1)(c). Therefore, this factor is not at issue and weighs against A.E.'s and M.D.'s positions.

4. R.C. 2151.414(D)(1)(d) – Whether Legally Secure Permanent Placement Could Have Been Achieved Without a Grant of Permanent Custody to FCCS

{¶ 34} Both A.E. and M.D. admit that their minor children were in need of legally secure placement, but both assert that such placement could have been achieved without granting permanent custody to FCCS. However, neither A.E. nor M.D. explains how and why, on the evidence before it, the trial court erred in concluding that this factor was satisfied.

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[4] M.D. also argues that the testimony at the hearing showed that the children liked him better than A.E. and that FCCS lacks formal protocols concerning when a child can validly refuse to visit their parents. We fail to see the relevance of either of these points in light of the fact that the testimony also showed that the children did not want to visit, let alone live with, either M.D. or A.E. Further, the evidence shows that M.D. seldom acted independently of A.E. concerning the children, and the children were unequivocal about not wanting to be with A.E.

{¶ 35} A.E. admits that there were no relatives with whom the children could be placed. A.E. also admits that the three caseworkers who testified provided evidence that A.E. and M.D.:

- did not comply with FCCS's case-plan requirements of additional psychological testing, counseling, and drug screens,
- failed to submit current prescriptions for their medications,
- refused to submit additional medical-information releases,
- missed many scheduled visits with the children, sometimes without notifying anyone in advance,
- failed to keep them apprised of their location and status,
- are not capable of caring for six children, and
- generally were uncooperative.

(Footnote deleted.) (Appellant A.E.'s Brief, 22-23.) After admitting these facts, A.E. argues only that she and M.D. were not in a position to present rebutting evidence because neither was in attendance on the final day of the hearing when it came time to present their cases. Because we can only conclude that this circumstance was wholly within control of A.E. and M.D., we cannot find some excuse for their failure to present rebutting evidence to outweigh the facts they have admitted to be true.

{¶ 36} We note that both A.E. and M.D. did provide testimony earlier during the hearing (as on cross). A.E. does not explain on appeal how her further testimony would have or could have rebutted the evidence presented by the caseworkers. The only rebutting evidence offered was A.E.'s and M.D.'s testimony. When A.E. and M.D. did not appear for the final day of the hearing, there was no attempt to proffer evidence that A.E. or M.D. would have testified to had they been present to do so. Even without this, on appeal A.E. fails to demonstrate or even argue as to how that error had any affect on this factor.

{¶ 37} M.D. argues somewhat differently. M.D. asserts that FCCS made it difficult for him to comply with the case plan or visit his children, thus thwarting his attempts to

be reunified with his children. Though M.D. does explicitly state so, his brief implies that it is FCCS' fault that he regularly failed to show up for drug testing and visitations. Specifically, he argues that when he and A.E. moved to Zanesville in fall 2012, drug testing and visitations were, for a time, still inconveniently scheduled in Columbus.

{¶ 38} M.D. does not have a job and instead collects disability payments for his subsistence. It would seem that he would therefore have more flexibility of time to meet these FCCS obligations for parenting the children concerned. Further, the record shows that FCCS offered gas cards and public transportation vouchers whenever the parents asked in order to cover the expense of a journey to Columbus to meet their obligations. Third, at the parents' request, the caseworker changed the test location to accommodate their needs, and yet the parents continued to miss drug screenings, missing four out of seven, and they tested positive for drugs on the screens they did take. Fourth, the difficulties M.D. complains about occurred in 2012. In February 2014, A.E. and M.D. moved back to Columbus. Yet by M.D.'s own admission, as of late July 2014, M.D. may not have completed a single one of the many drug tests that he was supposed to have taken in 2014. M.D. also admitted that he had not been coming to visits lately, notwithstanding the fact that he now only lives a few minutes away from the visitation site. Finally, without minimizing the inconvenience of a one-hour commute each way, the stakes for completing or failing to complete drugs tests and visitations were custody of his children. If traveling a few hours a week was too much of a burden for someone with no occupation, even for something so vitally important, how would M.D. have found the time to care for six children? The evidence was clear and convincing that he was unlikely to have reliably done so. The trial court's decision was not against the manifest weight of the evidence with respect to this factor.

5. R.C. 2151.414(D)(1)(e)[5] and (E)(7), (8), and (10) – Not Satisfied

{¶ 39} The trial court found that the factors set forth in R.C. 2151.414(E)(7), (8), and (10) are not satisfied in this case, and the parties do not contest that finding. We find that the trial court did not err with respect to these factors.

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[5] R.C. 2151.414(D)(1)(e) contains four additional factors found in R.C. 2151.414(E)(7) through (10): "Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

6. R.C. 2151.414(D)(1)(e) and (E)(9) – Whether the Parent Has Placed the Child at Substantial Risk of Harm Two or More Times Due to Drug Abuse and Has Rejected or Refused to Further Participate in Treatment Two or More Times

{¶ 40} Both M.D. and A.E. claim that they did not need drug treatment. Both also claim that no evidence was presented that their drug use was a hazard to their children.

{¶ 41} Both A.E. and M.D. frequently missed drug tests and, in the instances when they did test, the tests were frequently positive. A.E. even came to the FCCS offices disoriented and high on one occasion. Both H.D.D. and G.D. were born addicted to drugs and suffered withdrawal symptoms so severe they required hospitalization. *H.D.D.* at ¶ 12. This was not only a "substantial risk" to H.D.D. and G.D., it evolved to substantial harm to them in that they were born addicted to drugs from the drugs that entered their system in utero. R.C. 2151.414(E)(9). For all of M.D.'s and A.E.'s insistence that the drugs they use are prescription, they have not consistently provided evidence of legal prescriptions to FCCS. Moreover, A.E. admitted that she did not engage regularly in prenatal care. We take judicial notice that certain drugs have indications against being used by pregnant women. Taking A.E. at her word that the drugs in her system that were shared with H.D.D. and G.D. were prescription drugs, prenatal care and counseling could have regulated or prevented her use of them such that these two children were not exposed to them in utero. We are aware that cocaine can be prescribed in extremely limited situations and for extremely limited purposes. The evidence shows that A.E. did not consistently provide proof to FCCS of the prescriptions she was taking. One of the drugs H.D.D. had in his system when he was born was cocaine. We find the trial court did not abuse its discretion in finding against A.E. as to this factor involving her drug use and placing her child in a substantial risk of harm more than once concerning it. *Id.*

{¶ 42} Our previous decision in this case listed several discrete occasions when the parents' drug/alcohol use put the children at risk—leaving them unattended in the home, in stores, or in the street. *Id.* at ¶ 4. It is true that no new incidents have occurred since that 2012 decision, but that is not attributable to any reformed behavior by the parents, since none of these children have been in the custody of the parents since 2009.[6]

[6] G.D. was not born until 2011, but she has never been in the biological parents' custody.

{¶ 43} We find that the trial court's finding according to R.C. 2151.414(E)(9) by clear and convincing evidence in favor of FCCS is not against the manifest weight of the evidence.

7. R.C. 2151.414(E)(11) – Prior Involuntary Termination of Parental Rights as to a Sibling of the Children Under Consideration in this Case

{¶ 44} M.D. has only one child other than the six at issue here.[7] The record does not reflect whether M.D. was involuntarily deprived of his parental rights as to that child, but he admitted, "I got a boy that I've hardly ever seen that lives in Kentucky." (July 23, 2014 Tr. 6.) A.E. admits, and the record confirms, that her parental rights have been involuntarily terminated as to more than one of her older children.

{¶ 45} There is a second part of this factor, regarding which neither parent has offered evidence. That is, whether the parent has provided "clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child." R.C. 2151.414(E)(11). Neither A.E. nor M.D. offered evidence that showed that "legally secure permanent placement * * * [could] be achieved without a grant of permanent custody to the [FCCS]." R.C. 2151.414(D)(1)(d).

{¶ 46} The trial court's decision was not against the manifest weight of the evidence when the trial court found by clear and convincing evidence that this factor weighed against A.E. and M.D.

8. Manifest Weight and the Best Interests of the Children

{¶ 47} In examining the evidence in light of these statutory factors, it was not against the manifest weight of the evidence for the trial court to have concluded that the best interests of the children were in staying with their foster parents rather than returning to their biological parents. In affirming the trial court's finding that granting FCCS' motion for permanent custody was in the best interests of the six children concerned, we note that although M.D. and A.E. largely refused to engage in any sort of mental health treatment, the record shows that they were evaluated in 2008. With respect to A.E., Dr. Grady Baccus reported:

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[7] Though, through much of this case, M.D. has sought custody over M.E., M.D. is not the biological father of M.E.

> Present results indicate an individual with mental and emotional instability. [A.E.] is too caught up in her own world of confusion and this interferes with her parenting ability. She seems unable to focus on a problem long enough to resolve it. There is a mixture of chronic irritability and paranoia in [A.E.]'s protocol. She is unable or unwilling to cooperate with treatment goals. [A.E] suffers from significantly dysfunctional thought processes, as well as significant impairment in mood. Her life is extremely chaotic. * * * [A.E.]'s behavior is bizarre and irrational. She is extremely argumentative and hostile. Her grandiosity is blatant and extremely intense. Her presentation during the present evaluation was extremely negative and unproductive, as she was out of control during the whole process of the evaluation, constantly muttering to herself when completing forms and other assessments. [A.E]'s parenting is adversely affected by her confused mental and emotional state. [A.E]'s mental and emotional problems appear to be an indication of bipolar disorder with long episodes of mania.

(R. 135.) With respect to M.D., Dr. Baccus concluded:

> [M.D.] is an individual with borderline intellectual functioning; he has intellectual limitations that can affect his ability to parent. [M.D.] tends to minimize and oversimplify issues and concerns. [M.D.] has difficulty analyzing and interpreting information, he also has difficulty with academic learning. [M.D.] does not have a good understanding of parenting issues. [M.D.] is dependent on the mother of his children, [A.E.,] to determine how to parent their children. [M.D.] has a passive personality and may tend to let others dominate and control him.

(R. 135.)

{¶ 48} From his testimony in the record and the testimony of others, M.D. expresses generally good intentions about the children, but his actions in meeting his parental obligations in order to be awarded custody of his children are not consistent with his stated intentions. Moreover, he has been described as lacking the intelligence, responsibility, and means to take care of six children on his own (separate and apart from A.E.) and, in any case, he remains with A.E. A.E. is described by the trial as "a bi-polar, dysfunctional, drug addicted person with minimal to zero maternal instincts." (Permanent Custody Judgment Entry.) It was not against the manifest weight of the evidence for the trial court to conclude by clear and convincing evidence that the best

interests of the children lay in staying with their foster parents. We find that it was not against the manifest weight of the evidence for the trial court to have granted FCCS' motion for permanent custody. M.D.'s single assignment of error and A.E.'s second assignment of error are therefore overruled.

B. A.E.'s First Assignment of Error – Whether the Trial Court Erred in Failing to Grant A.E. a Continuance

{¶ 49} A.E. further argues that the trial court denied her due process of law in denying her counsel's motion for continuance on the third day of the hearing when she failed to attend. It is well recognized that the right to raise a child is a basic and essential civil right, and thus, before that right can be terminated, a parent must be given every procedural and substantive protection the law allows. *In re Hayes*, 79 Ohio St.3d 46, 48 (1997). A.E. argues in support of her assignment of error that the trial court was required to grant her a continuance and that its failure to do so is a denial of due process. We have previously found that an appellate court "must not reverse the denial of a continuance unless there has been an abuse of discretion." *In re M.S.*, 10th Dist. No. 07AP-529, 2007-Ohio-6506, ¶ 82. Clearly, if we find a denial of due process, there has been an abuse of discretion since no court has discretion to violate the law. *State ex rel. Richardson v. Bd. of Elections of Montgomery Cty.*, 2d Dist. No. 6543 (Oct. 26, 1979) (McBride, P.J., dissenting). We thus examine the law heavily relied upon by A.E. to support her argument. *In re Sears*, 10th Dist. No. 01AP-715 (Jan. 31, 2002).

{¶ 50} The *Sears* case concerned a mother who was unable to attend and testify live in a permanent custody proceeding because she was in prison. Her counsel had not made a motion for her to be transported until the morning of the hearing, and he thereafter failed to object to proceeding in her absence. *Id.* Unlike A.E., the mother in *Sears* was prevented from attending the hearing, even though there was evidence that she wanted to attend. Here, at one point during the proceeding before the trial court, A.E. had stated that she would not return for the next day of the hearing. She cited no reason, and it would not be unreasonable for the trial court to conclude that she had a lack of desire to attend further. There is no evidence in the record that A.E. was prevented from attending as was the parent in *Sears*. A.E.'s counsel offered no explanation for her failure

to appear on the third day of the hearing. Nothing further is offered in her brief to explain why she did not appear in court that day.

{¶ 51} We affirmed the trial court's decision in *Sears*, despite there being a basis for the mother's nonappearance. We found that the trial court had not erred in holding the hearing without the parent's testimony when she was represented by counsel and had offered testimony via deposition. *Id.* A.E. had already testified live at some length on July 22, 2014, albeit under cross-examination. Without explanation or excuse and with the previous statement during the course of the hearing that she did not intend to return, A.E. failed to appear on the third day of the hearing on July 24, 2014. When the court denied her counsel's motion for continuance, it did not deprive her of her right to due process. She failed to exercise it.

{¶ 52} *In re A.P.*, 10th Dist. No. 08AP-186, 2009-Ohio-438, has factual circumstances more analogous to A.E.'s than in *Sears*. In *A.P.*, a parent failed without excuse or explanation to appear for trial. Her counsel requested a continuance on the day of trial, but the continuance was denied. *Id.* at ¶ 4. On appeal, the parent argued that the failure to grant the continuance amounted to a denial of due process. *Id.* We noted that the continuance request was made the same day of trial without any showing of good cause in disregard of Loc.R. 2 of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which provides, "No case will be continued on the day of hearing except for good cause shown." We found that the trial court had not abused its discretion in denying the continuance. *Id.* at ¶ 6, citing *In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622. *See also In re Harris*, 10th Dist. No. 00AP-987 (Mar. 20, 2001) (finding no abuse of discretion in denying a continuance request because request was made in violation of local rule and counsel offered no reason for his client's absence); *In re Young*, 10th Dist. No. 99AP-489 (Dec. 21, 1999) (finding no abuse of discretion in a denial of a continuance when the request was made on the day of trial and there was no reason given as to why the movant was not able to attend the hearing).

{¶ 53} The transcript and other records in this case generally show that A.E. demonstrated an attitude of contempt for FCCS, the courts, and most other people and situations that were not to her liking or with whom or which she did not agree. She presented, as the trial court described it, with a "surly, ill-tempered, malevolent, and

disrespectful demeanor, of which she seem[ed] clueless." (Permanent Custody Judgment Entry.) She was consistently either disruptive of proceedings or absent. While A.E. had the right to be present on the third day of the hearing, she did not appear, having previously expressed a desire not to return. There is no evidence in the record that A.E. was prevented from attending the hearing. We can only conclude from the trial court record that A.E. chose not to exercise her due process rights afforded with the hearing, not that she was denied them. We find that the trial court was well within its discretion to deny A.E.'s motion for continuance. Accordingly, we overrule A.E.'s first assignment of error.

IV. CONCLUSION

{¶ 54} We overrule appellant A.E.'s two assignments of error and appellant M.D.'s single assignment of error and affirm the decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgments affirmed.

BROWN, P.J., and KLATT, J., concur.