



the biological father of B.K., the younger child, and has been involved with the mother of both children since around the time H.P. was 15 months old. During the course of the permanent custody hearing, the mother's attorney indicated that the mother wished to consent to the permanent custody motion and she has not appealed the court's decision.

{¶13} The Children's Services division of the Preble County Department of Job and Family services first became involved with the family on July 31, 2008 when the agency received a referral that two young children residing at the Budget Inn were left without adult supervision. The agency also received a police report that indicated officers sent to the motel found appellant and the mother intoxicated and the mother reported appellant hit her with a beer can.

{¶14} The agency investigated the situation and talked with appellant, who reported that the family was living at the motel while he worked on the motel roof. He indicated the mother left about a week before and he did not know where she was. The agency discussed supervision of the children and other matters and conducted follow-up visits over the next few weeks. During this time, the mother returned to the area and appellant informed the agency that the mother is an alcoholic who drinks every day. During a subsequent follow-up visit, H.P. was discovered playing in the parking lot unsupervised.

{¶15} The agency also discovered through investigation that the family had an ongoing history with Clark County Children Services and that the mother had been charged with child endangering after driving intoxicated with H.P. in the car. On August 20, 2008, a caseworker visited the motel and was informed by appellant that the mother had been intoxicated the night before and left with the children. The caseworker found the mother and children at a domestic violence shelter, where it was reported that the

mother arrived intoxicated and the children were filthy. The agency then requested temporary emergency custody of the children, which the court granted.

{¶16} A complaint alleging the children were neglected and dependent was filed on August 21, 2008. A case plan was prepared on September 26, 2008 that addressed parenting, housing and income, alcohol assessments and employment. At a hearing on December 10, 2008, the parents admitted to the facts in the complaint after it was agreed that a phrase regarding the mother calling 911 due to the domestic violence of the father would be deleted from the complaint. At this hearing, the court explained to the parents the consequences of admitting to the facts in the complaint. The court also explained that the parents would have to follow the case plan and that if the parents failed to work on the case plan, the agency would have to ask for permanent custody of the children. The court found the children neglected and dependent and continued temporary custody with the agency.

{¶17} Appellant completed a parenting class on February 3, 2009, but on April 17, 2009, he was arrested for public intoxication. His visitation with the children was suspended until review of the case. Appellant completed an assessment for domestic violence on May 28, 2009 and began an educational program to address this issue. In May/June 2009 appellant began efforts toward addressing his alcohol problem with New Beginnings.

{¶18} On July 8, 2009, the agency filed a request for an extension of temporary custody. The request indicated that the parents had not demonstrated sufficient commitment to the case plan but the agency wanted to allow a brief additional period of time for the parents to demonstrate progress toward the case plan. The motion also indicated that the agency was considering permanent custody if the parents did not take advantage of the opportunities to allow reunification.

{¶9} At a hearing on July 28, 2009, appellant's counsel indicated he was in favor of the extension. Counsel stated that he understood that the agency was "getting tired of treading water" and he had communicated to appellant that there was "essentially a sixty day window" for appellant to address a significant hurdle or it was likely that the agency would file a motion for permanent custody of the children. The court granted the extension and directly addressed appellant, discussing the probability of permanent custody if the parents' efforts were not redirected toward reunification. The court indicated that there was a compelling reason to justify forbearance of the filing of a permanent custody motion at the time due to the possibility of reunification if the parents could complete the case plan and demonstrate stability.

{¶10} At the July 28, 2009 hearing the court reinstated appellant's visitation on the condition of a clean urine test, but visitation was again suspended on August 11, 2009 after appellant tested positive for alcohol. Appellant was discharged from the New Beginnings alcohol treatment program on October 9, 2009 for testing positive for alcohol.

{¶11} Thereafter, the agency filed a motion for permanent custody on October 21, 2009. An agency worker indicated that the motion was filed due to a lack of commitment on the part of the parents. She stated that there was a lack of motivation to make the children a priority and the agency did not see improvement.

{¶12} Appellant completed the domestic violence education program at the Forensic Diagnostic Center on December 3, 2009. On recommendations of his therapist in this program, appellant entered an alcohol treatment program at the Center for Individual Family Services on December 29, 2009 which involved twelve sessions once a week for two hours. On April 8, 2010, during the course of the permanent custody hearings, appellant completed the substance abuse education class.

{¶13} On March 5, 2010, appellant filed a motion for legal custody of H.P. Hearings began on the motion for permanent custody on March 15, 2010. At that hearing, appellant indicated that he had not been paying support, but brought \$50 he was going to pay towards support that day. He was found in contempt on March 19, 2010 for failing to pay support as ordered.

{¶14} At the hearing, appellant testified that he has not had a drink since September 2009 and that he attends Alcoholics Anonymous meetings regularly. He was diagnosed with cancer for a large growth on his arm that he left untreated. Appellant's AA sponsor and a co-worker testified that appellant is doing well in his attempt to maintain sobriety.

{¶15} Appellant claimed that he worked regularly before he was diagnosed and began treatment for cancer, but the agency caseworker stated that when asked, the information appellant provided on employment was vague and largely undocumented. He stated that he planned to begin working again once he was cleared to do so by his physician. Appellant also testified that he is living in a home owned by his brother and does not pay rent.

{¶16} Evidence was presented that the mother did not make any progress on the case plan and continues to drink. Appellant stated that she is an alcoholic and that they parted ways due to her drinking. He claimed that he and the mother are no longer together and that he would keep the children away from her and signed a second lease with his brother as himself as the sole tenant, taking her name off the lease. However, evidence was presented to show that appellant told the agency in late 2009 and January and February of 2010 that he did not know where she was residing, but pictures showed the mother leaving his house on February 18, 2010. Appellant admitted that his relationship with the mother was "on and off again." Evidence was also presented that

the mother told agency workers that their plan was for her to get treatment once appellant had the children back.

{¶17} At the hearings, evidence established that appellant has a criminal record including offenses of violence, theft, non-support of dependents, and alcohol related offenses and that he has other children with whom he has no relationship and for whom he does not provide financial support. Appellant also does not have a driver's license and had to rely on others for transportation.

{¶18} The Court Appointed Special Advocate (CASA) for the children recommended that the court grant permanent custody to the agency. She testified that the parents have each indicated that they intend to get back together and the "huge delay" in seeking case plan services was a great concern because some of the programs take a while to complete and the parents had serious issues to address with the biggest being alcohol abuse, instability and domestic violence. The CASA indicated that she was concerned with the fragility of appellant's sobriety and that the parents would likely find themselves in the same situation in a short time. The CASA explained that while she commended appellant for his recent sobriety, there was concern with his ability to maintain sobriety when adding additional stressors such as the children and the mother's problems. She also testified that based on the parents' history, she did not think a court order for the mother to stay away from appellant if the children were returned to him would be of any effect.

{¶19} After consideration of the testimony and exhibits submitted at the hearing, on June 30, 2010, the court granted the motion for permanent custody. Appellant now appeals the trial court's decision to grant permanent custody of the children to the agency and raises two assignments of error for our review:

{¶20} "THE COURT ABUSED ITS DISCRETION IN AWARDING PERMANENT CUSTODY OF THE CHILDREN TO THE AGENCY."

{¶21} "THE AGENCY VIOLATED [THE FATHER'S] DUE PROCESS RIGHTS."

{¶22} In his first assignment of error, appellant argues that the court "was arbitrary and capricious in its best interest analysis by refusing to credit [the father] as having substantially complied with the case plan requirements" and that the court ignored the standard that permanent custody is a last resort and hurried to a decision in spite of strong evidence of substantial compliance.

{¶23} 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* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. 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. As an appellate court reviewing a decision granting permanent custody, we neither weigh the evidence nor assess the credibility of the witnesses, but instead determine whether there is sufficient clear and convincing evidence to support the juvenile court's decision. *In re S.F.T.*, Butler App. Nos. CA2010-02-043, CA2010-02-044, CA2010-02-045, CA2010-02-046, 2010-Ohio-3706.

{¶24} 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.*, Warren App. Nos. CA2009-10-139, CA2009-11-146, 2010-Ohio-1122, ¶22.

{¶25} The juvenile court found by clear and convincing evidence, and appellant does not dispute, that the children have been in the temporary custody of the agency for 12 months of a consecutive 22-month period as of the date of the permanent custody motion. However, appellant does dispute the juvenile court's finding that granting permanent custody of the children to the agency is in the children's best interest.

{¶26} R.C. 2151.414(D)(1) provides that in considering the best interest of a child in a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to the following:

{¶27} "(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;

{¶28} "(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;

{¶29} "(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 ending on or after March 18, 1999;

{¶30} "(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;

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

{¶32} As mentioned above, appellant argues that the court erred in its best interest analysis because it did not credit the father with substantial compliance of the case plan and did not consider permanent custody only as a last resort.

{¶33} In its best interest analysis, the court found that the children were not bonded to their mother, who through counsel consented to the permanent custody motion. The court also found that while the children were too young to express their personal wishes, the CASA recommended permanent custody. The court found that the children have been in the same foster home since their initial placement with the agency where they have flourished and their foster parents indicated a desire to adopt the children.

{¶34} The court further found that the children's need for a legally secure placement cannot be met in their current situation. Although the parents were estranged, and the mother abandoned the children, she indicated she would become involved again with the children when appellant gained custody. The court indicated it would not terminate the mother's parental rights and give custody to the father because it was impractical to try to keep the mother away on a permanent basis with a grant of custody to the father. The court also found appellant's alcoholism, financial situation and employment do not present the stability the children need.

{¶35} As mentioned above, the case plan addressed issues involving appellant's need for alcohol treatment, parenting classes, stable housing and income, and

employment. In addressing appellant's progress on the case plan, the court noted that appellant is an alcoholic who did not quit drinking until September 2009, but he tested positive for alcohol in October 2009, although appellant denied that he was drinking. The court found that appellant was discharged from an earlier alcohol treatment program and did not complete this requirement until six months after the permanent custody motion was filed. The court also found that appellant was less than honest regarding his continued involvement with the mother which affected his credibility and that this continued involvement raises issues regarding appellant's commitment to sobriety. The court found that while appellant is making progress in AA and his witnesses spoke well of him on this issue, the witnesses "only knew what [appellant] wanted them to know."

**{¶136}** The court also found that appellant quit work in the fall of 2009 when he was diagnosed with cancer and that his testimony about his income and earnings left the court questioning appellant's credibility and his ability to support himself or the children. The court also noted that appellant has "lived off" his half-brother and mother who have provided him with a place to live and money to spend. The court further stated that neither the half-brother nor mother testified regarding their willingness to continue this support.

**{¶137}** The court found that appellant "addressed most of the basic elements of the case plan [,] however some not until after the filing of the motion for permanent custody." Although appellant makes various factual and fairness arguments regarding his progress on the case plan and the court's best interest finding, the evidence supports the court's determinations. While appellant made some progress on the case plan, he did not address all of the issues of concern. Appellant testified that he is sober; however, there were questions regarding his ability to remain sober, particularly in light

of his continued involvement with the mother. In addition, most of the progress occurred after the motion for permanent custody was filed, casting doubt on appellant's commitment to the children. He completed classes for his alcohol addiction only after the permanent custody hearings began.

**{¶38}** Appellant also argues that the court ignored the standard that permanent custody is a last resort and instead hurried to a decision in spite of strong evidence of substantial compliance by appellant. However, the evidence does not support this assertion. Appellant had over 12 months from the time the children were removed to work toward reunification, but did very little during this time and only began to show some measure of progress towards the case plan goals after the permanent custody motion was filed. Most notably, appellant is an alcoholic who did not quit drinking until over a year after the children were initially removed. In addition, as mentioned above, issues still remain regarding his sobriety, housing, employment, income and continued involvement with the mother.

**{¶39}** Appellant further contends that the court did not make the required finding that granting permanent custody is the only way the child's need for a legally secure placement can be achieved as discussed in a case from this court. See *In re G.N.*, 176 Ohio App.3d 236, 2008-Ohio-1796. However, since the time of that decision, the Ohio Supreme Court accepted a conflict between *In re G.N.* and a case from the Second District Court of Appeals, *In re M.M.*, 121 Ohio St.3d 1407, 2009-Ohio-805, and determined that a court is not required to determine that granting permanent custody is the only way a child's need for a legally secure placement can be achieved. *In re M.M.*, 122 Ohio St.3d 541, 2009-Ohio-4048.

{¶40} Accordingly, we find sufficient credible evidence exists to support the trial court's determination that granting permanent custody to the agency is in the best interest of the children. Appellant's first assignment of error is overruled.

{¶41} In his second assignment of error, appellant argues that the trial court violated his due process rights by imposing additional requirements for reunification beyond the case plan. He argues that the court found he fulfilled the basic terms of the case plan, but the court added additional requirements and required that the plan be completed within a time frame.

{¶42} The Ohio Supreme Court has explained that the "12 of 22" provisions balance the importance of reuniting a child with the parents against the importance of a speedy resolution of the custody of the child. *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, ¶22. Once children have been in agency custody for 12 of 22 months, the agency need no longer prove that the children cannot be returned to the parents within a reasonable time. *Id* at ¶21. "Through the '12 of 22' provisions in the permanent custody statutes, the legislature provides parents with 12 months to work towards reunification before an agency can institute a permanent custody action \*\*\*." *Id* at ¶22. In fact, some courts have determined that the "12 of 22" is a presumption that a parent is unfit, based on the passage of time. *In re K.G.*, Wayne App. Nos. 03CA0066, 03CA0067, 03CA0068, 2004-Ohio-1421.

{¶43} The court addressed the fact that appellant waited largely until after the permanent custody motion was filed to work on the case plan goals, but considered this an indication of his level of commitment and relevant to reunification. There is no evidence that the court imposed an additional strict time requirement on appellant or added any other requirements to reunification. Moreover, the court discussed the time issue with appellant on several occasions, admonishing him that if there was not

considerable progress on the case plan at the 12-month mark, the agency would be required to file for permanent custody. See R.C. 2151.413(D)(1) (agency shall file for permanent custody if a child has been in agency custody for 12 of 22 months unless certain exceptions are met).

{¶44} The trial court properly considered appellant's progress on the case plan and did not add an additional time requirement to the case plan. Accordingly, appellant's second assignment of error is overruled.

{¶45} Judgment affirmed.

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