[Cite as *In re A.L.P.*, 2015-Ohio-1552.]

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

IN THE MATTER OF:

	:	Case No. 14CA37
A.L.P.	:	
	:	
	:	DECISION AND JUDGMENT
	:	ENTRY
	:	
	:	
	:	**Released: 04/15/15**

APPEARANCES:

Joseph H. Brockwell, Marietta, Ohio, for Appellant.

Amy Graham, Marietta, Ohio, for Appellee.

McFarland, A.J.

{¶1} This is an appeal by A.D. of the trial court's judgment that awarded legal custody of her biological child, A.L.P., to the child's paternal great-aunt and uncle. Appellant argues that the trial court abused its discretion by awarding the relatives legal custody instead of continuing the child in Washington County Children Services' (WCCS) temporary custody for another six months in order to allow her to complete the case plan requirements. We do not agree. When the court granted the relatives legal custody, the child had been in WCCS's temporary custody for eighteen months and during that time, appellant did not complete the case plan goals

or make any significant progress towards those goals. The trial court could have rationally determined that giving appellant another six months would yield the same results and would only prolong the inevitable. Consequently, we do not believe that the trial court abused its discretion by awarding the relatives legal custody and refusing to extend the temporary custody order for another six months. Therefore, we overrule appellant's assignment of error and affirm the court's judgment.

I. FACTS

{¶2} In April 2013, WCCS removed the child from appellant's home, and the child remained in WCCS's temporary custody throughout the proceedings.

{¶3} On February 21, 2014, appellant filed a motion that requested the court to place the child in her custody. On July 17, 2014, the relatives filed a motion for custody of the child.

{¶4} On October 6, 2014, WCCS filed a "reasonable efforts/best interest statement." In it, WCCS stated that "[n]othing has really changed in the 18 months that ALP has been in the [temporary custody] of the agency. Neither parent is able to attend scheduled appointments on a regular basis for extended periods of time. The parents continue to miss visits with ALP. [Appellant] has given up visits with ALP so she could attend scheduled

appointments with [the child's father]. This demonstrates that ALP is not a priority to [appellant]. [Appellant] has maintained her employment for an extended period of time which is a positive." WCCS requested the court to find that it is in the child's best interest to be placed in the relatives' legal custody.

{¶5} On October 14, 2014, appellant filed another motion for custody.

{¶6} On October 14, 2014, the court held a review hearing and considered the opposing motions for custody. WCCS noted that the parents live in West Virginia and that West Virginia refused to place the child with the parents because the father "has CPS substantiated abuse due to hitting, Domestic Violence and physical punishment." WCCS further asserted that the parents have made "minimal progress" towards the case plan goals. WCCS's counsel explained:

> "The parents have had minimal progress. They've done sporadic counseling[;] they've done sporadic visits.
>
> They have no transportation.
>
> The majority of the time they get to visit is because the caseworker goes and tries to bring them over.
>
> They've canceled visits, claiming they were sick, and then other people have seen them walking around doing other things when they should ha[ve] been visiting with their son.
>
> We would love to do temporary custody but I don't think six months is going to change anything, since we've been at this for about a year and a half."

{¶7} WCCS also stated that the child has been in the relatives' care since May 2014 and was "thriving."

{¶8} The child's guardian *ad litem* likewise stated that he did not believe "anything is going to change in six months." He stated: "I think that nothing is going to happen in the next six months that's going to change th[e] situation, or make it different than it is today." The guardian *ad litem* believed that the parties were in such a "position [that] we're not doing anything more than spinning our wheels" for the next six months. The guardian *ad litem* further opined that awarding the relatives legal custody of the child would serve the child's best interest.

{¶9} Appellant's counsel recognized that the court could not grant her custody of the child due to West Virginia's denial of placement. Appellant's counsel thus requested the court to extend temporary custody for another six months so that she could have a chance to have the child returned to her care.

{¶10} The child's paternal aunt stated that since the child was five days old, he has spent the majority of his life in her home. She stated that "[t]he parents promise things like to call and text and keep up with him, and they do not." She did not believe an additional six months would change the parents' situation.

{¶11} At the end of the hearing, the court granted the relatives legal custody of the child. The court found "no benefit" to continuing the child in WCCS's temporary custody for another six months.

{¶12} On October 24, 2014, the court denied the mother's motion and granted the relatives' motion for legal custody. The court found that (1) the child had been out of the parents' home for approximately eighteen months, (2) West Virginia denied a request to place the child in the parents' home, (3) the parents' visits had been sporadic, (4) there had been minimal case plan compliance by the parents, and (5) the child needed stability. The court did not believe that continuing the case for another six months would benefit the child. The court thus awarded the relatives legal custody of the child.

II. ASSIGNMENT OF ERROR

{¶13} Appellant raises one assignment of error.

> "The juvenile court abused its discretion when it found that it was in the best interest of the child to place him in the legal custody of a relative and deny the mother the opportunity to continue pursuing the requirements of the case plan."

III. ANALYSIS

{¶14} In her sole assignment of error, appellant argues the trial court erred by refusing to continue the child in WCCS's temporary custody for another six months while appellant continued to fulfill the case plan requirements.

A. STANDARD OF REVIEW

{¶15} "We apply the same standard to a trial court's decision to award a party legal custody of a child that we apply to all child custody disputes - that is, we afford the utmost deference to a trial court's child custody decision." *In re E.W.*, 4th Dist. Washington Nos. 10CA18, 10CA19, and 10CA20, 2011-Ohio-2123, ¶ 18, citing *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Consequently, absent an abuse of discretion, a reviewing court will not reverse a trial court's decision regarding child custody matters. *See, e.g., Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus. Thus, when "an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court." *Bechtol* at syllabus; *see also Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶16} In *Davis*, the court explained the abuse of discretion standard that applies in custody proceedings:

> " 'Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. (*Trickey v. Trickey* [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [*Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of

> each witness, something that does not translate well on the written page. As we stated in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80–81, 10 OBR 408, 410–412, 461 N.E.2d 1273, 1276–1277:
>
> 'The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * *
> * * *
>
> * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.' This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well."

Id. at 418–419. Thus, reviewing courts should afford great deference to trial court child custody decisions. *E.W.* at ¶ 19, citing *Pater v. Pater*, 63 Ohio St.3d 393, 396, 588 N.E.2d 794 (1992). Additionally, because child custody issues involve some of the most difficult and agonizing decisions that trial courts are required to decide, courts must have wide latitude to consider all of the evidence and appellate courts should not disturb a trial court's judgment absent an abuse of discretion. *Davis*, 77 Ohio St.3d 418; *Bragg v. Hatfield*, 152 Ohio App.3d 174, 2003–Ohio–1441, 787 N.E.2d 44 (4th Dist.),

¶ 24; *Hinton v. Hinton*, 4th Dist. Washington No. 02CA54, 2003–Ohio–2785, ¶ 9; *Ferris v. Ferris*, 4th Dist. Meigs No. 02CA4, 2003–Ohio–1284, ¶ 20.

B. LEGAL CUSTODY STANDARD

{¶17} A trial court may terminate or modify a prior dispositional order and award legal custody to a nonparent if doing so serves the child's best interest. R.C. 2151.353(A)(3); 2151.42(A); *see E.W.* at ¶ 20. *See generally In re Pryor* (1993), 86 Ohio App.3d 327, 332, 620 N.E.2d 973 (stating that "the primary, if not only, consideration in the disposition of all children's cases is the best interests and welfare of the child"). R.C. 3109.04 specifies the best interest factors courts must consider when determining whether to award legal custody to a nonparent. *E.W.* at ¶ 20; R.C. 2151.23(F)(1); *In re Poling*, 64 Ohio St.3d 211, 594 N.E.2d 589 (1992), paragraph two of the syllabus ("[w]hen a juvenile court makes a custody determination under R.C. * * * 2151.353, it must do so in accordance with R.C. 3109.04"); *Pryor*, 86 Ohio App.3d at 333, fn.4 (stating that a trial court applies the same best interest standard in child custody disputes originating from a divorce and originating from a neglect, dependency, abuse complaint).

{¶18} R.C. 3109.04(F)(1) requires a trial court that is ascertaining a child's best interests to consider all relevant factors, including, but not limited to:

> (a) The wishes of the child's parents regarding the child's care;
> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
> (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
> (d) The child's adjustment to the child's home, school, and community;
> (e) The mental and physical health of all persons involved in the situation;
> (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
> (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
> (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household

> that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;
>
> (i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;
>
> (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶19} In the case at bar, the trial court did not engage in a specific analysis of the foregoing best interests factors. However, in the absence of a proper Civ.R. 52 request for findings of fact and conclusions of law, it had no obligation to do so.

{¶20} Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." The failure to request findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. *Pawlus v. Bartrug*, 109 Ohio App.3d 796, 801, 673 N.E.2d 188 (1996); *Wangugi v. Wangugi*, 4th Dist. Ross No. 2531 (Apr. 12, 2000). When a party fails to request findings of fact and conclusions of law, we must generally presume the regularity of the trial court proceedings. *Bunten v. Bunten*, 126 Ohio App.3d 443, 447, 710

N.E.2d 757 (1998); *accord Cherry v. Cherry*, 66 Ohio St.2d 348, 356, 421 N.E.2d 1293 (1981). In the absence of findings of fact and conclusions of law, we generally must presume that the trial court applied the law correctly and must affirm if some evidence in the record supports its judgment. *Bugg v. Fancher*, 4th Dist. Highland No. 06CA12, 2007–Ohio–2019, ¶ 10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.*, 62 Ohio App.3d 657, 577 N.E.2d 383 (1989); *accord Yocum v. Means*, Darke App. No. 1576, 2002–Ohio–3803, ¶ 7 ("The lack of findings obviously circumscribes our review."). As the court explained in *Pettet v. Pettet*, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (1988):

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence. The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.' "

{¶21} In the case at bar, we are unable to conclude that the trial court abused its discretion by granting legal custody to the relatives. The trial court could have rationally determined that continuing the child in WCCS's temporary custody for an additional six months would not serve the child's

best interest but that placing the child in a stable and secure placement would. Appellant may indeed wish to have her child returned to her, but she has been unable—over the course of eighteen months—to stabilize her situation so that the child could be placed in her care. The evidence presented at the hearing gave no indication that an additional six months in WCCS's temporary custody would change the situation. Both WCCS's attorney and the child's guardian *ad litem* agreed that appellant gave them no reason to believe that she would be able to improve her circumstances if given an additional six months. Instead, both indicated that a further extension would merely delay the inevitable. Under these circumstances, we cannot conclude that the trial court abused its discretion by placing the child in a stable home rather than continuing the child in limbo for an additional six months.

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

JUDGMENT AFFIRMED.

Harsha, J., concurs with concurring opinion:

{¶23} I concur in the judgment and opinion overruling the mother's assignment of error in this private custody dispute. Although I agree that the principal opinion accurately sets forth the applicable standard of review based on the Supreme Court of Ohio precedent, I remain perplexed why the abuse of discretion standard for "private" custody cases inexplicably conflates elements more appropriately analyzed under a manifest weight of the evidence analysis. *See Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997), citing *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus, quoted and cited above. At the same time I acknowledge the use of a manifest weight of the evidence review when a children's services agency seeks permanent custody under R.C. 2151.414.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Hoover, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion with Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.