

biological father of L.B., and Ian Taylor is father to A.T. In August 2009, emergency custody of L.B. and A.T. was granted to Fayette County Children Services (FCCS) when Mother and Taylor were arrested and incarcerated on drug charges. FCCS filed a complaint, alleging that the children were abused, neglected, and dependent. A guardian ad litem (GAL) was appointed to represent the children.

{¶ 3} On December 8, 2009, the GAL filed a report recommending that FCCS maintain custody, and the trial court held an adjudication hearing. During the hearing, the state, on behalf of FCCS, agreed to dismiss the counts regarding neglect and abuse. Mother and Father entered stipulations that L.B. was dependent, and Mother and Taylor stipulated that A.T. was dependent. The trial court granted temporary custody of the children to FCCS, and L.B. was placed with Father's mother, L.B.'s paternal grandmother, and her husband. A.T. was placed with Taylor's father, A.T.'s paternal grandfather, Jeff Taylor (Jeff).

{¶ 4} However, and after the children were placed in their respective homes, FCCS performed background checks on the grandparents and learned that the husband of Father's mother (L.B.'s paternal stepgrandfather) had been the perpetrator in two prior substantiated sexual abuse cases. FCCS removed L.B. from the home of Father's mother, and placed the child with Jeff, who has no biological relation to L.B.

{¶ 5} On June 21, 2010, Mother gave birth to I.T., her second child with Taylor. I.T. was also adjudicated a dependent child when police arrested Mother and Taylor after a domestic dispute, which also involved narcotics. FCCS placed I.T. in Jeff's care.

{¶ 6} On December 17, 2010, FCCS filed a motion to modify the prior disposition by granting legal custody of L.B., A.T., and I.T. to Jeff. Thereafter, Father moved for custody of L.B. The juvenile court declined to grant legal custody of the children to Jeff because Mother, Father, and Taylor were making strides to complete the case plans that FCCS developed to facilitate reunification. The juvenile court also denied Father's custody motion,

and granted temporary custody of the children to Jeff. Since that time, all three children have done very well in Jeff's care.

{¶ 7} While the juvenile court denied Father's custody motion, he received supervised visitation with L.B., with FCCS providing the supervision. At some point, the visitation was terminated because Father failed to appear at several visitations, which upset L.B. However, in a subsequent court order, the juvenile court reinstated supervised visitation, with Father's mother (L.B.'s paternal grandmother) supervising the visits. The subsequent visits supervised by Father's mother were positive.

{¶ 8} FCCS filed additional motions regarding visitation, and eventually filed another motion asking the juvenile court to reconsider granting legal custody to Jeff. An additional hearing was held, and Jeff received legal custody of A.T. and I.T. However, and because Father did not receive proper notice of the hearing, the juvenile court ordered a separate hearing specific to L.B. Father received notice, and renewed his own motion for custody.

{¶ 9} The trial court held a hearing on the motions on March 6, 2012. At the conclusion of that hearing, the trial court granted legal custody of L.B. to Jeff and denied Father's motion for custody. Father now appeals the trial court's decision, raising the following assignment of error.

{¶ 10} THE TRIAL COURT ERRED BY GRANTING LEGAL CUSTODY TO A THIRD PARTY NON-PARENT BASED UPON INSUFFICIENT EVIDENCE AND AGAINST THE BEST INTEREST OF THE MINOR CHILD.

{¶ 11} Father argues in his assignment of error that the trial court erred in granting legal custody to Jeff, who is not related to L.B., and by denying his own motion for custody.

{¶ 12} Unlike permanent custody cases that divest a parent of all parental rights, legal custody proceedings merely vest in the custodian the right to have physical care and control subject to any residual parental rights, privileges, and responsibilities. *In re C.R.*, 108 Ohio

St.3d 369, 2006-Ohio-1191, ¶ 14-15. According to R.C. 2151.415(A)(3), a public children services agency that has been given temporary custody of a child because that child has been adjudicated abused, neglected, or dependent, can move the court to grant legal custody of the child to "a relative or other interested individual." The juvenile court "may award legal custody to a nonparent upon a demonstration by a preponderance of the evidence that granting legal custody to the nonparent is in the child's best interest." *In re C.L.T.*, 12th Dist. No. CA2011-04-073, 2012-Ohio-427, ¶ 10. A preponderance of the evidence constitutes "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.*, 12th Dist. No. CA2006-09-223, 2007-Ohio-4646, ¶ 26.

{¶ 13} R.C. 2151.23 sets forth the original jurisdiction of juvenile courts, and states that "the juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 and 3127.01 to 3127.53 of the Revised Code." R.C. 2151.23(F)(1). "When making the allocation of the parental rights and responsibilities for the care of the children * * * in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children." R.C. 3109.04(B)(1). Also, and according to R.C. 2151.42(A), "at any hearing in which a court is asked to modify or terminate an order of disposition issued under section 2151.353, 2151.415, or 2151.417 of the Revised Code, the court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child."

{¶ 14} In order to determine the best interest of a child, R.C. 3109.04(F)(1) requires the juvenile court to consider all relevant factors. *In re M.M.*, 12th Dist. No. CA2010-12-034, 2011-Ohio-3913, ¶ 9. These factors include, but are not limited to: the wishes of the parents, the child's interaction and interrelationship with his parents, siblings, and other persons who

may significantly affect the child's best interest, the child's adjustment to home, school and community, the mental and physical health of all persons involved, and the likelihood that the caregiver would honor and facilitate or had honored and facilitated visitation and parenting time. *In re A.L.H.*, 12th Dist. No. CA2010-02-004, 2010-Ohio-5425, ¶ 9. "While 'blood relationship' and 'family unity' are factors to consider when determining a child's best interest, neither one is controlling." *In re S.K.G.*, 12th Dist. No. CA2008-11-105, 2009-Ohio-4673, ¶ 12. Instead, a court must focus on the child's best interest when determining which party should have legal custody.

{¶ 15} Trial courts are entitled to broad discretion in custody proceedings. *Davis v. Flickinger*, 77 Ohio St.3d 415 (1997), paragraph one of the syllabus. As "custody issues are some of the most difficult and agonizing decisions a trial judge must make," the judge must be given "wide latitude in considering all the evidence" and the decision must not be reversed absent an abuse of discretion. *Id.* at 418. The term abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 16} We presume that the trial court's findings are correct because the trial court 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. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Therefore, deferential review in a child custody determination is especially crucial "where there may be much evident in the parties' demeanor and attitude that does *not* translate to the record well." (Emphasis sic.) *Flickinger*, 77 Ohio St.3d at 419.

{¶ 17} After reviewing the record, we cannot say that the juvenile court abused its discretion in granting legal custody of L.B. to Jeff. The juvenile court considered the following evidence regarding the best interest factors, and its decision in weighing those factors in

favor of Jeff is supported by the preponderance of the evidence.

{¶ 18} The trial court considered the first factor, "the wishes of the child's parents regarding the child's care." The record indicates that while Father obviously wants custody of L.B., Mother stated her desire that Jeff maintain custody of the child. Mother, who was incarcerated at the time of the hearing, testified that she wanted Jeff to have custody of L.B. (1) because the child does well in Jeff's care, (2) so that the child could be with her half-siblings, A.T. and I.T., and (3) so that L.B. could stay in the same school district. The court did not interview the child in camera, and therefore could not consider the second factor regarding the child's wishes.

{¶ 19} The court also heard evidence regarding the third factor, "the child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest." The record indicates that L.B. is close to her half-siblings, A.T. and I.T. The three children have grown up together, and have become bonded to each other. The juvenile court found that L.B. is also "very bonded" to Jeff, and the two have a close relationship despite their lack of blood relation.

{¶ 20} Regarding the fourth factor, "the child's adjustment to the child's home, school, and community," the record indicates that L.B. has adjusted well to living with Jeff, is thriving in Jeff's community, and does well in school. The juvenile court specifically found that L.B. is "doing well" in Jeff's care.

{¶ 21} The fifth factor required the court to consider "the mental and physical health of all persons involved in the situation." While Father expressed some concerns about L.B.'s physical appearance during his visits with her, the court heard testimony from FCCS that Father's concerns were unfounded and that the child was always appropriately dressed and well-cared for.

{¶ 22} The court also heard testimony regarding the sixth factor, "the parent more

likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights." The record indicates that Jeff has complied with the visitation schedule regarding Father and L.B. However, Father's visitation had been canceled at one point because he missed several visits, which caused L.B. great upset. There was also testimony from FCCS that Father was somewhat inappropriate during past visits by being critical of the child's dress and questioning her too intently about her life with Jeff. However, when FCCS confronted Father with his behavior, the visits immediately preceding the custody hearing showed marked improvement.

{¶ 23} The court also heard evidence regarding the seventh factor, "whether either parent has failed to make any child support payments." The court heard evidence that Father had four children as of the date of the hearing, and that he is behind in his child support for L.B. and well as one of his other children. At the time of the hearing, Father earned approximately \$500 per month, and did not have any definite job opportunities.

{¶ 24} The parties did not present any evidence regarding the final factors, whether either party had been convicted of any crime that resulted in the child being adjudicated abused or neglected, whether either party denied visitation in the past, or whether either party had plans to move from the state. The court did, however, hear evidence regarding other factors it took into consideration when making its decision.

{¶ 25} The court determined that L.B. has been in Jeff's care since 2010, and that the child needs permanency in her life. The juvenile court heard evidence that the child is confused and somewhat torn between Jeff and Father, and that she needs to have a definite indication of where she will reside and who will have custody of her in the future.

{¶ 26} After reviewing the record, the court's decision to grant legal custody to a nonparent was supported by the preponderance of the evidence and we cannot say that the juvenile court abused its discretion by granting Jeff legal custody instead of Father. As

previously stated, the juvenile court has been presiding over this matter for several years, and has given serious consideration to what custody determination is in the child's best interests. The court had been presented with multiple custody motions, and gave all involved parties ample opportunity to demonstrate their fitness to raise L.B. as evidenced by denying the first motion to award Jeff legal custody of the child. However, as time continued to pass, the court considered the dire need for L.B. to have stability in her life. The grant of legal custody to Jeff did not divest Father his ability to parent, and instead, Father was granted more liberal visitation rights with the child. Moreover, Father maintains the opportunity to regain custody should circumstances in his life change to the degree that it would be in L.B.'s best interest to be placed in his custody. However, and as related to the most recent custody motion, the preponderance of the evidence supports Jeff having legal custody of L.B. Having found no abuse of discretion, Father's assignment of error is overruled.

{¶ 27} Judgment affirmed.

HENDRICKSON, P.J., and BRESSLER, J., concur.

Bressler, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.