[Cite as *In re K.*, 2004-Ohio-4629.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83410

IN RE: K. & K.H.	:	
	:	
	:	JOURNAL ENTRY
	:	
	:	AND
	:	
	:	OPINION
	:	

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 2, 2004
CHARACTER OF PROCEEDING:	Appeal from Common Pleas Court, Juvenile Division, Case Nos. 01900514 & 01900515.
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For Appellant-Mother:	Joanne Canitia Brady 12665 Gwendolyn Farms Road Chardon, OH 44024 David B. Leitch 25000 Country Club Blvd., Suite 300 North Olmsted, OH 44070
For Appellee: [Cuyahoga County Department of Children and Family Services]	William D. Mason Cuyahoga County Prosecutor Amy L. Carson, Assistant 3955 Euclid Avenue Cleveland, OH 44115
Guardian Ad Litem:	Daniel Wolf 5227 Dogwood Trail

Lyndhurst, OH 44124

TIMOTHY E. McMONAGLE, J.:

{¶1} Appellant-mother appeals the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, awarding permanent custody of her children, K. & K.H., to the Cuyahoga County Department of Children and Family Services. For the reasons that follow, we affirm.

{¶2} Appellant is the mother of twins, K. & K.H., whose date of birth is February 26, 1999.[1] In February 2001, the Cuyahoga County Department of Children and Family Services ("CCDCFS") removed the twins from the home in which appellant was living because of "deplorable living conditions," which included no heat or running water. The trial court appointed Daniel Wolf as guardian ad litem for the twins, who were found to have scabies and developmental delay. In May 2001, appellant admitted to an amended complaint for neglect. The trial court thereafter awarded temporary custody to CCDCFS and the twins were eventually placed in a therapeutic foster home in the Toledo area.

{¶3} CCDCFS established a case plan for appellant, which included completing parenting classes, securing stable housing and obtaining a drug and alcohol assessment with random urine screens. The case was set for review in January 2002. At that time,

[1]The twins' father, although duly notified, failed to appear in person or through counsel at any proceedings in the trial court nor is he a party to this appeal.

however, CCDCFS moved for permanent custody of the twins and the case was set for hearing.

{¶4} At a hearing held in June 2002, CCDCFS withdrew its motion for permanent custody because it determined that appellant had substantially complied with her case plan. Apparently, appellant completed the parenting classes upon CCDCFS's second referral and eventually completed the drug assessment. CCDCFS made the decision to withdraw its motion despite appellant's minimal compliance with the random urine screens. Nonetheless, CCDCFS continued to find that appellant lacked stable housing. Consequently, the trial court extended the order for temporary custody upon CCDCFS's motion and set the matter for review in January 2003. As before, CCDCFS moved for permanent custody shortly before the review date.

{¶5} The matter eventually proceeded to an evidentiary hearing in June 2004. After hearing testimony from several social workers affiliated with CCDCFS as well as appellant, the trial court found it in the twins' best interests for CCDCFS to be awarded permanent custody.

{¶6} Appellant is now before this court and assigns four errors for our review.

I.

{¶7} In her first assignment of error, appellant contends that the trial court erred in failing to appoint counsel for the twins.

{¶8} A juvenile has a right to counsel in a proceeding to terminate parental rights, based on the juvenile's status as a party to the proceeding. See *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, at ¶17, citing *In re Janie M.* (1999), 131 Ohio App.3d 637, 639. This is so because "a child who is the subject of a juvenile court proceeding" is a "party" to that proceeding according to Juv.R. 2(Y). Id.; see, also, R.C. 2151.352; Juv.R. 4(A). Courts must determine, however, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child. Although a guardian ad litem can serve in the dual roles of advocate and guardian, the *Williams* court acknowledged the possibility of a "fundamental conflict in a dual-representation situation," noting that the duty of a guardian ad litem is to "recommend to the court what the guardian feels is in the best interest" of the child, while the duty of a lawyer to a child client is "to provide zealous representation" for the child's position. Id. at ¶18.

{¶9} We see no need for independent counsel in this case. The twins were two years old at the time of removal and four years old at the time of the permanent custody hearing. There was testimony that both children exhibited developmental delays, including delays in speech and language development. Indeed, a social worker testified that the few words spoken by the twins were often obscenities and that they began only recently speaking in short

sentences. Even in the absence of delayed speech and language development, however, the level of cognitive maturity exhibited by a four-year-old non-developmentally delayed child is not that which would indicate the need for independent legal counsel.

{¶10} At oral argument, counsel for the mother argued that a separately assigned attorney would have advocated for housing for the children, a right seemingly of constitutional importance that the guardian ad litem failed to protect. Counsel is presuming that the children not only possessed this desire but could have expressed it to separately assigned counsel. We doubt that a four-year-old child possesses the cognitive ability to not only express his or her wishes in this area but to formulate them in a manner that could be understood through the efforts of independent counsel. Although a child of this tender age seeks to have his or her basic needs satisfied, of which adequate shelter is one such need, it is the responsibility of the adult caregiver in the child's life to satisfy those needs. When that caregiver is unwilling or unable to satisfy those needs and an agency such as CCDCFS becomes involved, any perceived dereliction of duty on the part of the agency should be addressed by the caregiver's counsel, whose duty it is to advocate for the caregiver.

{¶11} Appellant's first assignment of error is not well taken and is overruled.

II.

{¶12} In her second assignment of error, appellant challenges the constitutionality of R.C. 2151.414(B)(1)(d). Specifically, she argues that this statutory provision violates her right to due process because it creates an irrebuttable presumption of parental unfitness.

{¶13} We note preliminarily that when a constitutional challenge is not raised before the trial court, it ordinarily will not be addressed for the first time on appeal. *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. The "failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Because appellant did not raise this constitutional challenge below, we need not consider it now.

{¶14} Discussed under this assignment of error but not raised independently, appellant alternatively contends that her trial counsel's failure to challenge the constitutionality of R.C. 2151.414(B)(1)(d) is equivalent to ineffective assistance of counsel. We disagree.

{¶15} The right to counsel, guaranteed in juvenile proceedings by R.C. 2151.352 and by Juv.R. 4, includes the right to

the effective assistance of counsel. *In re Heston* (1998), 129 Ohio App.3d 825, 827.

{¶16} "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, *** the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." Id.

{¶17} In order to establish a claim of ineffective assistance of counsel, appellant must demonstrate that her trial counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136, certiorari denied (1990), 497 U.S. 1011. Prejudice is demonstrated when appellant proves that, but for counsel's actions, there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. at 694. A strong presumption exists, however, that a licensed attorney is competent and that the challenged action reflects sound trial strategy within the range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d at 142. Although we declined to address the constitutionality of R.C. 2151.414(B)(1)(d) because it was not raised in the trial court, it is unlikely that the result of the proceeding would have been different had counsel raised the issue in that court. Other courts have previously addressed this issue and have rejected the arguments asserted by

appellant. See *In re Gomer*, 3rd Dist. No. 16-03-19, 2004-Ohio-1723, at ¶31; *In re Workman*, 4th Dist. No. 02CA574, 2003-Ohio-2220, at ¶40; *In re Thompson*, 10th Dist. No. 02AP-557, 2003-Ohio-580, ¶¶22-24. Because it appears unlikely that the result of the proceeding would have been different even if appellant's trial counsel had challenged the constitutionality of the permanent custody statute, trial counsel cannot be said to have been ineffective for his failure to raise this issue. See *In re Brooks*, 10th Dist. Nos. 04AP-164, 04AP-165, 04AP-201 & 04AP-202, 2004-Ohio-3887, at ¶32 (failure to challenge constitutionality of permanent custody statute did not constitute ineffective assistance of counsel).

{¶18} Appellant's second assignment of error is not well taken and is overruled.

III.

{¶19} In her third assignment of error, appellant contends that the trial court erred in finding that reasonable efforts were made to return the children to appellant's custody "when the record reveals unreasonable case planning and case management." We note initially that appellant did not raise this issue in the trial court and, as such, has effectively waived this issue from review by this court on appeal.

{¶20} Even if appellant had raised this issue in the court below, however, we are not persuaded by her argument. Appellant relies on R.C. 2151.419, which requires a court that removes, or continues the removal, a child from his or her home to make a

determination that "reasonable efforts to prevent the removal" have been made. This court has previously held that R.C. 2151.419 is inapplicable to permanent custody hearings brought under R.C. 2151.413.

{¶21} "R.C. 2151.419 requires the court to determine whether the public children services agency that filed the complaint in the case has made reasonable efforts to make it possible for the child to return safely home. However, that statute applies only to hearings held pursuant R.C. 2151.28, division (E) of R.C. 2151.31, R.C. 2151.314, R.C. 2151.33 or R.C. 2151.353. The motion for permanent custody in this case was filed pursuant to R.C. 2151.413. Therefore, the reasonable efforts demonstration is not required in the instant permanent custody analysis." *In re C.N.*, Cuyahoga App. No. 81813, 2003-Ohio-2048, at ¶37; see, also, *In re La.B.*, Cuyahoga App. No. 81981, 2003-Ohio-6852, at ¶16; but, see, *In re Leitwein*, 4th Dist. No. 03CA18, 2004-Ohio-1296, at ¶29 (acknowledging a conflict exists among appellate districts but holding that a "reasonable efforts determination" is required in motions for permanent custody brought under R.C. 2151.413).

{¶22} Notwithstanding the aforementioned conflict in the caselaw, the trial court, nonetheless, made a "reasonable efforts determination" when it found that CCDCFS "made reasonable efforts to prevent removal of the children, to eliminate the continued removal of the children from [t]heir home, or to make it possible

for the children to return home." Although appellant cloaks this assignment of error as one stemming from this determination, a determination she concedes may not be applicable under the facts of this case, the essence of her argument is that CCDCFS failed to assist her in obtaining housing. Appellant argues that CCDCFS had an "affirmative duty to apply [for public housing] and reunify her family." Yet, she directs us to no statute that imposes such a duty and we can discern none. To be sure, R.C. 2151.412 requires CCDCFS to "prepare and maintain a case plan" for appellant. See R.C. 2151.412. As part of this case plan, CCDCFS made several referrals for appellant, including one for public housing.[2] By appellant's own admission to marijuana use, however, she was ineligible for public housing.

{¶23} Appellant argues that, according to CCDCFS's own criteria, her drug use did not rise to the level requiring treatment and, therefore, it was wrong to exclude her from public housing. Although she blames CCDCFS for her exclusion, the record does not indicate that CCDCFS is the entity responsible for determining participation in public housing. Although CCDCFS made referrals to and recommendations for participation in certain public housing programs, it is appellant who bears the ultimate responsibility for insuring that she satisfies the requirements for eligibility.

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[2]CCDCFS also referred appellant for parenting classes and random urine screens.

{¶24} Appellant's third assignment of error is not well taken and is overruled.

IV.

{¶25} In her fourth assignment of error, appellant contends that the trial court erred in determining that there was clear and convincing evidence supporting its decision to award permanent custody to CCDCFS.

{¶26} A trial court's decision to award permanent custody will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Adoption of Lay* (1986), 25 Ohio St.3d 41, 42. 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. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶27} As pertains to this case, if a child is adjudicated as an abused, neglected or dependent child, a trial court may commit that child to the temporary custody of a public children services agency. See R.C. 2151.353(A)(2). Thereafter, R.C. 2151.413(A) authorizes the agency to move for permanent custody when that child is neither abandoned or orphaned. R.C. 2151.414(B)(1) governs procedures upon such a motion and provides:

{¶28} " *** [T]he court may grant permanent custody of a child to a movant if the court determines *** by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and *** [t]he child has been in the temporary custody of one or more public children services agencies *** for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999."

{¶29} Written in the conjunctive, an award of permanent custody is only warranted when, by clear and convincing evidence, the time requirements for temporary custody have been met *and* permanent custody is in the child's best interest. In determining the best interest of the child, R.C. 2151.414(D) provides a non-exhaustive list of factors that the court must consider. These include (1) the child's interaction and interrelationship with, inter alia, the child's parents, siblings, relatives and foster caregivers; (2) the child's wishes expressed directly or through a guardian ad litem; (3) the child's custodial history; (4) the child's need for legally secure permanent placement and if that type of placement can be obtained without granting permanent custody to CCDCFS; and (5) whether any factors listed in R.C. 2151.414(E)(7) to (11) apply. See R.C. 2151.414(D)(1) through (5).

{¶30} It is undisputed in this case that the twins had been in the temporary custody of CCDCFS for over twelve months of a consecutive twenty-two month period ending after March 18, 1999.

Indeed, they had been in CCDCFS custody for over two years at the time of trial. Appellant argues, however, that the trial court failed to "find one of the twelve statutorily predicate factors necessary to conclude that these children cannot or should not be placed with either parent."

{¶31} Although appellant references no particular statute under this assignment of error, it appears that she is referring to R.C. 2151.414(E), which sets forth several factors for the court to consider when determining whether a child cannot or should not be placed with either parent within a reasonable time. Application of this statute is unnecessary, however, because an award of permanent custody under R.C. 2151.414(B)(1)(d) requires no such determination.[3] See *In re C.N.*, 2003-Ohio-2048, at ¶22; see, also, *In re Brown*, 10th Dist. Nos. 04AP-169, 04AP-170, 04AP-180 & 04AP-181, 2004-Ohio-4044, at ¶9. Because it was not necessary for the trial court to engage in the analysis set forth in R.C. 2151.414(E), it cannot be error for the trial court to have failed to find one of those factors applicable from which to base an award of permanent custody.

{¶32} It is true that the best interest analysis set forth in subsection (D) includes determining whether *some* of the factors set forth in subsection (E) apply; namely, those set forth in

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[3]R.C. 2151.414(B)(1)(a), by contrast, requires such a finding when an award of permanent custody is made for a child who has been in the temporary custody of the agency for less than the time limitations set forth in subsection (B)(1)(d).

subsections (E)(7) through (E)(11). See R.C. 2151.414(D)(5). In that regard, we note that the trial court found subsection (E)(9) applicable. This subsection addresses issues related to a parent's abuse of substances and provides, in relevant part:

{¶33} "The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent."

{¶34} Appellant contends that this subsection is inapplicable and it was error for the court to make this finding because there was no order for treatment. We agree.

{¶35} It is true that appellant's case plan required her to be assessed for drug use, which she ultimately underwent, but there was no recommendation for treatment. Nor was there any dispositional order requiring treatment. It is true that two different social workers affiliated with her case referred appellant for a total of 15 urine screens, of which she only completed two. Despite one positive result for marijuana use, there was no recommendation for treatment, however. Consequently, the trial court's reliance on subsection (D)(9) as a basis for its decision is not supported by the record in this case.

{¶36} We note that the trial court also found R.C. 2151.414(E)(2) and (4) applicable. As stated previously, a court need not engage in a parental suitability determination as set forth in R.C. 2151.414(E) when the award of permanent custody is based on R.C. 2151.414(B)(1)(d), except as required by R.C. 2151.414(D)(5). The court's reliance on these factors, therefore, is misplaced.

{¶37} Notwithstanding the trial court's reliance on factors it did not need to consider and its finding that an inapplicable factor was applicable, we, nonetheless, hold that the court had before it competent credible evidence from which to award permanent custody to CCDCFS. At the time of trial, the children had been living with their foster mother for more than two years. According to the foster care social worker, the children's significant developmental delay is being addressed through their participation in early intervention programs and that, as such, the children have demonstrated "tremendous progress." Moreover, the guardian ad litem recommended that the children remain with the foster mother, who has expressed an interest in adopting the children. The children's need for permanency, combined with appellant's inability to provide housing for them, militates in favor of an award of permanent custody.

{¶38} Appellant argues that her inability to maintain suitable housing because of her lack of financial resources should not be the basis removing her children permanently from her care.

It is appellant's own actions, however, that serve as the basis for the children's removal. Her admitted use of marijuana and refusal to submit to random urine screens, except when she chose to, indicate an unwillingness to document improvement in this area and contributed to her ineligibility for pubic housing.

{¶39} It is true that the first motion for permanent custody was withdrawn when it appeared that appellant had made substantial progress in her case plan, with the exception of housing. But this occurred in June 2002, after the children had already been in temporary custody for more than one year. From June 2002 until January 2003, when CCDCFS filed its second motion for permanent custody, appellant did little to remedy her situation. Since the inception of this case, appellant gave CCDCFS seven different addresses. Indeed, she returned to her mother's home at one point after the children had been removed from that home originally. She failed to keep appointments with social workers for home visits and could not provide verification that the home the social workers ultimately did visit was her home. Indeed, appellant testified that CCDCFS social workers "don't need to know everything" when questioned about inconsistencies regarding her most recent housing situation.

{¶40} Poverty in and of itself is not a crime. Nor is it a basis for permanently removing children from their parents. When an impoverished parent's actions, however, result in parental neglect, our society would be remiss if it did not intervene for

the sake of the child's welfare. Appellant had more than two years to remedy the situation in which she found herself. Her children should not be penalized because she did not do so.

{¶41} Appellant's fourth assignment of error is not well taken and is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

TIMOTHY E. McMONAGLE
JUDGE

FRANK D. CELEBREZZE, JR., P.J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).