[Cite as *In re K.C.*, 2023-Ohio-4118.]

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

In the Matter of K.C., S.C., and H.C.,	:	Case No. 23CA10
	:	23CA11
Adjudged Abused, Neglected, or Dependent Children.	:	23CA12
	:	DECISION AND JUDGMENT ENTRY
	:	**RELEASED: 10/16/2023**

APPEARANCES:

Richard D. Hixson, Zanesville, Ohio, for appellant.

Ryan R. Black, Hocking County Prosecuting Attorney, and Alisa Turner, Assistant Hocking County Prosecutor, Logan, Ohio, for appellee.

Wilkin, J.

{¶1} Appellant, Amy Stover, appeals a decision of the Hocking County Court of Common Pleas, Juvenile Division, that granted South Central Ohio Jobs and Family Services ("the agency") permanent custody of her three children: two-year-old H.C.; four-year-old S.C.; and seven-year-old K.C. Appellant raises three assignments of error that assert (1) the trial court erred by considering a psychological evaluation that was not admitted into evidence and by admitting hearsay testimony derived from the psychological evaluation, (2) trial counsel provided ineffective assistance of counsel by failing to object to the alleged hearsay testimony, and (3) the trial court's finding that the children cannot be placed with her or should not be placed with her is against the manifest weight of the evidence. After our review of the record and the applicable law,

we do not find any merit to appellant's assignments of error. Therefore, we affirm the trial court's judgment.

FACTS AND PROCEDURAL BACKGROUND

{¶2} On September 19, 2022, the agency filed separate complaints that alleged the three children are dependent and neglected. The complaints alleged that the children arrive at "school with alive and dead bed bugs on their person daily" and that the parents have not followed through "with any fumigation or treatment (paid for by community resources)." The complaints further averred that S.C. and K.C. (who, at the time, were nearly four and six years old, respectively) are not potty trained. The complaints claimed that all three children sleep in cribs and that the agency has concerns that the youngest child, H.C., is "primarily being kept in a crib most of the day." The agency requested a protective-supervision order and any other orders deemed appropriate.

{¶3} On September 22, 2022, the agency filed an amended complaint that requested temporary custody of the children and any other orders deemed appropriate. At a shelter-care hearing, the court placed the children in the agency's temporary custody.

{¶4} In the meantime, the agency filed motions that requested the trial court to order the parents to undergo competency evaluations. The trial court subsequently ordered the parents to undergo psychological evaluations.

{¶5} On December 15, 2022, the court adjudicated the children dependent. The court placed the children in the parents' temporary custody subject to the agency's

protective supervision. The next day, the court removed the children from the parents' temporary custody and granted temporary custody to the agency.

{¶6} In a shelter-care entry, the court reported that it removed the children from the parents' temporary custody because the parents had been "verbally aggressive w[ith] each other," and "law enforcement had to intervene." The court further found that the parents are "not being truthful" with the agency.

{¶7} On February 1, 2023, the father permanently surrendered the children.

{¶8} A couple of months later, the agency filed permanent-custody motions. The agency alleged that (1) under R.C. 2151.41(E)(1) and (E)(2), the children cannot be placed with either parent within a reasonable time or should not be placed with either parent and (2) placing the children in the agency's permanent custody is in their best interests. The agency asserted that although it initially removed the children from the home due to the bed-bug infestation, the agency subsequently learned that appellant is not able "to understand and meet" the children's needs. The agency thus argued that appellant has failed continuously and repeatedly to substantially remedy the conditions the led to the children's removal within the meaning of R.C. 2151.414(E)(1).

{¶9} The agency further contended that appellant has a severe, "chronic mental illness, chronic emotional illness, [or] intellectual disability" that renders her "unable to provide an adequate permanent home for the child at the present time and, as anticipated within one year after" the permanent-custody hearing. The agency reported that appellant underwent a psychological evaluation, and the report indicated that appellant "would likely experience significant difficulty parenting and managing the needs of her children due to her own disabilities, and due to the children's disabilities."

The agency further asserted that the report revealed that appellant has "Borderline Intellectual Functioning and Autism Spectrum Disorder," "can read but cannot understand what she has just read, and struggles with higher order mathematical operations." The agency also stated that appellant "is reported to lack emotional reciprocity," "has difficulty picking up on social cues," and "possesses a moderately poor understanding of basic parenting concepts."[1]

{¶10} The agency outlined its "ongoing concerns" as follows:

> [Appellant] is developmentally delayed and struggles to understand the developmentally appropriate needs of her children. [Appellant] appears to view her children as perpetually in infancy. [Appellant] has not demonstrated an ability to adjust her parenting as the children develop and mature. Father was a support for [Appellant] and he has permanently surrendered the children to SCOJFS custody and left the state.
>
> [Appellant] is a victim of violence and continually puts herself in dangerous situations. She has repeatedly appeared before the case worker with visible facial injuries. [Appellant] appeared before the court with visible facial injuries and indicated she was beaten by a man she did not know but met online. [Appellant] indicated that she did not notify law enforcement of her assault.

{¶11} The agency further asserted that placing the children in its permanent custody is in their best interest. The agency, thus, requested the trial court to grant it permanent custody of the children.

{¶12} On April 25, 2023, the trial court held a hearing to consider the agency's permanent-custody motion. Caseworker Elizabeth Gura testified as follows. The children are "three happy kids right now," even though they have some developmental delays. K.C. has been diagnosed with autism, and S.C. is awaiting an autism evaluation. H.C., at two years of age, had "just started walking." When the agency removed the children from the home, none had been potty trained, and K.C. had been

[1] This report was not admitted into evidence and is not included in the record.

going to school wearing diapers. At the time, K.C. was six years old and S.C. was four years old.

{¶13} In addition to the children's lack of potty training, the family's home had "a severe bed bug infestation," and "[t]he children were going to school with dead and alive bed bugs on them." The children also "had rashes and bites all over them." By the time of the permanent-custody hearing, the issue had been resolved.

{¶14} Appellant underwent a psychological evaluation to ascertain whether "she could parent three developmentally delayed children on her own." The evaluation indicated that appellant "is likely to experience significant difficulty parenting or managing the needs of three children independently" and that "it is likely to be even more challenging in providing services to children with special needs." Gura testified that her independent interaction with appellant and the children supported the conclusions of the psychological evaluation.

{¶15} Appellant visited the children, and she seemed to "spend more time with" H.C., while the two older children "would be off playing by themselves." Additionally, appellant appeared to be "more interested in taking pictures of the kids than interacting with them." She also needed "to be prompted to change [H.C.]'s diaper."

{¶16} The children's guardian ad litem, Larry Meadows, testified that appellant has a repeated "history of meeting men online" and that these men are physically violent with appellant. Meadows stated that appellant had not reported any of the incidents to law enforcement, which he believed demonstrates that appellant lacks the ability to protect herself. He indicated that appellant's lack of protective capacity gives him concerns about appellant's ability to protect the children.

{¶17} Meadows stated that the children are "really outgoing" and are "always excited to see" appellant. He further stated, however, that the children do not ask about appellant when they are with the foster family. Moreover, he indicated that the children are "excited to see any stranger that walks into the room. That's just the way they are." Meadows explained that during the last visit between appellant and the children that Meadows observed, H.C. "would drop to the floor in fear if [appellant] got near her for whatever reason."

{¶18} Meadows believes that placing the children in the agency's permanent custody is in their best interests. He stated that the children "are thriving in foster care." Meadows indicated that in the foster home, the children "are free to roam in the house and play" and "are not kept in cribs all day." Plus, H.C., whom appellant claimed could not eat solid food, now eats "virtually anything." Meadows further explained that the psychological evaluation "was a big factor in [his] decision in that [appellant] would have significant difficulty parenting these children on her own."

{¶19} Meadows stated that he was not aware of any programs or services that would be able to help appellant provide a safe place for the children. He noted that the family had "programs in place" when the children were living with their parents, but they missed appointments.

{¶20} Harvey Fetherolf testified that he is appellant's live-in boyfriend. He believes that appellant is capable of caring for the children.

{¶21} Appellant testified that she currently lives in a two-bedroom house with her boyfriend and only needs to obtain beds for the children. She reported that when she visited the children, they were "always excited to see" her. Appellant stated that K.C.

told her that she would like to return home. Appellant believes that she is able to properly care for the children because she has "done it all along." Appellant explained that she "always" took care of the children.

{¶22} Appellant stated that when the children were removed from her care, the children remained sleeping in cribs because she did not want to purchase beds for them until the bed bugs had been eliminated. She explained that they had been battling bed bugs for about five years. Appellant defended the family's inability to rid the home of bed bugs by asserting that the father did not want "anybody coming to the house to treat bed bugs because he didn't want [any]body to see [her] visible injuries and stuff where he was beating [her]."

{¶23} Appellant further indicated that she "was in the process of potty training" S.C. when he was removed from her care. Appellant explained that K.C.'s autism was the reason K.C. was not potty trained. Appellant related that she "worked and worked and worked with [K.C.] but she fought [appellant] every step of the way." She did not "understand why" K.C. was able to be potty trained during the first few months in foster care.

{¶24} Meadows testified again and explained that the first time that he met K.C., she asked him if she could "go home" with him. During his last visit with her at the foster home, K.C. again was happy to see him and asked "to come home" with him.

{¶25} On May 2, 2023, the trial court granted the agency permanent custody of the children. The court found that the children cannot be placed with either parent within a reasonable time or should not be placed with either parent. The court observed that the father had permanently surrendered the children. The court found that

appellant "is incapable of properly caring for three special needs children." The court indicated that it had ordered a psychological evaluation and this evaluation "concluded that [appellant] would have serious difficulty parenting the children without significant help." The court pointed out that the two older children were not potty trained at the time of removal and still wore diapers to school. The court also noted that the family's home had a severe bed-bug infestation that remained unremedied for about five years, despite community assistance. The court explained that "[t]he infestation had not resolved because Father did not want anyone in the house for fear [others] would see bruises he inflicted on [appellant]."

{¶26} The court found that after the father left, appellant "has continued in abusive relationships." The court determined that appellant "is incapable of taking care of herself let alone her children."

{¶27} The court also found that placing the children in the agency's permanent custody is in their best interests. Of note, the court concluded that the children need a legally secure permanent placement and cannot achieve this type of placement without granting the agency permanent custody. The court indicated that the court-ordered psychological evaluation concluded that appellant "is incapable of caring for her children." The court further stated that appellant is "incapable of helping" the children with their developmental delays, unable to care for herself, and unable to cooperate with service providers. The court further noted that no suitable relative placements were available.

{¶28} The court, thus, placed the children in the agency's permanent custody. This appeal followed.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY SUBSTANTIALLY RELYING ON INADMISSIBLE HEARSAY TESTIMONY REGARDING A PSYCHOLOGICAL REPORT THAT WAS NOT ADMITTED INTO EVIDENCE, WITHOUT TESTIMONY FROM ITS PREPARER, WITHOUT IDENTIFICATION OF ITS PREPARER, WITHOUT A DATE OF PREPARATION, AND WITHOUT THE OPPORTUNITY FOR APPELLANT TO CROSS-EXAMINE THE PREPARER.

II. APPELLANT'S COUNSEL WAS INEFFECTIVE WHEN THEY FAILED TO OBJECT TO CASEWORKER TESTIMONY AS INADMISSIBLE HEARSAY AND VIOLATIVE OF APPELLANT'S RIGHT TO DUE PROCESS.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FOUND BY CLEAR AND CONVINCING EVIDENCE THAT THE CHILDREN COULD NOT BE PLACED WITH A.S. WITHIN A REASONABLE TIME OR SHOULD NOT BE PLACED WITH A.S., AS SUCH A FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ANALYSIS

FIRST ASSIGNMENT OF ERROR

{¶29} In her first assignment of error, appellant argues that the trial court abused its discretion by relying upon inadmissible hearsay—the psychological evaluation and witness testimony derived from the psychological evaluation— to support its decision. She contends that the trial court's reliance upon the evaluation and its admission of hearsay testimony deprived her of her due-process and confrontation rights. To support her argument, appellant relies upon *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485.

{¶30} In *Hoffman*, the Ohio Supreme Court held that if a trial court considers a guardian ad litem's report when ruling on a permanent-custody motion, the "parties to

the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody determination." *Id.* at syllabus. In *Hoffman*, after the agency filed a permanent-custody motion, the child's guardian ad litem filed a written report. The trial court later admitted the report into evidence. At the permanent-custody hearing, the trial court did not allow the parties to question the guardian ad litem regarding the contents of her report, even though the parent asked that the guardian ad litem be called as a witness to testify about her report and also asked the court to allow her to cross-examine the guardian ad litem about the report. *Id.* at ¶ 24.

{¶31} The trial court subsequently granted the agency permanent custody of the child. When issuing its decision, the court quoted from the guardian ad litem's written report.

{¶32} The parent appealed, and the appellate court reversed. The court determined that because the trial court admitted the guardian's report into evidence, it must allow the parent to cross-examine the guardian.

{¶33} On appeal to the Ohio Supreme Court, the court determined that "[d]ue process necessitates that [the parent] should have had the right to cross-examine the guardian ad litem, since the trial court relied upon the report." *Id.* at ¶ 25. The court explained that without the right to cross-examine the guardian ad litem regarding the report's contents and the guardian ad litem's basis for recommending permanent custody, "there are no measures to ensure the accuracy of the information provided and the credibility of those who made statements." *Id.* at ¶ 25. The court, thus, remanded

the matter to the trial court for a new hearing at which the parent could cross-examine the guardian ad litem. *Id.* at ¶ 26.

{¶34} Appellant cites to one other court that has extended *Hoffman*'s rationale to psychological evaluations, *In re R.G.M.*, 2023-Ohio-685, 210 N.E.3d 15, ¶ 22 (5th Dist.), *appeal allowed sub nom. In re R.G.M.*, 170 Ohio St.3d 1489, 2023-Ohio-2348, 212 N.E.3d 937. Appellant asserts that *Hoffman* and *R.G.M.* illustrate that the trial court violated her due-process and confrontation rights by relying upon the psychological evaluation without allowing her the opportunity to cross-examine the individual who administered the evaluation.

{¶35} First, we observe that unlike the parent in *Hoffman*, here, appellant did not ask to cross-examine the individual who prepared the psychological evaluation. A well-established rule of appellate procedure is that " 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. The failure to object to an error at a time when the court could have avoided or corrected the error means that the appellant forfeits the right to raise the issue on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 (stating that "an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *Quarterman* at ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during trial court

proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (concluding that party waived arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (explaining that an appellant cannot "present * * * new arguments for the first time on appeal"); *accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, fn.3 (stating that "[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, ¶ 24 (explaining that "arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal").

{¶36} In the case before us, at no point during the permanent-custody hearing did appellant ask to cross-examine the individual who prepared the psychological evaluation. Under these circumstances, we believe that appellant has forfeited the right to argue on appeal that the trial court violated her due-process and confrontation rights by relying upon the written report when rendering its decision.

{¶37} Appellate courts nevertheless have discretion to consider forfeited errors and review them for plain error. *Quarterman* at ¶ 16; *State v. Pyles*, 7th Dist. Mahoning No. 13-MA-22, 2015-Ohio-5594, ¶ 82, quoting *State v. Jones*, 7th Dist. Mahoning No. No. 06-MA-109, 2008-Ohio-1541, ¶ 65 (explaining that the plain error doctrine " 'is a wholly discretionary doctrine' "); *DeVan v. Cuyahoga Cty. Bd. of Revision*, 2015-Ohio-4279, 45 N.E.3d 661, ¶ 9 (8th Dist.) (noting that appellate court retains discretion to consider forfeited argument). For the plain-error doctrine to apply, the party claiming

error must establish (1) that " 'an error, i.e., a deviation from a legal rule' " occurred, (2) that the error was " 'an "obvious" defect in the trial proceedings,' " and (3) that this obvious error affected substantial rights, i.e., the error " 'must have affected the outcome of the trial.' " *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982) ("A 'plain error' is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse [e]ffect on the character and public confidence in judicial proceedings.").

{¶38} The plain-error doctrine is not, however, readily invoked in civil cases. Instead, an appellate court "must proceed with the utmost caution" when applying the plain-error doctrine in civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The Ohio Supreme Court has set a "very high standard" for invoking the plain-error doctrine in a civil case. *Perez v. Falls Financial, Inc.*, 87 Ohio St.3d 371, 721 N.E.2d 47 (2000). Thus, "the doctrine is sharply limited to the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss*, 79 Ohio St.3d at 122, 679 N.E.2d 1099; *accord Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶ 43. Moreover, appellate courts " 'should be hesitant to decide [forfeited errors] for the reason that justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination.' " *Risner v. Ohio Dept. of Nat.*

Resources, Ohio Div. of Wildlife, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 28, quoting *Sizemore v. Smith*, 6 Ohio St.3d 330, 332, 453 N.E.2d 632 (1983), fn. 2; *accord Mark v. Mellott Mfg. Co., Inc.*, 106 Ohio App.3d 571, 589, 666 N.E.2d 631 (4th Dist.1995) ("Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.").

{¶39} Additionally, "[t]he plain error doctrine should never be applied to reverse a civil judgment * * * to allow litigation of issues which could easily have been raised and determined in the initial trial." *Goldfuss*, 79 Ohio St.3d at 122, 679 N.E.2d 1099. Instead, " 'the idea that parties must bear the cost of their own mistakes at trial is a central presupposition of our adversarial system of justice.' " *Id.* at 121, quoting *Montalvo v. Lapez*, 77 Haw. 282, 305, 884 P.2d 345 (1994) (Nakayama, J., concurring in part and dissenting in part).

{¶40} In the case before us, we do not believe that the trial court plainly erred by relying on the psychological evaluation when rendering its permanent-custody decision. Juv.R. 32(A)(3) allows a trial court to "order and utilize a social history or * * * mental examination at any time after the filing of a complaint * * * [w]here a material allegation of a neglect, dependency, or abused child complaint relates to matters that a history or examination may clarify."[2] Moreover, R.C. 2151.35(B)(2)(c) states that "[m]edical examiners * * * shall not be cross-examined, except upon consent of the parties, for

[2] We observe that Juv.R. 32(A)(3) allows trial courts to "utilize" court-ordered mental examinations. The word "utilize" means "to make use of: turn to practical use or account." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/utilize, accessed 30 Aug. 2023. Little-to-no authority explains the precise manner in which a trial court may "utilize" the examination. *See In re Green*, 18 Ohio App.3d 43, 44, 480 N.E.2d 492, 493, 18 O.B.R. 155 (2nd Dist.1984) ("[w]here the court orders such an evaluation, it may utilize it"); *see also In re Sanchez*, 11th Dist. Trumbull No. 98-T-0104, 1999 WL 1313630, *5 (recognizing the *Green* court's conclusion as "the only logical result as there would be no point in the court ordering a mental examination if it could not utilize the results"). However, because the parties have not addressed the issue, we need not explore the matter.

good cause shown, or as the court in its discretion may direct." However, "[a]ny party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports that may be used by the court in determining disposition." *Id.*; *accord In re Smith*, 9th Dist. Summit No. 17919, 1997 WL 423035, *4 (July 23, 1997).

{¶41} Based upon the interplay of Juv.R. 32(A)(3) and R.C. 2151.35(B)(2)(c), and in the absence of clear guidance from the Ohio Supreme Court regarding the import of *Hoffman* on Juv.R. 32, if any, we do not believe that the trial court obviously erred by relying upon (i.e., "utilizing") the report when reaching its permanent-custody decision. We further point out that appellant did not ask to cross-examine the preparer or offer any evidence to supplement, explain, or dispute any information contained in the psychological evaluation. Moreover, although the trial court apparently considered the evaluation, it did not admit the psychological evaluation into evidence. We do not believe that the trial court obviously erred by failing to sua sponte decide that it could not consider the evaluation.

{¶42} Appellant further contends that the trial court plainly erred by allowing hearsay testimony regarding the contents of the psychological evaluation. Appellant did not object to this alleged hearsay testimony. Therefore, as with her previous argument, she has forfeited all but plain error.

{¶43} Juv.R. 34(B)(2) permits trial courts to "admit evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence," except as otherwise provided in Juv.R. 34(I). Juv.R. 34(I) states that "[t]he Rules of

Evidence shall apply in hearings on motions for permanent custody." Juv.R. 34(I); *see also In re Washington*, 143 Ohio App.3d 576, 581, 758 N.E.2d 724 (2001).

{¶44} The Rules of Evidence prohibit the use of hearsay. Evid. R. 802. "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 in the statement." Evid. R. 801(C). Hearsay is admissible only if it meets one of the exceptions enumerated in the Rules of Evidence. Evid. R. 802.

{¶45} In the case before us, we do not believe that the trial court plainly erred by allowing testimony derived from the psychological evaluation. Even if the trial court erred by allowing the testimony, we do not believe that any alleged error affected the outcome of the proceedings. Instead, the record otherwise contains adequate competent and credible evidence to support the trial court's permanent-custody decision. *See In re Mack*, 148 Ohio App.3d 626, 2002-Ohio-4161, 774 N.E.2d 1243, ¶ 10 and 24 (3rd Dist.) (concluding that even though trial court erred by relying upon the results of psychological examination when deciding permanent-custody issue, admitting the results "did not affect a substantial right of the appellant because the trier of fact would have reached the same decision had this error not occurred").

{¶46} Even without the testimony regarding the psychological evaluation, the evidence presented at the hearing shows that (1) appellant had not potty trained the two oldest children, even though the children were six and nearly four years old at the time of their removal; (2) both children were potty trained within a few months after being removed from appellant's care; (3) appellant had not been able to rid her home of bed bugs despite assistance from community resources; (4) appellant sent the children to

school with dead and alive bed bugs on them; (5) appellant had relationships with abusive men; and (6) the children are thriving in the foster home. Additionally, the caseworker's observations led her to believe that appellant is incapable of providing proper care to the three developmentally delayed children. This evidence helps support the trial court's finding that appellant "is incapable of taking care of herself let alone her children." Consequently, we do not believe that the trial court's permanent-custody decision would have been different if it had not heard the testimony regarding the psychological evaluation.

{¶47} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

SECOND ASSIGNMENT OF ERROR

{¶48} In her second assignment of error, appellant asserts that trial counsel performed ineffectively by failing to object to the alleged hearsay testimony. She charges that counsel's failure to object constituted deficient performance and that had counsel objected, a reasonable probability exists that the result of the proceeding would have been different. Appellant contends that without the improper hearsay testimony, the trial court may not have formed a firm belief that placing the children in the agency's permanent custody is in their best interests.

{¶49} The right to counsel, guaranteed in permanent custody proceedings by R.C. 2151.352 and by Juv.R. 4, includes the right to the effective assistance of counsel. *In re Wingo*, 143 Ohio App.3d 652, 666, 758 N.E.2d 780 (4th Dist.2001), citing *In re Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *e.g., In re J.P.B.*, 4th Dist. Washington No. 12CA34, 2013-Ohio-787, ¶ 23; *In re K.M.D.*, 4th Dist. Ross No.

11CA3289, 2012-Ohio-755, ¶ 60; *In re A.C.H.*, 4th Dist. Gallia No. 11CA2, 2011-Ohio-5595, ¶ 50. " '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.' " *Wingo*, 143 Ohio App.3d at 666, 758 N.E.2d 780, quoting *Heston*.

{¶50} Thus, to establish constitutionally ineffective assistance of counsel in a permanent-custody proceeding, a parent must show " '(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.' " *In re S.W.*, 2023-Ohio-793, 210 N.E.3d 36, ¶ 53 (4th Dist.), quoting *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 202; *e.g., Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶51} To demonstrate deficient performance, the party challenging counsel's conduct " 'must prove that counsel's performance fell below an objective level of reasonable representation.' " *State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155 ¶ 89 (4th Dist.), quoting *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. When considering counsel's performance, " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Walters*, 4th Dist. Washington Nos. 13CA33, 2014-

Ohio-4966, ¶ 23, quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Thus, the challenging party " 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " *State v. Jarrell*, 2017-Ohio-520, 85 N.E.3d 175, ¶ 49 (4th Dist.), quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

{¶52} To establish prejudice, the challenging party must demonstrate that a reasonable probability exists that " 'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.' " *Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014), quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts ordinarily may not simply presume the existence of prejudice but must require the challenging party to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22. As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective-assistance-of-counsel claim. *E.g., State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 86 (an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

{¶53} Here, even if we classified counsel's failure to object to the testimony as deficient performance, appellant cannot establish that counsel's alleged deficient performance affected the outcome of the proceedings. Instead, as we explained in our discussion of appellant's first assignment of error, even if the court erred by allowing the testimony, its decision would have remained the same. Consequently, appellant has not established both elements necessary to prove an ineffective-assistance-of-counsel claim.

{¶54} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

THIRD ASSIGNMENT OF ERROR

{¶55} In her third assignment of error, appellant contends that the trial court's decision that the children cannot be placed with her within a reasonable time or should not be placed with her is against the manifest weight of the evidence.

STANDARD OF REVIEW

{¶56} Generally, a reviewing court will not disturb a trial court's permanent custody decision unless the decision is against the manifest weight of the evidence. *E.g., In re B.E.*, 4th Dist. Highland No. 13CA26, 2014-Ohio-3178, ¶ 27; *In re R.S.*, 4th Dist. Highland No. 13CA22, 2013-Ohio-5569, ¶ 29. When an appellate court reviews whether a trial court's permanent custody decision is against the manifest weight of the evidence, the court " ' "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." ' " *Eastley v.*

Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist. 2001), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). We further observe, however, that issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984): "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Moreover, deferring to the trial court on matters of credibility is "crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 674 N.E.2d 1159 (1997); *accord In re Christian*, 4th Dist. Athens No. 04CA 10, 2004-Ohio-3146, 2004 WL 1367399, ¶ 7.

{¶57} The question that an appellate court must resolve when reviewing a permanent custody decision under the manifest weight of the evidence standard is "whether the juvenile court's findings * * * were supported by clear and convincing evidence." *In re K.H.*, 119 Ohio St.3d 538, 2008-Ohio-4825, 895 N.E.2d 809, ¶ 43. "Clear and convincing evidence" is:

> the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

In re Estate of Haynes, 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23 (1986).

{¶58} In determining whether a trial court based its decision upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *accord In re Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) ("Once the clear and convincing standard has been met to the satisfaction of the [trial] court, the reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof.").

{¶59} Thus, if a children services agency presented competent and credible evidence upon which the trier of fact reasonably could have formed a firm belief that permanent custody is warranted, then the court's decision is not against the manifest weight of the evidence. *In re R.M.*, 2013-Ohio-3588, 997 N.E.2d 169, ¶ 62 (4th Dist.); *In re R.L.*, 2d Dist. Greene Nos. 2012CA32 and 2012CA33, 2012-Ohio-6049, ¶ 17, quoting *In re A.U.*, 2d Dist. Montgomery No. 22287, 2008-Ohio-187, 2008 WL 185494, ¶ 9 ("A reviewing court will not overturn a court's grant of permanent custody to the state as being contrary to the manifest weight of the evidence 'if the record contains competent, credible evidence by which the court could have formed a firm belief or conviction that the essential statutory elements * * * have been established.' "). A reviewing court should find a trial court's permanent custody decision against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against

the [decision].' " *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

PERMANENT CUSTODY PROCEDURE

{¶60} Before a court may award a children services agency permanent custody of a child, R.C. 2151.414(A)(1) requires the court to hold a hearing. The primary purpose of the hearing is to allow the court to determine whether the child's best interests would be served by permanently terminating the parental relationship and by awarding permanent custody to the agency. R.C. 2151.414(A)(1). Additionally, when considering whether to grant a children services agency permanent custody, a trial court should consider the underlying purposes of R.C. Chapter 2151: "to care for and protect children, 'whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety.' " *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, ¶ 29, quoting R.C. 2151.01(A).

{¶61} R.C. 2151.414(B)(1) permits a trial court to grant permanent custody of a child to a children services agency if the court determines, by clear and convincing evidence, that the child's best interest would be served by the award of permanent custody and, as applicable here,

> (a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's

> parents within a reasonable time or should not be placed with the child's parents.

{¶62} R.C. 2151.414(E) requires a court that is determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents to consider all relevant evidence. The statute further specifies that if one or more of the specified conditions exist "as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent." As relevant here, those conditions are as follows:

> (1) 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.
>
> (2) Chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;
>
> * * * *

{¶63} A trial court may base its decision that a child cannot or should not be placed with either parent within a reasonable time upon the existence of any one of the R.C. 2151.414(E) factors. The existence of one factor alone will support a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent. *See In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862

N.E.2d 816, ¶ 50; *In re William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996); *e.g., In re L.R.B.*, 2nd Dist. Montgomery No. 28826, 2020-Ohio-6642, ¶ 52; *In re Hurlow*, 4th Dist. Gallia No. 98CA6, 1998 WL 655414 (Sept. 21, 1998).

{¶64} In the case at bar, the trial court did not specify which R.C. 2151.414(E) factor supported its finding that the children cannot be placed with appellant within a reasonable time or should not be placed with her. However, in the absence of a timely request for findings of fact and conclusions of law, the court had no obligation to do so. *E.g., In re Ar.C.*, 4th Dist. Ross No. 20CA3720, 2021-Ohio-596, ¶ 37; *accord In re N.B.*, 8th Dist. Cuyahoga No. 81392, 2003-Ohio-3656, ¶ 14, fn. 5.

{¶65} Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." Additionally, R.C. 2151.414(C) states: "If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding." Generally, the failure to request findings of fact and conclusions of law will result in a waiver of the right to challenge a trial court's finding concerning an issue. *In re Barnhart*, 4th Dist. Athens No. 02CA20, 2002-Ohio-6023, ¶ 23, citing *Pawlus v. Bartrug*, 109 Ohio App.3d 796, 801, 673 N.E.2d 188 (9th Dist.1996), and *Wangugi v. Wangugi*, 4th Dist. Ross No. 99CA2531, 2000 WL 377971 (Apr. 12, 2000). " '[W]hen a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other

relevant facts.' " *Id.*, quoting *Fallang v. Fallang*, 109 Ohio App.3d 543, 549, 672 N.E.2d 730 (12th Dist.1996). We have applied this rule to R.C. 2151.414 permanent-custody cases and have stated that, unless a party requests findings of fact and conclusions of law, a trial court need not set forth specific factual findings regarding each R.C. 2151.414(D) best interest factor. *In re M.M.*, 4th Dist. Scioto No. 07CA3203, 2008-Ohio-2007, ¶ 20; *In re Pettiford*, 4th Dist. Ross No. 06CA2883, 2006-Ohio-3647, ¶ 28; *In re Myers*, 4th Dist. Athens No. 02CA50, 2003-Ohio-2776, ¶ 23, citing *In re Malone*, 4th Dist. Scioto No. 93CA2165, 1994 WL 220434 (May 11, 1994); *In re Dyal*, 4th Dist. Hocking No. 01CA12, 2001 WL 925423, fn. 3 (Aug. 9, 2001), quoting *In re Day*, 10th Dist. Franklin No. 00AP-1191, 2001 WL 125180 (Feb. 15, 2001); *accord In re R.H.*, 5th Dist. Perry No. 10CA9, 2010-Ohio-3293, ¶ 14. If, however, a party requests findings of fact and conclusions of law, then the trial court must set forth specific factual findings that correlate to each best interest factor. *Myers* at ¶ 23. Additionally, the record must indicate that the trial court indeed considered the proper statutory factors. *In re Allbery*, 4th Dist. Hocking No. 05CA12, 2005-Ohio-6529, ¶ 13; *In re C.C.*, 10th Dist. Franklin No. 04AP-883-04AP-892, 2005-Ohio-5163, ¶ 53.

{¶66} We previously determined that this same analysis applies to R.C. 2151.414(E). *Ar.C.* at ¶ 39; *In re C.S.*, 4th Dist. Athens No. 15CA18, 2015-Ohio-4883, ¶ 31. Thus, in the absence of a proper request for findings of fact and conclusions of law, a trial court need not specifically set forth its findings regarding the R.C. 2151.414(E) factors. *C.S.* at ¶ 31, citing *In re Burton*, 3rd Dist. Mercer No. 10-04-01, 2004-Ohio-4021, ¶¶ 22-23. Consequently, here, because appellant did not request findings of fact

and conclusions of law, the trial court was not required to set forth a specific analysis of the R.C. 2151.414(E) factors.

{¶67} Furthermore, in the absence of findings of fact and conclusions of law, we generally must presume that the trial court applied the law correctly and must affirm if some evidence in the record supports its judgment. *Bugg* v. Fancher, 4th Dist. Highland No. 06CA12, 2007-Ohio-2019, ¶ 10, citing *Allstate Fin. Corp. v. Westfield Serv. Mgt. Co.*, 62 Ohio App.3d 657, 577 N.E.2d 383 (12th Dist.1989); *accord Yocum v. Means*, 2nd Dist. Darke No. 1576, 2002-Ohio-3803, ¶ 7 ("The lack of findings obviously circumscribes our review * * *."). As the court explained in *Pettet v. Pettet*, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (5th Dist.1988):

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

{¶68} In the case at bar, the trial court did set forth some facts regarding the R.C. 2151.414(E) factors, but it did not link those facts to the statutory factors. Appellant, however, did not request findings of fact and conclusions of law. Therefore, the trial court was not obligated to connect its findings of fact to the statutory language. Furthermore, without knowing how the trial court applied the facts to the R.C. 2151.414(E) statutory factors, our review is circumscribed. Thus, we must affirm the trial court's decision if some evidence exists to support it.

{¶69} Additionally, even though the trial court did not recite all of the language contained in R.C. 2151.414(E)(2), its decision suggests that it found that appellant suffers from a chronic intellectual disability "that is so severe that it makes [her] unable to provide an adequate permanent home for the child[ren] at the present time and, as anticipated, within one year after" the permanent-custody hearing. Without a request for findings of fact and conclusions of law, the trial court did not have an obligation to include this level of specificity in its decision (but the better practice would be to include the language of the statutory provision at issue). And without a request for findings of fact and conclusions of law, we must presume that the trial court correctly applied the law.

{¶70} Here, some evidence supports the trial court's decision. The court pointed out that the three children are developmentally delayed and found that appellant lacks the ability to provide proper care for the children. Both the caseworker and the GAL expressed concerns about appellant's ability to properly care for the children. Appellant's testimony reflects that she believes that she provided proper care for the children, even though (1) the two older children were not yet potty trained and K.C. attended school wearing diapers, (2) the children had live and dead bud bugs on their bodies, along with bed-bug rashes and bites, and (3) the youngest child, at eighteen months, had not started to walk or eat solid food. The trial court reasonably could have determined that appellant's testimony illustrates that she is unable to recognize the components of proper parental care.

{¶71} Moreover, although appellant asserts that the trial court could not consider the psychological evaluation when reaching its decision, we again note that she did not

argue that the trial court was unable to consider it at a time when the trial court may have avoided any error. Also, as we pointed out earlier, Juv.R. 32(A)(3) allows trial courts to "utilize" court-ordered mental examinations. Here, the trial court appears to have used (i.e., considered) the court-ordered mental examination when reaching its decision, a practice that Juv.R. 32(A)(3) seemingly authorizes.

{¶72} We also observe that the agency supported its permanent-custody motion, in part, by referring to the conclusions contained in the psychological evaluation. Appellant never argued that the agency could not use these conclusions to support its permanent-custody motion. And, as we noted above, appellant did not ask to cross-examine the individual who administered the evaluation or seek to introduce any evidence to supplement, explain, or dispute the information contained in the evaluation. Therefore, we do not believe that the trial court was prohibited from considering the conclusions contained in the psychological evaluation when rendering its decision. But even if it was, as we have discussed above, the record otherwise contains competent and credible evidence to support the trial court's finding that the children cannot be placed with appellant within a reasonable time or should not be placed with her.

{¶73} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

CONCLUSION

{¶74} Having overruled appellant's three assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking 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.

Smith, P.J., and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.