[Cite as *In re N.T.*, 2011-Ohio-650.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
N.T. AND D.T.	:	**CASE NO. 2010-A-0053**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 09 JC 2.

Judgment: Affirmed.

Anita B. Staley, Barthol & Staley, L.P.A., 7327 Center Street, Mentor, OH 44060 (For Appellant Rachel Sutton).

Laura M. DiGiacomo, Ashtabula County Children Services Board, 3914 C Court, P.O. Box 1175, Ashtabula, OH 44005-1175 (For Appellee Ashtabula County Children Services Board).

Eileen Noon Miller, Law Offices of Carolyn J. Paschke Co., L.P.A., 10808 Kinsman Road, P.O. Box 141, Newbury, OH 44065 (Guardian ad litem).

MARY JANE TRAPP, J.

{¶1} Rachael Sutton appeals from a judgment of the Juvenile Division of the Ashtabula County Court of Common Pleas which granted permanent custody of her two children to Ashtabula County Children Services Board ("ACCSB"). For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} On January 7, 2009, Trooper Anthony Mino of the Ashtabula Sheriff's Department pulled over a vehicle which was weaving on Interstate 90 eastbound

around 2:00 a.m. The driver was shaking and crying and the front-seat male passenger had a marijuana pipe on his person. The back-seat female passenger did not have identification and initially provided a false social security number. When Trooper Mino went to open the rear passenger door, an infant covered under layers of blankets "rolled out onto the interstate," and a second child was spotted in the back seat. The male and female passengers told the trooper the children were theirs and they were in the process of moving from Cleveland to New York. When Trooper Mino checked the vehicle, he found a case inside the dashboard which contained hypodermic needles and what appeared to be heroin. The male passenger, Damien Tribe, admitted to be a heroin addict and also admitted all three had just "shot up" a few hours ago before leaving Cleveland. Trooper Mino then found syringes, some white powder substance, and what appeared to be heroin paraphernalia inside a diaper bag. The female passenger, Ms. Sutton, admitted the items belonged to her. Mr. Damien and Ms. Sutton were then arrested for possession of heroin and transported to the county jail. The sheriff's department, after attempting to contact family members to no avail, contacted the county's family services.

{¶4} On the same day, the trial court granted an ex parte emergency telephone order granting ACCSB temporary custody of the children and the agency promptly filed a complaint for temporary custody, alleging the children were neglected pursuant to R.C. 2151.03(A)(2) and dependent pursuant to R.C. 2151.04(C). The court held an emergency shelter care hearing and found probable cause for the removal of the children.

{¶5} The children, N, a two-year-old girl, and D, a five-month-old baby girl, were first placed with a foster family who provided foster care for the county. After two weeks in foster care, the children were placed with a maternal great aunt and uncle who reside in Cuyahoga County. They were briefly placed with another couple wishing to adopt. When that placement failed, the children were returned to the relatives, who have expressed their desire for the children to be placed for adoption.

{¶6} On March 9, 2009, the court held an adjudicatory hearing. Neither parent was present due to their incarceration but each was represented by counsel. The court found that the children were neglected, and after a disposition hearing the children remained in the temporary custody of the agency.

{¶7} While incarcerated, the parents expressed their desire to comply with the case plan. In April 2009, after they were released from incarceration, they completed the initial drug and alcohol assessments but failed to follow through with recommendations for treatments.

{¶8} Between April and June 2009, the parents had six visits with the children, lasting an hour each. The parents disappeared after a visitation on June 6, 2009, and could not be located. Mr. Tribe admitted later that they were abusing drugs during this period of time, and the children's guardian ad litem ("GAL") also learned they failed to attend drug recovery services.

{¶9} The court held a semi-annual review in June 2009, during which the agency reported it was unable to locate the parents and therefore could not provide reunification services. The GAL reported that Ms. Sutton did not have a permanent

place to live, had apparently stopped visitation because of transportation issues, and was not in contact with either the GAL or the case worker.

{¶10} It was not until October 2009, that the agency learned Ms. Sutton had been arrested in Cuyahoga County and transferred to Tioga County, New York, where she was sentenced to two years of incarceration. The agency also learned she was pregnant and due in March 2010.

{¶11} In November 2009, the family who had initially provided foster care for the children for two weeks after they came into ACCSB's custody expressed an interest in a "pre-adoptive" placement for them. The children returned to the foster family and have lived there since November 2009. The foster family has now expressed a desire to adopt them, and the following month the agency filed a motion requesting modification of temporary custody to permanent custody.[1]

{¶12} During the annual review the agency reported the children were doing well in the foster home. It also reported Ms. Sutton had had no contact with the children since June 2009, and although she had completed the chemical dependency assessment, she did not comply with other aspects of the case plan.

{¶13} Regarding Mr. Tribe, the children's father, the agency made contact with him in October 2009, and learned he had been using heroin daily since his release from the county jail in April 2009. The agency assisted him with admission into a detox program at the Cleveland Clinic in October, but after his release from the program, he did not participate in an inpatient program as recommended. He subsequently found

1. The record reflects the agency filed a motion to transfer the case to Cuyahoga County on May 20, 2009 because the children's family lived in that county. The trial court granted the motion. Cuyahoga County Juvenile Court, however, requested Ashtabula County to retain jurisdiction although it did not issue any order either accepting or denying jurisdiction.

work in Cleveland and apparently made attempts to be admitted into an IOP Program. Although he did not make any contact with the children for the last six months, Mr. Tribe, present at the review, told the court he did not want his children adopted.

{¶14} The GAL represented to the court that D, the younger girl, "doesn't even know [Mr. Tribe] from the hole in the wall" and that "[s]he'd be dead" if "we were relying on Damien or Rachael." When she visited the children, she also observed that N "clings desperately to the foster mother." The GAL expressed her view that "these children can't stand a whole lot of more change. They've had too much change in their life;" and that the children "deserve to have some kind of permanency in an area where they're safe, where their parents have been drug-free for more than a couple months."

{¶15} The GAL filed her report for the court's review in anticipation of the permanent custody hearing. The GAL stated that Ms. Sutton had made no attempt to contact her other than a telephone call on May 12, 2009. The foster mother, on the other hand, has kept regular contact with her and frequently advised her of the children's progress.

{¶16} During the GAL's visits to the foster family, she observed N and D to have a loving bond with their foster father, mother, and siblings. She felt the family has been providing stable support for the children's emotional, medical, and educational needs. She described the home as "loving, warm, clean, appropriate." The foster parents have four other children, age 15, 11, eight, and five. N and D "fit right in as if they were always there and are [where] they belong." N has "a tremendously close bond with her just five year old foster sister as well as a terrific bond with the rest of the siblings and foster father and foster mother." D, "though younger, is treated as if she was always

there, her one year old wonder is appreciated and encouraged by the entire family." N and D are "clearly part of the heart of this family." The entire foster family is not only willing but anxious to adopt N and D. The GAL expressed her belief that removing N and D at this point from the home now would be harmful to them. She concluded the children's interests would be best served by granting the permanent custody to ACCSB.

{¶17} In April 2010, Ms. Sutton sent a letter to the court regarding the permanent custody matter. In the letter she expressed regrets that her drug addiction controlled her life since she was 13. Because of it, she had not been able to care for her children. She stated, however, that her life has improved since her imprisonment. She has been engaging in therapeutic programs three times a week, including a parenting program. Her drug treatment was to begin in the coming months, which she was committed to complete. Ms. Sutton also stated she is now living with her two-month-old infant daughter in the prison's nursery unit. She asked the court to give her a chance to prove that she would be a suitable parent to N and D.

{¶18} The foster parents have four other children, age 15, 11, eight, and five.

{¶19} **The Permanent Custody Hearing**

{¶20} The permanent custody hearing was initially scheduled for the end of March 2010. Because Ms. Sutton was incarcerated at the Taconic Correctional Facility in New York and would not be released until March 2011, the court continued the hearing to May, and ordered the Ashtabula County Sheriff's Department to transport her from New York to attend the permanent custody hearing. The state of New York, however, would not allow a prisoner released for a civil matter. At the end of April the court granted another request by Ms. Sutton's counsel to continue the hearing to allow

him to prepare interrogatories for Ms. Sutton or to depose her. Her attorney did neither; instead, Ms. Sutton wrote a letter to the court on June 9, 2010, in which she asked to participate at the permanent custody hearing by teleconference. She explained her participation by teleconference could be achieved by the court's issuing an order requiring the Taconic Correctional Facility to deliver her to a nearby facility equipped for a teleconference.

{¶21} In the letter Ms. Sutton also reported the progress she has made while incarcerated. By her good behavior and participation in appropriate programs, she has earned the privilege of living in the facility's nursery floor with her baby. She has also learned parenting skills from a parenting program and has begun to attend a Comprehensive Alcohol and Substance Abuse Treatment Program. She expressed a desire for visitations with N and D.

{¶22} After the continuances to secure Ms. Sutton's presence and/or testimony, the permanent custody hearing took place on July 21, 2010, without her presence. Both parents' counsel asked again for a continuance of the hearing until the mother's anticipated release from the prison in March 2011. The magistrate stated the court had made efforts to allow Ms. Sutton to participate at the hearing, but the state of New York would not release her for civil matters. The GAL opposed any further continuance, stating to continue the hearing would be a "travesty" to the children, emphasizing the parents' disappearance during these proceedings.

{¶23} The magistrate inquired of counsel whether Ms. Sutton was deposed. Her counsel admitted he failed to pursue that option; he stated, however, the June 9, 2010 letter Ms. Sutton wrote to the court contained the information that would have been

presented in a deposition. He asked the court to admit the letter as evidence and the agency's counsel so stipulated. The letter was admitted as the mother's Exhibit 1.

{¶24} The magistrate heard testimony from the case worker, a Tribe family member who at one time had sought custody of the girls, the girls' current foster mother, and their maternal great aunt and uncle, with whom they had lived for ten months. The GAL also offered her opinions.

{¶25} **The Case Worker**

{¶26} Jennifer Troy, the case worker for ACCSB, testified the goal of the case plan had initially been for reunification. The case plan required the parents to complete drug and alcohol assessments, participate in psychological assessments, and attend parental and anger management classes. It also required them to follow the recommendations made by these programs. She reported Ms. Sutton completed her drug and alcohol assessment and had started her IOP Program.

{¶27} She reported that the parents had five visits with the children between April and June of 2009. At the first visit in April after the parents' release from jail, the children were very hesitant to go to their parents because they did not seem to know who they were at the time, but they "did begin to warm up throughout the visit." She described both girls were afraid of their father. She felt the girls did not actually realize they were with their mother, because there were no tears when saying goodbye.

{¶28} Ms. Troy worked with the parents on their case plan regarding drug assessments until May 2009, and because the parents did not follow through with the case plan, the court terminated the visitations after June 2009. Her last contact with Ms. Sutton was in June 2009, when Ms. Sutton called to inform her she had been

"kicked out" of Mr. Tribe's sister's home, where she had been staying, because of a physical altercation between the two. She provided a contact telephone number, which turned out not to be in service.

{¶29} The next time the case worker heard from Ms. Sutton was October 2009, when she wrote to inform her she was in jail in Cuyahoga County awaiting sentencing. In December 2009, the case worker received another letter from Ms. Sutton, informing her she was in a New York prison. Ms. Sutton contacted her several more times after that to be updated on the custody case and to inform her of her participation in the parenting and drug treatment programs while incarcerated.

{¶30} Regarding Mr. Tribe, the case worker had two telephone contacts with him: in May 2009 and October 2009, both regarding the drug assessment services for him. He participated in an IOP Program for one week, but never completed the drug screen required in the case plan.

{¶31} Ms. Troy visited N and D at the home of the foster family a dozen times. She observed that the children interacted very well with the family, calling the foster parents "Mom" and "Dad." She stated the girls are very young and need to be placed in a secure, safe home where they will not experience any more changes in their lives. She believed such a permanent placement cannot be achieved without a grant of permanent custody.

{¶32} **Mr. Tribe's Family Member**

{¶33} Carrianne Tribe-Filhart, who had previously filed a motion for the custody of the girls, was present at the hearing. She requested her motion be withdrawn but

asked to be considered as an alternative placement in the event the agency's placement plan failed.

{¶34} **The Foster Mother**

{¶35} The foster mother testified that when N and D first came to their home in January 2009, they appeared "very frightened" and "disheveled," and "smelled like smoke," but did very well during the two-week stay in their home. Because the agency preferred relative placement, the girls were placed with their maternal great aunt and uncle, with whom she has kept in contact. In the fall of 2009, the agency inquired of the foster family about their interest in a pre-adoptive placement for the girls. They expressed a strong interest, and, after an inspection of their home, the agency determined their family would be a good placement and the girls moved back to their home on November 17, 2009.

{¶36} She testified N and D adjusted well to living with her family of four children. They are developmentally on target, and the only developmental issues they have related to a lack of consistency and the changes in their environments. She related that Ms. Sutton sent books to the girls twice but otherwise made no contact with them.

{¶37} The girls have bonded with the family and became attached to them. As she described:

{¶38} "They're very excited to see us in the morning. If we go anywhere, they're very excited when we come home. There's lots of hugs and kisses and I love you. Being very clingy to us when they are in a new environment or when new people are around. Just the way they talk about [how] they're part of our family and they are just

very happy. And, also, because people *** don't know the difference between the biological [children] and [N and D] when they see our family together, if they find out later that there's a distinction, they're really surprised. *** Just the way the whole family interacts."

{¶39} When asked if she and her husband would be interested in adopting the girls, the foster mother answered: "Absolutely, yes."

{¶40} **The Maternal Great Aunt and Uncle**

{¶41} The girls' maternal great aunt, Penny Lottig, testified that the girls were placed with them in January 2009 after initially staying with the foster family. They stayed with them for ten months before being transferred back to the foster family in November 2009. Ms. Lottig stated she and her husband are not a good placement for the girls due to their older age and certain family situations. She felt the girls need to be in a foster-to-adopt placement. The Lottigs have kept in contact with the foster family, visiting the girls monthly, and had been invited to a birthday party at the foster family home. Ms. Lottig stated the girls adjusted very well in their new home, calling the foster parents "mommy and daddy" and referring to their children as their "sisters and brothers." In her observations, the foster family treated the girls as their own. The foster family also told her and her husband if they were to adopt the girls, they will keep the Lottigs in the girls' life.

{¶42} Ms. Lottig testified that after the last visitation by the childrens' natural parents on June 6, 2009, she did not hear from Ms. Sutton except for a letter from her in October of 2009, stating she was trying to get her life together and asking Ms. Lottig to keep the girls in her home.

{¶43} Jeremy Lottig, Ms. Lottig's husband and the girls' great uncle, also testified. He stated he and his wife provided a home for the girls in the hope that their parents would be reunited with the girls. Because of the parents' inability to put their lives back together, he now felt it would be best for the girls to have a permanent placement. He observed the girls adjusting well and doing "wonderful" in their new home. He recounted an incident when he arranged for N, the older girl, to return to his house to visit. N was troubled and concerned that she would be moved again. He described the foster family as a loving family and felt the adoption by the family would be "a really good thing" for the girls. He also observed that during one visit D seemed to be afraid of Mr. Tribe, who he heard from only once, when he left a voicemail in the spring of 2010, saying he was trying to put his life back together and to get the girls back.

{¶44} **The GAL**

{¶45} Eileen Noon-Miller, the GAL, opined that as there is a home waiting for the children where they are loved and adored, it is in their best interests for the permanent custody to be granted to ACCSB.

{¶46} **The Decision and Appeal**

{¶47} After the hearing, the magistrate granted ACCSB's motion, awarding permanent custody to the agency. The trial court overruled the parents' objections and adopted the magistrate's decision. Ms. Sutton now appeals from the trial court's decision, assigning the following errors for our review:[2]

2. Mr. Tribe did not appeal from the court's decision and is not a party in this appeal.

{¶48} "[1.] The trial court erred in granting the motion for permanent custody as such decision was against the manifest weight of the evidence and resulted in a manifest miscarriage of justice.

{¶49} [2.] Appellant was denied the effective assistance of trial counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution."

{¶50} **Two-Prong Permanent Custody Analysis**

{¶51} R.C. 2151.414 sets forth the guidelines to be followed by a juvenile court in adjudicating a motion for permanent custody. R.C. 2151.414(B) outlines a two-prong analysis. It authorizes the juvenile court to grant permanent custody of a child to the public agency if, after a hearing, the court determines, by clear and convincing evidence, that it is in the best interests of the child to grant permanent custody to the agency, *and* that any of the four factors apply:

{¶52} "(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, *** 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.

{¶53} "(b) The child is abandoned.

{¶54} "(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶55} "(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 ***."

{¶56} This two-prong analysis required by R.C. 2151.414(B) has been summarized by our court as follows:

{¶57} "*** R.C. 2151.414(B) establishes a two-pronged analysis that the juvenile court must apply when ruling on a motion for permanent custody. In practice, the juvenile court will usually determine whether one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶58} "If the child is not abandoned or orphaned, then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the juvenile court must consider all relevant evidence before making this determination. The juvenile court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the conditions enumerated in R.C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶59} "Assuming the juvenile court ascertains that one of the four circumstances listed in R.C. 2151.414(B)(1)(a) through (d) is present, then the court proceeds to an analysis of the child's best interest. In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates that the juvenile court must consider all relevant factors, including, but not limited to, the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives,

foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the 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; (3) the custodial history of the child; and (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody.

{¶60} "The juvenile court may terminate the rights of a natural parent and grant permanent custody of the child to the moving party only if it determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody to the agency that filed the motion, and that one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present." *In re Krems*, 11th Dist. No. 2003-G-2535, 2004-Ohio-2449, ¶32-36. See, also, *In re T.B.*, 11th Dist. No. 2008-L-055, 2008-Ohio-4415, ¶35.

{¶61} "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." *Krems* at ¶36, citing *In re Holcomb* (1985), 18 Ohio St.3d 361, 368.

{¶62} "An appellate court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence." *Krems* at ¶36, citing *In re Jacobs* (Aug. 25, 2000), 11th Dist. No. 99-G-2231, 2000 Ohio App. LEXIS 3859, *8.

{¶63} **Findings Supported by Clear and Convincing Evidence**

{¶64} While the magistrate's decision is challenging to the reader, we are able to discern the following findings:

{¶65} Addressing the first prong of the analysis, regarding the issue of whether the children cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the magistrate considered several factors enumerated in R.C. 2151.414(E). She found: (1) the mother and father have continuously and repeatedly failed to substantially remedy the conditions causing the children to be placed outside of their homes; (2) the chronic mental illness or chemical dependency of the parent is so severe that it makes the parent unable to provide an adequate permanent home for the children at the present time and within one year of the hearing; (3) the parents have demonstrated a lack of commitment toward the children by failing to regularly support, visit, or communicate with the children when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the children; and (4) the mother and the father have abandoned the children.

{¶66} The magistrate therefore concluded the children cannot and/or should not be placed with either parent at this time or in the foreseeable future, which is one of the factors enumerated in R.C. 2151.414(B)(1) that must be present before the court can proceed to the second prong, i.e., best-interests-of-the-child analysis. In addition, the magistrate found another factor present, that is, the parents have abandoned the children.

{¶67} Regarding the second prong, the best-interests-of-the-child analysis, the magistrate stated she considered all of the factors enumerated in R.C. 2151.414(D), and she made the followings findings:

{¶68} Regarding the children's interaction and relationships with others: (1) N and D have not seen their parents since June 2009 and the only relatives they have contact with are their maternal great aunt and uncle. In contrast, they are very bonded to the foster family, who hope to adopt them; (2) regarding the wishes of the children, they are too young to be able to express their wishes; however, the GAL recommends the granting of permanent custody to facilitate their adoption by the foster family, and; (3) N and D's need for a legally secure permanent placement can only be achieved through the granting of permanent custody. The magistrate concluded the best interests of N and D will be served by a grant of permanent custody to the agency.

{¶69} These findings are supported by clear and convincing evidence contained in the record. In addition, although the magistrate did not expressly articulate it in the best-interests-of-child analysis, the record is replete with evidence that Ms. Sutton's repeated incarceration, apparently related to her drug abuse, prevented her from providing adequate care and a permanent home for her children.

{¶70} A parent's incarceration is a factor courts have taken into consideration when engaging in the best-interests analysis. See, e.g., *In re J.Z.*, 10th Dist. No. 05AP-8, 2005-Ohio-3285, ¶26 (the trial court properly concluded that termination of parental rights is in the best interests of the child as the mother's incarceration precluded her from providing an adequate and permanent home for the child; *In re Tyler Jo S.*, 6th Dist. No. L-04-1294, 2005-Ohio-1225, ¶19 (an award of permanent custody was in the

child's best interest; in reaching this conclusion, the trial court pointed to the mother's continuing incarceration and extensive criminal history including substance abuse); *In re C.N.*, 8th Dist. No. 81813, 2003-Ohio-2048, ¶32 (the trial court did not abuse its discretion in its best-interests analysis, which emphasized the children's need for a legally secure permanent placement due to the mother's history of substance abuse, rejections of drug treatment, and repeated incarceration).

{¶71} Ms. Sutton's repeated incarceration as a consequence of her substance abuse precluded her from providing an adequate and permanent home for N and D, who by all accounts have prospered in their foster family and bonded with not only the foster parents but also the foster siblings. They now have an opportunity to be adopted into this family. The opportunity for a secure placement could be lost without termination of parental rights. Our review of the record thus reflects clear and convincing evidence to support the court's decision granting permanent custody.

{¶72} **Efforts by the Agency to Assist the Parents**

{¶73} Under her first assignment of error, Ms. Sutton claims the agency did not use "diligent efforts" to assist her in remedying the conditions causing her children to be removed from the home.

{¶74} Paragraph one of R.C. 2151.414(E) references "diligent efforts" by the agency. Paragraph one contains one of the sixteen factors enumerated in Section (E) to be considered by the court when determining whether the child can be placed with either parent within a reasonable time, which is part of the first prong of the permanent custody analysis. Section (E) states, in pertinent part:

{¶75} "(E) In determining *** whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, *** one or more of the following exist as to each of the child's parents, 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:

{¶76} "(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." (Emphasis added.)

{¶77} Regarding the efforts by an agency to assist the parents, this court has stated the following:

{¶78} "At various stages of the child-custody proceeding, the [children services] agency may be required *** to prove that it has made reasonable efforts toward family reunification. To the extent that the trial court relies on R.C. 2151.414(E)(1) at a permanency hearing, the court must examine the 'reasonable case planning and diligent efforts by the agency to assist the parents' when considering whether the child

cannot or should not be placed with the parent within a reasonable time. However, the procedures in R.C. 2151.414 do not mandate that the court make a determination whether reasonable efforts have been made in every R.C. 2151.413 motion for permanent custody." *In re Johnston*, 11th Dist. No. 2008-A-0015, 2008-Ohio-3603, ¶52, quoting *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶42.

{¶79} Our review of the record shows the agency provided a case plan toward reunification. However, after completing the initial substance abuse assessment upon her release from the initial incarceration, Ms. Sutton did not follow through with the case plan. She did visit the children between April and June 2009, but her whereabouts were unknown after June, and she was re-incarcerated in October 2010.

{¶80} The trial court found the agency "made reasonable efforts to finalize the child[ren's] permanent custody." It, however, made no specific finding regarding whether the agency made "reasonable efforts" to assist the *parents*, but such a finding was not required. As the record reflects, because of her unavailability and repeated incarceration, the agency could not have provided any additional assistance. Therefore, Ms. Sutton's claim of lack of diligent efforts by the agency is without merit.

{¶81} **The Right of an Incarcerated Parent to Participate at Permanent Custody Hearing**

{¶82} Under the first assignment of error, Ms. Sutton also contends her due process rights were violated when she was not provided an opportunity to be present at the permanent custody hearing by teleconference.

{¶83} "[A]n individual does not have an absolute right to be present in a civil case to which he is a party." *In the Matter of Joseph P*, 6th Dist. No. L-02-1385, 2003-

Ohio-2217, ¶52, citing *In re Sprague* (1996), 113 Ohio App.3d 274; *Mancino v. Lakewood* (1987), 36 Ohio App.3d 219, 221.

{¶84} Regarding permanent custody hearings, the courts of Ohio have held that the right of an incarcerated parent to attend a permanent custody hearing is within the sound discretion of the trial court. *State ex rel. Vanderlaan v. Pollex* (1994), 96 Ohio App.3d 235, 236. See, also, *Joseph P* at ¶51 (a trial court has the discretion to decide whether to proceed with the hearing without having an incarcerated parent conveyed); *In the Matter of R.D., A.D., and E.D.*, 2d Dist. No. 08-CA-26, 2009-Ohio-1287, ¶12. Therefore, we will not reverse such a decision absent an abuse of discretion. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶85} "Because of the competing interests involved in proceedings such as these, Ohio courts have applied a balancing test to determine whether a parent's due process rights are violated when the court proceeds with a hearing on a permanent custody motion without the parent's presence. Specifically, a court should balance the following factors: '(1) the private interest affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the governmental burden of additional procedural safeguards.'" *Joseph* at ¶52, quoting *Sprague* at 276, citing *Mathews v. Eldridge* (1976), 424 U.S. 319, 335.

{¶86} Several of our sister districts have held that the failure to transport a parent from the prison to a permanent custody hearing does not violate a parent's due process rights when: "(1) the parent is represented at the hearing by counsel, (2) a full

record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition." *Joseph* at ¶52, citing *In the Matter of Leo D., Deandre E., and Desandra E.*, 6th Dist. No. L-01-1452, 2002-Ohio-1174, citing *In re Robert F.* (Aug. 20, 1997), 9th Dist. No. 18100, 1997 Ohio App. LEXIS 3746. See, also, *R.D.* at ¶13.

{¶87} Here, although Ms. Sutton asked to participate at the hearing via teleconference, the court did not pursue that possibility. The record, however, reflects she was represented at the hearing by counsel; a full record was made of the proceeding; and her June 9, 2010 letter, in which she detailed the progresses she made while in prison, was admitted as evidence in lieu of deposition testimony.

{¶88} Ms. Sutton claims her due process rights were violated by not being able to participate at the proceeding by videoconference, yet she fails to identify on appeal any additional testimony she would have provided that would have materially affected the outcome in this case. On appeal she does *not* contest the court's finding under the first prong of the permanent custody analysis, namely, the finding that N and D cannot be and/or should not be placed with either parent at this time or in the foreseeable future. Rather, she only contests the court's findings regarding the best interests of the children, which relate to the children's interaction with others, the wishes of the children, their custodial history, and their need for a legally secured placement, *none* of which she had personal knowledge of because of her prolonged incarceration. Therefore, her participation at the hearing would not have aided the court in analyzing the best interests of the children, the determination of which she challenges on appeal.

{¶89} Given this record, we cannot conclude Ms. Sutton's due process rights were violated when the court proceeded in her absence and admitted her letter into evidence in the place of deposition testimony. Balancing the children's urgent need to have a legally secure placement and the parent's right to be present at the proceeding, we conclude the trial court did not abuse its discretion in holding the hearing without the presence of Ms. Sutton after it made efforts to secure her presence to no avail.

{¶90} The first assignment of error is without merit.

{¶91} **Ineffective Assistance of Counsel**

{¶92} Under the second assignment, Ms. Sutton claims she was denied ineffective assistance of counsel.

{¶93} The courts have applied the standard two-part test in reviewing ineffective assistance of counsel claims regarding permanent custody proceedings. See, e.g., *In re Shores*, 3d Dist. Nos. 1-07-16 and 1-07-17, 2007-Ohio-5193, ¶17; *In re T.P.*, 2nd Dist. No. 20604, 2004-Ohio-5835, ¶45. To establish her claim that her counsel provided ineffective assistance, Ms. Sutton must demonstrate (1) her counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. To overcome this presumption, a defendant must demonstrate that "the

actions of his attorney did not fall within a range of reasonable assistance." *State v. Henderson*, 11th Dist. No. 2001-T-0047, 2002-Ohio-6715, ¶14. Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona* (2001), 93 Ohio St.3d 83, 105.

{¶94} Ms. Sutton's ineffective assistance claim relates to the counsel's failure to request her presence at the hearing by teleconference or to submit deposition testimony. She asserts that if she were allowed to present testimony, she could have let the court know "directly" that she was achieving the goals of the case plan in prison and that she had her baby with her in prison, which presumably would prove her ability to parent.

{¶95} Our review of the record shows Ms. Sutton's counsel's performance left something to be desired. He requested a continuance of the permanent custody hearing to allow him to take a deposition or prepare interrogatories but did neither. Also, the record does not reflect efforts by him to pursue the possibility of Ms. Sutton's presence at the hearing by teleconference.

{¶96} However, the information Ms. Sutton would have provided, whether by way of deposition, interrogatories, or teleconference, regarding her efforts and progress toward remedying her substance abuse and parenting issues, was contained in her June 9, 2009 letter, admitted into evidence at the hearing. Thus, we cannot conclude there is a reasonable probability that, were it not for counsel's deficient performance, the result of the permanent custody hearing would have been different. The second assignment is overruled.

{¶97} The judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.