

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN RE: :
A.F., et al. : CASE NO. CA2011-12-233
: OPINION
: 6/29/2012
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:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case Nos. JN2007-0551 and JN2007-0552

Traci Combs-Valerio, 240 East State Street, Trenton, Ohio 45067, guardian ad litem

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D.F.

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HENDRICKSON, J.

{¶ 1} Appellant, the biological father of two children, appeals a decision of the Butler
County Juvenile Court, granting permanent custody of the children to a children services
agency. The children's mother has not appealed the court's decision.

{¶ 2} On September 29, 2007, appellant's two daughters, ages seven and five, were removed from their home by Middletown police due to the condition of the home and allegations of drug abuse by their mother and father. The children were initially placed in the home of their maternal great-grandmother. Butler County Children's Services worker Sarah Smith received a referral alleging abuse and neglect of the children. Smith visited the parents' home on October 3, 2007. The home did not have running water, the toilets were backed up, and although there was some progress in the parents' attempts to clean the home, Smith found the home still contained piles of clothes and the living room was disheveled.

{¶ 3} Smith discussed the lack of water with the parents, who said they had only been back in the home for a few months and had previously been living in a hotel. The parents reported that they had been clean for four to five months from cocaine, although they admitted using marijuana in the past week. Smith requested that the parents complete a drug screen by the next day, but the parents did not do so. Because the girls were placed with a relative, Smith allowed the parents additional time to complete the screen. When the drug screen was not completed by October 8, 2007, the agency filed a complaint alleging neglect and dependency.

{¶ 4} A case plan was prepared by the agency that included drug and alcohol assessments by the parents, parenting education to deal with the condition of the home and psychological evaluations. The case plan also required the parents to maintain the home in a clean and safe manner and to make sure the family's financial needs were met. The court found the children dependent on November 26, 2007, and continued custody with the great-grandmother. In May 2008, the children were placed in the temporary custody of their half-brother and his wife, but were eventually placed in foster care in August 2008.

{¶ 5} According to the caseworker, the parents made little progress on the case

plan's requirement to maintain a safe and clean home. The caseworker testified that although the condition of the home improved, there was still no running water. The parents moved out of the home in the summer of 2008, but only lived in their next home for four to five months. The father then moved in with his sister for eight or nine months. The mother lived in a nursing home for a period of time due to health issues, then moved to a one-room efficiency apartment with a common kitchen area shared by all residents. The father moved in with the mother for a period of time. In June 2010, the father was living in Hope House, a homeless shelter. The mother lived with her sister, then moved to a nursing home.

{¶ 6} When the case began, the father was working at Whitt's Machine Shop, but lost his job in the summer of 2008 due to a dispute with his employer over an injury. In the summer of 2009, the father began sporadically working for Empire Motors when work was available. The mother receives \$650 in Social Security income.

{¶ 7} The father completed a drug and alcohol assessment in November 2007. Intensive outpatient treatment was recommended, and completed by father. The mother completed a drug and alcohol assessment, but due to health problems was not able to complete the required treatment. Much of the mother's lack of progress was due to a serious illness that involved spending months in a nursing home and prevented her from addressing her addiction issues. The father completed a parenting class through Development of Living Skills in July 2009 and the mother completed the classes in November 2009.

{¶ 8} At a review hearing in January 2010, the agency indicated it was filing a motion to extend temporary custody, but was also considering filing a motion for permanent custody if no progress was made by the parents because the children were in need of permanency. The agency filed a motion for permanent custody on January 29, 2010.

{¶ 9} On August 17, 2010, the first scheduled day of the hearing, the court granted a continuance due to a change in the guardian ad litem and the father's request for at least six

more weeks to allow him to obtain housing. The court indicated that this was already a three-year-old case, but the court would "bend over backwards" to give the parents an opportunity to reunify. The court granted the father's request for a continuance, but cautioned there would be no further continuances.

{¶ 10} The hearing continued on October 26, 2010, and on that date, the father stated that he now had a job and had recently acquired a residence. The court was reluctant to extend the hearing, noting that the case had been pending three years and it had taken until the last six months for a level of progress to be made. The state indicated there should be no more barriers to reunification and all that was left was for the father to prove that he could maintain the goals set in the case plan and was willing to give him one more chance.

{¶ 11} Although concerned this was a "last ditch" effort, the court agreed to grant the continuance. The agency's requirements were discussed on the record in detail with the father. The father was required to: 1) maintain the residence; 2) repair the home within 30 days of moving in; 3) pay the rent monthly with written verification given to Children Services; 4) have and maintain working utilities in the home; 5) provide weekly employment verification; and 6) obtain beds for the children. The court admonished the father that a March 2011 date was set for the permanent custody hearing, with a review in January 2011, and that if the father had not complied by the time of the January review, the permanent custody hearing would proceed in June.

{¶ 12} The caseworker testified that there were several issues with the house when the father moved in. She stated that the home had not been lived in for a while and the walls needed paint, the kitchen floors needed grout, the refrigerator was "quite smelly," there were holes in walls that needed patched, holes in the floors that needed vent covers, and the stairs to the basement needed a door because they were quite steep. The father was to have the repairs completed by the end of November and the caseworker scheduled a time to view the

progress on the home. A November 30, 2010 date was set, but was rescheduled to December 3 by the father. On that date, the agency found some progress, but the residence sill needed a basement door, still had holes in the bathroom wall, and still needed vents in the floor. The agency visited the home in January 2011, but the vents and basement door were still not fixed. The caseworker called the first week of February to schedule a visit, but the father asked the caseworker to wait until the items were fixed. On February 28, 2011, the caseworker visited the home, and the door and vents were finally fixed.

{¶ 13} The permanent custody hearing proceeded on March 1, 2011, before a magistrate. The father testified regarding the various residences that he has lived in over the course of the case and that he is currently working for a flat rate per day, but the number of days he works varies. He stated that he does not have a driver's license because it was lost for driving without insurance. He stated that he has not paid the fine to have his license reinstated because if he does so, his license will again be revoked due to \$6000 child support arrearage on an older child that he has owed for 12 years. At the hearing, the father produced pay stubs for December, January and February. He testified that his wife gets \$668 in Social Security and he gets \$200 a month in food stamps.

{¶ 14} The mother also testified at the March 1, 2011 hearing. She stated that she is in Stage 4 kidney failure with dialysis three days a week and has hyperthyroid, high blood pressure and heart problems.

{¶ 15} Throughout the case, visitation was supervised, and the parents regularly visited the children and interaction was appropriate. The location for visitation changed from relatives' homes to the agency during the course of the case, and visitation never increased to an unsupervised level.

{¶ 16} The foster mother testified that the children were placed in her home in August 2008 and they are doing well and have bonded with both the immediate and extended family.

The foster parents have adopted nine other children and are willing to adopt these children. The foster mother testified she would be willing to allow some visitation for the biological parents if the children were adopted.

{¶ 17} A case review was held on March 18, 2011, and the agency requested that the father complete a drug screen. The test was positive for cocaine. The father admitted relapsing due to stress. The agency attempted to schedule a new drug and alcohol assessment for the father, but the agency was unable to make contact with the father for a period of time to complete the necessary releases. The caseworker testified that at a March 25, 2011 visit, the father's home was messy, but did not appear to be hazardous. On April 21, 2011, the agency also requested the father to complete drug screens, but were unsuccessful in getting the father to follow through. The caseworker was scheduled to visit the father's home again on April 26, but the visit was cancelled. The caseworker asked the father to call when he was home to reschedule, but the father did not do so.

{¶ 18} The permanent custody hearing continued on May 24, 2011. The caseworker testified that the father has had negative drug screens since May 9, 2011. The caseworker stated that she spoke with the mother on April 29, 2011, and the mother indicated she was not in a position to raise the children and would like to see them adopted by the foster parents. The caseworker also testified that the father was required to provide pay stubs to the agency, but failed to do so and since the previous hearing on March 1, no receipts had been provided. Receipts from December, January and February provided at the previous hearing showed a range of \$40 to \$120 a week.

{¶ 19} The caseworker testified that the agency pursued permanent custody because of the father's recent relapse with an inability of the father to complete a new assessment, because the father failed until the date of the hearing to provide any verification of AA or NA meetings, and because of the history of instability regarding the family's finances and

housing situation. She indicated that the agency is concerned with the father's history which shows a lack of compliance with the court's orders and what needs to be done to get back on track.

{¶ 20} The mother again testified at the May 24, 2011 hearing. She stated that although she did not report it to the caseworker at the time, the father had relapsed on drugs in October 2010 when he left Hope House. She stated that when money came into the house it was immediately spent on drugs and sometimes there was no food in the house due to the drug use. The mother testified that she did not believe the children could safely return to their father.

{¶ 21} The father also testified at the May 24 hearing. He indicated he is able to maintain his \$300 a month rent with help from his wife. He provided pay stubs for March and April and statements from meetings with his pastor regarding his addiction. The father admitted he did not go to AA/NA meetings four times a week as required. He stated that he donates blood twice a week for \$200 a month and that he is looking for other income and jobs. He provided statements on his rent payments, and stated that he did not timely pay the April rent in full because he needed to arrange transportation so he could get money from his wife.

{¶ 22} The children's guardian ad litem submitted a report on June 10, 2011. The guardian ad litem found the father struggled with stability throughout the case and the children were in need of permanency. The guardian recommended that the court award permanent custody to the agency. The court conducted in camera interviews with the children to discuss their wishes and concerns.

{¶ 23} In a decision issued August 29, 2011, the magistrate granted permanent custody of the children to the agency. The father filed objections to the decision and the

court held a hearing on the objections. In a decision dated December 8, 2011, the court overruled the objections and adopted the magistrate's decision.

{¶ 24} Appellant now appeals the court's decision to grant permanent custody of the children to the agency, raising four assignments of error for our review:

THE COURT ERRED IN DENYING FATHER'S ORAL MOTION TO DISMISS PURSUANT TO *IN RE YOUNG CHILDREN AT THE START OF THE PERMANENT CUSTODY TRIAL.*

THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY AND IMPROPER SUMMARY FOR LITIGATION DOCUMENTS OF THE STATE.

THE COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN IT FOUND TERMINATING THE PARENTAL RIGHTS OF APPELLANT TO BE IN THE CHILD'S BEST INTERESTS AND TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE SUCH WAS NOT THE ONLY MEANS OF OBTAINING A LEGALLY SECURE PLACEMENT FOR THE CHILD AND/OR BECAUSE PERMANENT CUSTODY WAS NOT IN THE CHILD'S BEST INTERESTS.

THE COURT'S DECISION AND ORDER OF PERMANENT CUSTODY AND DENIAL OF LEGAL CUSTODY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS AND THE EVIDENCE PRESENTED FAILED TO MEET THE REQUISITE CLEAR AND CONVINCING STANDARD.

I. Application of *In re Young*

{¶ 25} In his first assignment of error, appellant argues that the trial court erred in denying his motion to dismiss the case. At the start of the permanent custody hearing on March 1, 2011, counsel for appellant argued that the court should dismiss the permanent custody case since all of the issues present at the time of the complaint had been remedied because the father had housing, a job and had completed drug treatment. Counsel argued that because the issues had been remedied, the court should no longer have jurisdiction pursuant to *In re Young*, 76 Ohio St.3d 632 (1996). The court denied the motion, stating that

it needed to hear evidence before it could determine if the allegations and arguments were correct.

{¶ 26} The Revised Code limits a grant of temporary custody to a children services agency to a period of two years – an initial period of one year, followed by up to two extensions of six months each. See R.C. 2151.353(F) and R.C. 2141.415(D)(1); *In re D.J.*, 2nd Dist. No. 21666, 2006-Ohio-6304. In *Young*, the Ohio Supreme Court held that a court retains jurisdiction over children after the specified time periods for temporary custody expire if the problems that led to the removal of the children remain unresolved. *Id.* at syllabus. Appellant argues that because the children had been in temporary custody of the agency for over two years and the conditions that led to their removal had been remedied, the court lacked jurisdiction to decide the permanent custody motion.

{¶ 27} First, we find appellant's arguments regarding the lack of jurisdiction after a two-year period of temporary custody do not apply when a motion for permanent custody is filed within the two-year time period and pending at the expiration of this time. R.C. 2151.415(A), which addresses disposition of a child on the expiration of temporary custody, specifically excludes cases in which a motion for permanent custody must be filed on the basis that a child has been in the temporary custody of an agency for 12 of 22 months. Thus, no motion regarding disposition at the end of temporary custody is required when the statute requires a permanent custody motion to be filed because a child has been in agency custody for 12 of 22 months, thus implying continued jurisdiction while the later motion is decided.

{¶ 28} Second, despite appellant's arguments to the contrary, the conditions that led to the removal of the children had not been fully remedied at the time of the hearing. On August 17, 2010, the time the permanent custody hearing was initially scheduled to begin, the father requested a continuance to obtain housing. While the father had obtained housing by the time the hearing actually began on March 1, 2011, he had only fixed problems with the

house a few days prior to this hearing and had failed to comply with the requirements discussed at the previous hearing. Moreover, the father's ability to maintain, not simply obtain, housing was an issue that had yet to be resolved. Likewise, although the father had obtained employment, the issue of whether the family's income was sufficient to meet their needs and the ability to maintain the employment were still unresolved issues. Accordingly, we find that the court did not err in denying appellant's motion to dismiss.

II. Admission of Social Summaries

{¶ 29} In his second assignment of error, appellant argues that the court erred in admitting social summaries prepared by the agency. Appellant contends these documents contained prejudicial hearsay that could not be disregarded by the trial court.

{¶ 30} The agency submitted social summaries that had been prepared by the caseworker during the pendency of this case. The caseworker testified that she prepared the summaries as part of her duties as a caseworker and the summaries are maintained in the family's case file at the agency. She indicated the purpose of the summaries is to give an update as far as placement, visitation and case plan services. The agency moved for the admission of the documents as business records.

{¶ 31} Counsel for appellant objected to the admission of the summaries on the basis that they were not business records and contain hearsay. The trial court admitted the summaries and stated that it was aware of the hearsay nature of some of the information in the documents and would not consider any hearsay contained in the documents.

{¶ 32} It is well-established that the admission or exclusion of evidence rests within the sound discretion of the trial court. *In re K.W. and J.W.*, 12th Dist. Nos. CA2003-11-289, CA2003-11-291, 2004-Ohio-5406. In this case, the court recognized that the social summaries contained hearsay evidence and stated that it would only consider references based on the caseworker's own observation and would not consider any information in the

summaries the case worker received from other sources.

{¶ 33} Although appellant argues that there is no indication "what the court considered or did not consider" and that there is no way to "unring the bell," it is well-established that as the fact-finder, a trial court is presumed to have considered only properly admissible evidence unless the record affirmatively demonstrates otherwise. *In re W.R.* 12th Dist. No CA2011-08-016; *In re D.G.*, 9th Dist. No. 08-CA-0062, 2009-Ohio-2080. As the trial court determined that the summaries contained hearsay and specifically stated it would disregard this hearsay, we find appellant's argument without merit. Appellant's second assignment of error is overruled.

III. Best Interest, Manifest Weight and Sufficiency of Evidence

{¶ 34} In appellant's third and fourth assignments of error, he challenges the court's best interest findings. Appellant argues that the court's grant of permanent custody was error because the father was bonded with the children, he completed case plan services and remedied the conditions that led to the removal, and the children want to return home.

{¶ 35} Before a natural parent's constitutionally protected liberty interest in the care and custody of his child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388 (1982). An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, ¶ 16 (7th Dist.). A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520 (12th Dist.).

{¶ 36} Pursuant to R.C. 2151.414(B)(1), a court may terminate parental rights and

award permanent custody to a children services agency if it makes findings pursuant to a two-part test. First, the court must find that the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D). Second, the court must find that any of the following apply: the child is abandoned; the child is orphaned; the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period; or where the preceding three factors do not apply, the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re E.B.*, 12th Dist. Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶ 22.

{¶ 37} The juvenile court found by clear and convincing evidence, and appellant does not dispute, that the children have been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period as of the date the agency filed the permanent custody motion. This provision balances the importance of reuniting children with their parents against a speedy resolution of the custody of the children, limiting the time spent in foster care. *In re E.B.*, 12th Dist. No. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122; *In re K.G.*, 9th Dist. Nos. 03CA0066, 03CA0067, 2004-Ohio-1421. With this finding, the agency is not required to prove that children cannot be returned to their parents within a reasonable time. *E.B.* at ¶20. Instead the agency must only show that granting permanent custody is in the best interest of the children. *Id.*

{¶ 38} As discussed above, appellant argues for various reasons that the juvenile court erred in finding that an award of permanent custody of the children to BCDJFS is in the children's best interest. R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing:

[T]he 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;
- (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 * * *;
- (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.

{¶ 39} With respect to R.C. 2151.414 (D)(1)(a), the juvenile court found that the children were initially placed with their great-grandmother, then an adult half-brother and his wife, and then placed in the temporary custody of the agency on August 14, 2008. The court found that since the removal of the children from the home, the mother and father have maintained regular and consistent visitation with the children. The court found the parents are bonded to the children, and the children are bonded to the parents. The court also found that the children are bonded to the foster parents. The foster family is willing to adopt the girls and indicated they would be willing to have the children maintain contact with their biological family. The court further found the children are involved in programs at the YMCA and church they attend and have friends at school and in the neighborhood and are doing well in school.

{¶ 40} With respect to R.C. 2151.414(D)(1)(b), the juvenile court indicated that it held an in camera interview with the girls and that it had taken the wishes and concerns expressed by the children into consideration. The court further found that the children's guardian ad litem recommended that the court award permanent custody to the agency.

{¶ 41} In considering R.C. 2151.414(D)(1)(c), the juvenile court reviewed the custodial

history of the children and determined that they have been in the temporary custody of the agency for 12 of 22 months. The court indicated the children were removed from their home in October 2007 and had been out of their home for a period of 26 consecutive months before the motion for permanent custody was filed.

{¶ 42} With respect to R.C. 2151.414 (D)(1)(d), the juvenile court found that the testimony of the witnesses, the exhibits, the custodial history of the children and the prior entries make it clear that there is a need for a legally secure permanent placement for the children. The court indicated that the children were almost eight years old and five and one-half years old when they were removed from the home. The court found that the children were now approximately 12 and nine and one-half years old. The court further considered that the children had been in foster care since August 2008, a period of three years.

{¶ 43} In addition, the court considered whether granting permanent custody was the only way the need for a legally secure placement could be achieved. The court took note of the girls' custodial history and indicated that the mother has had serious health concerns since the start of the case and her condition has deteriorated over the course of this action. The court found that the mother understood the children could not be returned to her and that the mother preferred that they be adopted rather than return them to the father due to his "crack habit." The court found the mother was not a viable option for permanency of the children.

{¶ 44} The court also found that no other family members have come forward to seek custody of the girls and that a Permanent Planned Living Arrangement was not a viable option because the agency had not filed a motion and the statutory factors have not been met.

{¶ 45} The court then determined that the only remaining alternative to awarding permanent custody was the father. The court indicated that the agency had concerns about

the father regarding drug abuse, stable and clean housing, and stable income. The court reviewed the father's progress in the area of drug abuse. The court found that the father completed the assessment and was screened for drugs on a random basis with positive tests in November 2007 and also from February 2008 to May 2009 when he tested positive for cocaine and/or marijuana or had diluted samples. The court further found that from July 2009 to June 2010, the tests were negative. No evidence was presented concerning drug screenings from June 2010 thru February 2011. However, in March 2011 father again tested positive for cocaine. The court found that until the relapse, the father had successfully addressed the agency's concerns regarding his drug abuse.

{¶ 46} The court reviewed the father's progress with Development of Living Skills, finding that the father did well in classes, with the exception of money management and developing personal resources, with DLS finding the father was unable to demonstrate effective money management because of his inability to maintain a steady income needed to cover the basic needs of the children. The court reviewed the father's employment and found that the father may be eligible for some type of financial assistance if the children were returned, but no details were presented to the court. The court concluded that it was not certain what the father's income would be if the children were placed with him.

{¶ 47} The court also found that the father had lived in six different residences since the start of the case. One of those residences was a homeless shelter where he lived for four months and another was with his sister because he could not afford rent anywhere else. The court found that the father had been in his current residence since October 2010 and the father testified that he is current on his rent payments. The court further found that the rent was paid in part by the mother's Social Security income and due to the mother's health problems, the future of those payments were uncertain. The court found that throughout the case, the father has been only marginally employed and has not had to pay rent and utilities

from his own earnings alone. Based on a review of the evidence, the court concluded that the father's ability to maintain his current residence is questionable and that after almost four years from filing the complaint in the case, the father failed to resolve the issues of stable housing and income. The court further found that over the unusually long course of the proceeding, the father has consistently demonstrated either a lack of understanding of the importance of financial stability and safe and stable housing or an inability to provide that stability.

{¶ 48} Finally, the court determined that no evidence relating to any of the factors in R.C. 2151.414(E)(7) to (11) was presented in this case.

{¶ 49} Based on a review of the best interest factors, the court concluded that given the history of this case for over four years, the father's continued inability to provide stable housing and income for himself and the children, it was unlikely the father will be able to achieve the stability needed by the children. The court found the progress recently made by the father was extremely tenuous and also considered the father's recent relapse on drugs with a lifelong addiction. The court found that if the children were reunited with their father and needed to be subsequently removed due to the father's inability to maintain his residence, income or suffer a drug relapse, the effects on the children would be devastating.

{¶ 50} The court found the foster family has provided the children stability for three years, that they are bonded to the children, are meeting their needs and are willing to have the children maintain contact with their biological family. Based on all of the evidence, the court found by clear and convincing evidence that it was in the best interest of the children to grant permanent custody to the agency.

{¶ 51} We have carefully and thoroughly reviewed the evidence in this case and find that the trial court's determination regarding the best interest of the children is supported by sufficient evidence and is not against the manifest weight of the evidence. At the time of the

magistrate's decision, the children had been out of their home for four years. The court gave the father numerous opportunities to correct the problems that led to the removal of the children and to prove he could provide and maintain the stability needed by the children.

{¶ 52} The court extended temporary custody and granted continuances of the permanent custody hearing to give the father more time to establish stability. However, despite the time involved and the numerous opportunities to prove himself, the father struggled with stability throughout the case and was never able to completely stabilize and maintain a safe home environment for the children. Appellant's third and fourth assignments of error are overruled.

{¶ 53} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.