[Cite as *In re D.T.*, 2015-Ohio-2333.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	
D.T.,	)	
MINOR CHILD OF CONNIE McKITRICK,	)	CASE NO. 14 JE 29
	)	
PLAINTIFF-APPELLANT,	)	OPINION
	)	
V.	)	
	)	
BRITTANY TURNER AND UNKNOWN FATHER,	)	
	)	
DEFENDANTS-APPELLEES,	)	
	)	
PAUL W. MOORE,	)	
	)	
INTERVENOR-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Juvenile Division of Jefferson County, Ohio Case No. 2014CU00008
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellant	Attorney John J. Mascio 325 N. Fourth Street Steubenville, Ohio 43952
For Intervenor-Appellee	Attorney Shawn M. Blake 4110 Sunset Blvd. Steubenville, Ohio 43952
JUDGES: Hon. Gene Donofrio Hon. Mary DeGenaro Hon. Carol Ann Robb	

Dated: June 11, 2015

[Cite as *In re D.T.*, 2015-Ohio-2333.]
DONOFRIO, P.J.

{¶1} Appellant, Connie McKitrick, appeals from a Jefferson County Common Pleas Court Juvenile Division decision granting legal custody of her great-nephew to appellee, Paul Moore.

{¶2} Brittany T. gave birth to D.T. on May 15, 2012. Brittany tested positive for opiates and cocaine prior to delivery. The Jefferson County Department of Job and Family Services (JCDJFS) obtained temporary custody of the child immediately after his birth due to Brittany's drug use during her pregnancy. D.T.'s father is unknown.

{¶3} When D.T. was released from the hospital two weeks after his birth, he was placed with foster parent appellee, Paul Moore. The child has remained in appellee's care since that time.

{¶4} On January 21, 2014, just ten days before the matter was set for a permanent custody hearing, appellant filed a Petition for Allocation of Parental Rights and Responsibilities seeking custody of D.T. Appellant is D.T.'s maternal great aunt. Brittany filed a consent to custody, agreeing that the court should place her son in appellant's care.

{¶5} Subsequently, appellee filed a motion to intervene, which the trial court granted. Appellee also filed a motion for legal custody of D.T.

{¶6} A magistrate held a hearing on the parties' competing motions. The magistrate noted that all of those involved agreed Brittany was not capable of caring for D.T. The magistrate further found the evidence demonstrated that both appellant and appellee would properly care for D.T. and would make suitable custodians. The magistrate framed the issue in this case as: "[W]hat should be given more weight in the case: the blood relationship between the child and [appellant] or the bond that has been established between the child and the foster father[?]"

{¶7} The magistrate found that D.T. was placed with appellee at the age of two weeks old and has remained with appellee throughout the duration of his 21 months. He found that appellee and D.T. had bonded and that, until recently, appellee was the only family D.T. has known. The magistrate further noted that

appellant did not meet D.T. until January 14, 2014, when she visited the child with Brittany. A week later, appellant filed for custody of D.T.

{¶8} The magistrate also acknowledged testimony regarding an incident of abuse that allegedly occurred at appellee's home between D.T. and an eight-year-old foster child who was also living with appellee at the time.

{¶9} The magistrate further noted that the JCDJFS caseworker testified it was the agency's position that a relative trumps a foster parent when the custody of a child is in question. Therefore, JCDFS believed it was in D.T.'s best interest for the court to grant his custody to appellant.

{¶10} Nonetheless, the magistrate found it would be in D.T.'s overwhelming best interest to remain in appellee's care. He noted that D.T. has a significant and crucial bond with appellee and the breaking of that bond would be detrimental to D.T. The magistrate further pointed out that appellee is the only family D.T. has ever known and appellee's home is the only home D.T. has ever known. Therefore, the magistrate found the bond between D.T. and appellee outweighed the blood relationship between D.T. and appellant. Thus, the magistrate recommended that the trial court deny appellant's motion and grant appellee's motion for legal custody.

{¶11} Appellant filed numerous objections to the magistrate's decision.

{¶12} The trial court overruled the objections. It entered a judgment finding it was in D.T.'s best interest to remain in appellee's care. It noted that appellee is the only family D.T. has ever known and appellee's home is the only home D.T. has ever known. Therefore, the trial court denied appellant's motion and granted appellee's motion for legal custody. The court designated appellee as D.T.'s legal custodian.

{¶13} Appellant filed a timely notice of appeal on August 21, 2014.

{¶14} Appellant raises four assignments of error.

{¶15} Appellant's first assignment of error states:

> THE TRIAL COURT COMMITTED PLAIN ERROR IN EXCLUDING CHILDREN'S SERVICES BOARD FROM THE CHILD

CUSTODY PROCEEDINGS AND AT THE VERY LEAST ABUSED ITS DISCRETION IN THIS REGARD.

{¶16} Appellant argues the magistrate erred in excluding JCDJFS from the proceedings even though it had legal custody of D.T. at the time. She contends that by excluding JCDJFS, no one represented D.T. or his interests. Appellant asserts the trial court should have made JCDJFS a party to the proceedings. Appellant acknowledges that she failed to object to this alleged error in the trial court. She urges this was a plain error, but argues at the least, it was an abuse of discretion.

{¶17} Appellant failed to raise this error at the hearing or in her objections to the magistrate's decision. Therefore, she has waived all but plain error. Plain error is one in which but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶18} The plain error doctrine is not favored in the appeal of civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at the syllabus. Appellate courts may apply it "only in the extremely rare case involving exceptional circumstances" where the error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Id*.

{¶19} As appellee points out, although JCDJFS was not a party to this action and its counsel was not permitted to question the witnesses, Jennifer Yasho, JCDJFS's employee and D.T.'s caseworker, testified extensively. She testified that appellee has met all of his responsibilities in caring for D.T. and has done everything that JCDJFS has asked of him. (Tr. 168-170). Nonetheless, she opined it was in D.T.'s best interest for the court to grant his custody to appellant because then he would be with his biological family. (Tr. 188-189). She testified that JCDJFS always looks towards family members when placing a child. (Tr. 192-193). Therefore, even though JCDJFS was excluded from the hearing as a party, the agency's position was made clear to the court through Yasho's testimony.

{¶20} Appellant has failed to demonstrate that the outcome of the proceedings would have been different had the court allowed JCDJFS to be a party. The agency's position was made known to the court through Yasho's testimony. Appellant does not explain how allowing JCDJFS to be a party to the proceedings would have changed the outcome of the hearing. Thus, plain error does not exist here.

{¶21} Accordingly, appellant's first assignment of error is without merit.

{¶22} Appellant's second assignment of error states:

> THE TRIAL COURT COMMITTED PLAIN ERROR IN AWARDING LEGAL CUSTODY TO APPELLEE MOORE ABSENT A STATEMENT OF UNDERSTANDING AS REQUIRED BY R.C. 2151.353(A)(3) AND AT THE VERY LEAST ABUSED ITS DISCRETION.

{¶23} Here appellant contends the trial court committed plain error in awarding legal custody to appellee when appellee failed to sign a statement of understanding for legal custody pursuant to R.C. 2151.353(A)(3).

{¶24} R.C. 2151.353(A)(3) provides:

> (A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:
>
> * * *
>
> (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings. A person identified in a complaint or motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person

identified signs a statement of understanding for legal custody that contains at least the following provisions:

(a) That it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child;

(b) That the person understands that legal custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian for the child until the child reaches the age of majority. Responsibility as custodian for the child shall continue beyond the age of majority if, at the time the child reaches the age of majority, the child is pursuing a diploma granted by the board of education or other governing authority, successful completion of the curriculum of any high school, successful completion of an individualized education program developed for the student by any high school, or an age and schooling certificate. Responsibility beyond the age of majority shall terminate when the child ceases to continuously pursue such an education, completes such an education, or is excused from such an education under standards adopted by the state board of education, whichever occurs first.

(c) That the parents of the child have residual parental rights, privileges, and responsibilities, including, but not limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support;

(d) That the person understands that the person must be present in court for the dispositional hearing in order to affirm the person's intention to become legal custodian, to affirm that the person understands the effect of the custodianship before the court, and to answer any questions that the court or any parties to the case may have.

{¶25} Appellant failed to raise this issue in the trial court when it could have easily been corrected. Therefore, appellant has once again waived all but plain error.

{¶26} Other appellate courts have held that the failure to file an R.C. 2151.353(A)(3) affidavit is not plain error when the party seeking legal custody testifies at the hearing about their intentions to provide a home for the child and their testimony demonstrates they understand the commitment they are making as legal custodians. *In re W.A.*, 5th Dist. No. CT2013-0002, 2013-Ohio-3444, ¶¶15-16; *In re A.V.O.*, 9th Dist. Nos. 11CA010115, 11CA010116, 11CA010117, 11CA010118, 2012-Ohio-4092, ¶¶8-10. Appellee met these requirements.

{¶27} Appellee appeared at the hearing and testified at length. He testified regarding everything he has done to care for D.T. since D.T. came into his care, such as feeding him, bathing him, changing his diapers, taking him to doctors' appointments, and getting up with him in the middle of the night. (Tr. 371). He also testified about taking D.T. to church and to play with other children. (Tr. 368). And appellee testified about reading to him and getting him ready to go to preschool. (Tr. 351-352, 373).

{¶28} Appellee also testified as to caring for D.T. into the future too. He testified that D.T. will continue to see a neurologist for some time (Tr. 361). He also stated that he believes it is important for D.T. to know who his family is, so appellee will continue to allow appellant's family to visit with D.T. (Tr. 386). And he stated that he is a foster-to-adopt parent, so he was hopeful that he would get to adopt D.T. (Tr. 376, 387-388). He also had a plan in place where his niece would care for D.T. in the event something happened to him. (Tr. 41).

{¶29} This testimony demonstrates appellee understands the commitment required of a legal custodian. Consequently, there was no plain error in this case due to the failure to file an R.C. 2151.353(A)(3) affidavit.

{¶30} Accordingly, appellant's second assignment of error is without merit.

{¶31} Appellant's third assignment of error states:

THE TRIAL COURT COMMITTED PLAIN ERROR AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY ALLOCATE PARENTAL RIGHTS AND RESPONSIBILITIES BY FAILING TO MAKE ORDERS WITH RESPECT TO CHILD SUPPORT, HEALTHCARE AND THE DEPENDENCY EXEMPTION AND BY FAILING TO MAKE PROVISIONS FOR CONTINUED VISITATION BETWEEN APPELLANT AND THE MINOR CHILD.

{¶32} In this assignment of error, appellant asserts the trial court erred in failing to put on an order of child support. She also argues the trial court erred in failing to grant her visitation with D.T. Appellant acknowledges, however, that she currently visits with D.T. once a week for five hours.

{¶33} As to the child support issue, only those parties who can demonstrate a present interest in the subject matter of the litigation and who have been prejudiced by the court's decision have standing to file an appeal. *Still v. Hayman*, 153 Ohio App.3d 487, 2003-Ohio-4113, 794 N.E.2d 751, ¶26. In this case, appellant cannot demonstrate a present interest in child support because she does not have custody of D.T. Likewise, she was not prejudiced by the fact that the trial court did not include a child support order in its judgment ruling on D.T.'s legal custody. Thus, appellant does not have standing on appeal to raise an issue regarding child support.

{¶34} Moreover, this was an action dealing with two separate motions for legal custody, one by a great aunt and the other by a foster parent. Neither of these parties have any obligation to pay child support.

{¶35} As to the visitation issue, R.C. 3109.12(A) provides that if a child is born to an unmarried woman, the woman's parents and any relative of the woman may file a complaint requesting the court to grant them reasonable visitation with the child.

{¶36} Appellant, however, did not file a motion for visitation with D.T. in this case. She only filed a petition for allocation of parental rights and responsibilities. Thus, visitation was not at issue.

{¶37} Even so, after the court entered its judgment in this case, the parties agreed that appellant would have visitation with D.T. on Saturdays from 1:00 p.m. to 6:00 p.m. The court put on an order to this effect.

{¶38} Accordingly, appellant's third assignment of error is without merit.

{¶39} Appellant's fourth assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LEGAL CUSTODY OF THE MINOR CHILD TO APPELLEE, A NON RELATIVE OF THE MINOR CHILD.

{¶40} Appellant argues in her final assignment of error that the trial court focused solely on the bond between appellee and D.T. She claims the court minimized the fact that while D.T. was in appellee's care, he may have been sexually assaulted by another foster child living at appellee's home. Appellant also points out that JCDJFS favored placing D.T. with her because she is a blood relative. She acknowledges that blood relations are not controlling but notes that relative placement is generally favored over non-relative placement. Appellant contends the trial court failed to consider all of the applicable statutory best interest factors.

{¶41} On appeal, we will not reverse an award of legal custody absent an abuse of discretion. *In re Nice*, 141 Ohio App.3d 445, 455, 751 N.E.2d 552 (7th Dist.2001). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). If the court's decision on the child's best interest regarding legal custody is not supported by competent, credible evidence, then it is unreasonable and we may reverse it. *Nice*, 141 Ohio App.3d at 455. The burden of proof is not clear and convincing evidence, as it is in a permanent custody proceeding, but is merely preponderance of the evidence. *Id*; R.C. 2151.414(B)(1) and (E); Juv.R. 29(E).

{¶42} When a juvenile court makes a determination of legal custody under 2151.353, it must do so in accordance with R.C. 3109.04. *In re Poling*, 64 Ohio St.

3d 211, 1992-Ohio-144, 594 N.E.2d 589, paragraph two of the syllabus. This means the court should consider all factors relevant to the best interest of the child, including any relevant factors found in R.C. 3109.04(F). *In re D.T.*, 5th Dist. No. 2013CA00252, 2014-Ohio-2495, ¶21.

{¶43} The relevant R.C. 3109.04(F)(1) factors are:

> (a) The wishes of the child's parents regarding the child's care;
>
> * * *
>
> (c) 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;
>
> (d) The child's adjustment to the child's home, school, and community;
>
> (e) The mental and physical health of all persons involved in the situation;
>
> (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
>
> * * *
>
> (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; * * *; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;
>
> (i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court[.]

{¶44} "While 'blood relationship' and 'family unity' (i.e., a preference for a family member) are factors to consider when determining a child's best interest, neither one is controlling." *In re D.S.*, 2d Dist. No. 2013 CA 51, 2014-Ohio-2444, ¶9, citing *In re S.K.G.*, 12th Dist. CA2008-11-105, 2009-Ohio-4673, ¶12.

{¶45} In this case, the parties and the mother agreed that the mother is not capable of caring for D.T. at this time. The mother testified that she signed a consent for appellant to have custody of D.T. (Tr. 72). She stated that even though she cannot care for D.T., she wants him to know his family. (Tr. 74-75).

{¶46} D.T.'s pediatrician testified D.T. was born addicted to drugs. (Tr. 61). She also stated appellee has brought D.T. to all of his appointments, including travelling to Akron, Ohio and Wheeling, West Virginia so D.T. could see specialists. (Tr. 65). She further testified appellee did well administering and weaning D.T. from the phenobarbital, asked appropriate questions, and was an attentive caregiver. (Tr. 65).

{¶47} Both appellant and appellee presented evidence that they would provide a good home for D.T.

{¶48} Appellant's friend testified that appellant is a good Christian mother to her six children and her home is stable and fun. (Tr. 91). She also testified that when she observed D.T. at a visit to appellant's home, he appeared comfortable as if he was one of appellant's children. (Tr. 95). Appellant's pastor testified that appellant has a good family that comes to church every week and is actively involved in the church. (Tr. 112). Appellant's husband testified that he supports appellant's motion for custody. (Tr. 267). He stated that appellant is a good mother and knows how to raise children. (Tr. 267). He testified that when D.T. visits at their home D.T. is happy and loving and acts like he is one of their children. (Tr. 267).

{¶49} Appellant testified that when D.T. came to visit her home, she was surprised that he was calm and comfortable with her family. (Tr. 219). She stated they all played with him with different toys and balls. (Tr. 219-220). Appellant also testified that she works from home. (Tr. 194-197). And she stated that of her six

children, four still live at home. (Tr. 197). They are ages 26, 19, 17, and 11. (Tr. 197).

{¶50} Appellant stated that she did not initially seek custody of D.T. because she was concerned about violence from the alleged father. (Tr. 204). But in May 2013, she contacted JCDJFS about obtaining custody of D.T. (Tr. 206-207). Appellant and her family then submitted to fingerprinting and background checks. (Tr. 208). Appellant stated that initially Brittany did not want her to have custody of D.T. but in early December 2013, Brittany texted her and asked if she was still willing to take D.T. (Tr. 209; Pt. Ex. A). Appellant then filled out the necessary paperwork and she and Brittany made arrangements to visit D.T. (Tr. 212-213). She visited with D.T. on January 14, 2014. (Tr. 216). JCDJFS conducted a home study a few days later. (Tr. 216).

{¶51} Appellee's niece testified that she has observed a "loving father-son relationship" between appellee and D.T. (Tr. 318). Appellee's sister-in-law testified that D.T. and appellee have an "emotional bond" and that to take D.T. away from appellee would be to take him away from the only father he has ever known. (Tr. 326). Appellee's sisters testified that appellee has raised D.T. up to this point and believed it would be in D.T.'s best interest to remain with appellee. (Tr. 329-330, 332).

{¶52} Appellee testified that he has been the only parent D.T. has ever known. (Tr. 371). He stated he has done everything to care for him. (Tr. 371). Appellee testified that he loves D.T. and he believes it is in D.T.'s best interest to remain with him. (Tr. 373).

{¶53} Jennifer Yasho, the JCDJFS caseworker, also testified. She made numerous visits to appellee's house. Yasho testified that appellee took good care of D.T. and she did not have any concerns about him. (Tr. 141). She stated that he has met all of his responsibilities as a foster parent. (Tr. 168-170).

{¶54} Yasho testified appellant first approached her in May 2013, about getting custody of D.T. (Tr. 143). She stated it took until December 2013, to get the

results of the fingerprints and background checks because they had to be "mailed out." (Tr. 144). When she conducted the home study of appellant's house, she found it to be very appropriate with a sufficient amount of space. (Tr. 146).

{¶55} Yasho further testified that she observed the first visit between appellant and D.T. and that after D.T. warmed up, he was smiling and playing. (Tr. 150). She stated that, ten days later, when D.T. went with appellant for a weekend visit, he was "clingy" to appellee. (Tr. 152). But Yasho stated that recently when appellee brought D.T. to visit appellant, D.T. smiled at appellant and put his hands up to go with her. (Tr. 152).

{¶56} Yasho went on to testify about her opinion and the agency's position. She opined that it was in D.T.'s best interest to be with his family. (Tr. 188). She stated that the blood relationship between D.T. and appellant trumped the fact that D.T. had resided with appellee for most of his life. (Tr. 188-189, 193). Yasho stated that she believed D.T.'s best interest was to live with a relative instead of a foster parent who had raised him for two years. (Tr. 189). She stated that JCDJFS looks to place children with family. (Tr. 193).

{¶57} Pam Petrilla testified on appellee's behalf. She is a counselor with experience working with children and families. (Tr. 305). She is also the executive director of the Jefferson County Prevention and Recovery Board. (Tr. 304). Additionally, she is appellee's friend and appellee is a member of the Jefferson County Prevention and Recovery Board. (Tr. 307). The trial court qualified Petrilla as an expert in this case. (Tr. 306). Appellant had no objections.

{¶58} Petrilla stated that she has seen appellee and D.T. every few weeks since D.T. was two weeks old. (Tr. 307). She stated that D.T. shows his love for appellee and appellee is devoted to D.T. (Tr. 307). Petrilla opined she had concern for a child being removed from his home at the developmental age of two years. (Tr. 308). She believed it would break the trust D.T. had built and it could affect him for the rest of his life. (Tr. 308). She opined that the trust D.T. had built in appellee and

his home outweighed a blood relationship. (Tr. 309-310). Thus, Petrilla stated in her professional opinion, it was in D.T.'s best interest to remain with appellee. (Tr. 310).

{¶59} The parties also presented testimony about an incident that occurred at appellee's house. Appellee testified that in December 2013, he was changing D.T.'s diaper in the T.V. room when he realized he did not have any baby wipes. (Tr. 362). He went to another room to retrieve the wipes, leaving D.T. in the T.V. room with an eight-year foster child who was also staying at appellee's house at the time. (Tr. 362). Appellee testified that when he returned with the wipes 40 second later, he found the eight-year-old with his pants down and when the eight-year-old saw appellee he ran into the bathroom. (Tr. 362). Appellee immediately called JCDJFS to report the incident. (Tr. 362). The other foster child was removed from appellee's home the next day. (Tr. 363).

{¶60} Yasho testified that when the eight-year-old was interviewed, he stated that he put his penis in D.T.'s butt. (Tr. 156). Based on this statement, JCDJFS found this was a matter of lack of supervision, which constituted a finding of neglect on appellee's part. (Tr. 162). Yasho stated that she contacted Detective Erik Dervis to interview appellee a week after the incident but the interview did not take place until January 31, 2014. (Tr. 159).

{¶61} Det. Dervis testified that he interviewed appellee regarding the incident. He stated appellee was "fantastic, willing to give information, wasn't holding anything back." (Tr. 122). Det. Dervis testified nothing criminal occurred and he would not classify appellee's conduct as neglectful. (Tr. 123).

{¶62} Given all of the above evidence, the court appropriately concluded that both parties would provide suitable, stable homes for D.T. The evidence was clear that appellee has provided good care for D.T. and that the two are very bonded to each other. The evidence was also clear that appellant has done everything required of her to obtain custody and that she and her family would provide a loving home for D.T. Thus, as the magistrate observed, this case turned on which factor is to be

given more weight – the bond between appellee and D.T. or the blood relationship between appellant and D.T.

{¶63} In developing a case plan, the children's services agency and the court shall be guided by the following general priorities:

> (1) A child who is residing with or can be placed with the child's parents within a reasonable time should remain in their legal custody even if an order of protective supervision is required for a reasonable period of time;
>
> (2) If both parents of the child have abandoned the child, have relinquished custody of the child, have become incapable of supporting or caring for the child even with reasonable assistance, or have a detrimental effect on the health, safety, and best interest of the child, the child should be placed in the legal custody of a suitable member of the child's extended family;
>
> (3) If a child described in division (H)(2) of this section has no suitable member of the child's extended family to accept legal custody, the child should be placed in the legal custody of a suitable nonrelative who shall be made a party to the proceedings after being given legal custody of the child[.]

R.C. 2151.412(H)(1)(2)(3).

{¶64} Regarding these priorities, this court has stated:

> Ohio's courts have consistently recognized that the language in R.C. 2151.412(G) [now R.C. 2151.412(H)] is precatory, not mandatory. *In re Hiatt* (1993), 86 Ohio App.3d 716, 722, 621 N.E.2d 1222; *In re Rollinson* (April 27, 1998), 5th Dist. Nos. 97 CA 00243, 97 CA 00206; *In re Dixon* (Nov. 29, 1991), 6th Dist. No. L-91-021. As the court in *Hiatt* stated, R.C. 2151.412 provides, "rather oxymoronic 'mandatory

> guidelines." *Id*. at 722, 621 N.E.2d 1222. Thus, this statute does not command the juvenile court to act in a specific manner. Instead, it sets out general, discretionary priorities to guide the court. So while the guidelines may be helpful to the juvenile court, it is not obligated to follow them. Therefore, the juvenile court's judgment is not in error simply because the court chose not to follow one of these suggested guidelines.

In re Halstead, 7th Dist. No. 04 CO 37, 2005-Ohio-403, ¶39.

{¶65} Other districts have cited to *Halstead* in affirming judgments granting legal custody to foster parents over blood relatives. See, *In re S.K.G*., 12th Dist. No. CA2008-11-105, 2009-Ohio-4673, ¶15 ("fact that appellant is biologically related to the child while appellees are not was only one factor the juvenile court had to consider in making the custody decision. However, it was not the determining factor. There was ample evidence to show that appellees took the child in and have provided a nice, stable environment for the child. Consequently, we find no abuse of discretion in the juvenile court's decision to grant appellees custody of the child."); *In Matter of A.V*., 10th Dist. No.05AP-789, 2006-Ohio-3149, ¶19 (trial court did not abuse its discretion by finding that considerations related to stability and continuity of care were overriding factors, especially, where the child had been raised since birth by the same foster family that sought legal custody, and notwithstanding the fact that both parties seeking legal custody were suitable custodians); *In re Patterson*, 1st Dist. No. C-090311, 2010-Ohio-766, ¶16 ("No preference exists for family members, other than parents, in custody awards. R.C. 2151.412(G) does state that if parents are not suitable custodians for their children, extended family members are next in priority. But courts have held that this statute applies only to case plans, not custody determinations, and even then, its provisions are not mandatory.")

{¶66} This case presents a close call. The evidence makes clear that both parties would love and care for D.T. and provide him with a stable home. And while we may have reached a different decision, given that our standard of review is abuse

of discretion and because there is ample evidence to support the trial court's judgment, we must conclude that the trial court did not abuse its discretion in granting legal custody of D.T. to appellee.

{¶67} Accordingly, appellant's fourth assignment of error is without merit.

{¶68} For the reasons stated above, the trial court's judgment is hereby affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.