[Cite as *In re A.M.*, 2018-Ohio-2072.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN THE MATTER OF: :

A.M., : CASE NO. 17CA43

:

Adjudicated Dependent Child. : DECISION AND JUDGMENT ENTRY

APPEARANCES:

Krista Gieske, Cincinnati, Ohio, for Appellant.

Merry M. Saunders, Assistant Athens County Prosecuting Attorney, Athens, Ohio, for Appellee.

CIVIL CASE FROM COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 5-16-18

Abele, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court, Juvenile Division, judgment that granted Athens County Children Services (ACCS), appellee herein, permanent custody of two-year-old A.M. L.B., the child's biological mother and appellant herein, raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE JUVENILE COURT'S DECISION AWARDING PERMANENT CUSTODY OF A.M. TO ATHENS COUNTY CHILDREN SERVICES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "MOTHER WAS DENIED HER CONSTITUTIONAL RIGHT

> TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO PURSUE ALTERNATIVE RELIEF BY MOVING THE JUVENILE COURT FOR AN ORDER SETTING FORTH A VISITATION SCHEDULE AFTER ALL PARTIES INDICATED THEIR SUPPORT FOR SUCH AN ORDER ON THE RECORD AT THE HEARING."

{¶ 2} Appellant and B.M. are the child's biological parents. Appellant has mental health and substance abuse issues. B.M., who is currently incarcerated and will remain so until June 2019, is not involved in this appeal. A.M. suffers from Bardet-Biedl syndrome, a genetic condition that carries a host of medical issues and that requires extensive medical care.

{¶ 3} In September 2016, appellee learned that appellant left the then one-year-old child in an acquaintance's care and that appellant did not give the acquaintance a way to contact her. Appellant gave the acquaintance a baby bag that contained baby food and a burnt spoon with what appeared to be blood on it.

{¶ 4} After appellee received this report, a caseworker met with appellant. The caseworker reported that appellant appeared to be falling asleep, but appellant denied taking any drugs. Appellant informed the caseworker that the child has scoliosis, extra digits, and enlarged kidneys. Appellant also stated "that she had worms coming out of her eyes and that A.M. also had worms coming out of his back." The caseworker noted that appellant's face, neck, and arms were covered with "open, bleeding sores" and that the child also had sores and scratches on his back.[1] The caseworker advised appellant to go to the emergency room.

{¶ 5} At the emergency room, appellant took a drug test. The drug test returned positive for opiates and amphetamines.

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[1] Later testimony revealed that appellant suffered from some type of skin condition and that appellant's doctors had difficulty pinpointing the cause of her condition.

{¶ 6} Appellee filed a complaint that alleged the child is a dependent and neglected child. The trial court subsequently adjudicated the child dependent and placed the child in appellee's temporary custody. The court dismissed the neglect allegation.

{¶ 7} On July 20, 2017, appellee filed a motion to modify the disposition to permanent custody. Appellee alleged that the child cannot be placed with either parent within a reasonable time, or should not be placed with either parent, and that placing the child in appellee's permanent custody is in the child's best interest.

{¶ 8} At the permanent custody hearing, Teresa Mills testified that on March 16, 2017 the child first entered her care and has remained in her home since that time. Mills stated that when the child first entered her home, he exhibited developmental delays. She explained that the child "would just lay on his back and he would roll different places." Mills related that the child could sit up with assistance, but if he started to fall, he could not, and still cannot, catch himself. Mills indicated that the child receives physical, as well as occupational, therapy once per week and that Help Me Grow provides assistance twice per month. Mills stated that the child has not started speech therapy, but she is looking into it.

{¶ 9} Mills testified that the child also has other medical issues that require extensive care. Mills explained that the child initially had weekly appointments at Nationwide Children's Hospital in Columbus, but now, it varies between one to two appointments per month. Mills stated that a complex care team at Nationwide Children's monitors the child.

{¶ 10} Mills related that she quit her job in order to stay home and provide constant care for the child. Mills indicated that she developed a routine to follow with the child in order to help address his issues. After waking up, she works on his legs by setting him up in a gait

trainer. She explained that the child cannot get around without the trainer. Mills stated that the child has started to eat more food on his own, but still cannot use a spoon. Mills testified that she has "to do everything for him cause he can't."

{¶ 11} Mills indicated that she and her husband are interested in caring for the child "long-term." Mills stated that her daughter and A.M. get along "awesome." Mills explained that appellant appears excited to see the child during visits, but that the child is "kind of stand offish when it comes to different people and stuff."

{¶ 12} Mills related that she informed appellant that if appellant remains drug-free and keeps her mental health issues under control, then Mills would not "have a problem with [the child] going to visit [appellant], going out to eat, and to the park and different places." Mills further explained that in August 2017, appellee indicated that it would allow appellant to visit with the child off-site. Appellee indicated that Mills and appellant should arrange visits off-site, but appellee later advised Mills that they had to wait until the court changed visitations.

{¶ 13} Stephanie Russell, appellant's case manager at Integrated Services, testified that she has been working with appellant since December 2016. Russell explained that she has helped appellant with nearly all of her transportation needs to ensure that she attended her visits with the child, her psychiatric appointments, her counseling, and her substance abuse treatment. Russell indicated that appellant sometimes walks to appointments, but Russell otherwise provides appellant with all of her transportation needs.

{¶ 14} Russell related that she also helped appellant obtain housing and that appellant has independently maintained that housing. Russell stated that the mother receives housing assistance, food stamps, and cash assistance and that Russell believes that appellant's apartment

would be physically appropriate for the child, as long as the child had assistance.

{¶ 15} Russell explained that she also helps appellant keep track of her appointments and ensures that appellant attends them. Russell indicated that appellant has done "quite well in the last couple of months as far keeping her own," but Russell "definitely [is] a key component of that."

{¶ 16} Russell testified that she sees appellant about every other day. Russell related that she has attempted to reduce her role, but when the parties tried to allow appellant the opportunity to use transportation that appellee provided, appellant had "a hard time making sure that she was up and outside for" her transportation.

{¶ 17} Russell further stated that appellant completed a substance abuse assessment, receives mental health counseling, takes her prescribed medication, and sees a counselor once per week. Russell indicated that appellant has the following mental health diagnoses: bipolar, anxiety, and borderline personality disorder.

{¶ 18} ACCS caseworker Hannah Jeffers testified that she has worked with the family since September 2016. Jeffers explained that appellant's case plan required appellant to obtain appropriate housing, address her mental health issues, improve her protective capacities, and attend to her own medical care. Jeffers further indicated that appellant displayed signs of substance abuse. Between September 2016 and May 2017, appellant tested positive for opiates, Tramadol, methamphetamine, and marijuana. Jeffers stated that since July 2017, when appellant started treatment with Dr. Ford,[2] appellant has not tested positive for other drugs.

[2] The record does not reveal the precise type of care that Dr. Ford provides, but the testimony suggests that Dr. Ford helps appellant with her drug addiction.

{¶ 19} Jeffers further related that appellant visits with the child twice per week for one hour at a time. Jeffers explained that appellant originally had two-hour visits, but appellant later "expressed that * * * one hour was sufficient." Jeffers stated that appellant did not ask to increase the length of her visits, but they did discuss off-site visits. Jeffers indicated that she is not opposed to off-site visits, but the parties have not yet arranged off-site visits due to scheduling difficulties

{¶ 20} Jeffers testified that the child is doing well in his current placement and showing improvement. The child uses a gait trainer and can maneuver throughout the house. She explained that when the child first entered appellee's custody, the child was able to "look at you," but not much else; he was "very catatonic." After the child entered appellee's care, the child tested positive for Bardet-Biedl syndrome. Jeffers stated that since the child entered appellee's temporary custody, he has undergone surgery to remove extra digits from his hands and feet, to remove his adenoids, to correct penile torsion, and to place tubes in his ears. Jeffers indicated that the child has had a team of doctors: a neurologist, an ophthalmologist, and a cardiologist. She explained that the child's kidneys excrete too much fluid and that blindness can occur. Jeffers testified that the child needs a caregiver who is able to maintain and follow-up with all of his medical appointments.

{¶ 21} Jeffers stated that she discussed the importance of the child's needs with appellant and that appellant is aware of what the child needs. She further indicated, however, that "[t]he concern is consistency and the accountability to make sure that this child goes to all of his appointments and has all of his medical needs addressed and intervene when they are at a potential to be life threatening." Jeffers does not believe appellant is able to do this on a

consistent, ongoing basis. Jeffers explained that the mother's substance abuse treatment is ongoing and that "[h]er definite lack of energy is going to be one of the issues." Jeffers related that the child is "really dependent on an adult for all of his needs" and that she does not believe appellant is capable of meeting the child's needs.

{¶ 22} Jeffers believes that placing the child in appellee's permanent custody is in his best interest. She does not believe that it is in the child's best interest to extend the case so that appellant can have additional time to address her issues. Jeffers agrees that appellant has done well for the past six months, but she does not agree that appellant has progressed to the point where she can safely care for the child and meet all of his needs.

{¶ 23} Katie Edenfield, the child's guardian ad litem, testified that she believes that placing the child in appellee's permanent custody is in his best interest. Edenfield explained that the child is "a high risk child who needs consistency and care." Edenfield related her concern regarding appellant's ability to provide for the child's needs. She noted that appellant had three other children permanently removed from her custody and that appellant suffers from chronic drug addiction. Edenfield agreed that appellant recently engaged in treatment, but further pointed out that appellant demonstrated inconsistency throughout the past.

{¶ 24} Edenfield also indicated that she believes it is in the child's best interest to permit appellant to visit the child, as long as the current care providers supervise the visits. Edenfield testified that she would support a court order that required off-site visits with the child.

{¶ 25} Appellant testified at the hearing. She admitted that in 2011, 2012 and 2013, she lost permanent custody of three other children due to substance abuse issues. Appellant explained that she has since tried to correct her mistakes so that she can be a good parent.

Appellant stated that she currently sees Dr. Ford and attends drug treatment and mental health counseling.

{¶ 26} Appellant claimed that she can provide for the child's needs, as long as she has help. She related that if the child cannot be returned to her, then she would like to continue a relationship with the child. Appellant indicated that instead of having court-ordered visits, she would prefer to work out an arrangement with the child's current care providers.

{¶ 27} After hearing all of the evidence, on December 1, 2017 the trial court granted appellee permanent custody of the child. The court found that (1) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, and (2) placing the child in appellee's permanent custody is in his best interest.

{¶ 28} In particular, the trial court determined that pursuant to R.C. 2151.414(E)(1), (2), (11), and (12), the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. The court found that R.C. 2151.414(E)(1) and (2) applies to appellant, because appellant has not

> successfully and adequately address[ed] her medical, mental health, and substance abuse issues to the level necessary to be a parent to A.M., especially in light of his own special medical needs. Mother had seriously neglected his special needs prior to his emergency removal, and has remained inconsistent, or even unavailable since that time. Mother has a social services case manager assigned to her who sees her approximately every other day due to her "high needs." She lives alone and has no earned income or social security income. While mother has shown recent signs of more meaningful engagement in addressing her own issues, she remains unsuitable to parent this child.

{¶ 29} The trial court additionally found that R.C. 2151.414(E)(11) applies to appellant. The court pointed out that the mother has had three other children permanently removed from her custody.

{¶ 30} The trial court determined that R.C. 2151.414(E)(12) applies to the child's father. The court noted that the father has been in prison since December 2016, and will remain in prison until June 2019.

{¶ 31} The trial court also considered the child's best interest. With respect to the child's interactions and interrelationships, the court stated: "A.M. has some relationship with his mother although visits have been inconsistent. He is doing well with his kinship caregivers. His father has been in prison since December 2016."

{¶ 32} The trial court did consider the child's wishes, but found that the child "is too young to know the meaning of this action." The trial court next reviewed the child's custodial history and noted that he "lived with his mother and sometimes father until his emergency removal in September 2016. Since then, A.M. has been in the continuous custody of ACCS in a kinship placement."

{¶ 33} The trial court also examined the child's need for a legally secure permanent placement and whether he could achieve that type of placement without granting appellee permanent custody. The court found that the child "needs and deserves a legally secure and permanent placement which can only be achieved with an order of permanent custody to ACCS." The court noted that the child "has significant medical concerns that will require numerous appointments and procedures with doctors and therapists. Father is in prison and mother has her own significant issues including medical, substance abuse, and mental health. Mother's mental health diagnosis include [sic] PTSD, Borderline Personality Disorder, Bi-Polar, and Anxiety Disorder."

{¶ 34} The trial court also found that R.C. 2151.414(E)(11) applies because appellant

lost her parental rights to three other children.

{¶ 35} Consequently, the trial court granted appellee permanent custody of the child. This appeal followed.

I

PERMANENT CUSTODY

{¶ 36} In her first assignment of error, appellant asserts that the trial court's decision to grant appellee permanent custody of the child is against the manifest weight of the evidence. She contends that the record does not contain clear and convincing evidence to support the trial court's findings that (1) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent and (2) permanent custody is in the child's best interest. Appellant argues that she has demonstrated substantial progress with her case plan goals and that the trial court should not have terminated her parental rights without affording her additional time to illustrate her ability to provide proper care for the child.

{¶ 37} Appellant additionally claims that the record does not support two of the trial court's findings: (1) its finding that "A.M. has some relationship with his mother although visits have been inconsistent"; and (2) its finding that appellant did not "successfully and adequately address her medical, mental health, and substance abuse issues to the level necessary to parent A.M."

A

STANDARD OF REVIEW

{¶ 38} Generally, a reviewing court will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *E.g., In re B.E.*, 4th

Dist. Highland No. 13CA26, 2014–Ohio–3178, ¶27; *In re R.S.,* 4th Dist. Highland No. 13CA22, 2013–Ohio–5569, ¶29.

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'"

Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶12, quoting *State v. Thompkins,*78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary 1594 (6th Ed.1990).

{¶ 39} When an appellate court reviews whether a trial court's permanent custody decision is against the manifest weight of the evidence, the court "'"weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered."'" *Eastley* at ¶20, quoting *Tewarson v. Simon,* 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001), quoting *Thompkins,* 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *accord In re Pittman,* 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶23–24.

{¶ 40} The question that we must resolve when reviewing a permanent custody decision under the manifest weight of the evidence standard is "whether the juvenile court's findings * * * were supported by clear and convincing evidence." *In re K.H.,* 119 Ohio St.3d 538, 2008–Ohio–4825, 895 N.E.2d 809, ¶43. "Clear and convincing evidence" is:

> the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

In re Estate of Haynes, 25 Ohio St.3d 101, 103–04, 495 N.E.2d 23 (1986). In determining whether a trial court based its decision upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *accord In re Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) ("Once the clear and convincing standard has been met to the satisfaction of the [trial] court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof."); *In re Adoption of Lay*, 25 Ohio St.3d 41, 42–43, 495 N.E.2d 9 (1986). *Cf. In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986) (stating that whether a fact has been "proven by clear and convincing evidence in a particular case is a determination for the [trial] court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence"). Thus, if the children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court's decision is not against the manifest weight of the evidence. *In re R.M.*, 4th Dist. Athens Nos. 12CA43 and 12CA44, 2013–Ohio–3588, ¶62; *In re R.L.*, 2nd Dist. Greene Nos. 2012CA32 and 2012CA33, 2012–Ohio–6049, ¶17, quoting *In re A.U.*, 2nd Dist. Montgomery No. 22287, 2008–Ohio–187, ¶9 ("A reviewing court will not overturn a court's grant of permanent custody to the state as being contrary to the manifest weight of the evidence

'if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements * * * have been established.'"). Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Thompkins,* 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court should find a trial court's permanent custody decision against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the [decision].'" *Thompkins,* 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175; accord *State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 41} Furthermore, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. *Eastley* at ¶21. As the *Eastley* court explained:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Id., quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶ 42} Moreover, deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does

not translate to the record well." *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997); *accord In re Christian*, 4th Dist. Athens No. 04CA10, 2004–Ohio–3146, ¶7. As the Ohio Supreme Court long-ago explained:

> In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.

Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952).

{¶ 43} Furthermore, unlike an ordinary civil proceeding in which a judge has little to no contact with the parties before a trial, in a permanent custody case a trial court judge may have significant contact with the parties before a permanent custody motion is even filed. In such a situation, it is not unreasonable to presume that the trial court judge had far more opportunities to evaluate the credibility, demeanor, attitude, etc., of the parties than this court ever could from a mere reading of the permanent custody hearing transcript.

{¶ 44} In the case at bar, after our review we are unable to conclude that the evidence weighs heavily against the trial court's decision.

B

PERMANENT CUSTODY PRINCIPLES

{¶ 45} A parent has a "fundamental liberty interest" in the care, custody, and management of his or her child and an "essential" and "basic civil right" to raise his or her children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990); *accord In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶¶ 8–9. A parent's rights, however, are not absolute. *D.A.* at

¶11. Rather, "'it is plain that the natural rights of a parent * * * are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.'" *In re Cunningham,* 59 Ohio St.2d 100, 106, 391 N.E.2d 1034 (1979), quoting *In re R.J.C.,* 300 So.2d 54, 58 (Fla.App.1974). Thus, the State may terminate parental rights when a child's best interest demands such termination. *D.A.* at ¶11.

{¶ 46} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child's best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. *Id.* Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying purposes of R.C. Chapter 2151: "to care for and protect children, 'whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety.'" *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, ¶29, quoting R.C. 2151.01(A).

C

PERMANENT CUSTODY FRAMEWORK

{¶ 47} A children services agency may obtain permanent custody of a child by (1) requesting it in the abuse, neglect or dependency complaint under R.C. 2151.353, or (2) filing a motion under R.C. 2151.413 after obtaining temporary custody. In this case, appellee sought permanent custody of the child by filing a motion under R.C. 2151.413. When an agency files a permanent custody motion under R.C. 2151.413, R.C. 2151.414 applies. R.C. 2151.414(A).

{¶ 48} R.C. 2151.414(B)(1) permits a trial court to grant permanent custody of a child to

a children services agency if the court determines, by clear and convincing evidence, that the child's best interest would be served by the award of permanent custody and that one of the following conditions applies:

> (a) The child is not abandoned or orphaned or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.
>
> (b) The child is abandoned.
>
> (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.
>
> (d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.
>
> (e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶ 49} Thus, before a trial court may award a children services agency permanent custody, it must find (1) that one of the circumstances described in R.C. 2151.414(B)(1) applies, and (2) that awarding the children services agency permanent custody would further the child's best interest.

D

2151.414(B)(1)(a)

{¶ 50} In the case sub judice, the trial court determined that R.C. 2151.414(B)(1)(a) applies (the child cannot be placed with either parent within a reasonable time or should not be placed with either parent). In determining whether a child cannot be placed with either parent within a reasonable time or should not be placed with either parent, R.C. 2151.414(E) requires

the trial court to consider "all relevant evidence" and outlines the factors a trial court "shall consider." If a court finds, by clear and convincing evidence, the existence of any one of the listed factors, "the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent." As relevant in the case at bar, R.C. 2151.414(E)(1), (2), (11), and (12) state:

> (1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.
>
> (2) Chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;
>
> * * * *
>
> (11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child * * * and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.
>
> (12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

A trial court may base its decision that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent upon the existence of any one of the R.C. 2151.414(E) factors. The existence of one factor alone will support a finding that the child

cannot be placed with either parent within a reasonable time or should not be placed with either parent. *E.g.*, *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶ 50; *In re William S.*, 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996).

{¶ 51} In the case at bar, although the trial court found several R.C. 2151.414(E) factors applied, we focus upon the trial court's R.C. 2151.414(E)(11) finding with respect to appellant and its R.C. 2151.414(E)(12) finding with respect to the father.

{¶ 52} Appellant does not dispute that she previously had three other children permanently removed from her custody. Furthermore, appellant did not present convincing evidence that, notwithstanding the three prior terminations, she can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child. The evidence is undisputed that the child requires extensive medical care and constant care from a dedicated caregiver. Appellant's own substance abuse and mental health treatments prevent her from being able to provide the child with the care he needs. Appellant continues to receive counseling for her substance abuse and mental health issues. Although appellant has made progress, she has not demonstrated that she has sufficiently conquered her issues so that she can focus all of her attention on the child's significant needs. Appellant's Integrated Services counselor, Stephanie Russell, explained that appellant is one of her higher needs clients, and that almost every other day, she assists appellant with many aspects of appellant's own care. If appellant requires assistance with her own needs, it is difficult to imagine how she could manage the child's significant medical and developmental needs. Thus, we do not believe appellant presented clear and convincing evidence that, notwithstanding the three prior parental-rights terminations, she can provide a legally secure permanent placement and adequate care for the

health, welfare, and safety of the child.[3] This finding supports the trial court's determination that the child cannot be placed with appellant or should not be placed with appellant. Additionally, the court found that R.C. 2151.414(E)(12) applies to the father. Appellant has not disputed this finding.

{¶ 53} Consequently, we believe that the record contains ample clear and convincing evidence to support the trial court's R.C. 2151.414(B)(1)(a) finding that the child cannot be placed with either parent within a reasonable time, or should not be placed with either parent.

{¶ 54} To the extent that the trial court issued some incorrect factual findings regarding whether the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, as appellant suggests, we do not believe that any incorrect findings affect the above analysis. Therefore, any incorrect factual findings constitute harmless error that we must disregard. *See* Civ.R. 61 (explaining that court "must disregard any error or defect in the proceeding" that does not affect a party's substantial rights); *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶26, 912 N.E.2d 595, quoting *Smith v. Flesher*, 12 Ohio St.2d 107, 110, 233 N.E.2d 137 (1967) (explaining that "'in order to secure a reversal of a judgment,'" a party "'must not only show some error but must also show that error was prejudicial to him'").

E

BEST INTEREST

[3] We point out that when discussing R.C. 2151.414(E)(11), the trial court did not specifically address the second clause of the statute. We nevertheless note that its decision contains facts that support findings under the second clause.

{¶ 55} R.C. 2151.414(D) directs a trial court to consider "all relevant factors," as well as specific factors, to determine whether a child's best interests will be served by granting a children services agency permanent custody. The listed factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (4) 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; and (5) whether any factors listed under R.C. 2151.414(E)(7) to (11) apply.[4]

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[4] R.C. 2151.414(E)(7) to (11) state:

> (7) The parent has been convicted of or pleaded guilty to one of the following:
>
> (a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;
>
> (b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
>
> © An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;
>
> (d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
>
> (e) An offense under section 2905.32, 2907.21, or 2907.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
>
> (f) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a), (d), or (e) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

Determining whether granting permanent custody to a children services agency will promote a child's best interest involves a delicate balancing of "all relevant [best interest] factors," as well as the "five enumerated statutory factors." *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶57, citing *In re Schaefer,* 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, ¶56; *accord In re C.G.*, 9th Dist. Summit Nos. 24097 and 24099, 2008–Ohio–3773, ¶28; *In re N.W.*, 10th Dist. Franklin Nos. 07AP–590 and 07AP–591, 2008–Ohio–297, 2008 WL 224356, ¶19. However, none of the best interest factors requires a court to give it "greater weight or heightened significance." *C.F.* at ¶57. Instead, the trial court considers the totality of the circumstances when making its best interest determination. *In re K.M.S.*, 3rd Dist. Marion Nos. 9–15–37, 9–15–38, and 9–15–39, 2017–Ohio–142, 2017 WL 168864, ¶24; *In re A.C.*, 9th Dist. Summit No. 27328, 2014–Ohio–4918, ¶46. In general, "[a] child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security." *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016–Ohio–916, 2016 WL 915012, ¶66, citing *In re Adoption of Ridenour,* 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

{¶ 56} In the case at bar, we first note that appellant does not directly address each of the best interest factors and discuss why they weigh in favor of rejecting appellee's request for permanent custody of the child. Instead, she primarily focuses on her case-plan compliance. We note, however, that a parent's "substantial compliance with a case plan, in and of itself, does not prove that a grant of permanent custody to an agency is erroneous." *In re A.C–B.*, 9th Dist. Summit Nos. 28330 and 28349, 2017–Ohio–374, 2017 WL 440116, ¶11, citing *In re M.Z.*, 9th

Dist. No. 11CA010104, 2012–Ohio–3194, ¶19; *In re K.J.*, 4th Dist. Athens No. 08CA14, 2008–Ohio–5227, ¶24 (stating that "when considering a R.C. 2151.414(D)(1)(d) permanent custody motion, the focus is upon the child's best interests, not upon the parent's compliance with the case plan"). A parent's case plan compliance may be relevant to the extent that it affects the child's best interest. *E.g.*, *In re T.J.*, 4th Dist. Highland No. 2016–Ohio–163, 2016 WL 228187, ¶36, citing *In re R.L.*, 9th Dist. Summit Nos. 27214 and 27233, 2014–Ohio–3117, ¶34 (stating that "although case plan compliance may be relevant to a trial court's best interest determination, it is not dispositive of it"). A parent's case plan compliance does not, however, preclude a trial court from awarding permanent custody to a children services agency when doing so is in the child's best interest. *Id.*, citing *In re N.L.*, 9th Dist. Summit No. 27784, 2015–Ohio–4165, ¶35 (stating that "substantial compliance with a case plan, in and of itself, does not establish that a grant of permanent custody to an agency is erroneous"); *In re S.C.*, 8th Dist. Cuyahoga No. 102349, 2015–Ohio–2280, ¶40 ("Compliance with a case plan is not, in and of itself, dispositive of the issue of reunification."); *In re W.C.J.*, 4th Dist. Jackson No. 14CA3, 2014–Ohio–5841, ¶46 ("Substantial compliance with a case plan is not necessarily dispositive on the issue of reunification and does not preclude a grant of permanent custody to a children's services agency."). "Indeed, because the trial court's primary focus in a permanent custody proceeding is the child's best interest, 'it is entirely possible that a parent could complete all of his/her case plan goals and the trial court still appropriately terminate his/her parental rights.'" *W.C.J.* at ¶46, quoting *In re Gomer*, 3d Dist. Wyandot Nos. 16–03–19, 16–03–20, and 16–03–21, 2004–Ohio–1723, ¶36. Consequently, we disagree with appellant that her alleged case plan compliance shows that granting appellee permanent custody is not in the child's best interest.

Rather, we believe that despite appellant's case plan compliance, the record contains ample competent and credible evidence to support the trial court's finding that granting appellee permanent custody is in the child's best interest.

1

Child's Interactions and Interrelationships

{¶ 57} The child has lived with the Mills family since March 2017. Mills stays home to provide constant care for the child and ensures that he attends all of his medical and other health-related appointments. Mills indicated that the child and Mills's daughter share an "awesome" relationship. Mills additionally expressed an interest in keeping the child in her care on a "long-term" basis.

{¶ 58} Appellant clearly loves her child. Russell stated that she observed appellant's interaction with the child and noted "very clear and evident love." Appellant attended the majority of her visits with the child, and appellee did not express any concern with appellant's interaction with the child during visits. Appellant, however, asked that appellee reduce the visits from two hours to one hour. While appellant claims that she did so out of concern for the child, the caseworker, Jeffers, stated that appellant simply indicated that one hour was "sufficient."

{¶ 59} Additionally, appellant has struggled with drug addiction and lost custody of three other children due to substance abuse issues. Yet despite losing custody of three other children, appellant continued to abuse drugs when A.M. was in her care. Moreover, when the child first entered appellee's custody, he had sores on his body and showed signs of developmental delays. The caseworker described the child as "catatonic" when he first entered appellee's temporary custody at one year of age. Thus, when the child was in appellant's custody, she did not

demonstrate that she would place his needs above all others. While appellant recently showed progress in addressing her substance abuse issues, the case worker and the guardian ad litem found appellant's past inconsistent behavior concerning. Both noted that the child's medical condition demands consistent and constant care to address his medical needs and questioned whether appellant could adequately conquer her substance-abuse and mental-health issues so as to be able to provide the child with the care he needs.

{¶ 60} Thus, although we do not doubt appellant's love for her child, Mills' home appears to offer the child the best opportunity to maintain consistently healthy interactions and interrelationships.

2

Child's Wishes

{¶ 61} The court found that the child is too young to express his wishes. We observe that the guardian ad litem opined that placing the child in appellee's permanent custody is in his best interest. *In re S.M.*, 4th Dist. Highland No. 14CA4, 2014–Ohio–2961, 2014 WL 3014037, ¶32, citing *C.F.* at ¶55 (noting that R.C. 2151.414 permits court to consider child's wishes as child directly expresses or through the guardian ad litem). The guardian ad litem also recommended that appellant continue to have a relationship with the child and noted that she would approve appellant having supervised visits with the child.

3

Custodial History

{¶ 62} The child lived with appellant from birth until his September 2016 removal. He lived in a foster home between the date of his removal and March 2017, when he was placed with

the Mills family. The child was not in appellee's permanent custody for more than twelve out of the past twenty-two months when appellee filed its permanent custody motion.

4

Legally Secure Permanent Placement

{¶ 63} "Although the Ohio Revised Code does not define the term, 'legally secure permanent placement,' this court and others have generally interpreted the phrase to mean a safe, stable, consistent environment where a child's needs will be met." *In re M.B.*, 4th Dist. Highland No. 15CA19, 2016–Ohio–793, 2016 WL 818754, ¶56, citing *In re Dyal*, 4th Dist. Hocking No. 01CA12, 2001 WL 925423, *9 (Aug. 9, 2001) (implying that "legally secure permanent placement" means a "stable, safe, and nurturing environment"); *see also In re K.M.*, 10th Dist. Franklin Nos. 15AP–64 and 15AP–66, 2015–Ohio–4682, ¶28 (observing that legally secure permanent placement requires more than stable home and income but also requires environment that will provide for child's needs); *In re J.H.*, 11th Dist. Lake No. 2012–L–126, 2013–Ohio–1293, ¶95 (stating that mother unable to provide legally secure permanent placement when she lacked physical and emotional stability and that father unable to do so when he lacked grasp of parenting concepts); *In re J.W.*, 171 Ohio App.3d 248, 2007–Ohio–2007, 870 N.E.2d 245, ¶34 (10th Dist.) (Sadler, J., dissenting) (stating that a legally secure permanent placement means "a placement that is stable and consistent"); Black's Law Dictionary 1354 (6th Ed. 1990) (defining "secure" to mean, in part, "not exposed to danger; safe; so strong, stable or firm as to insure safety"); *id.* at 1139 (defining "permanent" to mean, in part, "[c]ontinuing or enduring in the same state, status, place, or the like without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or

transient"). Thus, "[a] legally secure permanent placement is more than a house with four walls. Rather, it generally encompasses a stable environment where a child will live in safety with one or more dependable adults who will provide for the child's needs." *M.B.* at ¶56.

{¶ 64} In the case at bar, we believe that the record contains clear and convincing evidence to support the court's finding that the child needs a legally secure permanent placement and that he cannot obtain this type of placement without granting appellee permanent custody. Although appellant's home environment may be physically appropriate, appellee expressed great concern regarding her ability to provide the child with the care that he needs. The child's medical condition requires consistent and constant care. Both the case worker and the guardian ad litem noted appellant's past struggles with drug addiction and her inability to maintain custody of three other children. While we cannot discount the progress appellant has made with her case plan, we also cannot fault the trial court for deciding not to experiment with the child's welfare, especially given his incredibly fragile medical condition. As this court has recognized:

> "'" * * * [A] child should not have to endure the inevitable to its great detriment and harm in order to give the * * * [parent] an opportunity to prove her suitability. To anticipate the future, however, is at most, a difficult basis for a judicial determination. The child's present condition and environment is the subject for decision not the expected or anticipated behavior of unsuitability or unfitness of the * * * [parent]. * * * The law does not require the court to experiment with the child's welfare to see if he will suffer great detriment or harm."'"

W.C.J. at ¶48, quoting *In re Bishop*, 36 Ohio App.3d 123, 126, 521 N.E.2d 838 (5th Dist.1987), quoting *In re East*, 32 Ohio Misc. 65, 69, 288 N.E.2d 343, 346 (1972). Thus, the trial court had no obligation to experiment with the child's welfare.

{¶ 65} The trial court also found that appellant had her parental rights involuntarily terminated with respect to three other children. We note that the trial court did not explicitly address the second clause contained in R.C. 2151.414(E)(11), but as we previously discussed, its decision contains ample facts to show that appellant did not present clear and convincing evidence that despite the three prior parental-rights terminations, she can adequately care for the child.

6

Balancing

{¶ 66} After considering all of the foregoing factors, we do not believe that the trial court's best-interest determination is against the manifest weight of the evidence. Instead, we believe that the foregoing evidence illustrates that placing the child in appellee's permanent custody is in his best interest. Appellant's past history raises serious concerns regarding her ability to remain drug-free and in a state of mind to provide the child with the consistent and constant attention that his medical condition demands. On the other hand, placing the child in appellee's permanent custody will ensure that he receives all of the care that he needs. Mills expressed interest in keeping the child on a long-term basis, and she has shown her dedication to providing for the child's needs.

{¶ 67} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 68} In her second assignment of error, appellant argues that her trial counsel

performed ineffectively by failing to seek a court order mandating visitation with the child. Appellant asserts that the testimony presented at the permanent custody hearing shows that "there was a consensus on the prospect of the juvenile court issuing an order solidifying an off-grounds visitation schedule between [appellant] and A.M." She thus contends that "it was unreasonable for trial counsel to neglect to pursue a visitation order during the permanent custody proceeding." Appellant claims that if trial counsel had pursued a visitation order, she would not have been deprived of all contact with her child.

{¶ 69} The right to counsel, guaranteed in permanent custody proceedings by R.C. 2151.352 and by Juv.R. 4, includes the right to the effective assistance of counsel. *In re Wingo*, 143 Ohio App.3d 652, 666, 758 N.E.2d 780 (4th Dist.2001), citing *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *e.g.*, *In re J.P.B.*, 4th Dist. Washington No. 12CA34, 2013–Ohio–787, 2013 WL 839932, ¶23; *In re K.M.D.*, 4th Dist. Ross No. 11CA3289, 2012–Ohio–755, ¶60; *In re A.C.H.*, 4th Dist. Gallia No. 11CA2, 2011–Ohio–5595, ¶50. "'Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody.'" *Id.*, quoting *Heston*.

{¶ 70} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d674 (1984); *State v. Obermiller*, 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶83; *State v. Powell*, 132 Ohio St.3d 233,

2012–Ohio–2577, 971 N.E.2d 865, ¶85. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal,* 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶ 71} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky,* 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland,* 466 U.S. at 688; *accord Hinton,* 134 S.Ct. at 1088. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial."'" *Obermiller* at ¶85, quoting *State v. Pasqualone,* 121 Ohio St.3d 186, 2009–Ohio–315, 903 N.E.2d 270, ¶24, quoting *Taylor v. Illinois,* 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Furthermore, "'[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton,* 134 S.Ct. at 1088, quoting *Strickland,* 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); *accord Hinton,* 134 S.Ct. at 1088, citing *Padilla,* 559 U.S. at 366; *State v. Wesson,* 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81.

{¶ 72} Moreover, when considering whether trial counsel's representation amounts to

deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g.*, *Obermiller* at ¶84; *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 73} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 134 S.Ct. at 1089, quoting *Strickland*, 466 U.S. at 694; *e.g.*, *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002). As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. *E.g.*, *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014–Ohio–3123, ¶22; *State v. Simmons*, 4th Dist.

Highland No. 13CA4, 2013–Ohio–2890, ¶25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012–Ohio–1625, ¶25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009–Ohio–6191, ¶68; *accord State v. Powell*, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

{¶ 74} In the case sub judice, we do not believe that trial counsel performed ineffectively by failing to seek a visitation order. Appellant testified that she did not want a court order, but instead, she wanted to make arrangements directly with Mills. Thus, trial counsel's decision not to seek a court order appears consistent with appellant's wishes and was not so professionally unreasonable as to satisfy the deficient performance part of the *Strickland* inquiry.

{¶ 75} Furthermore, appellant cannot show that the result of the permanent custody proceeding would have been different if trial counsel had sought a court order mandating visitation. Appellant does not allege that the trial court would have rejected appellee's request for permanent custody of the child, if trial counsel had filed a visitation motion. Instead, she contends that if trial counsel had pursued a visitation motion, she would not have been deprived of all contact with her child.

{¶ 76} We observe, however, that permanent custody "divests the natural parents * * * of all parental rights, privileges, and obligations, including all residual rights and obligations." R.C. 2151.011(B)(31). "Residual parental rights, privileges, and responsibilities" include "the privilege of reasonable visitation." R.C. 2151.011(B)(48). Furthermore, R.C. 2151.414(F) states that "[t]he parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action." In light of the foregoing statutes, we question whether the trial court could order

post-permanent-custody-visitation to appellant, if trial counsel had requested it. *See generally In re McBride*, 110 Ohio St.3d 19, 850 N.E.2d 43 (concluding that "[a] parent who has lost permanent custody of a child does not have standing as a nonparent to file a petition for custody of that child"). We therefore do not believe appellant met her burden of demonstrating that the result of the proceeding would have been different if trial counsel had requested the court to issue an order mandating visitation between appellant and the child following the termination of appellant's parental rights.

{¶ 77} None of this means, however, that appellant and Mills are prohibited from arranging supervised visits with the child. The testimony presented at the permanent custody hearing indicates that Mills would allow appellant to visit the child, if appellant maintains drug-free and continues to address her mental health issues. The child's guardian ad litem also indicated that she would agree to visits with appellant under similar conditions. Thus, even though a court order requiring post-permanent-custody-visitation does not exist, nothing appears to prevent Mills from agreeing to allow appellant to visit. However, because the trial court granted appellee permanent custody, appellant does not have an enforceable right to visit with the child.

{¶ 78} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[Cite as *In re A.M.*, 2018-Ohio-2072.]

JUDGMENT ENTRY

It is ordered that the appeal be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.