**[Cite as *In re K.M.*, 2019-Ohio-4252.]**

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

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| IN THE MATTER OF: | : | Case Nos. 19CA3677 |
| | : | 19CA3678 |
| K.M., IV | : | |
| K.M. | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| ADJUDICATED DEPENDENT OR | : | |
| ABUSED CHILDREN. | : | **Released: 10/10/19** |

APPEARANCES:

Chase B. Bunstine, Chillicothe, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Jennifer L. Ater, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

McFarland, J.

**{¶1}** Appellant, the children's biological mother, appeals the trial court's judgment that awarded Appellee, South Central Ohio Job and Family Services, permanent custody of two-year-old K.M. and three-year-old K.M., IV. Appellant raises two assignments of error. First, Appellant contends that the trial court erred by granting Appellee permanent custody of the children because Appellee failed to use reasonable efforts to reunify the family. Second, Appellant argues that the trial court's best interest finding is against the manifest weight of the evidence.

**{¶2}** We do not agree with either of Appellant's arguments. Instead, the record contains competent evidence to support the trial court's decision to award Appellee permanent custody of the children. Accordingly, we overrule Appellant's two assignments of error and affirm the trial court's judgment.

## I. FACTS

**{¶3}** On January 9, 2017, Appellee filed complaints that alleged K.M., IV was a dependent child and that K.M. was an abused child. Appellee requested temporary custody of the children. The attached statement of facts alleged the following.

**{¶4}** Appellant and the children's father took K.M. to the emergency room with congestion and shortness of breath. An examination revealed multiple rib fractures and a possible fracture to the left upper arm. The child also had some bruising and dried blood on his lower lip. The child was transported to Nationwide Children's Hospital in Columbus. Additional examination showed that the child had a fractured skull, a non-displaced fracture on the left side of the skull, and multiple healing fractures, including five rib fractures, a right forearm fracture, fractures of the left and right femurs, and broken bones in the top and bottom of both legs. The child was placed on life support after arriving at Nationwide Children's Hospital and

remained in the intensive care unit. The parents were unable to adequately explain the injuries and appeared unwilling to discuss the injuries. The children's father subsequently was convicted of felonious assault and child endangering and sentenced to serve seven years in prison.

**{¶5}** The court later adjudicated K.M., IV a dependent child and adjudicated K.M. an abused child. The court placed both children in Appellee's temporary custody.

**{¶6}** Appellee developed a case plan for the family. The case plan required Appellant to attend the children's medical appointments, to actively participate in the parenting aspect of Help Me Grow Services, to follow through with all healthcare and other service provider recommendations, to attend parenting classes, and to follow through with the skills learned during parenting classes.

**{¶7}** On September 12, 2017, the court allowed K.M., IV to be placed with Appellant subject to Appellee's protective services. The court also ordered that "there is to be no contact with the child's father." K.M. remained in Appellee's temporary custody and in the same foster home.

**{¶8}** In early April 2018, K.M. also returned to live with Appellant. On April 29, 2018, Appellee learned that Appellant had left K.M., IV alone in her car for twenty to twenty-five minutes so that Appellant could go on a

date. Appellee thus sought and obtained an emergency temporary custody order.

**{¶9}** Appellee developed an amended case plan for the family. The case plan required Appellant to re-engage in services at Mid-Ohio Psychological Services and to follow recommendations, to complete the Positive Parenting Program through Mental Health America of Licking County, to engage in case management services through The Woodlands, to consistently visit the children, and to attend all of the children's medical appointments. The case plan further indicated that Appellant was to have no contact with the children's father. The trial court later approved the case plan and incorporated it into its dispositional order. Shortly thereafter, the agency filed motions for permanent custody.

**{¶10}** At the permanent custody hearing, caseworker Lindsey Sparks stated that Appellee removed the children from the home after the agency learned that the parents took their one-month-old child, K.M., to the emergency room with several unexplained injuries. Ms. Sparks reported that an investigation determined that the child's injuries resulted from child abuse. Ms. Sparks stated that the children's father later was convicted of child endangering and felonious assault.

**{¶11}** Ms. Sparks reported that the agency developed a case plan for the parents. She explained that the case plan required the parents to maintain suitable housing, to meet the children's special needs, to complete a psychological evaluation and comply with any treatment recommendations, to cooperate with law enforcement, to attend all scheduled visitations, and to attend parenting classes.

**{¶12}** Ms. Sparks stated that both children have special needs. She indicated that K.M., IV has some cognitive delays and needs physical and speech therapy. K.M. has cerebral palsy and requires physical, speech, and occupational therapy.

**{¶13}** And, Ms. Sparks testified that in April 2018, Appellee received a referral that indicated K.M. returned from a visit with Appellant with a bite mark, severe diaper rash, and multiple bruises throughout the body. Ms. Sparks stated that she met with Appellant at Appellant's residence to discuss K.M.'s injuries. Appellant explained that the children had been playing in their bedroom, alone, for approximately twenty-five minutes. Appellant further stated that she caught K.M., IV throwing toys and biting K.M. Appellant advised Ms. Sparks that Appellant tried to intervene, but Appellant found K.M., IV difficult to manage when K.M. was present. Ms. Sparks indicated that Appellant's explanation gave her concern, because

Appellant apparently found it appropriate to leave the two young children unsupervised and alone in their bedroom.

**{¶14}** Further, Ms. Sparks reported that she also noted that Appellant did not have appropriate beds for the children. Ms. Sparks explained that Appellant had a crib set up for K.M., IV with a mattress next to it on the floor to break his fall. Ms. Sparks stated that Appellant had a small pack-and-play for K.M. Ms. Sparks explained that she spoke to Appellant about K.M. being too big for the pack-and-play and about obtaining a toddler bed for K.M., IV. Ms. Sparks testified that Appellee provided Appellant with a voucher to purchase items in order to meet the children's basic needs.

**{¶15}** Ms. Sparks also stated that Appellee became concerned because Appellant continued to maintain contact with the father, yet Appellant had informed Appellee that she no longer had any contact with the father and "wanted to move forward with her life." Ms. Sparks testified that she listened to audio tapes of Appellant's phone conversations with the father while he was in prison. Ms. Sparks reported that the two discussed staying together and being together upon his release from prison. Ms. Sparks explained that Appellant's continued involvement with the father raised questions regarding her protective capabilities.

**{¶16}** Ms. Sparks indicated that shortly after K.M. had been placed in Appellant's home, Appellee received another referral. Ms. Sparks stated that Appellee learned that Appellant had been arrested for child endangering because she left K.M., IV alone in a car for approximately twenty-five minutes. When Ms. Sparks spoke to Appellant about the incident, Appellant explained that she had been on a date and that she planned to leave K.M., IV in the car. Appellant informed Ms. Sparks that she did not perceive any danger because Appellant asked a nearby stranger to watch Appellant's car. Appellant additionally advised Ms. Sparks that Appellant kept the car within her view.

**{¶17}** And, she testified that as a result of Appellant's conduct and child-endangering arrest, Appellee sought and received an ex parte removal of the children. She explained that the children had remained in Appellee's temporary custody since the end of April 2018.

**{¶18}** Caseworker Elizabeth Radcliff testified that after the children's April 2018 removal, Appellee developed an amended case plan primarily to address Appellant's move out of Ross County. Ms. Radcliff stated that Appellant did not sign the case plan because Appellant "had been no show for appointments." Ms. Radcliff explained that she nevertheless discussed

the amended case plan with Appellant and gave Appellant information regarding the services named in the case plan.

**{¶19}** Ms. Radcliff reported that Appellant did not fully comply with the amended case plan. She indicated that Appellant did not engage in the Positive Parenting Program or with The Woodlands. Ms. Radcliff explained that Appellant did not continue to attend all of the children's medical appointments and missed several visits with the children between September and November 2018.

**{¶20}** And, Ms. Radcliff additionally stated that she informed Appellant that Appellee did not want Appellant to have contact with the father due to the father's child abuse. Ms. Radcliff reported that Appellant responded "that she did not care to speak with [the father]."

**{¶21}** She testified that K.M. has cerebral palsy and receives speech, physical, feeding, and occupational therapy. She stated that K.M., IV has some cognitive delays and receives occupational and speech therapy.

**{¶22}** Ms. Radcliff also reported that Appellant interacted appropriately with the children during visits but at times had difficulty maintaining control of the boys. Ms. Radcliff explained, however, that she didn't believe Appellant possessed adequate protective capacities in order to safeguard the children. Ms. Radcliff further didn't believe that Appellant

had remedied the conditions that caused the children's removal and that the children could not or should not be placed with either parent.

**{¶23}** The foster mother testified that Appellee placed the children in her home upon their removal, that K.M., IV remained in her care until the end of August 2017, and that K.M. remained in her care until early April 2018. The foster mother explained that on April 29, 2018, the children returned to her home, and they had remained in her care since that time. The foster mother reported that she would be willing to adopt the children.

**{¶24}** Psychologist Robin Rippeth testified that she interviewed Appellant in May 2017, and subsequently prepared a psychological evaluation report. Dr. Rippeth noted that Appellant had engaged in psychological services in the past. She explained that in 2010, Appellant had been diagnosed with dependent personality disorder, anxiety disorder not otherwise specified, and mild mental retardation or intellectual developmental disorder. Dr. Rippeth reported that Appellant's IQ score was 68, that she had adaptive functioning delays, and that she displayed limitations in the ability to take care of daily living tasks.

**{¶25}** Dr. Rippeth testified that after she evaluated Appellant in 2017, she diagnosed Appellant with mild intellectual developmental disorder and dependent personality disorder. Dr. Rippeth explained that Appellant

continued to struggle with daily living skills. Dr. Rippeth also indicated that Appellant's "cognitive limitations make it difficult for her to engage in those decision making skills on a day to day basis" and that "it would make it difficult for her to generalize parenting tasks or skills from one situation to the next situation that is encountered with her children to choose appropriate levels of supervision." Dr. Rippeth stated that Appellant's diagnoses gave her concern regarding Appellant's parenting abilities, especially in light of K.M.'s cerebral palsy. Dr. Rippeth reported that Appellant would need an outside provider to assist with caring for the children and with Appellant's day-to-day needs.

**{¶26}** Jenna Bunstine, a developmental specialist with the Ross County Board of Developmental Disabilities, testified that she received a referral for "global development delays" involving both children. Ms. Bunstine stated that she worked with the family every other week for about six to nine months. Ms. Bunstine believed that Appellant was receptive to her assistance and that Appellant implemented the skills she taught. Ms. Bunstine additionally thought Appellant appeared bonded to both children. Ms. Bunstine explained that she stopped working with the family in late 2017, when Appellant moved out of the county.

**{¶27}** Appellant testified that in December 2017, she moved to Hebron and remained living in Hebron until the end of June 2018. She stated that she then moved to Springfield for a short time and that on August 1, 2018, she moved into her current residence in Urbana.

**{¶28}** Appellant reported that she completed parenting classes and attended K.M.'s medical appointments. Appellant indicated that she also attended K.M.'s therapy sessions, which included physical and occupational therapy as well as a swallow study every three months.

**{¶29}** Appellant agreed that she made a mistake when she left K.M., IV in her car but explained that she had been under stress. Appellant stated that she realized now that she should have sought help and attested that she would not allow a similar incident to happen in the future. Appellant indicated that she now has more support from her family and from her boyfriend.

**{¶30}** Appellant stated that even after Appellee removed the children in April 2018, she continued to work on her case plan. Appellant reported that she visited the children but that she missed a few visits when she was sick with the flu. Appellant further explained that she had trouble attending visits after her car broke down.

**{¶31}** On cross-examination, Appellant agreed that she had not re-engaged in mental health counseling between April 2018 and November 2018 and that between September 2018 and November 2018, she did not visit the children.

**{¶32}** On March 28, 2019, the trial court concluded that granting Appellee permanent custody of the children would serve the children's best interests. The court found that Appellant failed to remedy the conditions that caused the children's removal and that Appellee had made reasonable efforts to reunify the family by providing Appellant with case management services, visitation, and referrals to service providers. The court decided that the children "should never be reunited with the father" and that the children could not be placed with Appellant within a reasonable period of time. The court additionally determined that K.M. had been in Appellee's temporary custody for twelve or more months of a consecutive twenty-two month period. The court also observed that the guardian ad litem recommended that the court grant the agency permanent custody. The court thus granted Appellee permanent custody of the children. This appeal followed.

## II. ASSIGNMENTS OF ERROR

**{¶33}** Appellant timely appealed and raises two assignments of error:

First Assignment of Error:

> "The trial court erred in terminating appellant's parental rights as Children's Services did not make reasonable efforts to permit the children to return home."
>
> Second Assignment of Error:
>
> "The trial court committed reversible error in finding that permanent custody was in the best interest of the minor children when such a finding was against the manifest weight of the evidence."

## III. ANALYSIS

### A.

**{¶34}** In her first assignment of error, Appellant argues that the trial court erred by terminating her parental rights when the evidence failed to show that Appellee used reasonable efforts to return the children to the home. Appellant contends that Appellee's efforts were not reasonable, because Appellee chose to place the children with a foster parent who stated a desire to adopt at least one of the children. Appellant asserts that placing the children with a foster parent who wanted to adopt at least one of the children thwarted her ability to attend all of the children's medical and other appointments.

**{¶35}** Appellant also claims that Appellee's failure to obtain her signature on the amended case plan filed June 6, 2018 illustrates that the agency did not use reasonable efforts.

**{¶36}** R.C. 2151.419(A)(1) requires a trial court to determine whether a children services agency "made reasonable efforts to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home." However, this statute applies only at "adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children * * *." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 41; *accord In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916, 2016 WL 915012, ¶ 72. Thus, "'[b]y its plain terms, the statute does not apply to motions for permanent custody brought pursuant to R.C. 2151.413, or to hearings held on such motions pursuant to R.C. 2151.414.'" *C.F.* at ¶ 41, quoting *In re A.C.*, 12th Dist. Clermont No. CA2004-05-041, 2004-Ohio-5531, 2004 WL 2340127, ¶ 30. Nonetheless, "[t]his does not mean that the agency is relieved of the duty to make reasonable efforts" before seeking permanent custody. *Id.* at ¶ 42. Instead, at prior "stages of the child-custody proceeding, the agency may be required under other statutes to prove that it has made reasonable efforts toward family reunification." *Id.* Additionally, "[if] the agency has not established that reasonable efforts have been made prior to the hearing on a motion for

permanent custody, then it must demonstrate such efforts at that time." *Id.* at ¶ 43.

**{¶37}** In the case at bar, Appellant's appeal does not originate from one of the types of hearings specifically listed in R.C. 2151.419(A): "adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children." Appellee, therefore, was not required to prove at the permanent custody hearing that it used reasonable efforts to reunify the family, unless it had not previously done so.

**{¶38}** The record reflects that the trial court made several reasonable efforts findings before Appellee filed its permanent custody motions. Thus, the court did not need to again find that the agency used reasonable efforts before it could grant the agency permanent custody of the children. *E.g., In re M.H.–L.T.*, 4th Dist. Washington No. 17CA12, 2017-Ohio-7825, 2017 WL 4274268, ¶ 64; *In re S.S.*, 4th Dist. Jackson Nos. 16CA7 and 16CA8, 2017-Ohio-2938, 2017 WL 2256777, ¶ 168.

**{¶39}** We additionally observe that Appellant never objected to any of the multiple reasonable efforts findings that the trial court made throughout the pendency of the case before Appellee filed its permanent custody motions. Appellant could have, but did not, assert at an earlier stage

of the proceedings that Appellee had fallen short in its duty to use reasonable efforts. Appellant thus did not give the trial court an opportunity to consider her argument that Appellee failed to use reasonable efforts and to correct any deficiencies. Therefore, absent plain error, Appellant has forfeited the argument for purposes of appeal. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997) (stating that the "failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal"); *accord In re J.W.*, 9th Dist. Summit No. 28966, 2018-Ohio-3897, 2018 WL 4656088, ¶ 7; *In re S.C.*, 189 Ohio App.3d 308, 2010–Ohio–3394, 938 N.E.2d 390 (4th Dist.) ¶¶ 40–41; *In re T.S.*, 8th Dist. No. 92816, 2009–Ohio–5496, ¶ 17; *In re Slider*, 160 Ohio App.3d 159, 2005–Ohio–1457, 826 N.E.2d 356, ¶ 11 (4th Dist).

**{¶40}** "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. Moreover, plain error does not exist unless the court's obvious deviation from a legal rule affected the outcome of the

proceeding. *E.g., State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

**{¶41}** We do not believe that the record in the case at bar shows that the trial court plainly erred by finding that Appellee used reasonable efforts to reunify the family. We discussed the meaning of "reasonable efforts" in *C.B.C., supra*, at ¶ 76, as follows:

> In general, "reasonable efforts" mean "'[t]he state's efforts to resolve the threat to the child before removing the child or to permit the child to return home after the threat is removed.'" *C.F.* at ¶ 28, quoting Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U.Pub.Int.L.J. 259, 260 (2003). "'Reasonable efforts means that a children's services agency must act diligently and provide services appropriate to the family's need to prevent the child's removal or as a predicate to reunification.'" *In re H.M.K.*, 3rd Dist. Wyandot Nos. 16–12–15 and 16-12-16, 2013-Ohio-4317 [2013 WL 5447791], ¶ 95, quoting *In re D.A.*, 6th Dist. Lucas No. L-11-1197, 2012-Ohio-1104 [2012 WL 929609], ¶ 30. In other words, the agency must use reasonable efforts to help remove the obstacles preventing family reunification. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L.Rev. 321, 366 (2005), quoting *In re Child of E.V.*, 634 N.W.2d 443, 447 (Minn.Ct.App. 2001), and *In re K.L.P.*, No. C1–99–1235, 2000 WL 343203, at *5 (Minn.Ct.App. Apr. 4, 2000) (explaining that the agency must address what is "necessary to correct the conditions that led to the out-of-home placement" and must "provide those services that would assist in alleviating the conditions leading to the determination of dependency"). However, "'[r]easonable efforts' does not mean all available efforts. Otherwise, there would always be an argument that one more additional service, no matter how remote, may have made reunification possible." *In re Lewis*, 4th Dist. Athens No. 03CA12, 2003-Ohio-5262 [2003 WL 22267129], ¶ 16. Furthermore, the meaning of "reasonable efforts" "will obviously vary with the circumstances of each individual case." *Suter v. Artist M.*, 503 U.S. 347, 360, 112 S.Ct. 1360, 118 L.Ed.2d 1

> (1992). Additionally, "[i]n determining whether reasonable efforts were made, the child's health and safety shall be paramount." R.C. 2151.419(A)(1).

**{¶42}** Here, the record demonstrates that Appellee used reasonable efforts to reunify the family. Appellee provided case planning services, visitation, in-home providers, and referrals for services. Appellant engaged in many of the offered services, and Appellee eventually returned both children to Appellant's home. Appellant unfortunately failed to demonstrate that she could adequately protect the children. Appellant left K.M., IV alone in her car while she went on a walk around a park with a date. Appellant asserted that she believed the child was adequately protected because Appellant asked a stranger to watch the child. Appellant also claimed that her car remained in her eyesight as she walked around the park with her date. Nonetheless, law enforcement officials were called, and Appellant subsequently was convicted of child endangering. Appellee thus used reasonable efforts to reunify the children by engaging in not only case planning services but also in allowing the children to return home in an attempt to see whether Appellant could show that she possessed the necessary protective capacity to provide adequate care for her two, young special needs children.

**{¶43}** Appellant additionally asserts that Appellee did not use reasonable efforts to reunify the family because Appellee failed to ensure that Appellant signed an amended case plan filed in June 2018. We observe, however, that Appellant did not object to the trial court's decision that approved the amended case plan and that incorporated the case plan into its dispositional order. "A party may not object to matters regarding case plan implementation for the first time on appeal." *In re N.L.*, 9th Dist. Summit No. 27784, 2015-Ohio-4165, ¶ 33, citing *In re M.Z.*, 9th Dist. Lorain No. 11CA010104, 2012-Ohio-3194, ¶ 18. Because Appellant failed to challenge the amended case plan at a time when the trial court could have considered any objections to it, we will not consider Appellant's argument that Appellee failed to ensure that Appellant was aware of the case-plan amendments. *See generally In re K.J.*, 9th Dist. Summit No. 29149, 2019-Ohio-123, 2019 WL 254314, ¶¶ 22-23 (declining to consider parent's argument regarding case plan implementation when parent failed to object to case plan during trial court proceedings).

**{¶44}** Accordingly, based upon the foregoing reasons, we overrule Appellant's first assignment of error.

B.

**{¶45}** In her second assignment of error, Appellant asserts that the trial court's decision to award Appellee permanent custody of the children is against the manifest weight of evidence.

1.

**{¶46}** 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).

**{¶47}** 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.

**{¶48}** 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].'" *Id.*, quoting *Martin,* 20 Ohio App.3d at 175; *accord State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

**{¶49}** 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).

**{¶50}** 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 Supreme Court of Ohio 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).

**{¶51}** 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.

2.

**{¶52}** 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.

3.

**{¶53}** 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).

**{¶54}** 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, 862 N.E.2d 816, ¶ 29, quoting R.C. 2151.01(A).

**{¶55}** 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.

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.

4.

**{¶56}** We initially note that although the trial court entered some factual findings, the trial court did not detail the reasoning underlying its decision to grant Appellee permanent custody of the children or cite the governing statutory provisions. However, in the absence of a proper request for findings of fact and conclusions of law, the trial court had no obligation to do so.

**{¶57}** Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." Additionally, R.C. 2151.414(C) states: "If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding." The failure to request findings of fact and conclusions of law ordinarily results in a forfeiture of the right to challenge the trial court's lack of an explicit finding concerning an issue. *In re Barnhart*, 4th Dist. Athens No. 02CA20, 2002–Ohio–6023, ¶ 23, and *Wangugi v. Wangugi*, 4th Dist. Ross No. 99CA2531, 2000 WL 377971 (Apr. 12, 2000). Moreover, "'[w]hen a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other relevant facts.'" *Id.*, quoting *Fallang v. Fallang*, 109 Ohio App.3d 543, 549, 672 N.E.2d 730 (12th Dist.1996).

**{¶58}** We have applied this rule to permanent custody cases and have held that unless a party requests findings of fact and conclusions of law, a

trial court need not set forth specific factual findings regarding each R.C. 2151.414(D) best interest factor. *In re R.S.-G.*, 4th Dist. Athens No. 15CA2, 2015–Ohio–4245, ¶ 48; *In re N.S.N.*, 4th Dist. Washington Nos. 15CA6, 15CA7, 15CA8, 15CA9, 2015–Ohio–2486, ¶¶ 36–37. We also have concluded that this same analysis applies to R.C. 2151.414(E). *In re C.S.*, 4th Dist. Athens No. 15CA18, 2015–Ohio–4883, ¶ 31. Thus, in the absence of a proper request for findings of fact and conclusions of law, the trial court was not required to set forth a specific analysis of the R.C. 2151.414(D) or (E) factors. *See also In re Burton,* 3rd Dist. Mercer No. 10–04–01, 2004–Ohio–4021, ¶¶ 22–23.

**{¶59}** Furthermore, in the absence of findings of fact and conclusions of law, we presume that the trial court applied the law correctly and affirm its judgment if evidence in the record reasonably supports its. *Bugg v. Fancher,* 4th Dist. Highland No. 06CA12, 2007–Ohio–2019, ¶ 10, citing *Allstate Fin. Corp. v. Westfield Serv. Mgt. Co.,* 62 Ohio App.3d 657, 577 N.E.2d 383 (12th Dist.1989); *accord Yocum v. Means,* 2nd Dist. Darke No. 1576, 2002–Ohio–3803, ¶ 7 ("The lack of findings obviously circumscribes our review * * *."). As the court explained in *Pettet v. Pettet,* 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (5th Dist.1988):

> [W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position

> superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence. The message should be clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already "uphill" burden of demonstrating error becomes an almost insurmountable "mountain."

**{¶60}** In the case at bar, the trial court did not explicitly connect its factual findings to any of the statutory factors set forth in R.C. 2151.414. We thus are unable to determine how the trial court applied the facts to the statutory factors. Our review is therefore circumscribed, and we must affirm the trial court's decision if there is some evidence to uphold it. *In re I.B-C.*, 4th Dist. Ross No. 18CA3647, 2019-Ohio-1464, 2019 WL 1755367, ¶ 38.

**{¶61}** We also note that although Appellant's second assignment of error states that she challenges the trial court's best-interest determination, the substance of the argument contained within Appellant's second assignment of error does not focus upon the best-interest factors listed in R.C. 2151.414(D). Instead, the argument centers upon the trial court's finding that Appellant had not remedied the conditions that led to the children's removal. More particularly, Appellant contends that the trial court incorrectly determined that Appellant (1) has "significant mental health issues," (2) was unable to maintain stable housing, (3) failed to

adequately protect the children; and (4) failed to provide adequate therapeutic care for the children. Nowhere does Appellant assert that the trial court incorrectly evaluated the best interest factors. Rather, Appellant's argument focuses upon her conduct and not upon the children's best interest. Because Appellant's argument does not specifically address the children's best interest or the best interest factors listed in R.C. 2151.414(D), we construe her second assignment of error as a challenge to the trial court's finding under R.C. 2151.414(B).

**{¶62}** The trial court did not cite which R.C. 2151.414(B) factor applied. We note, however, that the trial court found that the children could not be placed with Appellant within a reasonable time or should not be placed with her. Thus, the trial court appears to have relied upon R.C. 2151.414(B)(1)(a) (i.e., "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").

**{¶63}** The court also determined that the younger child, K.M., had been in Appellee's temporary custody for twelve or more months of a consecutive twenty-two month period. The court thus appears to have relied upon R.C. 2151.414(B)(1)(d) as it relates to K.M. Because Appellant does

not raise any issue regarding the court's twelve-out-of-twenty-two-month finding as it relates to K.M., we do not address it.

5.

**{¶64}** 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) and (2):

> (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;

**{¶65}** We again note that the trial court did not specifically cite either of the foregoing statutory provisions. Nevertheless, the trial court's decision refers to Appellant's failure to remedy the conditions that led to the children's removal and to her intellectual disability and cognitive limitations. As we explain below, we believe that the record contains some evidence to support the trial court's factual findings and thus to support findings under either R.C. 2151.414(E)(1) or (E)(2).

**{¶66}** Appellee started working with the family in January 2017 after learning that then-one-month-old K.M. suffered severe and inadequately explained injuries. Appellee later learned that the K.M.'s father had inflicted the injuries. The father went to prison, and Appellee worked with Appellant in an attempt to reunify the family. Appellee allowed both children to return to Appellant's home. However, shortly thereafter, Appellee obtained an emergency removal based upon Appellant's child endangering conviction that resulted after she left K.M., IV alone inside her car while Appellant went on a date.

**{¶67}** Throughout the case, one of Appellee's primary concerns was Appellant's protective capacities. Appellee discovered that Appellant continued to have frequent contact with the father, even though Appellee

stressed the importance of Appellant disconnecting herself from the person who had severely abused K.M. Appellee did not believe that Appellant intended to sever all ties with the father and that Appellant would expose the children to risk of harm.

**{¶68}** Appellee additionally relayed its concerns that Appellant did not provide adequate supervision when the children were in her care. Appellee introduced evidence that Appellant asked complete strangers to watch her children while she ran inside a store to purchase cigarettes and that Appellant left the children unsupervised while playing in their room. Appellant further lacked appropriate bedding for the children and did not realize on her own the inappropriateness of the bedding.

**{¶69}** Although Appellant engaged in case planning services and made an effort to compensate for her intellectual disability, her conduct sadly displayed that she lacks adequate protective capacities and that the children may be placed at risk if returned to her care. The trial court could have reasonably determined that Appellant's conduct in leaving K.M., IV in the car while she went on a date was the most likely indicator of her future conduct if the children were returned to her care. The trial court quite rationally could have determined that returning the children to Appellant's care would be gambling with their lives. We cannot fault the trial court for

choosing to ensure that the children would be placed in a safe environment rather than in an environment where Appellant may or may not adequately protect them. *See generally In re M.H.*, 4th Dist. Pike No. 17CA882, 2017-Ohio-7365, 2017 WL 3701168, ¶ 93 (determining that despite mother's attempts to overcome intellectual disability, mother still lacked ability to provide proper care for child); *In re N.L.*, 9th Dist. Summit No. 27784, 2015–Ohio–4165, ¶ 31, 37 (determining that parents' inability "to provide safe and appropriate care for their child without consistently relying on the assistance and judgments of others" created "significant health and safety risk" to child and supported trial court's R.C. 2151.414(E)(1) finding that the parents failed to continuously and repeatedly substantially remedy conditions causing child's removal); *In re J.M.–R.*, 8th Dist. Cuyahoga No. 98902, 2013–Ohio–1560, 2013 WL 1697356, ¶ 33 (upholding trial court's determination that child cannot be placed with parent within a reasonable time or should not be placed with parent when mother had "borderline intellectual capacity" and would be unable to care for child without support).

**{¶70}** Additionally, although we commend Appellant's efforts to comply with case plan and to engage in services, we do not agree with Appellant that her case plan compliance necessarily proves that the children can be placed with her within a reasonable time or should be placed with

her. As we have often noted, a parent's case plan compliance may be a relevant, but not necessarily conclusive, factor when a court considers a permanent custody motion. *In re W.C.J.*, 4th Dist. Jackson No. 14CA3, 2014–Ohio–5841, ¶ 46 (stating that "[s]ubstantial 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"); *see In re S.S.*, 4th Dist. Jackson No. 16CA7 and 16CA8, 2017–Ohio–2938, ¶ 164; *In re M.B.*, 4th Dist. Highland No. 15CA19, 2016–Ohio–793, ¶ 59; *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 West*, 4th Dist. Athens No. 03CA20, 2003–Ohio–6299, ¶ 19. While the mother showed dedication to completing the initial case plan activities, her case plan compliance does not, by itself, prove that her intellectual disability permits her to provide an adequate permanent home for the children. Appellant's case plan compliance reveals her willingness and ability to complete the activities the agency requested, but it does not, by itself, demonstrate that she is able to provide the children with an adequate

permanent home. Thus, under the facts present in the case at bar, Appellant's case plan compliance does not negate the trial court's conclusion that the children could not be placed with her within a reasonable time or should not be placed with her.

**{¶71}** We further observe that a parent who chooses to engage with an individual who severely abused the parent's child may give rise to a finding that the parent lacks protective capacities or a commitment to providing for a child's emotional needs. *Matter of A.M.*, 4th Dist. No. 17CA32, 2018-Ohio-646, 105 N.E.3d 389, 2018 WL 985972, ¶ 82 (concluding that mother's denials of sexual abuse and continued relationship with abuser showed that mother lacked protective capacities), citing *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 47 (concluding that mother's decision to remain living with pedophile-husband supported finding under R.C. 2151.414(E)(14) that she is unwilling to prevent children from suffering physical, emotional, or sexual abuse); *In re A.J.*, 6th Dist. Lucas No. L-13-1118, 2014-Ohio-421, 2014 WL 505345, ¶ 55 (stating that mother's "continued skepticism about what occurred under her own roof displays a conscious disregard to protect her children and for their well-being"); *In re J.H.*, 12th Dist. Preble No. CA2007-07-016, 2007-Ohio-7079, 2007 WL 4554957, ¶¶ 30–31 (determining that evidence did not show

that father prioritized his children's safety and thus would be unwilling to protect children from future abuse when he intended to stay married to his wife, the abuser, and when he failed to acknowledge that his wife abused the children); *In re Moore*, 7th Dist. Belmont No. 04-BE-9, 2005-Ohio-136, 2005 WL 78754, ¶ 40 (upholding trial court's permanent custody decision based, in part, upon testimony from sexual abuse investigator that "if a parent does not believe abuse allegation by a child, they would not be capable of protecting that child from future abuse"); *Matter of Ranker*, 11th Dist. Portage Nos. 95–P–0093–0096, 1996 WL 761159, *10 (Dec. 6, 1996) (noting that court may grant permanent custody when mother is unable to protect her children from a foreseeable abusive situation). Here, Appellant continued her relationship with the children's father even though the father had severely injured then-one-month-old K.M. Appellee introduced testimony and evidence regarding the conversations between Appellant and the father. Those conversations support findings that Appellant did not completely disengage herself from the father and that Appellant wanted to maintain a relationship with the father, despite her knowledge that he had severely injured K.M.

**{¶72}** Consequently, based upon all of the foregoing reasons, we disagree with Appellant that the trial court's decision is against the manifest weight of the evidence.

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

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.**