[Cite as *In re J.T.*, 2009-Ohio-6224.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93240 and 93241

IN RE: J.T., ET AL.

Minor Children

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD06901810 and AD06901811

BEFORE: Boyle, J., Kilbane, P.J., and Jones, J.

RELEASED: November 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} In this consolidated appeal, appellants, mother and father, appeal the trial court's grant of permanent custody of their two children, J.T. and N.T., to the Cuyahoga County Department of Children and Family Services ("CCDCFS" or "the agency"). Finding no merit to the appeal, we affirm.

{¶ 2} On December 16, 2006, J.T. (born May 8, 1997) and N.T. (born September 28, 1998) were removed from their mother's home and placed in foster care after the Newburgh Heights police discovered them alone with mother's boyfriend, an alleged inappropriate caregiver, and the mother's whereabouts were unknown. (Although father and mother are married, they were not living together at the time.) The police also found the house in total disarray and reported that the home lacked a safe walkway inside the home.

{¶ 3} Three days later, the agency sought temporary custody of the children and filed a complaint alleging that the children were neglected and dependent. The court appointed a guardian ad litem ("GAL") for the children and continued the matter for several pretrials until service was perfected on the parents.

{¶ 4} The mother and father first appeared in June 2007. The court assigned counsel, appointed a GAL for the father, who allegedly had serious health issues, and set the matter for trial in October 2007. At the adjudicatory hearing, mother and father, through their attorneys, admitted

inter alia to the following facts in the agency's amended complaint for temporary custody:

{¶ 5} "[1.] Mother has a history of leaving the children without making her whereabouts known in her absence.

{¶ 6} "[2.] Mother has a substance abuse problem, specifically cocaine, which prevents her from providing adequate care for the children. Mother tested positive for cocaine on October 25, 2006. Mother has failed to comply with the request of CCDCFS to participate in substance abuse assessment and treatment. Mother has since entered treatment on August 27, 2007.

{¶ 7} "[3.] Mother is in need of parent education in order to improve her parenting skills and care for her children.

{¶ 8} "[4.] Father [J.T.] suffers from a serious health condition and is physically unable to care for the children. Father's illness has required hospitalization and prevents him from providing a safe, stable environment for the children.

{¶ 9} "[5.] Mother and Father were convicted of domestic violence which has required police intervention and which places the children at risk of harm."

{¶ 10} Based on the parents' admissions and stipulation to a disposition of temporary custody, the trial court adjudicated the children dependent and granted temporary custody to the agency. The children were placed in foster

care, and the parents were each assigned a case plan in order to prepare them for reunification with the children. The mother's case plan focused on her receiving treatment for her substance abuse problem, obtaining employment and stable housing, providing for the children's basic needs, attending parenting classes, and participating in a program for domestic violence victims. The father's case plan focused on him receiving counseling for domestic violence, completing parenting and anger management classes, obtaining stable housing, and continuing with his mental health treatment.[1]

{¶ 11} In December 2007, the agency moved for its first extension of temporary custody, which the court granted. The court set the matter for review in May 2008.

{¶ 12} On May 21, 2008, the court held a status hearing. The agency indicated that there had been no compliance with the case plans and, consequently, it had moved to modify temporary custody to permanent custody. At the status hearing, the children's GAL, Jean Brandt, testified that the children are doing well in their foster home and that "temporary custody is in their best interest as the parents haven't resolved the matters that led to [the children's] removal."

[1]Father's requirement to attend parenting classes was later removed from his case plan.

{¶ 13} Shortly before the permanent custody hearing, the court removed the children's GAL, Jean Brandt, because it became apparent that the children's wishes conflicted with Brandt's. Consequently, the court appointed Brandt as the children's attorney and appointed a new GAL. On February 19, 2009, the court held a hearing on the agency's motion for permanent custody where the following evidence was presented.

{¶ 14} The agency presented three witnesses: Trikita Gardner, a social worker at CCDCFS; Marcus Gaither, a case manager at Murtis Taylor (a multi-service center where father was receiving mental health treatment); and Deborah Brown, supervisor of parenting education at Beechbrook.

{¶ 15} Gardner testified that the agency first became involved in December 2006 because there was a clear lack of supervision and a history of domestic violence. According to Gardner, both the mother and father had failed to meet the objectives of their case plan to allow for reunification with the children. Specifically, as to the mother's progress, Gardner testified that the mother repeatedly tested positive for cocaine and, despite being referred to treatment on four separate occasions with three different agencies, she failed to complete any of the programs. Her last time in treatment was at Recovery Resources, where she was referred on July 29, 2008, but she was later discharged "for testing positive for cocaine on numerous occasions." Since then, mother had not received any further treatment and failed to

follow through with necessary prerequisites to be admitted at Matt Talbot, a treatment center, where a referral was made in November 2008. Gardner further testified that the mother's drug history dated back to 1992 as evidenced by her first conviction for drug abuse.

{¶ 16} As to the father, Gardner testified that he failed to follow through with four separate referrals for anger management classes. The father did not attend the classes and expressed his belief that they were unnecessary despite being part of his case plan. She further testified that he was also referred to Beechbrook for domestic violence counseling, which he failed to attend.

{¶ 17} As for his mental health issues, Gardner testified that father was diagnosed with chronic schizophrenia, hallucinations, and delusions, with chronic risk of being violent. Because father was already receiving services at Murtis Taylor at the time that the agency became involved, no referral for mental health services was specifically made a part of his case plan. Instead, father signed a release so the agency could be in contact with Murtis Taylor. Gardner testified on cross-examination that Murtis Taylor had expressed concern to the agency that father was not taking his medication. She further testified that father told her that he was no longer going to Murtis Taylor because "he didn't need to go."

{¶ 18} Gardner further testified that the parents' visitation privileges had to be revised after the agency discovered that they were taking the children outside of the paternal grandmother's home, in contravention of the supervised-visitation arrangement. As a result, their visitation privileges became more restrictive.

{¶ 19} In observing the visits between the children and their parents, Gardner stated that the children interacted very well with their mother — "they love to see her" and that "[t]hey really do bond well with [her]." The children interacted differently with the father. According to Gardner, the father fell asleep during some of the visits and "[s]ometimes the kids just play with each other and don't really talk. * * * It's not the same every time when [the father] visits." Gardner further testified that father is more engaging and active during those visits when the mother is also there. Gardner conceded that both children did not want the agency to be awarded permanent custody and that there were no issues of abuse.

{¶ 20} Gardner stated that she believed the award of permanent custody was in the children's best interest because it would allow for their basic needs to be met, which the parents were not fit to provide based on their noncompliance with their case plan. Gardner further stated the children were doing well with their foster family who wanted to adopt them.

{¶ 21} The agency also introduced evidence that the father is allegedly the father of four other children — three who the agency obtained permanent custody over, and one child who was placed in a permanent planned living arrangement.

{¶ 22} Next, the agency called Gaither, a case worker at Murtis Taylor, who testified that father had been receiving services for his schizophrenia at Murtis Taylor over the past five years. He further testified that the father was not coming in for services as often as the agency wanted. According to Gaither, father was not compliant in taking his medication.

{¶ 23} Lastly, Brown testified that father failed to appear for anger management classes at Beechbrook and that he never registered for any session despite three separate referrals by the agency.

{¶ 24} The parents did not testify or call any witnesses on their behalf.

{¶ 25} Prior to trial, the children's newly appointed GAL, who replaced Brandt after her appointment as the children's attorney, filed a written report with the court, recommending that the agency be granted permanent custody. At trial, the GAL reiterated his same position.

{¶ 26} Counsel for the parents and children argued that permanent custody should not be granted based on the wishes of the children and their strong bond with their parents.

{¶ 27} The trial court ultimately awarded the agency permanent custody of the children and terminated the mother's and father's parental rights, which they both appeal.

{¶ 28} Father raises the following five assignments of error:

{¶ 29} "[I.] The court committed reversible error by allowing state witnesses to testify as to matters which they had no personal knowledge, in violation of Ohio Evid.R. 602 and appellant's right to fundamentally fair proceedings in accordance with the due process clause of the Fourteenth Amendment to the U.S. Constitution, and Section 16, Article 1, of the Ohio Constitution.

{¶ 30} "[II.] The trial court committed reversible error in allowing the prosecutor to elicit a multitude of inadmissible hearsay evidence as part of the state's case in chief.

{¶ 31} "[III.] The court committed reversible error by allowing state witnesses to testify and give opinion as to matters well outside the scope of the lay witnesses' expertise, in violation of Ohio Evidence Rule[s] 701 and 702.

{¶ 32} "[IV.] The trial court's grant of permanent custody to CCDCFS was against the manifest weight of the evidence.

{¶ 33} "[V.] Appellant [father] was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution."

{¶ 34} The mother has also appealed the grant of permanent custody, asserting a single assignment of error[2] but raising the following three distinct issues:

{¶ 35} "[I.] Whether the trial court violated [mother's] state and federal due process rights by terminating her parental rights when the trial court delayed timely adjudication of the complaint pursuant to Ohio statutory law.

{¶ 36} "[II.] Whether the trial court violated [mother's] state and federal due process rights by terminating her parental rights when the basis of the state's case was the testimony of a social worker who began working on the case three months after the permanent motion was filed.

{¶ 37} "[III.] Whether the trial court violated [mother's] state and federal due process rights by termination [sic] her parental rights to [the children] when the trial court failed to appoint a guardian ad litem for [mother] to insure [sic] that she understood the court process."

{¶ 38} Before addressing the merits of father's and mother's arguments, we initially recognize that "parents have a constitutionally protected

[2]Because mother assigns separate arguments for each of the three issues contained in her single assignment of error, we will address each one as if raised as separate assignments of error. See App.R. 12 and 16.

fundamental interest in the care, custody, and management of their children." *In re R.H.*, 10th Dist. No. 09AP-127, 370-372, 536, 2009-Ohio-5583, citing *Santosky v. Kramer* (1982), 455 U.S. 745; *Troxel v. Granville* (2000), 530 U.S. 57, 66. The Supreme Court of Ohio has long recognized the essential and basic rights of a parent to raise his or her child and that "parents who are suitable persons have a 'paramount' right to the custody of their minor children." *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105; ¶8, quoting *In re Murray* (1990), 52 Ohio St.3d 155, 157; see, also, *In re Perales* (1977), 52 Ohio St.2d 89, 97; *Clark v. Bayer* (1877), 32 Ohio St. 299, 310. Indeed, the termination of parental rights has been described as the "family law equivalent of the death penalty in a criminal case." *In re Hayes* (1997), 79 Ohio St.3d 46, 48. Therefore, parents "must be afforded every procedural and substantive protection the law allows." Id.

{¶ 39} But a parent's fundamental interest is not absolute — it is always subject to the ultimate welfare of the child. *In re D.A.*, 2007-Ohio-1105, at ¶11. "Once the case reaches the disposition phase, the best interest of the child controls. The termination of parental rights should be an alternative of 'last resort.'" Id. at ¶11.

I. Father's Appeal

{¶ 40} For the ease of discussion, we will address father's assignments of error out of order and together where appropriate.

Manifest Weight of the Evidence

{¶ 41} In his fourth assignment of error, father argues that the trial court's award of permanent custody to the agency is against the manifest weight of the evidence. He contends that the agency failed to demonstrate that the children cannot or should not be placed with him because the record reveals that he substantially complied with his case plan and that the risks of danger that precipitated the children's removal no longer exist. He further contends that the children's strong bond to him and the possibility of their placement with a relative required the trial court to find that their best interests are not served with the grant of permanent custody.

{¶ 42} A juvenile court's authority to award permanent custody of a child to the state arises under R.C. 2151.414. *In re M.H.*, 8th Dist. No. 80620, 2002-Ohio-2968, ¶22. Under the statute, the court is required to grant permanent custody of a child to the state if it determines, by clear and convincing evidence, that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors enumerated in R.C. 2151.414(D); and (2) the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, pursuant to at least one of the factors listed in R.C. 2151.414(E).

{¶ 43} Clear and convincing evidence is "that measure or degree of proof which is more than a mere 'preponderance of the evidence' but not to the

extent of such certainty required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In re Awkal* (1994), 95 Ohio App.3d 309, fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St.3d 176, 180-181.

{¶ 44} Where clear and convincing proof is required at trial, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the requisite degree of proof. *In re T.S.*, 8th Dist. No. 92816, 2009-Ohio-5496, ¶24, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. Id.

{¶ 45} Thus, we must look to the entire record to determine whether the trial court had sufficient evidence to clearly and convincingly find that it was in J.T. and N.T.'s best interest to place them in the permanent custody of CCDCFS and that they could not be placed with either parent in a reasonable period of time or should not have been placed with the parents. After a thorough review of the evidence, we conclude that it did.

Best Interest Determination

{¶ 46} In determining the best interest of the children, R.C. 2151.414(D) requires the trial court to consider all relevant factors, including, but not limited to, the following:

{¶ 47} "(1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 48} "(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard to the maturity of the child;

{¶ 49} "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public service agencies * * * for twelve or more months of a consecutive twenty-two month period * * *;

{¶ 50} "(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;

{¶ 51} "(5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents of the child."

{¶ 52} R.C. 2151.414(D) does not require the juvenile court to find that each best- interest factor applies, only that it consider each one. *In re Shaeffer Children* (1993), 85 Ohio App.3d 683. And one factor is not given greater weight than the others. *In re Schaefer*, 111 Ohio St.3d 498,

2006-Ohio-5513, ¶56. Further, this court has "consistently held that only one of the factors set forth in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to terminate parental rights." *In re Z.T.*, 8th Dist. No. 88009, 2007-Ohio-827, ¶56; see, also, *In re. P.C.*, 8th Dist. Nos. 90540 and 90541, 2008-Ohio-3458, ¶31, citing *In re C.H.*, 8th Dist. Nos. 82258 and 82852, 2003-Ohio-6854, ¶34.

{¶ 53} The record reveals that the trial court considered each of the factors, relying on the evidence in the entire record, including the GAL's report, and ultimately concluded that a grant of permanent custody is in the best interest of the children. We find clear and convincing evidence in the record to support this decision.

{¶ 54} Here, although the children desire to remain in their parents' custody, the remaining factors weigh heavily in awarding custody to the agency. The children had been in the custody of the agency for over twelve months in a consecutive twenty-two month period, residing with a foster family since their removal from their mother's home in December 2006. The record revealed that the foster mother wanted to adopt the children, that the children were doing well in the foster home, and that they were being properly cared for.

{¶ 55} Although the father now argues that he can and wants to care for the children, his failure to complete his case plan and his mental and physical

conditions belie his argument. Indeed, this court has consistently recognized that "[n]oncompliance with a parent's case plan is a ground for termination of parental rights." *In re M.H.*, 2002-Ohio-2968, ¶34; *In re D.J.*, 8th Dist. No. 88646, 2007-Ohio-1974, ¶61. Despite father's attempt to understate his case plan objectives, the record is clear that father failed to attend classes for anger management as well as complete counseling for domestic violence. Further, although father argues that the agency never set any specific requirements related to his mental health treatment, this is not entirely accurate. Father's health conditions were an issue from the inception of the case and his mental health treatment was always a part of his case plan. It is clear from father's case plan that he was required to continue and receive treatment related to his schizophrenia. Father's statement to Gardner that he no longer needed services from Murtis Taylor is obviously relevant to the trial court's determination of the children's best interest.

{¶ 56} Next, the agency presented evidence that the father had three other children who were placed in the permanent custody of the agency and where father's parental rights were involuntarily terminated. Such evidence is a relevant factor under R.C. 2151.414(E)(11) and places a burden on the parent to demonstrate that "the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child." Although father contends that he was only the alleged father and

that paternity was never established, we need not even address this argument because sufficient evidence exists apart from this showing that supports the trial court's best-interest determination.

{¶ 57} The record further reveals that the GAL recommended that permanent custody be granted to the agency. Although we acknowledge that the GAL who testified at the permanent custody hearing had only been appointed a month before the hearing, thereby severely undermining his credibility, we find it important to note that the former GAL, Brandt, who had been involved in the case since the award of temporary custody, had consistently recommended that custody be granted to the agency. Because of an apparent conflict between Brandt's wishes and the children, the court was required to appoint a new GAL prior to the permanent custody hearing. Thus, we find it significant that both GALs recommended that the agency be granted custody because of the father and mother's lack of compliance with their case plans.

{¶ 58} Finally, we find no merit to father's claim that the trial court should have considered granting custody of the children to his mother or another relative. Although father argues that the agency failed to properly pursue this option, the record reveals otherwise. Gardner testified that the agency specifically inquired as to the paternal grandmother's interest but that she never responded. Gardner further testified that mother told the

agency that her siblings were not interested in taking the children and the relatives never responded to the agency's letters. Moreover, the juvenile court is not required to consider placement with a relative prior to granting permanent custody. *In re Patterson* (1999), 134 Ohio App.3d 119, 130.

Placement with Either Parent

{¶ 59} The trial court's determination of whether the child cannot or should not be placed with either parent within a reasonable period of time is guided by R.C. 2151.414(E), which sets forth sixteen factors that the court may consider in its determination. It provides that if the trial court finds by clear and convincing evidence that any of the sixteen factors exists, the court must enter a finding that the child cannot or should not be placed with either parent within a reasonable period of time. *In re P.C.*, 2008-Ohio-3458, ¶19. Relevant to this case is R.C. 2151.414(E)(1), which states:

{¶ 60} "Following the placement of the child outside the child's home and notwithstanding 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, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental 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."

{¶ 61} The record supports the trial court's determination that the children cannot and should not be returned to either parent because both mother and father had failed continuously and repeatedly to substantially remedy the conditions that had caused the children to be placed outside the home.[3] As to father's argument that he remedied the conditions that caused the children's removal and that he successfully completed his case plan, the record demonstrates otherwise.

{¶ 62} While we acknowledge that father regularly visited the children, that he complied with an initial screening for drugs, which came back negative, and that he signed a release to allow the agency to communicate with Murtis Taylor, we fail to see any other compliance. Here, based on Gardner's testimony, Brown's testimony, and the CCDCFS's Semi-Annual Administrative Review ("SAR") of September 9, 2008, which was filed with the court, the record demonstrates that father had not completed his case plan. Father failed to complete his anger management and domestic violence counseling. Notably, the amended complaint for temporary custody,

[3]Mother does not raise any argument that the trial court erred in making this determination under R.C. 2151.414(E) and, therefore, our analysis focuses on the arguments raised by father.

which father stipulated to, specifically referenced that father had been convicted of domestic violence and that such domestic violence places the children in risk of harm. The father's failure to follow through with a specific case plan objective to alleviate this risk, namely, anger management classes and domestic violence counseling, reveals that he is not willing or able to properly care for the children. Indeed, father's case plan objectives were created for the specific purpose of allowing the children to be reunited and he nonetheless disregarded them.

{¶ 63} Moreover, we again note that the father's mental health treatment was part of his case plan. Indeed, the record demonstrates that father's mental and physical health were always a concern regarding his suitability to care for the children, as evidenced by father's own admission to the amended complaint for temporary custody. Therefore, father's acknowledgment that he no longer was receiving services related to his schizophrenia is relevant to whether he can provide a safe and stable environment for the children.

{¶ 64} In summary, we find that the record demonstrates that the agency made reasonable efforts to reunite father with his children, but he did not make similar efforts toward reunification as evidenced by his failure to complete his case plan.

{¶ 65} Father's fourth assignment of error is overruled.

Evid.R. 602 and Hearsay

{¶ 66} In father's first and second assignments of error, he argues that the trial court improperly allowed Gardner and Gaither (the agency's two main witnesses) to testify as to matters that they had no personal knowledge in violation of Evid.R. 602 and that their testimony primarily consisted of inadmissible hearsay.

{¶ 67} Initially, we note that a trial court has broad discretion in admitting or excluding evidence, and absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. Further, the failure to timely object to the admissibility of evidence results in the waiver of the issue for purposes of appeal, unless the plain error doctrine is applicable. *In re Z.T.*, 8th Dist. No. 88009, 2007-Ohio-827, ¶19; *In re J.J.*, 12th Dist. No. CA2005-12-525, 2006-Ohio-2999, ¶8. "Plain error does not exist unless, but for the error, the outcome at trial would have been different." *State v. Joseph* (1995), 73 Ohio St.3d 450, citing *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

Gardner's Testimony

{¶ 68} Father contends that the trial court should not have allowed Gardner to testify as to facts that occurred prior to her direct involvement in the case because she had no personal knowledge of the facts. To the extent

that Gardner relied on her case file to answer questions preceding her direct involvement, father argues that her testimony should have been excluded as impermissible hearsay. Although father failed to object to admission of the testimony, he contends that its admission amounted to plain error.[4] We disagree.

{¶ 69} Evid.R. 602 provides the following: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

{¶ 70} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is generally inadmissible. Evid.R. 802. "'[H]earsay is not admissible in adversarial juvenile court proceedings at which a parent, charged with neglecting his or her children, may lose the right to custody of his or her children. * * * [Because] the judge acts as the factfinder and is presumed to be able to disregard hearsay statements, the person against

[4]The record reveals that father's trial counsel elicited on cross-examination some of the testimony that father now complains about on appeal. Father's argument therefore also fails under the invited error doctrine. See *State v. Gumins*, 8th Dist. No. 90447, 2008-Ohio-4238, ¶18 (under the doctrine of invited error, a litigant may not take advantage of an error that he himself invited or induced).

whom the hearsay statements were admitted in such a case must show that the statements were prejudicial or were relied upon by the judge in making his decision.'" *In re Lucas* (1985), 29 Ohio App.3d 165, 172, quoting *In re Vickers Children* (1983), 14 Ohio App.3d 201, 206, and citing *In re Sims* (1983), 13 Ohio App.3d 37.

{¶ 71} Here, father specifically challenges Gardner's testimony related to the circumstances leading to the children's removal, his medical conditions, the alleged domestic violence in the home, and his progress on his case plan. But our review reveals that all of this evidence was already part of the record. First, the father stipulated to the allegations of the amended complaint for temporary custody that detailed the circumstances leading to the children's removal, including father's conviction for domestic violence. Second, the SAR report dated September 9, 2008 and the father's case plan, which were properly part of the record before the court, all documented father's medical condition as well as his lack of progress in his case plan.[5] Thus, we cannot say that father was prejudiced by Gardner's testimony when her testimony was duplicative to matters already established in the record. See *In re P.C.*,

[5]Indeed, Ohio appellate courts have repeatedly relied on SAR reports and case plans properly filed in the record when determining whether a trial court's determination in a permanent custody is supported by clear and convincing evidence. See, e.g., *In re D.J.*, 8th Dist. No. 88646, 2007-Ohio-1974; *In re Austin* (Dec. 19, 2001), 3d Dist. Nos. 1-01-79 and 1-01-80; *In re Garvin* (June 15, 2000), 8th Dist. Nos. 75329 and 75410.

2008-Ohio-3458, ¶40 (rejecting mother's argument that trial counsel should have objected to social worker's testimony that she had been diagnosed with schizophrenia because mother's mental status had already been documented in the record).

{¶ 72} Moreover, we further note that this court has previously held "that it is not error for a social worker to testify to reports that predated her assignment to a particular case." *In re Z.T.*, 2007-Ohio-827, ¶20, citing *In re Gilbert* (Mar. 23, 2000), 8th Dist. No. 75469. In reaching this holding, this court rejected appellant's claim that the social worker's testimony constituted inadmissible hearsay. Instead, we specifically recognized that a social worker could competently testify to the contents of the agency's case file pursuant to Evid.R. 803(6) (hearsay exception for records kept in the ordinary course of business) and Evid.R. 803(8)(hearsay exception for public records and reports that set forth the activities of an agency or office and contain matters observed which, pursuant to a duty of law, i.e., R.C. 5153.17, the agency has a duty to report). Id. at ¶21. Here, the record reveals that Gardner was the assigned social worker on the case, that she reviewed the case file, and specifically relied on its contents when answering questions related to the history of case. We find no merit to the father's contention that Gardner was not qualified to testify as to the contents of the agency's file.

Gaither's Testimony

{¶ 73} Next, father argues that the trial court erred in allowing Gaither to testify that father was not compliant with his medications because Gaither did not have personal knowledge, and he relied solely on the progress notes of the agency's nurse and doctor.

{¶ 74} The record reveals, however, that Gaither's duties as father's case manager included monitoring father's compliance with medications. Gaither's testimony further established that the progress notes were kept by Murtis Taylor in the regular course of business and that, as father's case manager, Gaither was required to review these records. Thus, we find that his testimony was admissible as an exception to hearsay under Evid.R. 803(6).

{¶ 75} But even assuming that the admission of this evidence was erroneous, we cannot say that father was prejudiced. Here, father's own admission to Gardner evidenced that he was no longer seeking services related to his schizophrenia. Because this evidence was properly admitted and duplicative of Gaither's testimony, we find no prejudice. See *In re S.W.E.*, 8th Dist. No. 91057, 2008-Ohio-4234 (recognizing that parent's own statement being offered against parent is not hearsay under Evid.R. 801(D)(2)(a)).

{¶ 76} Father's first and second assignments of error are overruled.

Inadmissible Expert Testimony

{¶ 77} In his third assignment of error, father argues that the trial court erred in allowing Gardner and Gaither to provide expert testimony as to his mental and physical health when they were not qualified to do so and that their testimony violated Evid.R. 701 and 702.

{¶ 78} Evid.R. 701 governs opinion testimony by lay witnesses and provides:

{¶ 79} "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶ 80} Evid.R. 702, on the other hand, sets forth the requirements for a witness to testify as an expert.

{¶ 81} We find no evidence in the record that Evid.R. 701 or 702 were violated based on Gardner's testimony. Here, the agency did not present Gardner as an expert and her testimony was limited to her perceptions. As for father's claim that Gardner impermissibly discussed his mental and physical conditions, these matters were already well documented and made part of the record. We find no support for father's broad assertion that the agency was required to bring in a medical doctor or submit medical records to

corroborate father's mental and physical conditions. Indeed, father acknowledged having schizophrenia and diabetes, which was documented in his case plan and the SARs filed with the court.

{¶ 82} Father again challenges Gaither's testimony regarding his noncompliance with his medications. Even if the trial court erred in admitting this evidence, father cannot demonstrate that it prejudiced him because other properly admitted evidence revealed that father was no longer seeking treatment. We likewise find that Gaither's testimony did not exceed his own experience and that it did not amount to impermissible expert opinion.

{¶ 83} Father's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 84} In his final assignment of error, father argues that he was denied effective assistance of counsel because his trial counsel (1) failed to object to the impermissible hearsay testimony of Gardner and Gaither, and (2) failed to present any evidence, including father's own testimony, supporting father's desire and ability to care for the children.

{¶ 85} To establish ineffective assistance of counsel, father must demonstrate that his lawyer's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, citing

Strickland v. Washington (1984), 466 U.S. 668, 687. He must show that, but for his lawyer's deficient performance, the outcome of the hearing would have been different. Id.

{¶ 86} An attorney properly licensed in Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. Here, father has the burden of proof and must overcome the strong presumption that his counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Indeed, as the reviewing court, "we will not second-guess strategic decisions of trial counsel, as least insofar as they are reasonable." *In re P.C.*, 2008-Ohio-3458, ¶39.

{¶ 87} Having already found that Gardner's testimony was admissible and that father was not prejudiced by its admission, we find no merit to father's claim that his counsel was ineffective for not objecting to its admission. As for father's claim that his counsel should have objected to Gaither's testimony, the record reflects that he did. Thus, father's claim that his counsel was deficient is without merit.

{¶ 88} We likewise find no merit to father's claim that his counsel was deficient for failing to present him as a witness — this was simply a tactical decision. It is generally presumed that the tactical decision of calling or refusing to call witnesses will not sustain a claim of ineffective assistance of counsel. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230; *State v. Williams*

(1991), 74 Ohio App.3d 686, 695. Here, father fails to demonstrate on appeal how his testimony would have assisted in his defense. Likewise, although he complains that his counsel should have presented additional evidence, he fails to identify what evidence. Because the record fails to demonstrate that trial counsel's tactical decision not to call father or any other witnesses was unreasonable, we refuse to second-guess it. See *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026 (defense counsel's failure to present alleged alibi witness was not ineffective assistance of counsel; defendant failed to overcome presumption that decision was merely a sound trial tactic).

{¶ 89} Father's fifth assignment of error is overruled.

II. Mother's Appeal

Untimeliness of Temporary Custody Proceedings

{¶ 90} In her first assignment of error, mother argues that her due process rights were violated by the trial court's failure to timely hold an adjudicatory and dispositional hearing on the agency's initial motion for temporary custody. She argues that the delay resulted in her not being able to start her case plan earlier, depriving her of a meaningful opportunity to complete the services offered. She also broadly argues that her strong bond with the children negates the trial court's finding that the children's best interest is served by granting the agency permanent custody. We find her arguments to lack merit.

{¶ 91} First, mother never appealed the children's dependency adjudication and the agency's award of temporary custody and is precluded from now raising arguments related to those proceedings, including the fact that the adjudication and dispositional hearings occurred beyond the statutory period. See *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810 (trial court's orders relating to the adjudicatory and dispositional temporary custody hearings are final orders and are not subject to later review if not timely appealed). Notably, even if mother had filed a timely appeal regarding these proceedings, her argument would still fail because she stipulated to the allegations of the agency's amended complaint for temporary custody and never raised any argument below regarding the untimeliness of the hearing.

{¶ 92} As for mother's claim that she was deprived a meaningful opportunity to complete her case plan, we find this argument disingenuous. Our review of the record indicates that one of the main priorities for mother to address was her substance abuse problem. The agency arranged on several occasions for mother to receive treatment from different treatment centers but mother never successfully completed treatment — she repeatedly tested positive for cocaine. The record further reveals that the mother has not been in treatment since July 2008 and that she failed to follow through with the necessary prerequisites for being admitted at another

treatment center where a placement was available. Thus, regardless of how much time that mother had, her refusal to receive treatment undermines her claim on appeal that she needs additional time to conquer her chronic substance abuse problem and accomplish her case plan.

{¶ 93} As for mother's broad claim that her bond with her children should have trumped all other factors in the court's consideration of the best interest of the children, the law provides otherwise. See *In re Shaefer*, 2006-Ohio-5513, at ¶56; *In re D.J.*, 8th Dist. No. 88646, 2007-Ohio-1974, ¶56 ("the statute does not require a court to weigh a mother's bond more heavily than the other best interest factors").

{¶ 94} Here, the record is abundantly clear that the children love their mother very much. And this case is especially difficult given the ages of the children and their stated desire to remain with their parents. But the trial court is charged with the grave responsibility of determining the children's best interest, and this is not solely limited to the children's stated wishes. *In re Shaefer*, supra. As the reviewing court, we must not disturb the trial court's decision if it is supported by competent, credible evidence.

{¶ 95} As discussed above, we find many of the best interest factors, as enumerated in R.C. 2151.414(D), weigh in favor of granting the agency permanent custody: (1) the children had been in the agency's custody for over twelve months in a consecutive twenty-two month period; (2) the children

were doing well in their foster home and their foster mother wanted to adopt them; (3) neither the father nor mother had completed their case plans; and (4) the parents failed to remedy the situation that led to their removal. Here, the record is abundantly clear that the mother suffers from a chronic drug problem, which she has failed to overcome. Despite the bond between the children and their mother, the mother's drug problem severely undermines her ability to care for her children. Indeed, in addition to failing to address her drug problem, mother never obtained employment or completed parenting classes as required under her case plan.

{¶ 96} Mother's first assignment of error is overruled.

Social Worker's Testimony

{¶ 97} In her second assignment of error, mother argues that her rights afforded under the Confrontation Clause and her due process rights were violated because she was not given the opportunity to cross-examine the social worker whose affidavit was attached to the agency's motion for permanent custody. In permanent custody proceedings, however, a parent is not constitutionally afforded a right to confront witnesses. See, e.g., *In re Hitchcock* (June 22, 2000), 8th Dist. No. 76432; *In re Burchfield* (1988), 51 Ohio App.3d 148, 154. As this court has repeatedly held, "the Confrontation Clause of the United States Constitution only applies in criminal cases and

not to cases involving requests for permanent custody." *In re M.W.*, 8th Dist. No. 83390, 2005-Ohio-1302, ¶3.

{¶ 98} Although mother implies that she was prejudiced by not being able to cross-examine the prior social worker who preceded Gardner on the case, the record reflects that mother never subpoenaed the social worker to testify at trial. Mother, therefore, cannot now complain on appeal to an issue that she could have easily remedied below.

{¶ 99} Mother also challenges the admissibility of Gardner's testimony as to the events predating Gardner's assignment for the same reasons raised by father, i.e., that Gardner lacked personal knowledge and her testimony amounted to hearsay. For the same reasons discussed in father's appeal, we find no merit to this argument.

{¶ 100} Mother's second assignment of error is overruled.

Appointment of GAL for Mother

{¶ 101} In the mother's final assignment of error, she argues that the trial court violated her due process rights because it should have appointed her a GAL to ensure that she understood the court proceedings and to assist her in defending her parental rights.

{¶ 102} R.C. 2151.281(C) governs the appointment of a GAL for a parent and provides:

{¶ 103} "In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child in which the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of that parent." See, also, Juv.R. 4(B) (imposing the same requirement).

{¶ 104} In this case, mother was appointed her own counsel who at no time during the proceedings suggested that mother needed a GAL. Notably, mother does not assign any error related to her trial counsel's representation during the proceedings. Although mother now argues that she needed assistance in understanding the proceedings and amounting a defense, it is presumed that her trial counsel provided such assistance. See *State v. Lott* (1990), 51 Ohio St.3d at 174 (licensed attorney is presumed to be competent).

{¶ 105} Further, we find no evidence in the record to suggest that mother appeared to be mentally incompetent; therefore, we cannot say that the trial court erred in failing to sua sponte appoint mother a GAL. See *In re K.P.*, 8th Dist. No. 82709, 2004-Ohio-1448, ¶24 ("Because appellant did not appear mentally incompetent at any stage of the proceedings and never requested a guardian ad litem appointment, the trial court did not err in failing to appoint a guardian ad litem on behalf of appellant").

{¶ 106} Mother's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR