[Cite as *In re A.P.*, 2023-Ohio-2463.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[In the matter of:	:	
		No. 22AP-570
A.P.,	:	(C.P.C. No. 18JU-9729)
F.S.G., Mother,	:	(REGULAR CALENDAR)
Appellant].	:	
[In the matter of:	:	
		No. 22AP-571
P.G.,	:	(C.P.C. No. 18JU-9727)
F.S.G., Mother,	:	(REGULAR CALENDAR)
Appellant].	:	

D E C I S I O N

Rendered on July 18, 2023

On brief: *Victoria E. Ullmann*, for appellant.

On brief: *Robert J. McClaren*, for appellee Franklin County Children Services.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations and Juvenile Branch

LUPER SCHUSTER, J.

{¶ 1} Appellant, F.S.G., mother of P.G. and A.P., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations and Juvenile Branch, placing P.G. and A.P. in the permanent custody of appellee, Franklin County Children Services ("FCCS"). For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} P.G. was born in January 2017, and A.P. was born in April 2018. On August 20, 2018, FCCS filed separate complaints alleging P.G. and A.P. were abused, neglected, and dependent children, and the children were placed in the emergency care of FCCS. The next day, temporary orders of custody were entered.

{¶ 3} In November 2018, P.G. and A.P. were adjudicated neglected and dependent, and the trial court granted FCCS temporary court custody of the children. In its decisions granting temporary court custody, the trial court found that reasonable efforts had been made to prevent or eliminate the need for removal of the children from their own home. The trial court also adopted a case plan that, among other things, required mother to participate in random drug screenings. In October 2019, the trial court extended temporary court custody and again found that reasonable efforts had been made to prevent or eliminate the need for removal of the children from their own home.

{¶ 4} In March 2020, the trial court terminated temporary court custody as to P.G., and she was returned to mother. As to A.P., the trial court extended temporary court custody for a second time, and it again found that reasonable efforts had been made to prevent or eliminate the need for removal of A.P. from the child's own home. Reunification of P.G. with mother was not successful, and in March 2021, FCCS was again awarded temporary custody of P.G.

{¶ 5} In June 2020, FCCS moved for permanent custody of A.P., and in April 2021, the agency moved for permanent custody of P.G. These motions came for trial in June 2022. Following trial on the motions, the trial court issued a written decision granting the motions and committing P.G. and A.P. to the permanent custody of FCCS for the purpose of adoption. This decision included findings that reasonable efforts had been made to prevent or eliminate the need for removal of the children from their own home, the children should not or cannot be placed with either parent in a reasonable time, the children had been in the temporary custody of FCCS for 12 or more months in a consecutive 22-month period, and the granting of permanent custody is in their best interest.

{¶ 6} Mother timely appeals.

II. Assignments of Error

{¶ 7} Mother presents the following eight assignments of error for our review:

> I. The trial court erred in failing to articulate or apply a definition of the term "reasonable efforts."
>
> II. The trial court erred in finding that the agency complied with reasonable efforts requirement.
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> III. The trial court erred in failing to articulate a definition of the term "diligent efforts."
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> IV. The trial court erred in finding that the caseplan was reasonable when it violated the 4th amendment.
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> V. The trial court erred in accepting the agency's actions are diligent efforts when there is no operational definition of the term.
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> VI. The trial court erred in finding that mother could be penalized for disputing agency actions against her family.
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> VII. If the agency and trial court have consistently violated the constitutional rights of parents for years with illegal drug testing, the court cannot grant permanent custody based upon [R.C.] 2151.414.
>
> VIII. The trial court erred in granting permanent custody to the agency.

III. Discussion

{¶ 8} Mother's eight assignments of error challenge that her case plan required drug testing and the trial court's reasonable and diligent efforts findings relating to FCCS's permanent custody motions. In assigning trial court error, mother generally alleges the trial court erred in granting FCCS's request for permanent custody of P.G. and A.P. Mother does not, however, separately argue her assignments of error in her appellate brief. Instead, she notes their connection to certain statements of issues, which she frames her arguments around. The failure to separately argue assignments of error in the body of an appellate brief violates App.R. 16(A)(7). And, pursuant to App.R. 12(A)(2), an appellate court "may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." Despite this non-compliance with the appellate rules, we address mother's assigned errors.

{¶ 9} "Parents have a constitutionally-protected fundamental interest in the care, custody, and management of their children." *In re H.D.*, 10th Dist. No. 13AP-707, 2014-Ohio-228, ¶ 10, citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Supreme Court of Ohio recognizes the essential and basic rights of a parent to raise his or her child. *In re Murray*, 52 Ohio St.3d 155, 157 (1990). However, these rights are not absolute, and a parent's natural rights are subject to the ultimate welfare of the child. *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979). In certain circumstances, therefore, the state may terminate the parental rights of natural parents when such termination is in the best interest of the child. *H.D.* at ¶ 10, citing *In re E.G.*, 10th Dist. No. 07AP-26, 2007-Ohio-3658, ¶ 8, citing *In re Harmon*, 4th Dist. No. 00 CA 2694, 2000 Ohio App. LEXIS 4550 (Sept. 25, 2000); *In re Wise*, 96 Ohio App.3d 619, 624 (9th Dist.1994).

{¶ 10} R.C. 2151.414(B) sets forth the circumstances under which a court may grant permanent custody of a child to a children services agency such as FCCS. In deciding to award permanent custody, the trial court must take a two-step approach. *In re K.L.*, 10th Dist. No. 13AP-218, 2013-Ohio-3499, ¶ 18. The court first must determine if any of the factors set forth in R.C. 2151.414(B)(1) apply. *Id.* As pertinent here, the first factor concerns whether the child cannot or should not be placed with either parent within a reasonable time. *See* R.C. 2151.414(B)(1)(a). When evaluating whether a child cannot or should not be placed with either parent within a reasonable time, the court must consider "all relevant evidence" and determine whether one or more of the factors listed under R.C. 2151.414(E)(1) through (16) exist. R.C. 2151.414(E). Of these factors, mother's challenge to the trial court's decision relates to R.C. 2151.414(E)(1), which states: "[N]otwithstanding reasonable case planning and diligent efforts by the agency to assist the parent 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."

{¶ 11} The fourth factor described in R.C. 2151.414(B)(1) is that "[t]he child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period." R.C. 2151.414(B)(1)(d). " 'When a child has been in the temporary custody of FCCS for 12 or more months in a consecutive 22-month period, the court need not find that the child

cannot or should not be placed with either parent within a reasonable time.' " *In re C.W.*, 10th Dist. No. 19AP-309, 2020-Ohio-1248, ¶ 56, quoting *In re D.G.*, 10th Dist. No. 09AP-1122, 2010-Ohio-2370, ¶ 11, citing *In re Williams*, 10th Dist. No. 02AP-924, 2002-Ohio-7205, ¶ 46. That is, " '[t]he question of whether the child cannot or should not be placed with either parent within a reasonable time under R.C. 2151.414(B)(1)(a) becomes relevant only where the child has not been in agency custody for the requisite time under subsection (d). Subsections (a) and (d) of R.C. 2151.414(B)(1) are, accordingly, mutually exclusive.' " *Id.*, quoting *D.G.* at ¶ 11.

{¶ 12} Once a trial court determines that one of the circumstances in R.C. 2151.414(B)(1) applies, it must then determine whether "clear and convincing" evidence demonstrates that a grant of permanent custody is in the child's best interest. *In re A.J.*, 10th Dist. No. 13AP-864, 2014-Ohio-2734, ¶ 16; R.C. 2151.414(B)(1). "Clear and convincing evidence is that degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the facts to be established." *K.L.* at ¶ 14. "It is more than a mere preponderance of the evidence but does not require proof beyond a reasonable doubt." *Id.* In determining whether granting permanent custody is in the child's best interest, the court must consider all relevant factors, including specific factors set forth in R.C. 2151.414(D)(1)(a) through (e). On appeal, we will not reverse a trial court's best interest finding in a permanent custody case unless it is against the manifest weight of the evidence. *In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622, ¶ 4, citing *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312, ¶ 28. Judgments in permanent custody proceedings are not against the manifest weight of the evidence "when all material elements are supported by competent, credible evidence." *In re J.T.*, 10th Dist. No. 11AP-1056, 2012-Ohio-2818, ¶ 8.

{¶ 13} Here, the trial court found that P.G. and A.P. were in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. Mother does not challenge this finding. Because the establishment of the time requirements under R.C. 2151.414(B)(1)(d) is not disputed, it is inconsequential whether the trial court properly also determined, pursuant to R.C. 2151.414(B)(1)(a) and (E), whether the children cannot or should not be placed with either parent within a reasonable time. *See C.W.* Thus, mother's argument based on R.C. 2151.414(E)(1)'s "diligent efforts" language is unavailing. Further,

the trial court, based on its review of all relevant factors, including the recommendations of the guardian ad litem and caseworker, found that granting FCCS's request for permanent custody of P.G. and A.P. was in each child's best interest. Mother does not allege this finding was against the manifest weight of the evidence. Instead, she alleges that the random drug testing requirements of the case plan violated her rights, and that the trial court's findings that FCCS made reasonable efforts toward reunification were not supported by the evidence. These arguments are unpersuasive.

{¶ 14} Mother forfeited her challenge to the trial court's approval and adoption of the case plan's random drug testing requirements. Case plans " 'are the tool that child protective service agencies use to facilitate the reunification of families who * * * have been temporarily separated.' " *In re K.M.*, 10th Dist. No. 15AP-64, 2015-Ohio-4682, ¶ 48, quoting *In re Evans*, 3d Dist. No. 1-01-75 (Oct. 30, 2001). On November 14, 2018, a trial court magistrate recommended the approval and adoption of the submitted case plan that required, among other things, mother participate in random drug screenings. The case plan indicates that it was reported to the agency that mother uses illegal substances, and that she tested positive for illegal substances at the January 2017 birth of P.G. and A.P.'s older sibling, E.M., whose custody is not at issue in this appeal.[1] On November 27, 2018, the trial court approved and adopted the case plan, adjudicated P.G. and A.P. dependent and neglected, and awarded FCCS temporary custody. On January 10, 2019, an amended case plan was filed due to a change in the placement of the children, but the drug screening requirements remained in effect.

{¶ 15} In February 2021, in the case involving P.G., mother moved to terminate the drug testing requirements.[2] She argued that "[t]here has never been reasonable suspicion of drug or alcohol use in this case that would affect parenting," and that the testing was "not justifiable or authorized by statute." (Feb. 23, 2021 Mot. at 1.) The magistrate denied

[1] Later at trial on FCCS's permanent custody motions, the caseworker assigned to the family, Sierra Ellis, testified that E.M. tested positive for marijuana at his birth, causing the agency to require mother's drug testing. She also testified that mother's drug usage remained a concern throughout FCCS's involvement because she "continuously has positive drug screens." (June 7, 2022 Tr. at 79.) We further note that, in *In re A.P.*, 10th Dist. No. 22AP-62, 2022-Ohio-4295, this court rejected, on both procedural and substantive grounds, mother's challenge to the drug testing requirements of a case plan concerning another child of hers, Au.P.

[2] Mother did not file the same or a similar motion in the case involving A.P.

mother's motion to terminate the drug testing requirements, and mother objected to the magistrate's decision. In October 2021, the trial court overruled mother's objections to the magistrate's decision, noting in part that mother did not object or otherwise timely challenge the imposed drug testing requirements. We agree. Because mother neither objected to, nor otherwise timely challenged the imposed drug testing requirements, she was precluded from subsequently challenging those requirements, including in this appeal. *See A.P.* at ¶ 30 ("A parent that fails to object to case plan objectives or requirements during its formation and implementation forfeits the issue for purposes of appeal."). On this basis, mother's drug testing argument lacks merit, and it is therefore unnecessary in this appeal to further analyze the drug testing issue.

{¶ 16} We next address mother's challenge to the trial court's finding that reasonable efforts had been made to prevent or eliminate the need for removal of the children from their own home. R.C. 2151.419(A)(1) provides that, at specified hearings, the juvenile court must determine whether a public children services agency "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." This statute applies to "adjudicatory, emergency, detention, and temporary-disposition hearings, and dispositional hearings for abused, neglected, or dependent children, all of which occur prior to a decision transferring permanent custody to the state." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 41. Because this statute makes no reference to a hearing on a permanent custody motion, it does not apply to motions for permanent custody brought pursuant to R.C. 2151.413, or to hearings held on such motions pursuant to R.C. 2151.414. *Id.*

{¶ 17} However, an agency may not file a motion for permanent custody "[i]f 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 to the parents of the child or the child to ensure the safe return of the child to the child's home." R.C. 2151.413(D)(3)(b). Consequently, "[i]f the agency has not established that reasonable efforts have been made prior to the hearing on a motion for permanent custody, then it must demonstrate such efforts at that time." *C.F.* at ¶ 43. *See In re N.M.*, 10th Dist. No. 20AP-158, 2021-Ohio-2080, ¶ 58 ("[T]he issue of whether the agency made reasonable

efforts at reunification only arises at the hearing on a motion for permanent custody if the agency has not established that reasonable efforts were made prior to the hearing."). Conversely, if the trial court finds, prior to a permanent custody hearing, that the agency had made reasonable efforts to reunify the family during the child custody proceedings, it is unnecessary for the trial court to make a reasonable efforts finding in its permanent custody decision. *In re J.H.*, 10th Dist. No. 19AP-517, 2021-Ohio-807, ¶ 65.

{¶ 18} Here, prior to the permanent custody hearing, the trial court found FCCS had made the required reasonable efforts. In November 2018, the trial court placed P.G. and A.P. in FCCS's temporary custody upon finding, among other things, that the children were neglected and dependent minors and that reasonable efforts had been made to prevent or eliminate the need for removal of the children from their own home. The trial court again made this finding in decisions extending temporary custody to FCCS. Because the trial court's November 2018 judgments, and subsequent decisions extending temporary custody, satisfied R.C. 2151.419(A)(1)'s reasonable efforts finding requirement, it was unnecessary for the trial court to make a reasonable efforts finding in the permanent custody decision.

{¶ 19} Although unnecessary for the purpose of granting permanent custody, the trial court made another reasonable efforts finding in its permanent custody decision. Mother's challenge to this finding in this appeal has no merit because " '[w]e cannot reverse a judgment based on an alleged error in a finding that the trial court never had to make in the first place.' " *In re Bil.I.*, 10th Dist. No. 22AP-127, 2023-Ohio-434, ¶ 30, quoting *J.H.* at ¶ 66. Because the trial court did not need to make a reasonable efforts finding in its permanent custody decision, that finding had no effect on the final judgment. Further, even though mother could have challenged earlier reasonable efforts findings by timely objection or appeal, she did not. On this additional basis, mother's reasonable efforts finding argument fails. *See id.* ("Because appellants failed to object to or appeal the earlier reasonable efforts findings at the time they were made, they cannot challenge those findings now [on appeal].").

{¶ 20} For these reasons, we overrule all eight of mother's assignments of error.

IV. Disposition

{¶ 21} Having overruled all eight of mother's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations and Juvenile Branch.

Judgment affirmed.

MENTEL and EDELSTEIN, JJ., concur.