[Cite as *In re T.W.*, 2011-Ohio-903.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re: T.W. et al.,	:	
		No. 10AP-897
(F.W.,	:	(C.P.C. No. 06JU07-10529)
Appellant).	:	(REGULAR CALENDAR)
In Re: T.J.,	:	
		No. 10AP-898
(F.W.,	:	(C.P.C. No. 06JU07-10530)
Appellant).	:	(REGULAR CALENDAR)
In Re: C.H.,	:	
		No. 10AP-899
(F.W.,	:	(C.P.C. No. 10JU07-10037)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 1, 2011

Robert J. McClaren, for appellee Franklin County Children Services.

Abe Bahgat, Guardian ad Litem.

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶1} Appellant, F.W., appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, awarding permanent custody to appellee Franklin County Children Services ("FCCS" or "appellee"), of appellant's five children, T.W.1, T.W.2, T.J., N.H., and C.H. (collectively, "the children"), and thereby terminating her parental rights with respect to these children.

{¶2} The following facts and procedural history are taken from the record. Appellant is the mother of seven children, five of which are the subjects of this consolidated appeal. The children involved in the matter before us are twin siblings, T.W.1 and T.W.2, born May 3, 1999, T.J., born July 30, 2000, N.H., born March 28, 2004, and C.H., born January 30, 2010. R.J. is the biological father of T.W.1, T.W.2, and T.J., and C.H. Sr. is the biological father of N.H. and C.H.[1]

{¶3} The four oldest children, T.W.1, T.W.2, T.J., and N.H., were first removed from appellant's care in July 2004. However, after appellant's completion of a case plan, the children were returned to her in December of that year. In January 2006, FCCS again obtained custody of these four children, and they remained in the custody of FCCS until August 2006, at which time they were again returned to appellant. Just over a year later, on October 12, 2007, the children were removed from appellant's care for the final time. C.H. has been in the temporary custody of FCCS since his birth on January 30, 2010.

[1] Neither R.J. nor C.H. Sr. has appealed from the trial court's judgment awarding permanent custody of the children to FCCS, and no arguments have been asserted regarding the termination of their parental rights.

{¶4} On July 3, 2006, complaints were filed alleging T.W.1, T.W.2, T.J., and N.H. were neglected and dependent children.[2] The complaints asserted this family has a history with FCCS dating back to 1999, with physical abuse being substantiated in 2004. According to the complaints, in December 2005, FCCS received a referral due to concerns of these four children losing weight, being late for school, and appearing at school inappropriately dressed. Additionally, it was alleged that though the children were eligible for free breakfast and free lunch at school, they often missed breakfast because of tardiness. The complaints further asserted the children were not being fed dinner, but, instead, were being sent to their rooms after school and locked in their bedrooms overnight. The complaint pertaining to T.J. also contained an allegation of abuse based on a report FCCS received on December 19, 2005. The report indicated T.J. sustained a bruise and bump on his temple after appellant allegedly pushed him into a wall after he urinated in his pants.

{¶5} Following the January 2006 removal of the children, appellant was charged with domestic violence against T.J. in violation of R.C. 2919.25. On June 5, 2006, appellant entered a guilty plea to misdemeanor domestic violence and was placed on probation. Permanent custody motions with respect to these four children were filed on November 14, 2008, and amended motions for permanent custody were filed on August 31, 2009.

{¶6} C.H. was born on January 30, 2010. After obtaining emergency custody of C.H., FCCS was granted temporary custody on February 5, 2010. The complaint seeking

[2] Initial complaints were filed on January 11, 2006. These complaints were dismissed and re-filed on April 10, 2006, then again dismissed and re-filed on July 3, 2006.

permanent custody of C.H. alleged he was a dependent and neglected child based on referrals concerning appellant's mental health, physical abuse of C.H.'s siblings, and domestic violence between appellant and C.H.'s father, C.H. Sr. According to the complaint, appellant no longer had custody of any of C.H.'s siblings because after they were returned to her, the children were not being fed, one slept in a hallway without a mattress, pillow or blanket, one was drinking out of the toilet due to thirst, the children's clothes were not being washed, and appellant was again using physical discipline with a belt. The complaint asserted appellant was residing with C.H. Sr., who had failed to make any progress on his case plan, had a long history of domestic violence, and had previously been incarcerated on drug charges. Additionally, the complaint alleged C.H. Sr. did not engage in any of the recommended treatment services, including drug and alcohol assessments, anger management, domestic violence counseling, and couples counseling. The complaint also asserted C.H. Sr. had been volatile and verbally aggressive with FCCS case plan providers and demonstrated inappropriate interactions with his son N.H. during supervised visits.

{¶7} The dispositional hearing, pursuant to FCCS's request for permanent custody of these five children, occurred over nine days, to wit: April 19, 26, July 12, 13, 14, 15, and August 16 and 17, 2010. During this time, the trial court heard testimony from nine witnesses, including appellant, C.H. Sr., and the guardian ad litem. At the time of trial, T.W.1 was in one foster home, T.W.2 and T.J. were placed together in another, and N.H. was in a foster home with C.H. and their twin siblings that are not the subjects of this appeal. The guardian ad litem filed his report on August 24, 2010. The report included a recommendation that FCCS's request for permanent custody be denied and that the

children be returned to appellant, with the exception of T.W.1, who the guardian ad litem recommended be returned to appellant under court ordered protective supervision.

{¶8} On September 17, 2010, the trial court issued a judgment entry awarding permanent custody of all five children to FCCS. It is from this judgment that appellant has appealed and asserts the following five assignments of error:

> 1. The juvenile court erred in assuming that Mother bore an evidentiary burden of proving that she is able to provide a safe, stable, permanent home.
>
> 2. The juvenile court erred in terminating Mother's parental rights to Baby CH.
>
> 3. The juvenile court erred in terminating Mother's parental rights with respect to NW.
>
> 4. The juvenile court erred in terminating Mother's parental rights with respect to TW1 and TJ.
>
> 5. The juvenile court erred in terminating Mother's parental rights to TW2.

{¶9} Parents have a constitutionally-protected fundamental interest in the care, custody, and management of their children. *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, 2060; *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388. The Supreme Court of Ohio has recognized the essential and basic rights of a parent to raise his or her child. *In re Murray* (1990), 52 Ohio St.3d 155, 157. These rights, however, are not absolute, and a parent's natural rights are always subject to the ultimate welfare of the child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 106. Thus, in certain circumstances, the state may terminate the parental rights of natural parents when it is in the best interest of the child. *In re E.G.*, 10th Dist. No. 07AP-26, 2007-Ohio-3658, ¶8, citing *In re Harmon* (Sept. 25, 2000), 4th Dist. No. 00 CA 2694; *In re Wise* (1994), 96 Ohio App.3d 619, 624.

{¶10} A decision to award permanent custody requires the trial court to take a two-step approach. First, a trial court must find whether any of the following apply:

> (a) The child is not abandoned or orphaned, 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, 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 if, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, 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.
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> (b) The child is abandoned.
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> (c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.
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> (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 or 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 and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

R.C. 2151.414(B)(1).

{¶11} Once the trial court finds that one of the circumstances in R.C. 2151.414(B)(1)(a) through (d) apply, the trial court then must determine whether a grant of permanent custody is in the best interest of the child. R.C. 2151.414(B)(1). FCCS must prove by clear and convincing evidence that an award of permanent custody is in the child's best interest. Id. Clear and convincing evidence is more than a mere

preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368; *Cross v. Ledford* (1954), 161 Ohio St. 469.

{¶12} In determining the best interest of a child, a trial court is required to consider all relevant factors including, but not limited to, the following:

> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
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> (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period or 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 and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
>
> (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

R.C. 2151.414(D)(1).

{¶13} In considering the trial court's decision to grant permanent custody to FCCS, this court must determine from the record whether the trial court had sufficient

evidence before it to satisfy the clear and convincing standard.[3] *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887, ¶59, appeal denied, 103 Ohio St.3d 1495, 2004-Ohio-5605; see also *Holcomb* at 368, citing *Cross* at paragraph three of the syllabus. However, " 'every reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court].' " *Brooks* at ¶59, quoting *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Furthermore, "if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the [juvenile] court's verdict and judgment." Id.

{¶14} The findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *Brooks* at ¶60, citing *In re Brown* (1994), 98 Ohio App.3d 337, 342; *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944. " 'The discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *Brooks* at ¶60, quoting *Hogle*, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316.

{¶15} In her first assignment of error, appellant contends the trial court erroneously placed an evidentiary burden upon her to prove that she is able to provide a safe, stable, and permanent home for the children. According to appellant, this

[3] During oral argument, appellant noted that when reviewing permanent custody cases, this court has occasionally referenced a manifest weight of the evidence standard of review. We decline to speculate on the rationale for use of this language in prior decisions, and, instead, reaffirm our standard for reviewing awards of permanent custody to FCCS as set forth in *In re Brooks.*

contention is established by the following language taken from the trial court's September 17, 2010 decision awarding permanent custody to FCCS:

> Consistent with reports from FCCS case workers, [appellant] presented to the Court with a frustrated distrustful demeanor. While it is understandable how this adversarial proceeding instills distrust in FCCS and the system in general, the record will reflect that [appellant] was given extended opportunity by this Court (and FCCS), to prove that she is able to provide her children with a safe, stable permanent home.

(Decision at 9-10.)

{¶16} Despite use of the word "prove," we do not find this passage to be an indication that the trial court placed an evidentiary burden upon appellant. As stated by this court in *In re Holbert* (Mar. 6, 1984), 10th Dist. No. 83AP-704:

> [T]he burden is upon the movant to establish its case by clear and convincing evidence. R.C. 2151.414(B). However, once the movant meets or exceeds its burden of proof, the burden then shifts to the respondent to go forward with (produce) evidence which makes the movant's evidence something less than clear and convincing. Thus, the burden of proof does not shift to the respondent but, rather, remains upon the moving party throughout the proceedings. It is the burden of production that shifts to the respondent once the movant has established its case by clear and convincing evidence. The respondent is not required to prove his or her case or disprove the movant's case, but must put forth evidence which reduces the movant's evidence below the standard of clear and convincing.

{¶17} In the case sub judice, the record is clear that the trial court did not improperly shift the evidentiary burden to appellant. The language from the trial court's decision upon which appellant relies is a recognition of the opportunity appellant had to come forward with any evidence to counter the evidence presented by FCCS and to make FCCS's evidence something less than clear and convincing.

{¶18} The trial court was well aware of the requisite burden of proof, as its decision states, "FCCS' burden of proof is by clear and convincing evidence," and the decision proceeds to define said burden of proof. (Decision at 32.) The trial court's decision also states that it found, "FCCS presented clear and convincing evidence" of (1) R.C. 2151.414(B)(1), (2) the existence of various factors contained in R.C. 2151.414(E), and (3) that permanent custody is in the best interests of all five children. (Decision at 16, 18, and 26.) Moreover, the decision states, "the Court finds by clear and convincing evidence that [C.H.] cannot or should not be placed with either of his parents within a reasonable time," and "[f]urthermore, clear and convincing evidence shows that granting FCCS' Motion for Permanent Custody is in [T.W.1, T.W.2, T.J., N.H., and C.H.]'s best interest as at least one (1) of the factors listed under R.C. 2151.414(B)(1) applies to them." (Decision at 32.)

{¶19} At no time did the trial court shift the burden of proof, which always required FCCS to prove by clear and convincing evidence that an award of permanent custody was in the best interests of the children. Accordingly, we overrule appellant's first assignment of error.

{¶20} Appellant's remaining assignments of error challenge the trial court's judgment awarding permanent custody to FCCS. For ease of discussion, we will address these assignments of error together. Additionally, where applicable we include the arguments contained in the brief of the guardian ad litem filed in support of appellant.

{¶21} As previously indicated, the decision to award permanent custody requires a two-step approach. In connection with the first step of the analysis, it is not disputed, and appellant concedes, that T.W.1, T.W.2, T.J., and N.H. have been in the temporary

custody of FCCS for 12 or more months of a consecutive 22-month period, as they have been in the temporary custody of FCCS since the date of their last removal in October 2007. Thus, the trial court properly found that with respect to these four children, the requirement of R.C. 2151.414(B)(1)(d) was satisfied by clear and convincing evidence.

{¶22} Though C.H. has been in foster care since the time of his birth, it is undisputed that his length of time in FCCS custody does not satisfy R.C. 2151.414(B)(1)(d); therefore, the request for permanent custody of C.H. was based on R.C. 2151.414(B)(1)(a). According to R.C. 2151.414(E), in determining whether a child cannot be placed with either parent within a reasonable time or should not be placed with the child's parents as set forth in R.C. 2151.414(B)(1)(a), a court must determine, by clear and convincing evidence, that one or more of the factors enumerated in R.C. 2151.414(E)(1) through (16) exist.

{¶23} A trial court may base its decision that a child should not be placed or cannot be placed with a parent within a reasonable time upon the existence of any one of the R.C. 2151.414(E) factors. *In re A.S.*, 10th Dist. No. 10AP-414, 2010-Ohio-5446, ¶17. The existence of one factor alone will support a finding that a child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *In re D.C.*, 10th Dist. No. 08AP-1010, 2009-Ohio-2145, ¶35, citing *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶50.[4]

[4] As noted infra, C.H. Sr. has not appealed from the decision of the trial court to award permanent custody to FCCS. Additionally, appellant has not contested the trial court's finding that C.H. cannot be placed with C.H. Sr. within a reasonable time or that C.H. should not be placed with C.H. Sr. Therefore, our analysis focuses on appellant and her arguments as contained in her appellate brief.

{¶24} In the case sub judice, the trial court found that as to appellant, FCCS presented clear and convincing evidence at trial that factors (1), (2), (4), (6), and (16) of R.C. 2151.414(E) existed. According to appellant, each of these findings is erroneous. As is relevant here, R.C. 2151.414(E) provides:

> (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, mental retardation, 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 [2151.35.3] of the Revised Code;
>
> * * *
>
> (4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;
>
> * * *
>
> (6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section * * * 2919.25 * * * of the Revised Code and the child or

> a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.
>
> * * *
>
> (16) Any other factor the court considers relevant.

{¶25} Appellant first contends the trial court's finding under R.C. 2151.414(E)(1) that appellant failed to remedy the problem that caused FCCS to remove C.H. was in error. According to appellant, the asserted "problem" leading to removal of C.H. does not meet the general neglect or dependency standard for removing a child from the home. As mentioned infra, C.H. was placed with FCCS directly from the hospital after his birth. Moreover, at the time of his birth, C.H.'s dependency was stipulated to by all the parties due to the ongoing matters with appellant's older children. Accordingly, there is no dispute as to the appropriateness of C.H.'s initial placement with FCCS. Rather, the focus is whether FCCS should be awarded permanent custody of C.H.

{¶26} Appellant suggests that we must consider C.H. separately from the other children because he was not born until after the older children were removed from appellant's care. In other words, it is appellant's position that we need not consider the reasons for the removal of C.H.'s siblings when reviewing whether permanent custody of him should be awarded to FCCS. To accept appellant's proposition, however, equates to a finding that even though a parent is not currently completing a case plan and is not currently attempting to remedy a situation that caused the removal of her children, before a court can consider awarding permanent custody to an agency of a baby who has never

been in that parent's care, the baby must first be subjected to that un-remedied situation and/or the process be further prolonged by additional grants of temporary agency custody, so as to only further prevent permanent placement. This is a position we cannot embrace.

{¶27} Appellant also attempts to simplify the trial court's decision by stating C.H. Sr.'s presence was the primary basis for the trial court's decision to terminate her parental rights. We disagree. The trial court considered the history that appellant has with FCCS and her other children that dates back to 1999. Additionally, the trial court noted that though the older children were removed from her care for the final time in October 2007, appellant has not completed her case plan objectives. One of the primary case plan objectives was individual counseling to address not only parenting issues, but also the abusive relationship between appellant and C.H. Sr. In fact, it was not until the fall of 2009, which was two years after the removal of the four older children, that appellant made any attempt to begin her individual counseling. At trial, appellant testified that even though she had recently begun her individual counseling, she had not consistently attended weekly counseling as instructed by her counselor. Also, appellant's counselor testified that appellant attended only two counseling sessions between December 2009 and March 6, 2010. It is unclear what happened after March 24, 2010 because appellant withdrew her consent prohibiting the counselor from further testifying about anything that occurred after that date.

{¶28} Appellant also failed to comply with visitation as set forth in the case plan of the four older children. Prior to visitation being suspended in August 2009, appellant attended only 27 of 100 visits, and went two 90-day periods without visiting or contacting

the children. We recognize the suspended visitation and the majority of the missed visits with the children occurred prior to C.H.'s birth; however, C.H.'s removal was based in part on the fact that all of his siblings had been removed from appellant's care. Thus, appellant's failure to complete case plan objectives with respect to T.W.1, T.W.2, T.J., and N.H. is clearly relevant to the determination of whether appellant has remedied the problems that caused C.H.'s removal.

{¶29} Moreover, the concern regarding the relationship between appellant and C.H. Sr. arises out of the evidence pertaining to domestic violence occurring between them. At trial, appellant denied the occurrence of domestic violence, and testified she "exaggerated" any previous statements she had made regarding the occurrence of domestic violence between her and C.H. Sr. However, Kala Johnson, appellant's counselor, testified appellant reported being "fearful of [C.H. Sr.] physically, that in the past he had hit her, tried to choke her, called her names, slapped her." (July 14, 2010 Tr. 59.) Ms. Johnson also testified that appellant described C.H. Sr. as exhibiting compulsive and controlling behaviors. The record also contains evidence that C.H. Sr. had demonstrated hostility and aggressive behavior toward several of the persons associated with FCCS during the pendency of these proceedings. While appellant attempts to argue it is only C.H. Sr.'s "continued presence" that is at issue, the record reveals that the issue is instead the relationship between C.H. Sr. and appellant coupled with appellant's apparent inability to set appropriate boundaries within the relationship – the precise issue FCCS established was one of the main objectives to be addressed in counseling.

{¶30} Additionally, the record is clear that C.H. Sr. made little effort to complete his case plan until a few months prior to trial. C.H. Sr. was incarcerated on a drug

trafficking charge when N.H. was born, and did not meet N.H. until the child was four years old. Despite C.H. Sr.'s background with drug use, he refused to comply with referrals for alcohol and drug assessments until December 2009. However, C.H. Sr. did not complete the intensive outpatient treatment program that was recommended as a result of the assessment. Beginning in April 2009, C.H. Sr. was given multiple referrals for anger management, and while he finally linked with a provider in February 2010, the provider informed FCCS that C.H. Sr. attended only two of the six sessions. Additionally, C.H. Sr. failed to obtain either stable housing or stable employment. Moreover, though being aware of FCCS's concerns regarding the abusive nature of the relationship, neither C.H. Sr. nor appellant attended couples counseling as outlined in the case plan to address their relationship issues.

{¶31} Appellant is correct in her statement that there is no evidence in the record that C.H. Sr. physically abused or physically harmed any of the children. Yet, we cannot say as appellant urges us to that this results in a finding that C.H. Sr.'s relationship with appellant and involvement with these children does not pose a risk of an unsafe environment. This is particularly so in light of the fact that C.H. Sr.'s substance abuse issues and the seemingly abusive nature of the relationship with appellant have gone largely unaddressed.

{¶32} For all these reasons, we find the record contains clear and convincing evidence that supports the trial court's finding that factor (1) of R.C. 2151.414(E) exists.

{¶33} Given that FCCS must demonstrate the existence of only one factor to support a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, and we have found the evidence supports

a finding under R.C. 2151.414(E)(1), we need not address the remaining factors found by the trial court.[5] *In re A.S.* at ¶43; *In re Norris*, 4th Dist. No. 00CA038, 2000-Ohio-2038.

{¶34} Having found the trial court's determination that R.C. 2151.414(B)(1)(d) applies to T.W.1, T.W.2, T.J., and N.H. and that R.C. 2151.414(B)(1)(a) applies to C.H. is supported by clear and convincing evidence, we now turn to the second step of the analysis which concerns whether an award of permanent custody to the children's services agency is in the best interests of the children. According to appellant, the trial court erred in finding that such an award was in the best interests of the children.

{¶35} The trial court addressed each of the factors set forth in R.C. 2151.414(D)(1). In regards to R.C. 2151.414(D)(1)(a), which addresses the children's interactions with their parents, relatives, foster parents, and siblings, the trial court noted the children are clearly bonded to each other and that there is evidence that each child is bonded to their corresponding foster parents. Furthermore, the trial court noted that while T.W.1 has not bonded with either of her biological parents, T.W.2, T.J., and N.H. have had an opportunity to re-bond with appellant through family counseling and that N.H. and T.J. have a bond with their father C.H. Sr. The trial court also found that "[t]o the extent possible," C.H. has and is developing a bond with his parents. (Decision at 27.)

[5] Appellant has made the argument that application of R.C. 2151.414(E)(6) in this case is unconstitutional. Even if we were to address the application of R.C. 2151.414(E)(6), we would not reach the merits of this constitutional challenge because this issue was not raised in the trial court. The failure to raise at the trial level the issue of the constitutionality of a statute or its application which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore, need not be heard for the first time on appeal. *In re N.W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37; *In re Dailey*, 10th Dist. No. 04AP-1346, 2005-Ohio-2196; *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312.

{¶36} R.C. 2151.414(D)(1)(b) addresses the wishes of the children as expressed directly by the children or through the guardian ad litem. The four older children were interviewed by the trial court, and their wishes were summarized by the trial court as follows.

{¶37} T.W.1 was adamant about her desire to be adopted by her foster mother with whom she has lived for three years. T.W.1 stated that she feels safe with her foster mother, and though she enjoys visiting with her siblings, she does not want to visit with appellant.

{¶38} T.W.2 stated her first choice was to live with her father, R.J., because he treats her better than appellant. According to T.W.2, sometimes appellant would not feed them and appellant would "beat on [T.J.] a lot." (Aug. 17, 2010 Tr. 16.) However, T.W.2 stated her second choice would be to live with appellant because "as many times as we got tooken away, our mom would change." (Aug. 17, 2010 Tr. 21.) T.W.2 said she believed her mom had changed because appellant was doing things "she's supposed to." (Aug. 17, 2010 Tr. 21.) When asked about adoption, T.W.2 indicated she did not want to be adopted because she did not trust people. T.W.2 went on to say that if she were to be adopted, she would want it to be by her foster mother.

{¶39} T.J. stated he wanted to live with appellant. T.J. also said that he would like to live with appellant part of the time and with his father the other part of the time.

{¶40} N.H. told the trial court that he wanted to go home to mom and dad. N.H. said that his dad, C.H. Sr., told him that he would be able to come home if he told the judge that was what he wanted. When asked by the trial judge why he wanted to return home, N.H. responded that he thought it would stop his dad from hitting appellant.

However, the trial court noted the testimony of Ms. Gilbert indicated N.H. had not witnessed any violence between C.H. Sr. and appellant, but rather had been told these things.

{¶41} The guardian ad litem filed his report on August 24, 2010. The report was consistent with the children's wishes as expressed by them at trial. The report included a finding that T.W.1 was adamant about not wanting to see her mother and instead wanting to be adopted by her foster mother. The report also indicated T.W.2, T.J., and N.H. expressed their desire to return to appellant's home.

{¶42} R.C. 2151.414(D)(1)(c) concerns the custodial history of the children. As indicated previously, the four older children were removed from appellant's care for approximately five months in 2004, and then again for approximately eight months in 2006. From October 2007, however, T.W.1, T.W.2, T.J., and N.H. have remained in the temporary custody of FCCS. C.H. has been in the temporary custody of FCCS for his entire life, and at the time of trial had been in the same foster home for the previous eight months. The trial court also noted that all of the children were currently placed in potentially adoptive homes.

{¶43} R.C. 2151.414(D)(1)(d) takes into account a child's need for legally-secure placement and whether that placement could be achieved without a grant of permanent custody to FCCS. All of the parties agree these children need legally-secure placement. The trial court found that such placement cannot be achieved without a grant of permanent custody to FCCS.

{¶44} Appellant maintains there is no evidence that placement with her is not "legally secure." We disagree. While the evidence suggests appellant now has a stable

home and has maintained stable employment for several years, there is also evidence in the record that appellant has not completed her case plan objectives, and thereby failed to remedy the situation that caused the children's removal from the home.

{¶45} Appellant failed to maintain consistent visitation with T.W.1, T.W.2, T.J., and N.H. as she went two 90-day periods without visiting these children. Additionally, though she has attended family counseling, appellant has failed to consistently attend, let alone complete, her individual counseling that was one of the primary case plan objectives.

{¶46} Finally, R.C. 2151.414(D)(1)(e) concerns whether any factor of R.C. 2151.414(E)(7) through (10) applies. The trial court found factor (10) of R.C. 2151.414(E), that "[t]he parent has abandoned the child," was applicable to both C.H. Sr. and appellant. The basis for this was the undisputed evidence that each had gone at least 90 days without visiting or contacting the children, and appellant had done so on two different occasions.

{¶47} Additionally, the trial court considered "other relevant factors" including each of the children's individual treatment needs. These needs included T.W.1's diagnosis of traumatic stress disorder, attention deficit hyperactivity disorder, and depressive disorder; T.W.2's diagnosis of post-traumatic stress disorder and attention deficit hyperactivity disorder; T.J.'s and N.H.'s behavioral issues; and T.J.'s chronic issues with bedwetting.

{¶48} Appellant attacks essentially each finding of the trial court. First, appellant contends there is no evidence regarding adoption prospects for any of the children other than T.W.1. The record, however, reflects otherwise, as Ms. Binting testified that to her knowledge *all* of the children were in adoptive foster homes. (Apr. 26, 2010 Tr. 141.)

{¶49} Appellant also takes issue with the trial court's finding that she withheld food from the children. First, appellant contends this finding is inconsistent because on page 29 of the decision the trial court stated R.C. 2151.414(E)(7)-(9) "not a factor," but then on page 18 of its decision, the trial court stated FCCS presented by clear and convincing evidence the existence of several R.C. 2151.414(E) factors, including (E)(8) as to appellant. Regardless, there is evidence to support a finding that appellant withheld food from T.W.1, T.W.2, T.J., and N.H. Ms. Binting testified that one of the reasons for the children's final removal from appellant's care was because they were being denied food and they were stealing food at school. At trial, appellant denied ever withholding food from any of the children. Thus, the trial court was presented with conflicting evidence on this issue, but that does not necessarily mean the evidence presented by FCCS was something less than clear and convincing. Credibility determinations remain with the trial court, and, though not expressly stated, it is entirely possible the trial court determined appellant was not credible in her denial.

{¶50} Appellant next challenges the trial court's findings made under R.C. 2151.414(E)(10). According to appellant, she did not "actually" abandon the children, but rather, only statutorily abandoned them because she was frustrated with FCCS's treatment of her. We find this distinction inconsequential. Pursuant to R.C. 2151.011(C), a child is presumed abandoned when the parents of the child have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after that period of 90 days. Here it is undisputed that appellant went two 90-day periods without visiting T.W.1, T.W.2, T.J., and N.H., once during the fall of 2008 and once during the summer of 2009. During her July 2010

testimony, appellant testified she had missed only two visits since April 2010, but again appellant's reason for the missed visits was that she "skipped these visits out of frustration with FCCS." (Appellant's brief at 35.)

{¶51} Appellant also contends the trial court's decision is "anomalous." According to appellant, the decision is anomalous because the trial court did not have to consider the factors of R.C. 2151.414(E) that govern whether a child "should be placed with" a parent since it had already found T.W.1, T.W.2, T.J., and N.H. satisfied the 12 of 22 months condition of R.C. 2151.414(B)(1)(d). Though the trial court was not *required* to make these additional findings, we do not find it anomalous that it did so. A trial court is not limited to making only the minimum number of required findings in any given case, and it remains free to make additional findings if it so chooses.

{¶52} Regardless, as this court has said, when R.C. 2151.414(B)(1)(d) has been satisfied, it is unnecessary for the trial court to analyze when a child could or should be placed with either parent and we need not consider such extraneous findings as to R.C. 2151.414(B)(1)(a). *In re R.L.*, 10th Dist. No. 07AP-36, 2007-Ohio-3553, ¶11, citing *In re Damron*, 10th Dist. No. 03AP-419, 2003-Ohio-5810, ¶9; *In re L.M.*, 10th Dist. No. 06AP-534, 2007-Ohio-1596, ¶27; *In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶52. Therefore, while a trial court can give multiple reasons for its holding, once a reviewing court finds one ground is supported by clear and convincing evidence it is not bound to review the extraneous findings.

{¶53} Appellant also challenges T.W.1's express wishes to be adopted by her foster mother and have no visitation with appellant. Appellant contends the guardian ad litem believed T.W.1 was "coached" to express that view. The guardian ad litem's belief,

however, is unsubstantiated because the record is devoid of any evidence that T.W.1 was coached in her statements. Further, when asked if anyone had told her what to say during her interview with the court or if anyone had promised her anything, T.W.1 expressly stated, "no." (Aug. 17, 2010 Tr. 87-88.)

{¶54} In his brief filed in support of appellant, the guardian ad litem contends the trial court erred in disregarding his report and recommendation that FCCS's request for permanent custody be denied because appellant substantially complied with the case plan objectives. There is no statute or controlling authority, and the guardian ad litem does not cite any such authority, that requires the trial court to rule in accordance with a recommendation from a guardian ad litem. *In re Baby C.*, 10th Dist. No. 05AP-1254, 2006-Ohio-2067, ¶95; *In re Haywood*, 3d Dist. No. 1-99-93, 2000-Ohio-1740. The trial court did consider the guardian ad litem's recommendation as its decision indicates it considered all of the testimony, which included that of the guardian ad litem, as well as the guardian ad litem's report and recommendation.

{¶55} As for appellant's completion of some aspects of the case plan, this court has stated, "R.C. 2151.414(D) does not require courts to deny a children services agency's motion for permanent custody solely by virtue of a parent's substantial compliance with the case plan." *In re D.S.*, 10th Dist. No. 07AP-479, 2007-Ohio-6781, fn.1, quoting *Brooks* at ¶62; see also *In re C.R.*, 9th Dist. No. 25211, 2010-Ohio-2737, ¶36. Thus, while evidence of case plan compliance is relevant to a best-interest determination, it is not dispositive of it. Id.

{¶56} Counseling, particularly appellant's individual counseling, is the key area of dispute, and from the perspective of FCCS was the primary objective of the case plan in

order for appellant to address not only parenting issues, but also issues pertaining to domestic violence. The record contains evidence that appellant waited two years after the final removal of T.W.1, T.W.2, T.J., and N.H. to even attempt individual counseling and link with a provider. Though appellant did eventually link with a provider, she attended only a few sessions and unilaterally stopped attending. In Ms. Binting's and Ms. Sines's opinions, appellant did not complete this "important" case plan objective because she failed to follow through with a psychiatrist for possible pharmaceutical treatment of her depression from which appellant testified that she suffers, appellant failed to make sufficient progress in therapy, and appellant unilaterally decided to terminate counseling. Appellant essentially blames her failure to continue counseling on Ms. Johnson, saying that she believes Ms. Johnson is "against" her. (July 13, 2010 Tr. 66.) After hearing the evidence, the trial court found appellant did not adequately or substantially complete the case plan objectives as it related to her need for ongoing, regular individual counseling to address issues that led in part to the children's removal. We accept this finding of the trial court. See *In re C.R.* (finding mother's two and one-half year inability to complete important case plan objectives was demonstrated by her failure to consistently participate in individual counseling).

{¶57} The trial court was aware of the positive accomplishments appellant has made in her life, and stated appellant is to be commended for the same. We must not lose sight, however, of whose interests with which we are to be concerned. C.H. has been in foster care his entire life, N.H. for over half of his life, and T.J., T.W.1, and T.W.2 for over a third of their lives. While continued temporary custody to FCCS may reflect what is in the best interest of appellant, it does not appear to reflect what is in the best

interests of the children. Though appellant appeared more engaged in these proceedings beginning a few months prior to trial, the record does not reflect that in the two and one-half plus years since the removal of the older children appellant has remedied the situation that caused their removal.

{¶58} Upon thorough consideration of the record, we find clear and convincing evidence exists to support the trial court's determination that an award of permanent custody is in the best interests of T.W.1, T.W.2, T.J., N.H., and C.H.

{¶59} Having found clear and convincing evidence supports the trial court's decision that R.C. 2151.414(D)(1)(a) applies to C.H., R.C. 2151.414(D)(1)(d) applies to T.W.1, T.W.2, T.J., and N.H., and an award of permanent custody is in the best interests of all five children, we overrule appellant's second, third, fourth, and fifth assignments of error.

{¶60} For the foregoing reasons, appellant's five assignments errors are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

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