[Cite as *In re N.S.*, 2015-Ohio-1510.]

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

IN THE MATTER OF:

N.S.,	:	Case No. 14CA23
Adjudicated Dependent Child.	:	DECISION AND JUDGMENT ENTRY
	:	RELEASED 04/17/2015

APPEARANCES:

Timothy P. Gleeson, 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, N.M, 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 grandchild, N.S. Her appointed counsel advised this Court that he has reviewed the record and can discern no meritorious claims for appeal. Using the procedure adopted in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel has moved to withdraw. After independently reviewing the record, we agree with counsel's assessment that no meritorious claims exist upon which to predicate an appeal. Therefore, we grant counsel's request to withdraw, find this appeal is wholly frivolous, and affirm the trial court's judgment.

I. FACTS

{¶ 2} N.S., a quadriplegic diagnosed with cerebral palsy, lived with her biological mother, S.S., from birth until she was six months of age. In 2011, the child's biological father died of a drug overdose. In 2012, S.S. was found guilty of several felony offenses in the state of Florida and was sentenced to serve four years in prison. N.S. lived with appellant until February 27, 2013, when appellant 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 S.S. was incarcerated in Florida. The complaint further alleged that the child had been residing with appellant when appellant was arrested. The complaint also alleged that heroin, paraphernalia, and loaded weapons were found in appellant'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 appellant:

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

{¶ 5} On February 7, 2014, the Hocking County Common Pleas Court sentenced appellant 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. S.S. submitted the following facts in an App.R. 9(C) statement. N.S.'s caseworker, Rebecca Carter, testified that S.S. presently is incarcerated in Florida with an expected release date of August 2015. N.M. 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} S.S. testified that her release date is August 2015, but she may be released at the end of February 2015. S.S. 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 S.S.'s App.R. 9(C) statement. 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. The trial court adopted S.S.’s App.R. 9(C) statement as amended by the state.

{¶ 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 S.S. within a reasonable time, because S.S. 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 S.S. from birth to six months and that appellant then had temporary custody due to S.S.'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 S.S.'s parental rights.This appeal followed.

II. *Anders v. California*

{¶ 19} N.M.'s appellate counsel filed a motion to withdraw and an *Anders* brief. In *State v. Lester*, 4th Dist. Vinton No. 12CA689, 2013–Ohio–2485, ¶ 3, we discussed *Anders'* requirements:

> In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Id.* at 744. The client should be furnished with a copy of the brief and given time to raise any matters the client chooses. *Id.* Once these requirements are met, we must fully examine the proceedings below to determine if an arguably meritorious issue exists. *Id.* If so, we must appoint new counsel and decide the merits of the appeal. *Id.* If we find the appeal frivolous, we may grant the request to withdraw and dismiss the appeal without violating federal constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 20} This court has previously applied *Anders* to an appeal involving the termination of parental rights. *In re J.K.*, 4th Dist. Athens No. 09CA20, 2009–Ohio–5391. Other courts have done the same. *In re J.L.*, 5th Dist. Muskingum No. CT2014–0010, 2014–Ohio–2684, ¶ 17; *In re B.A.*, 6th Dist. Williams No. WM–13–005, 2014–Ohio–151. *But see In re J.M.*, 1st Dist. Hamilton No. C–130643, 2013–Ohio–5896, ¶ 19 (holding that "the *Anders* procedures are not appropriate in appeals from decisions terminating parental rights or awarding legal custody").

{¶ 21} Appellate counsel identified four potential assignments of error:

First Potential Assignment of Error:

THE TRIAL COURT ERRED IN ADMITTING THE GUARDIAN *AD LITEM*'S REPORT AND CONSIDERING IT AS SUBSTANTIVE EVIDENCE.

Second Assignment of Error:

SOUTH CENTRAL OHIO JOB AND FAMILY SERVICES, CHILDREN SERVICES, AGREED TO PROVIDE [APPELLANT] THE OPPORTUNITY FOR REUNIFICATION UPON JUDICIAL RELEASE FROM PRISON.

Third Assignment of Error:

SOUTH CENTRAL OHIO JOB AND FAMILY SERVICES, CHILDREN SERVICES, FAILED TO CONSIDER AVAILABLE AND APPROPRIATE RELATIVE PLACEMENTS.

Fourth Assignment of Error:

THE TRIAL COURT ERRED IN FINDING THAT PERMANENT CUSTODY WAS IN THE BEST INTERESTS OF N.S.

III. ANALYSIS

A. Guardian *Ad Litem*'s Report

{¶ 22} In the first potential assignment of error, appellate counsel suggests that the trial court erred by admitting the guardian ad litem's report as substantive evidence during the permanent custody hearing.

{¶ 23} This court has previously held that a trial court errs to the extent it admits and considers a guardian ad litem's report as substantive evidence in a permanent custody case. *In re Hilyard,* 4th Dist. Vinton Nos. 05CA630, 05CA631, 05CA632, 05CA633, 05CA634, 05CA635, 05CA636, 05CA637, 05CA638, 05CA639, 2006–Ohio–1977, ¶

58.[1] We further stated, however, that to constitute reversible error, the court's consideration of a guardian *ad litem*'s report must be prejudicial. *Id*. In the case at bar, if the trial court considered the guardian *ad litem*'s report as substantive evidence, appellant cannot demonstrate prejudice. Even without the guardian *ad litem*'s report, the evidence unquestionably shows (1) appellant is incarcerated and her prison term does not expire until October 2018; (2) the child's mother is incarcerated and has not seen the child in over four years; (3) the child's father is deceased; and (4) since being removed from appellant's custody, the child has progressed. Thus, we agree with counsel's assessment that this potential assignment of error lacks merit.

B. Reunification Agreement

{¶ 24} In the second potential assignment of error, counsel asserts that appellant agreed to a plea agreement on her criminal charges in exchange for appellee's promise that appellee would reunify appellant with the child when appellant was judicially released.

{¶ 25} We summarily overrule appellant's second assignment of error. There is absolutely no evidence in the record regarding an agreement to reunify appellant with the child if she receives judicial release. Moreover, if appellant is arguing that her plea

[1] *See also In re K.W.*, 2nd Dist. Clark No. 2013-CA-107, 2014-Ohio-4606, ¶ 17 (Quotations omitted.) ("It is true that, [o]rdinarily, a GAL's report is not considered evidence. * * * This is because [a] guardian ad litem is an agent of the court, * * * and in a permanent custody proceeding, a written report by the GAL is required by statute, * * * to give the court information, in addition to that elicited at the hearing, to assist it in making sound decisions concerning permanent custody placements[.] * * * A GAL report, then, is merely submitted as additional information for the court's consideration, similar to a pre-sentence investigation report in a criminal proceeding."); *In re S.W.*, 12th Dist. Brown No. CA2011-12-028, 2012-Ohio-3199, ¶ 14 (Citations omitted.) ("The purpose of a GAL's report is to give the court information in addition to that elicited at the hearing to guide the juvenile court in making its decision. * * * Under normal circumstances, a GAL's report is not considered evidence, and is submitted as additional information, such as a presentence investigation report in a criminal proceeding. Therefore, Ohio courts have held that a juvenile court may consider the GAL's report despite hearsay within it, so long as the trial court provides due process protection for the parent by making the GAL available for cross-examination.").

agreement is invalid, an appeal from a permanent custody decision is not the proper procedure for raising that issue. We therefore agree with counsel that this second potential assignment of error lacks merit.

C. Relative Placement

{¶ 26} In the third potential assignment of error, appellant suggests that the trial court erred by failing to consider available and appropriate relative placements.

{¶ 27} 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.

{¶ 28} Thus, we agree with counsel that the third potential assignment of error lacks merit.

D. Best Interest

{¶ 29} In the fourth potential assignment of error, counsel suggests that the trial court erred by determining that awarding appellee permanent custody would serve the child's best interest.

1.

STANDARD OF REVIEW

{¶ 30} 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).

{¶ 31} 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.

{¶ 32} 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).

{¶ 33} 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).

{¶ 34} 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

{¶ 35} 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.

{¶ 36} 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

{¶ 37} 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.

{¶ 38} 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.

{¶ 39} 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

{¶ 40} 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.

{¶ 41} In the case at bar, we agree with counsel's assessment that a challenge to the trial court's best interest determination lacks merit. The father is deceased, and the mother is in prison. Appellant has been sentenced to a four year and nine month prison term. Appellee found no other suitable placements for the child. The child has special needs and has benefited from being placed in a stable foster home. The trial court had more than enough evidence from which to conclude that the child's best interest mandate awarding appellee permanent custody. The court could have reasonably determined that it would be a horrible disservice to this young, fragile child to continue her in a temporary situation and allow either her mother or appellant to attempt to regain custody only to subject the child to the same situations which led to the child's prior removals. Consequently, the fourth potential assignment of error lacks merit.

{¶ 42} We have independently reviewed the record and agree with appellant's counsel that no arguably meritorious issues exist. Therefore, we grant counsel's request to withdraw, find this appeal wholly frivolous, 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: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Judgment Only.

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.