[Cite as *In re M.M.*, 2014-Ohio-5111.]

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

IN THE MATTER OF:

M.M.,	:	Case No. 14CA6
Adjudicated Dependent Child.	:	DECISION AND JUDGMENT ENTRY
	:	RELEASED 11/13/2014

APPEARANCES:

Joshua D. Price, 104 Mulberry Avenue, P.O. Box 591, Pomeroy, Ohio 45769, for Appellant.

John S. Custer, 175 Race Street, Middleport, Ohio 45760, for Appellee Meigs County Department of Jobs and Family Services.

Jenny Evans, Guardian Ad Litem, P.O. Box 1231, 463 Second Avenue, Gallipolis, Ohio 45631.

Hoover, J.

{¶ 1} Appellant, N.T., appeals the trial court's judgment that awarded appellee, Meigs County Children Services (MCCS), permanent custody of her one-year-old biological child, M.M. For the reasons that follow, we affirm the trial court's judgment.

I. FACTS

{¶ 2} On July 3, 2013, appellant gave birth to M.M., and both appellant and the child tested positive for drugs. On July 5, 2013, the court granted appellee temporary emergency custody of the two-day-old child. Shortly thereafter, appellee filed a dependency complaint.

{¶ 3} On August 6, 2013, the court held an adjudicatory hearing. Appellant did not appear, even though she had been seen in the courthouse the previous day. The court re-scheduled the adjudicatory hearing for August 28, 2013.

{¶ 4} On August 28, 2013, the court held the adjudicatory hearing and noted that appellant failed to appear. On September 6, 2013, the court adjudicated the child dependent.

{¶ 5} On October 8, 2013, the court held a dispositional hearing, and again, appellant did not appear. On October 21, 2013, the court continued the child in appellee's temporary custody.

{¶ 6} On March 4, 2014, the father permanently surrendered the child. On that same date, appellee filed a permanent custody motion. Appellee alleged that appellant is in prison and that the child cannot be placed with appellant within a reasonable time.

{¶ 7} On March 11, 2014, appellant filed a motion for an order of transport so that she could attend the permanent custody hearing. The trial court denied her motion.[1]

{¶ 8} On April 3, 2014, the guardian ad litem filed a report and recommended that the trial court award appellee permanent custody of the child.

{¶ 9} On May 13, 2014, the court held a hearing to consider appellee's permanent custody motion. MCCS caseworker Terri Ingels testified that appellee sought emergency custody of the child upon learning that the newborn child tested positive for drugs. Ingels further explained that appellant has a prior history with children services agencies. Ingels stated that appellant had her parental rights terminated with respect to two other children and that a third child currently is in appellee's temporary custody.

[1] The trial court did not enter a written decision denying appellant's motion; but the record nonetheless indicates that the court denied her motion.

{¶ 10} Ingels testified that appellant has been involved with appellee since 2009 and that appellant's situation has not improved since that time. Ingels explained that appellant "always had an inconsistency in housing or employment or finances or being able to pass drug screens. * * * [T]here hasn't been anything that she's ever been able to follow through with really or be consistent at over the years."

{¶ 11} Ingels explained that appellant failed to appear for case plan appointments scheduled at children services. One time, appellant informed Ingels that she missed an appointment because "she had laundry to get done." Ingels stated that although appellant failed to meet with her to discuss the case plan, appellee still filed a case plan with the court. The case plan required appellant to complete a parenting course, complete substance abuse treatment, complete random drug screens, and obtain stable employment and housing. Ingels testified that from the time appellee filed the complaint in July 2013 until appellant's incarceration in January 2014, appellant did not complete a parenting course, did not complete substance abuse treatment, and did not obtain stable housing or employment. She further stated that appellant passed a couple of drug screens but failed others.

{¶ 12} Ingels explained that appellant presently is incarcerated and that her scheduled release date is December 2015, with a possibility of early release in July 2015. Ingels stated that even if appellant is released in July 2015, appellee could not immediately return the child to appellant's care. Instead, appellant would need at least six months beyond her release date in order to show her ability to maintain sobriety and to properly care for the child.

{¶ 13} Ingels testified that appellant gave her the name of a relative placement, but appellant did not provide an address for the relative placement. Ingels stated that she was unable to independently locate an address for appellant's suggested relative placement. Ingels also explained that appellee had attempted relative placement with one of appellant's other children, but the placement did not last.

{¶ 14} The guardian ad litem testified that awarding appellee permanent custody is in the child's best interest and that having appellant in the child's life is not in the child's best interest. She stated that the child lives with her older sibling in "a very loving [foster] home" and that they share a "sisterly bond." The guardian ad litem does not believe that appellant has taken responsibility for her actions or that she has a plan to prevent relapse upon her release from prison.

{¶ 15} On June 19, 2014, the trial court granted appellee permanent custody. The court found that the child cannot be placed with appellant within a reasonable period of time and cited the following factors: (1) "[f]ailure to support or maintain contact;" (2) "[i]ncarceration for 18 months;" (3) "[r]epeated risk due to chemical dependency;" (4) "[r]epeated incarceration;" and (5) "[u]nwillingness to provide or protect."

{¶ 16} The court then examined the best interest factors and found: (1) the child needs a legally secure permanent placement that cannot be achieved without a grant of permanent custody; (2) the child is bonded with the foster family and is adoptable; (3) appellant had parental rights involuntarily terminated with respect to a sibling; (4) appellant was incarcerated at the time appellee filed the permanent custody motion and will not be available to care for the child for at least eighteen months after the filing of the permanent custody hearing or the dispositional hearing; (5) appellant cannot currently

provide the child with a permanent and stable environment; and (6) no viable relative placements exist. The court thus permanently terminated appellant's parental rights and awarded appellee permanent custody of the child. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶ 17} Appellant raises three assignments of error.

First Assignment of Error:

> THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT THE AGENCY MADE REASONABLE EFFORTS TO REUNIFY WITH APPELLANT OR IN LOOKING FOR A SUITABLE RELATIVE PLACEMENT.

Second Assignment of Error:

> THE TRIAL COURT'S RULING IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Third Assignment of Error:

> THE TRIAL COURT DENIED APPELLANT HER CONSTITUTIONAL RIGHTS TO DUE PROCESS PROTECTED BY RESPECTIVE CONSTITUTIONS OF THE UNITED STATES AND STATE OF OHIO IN FAILING TO PROVIDE APPELLANT/MOTHER A MEANINGFUL OPPORTUNITY TO ATTEND AND PARTICIPATE IN THE PERMANENT CUSTODY HEARING.

III. ANALYSIS

A. PERMANENT CUSTODY

{¶ 18} Appellant's first and second assignments of error question the propriety of the trial court's decision awarding appellee permanent custody. Thus, for ease of analysis, we have combined them.

{¶ 19} In her first assignment of error, appellant challenges the trial court's finding that appellee used reasonable efforts to reunify her with the child. Appellant asserts that the evidence shows that appellee did not use any efforts to place the child in

the least-restrictive, most family-like setting, but instead, immediately placed the child in a foster-to-adopt home. Appellant additionally contends that appellee failed to seriously consider any relative placements.

{¶ 20} In her second assignment of error, appellant asserts that clear and convincing evidence does not support the trial court's finding that the child cannot or should not be placed with appellant within a reasonable time. Appellant contends that while imprisoned, she substantially remedied the conditions that caused the child's initial removal. Appellant further asserts that she will be eligible for judicial release before her prison term expires in December 2015; and thus, she will be able to reunify with the child in less than eighteen months. Appellant claimed that upon her release, she would live with a friend whose home was "very appropriate" and who could provide sufficient income to care for appellant and the child.

1.

Standard of Review

{¶ 21} A reviewing court generally will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *In re M.H.*, 4th Dist. Vinton No. 11CA683, 2011–Ohio–5140, ¶ 29; *In re A.S.*, 4th Dist. Athens Nos. 10CA16, 10CA17, 10CA18, 2010–Ohio–4873, ¶ 7.

> "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).

{¶ 22} 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* at 387. *Accord In re Pittman,* 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶ 23–24.

{¶ 23} In a permanent custody case, the ultimate question for a reviewing court 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: "[T]he 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, 104, 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."). "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." (Citations omitted.) *In re R.M.,* 2013–Ohio–3588, 997 N.E.2d 169, ¶ 55 (4th Dist).

{¶ 24} 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, 678 N.E.2d 541, 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* at 175; *accord State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 25} 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. As the *Eastley* court explained:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption 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."

Eastley, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jur.3d, Appellate Review, § 60, at 191–192 (1978).

2.
Permanent Custody Principles

{¶ 26} 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, 156, 556 N.E.2d 1169 (1990); *accord In re D.A.,* 113 Ohio St.3d 88, 2007–Ohio–1105, 862 N.E.2d 829, ¶ 9. A parent's rights, however, are not absolute. *In re 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. *In re D.A.* at ¶ 11.

{¶ 27} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child's best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. *Id.* Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying purposes of R.C. Chapter 2151, as set forth in R.C. 2151.01:

> (A) To provide for the care, protection, and mental and physical development of 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;
>
> (B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

3.

Permanent Custody Framework

{¶ 28} 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 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 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.
>
> (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, 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 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

{¶ 29} 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 interests.

{¶ 30} In the case at bar, appellant does not challenge the trial court's best interest finding. Instead, appellant argues that clear and convincing evidence does not support the trial court's R.C. 2151.414(B)(1)(a) finding that the child cannot or should not be returned to appellant within a reasonable time.

a. Reasonable Time

{¶ 31} R.C. 2151.414(E) governs a trial court's analysis of whether a child cannot or should not be returned to a parent within a reasonable time. The statute requires the trial court to consider "all relevant evidence" and sets forth the factors a trial court must consider in determining whether a child cannot or should not be placed with either parent within a reasonable time. The pertinent subsections of the statute for this case are set forth below. If the court finds the existence of any one of the following 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":

> (11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially

> equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.
>
> (12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

R.C. 2151.414(E)(11) and (12).

{¶ 32} In the case sub judice, competent and credible evidence supports the trial court's finding that the child cannot or should not be returned to appellant within a reasonable time. The court found that several R.C. 2151.414(E) factors applied, but here, we focus on R.C. 2151.414(E)(11) and (12). Appellant had her parental rights involuntarily terminated with respect to two other children. This one factor alone is sufficient to support the trial court's R.C. 2151.414(B)(1)(a) finding that the child cannot or should not be returned to appellant within a reasonable time. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 50; *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996), syllabus. Additionally, the evidence clearly shows that appellant is incarcerated, and her expected release date is December 2015. Thus, at the time of the permanent custody hearing, appellant would be unavailable to care for the child for at least eighteen months. Even though appellant suggests that she may receive judicial release and thus be available to care for the child before eighteen months elapse, appellant can only speculate. The record does not demonstrate that appellant will, in fact,

be released before eighteen months elapses. *In re K.M.D.*, 4th Dist. Ross No. 11CA3289, 2012-Ohio-755, ¶ 26; *In re M.J.C.*, 4th Dist. Scioto No. 09CA3273, 2009-Ohio-1779, ¶ 21.

{¶ 33} Moreover, simply because appellant claims that, while imprisoned, she has substantially remedied the conditions that led to the child's removal does not mean that the trial court was required to afford appellant a reasonable time to prove that she would be able to properly care for the child upon her release. Appellant did not attempt to substantially remedy the conditions until she was placed in prison. She cannot establish that she would be able to maintain sobriety and provide a safe, stable permanent home for the child upon her release from imprisonment. In fact, as appellee observed, appellant has an extensive substance abuse history and involvement with children services. Her past behavior is a better indicator of the future than her promises to maintain sobriety this time around. As we have recognized time and again, a trial court is not required to experiment with a child's welfare in order to permit a parent to prove his or her suitability:

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

In re A.C.H., 4th Dist. Gallia No. 11CA2, 2011–Ohio–5595, ¶ 42, quoting *In re Bishop*, 36 Ohio App.3d 123, 126, 521 N.E.2d 838 (5th Dist.1987), quoting *In re East,* 32 Ohio Misc. 65, 69, 288 N.E.2d 343 (1972). Appellant expects that upon her release from prison, she will be better able to care for her child. However, the caseworker testified that even if appellant were released from prison tomorrow, appellant would need to maintain sobriety for at least six months. The trial court was not required to keep the child in limbo or to experiment with her welfare in order to see whether appellant could adequately protect the child upon her release from prison. We cannot fault the trial court for deciding not to experiment with the child's welfare in order to provide appellant an opportunity to prove her ability to give the child proper care. *In re J.V-M.P.*, 4th Dist. Washington No. 13CA37, 2014-Ohio-486, ¶ 26.

{¶ 34} Consequently, we disagree with appellant that the trial court's finding that the child cannot or should not be returned to her within a reasonable time is against the manifest weight of the evidence.

b. Reasonable Efforts

{¶ 35} Appellant also asserts that the trial court's reasonable efforts finding is against the manifest weight of the evidence. R.C. 2151.419 governs a trial court's reasonable efforts findings. R.C. 2151.419(A)(1) states:

> Except as provided in division (A)(2) of this section, at any hearing held pursuant to section 2151.28, division (E) of section 2151.31, or section 2151.314, 2151.33, or 2151.353 of the Revised Code at which the court removes a child from the child's home or continues the removal of a child from the child's home, the court shall determine whether the public

> children services agency or private child placing agency that filed the complaint in the case, removed the child from home, has custody of the child, or will be given custody of the child has 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. * * * *

{¶ 36} "By its terms, R.C. 2151.419 applies only at * * * * adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children, all of which occur prior to a decision transferring permanent custody to the state. The statute makes no reference to a hearing on a motion for permanent custody. Therefore, '[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.' " *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 41, quoting *In re A.C.*, 12th Dist. Clermont No. CA2004-05-041, 2004-Ohio-5531, ¶ 30.

{¶ 37} R.C. 2151.419(A)(2) additionally sets forth specific situations in which a children services agency need not use reasonable efforts to reunify the family. The statute specifies that the agency need not use reasonable efforts if the parent from whom the child was removed (1) has been convicted of or pleaded guilty to certain criminal offenses, (2) has repeatedly withheld medical treatment or food from the child, (3) has placed the child at substantial risk of harm on more than one occasion because of alcohol or drug abuse, (4) has abandoned the child, or (5) has had parental rights involuntarily terminated with respect to a sibling of the child at issue.

{¶ 38} In the case at bar, even though the trial court found that appellee used reasonable efforts, R.C. 2151.419(A)(2)(e) relieved appellee of the duty to use reasonable efforts. As we previously indicated, the evidence plainly shows that appellant had her parental rights involuntarily terminated with respect to not one child, but two children. Consequently, appellee was not required to use reasonable efforts, and the trial court's finding in this regard is superfluous. *In re D.H.*, 6th Dist. Lucas No. L-13-1152, 2013-Ohio-5286,¶ 23; *In re Harness*, 4th Dist. Athens No. 06CA28, 2006-Ohio-6359, ¶ 19.

{¶ 39} To the extent appellant asserts that the trial court was required to consider placing the child with a relative before it could award appellee permanent custody, we do not agree. We have previously recognized that a trial court need not consider relative placement before awarding a children services agency permanent custody. *E.g., In re C.T.L.A.*, 4th Dist. Hocking No. 13CA24, 2014-Ohio-1550, ¶ 52; accord *In re E.D.*, 2nd Dist. Montgomery No. 26261, 2014-Ohio-4600, ¶ 10; *In re J.H.*, 4th Dist. Hocking No. 14CA4, 2014-Ohio-3108, ¶ 27. A juvenile court need not determine by clear and convincing evidence that "termination of appellant's parental rights was not only a necessary option, but also the only option." *In re Schaefer*, 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, ¶ 64. Nor must "the juvenile court find by clear and convincing evidence that no suitable relative was available for placement." *Id.* R.C. 2151.414 "does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors." *Id.; In re J.K.*, 4th Dist. Ross No. 11CA3269, 2012–Ohio–214, ¶ 27. Rather, a juvenile court is vested with discretion to determine what placement option is in the child's best interest. *In re A.C.H.,*

2011–Ohio–5595, at ¶ 44. The child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991). Therefore, courts are not required to favor a relative if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody. *Schaefer* at ¶ 64.

{¶ 40} Consequently, the trial court was not required to find that appellee used reasonable efforts to reunify the child with appellant and was not required to find that appellee used reasonable efforts to place the child with a relative before awarding appellee permanent custody.

{¶ 41} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

B. DUE PROCESS

{¶ 42} In her third assignment of error, appellant argues that the trial court deprived her of her due process right to a fundamentally fair hearing. Specifically, appellant complains that the trial court deprived her of her right to be present at the hearing and to present evidence. Appellant contends that she was unable to present evidence regarding her potential for judicial release and her housing and income options upon her release from prison.

{¶ 43} "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54. Therefore, parents 'must be afforded every procedural and substantive protection the law allows.' *Id.*" *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). *Accord In re B.C.*, --- Ohio St.3d ---, 2014-Ohio-4558, ---

N.E.3d ---, ¶ 19. However, an incarcerated parent does not have "an absolute due process right to attend the trial of a civil action to which he is a party. Any such right must be balanced against the state's interest in avoiding the risks and expenses of transportation." *Abuhilwa v. Board*, 4th Dist. Pickaway No. 08CA3, 2008-Ohio-5326, ¶ 7.

{¶ 44} In evaluating the due process right of an incarcerated parent to be present at a permanent custody hearing, this court and others have applied the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *B.C.* at ¶ 18; *In re Elliot*, 4th Dist. Lawrence No. 92CA34, 1993 WL 268846, *4 (June 25, 1993); *accord In re A.F.*, 6th Dist. Williams No. WM-13-007, 2014-Ohio-633, ¶ 19; *In re K.L.*, 10th Dist. Franklin Nos. 13AP-218 and 13AP-231, 2013-Ohio-3499, ¶ 43. The *Mathews* test requires a court to evaluate three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* at 335.

{¶ 45} With respect to the first factor, the permanent custody hearing will affect a significant private interest. Appellant's "interest in the care, custody, and control of [her child] 'is perhaps the oldest of the fundamental liberty interests.' " *B.C.* at ¶ 19, quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This interest in the care, custody and management of a child "does not evaporate" simply because the parent has not been a "model" parent or "lost temporary custody of their

child to the state." *Elliot, supra*, at *4, citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

{¶ 46} In addition to appellant's private interest, we also must consider the child's private interest. *B.C.* at ¶ 20. When a court considers a permanent custody motion, the parent's interest "are subordinate to the child's interest." *Id.* Here, the child's private interest "at least initially, mirrors [her] mother's, *i.e.*, [s]he has a substantial interest in preserving the natural family unit. But when remaining in the natural family unit would be harmful to [the child], [the child's] interest changes. [The child's] private interest then becomes a permanent placement in a stable, secure, and nurturing home without undue delay. *See In re Adoption of Zschach*, 75 Ohio St.3d 648, 651, 665 N.E.2d 1070 (1996). 'There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged.' " *Id.*, quoting *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513–514, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982). Thus, although appellant has a significant private interest, the child has a stronger interest in being placed in a stable, secure, and nurturing home without undue delay.

{¶ 47} Second, the risk of an erroneous deprivation of appellant's fundamental liberty interest in the care, custody, and management of her child by holding the permanent custody hearing in her absence appears low. Appellant's counsel fully participated in the permanent custody hearing and represented appellant's interest. Contrary to appellant's argument, the trial court did hear evidence regarding appellant's potential for judicial release and her expected living conditions upon her release from

prison. The caseworker testified that appellant's expected release date is December 2015 and that she may apply for early release in July 2015. The caseworker further testified that appellant planned to live with her friend upon her release from prison. Moreover, appellant could have offered her testimony via deposition or affidavit, yet she did not request to do so. *In re H.S.*, 12th Dist. Clermont No. CA2013-02-012, 2013-Ohio-2155, ¶ 11; *In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶¶ 21, 24; *In re Maciulewicz*, 11th Dist. Ashtabula No. 2002-A-0046, 2002-Ohio-4820, ¶ 18; *In re Sprague*, 113 Ohio App.3d 274, 277, 680 N.E.2d 1041 (12th Dist.1996).

{¶ 48} Next, we consider the state's interest. In *Elliot, supra*, we identified "[t]wo state interests [that] are at stake in a permanent custody proceeding—a parens patriae interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Elliot* at *5, citing *Santosky*, 455 U.S. at 766. "In a permanent custody proceeding, the state's parens patriae interest is served by procedures that 'promote an accurate determination of whether the natural parents can and will provide a normal home.' " *Id.*, quoting *Santosky* at 767. Thus, in *Elliot*, we stated:

> "Permitting [appellant] to be present would be the optimal arrangement. However, allowing some other means of presenting his testimony would clearly serve the state's goal and the children's interest, and it would not impose any undue fiscal or administrative burden upon the state. The trial court did not err in overruling [appellant's] motion to be present at the hearing. * * *."

Id.

{¶ 49} Similarly, in the case at bar, permitting appellant to attend the permanent custody hearing would be the optimal arrangement. However, permitting appellant to present her testimony via other means "clearly serve[s] the state's goal and the child[]'s interest, and it would not impose any undue fiscal or administrative burden upon the state." Appellant did not request the trial court to permit her testimony by other means. Consequently, a balance of the *Mathews* factors shows that the trial court did not deprive appellant of her due process rights by rejecting her request to be transported from prison so that she could attend the permanent custody hearing.

{¶ 50} Moreover, we have previously concluded that "[a] trial court possesses discretion to proceed with a permanent custody hearing in a parent's absence." *In re A.C.H.*, 2011-Ohio-5595 at ¶ 46, citing *In re S.G.*, 2nd Dist. Greene No. 2009-CA-46, 2010-Ohio-2641, ¶ 22. In *A.C.H.*, we determined that the trial court did not deprive the parent of his due process rights by holding the permanent custody hearing in his absence when "[c]ounsel meaningfully represented appellant at the hearing, a complete record was made, and appellant * * * failed to show what testimony or evidence he would have offered that would have changed the outcome of the case." *Id.* at ¶ 46.

{¶ 51} The same scenario applies in the case *sub judice*. Counsel meaningfully represented appellant at the hearing, a complete record was made, and appellant has failed to show what additional testimony or evidence she would have offered that would have changed the outcome of the case. Consequently, the trial court did not deprive appellant of her due process right to a fundamentally fair permanent custody hearing.

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

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Abele, P.J. and McFarland, J.: Concur in Judgment and Opinion.

By:_____
Marie Hoover, 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.