[Cite as *In re A.L.F.*, 2019-Ohio-937.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

IN THE MATTER OF:

A. L. F.,

DEPENDENT CHILD.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0024

Civil Appeal from the
Court of Common Pleas, Juvenile Division of Columbiana County, Ohio
Case No. J2015-0116-3

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Aviva L. Wilcher, 1655 W. Market St. Suite. 235, Akron, Ohio 44313 for Appellant/Cross Appellee, Natural Father and

Atty. Allyson Lehere, Assistant Prosecutor, 260 W. Lincoln Way, Lisbon, Ohio 44432 for Appellee, Columbiana County Job and Family Services and

Atty. Rhonda G. Santha 6401 State Route 534, West Farmington, Ohio 44491 for Cross Appellant, Melissa Fry, Mother.

Dated: March 11, 2019

Robb, J.

{¶1} The parents of a young child appeal the decision of the Columbiana County Common Pleas Court, Juvenile Division, terminating their parental rights and granting permanent custody to the Columbiana County Department of Job and Family Services ("the agency"). The father challenges the weight of the evidence, setting forth arguments about whether the trial court properly found the child could not be placed with him within a reasonable time or should not be so placed and whether the agency made reasonable reunification efforts. Both the father and the mother challenge the trial court's decision on the child's best interest. For the following reasons, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶2} The subject child was born in July 2012 to D.F. (the father) and M.F. (the mother). When the child was two months old, the agency in Mahoning County placed him with the mother's cousin, who received legal custody. (Tr. 95). Until the child was almost three years old, he lived with the legal custodian (and her child) in Columbiana County. In June 2015, the legal custodian was arrested after traveling to Jefferson County with her child to purchase heroin. The custodian and her mother then used the heroin, resulting in the custodian's child having to run for help due to a possible overdose. (Tr. 95).

{¶3} As a result of these allegations, a complaint was filed on June 29, 2015, alleging the subject child was dependent. The agency was immediately granted emergency custody of the subject child (and the custodian's child). The parents attended the adjudicatory hearing and stipulated to a finding of dependency, which was memorialized in an August 3, 2015 judgment entry. Emergency temporary custody was continued pending the dispositional hearing.

{¶4} The agency provided the parents with a case plan in July 2015, which required them to: maintain stable emotional and mental health; receive diagnostic services at an approved agency (with a referral to a counseling center in Lisbon); follow through with recommended counseling; sign releases; have progress measured through conversations and at home visits; maintain stable income and housing with no safety

hazards; complete all aspects of an approved parenting program (with a referral to a certain organization); demonstrate good parenting skills during visitation (including parenting by the mother without prompts from the father); be prepared to provide for the child's needs upon reunification; provide information on family members for placement; protect the child's safety; and ensure the child would receive necessary medical care. The case plan provided two hours of supervised visitation per week.

{¶5} The dispositional hearing was held in September 2015, but the parents did not attend. The court granted temporary custody to the agency and made the case plan an order of the court. In doing so, the court stated: the parents appeared to suffer from mental health and/or cognitive disabilities; the child was recently removed from their custody; the father does not seem to be in the home much of the time; and they do not appear able to care for the child. (9/21/15 J.E.).

{¶6} Temporary custody was continued at review hearings. After the first review hearing, the court found the parents "have not worked their case plan," the mother was not attending any visitation, and the father "exhibited erratic if not irrational behavior in the courtroom; at time[s] rambling incoherently about things completely unrelated to the case at hand." (3/10/16 Mag. Order). At the second review hearing, the court found the parents had not completed the case plan, the mother only sporadically visited the child, and the father continued to suffer from severe mental health issues. (6/28/16 Mag. Order). The agency's efforts were discussed in both orders and found to be reasonable.

{¶7} On September 20, 2016, the agency filed a motion for permanent custody. A pretrial was held in December, and the case was set for a March 2017 trial which was then continued to July 2017. At the continued hearing, the parents appeared, all parties agreed to a continuance, and the state moved to dismiss (and refile) the motion for permanent custody over concerns the matter would not be heard within the statutory time frame. *See* R.C. 2151.414(A)(2) (and stating the timelines are not jurisdictional). The court dismissed the original motion without prejudice and ordered the agency to immediately refile the motion for permanent custody, which the state did on July 18, 2017.

{¶8} The parents filed motions to reinstate visitation in August 2017. According to the mother's motion, she stopped visiting the child because she believed there was no chance of regaining custody. When the case was called for trial in October 2017, the attorneys for the parents received a continuance. At this time, the court reinstated

visitation. The parents attended two of the three visits scheduled in October and none of the scheduled weekly visits in November; they then started visiting regularly. The rescheduled trial was continued as the father required new counsel. The case was finally tried on May 1, 2018.

{¶9} At the time of trial, the child was not yet six years old. The child's legal custodian died a month prior to trial. After the child was removed from her custody and adjudicated dependent, the child lived in four different foster homes: the child was only briefly in the first home when an issue arose with the legal custodian's child (and the agency wished the children to remain together); the child was removed from the second home after 1.5 years because another foster child in the home was assaulted (by an undisclosed individual); the child was not in the third home long when his behaviors were considered overwhelming; and the child was placed in the final foster home on September 5, 2017. The child was hospitalized three times soon thereafter due to behavioral issues; medications were prescribed and altered. (Tr. 105-106). Diagnoses of the child included: Oppositional Defiant Disorder, Reactive Attachment Disorder, Adjustment Disorder (as a result of changes in the child's environment), PTSD, and ADHD. (Tr. 19, 41, 53, 100). The child was on a waiting list to be evaluated for autism. (Tr. 24).

{¶10} The child's behavioral therapist testified the child did not follow directions easily and was very aggressive, emotional, and defiant. (Tr. 10). After being ejected from preschool for hitting, kicking, and spitting, an appropriate kindergarten was located. (Tr. 104). The child could only cope with attending for half of a day and required a one-on-one aide in a special needs classroom. (Tr. 11, 17, 108). The child was verbally and educationally delayed. (Tr. 24). The child's behavior showed improvement from specific training strategies provided to the foster parents and routine. (Tr. 10, 15). The ability to communicate daily with the child's school was important to the child's progress. The child's caregiver must be willing to: give the child his or her full effort, consistently set clear boundaries, notice indicators of impending behavior, act proactively, provide immediate redirection, stay calm, and impose consequences without anger. (Tr. 11-14).

{¶11} The child was seeing a psychiatrist once a month for medication, a child therapist once every two weeks, and a behavior therapist regularly in the home. (Tr. 26, 50, 112-113). The child attended speech therapy, play therapy, swimming, and gymnastics. (Tr. 26, 115). The foster parents never missed an appointment, were active

in the child's sessions, and were capable of handling his behaviors; the child was very attached to the foster family. (Tr. 27, 48, 80).

{¶12} The mother had her parental rights involuntarily terminated as to her three oldest children; the relevant Mahoning County magistrate's decision from 2009 and judgment entry from 2010 were admitted as exhibits. (Tr. 144-147). The mother surrendered her rights as to a fourth child in Mahoning County. (Tr. 143). The mother's three youngest children were products of her marriage to the father in this case: a ten-year-old daughter, who lived with her paternal grandmother; the subject child, who was removed from the care of the parents at two months of age; and a four-year-old daughter, who lived with the parents. (Tr. 142). An alternative response case was opened for the youngest daughter in Mahoning County due to allegations of inadequate food and being hit by an uncle, but the allegations were resolved. (Tr. 174-175). The mother testified she visited her ten-year-old daughter once a month. (Tr. 227). The father testified he attended anger management counseling as ordered by a judge in Mahoning County in relation to his request to visit the ten-year-old daughter. (Tr. 232).

{¶13} The father had three older children from other relationships. (Tr. 128). The father was regularly heard complaining about his children being removed in the past by another agency, his inability to speak to his older children, and his past issues (e.g., stating he lost custody of his children because he was pistol-whipped, providing information on rape victims, and stating he went to prison after a vehicular homicide charge as a result of a pedestrian throwing himself under his car). (Tr. 58, 70, 131, 160-161). Although he claimed his charge was reduced to reckless operation, he testified he was sentenced to prison. (Tr. 233). The father often became agitated during meetings or visits, and his attention was hard to redirect; past visits were relocated from a public place to the agency as a result of the father's public outcries. (Tr. 161-162, 164).

{¶14} After being presented with the July 2015 case plan, which was incorporated into a court order, the parents refused to attend the required parenting course. Although this was a new case, the father informed the case worker that he did not want to take a parenting course again as they completed one in August 2014; it was unknown why the parents took these classes in 2014. (Tr. 118-119). The parents did not agree to take a class until October 2017, but they did not attend the recommended class. (Tr. 119-120).

They completed a course in December 2017; the facility did not generate a written evaluation or witness a visitation. (Tr. 121).

{¶15} The mother failed to obtain a psychological evaluation when presented with the case plan in July 2015, which also required her to attend any counseling recommended as a result of the evaluations. The mother had two prior psychiatric hospitalizations. The mother disclosed that she was on medication for depression. (Tr. 133). At the father's instruction, the mother refused to sign a release for the center where she received her medications. (Tr. 153). The mother finally signed a release the week before the hearing, but the counseling center did not provide records by the day of trial. (Tr. 153-154, 177-178).

{¶16} The father was resistant to the evaluation requirement at first but was eventually evaluated and went to four counseling sessions in 2016. (Tr. 152). He signed a release at some point but refused the request to update it. (Tr. 153). The father testified he refused to sign a release because he believed the counselor would have a legal duty to report if he was considered unable to take care of a child. The father also testified the case worker believed he was too mentally ill to take care of the subject child, noting she would not specify why she believed this. (Tr. 233).

{¶17} Both parents attended psychological evaluations in November 2017, after various continuances in the permanent custody proceedings. These reports were admitted as court exhibits. The psychologist recommended counseling for the father, but there is no indication the father thereafter received any counseling. The mother reported she was not sure if she was receiving counseling but another time reported she was not receiving counseling. (Tr. 179). The case worker noticed the mother had limited mental abilities and did not seem to understand various subjects. (Tr. 157). This was emphasized in the psychological evaluation as well.

{¶18} The parents moved from an apartment in Jefferson County to a home in Youngstown without informing the agency. When the father was contacted, he provided the wrong address in Youngstown. Their four-year-old daughter lived with them. She was away from the house for preschool for nearly 8 hours per weekday. (Tr. 224). She often wore dirty clothes; at one home visit, the mother's clothes also appeared dirty, and the child was not wearing underwear. (Tr. 133). Both parents receive income from the Social Security system. The father was not present for various home visits with the case

worker as he worked "odds jobs," and the case worker believed the mother would be the primary caregiver. (Tr. 126, 134, 142). The father's brother also lived in the home but was not considered a suitable caregiver.

{¶19} The first time the case worker attempted to conduct a home visit in Youngstown in April 2017, the father was outside with the mother and the four-year-old child. He was so argumentative that the case worker did not feel comfortable entering the house. (Tr. 129). After another visit, the interior of the home was described as very cluttered with small pathways to navigate. (Tr. 61-66). The interior condition improved on later visits. (Tr. 135). The front porch contained "junk" and trash. (Tr. 135). A small yard was littered with objects including various cars (which they were reportedly fixing), bicycles, scrap metal, bags of plastic bottles, and an unused hot tub. (Tr. 68). The yard was considered unsafe for play. Besides the aforementioned objects, a car was raised on jacks in the front yard and two piles of large logs were stacked ten feet high in the backyard (which they brought with them from the apartment in Jefferson County). (Tr. 68, 137). The amount of objects in the yard increased after the agency's first visit. (Tr. 130).

{¶20} The child's Court-Appointed Special Advocate (CASA) recommended the grant of permanent custody to the agency. (Tr. 57). Her four CASA reports were admitted as court exhibits. She testified the father announced at a court hearing that he was suspending his visitation because of scheduling issues, the amount of rules, and the amount of work he wanted to do on the house in Youngstown. (Tr. 73). The mother had already stopped visiting, and after the father's announcement, there were no parental visits for more than one year. (Tr. 73). Before the mother stopped visiting, a case worker noticed the mother showed little interest in the child during visits, often asking how much time was left or leaving the premises. (Tr. 165). The mother only attended eight weekly visits between the child's removal in June 2015 and the father's June 2016 announcement that he was suspending visitation. (Tr. 166).

{¶21} After visitation resumed, the CASA observed a January 2018 visitation where the mother expressed no affection toward the child and no bond was apparent between them; the mother barely communicated with the child except to instruct him to eat. (Tr. 76, 87). The father's visits were more constructive (until he started talking to observers about his past). (Tr. 165, 198, 211). During recent visits, the subject child was

physically aggressive toward his sister and other children. (Tr. 201, 204, 215-216). The father would impose discipline such as time-out or temporarily withholding a reward. (Tr. 203, 219). However, he was also observed hitting the child with a coloring book as punishment, even though physical discipline is prohibited during supervised visitation. (Tr. 204).

{¶22} On June 27, 2018, the court granted the agency's motion for permanent custody of the subject child and terminated parental rights. The court found the agency engaged in reasonable case planning efforts and reasonable efforts to find appropriate alternative family resources for placement. The court recited a variety of facts concerning the child and the parents. The child was found to suffer from severe emotional and behavioral mental illness and to be in need of: long term placement and permanency; routine and boundaries; consistent care in a structured environment by parents who have proven their ability to meet the child's needs; and intense one-on-one monitoring by those participating in his psychiatric care. The court concluded permanent custody was in the child's best interest, the child could not be placed with either parent within a reasonable time or should not be placed with either as they are unable to meet the child's special needs, and the child had been in the permanent custody of the agency for more than twelve months of a consecutive twenty-two-month period.

{¶23} Each parent filed a timely notice of appeal. The mother's brief was filed in October 2018; the agency's response to the mother's brief was filed in December 2018; the father's brief was not filed until January 2019; and the agency responded on January 28, 2019. Oral argument was timely held on February 20, 2019, within thirty days of the date briefing closed, and an opinion is being timely issued within thirty days of the hearing. *See* App.R. 11.2(C)(4)-(5).

{¶24} The father sets forth two assignments of error. The portion of his first assignment of error challenging the application of the best interest factors will be addressed last with the mother's sole assignment of error, which also challenges the trial court's weighing of these factors. Before analyzing this second step in the permanent custody analysis, we address the arguments set forth by the father as to the first step.

PERMANENT CUSTODY STEP ONE:

Cannot or Should Not Be Placed or 12 of 22

{¶25} The father's first assignment of error contends:

"The trial court's decision granting the permanent custody motion was against the manifest weight of the evidence."

{¶26} The court may grant permanent custody to the movant if it finds by clear and convincing evidence it is in the best interest of the child and any of the following apply: (1) the child cannot be placed with either parent within a reasonable time or should not be so placed; (2) the child is abandoned; (3) the child is orphaned with no relatives able to take permanent custody; (4) the child has been in the temporary custody of an agency for 12 or more months of a consecutive 22 month period; or (5) the child or another child in the custody of the parents was adjudicated abused, neglected, or dependent three separate times. R.C. 2151.414(B)(1)(a)-(e).

{¶27} "Clear and convincing evidence" is a measure of proof that will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990), citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). It is an intermediate measure or degree of proof which is more than a mere "preponderance of the evidence" but less than the certainty required where the burden of proof is "beyond a reasonable doubt" as in criminal cases. *Id.* "Clear and convincing" does not mean "clear and unequivocal." *Disciplinary Counsel v. Stafford*, 131 Ohio St.3d 385, 2012–Ohio–909, 965 N.E.2d 971, ¶ 21; *Cross*, 161 Ohio St. at 477.

{¶28} The juvenile court's decision on a motion for permanent custody is subject to an abuse of discretion review. *In re C.F.,* 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816*,* ¶ 48. An abuse of discretion occurs if the court's decision is unreasonable, arbitrary or unconscionable; it entails more than an error of judgment. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). A decision is unreasonable if it is unsupportable by any sound reasoning process. *See AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). A decision is not unreasonable merely because a reviewing court would have made a different decision if in the trial court's place. The appellate court is not free to merely substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). We are guided by a presumption the trial court's findings are correct since the trial court judge is best able to judge credibility of witnesses and occupies the best position for weighing the evidence. *Davis v. Flickinger*, 77 Ohio St.3d

415, 418-419, 674 N.E.2d 1159 (1997) ("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"); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶29} In his first "issue presented for review," the father contends the court abused its discretion in finding the subject child could not be placed with him within a reasonable time or should not be placed with him. He points out the agency saw no reason to file a complaint regarding his four-year-old daughter who lives with him. He states his home was stable and appropriate and he was able to care for the subject child. He suggests that if the exterior of his home was so unsafe, some action would have been taken regarding his daughter. The father points out it was the mother who had her parental rights involuntarily terminated with regards to three other children (from another father), which shifted the burden to her. *See* R.C. 2151.414(E)(11) (the court *shall* find the child cannot be placed with either parent within a reasonable time or should not be so placed if the parent had parental rights involuntarily terminated as to a sibling and failed to provide clear and convincing evidence to prove she can provide a legal secure permanent placement and adequate care for the health, welfare, and safety of the child). The father emphasizes the burden did not similarly shift to him on this topic as there was no indication he had his parental rights involuntarily terminated with regard to his children.

{¶30} In determining whether the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, there are additional statutory factors that require a court to make a finding under division (E), including but not limited to: (1) the parent "has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home" despite "reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home"; (2) chronic mental or emotional illness or mental retardation will render the parent unable to provide an adequate home for a year after the hearing; (4) the parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child; (10) the parent has abandoned the child; or (16) other relevant factors. R.C. 2151.414(E).

{¶31} Regarding the abandonment factor in (E)(10), "a child shall be presumed abandoned when the parents of the child have failed to visit or maintain contact with the child more than ninety days, regardless of whether the parents resume contact with the child after that period of ninety days." R.C. 2151.011(C). In considering the failure to remedy factor, (E)(1) instructs the court to consider the utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties. R.C. 2151.414(E)(1). Here, there were failed utilizations and then late utilizations of such services. The father discusses whether the agency's efforts were reasonable in the second assignment of error.

{¶32} As to division (E)(4), the parents clearly demonstrated a lack of commitment toward the child by failing to regularly visit with the child when able to do so or by other actions showing an unwillingness to provide an adequate permanent home for the child. Furthermore, the court shall consider all relevant evidence on the topic of whether the child cannot be placed with either parent within a reasonable time or should not be placed with either, and the list of factors is not exclusive as the statute concludes with "any other relevant factors." R.C. 2151.414(E)(16).

{¶33} We refer to our Statement of the Case above for more detailed facts presented in the testimony. To review, the child was removed from the custody of the father and the mother in 2012 when he was two months old, and this case arose after the legal custodian's action resulted in the child's dependency adjudication and temporary custody disposition. The case worker testified that she advised the parents this was a new case with new obligations, but the father insisted they did not need more parenting classes. The father was often uncooperative and confrontational, further delaying the progress of the case plan. His ability to stay focused and calm (as required for dealing with this child's problems) was questionable.

{¶34} It was through his advice that the mother refused to sign the release. By the time she was convinced to sign the release, it was too late (for purposes of trial) to ascertain the reason for her psychiatric medications and her progress. She also failed to participate in the psychiatric evaluation requested in July 2015, waiting more than two years (after multiple continuances in the permanent custody trial) to get evaluated. She had prior psychiatric hospitalizations for depression and multiple children removed from

her care, making the release, her participation in the requested evaluation, the attendance at any recommended counseling, and her completion of a new parenting class very important features of the case plan. However, the father's prompting thwarted these measures.

{¶35} Rather than work the case plan diligently and visit the child weekly as scheduled, the mother showed no interest in the child at the few visits she attended and the father suspended his own visitation, after which both parents completely stopped visiting for more than a year. These were continuous and substantial failures to remedy a condition identified in the case plan. The parents did not resume visiting or make serious attempts to work the basic parts of the case plan until after the second motion for permanent custody was filed. The father's new effort did not erase from the record the evidence giving rise to concerns over his stability and commitment.

{¶36} The court heard the parents and other witnesses testify and could observe their demeanor and assigned the weight to give their testimony. No bond was observed between the child and the mother. The mother does not contest the finding under step one, and the father's argument pertains only to himself. Nevertheless, the father was married to and lived with the mother. It appeared she would be the child's primary caregiver. In considering how to counter certain delays experienced by the child, it was relevant that the mother was rarely observed speaking to the child. And, the child had special needs of a great nature, more than mere delays. The importance of decreasing the child's physical and verbal aggression cannot be overstated. The evidence showed that in order to change the child's behavior, the caregiver must have high commitment to the endeavor, ensure attendance at all appointments, engage in communication with others, and maintain a structured environment. There was no indication the mother could understand or participate in the strategies necessary to encourage the child's progress. As pointed out by the agency, the father was considered anti-social, suspicious, and lacking in insight into his behavior.

{¶37} The father complains about a factual finding the court made about his prior alcohol-related offenses and notes he was not required to obtain a substance abuse assessment. However, this was part of a recitation of a broad range of factual findings from the evidence presented at trial. It related to his denial of a substance use issue and matters raised in the November 2017 psychological evaluation. On this topic, the father

was recommended for counseling with behavior management but did not proceed with this obligation. A prior counseling attempt resulted in four visits and culminated in his unusual decision voiced at a hearing to suspend visitation with the child (which decision he maintained for more than a year). The father blames the changes in foster homes for the child's behavior; however, if the case plan had been followed and productive visitation with the child continued, the child would not have experienced a long-term loss of his parents' visitation. Contrary to the father's suggestion, the fact that their four-year-old daughter was not removed from his care does not make the trial court's decision contrary to the weight of the evidence with regard to the subject child. The question was not the ability to meet the daughter's basic needs (without the subject child in the house) but involved the ability to meet an additional child's needs when the child has extreme needs.

{¶38} We shall not substitute our judgment for that of the trial court on these issues. The trial court's decision was supported by the manifest weight of the evidence which clearly and convincingly showed the child could not be placed with the parents within a reasonable time or should not be so placed.

{¶39} Additionally, it must be recognized: "The statutory findings for granting permanent custody in (a) through (e) of R.C. 2151.414(B)(1) are alternatives so that only one of the five options must be found by the court." *In the Matter of A.E.B.*, 7th Dist. No. 17 JE 0030, 2018-Ohio-2269, ¶ 29, citing *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 23-27. "[A]n agency need no longer prove that a child cannot be returned to the parents within a reasonable time or should not be returned to the parents, so long as the child has been in the temporary custody of an agency for at least 12 months." *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1176, ¶ 21 (discussing the 1999 statutory changes).

{¶40} A child is considered to have entered the agency's temporary custody on the earlier of the date the child is adjudicated under R.C. 2151.28 (which was August 4, 2015) or sixty days after removal (which was June 29, 2015). R.C. 2151.414(B)(1). As the date of the dependency adjudication is the earlier date, this makes August 4, 2015 the date the child entered temporary custody. Either way, by the time the September 20, 2016 motion for permanent custody was filed, the child had spent more than twelve consecutive months in the temporary custody of the agency. Clearly, the child had been in the temporary custody of the agency for "twelve or more months of a consecutive

twenty-two-month period" at the time the motion for permanent custody was initially filed. And, the child remained in temporary custody for the entire lengthy period thereafter; by the time of the second or replacement motion for permanent custody, the child had been in the agency's temporary custody for over two consecutive years.

{¶41} The existence of the 12 of 22 element in R.C. 2151.414(B)(1)(d) is not disputed. As the mother's brief recognizes, the question of whether the child could not be placed with either parent within a reasonable time or should not be so placed under R.C. 2151.414(B)(1)(a) is not dispositive to an appeal under the first step if the 12 of 22 provision is satisfied. R.C. 2151.414(B)(1) (requiring best interests and "any of the following" then listing (a)-(e) as options). "The Agency need only prove one of the grounds, not all of them. Accordingly, as the 12 of 22 ground had been met, the Agency next had to demonstrate by clear and convincing evidence that permanent custody was in the best interest of the children." *In the Matter of M.A.*, 7th Dist. No. 17 MO 0004, 2018-Ohio-209, ¶ 21. For all of the aforestated reasons, the father's initial argument is overruled.

REASONABLE EFFORTS

{¶42} The father's second assignment of error contends:

"The trial court erred in finding that Columbiana County Children Services used reasonable efforts to prevent the continued removal of the child from his father."

{¶43} In support of this argument, the father cites R.C. 2151.419(A)(1), which provides in part:

> 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.

R.C. 2151.419(A)(1). This division also places the burden on the agency to prove it made reasonable efforts while warning *the child's health and safety shall be paramount*. *Id.*

{¶44} Division (A)(2) provides the court shall make a determination that reasonable efforts are not required if certain facts exist, including where the parent abandoned the child or the parent had parental rights involuntarily terminated with respect to a sibling of the child. R.C. 2151.419(A)(2)(d)-(e). The father notes the evidence of prior involuntary termination of parental rights applies only to the mother.

{¶45} Initially, we must point out that R.C. 2151.419(A)(1) does not include in its list any mention of a hearing held pursuant to R.C. 2151.414 for a permanent custody motion filed under R.C. 2151.413. The citation in R.C. 2151.419(A)(1) to R.C. 2151.353 is not pertinent as the latter statute's reference to permanent custody involves only the initial disposition after the adjudication of abuse, neglect, or dependency. *See* R.C. 2151.353(A)(4). Here, the initial disposition after the dependency adjudication granted the agency temporary custody under R.C. 2151.353(A)(2)(a). Over a year later, the agency filed a motion for permanent custody under R.C. 2151.413.

{¶46} In analyzing the issue of reasonable efforts, the Ohio Supreme Court concluded the specific requirement set forth in the aforequoted R.C. 2151.419(A)(1) (for the agency to show it made reasonable efforts and the trial court to determine these efforts were made) does not apply in addressing a motion for permanent custody under R.C. 2151.413. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 4. A distinction was explained.

{¶47} The agency has an obligation to "make reasonable efforts to reunify the family before terminating parental rights" (except for some narrowly defined statutory exceptions discussed above). *Id.* at ¶ 4, 29, citing, *e.g.*, R.C. 2151.412 (the agency must prepare and maintain a case plan for children in temporary custody to eliminate the need for placement so the child can safely return home); R.C. 2151.413(D)(3)(b) (an agency may not *file* for permanent custody under the 12 of 22 rule if reasonable efforts to return the child to the child's home are required under R.C. 2151.419 and the agency has not provided the services required by the case plan).

{¶48} However, the court is not necessarily required to determine these efforts when ruling on a motion for permanent custody filed under R.C. 2151.413. *In re C.F.*, 113 Ohio St.3d 73 at ¶ 4, 42-43. It is only when the agency "has not already proven

reasonable efforts [that] the agency must do so at the permanent custody hearing." *Id.* at ¶ 4, 43. After so holding, the Court emphasized how the trial court made findings as to reasonable efforts all along in the case, for instance at removal, adjudication, temporary custody, and review hearings. *Id.* at ¶ 45.

{¶49} Here, the trial court found the agency made reasonable efforts to prevent removal from the child's home at the probable cause hearing and at the dependency adjudication (where the parents appeared and stipulated to dependency). The fact the parents did not have custody when the child was removed from the child's home (where the child lived with a court-ordered legal custodian) does not diminish the finding of reasonable efforts (to prevent the removal at issue before the court at that time). The court noted the agency would soon be determining the reasonable efforts required to safely return the child to the parents, pointing out the child had already been removed from the parents in the past by a different county and the facts surrounding that removal and the situation of the parents were as yet unknown.

{¶50} Subsequently, at the dispositional hearing on the adjudication, the court granted temporary custody to the agency. The parents did not appear for this hearing. The court found reasonable efforts were made by the agency and listed certain problems with returning the child to the parents (mental health or cognitive issues, custody of the subject child was recently taken from the parents by the juvenile court in Mahoning County, inability to care for the child, and the father rarely being present at the home). The court specified the reasonable efforts of the agency by the offer of parenting classes, psychological evaluations, visitation, home visits, monitoring services, and home studies of potential family placement resources. The case plan was adopted as an order of the court in the September 21, 2015 judgment entry, and had already been provided to the parents in July 2015.

{¶51} In continuing temporary custody after a March 2, 2016 review hearing, the court found "reasonable efforts have been made and continue to be made to prevent or eliminate the need for continued placement outside of the home" and cited to the issues with the legal custodian and with the parents. The court observed: "[The parents] have not worked their case plan and [the mother] is not attending any visitation with the minor child [A.L.F.] The Court specifically notes that today, [the father] exhibited erratic if not irrational behavior in the courtroom; at time rambling incoherently about things completely

unrelated to the case at hand." It was concluded the agency made reasonable efforts by providing information as to parenting classes and psychological evaluations as well as counseling, conducted home studies on family members, conducted face-to-face visits, facilitated visitation, monitored case plan compliance, and provided information on substance abuse.

{¶52} At the June 14, 2016 review hearing, the mother failed to appear. In discussing reasonable efforts, the court pointed out the parents had not completed their case plan, the mother only sporadically visited the child, and the father "continues to suffer from severe mental health issues." The court reiterated the description of the agency's reasonable efforts set forth above.

{¶53} At this point, the parents stopped visiting the child, and the child's temporary custody with the agency then reached the one-year mark. The agency filed a motion for permanent custody on September 20, 2016, which was continued for various reasons and thereafter refiled due to timing concerns.

{¶54} From the above recitation, it can be seen that the trial court made findings on reasonable efforts throughout the proceedings prior to the filing of the permanent custody motion. The filing of the motion is a dispositive point for reasonable efforts. *See* R.C. 2151.413(D)(3)(b) (agency cannot file motion if reasonable efforts are required but the agency has not provided the services required by the case plan); *In re C.F.*, 113 Ohio St.3d 73 at ¶ 4, 42-43 (if the agency already established its reasonable efforts, it need not re-establish the efforts at the permanent custody hearing).

{¶55} Furthermore, the evidence at the permanent custody hearing showed: the father declared, at the June 2016 hearing, that he was indefinitely suspending his visitation; the mother had already stopped visiting the child; and neither parent thereafter visited the child until October 2017 when the court reinstated visitation upon their August 2017 motions. These motions were not filed until the agency filed a second motion for permanent custody in July 2017, emphasizing how the parents had not visited the child since June 2016. The agency had performed its case planning obligations and could not monitor the scheduled weekly supervised visits if the parents were refusing to visit.

{¶56} The efforts required are those reasonable under the circumstances; the requirement is not extraordinary efforts or all available efforts. *See In re A.M.*, 3d Dist. No. 9-14-46, 2015-Ohio-2740, ¶ 25. Where referrals are made, visitation is provided, and

standards are set, the fact a parent resists or refuses does not require an agency to badger the parents, drag them to visits, or create a new case plan due to the parents decision, after the agency's permanent custody motion was filed, to resume visitation. Efforts that were previously considered reasonable do not become unreasonable due to a parent's acts or omissions.

{¶57} In addition to the original efforts, the agency discussed its continuing efforts at the permanent custody hearing and the parents' response to the contents of the case plan. A parenting class was required and offered but it was not until December 2017, more than two years after being provided with the case plan, the parents completed a parenting class. It was not the class recommended by the agency and did not result in an evaluation, but the agency spoke to the provider. The agency referred the parents for psychological evaluations in July 2015 (but the mother did not avail herself of this until November 17, 2017). The mother refused to release prior medical records until just before the hearing, and the records still had not been provided to the agency from the center where the mother received her medications. This refusal, prompted by the father, precluded consideration of the mother's psychological well-being and need for counseling throughout the years. The concerns over the parents' mental well-being and parenting skills would provide a rational reason to refrain from including the parents in the child's new therapy and treatment during the fall 2017 transition regarding his homes, medications, schools, therapists, and reinstated visitation. After weekly visits recommenced in October 2017, the parents missed all of the November visits where the agency would have monitored visitation. The agency conducted multiple home visits at the parents' new home. The agency also ensured the subject child received extensive services in an attempt to minimize his extreme behaviors.

{¶58} Finally, in granting permanent custody, the court's final judgment entry found the agency engaged in reasonable case planning and offered services to the parents to assist them in complying with the case plan and meeting the goal of reunification. The court mentioned the child's treatment and the parents' referrals for evaluations, treatment, and support services. The court pointed out the father was resistant to the parenting classes required by the case plan (until more than two years after it was formulated). The court discussed the reasonable efforts at locating alternative family resources. The court also addressed the allegation that the parents moved without

advising the agency and then provided a false address to the agency when asked. The court's conclusions on reasonable efforts were not unreasonable or contrary to the manifest weight of the evidence.

{¶59} Findings on the agency's reasonable efforts were made throughout the proceedings. Even assuming arguendo the agency had the burden to show reasonable efforts at the permanent custody hearing, this burden was met. For the various reasons discussed above, this assignment of error is without merit.

CHILD'S BEST INTEREST

{¶60} Within the father's first assignment of error on weight of the evidence, he challenges the decision on the child's best interests. On this topic, the mother presents the following assignment of error:

"Trial court's finding of best interests by clear and convincing evidence in a permanent custody case which terminated Appellant's parental rights was against the manifest weight of the evidence."

{¶61} In determining the best interest of a child, the court shall consider all relevant factors, including, but not limited to, the following: (a) the child's interaction and interrelationship with parents, siblings, relatives, foster caregivers, providers, and any person who may significantly affect the child; (b) the child's wishes expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child; (c) the custodial history of the child, including whether the child has been in the temporary custody of an agency for twelve or more months of a consecutive twenty-two-month period; (d) 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 (e) whether any of the factors in divisions (E)(7) to (11) apply in relation to the parents and child. R.C. 2151.414(D)(1). As to the last best interest factor, division (E)(10) involves a parent who has abandoned a child, and division (E)(11) involves a parent who has had parental rights involuntarily terminated with respect to the child's sibling and who failed to provide clear and convincing evidence the parent can provide a legally secure permanent placement and adequate care for the child's health, safety, and welfare.

{¶62} The court's judgment entry specified its obligation to find permanent custody was in the child's best interest by clear and convincing evidence, noting the best interest

test applied whether the court applied the "12 of 22" provision or the "cannot or should not" provision. The court cited R.C. 2151.414(B)(2) (where the best interest test is set forth) and (D)(1) (where the best interest factors are listed). The court then made various factual findings generally encompassing various best interest factors.

{¶63} The mother contests the court's finding that she "exhibited little effort or desire to meet" the case plan; she asserts she did finally comply years later. As to the trial court's statement, "there had been little or no maternal bond observed," the mother complains the court failed to consider that this was the result of not having custody of her child and the child's foster care issues. She states she was never given an opportunity to learn how to parent this child.

{¶64} The father states he demonstrated parenting skills and affection at visitation. He and the mother raise the child's younger sibling. He notes his home was adequate and stable. He has stable income which he supplements with odd jobs. He points to his attendance at parenting classes prior to this case and his completion of a parenting program in December 2017.

{¶65} We note the best interest factor citing (E)(11) is pertinent to the mother: she had her parental rights involuntarily terminated with respect to three other children and she did not meet a shifted burden of proving by clear and convincing evidence that she could provide adequate care for this particular child. *See* R.C. 2151.414(D)(1)(e). This does not apply to the father, but the court can consider any other relevant factor, and the parents live together. Although there was no mention of involuntary termination of parental rights with regards to the father, he often declared that he had other children removed and that he could not visit them. This can be considered as an additional factor in the non-exclusive list.

{¶66} Regarding the best interest factor in division (D)(1)(d), there is no dispute the child had an extreme need for a legally secure permanent placement. It was not unreasonable to conclude this type of placement could not be achieved without a grant of permanent custody to the agency. The parents' intentional and planned suspension of parental visitation with the child, which lasted over a year before they decided they wished to resume visitation, can reasonably be viewed as one predictive indicator of a lack of commitment to the child's welfare. The parents' respective issues raised additional concerns in the realm of permanency considerations. *See* R.C. 2151.414(D)(1)(d).

{¶67} As for the (D)(1)(c) factor, the custodial history of the child is also a weighty consideration in this case. Not only has the child been in the temporary custody of an agency for twelve or more months of a consecutive twenty-two-month period (at the time the motion was filed and for a lengthy period thereafter), the child was with a legal custodian from age two months until he was almost three years old. The parents essentially had no custodial history with this child who was nearly six years old. *See* R.C. 2151.414(D)(1)(c).

{¶68} Regarding the division (D)(1)(a) factor, there was evidence on the interaction and interrelationship of the child with his parents, siblings, foster caregivers, providers, and other significant persons. We discussed the younger sibling in the parents' home, whom the subject child treated in a physically aggressive manner during visitation. As for other siblings, the mother had five older children removed from her care; four were adopted, and she claims to see the ten-year-old once a month. The father is not in contact with the three children he fathered prior to the parties' marriage. The child is bonded to his foster mother, whose own mother is also involved in the child's care. The child experienced stress when he was left at the resumed visitations with his parents. *See* R.C. 2151.414(D)(1)(a). Although the child is immature for purposes of the division (D)(1)(b) best interest factor, it is noted that the CASA recommended permanent custody be granted to the agency.

{¶69} In conclusion, it was not contrary to the manifest weight of the evidence or unreasonable for the trial court to have developed "a firm belief or conviction" that permanent custody would be in the child's best interest upon weighing the factors. *See State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990), citing *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954) (defining clear and convincing evidence). The standard was not that of "beyond a reasonable doubt" as applicable to criminal cases. *Id*. Furthermore, the weight of the evidence "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, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We are guided by the presumption the trial court's findings are correct; the trial court judge occupied the best position from which to judge credibility and weigh the evidence. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d

1273 (1984). After a thorough review of the trial transcript and the rest of the record, this court cannot conclude the trial court's decision on the child's best interest is reversible.

{¶70} The parties' arguments are overruled, and the trial court's judgment is hereby affirmed

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Juvenile Division of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.