[Cite as *In re N.S.*, 2015-Ohio-1468.]

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

IN THE MATTER OF:

N.S.,	:	Case No. 14CA22
Adjudicated Dependent Child.	:	DECISION AND JUDGMENT ENTRY
	:	RELEASED 04/13/2015

APPEARANCES:

Ryan Shepler, Kernen & Shepler, LLC, Logan, Ohio, for Appellant.

Laina Fetherolf, Hocking County Prosecuting Attorney, and Ann Allen McDonough, Assistant Hocking County Prosecuting Attorney, Logan, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Appellant, S.S., appeals the trial court's judgment that awarded appellee, South Central Ohio Job and Family Services, Children Services, permanent custody of her four and one-half-year-old biological child, N.S. For the reasons that follow, we affirm the trial court's judgment.

I. FACTS

{¶ 2} N.S., a quadriplegic diagnosed with cerebral palsy, lived with appellant from birth until she was six months of age. In 2011, the child's biological father died of a drug overdose. In 2012, appellant was found guilty of several felony offenses in the state of Florida and was subsequently sentenced to serve four years in prison. N.S. lived with her maternal grandmother, N.M., until February 27, 2013, when the grandmother was

arrested; and the court entered a protective order that granted appellee temporary custody of the child.

{¶ 3} Appellee subsequently filed a complaint that alleged the child is a dependent child and that requested temporary custody. The complaint alleged that appellant was incarcerated in Florida. The complaint further alleged that the child had been residing with her maternal grandmother when the maternal grandmother was arrested. The complaint also alleged that heroin, paraphernalia, and loaded weapons were found in the grandmother's home. The court subsequently adjudicated the child dependent and ordered the child to remain in appellee's temporary custody.

{¶ 4} Appellee developed a case plan that identified the following concerns regarding N.M.:

> [N.M.] received custody of [N.S.] from the State of Florida. Florida requested home studies from the former Hocking County Children Services Board. This request was refused due to the persons who resided or owned the homes would not be a safe place for [N.S.] to reside. Florida ignored the concerns. [N.M.] has placed her grand daughter [N.S.] in repeated harm and involved and exposed [N.S.] to at risk situations and persons who may pose safety risks to [N.S.]. [N.M.] has had [N.S.] in a car during a theft in Vinton County in which the owner of the property * * * pulled a gun on her and called the police. [N.M.] was charged with two offenses and convicted of the more serious offense. A charge of child endangering was dismissed for a plea to the other offense. At the time [N.M.] lived in Vinton County. She then moved to Franklin County.

> [N.S.] was removed and placed in foster care by Franklin County. [N.M.] worked on a reunification plan that involved her attending substance abuse treatment. [N.M.] eventually received custody back of [N.S.] and later the case closed against the recommendations of Franklin County Children Services and the GAL[.] [N.M.] has allegedly involved herself in criminal activity, taken to jail and [N.S.] removed from her custody a second time. [N.M.] has many other concerns that will be addressed.

{¶ 5} On February 7, 2014, the Hocking County Common Pleas Court sentenced the grandmother to four years and nine months in prison

{¶ 6} On June 18, 2014, appellee filed a motion for permanent custody.

{¶ 7} On September 16, 2014, the guardian ad litem filed a detailed report and recommended that the court award appellee permanent custody of the child.

{¶ 8} On September 23, 2014, the court held a hearing to consider appellee's permanent custody motion. Due to a malfunction, the transcript is unavailable. Appellant submitted the following facts in an App.R. 9(C) statement. N.S.'s caseworker, Rebecca Carter, testified that appellant presently is incarcerated in Florida with an expected release date of August 2015. The child's maternal grandmother was arrested in February 2014 and "will be allowed judicial release in January 2015." N.S. has been placed with a foster family and has been making progress. Carter considered placing N.S. with several different relatives but none were deemed appropriate. The child's great-grandmother was disqualified due to medical reasons. Carter stated that N.S. "was in the best place she could possibly be because the [f]oster [f]amily had been trained in dealing with children

with disabilities and * * * they knew what resources were out there that they could benefit from with regards to [N.S.]."

{¶ 9} The child's guardian ad litem stated that the child "has made significant progress since being placed with the foster family." The guardian ad litem testified that N.S. "cannot be placed with [the great-grandmother] because [the great-grandmother] is handicap[ped]."

{¶ 10} Appellant testified that her release date is August 2015, but she may be released at the end of February 2015. Appellant believes that the great-grandmother (S.B.) "would be exceptionally qualified to care for her daughter until she is able to be released."

{¶ 11} S.B. testified that she is a paraplegic due to an accident that occurred when her children were young. Despite her disability, she raised four children. S.B. stated that her home is equipped to handle N.S. and her disabilities and that her home health aides would help care for N.S.

{¶ 12} The state submitted the following amendments to appellant's App.R. 9(C) statement, which the trial court adopted. Carter "had no personal knowledge or records that showed any information regarding a judicial release for [the child's grandmother] in January 2015." Carter testified that the child's grandmother was sentenced to a prison term that would end in October 2018. Carter stated that S.B. was not deemed an appropriate placement for the child "not only because [S.B.] is a paraplegic who requires assistance for herself, but also because N.S. is a quadriplegic with cerebral palsy, unlike the four children who were successfully raised by [S.B.]." Appellant testified that she has not seen N.S. since N.S. was six months old.

{¶ 13} On September 29, 2014, the trial court awarded appellee permanent custody of the child. The court determined that the child could not be placed with either parent within a reasonable time. The court noted that the biological father is deceased. The court found that the child could not be placed with appellant within a reasonable time, because appellant is incarcerated and has "a chronic involvement with the criminal justice system and repeated and long term incarceration during the child's life. Mother has demonstrated no willingness []or ability to care for, nurture and protect her child. Her efforts to recruit family members to care for the child were unsuccessful and no suitable family member has been identified to take custody of and/or raise the child."

{¶ 14} The court evaluated whether awarding appellee permanent custody would serve the child's best interest. The court considered the child's interaction and interrelationships and explained:

> [N.S.] has thrived in foster care since February 2013. She now resides with foster parents * * * and has shown great improvement i[n] communications and motor skills. She is diagnosed with cerebral palsy and quadriplegia. She reportedly has adjusted well in the current foster placement. Caseworker Rebecca Carter documented numerous attempts to identify and secure family placements for the child. Family members did not cooperate in visiting with or providing for the child.

{¶ 15} With respect to the child's wishes, the court stated:

> The Court finds the child is not competent to testify. The guardian ad litem believes that granting permanent custody to [appellee] is in the child's best interests. The guardian ad litem has had a long term relationship with the

child with frequent visits and has communicated with Mother on several occasions. GAL testified that child has seen monumental growth and improvement in foster care.

{¶ 16} The court considered the child's custodial history and noted that the child lived with appellant from birth to six months and that the maternal grandmother then had temporary custody due to appellant's incarceration.

{¶ 17} The court also reviewed the child's need for a legally secure permanent placement and whether that type of placement could be achieved without granting appellee permanent custody. The court stated: "The child has never experienced secure placement with her mother or grandmother. Mother has made no progress in reducing her criminal activity or recidivism. Grandmother * * * has a similar history."

{¶ 18} The court thus found that awarding appellee permanent custody would serve the child's best interest. The court additionally found that the child had been in appellee's temporary custody for twelve or more months or a consecutive twenty-two month period in accordance with R.C. 2151.414(B)(1)(d). The court consequently awarded appellee permanent custody and terminated appellant's parental rights. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶ 19} Appellant raises two assignments of error.

First Assignment of Error:

THE COURT MUST REMAND FOR REHEARING DUE TO THE ABSENCE OF THE TRIAL COURT TRANSCRIPT.

Second Assignment of Error:

THE TRIAL COURT ERRED IN FINDING THAT CLEAR AND CONVINCING EVIDENCE SUPPORTS A FINDING THAT GRANTING PERMANENT CUSTODY IS IN THE BEST INTEREST OF [N.S.].

III. ANALYSIS

A. LACK OF TRANSCRIPT

{¶ 20} In her first assignment of error, appellant argues that we must remand this matter to the trial court due to the lack of a transcript. Appellant recognizes that her trial counsel filed an App.R. 9(C) statement, but she asserts that "memories had faded and it was difficult to procure an accurate and complete picture of the trial court proceedings."

{¶ 21} Juv.R. 37(A) requires juvenile courts to "make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates" and specifies that "[t]he record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device." The Ohio Supreme Court has "admonish[ed] juvenile courts to take seriously their obligation to ensure that these types of proceedings are recorded properly." *In re B.E.*, 102 Ohio St.3d 388, 2004-Ohio-3361, 811 N.E.2d 76, ¶ 17. The court explained:

> Far too often, we see incomplete records, frequently caused by malfunctioning audio-recording devices. Obviously, it is in the court's best interest to properly record its proceedings the first time around, preferably through the use of a court stenographer. As we cautioned the court and bar in the context of Crim.R. 22: "The minimal effort needed to comply with Crim.R. 22 is far outweighed by the expense, in time and

> taxpayer money, of retrying a complex criminal case." *State v. Brewer*, 48 Ohio St.3d at 61, 549 N.E.2d 491. The same holds true in juvenile court proceedings.

Id.

{¶ 22} However, a juvenile court's failure to ensure that its proceedings are properly recorded does not necessarily mandate a reversal for a rehearing. Instead, App.R. 9(C)(1) contemplates situations when a transcript of proceedings may be unavailable and provides a means to reconstruct the record. The rule states: "If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Thus, if an appellant is able to prepare a statement of evidence, a rehearing ordinarily is not required. Instead, a rehearing is necessary when "an appellant attempts but is unable to submit an App.R. 9(C) statement to correct or supplement the record." *B.E.* at ¶ 16.

{¶ 23} For example, in *B.E.*, the party attempted to comply with App.R. 9(C) but "could not do so because neither trial counsel recollected the missing testimony." The Supreme Court remanded the matter for a rehearing and explained:

> Under the facts of this case, we are unwilling to presume the validity of the juvenile court's proceedings in the absence of an App.R. 9(C) statement, as appellant urges us to do. In this situation, where it is alleged that the missing testimony cannot be recreated, we believe that justice dictates that the matter be remanded for a rehearing. Otherwise, we would

> be penalizing an appellant for the court's inability to comply with an established court rule in the first place.

Id. at ¶ 16.

{¶ 24} In *In re Sidney B.*, 6th Dist. Lucas No. L-06-1371, 2008-Ohio-1961, the court remanded for a rehearing when the App.R. 9(C) statement was "essentially inadequate for use by this court in reviewing the trial court's proceedings." *Id.* at ¶ 12. Likewise, in *In re A.R.R.*, 11th Dist. Lake No. 2013-L-054, 2014-Ohio-3367, the court remanded for a rehearing when "no one could recall what happened at the hearing with sufficient particularity to provide an adequate record for meaningful appellate review." *Id.* at ¶ 8.

{¶ 25} In the case at bar, by contrast, the App.R. 9(C) statement is not inadequate for appellate review. Moreover, none of the parties or their counsel indicated that they were unable to recall the hearing with sufficient particularity to construct an App.R. 9(C) statement. To the contrary, the App.R. 9(C) statement indicates that the parties were able to adequately reconstruct the record. The App.R. 9(C) statement lists all parties in attendance and contains summaries of each witness's testimony. While a transcript obviously would be preferable, appellant has failed to demonstrate how the App.R. 9(C) statement is insufficient for appellate review. Consequently, we do not agree that the absence of a transcript in the case at bar mandates a remand for a rehearing.

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

B. PERMANENT CUSTODY

{¶ 27} In her second assignment of error, appellant contends that the trial court erred by determining that awarding appellee permanent custody is in the child's best interest. Specifically, appellant disputes the court's finding that the child could not achieve a legally secure permanent placement without granting permanent custody to appellee. Appellant argues that the child's great-grandmother could have provided a legally secure permanent placement for the child and, thus, awarding permanent custody was not necessary.

1. Standard of Review

{¶ 28} 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).

{¶ 29} 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, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). *Accord In re Pittman,* 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶ 23–24.

{¶ 30} 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.).

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

{¶ 32} 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 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

{¶ 33} 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. 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.

{¶ 34} 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

{¶ 35} 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.

{¶ 36} 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)[1] applies, and (2) that awarding the children services agency permanent custody would further the child's best interests.

[1] The General Assembly recently amended R.C. 2151.414(B)(1) to add division (e), which states:

> The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶ 37} In the case at bar, appellant does not challenge the trial court's R.C. 2151.414(B)(1) finding. Therefore, we do not address it. Instead, appellant focuses her argument on the trial court's best interest determination.

4. Best Interest

{¶ 38} R.C. 2151.414(D) requires a trial court to consider specific factors to determine whether a child's best interest will be served by granting a children services agency permanent custody. The factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (5) whether any factors listed under R.C. 2151.414(E)(7) to (11) apply.

{¶ 39} Here, the only best interest factor appellant challenges is the court's finding regarding the child's need for a legally secure permanent placement and whether that type of placement can be achieved without granting permanent custody to appellee. Appellant contends that the evidence shows that the child's great-grandmother could provide a legally secure permanent placement for the child. She further argues that both she and the child's grandmother could be released from prison as early as February 2015. Appellant thus contends that the court should have placed the child with the great-grandmother until either appellant or the child's grandmother is released from prison.

{¶ 40} We do not agree with appellant that the trial court should have placed the child with the great-grandmother. 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 M.M.*, 4th Dist. Meigs No. 14CA6, 2014-Ohio-5111, ¶ 39; *In re J.H.*, 4th Dist. Hocking No. 14CA4, 2014-Ohio-3108, ¶ 27; *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 *J.H.*, we explained:

> [In *In re Schaefer*, 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, the court] rejected the argument that a trial court must find by clear and convincing evidence that no suitable relative is available for placement before awarding a children services agency permanent custody. The court explained that R.C. 2151.414(D)(1)(d) is not entitled to any "heightened importance," and the trial court is not "required to credit evidence in support of maintaining the parental relationship when evidence supporting termination outweighs it clearly and convincingly." *Id.* at ¶ 56, 857 N.E.2d 532. The *Schaefer* court further rejected any argument that a juvenile court must determine by clear and convincing evidence that "termination of appellant's parental rights was not only a necessary option, but also the only option" or that "no suitable relative was available for placement." *Id.* at ¶ 64, 857 N.E.2d 532. The court stated that R.C. 2151.414(D) "does not make the availability of a placement that would not require a termination of parental rights an all-controlling factor," and it "does not even require the court to weigh that factor more heavily than other factors." *Id. Accord*

> *C. T.L.A., supra,* at ¶ 52 (stating that trial court "had no duty to first consider placing the child with [a]ppellant's relatives or a family friend before granting [a]ppellee permanent custody"); *In re J.K.,* 4th Dist. Ross No. 11CA3269, 2012–Ohio–214, ¶ 27 and ¶ 30; *In re A.C.H.,* 4th Dist. Gallia No. 11 CA2, 2011–Ohio–5595, ¶ 44; *In re M.O.,* 4th Dist. Ross No. 10CA3189, 2011–Ohio–2011, ¶ 20 (stating that children services agency "had no statutory duty to make 'reasonable efforts' to effect a relative placement before seeking permanent custody * * * * [, and] the juvenile court did not have to find by clear and convincing evidence that no suitable relative was available for placement before awarding the agency permanent custody").

Id. at ¶ 24; *accord In re A.R.,* 4th Dist. Highland No. 14CA10, 2014-Ohio-4916, ¶ 21.

{¶ 41} Appellant nevertheless asserts that under that Ninth District's rationale in *In re A.A.,* 9th Dist. Summit No. 22196, 2004–Ohio–5955, the trial court was required to determine whether her great-grandmother could have provided the child with a legally secure permanent placement before terminating her parental rights and awarding appellee permanent custody. However, as we recognized in *In re J.H., A.A.* was decided approximately two years before the *Schaefer* decision. Thus, the rule that appellant cites from *A.A.* ("If a legally secure placement could have been accomplished without terminating parental rights * * *, the agency should have explored it and the trial court should have considered this less drastic alternative to permanently severing a family relationship," *A.A.* at ¶ 18) is of questionable validity in light of the *Schaefer* court's statement that R.C. 2151.414(D) "does not make the availability of a placement that

would not require a termination of parental rights an all-controlling factor," and it "does not even require the court to weigh that factor more heavily than other factors." *Schaefer* at ¶ 64; *accord J.H.* at ¶¶ 27-28.

{¶ 42} Moreover, appellee found no viable legally secure permanent placement options other than permanent custody. Appellant is incarcerated and even if she is released in February 2015, she would need to demonstrate that she is able to provide the child with a legally secure permanent placement. She apparently has not been able to do so throughout the child's four-and-one-half years of life and has given no reason why she would be able to do so upon her release from prison. When, if ever, appellant would be able to provide a legally secure permanent placement for the child is unknown. The trial court was not required to deny the child the permanency that she needs, especially given her young age and special needs, in order to provide appellant additional chances to prove that she can provide a legally secure permanent placement for the child. To deny appellee permanent custody would only prolong the child's uncertainty. We do not believe that the trial court was required to experiment with this fragile child's best interest in order to permit appellant to prove that she will be able to regain custody of the child. *E.g., In re C.T.L.A.,* 4th Dist. Hocking No. 13CA24, 2014–Ohio–1550, ¶ 51.

> "* * * [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 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 (C.P.1972). We therefore disagree with appellant's suggestion that the court should have considered a temporary arrangement pending appellant's unpredictable ability to regain custody of the child. *J.H. at* ¶ 26, citing *In re J.B.*, 9th Dist. Summit Nos. 24470 and 24473, 2009–Ohio–1054, ¶ 27 (observing that a temporary placement offers "none of the protections of legal custody and no assurance of permanence").

{¶ 43} Furthermore, in 2014, the child's grandmother was sentenced to a four-year prison term. Thus, the child's grandmother is unable to provide the child with a legally secure permanent placement. Any claim that the grandmother will receive judicial release is speculative. Moreover, the trial court found that the grandmother had troubles similar to appellant's, *i.e.*, she was unable to provide a consistently safe, secure, and stable home for the child. N.S. deserves a permanent placement where her safety, security, and stability will no longer be in question. Obviously, the trial court was troubled by the grandmother's past history and believed that it indicated her ability to provide the child with a legally secure permanent placement (even if she were released early from her four-year prison term) was doubtful. Consequently, the trial court had no obligation to hold the child's permanency in abeyance until the grandmother is released from prison. We therefore disagree with appellant that the trial court wrongly determined that the child needed a legally secure permanent placement that could not be achieved without granting appellee permanent custody.

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

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. 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 Hocking 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.

Harsha, J. and McFarland, A.J.: Concur in Judgment and Opinion.

By:_____
Marie Hoover
Presiding 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.