[Cite as *In re C.P.*, 2009-Ohio-2760.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: :

C.P., : No. 08AP-1128
(C.P.C. No. 07JU08-12938)

(J.P., :

(REGULAR CALENDAR)

Appellant). :

D E C I S I O N

Rendered on June 11, 2009

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant.

Robert J. McClaren, for appellee Franklin County Children Services.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellee Guardian ad Litem for C.P.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

CONNOR, J.

{¶1} Appellant-mother, J.P. ("appellant" or "mother"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, terminating her parental rights and awarding permanent custody of her daughter, C.P., to Franklin County Children Services ("FCCS" or "agency"). For the following reasons, we vacate the judgment of the trial court and remand for further proceedings.

{¶2} C.P. was born on December 29, 2006. Within a few days of her birth, C.P. was placed in the custody of FCCS under an emergency order. FCCS filed a complaint alleging that C.P. was a neglected and dependent child. Specifically, the complaint alleged FCCS currently had temporary custody of C.P.'s siblings and had filed for permanent custody based upon the following: mother's failure to follow through with drug and alcohol assessments; mother's failure to follow through with domestic violence classes; mother's failure to attend counseling; mother's failure to utilize parenting skills taught to her during parenting classes; and mother's history of domestic violence. The complaint also alleged mother did not have supplies for C.P. at her home. Although the agency first sought permanent custody of C.P. as an initial disposition at the same time that it sought permanent custody of her three older siblings, C.P. was subsequently found to be a dependent child, and temporary custody was granted to FCCS in October 2007. Thereafter, the case plan involving C.P. called for reunification with appellant.

{¶3} On June 3, 2008, FCCS filed a motion for permanent custody, alleging the following: the child could not and should not be placed with either parent within a reasonable time; the child was abandoned by the father; and the child had been in the custody of FCCS for 12 or more months of a consecutive 22-month period.

{¶4} Approximately two months after FCCS filed its permanent custody motion with respect to C.P., appellant gave birth to a fifth child, who was also placed into temporary custody with the agency. The agency did not file a permanent custody motion with respect to the infant, and he is not the subject of this appeal.

{¶5} A trial on the motion for permanent custody was held on December 1 and 2, 2008. The father of C.P. was not present, as C.P.'s paternity has never been established.

Appellant-mother was present and was represented during the trial. Appellant, as well as the FCCS caseworker and the Guardian ad Litem, testified during the trial. The FCCS caseworker recommended that permanent custody be granted to the agency. However, the Guardian ad Litem opposed the motion. The Guardian ad Litem testified mother had substantially complied with the case plan, and there was an opportunity for reunification to occur within a reasonable time.

{¶6} The trial court found by clear and convincing evidence that it was in the best interest of the child to grant permanent custody to FCCS and that C.P. had been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period or, in the alternative, that she cannot or should not be placed with her mother within a reasonable time. The trial court also found that the father had abandoned the child. Therefore, appellant's parental rights (as well as the father's) were terminated and permanent custody was awarded to FCCS. Appellant appeals, asserting the following assignments of error:

> Assignment of Error 1: The Juvenile Court erred in finding that "[i]t is in the best interest of the child to permanently commit the child to Franklin County Children Services."[1]
>
> Assignment of Error 2: Mother was deprived of her right to effective assistance of counsel.
>
> [Assignment of Error 3:] The Juvenile Court's reliance on Ms. Sines's testimony about the contents of reports was plain error.[2]

---

[1] This assignment of error contains various subparts which list nine specific errors that contributed to the alleged erroneous best interest finding. We have not specifically enumerated each subpart here.

[2] Appellant raised this assignment of error for the first time in her reply brief. Neither appellee nor the Guardian ad Litem raised any objections to this "new" assignment of error.

{¶7} Where the standard of proof required is clear and convincing, the reviewing court should examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy this burden. It is firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there is competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

{¶8} Permanent custody judgments which are supported by some competent, credible evidence going to all essential elements of a case will not be reversed as being against the manifest weight of the evidence. *In re Brofford* (1992), 83 Ohio App.3d 869, 876-77. A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Andy-Jones*, 10th Dist. No. 03AP-1167, 2004-Ohio-3312. In considering a trial court's decision to grant permanent custody to FCCS, this court must determine from the record whether the trial court had sufficient evidence before it. *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887.

{¶9} The reviewing court must weigh the evidence in order to determine whether the trier 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. *In re R.L.*, 10th Dist. No. 07AP-36, 2007-Ohio-3553, ¶6, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶10} " 'The discretion which the juvenile court enjoys in determining whether an order of permanent custody is in the best interest of a child should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *In re Hogle* (June 27, 2000), 10th Dist. No. 99AP-944, quoting *In re Awkal* (1994), 95 Ohio App.3d 309, 316.

{¶11} However, it is also "well recognized that the right to raise a child is an 'essential' and 'basic' civil right." *In re Hayes* (1997), 79 Ohio St.3d 46, 48, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.' " *In re Hayes*, ¶48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Accordingly, parents must receive every procedural and substantive protection the law permits. Id. "Because an award of permanent custody is the most drastic disposition available under the law, it is an alternative of last resort and is only justified when it is necessary for the welfare of the children." *In re Swisher*, 10th Dist. No. 02AP-1408, 2003-Ohio-5446, ¶26, citing *In re Cunningham* (1979), 59 Ohio St.2d 100, 105.

{¶12} A decision to award permanent custody requires the trial court to conduct a hearing and make a two-part finding. A trial court may grant permanent custody of a child to an agency if the court determines, by clear and convincing evidence, that: (1) it is in the best interest of the child; and (2) that one of the following factors set forth under R.C. 2151.414(B)(1) applies: (a) the child cannot or should not be placed with the parents; (b) the child is abandoned; (c) the child is orphaned; or (d) the child has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1); *In re C.F.*, 113

Ohio St.3d 73, 2007-Ohio-1104, ¶23-27. 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. *In re Abram*, 10th Dist. No. 04AP-220, 2004-Ohio-5435. Clear and convincing evidence does not mean the evidence must be clear and unequivocal, nor does it require proof beyond a reasonable doubt. Id.

{¶13} In the instant case, there are two ways by which permanent custody can be granted to the agency. First, appellant's parental rights can lawfully be terminated upon a finding that the child has been in the temporary custody of FCCS for 12 or more months of a consecutive 22-month period, and upon a finding that it is in the best interest of the child. R.C. 2151.414(B)(1)(d). See also *In re Brooks*, supra. A determination of best interest requires the court to analyze the factors set forth in R.C. 2151.414(D). We note that the plain language of R.C. 2151.414 clearly allows for the termination of parental rights without any finding that the child cannot or should not be placed with either parent within a reasonable time.

{¶14} In the alternative, and pursuant to R.C. 2151.414(B)(1)(a), the trial court may determine that the child could not or should not be placed with the mother within a reasonable period of time, based upon a finding that one or more of the factors set forth in R.C. 2151.414(E) are applicable, and also upon a separate finding that it is in the best interest of the child, using the best-interest factors set forth under R.C. 2151.414(D).

{¶15} As stated above, the agency must prove by clear and convincing evidence that an award of permanent custody to FCCS is in the best interest of the child. In determining the best interest of the child, the trial court is required to consider all relevant factors, including, but not limited to: (1) the interaction and interrelationship of the child

with the parents, siblings, relatives, foster caregivers, and any other person who may significantly affect the child; (2) the wishes of the child, as expressed directly by the child or through the Guardian ad Litem, with due regard for the child's maturity; (3) the custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies for 12 or more months of a consecutive 22-month period; (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (5) whether any of the factors in divisions (E)(7) to (11) of R.C. 2151.414 are applicable.

{¶16} As to the fifth factor listed above, the factors set forth in R.C. 2151.414(E)(7) through (11) include: (1) whether the parents have been convicted of or pled guilty to various crimes; (2) whether medical treatment or food has been withheld from the child; (3) whether the parent has placed the child at a substantial risk of harm due to alcohol or drug abuse; (4) whether the parent has abandoned the child; and (5) whether the parent has had parental rights terminated with respect to a sibling of the child.

{¶17} In her first assignment of error, appellant asserts the trial court erred in finding it is in the best interest of the child to grant permanent custody to the agency. Appellant bases this assertion upon her argument that the "best interest" factors considered by the court do not support the court's decision by the manifest weight of the evidence under a clear and convincing standard.

{¶18} Here, the trial court found the date on which FCCS obtained temporary custody of C.P. to be January 2, 2007. The motion for permanent custody was filed

June 3, 2008. Therefore, the trial court found C.P. was under the temporary custody of FCCS for 12 or more months of a consecutive 22-month period. Appellant does not dispute this fact, and therefore the requirement of R.C. 2151.414(B)(1)(d) is satisfied. Thus, the next issue is whether permanent placement was in the child's best interest. *In re A.L.*, 10th Dist. No. 07AP-638, 2008-Ohio-800. Appellant argues that it was not.

{¶19} In its Permanent Custody Judgment Entry, and under the heading "Best Interests of the Child Determination," the trial court determined "by clear and convincing evidence that it is in the best interest of the child to grant permanent custody of the child to Franklin County Children Services for the following reason(s)." (Permanent Custody Judgment Entry, at 4-5.) The "reasons" listed by the trial court are that the child cannot or should not be placed with either parent within a reasonable time, and that the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period. However, these "reasons" are not evidence or reasons why it is in the best interest of the child to grant the permanent custody motion. The trial court has actually listed the eligibility factors set forth under R.C. 2151.414(B)(1) that are used for preliminarily determining if a child is eligible for permanent custody.

{¶20} Nevertheless, the trial court went on to state in its Permanent Custody Judgment Entry that it has considered all relevant factors. It then proceeded to list several of the mandatory best-interest factors set forth under R.C. 2151.414(D). Specifically, the trial court listed the factors involving the interaction and interrelationship of the child with the parents, siblings, foster parents, and others; the wishes of the child; the custodial history of the child; and the child's need for a legally secure permanent placement. The trial court made no mention of the factors listed under R.C.

2151.414(D)(5), which references whether any of the factors in divisions (E)(7) through (11) apply. The trial court provided extremely limited analysis or application of these factors. However, the trial court did make an additional reference to the fact that, prior to trial, the Guardian ad Litem filed a report regarding his recommendation, but that he changed his recommendation after hearing the evidence, and that he no longer supported the motion for permanent custody. (Permanent Custody Judgment Entry, at 5.)

{¶21} In looking at the factor regarding the interaction and interrelationship of C.P. with her mother, siblings, and foster parents, the trial court found mother and child were "acquainted" as a result of the number of visits, but not bonded. The trial court further found there was some bond with the siblings and a strong bond with the foster parents, but acknowledged C.P. would be removed from their care if permanent custody was granted.

{¶22} In analyzing this factor, we find there is evidence on both sides with respect to the issue of bonding. Mother testified that she feels bonded to C.P., but the FCCS caseworker, Erin Sines, testified that, in her opinion, C.P. was not bonded to mother. Ms. Sines based her opinion on the fact that mother had missed approximately half of her scheduled visits. (Tr. 111.) Ms. Sines also based her opinion upon her observation of tension between the two, such as C.P.'s hesitation in visiting with mother, as well as C.P.'s failure to listen to mother redirect her and the fact that C.P. often played by herself. (Tr. 128.)

{¶23} While Ms. Sines testified C.P. was bonded to her foster parents, she also testified the agency did not intend for C.P. to be adopted by the foster parents because

FCCS believed it was in C.P.'s best interest to be with her older siblings, who had been adopted by a different family.

{¶24} With respect to the trial court's finding that there was "some bond" with the siblings, we note the only testimony about their bond or interaction was that C.P. had lived with one of her three siblings as an infant, and the testimony was that C.P. had "outside visitation with the older siblings too in between the time of permanent custody" which, as pointed out by the Guardian ad Litem, is just like the visitation that she's had with mother, with whom the court only determined she was "acquainted." (Tr. 115.) Moreover, the caseworker never actually testified about a bond with the siblings, just that she wouldn't go so far as to say there would only be a bond, at most, with the one sibling with whom C.P. had lived. (Tr. 115.)

{¶25} The remaining evidence regarding bonding cuts both for and against permanent custody, given that the child is only "acquainted" with mom and bonded with the foster parents, yet she will not be placed with those foster parents, but with an entirely new family if permanent custody is affirmed.

{¶26} In looking at the wishes of the child, the trial court found that the child, age 23 months at the time of the hearing, was too young to express her wishes. This finding is supported by the record. Thus, there is no evidence to consider here.

{¶27} Regarding the custodial history of the child, the trial court noted that C.P. has been in the custody of FCCS since her birth. We note the record does establish that the child was placed into custody with FCCS pursuant to an emergency order only a few days after she was born and that she has remained in the custody of the agency ever

since that time. She had been with the same foster family for over a year at the time of the hearing. Outside of a day or so, the child has never lived with her mother.

{¶28} However, as stated above, this foster family is not looking to adopt C.P. Any adoptive parents would be new to her. Thus, this factor measures both for and against permanent custody.

{¶29} Next we consider the child's need for a legally secure permanent placement and whether such placement can be achieved without a grant of permanent custody to the agency. The trial court determined that type of placement could not be achieved without a grant of permanent custody to FCCS. However, the trial court failed to provide any analysis or explanation for this determination. In another section of its entry, the trial court did state that "[s]uccessful adoptive placement with siblings seems much less speculative for the best interest of the child than keeping the child's need for a permanent placement in ongoing limbo on the chance that finally the mother will become capable of having custody." (Permanent Custody Judgment Entry, at 2.) Although it is unclear, we presume the trial court was basing this "finding of fact" upon other findings of fact that it made, such as mother's visitation attendance record, which it found to be slightly higher than 50 percent and its finding that mother has previously been terminated from counseling programs due to lack of consistent attendance. We find the trial court failed to adequately address this factor.

{¶30} It is also significant to note that, although there is a "best interest" provision that requires the trial court to consider the factors listed in divisions (E)(7) to (11) of R.C. 2151.414, the trial court made no mention whatsoever here of considering these factors.

{¶31} Under this "best interest" provision regarding the factors set forth in divisions (E)(7) to (11), we find the only factor that is applicable is the one considering whether the parent has had parental rights terminated with respect to the child's sibling. Obviously this factor cuts against the mother and in favor of permanent custody to the agency. However, the other four factors do not favor permanent custody, as mother has not been convicted of a qualifying crime, she has never withheld food or medical treatment, she has not placed the child in substantial risk of harm due to drug or alcohol abuse, and she has not abandoned the child.

{¶32} Therefore, in looking at the best-interest factors and the court's application of those factors, as well as the evidence in the record, we find it is not clear that there is relevant, competent, and credible evidence upon which the finder of fact based its judgment and concluded that the essential statutory elements for a termination of parental rights have been established.

{¶33} In looking at the trial court's judgment entry, it is evident that in weighing the evidence and reaching its conclusions, the trial court intermingled and confused many of the eligibility factors set forth under R.C. 2151.414(E), used for determining whether a child can or should be placed with the parent within a reasonable time, with the best interest determination factors set forth under R.C. 2151.414(D). In fact, the trial court addressed both sets of factors under its heading "Best Interest of the Child Determination."

{¶34} Specifically, after addressing most of the best-interest factors, the trial court, beginning at page five of its Permanent Custody Judgment Entry, cited to R.C. 2151.414(E) and found by clear and convincing evidence "that the following exist as to

each of the child's parents and whether the child can or should be placed with either parent within a reasonable time," and then went on to find: (1) mother failed to remedy the problems of domestic violence, limited parenting skills and lack of stability for custody and failed to do so continuously and repeatedly, while failing to utilize services made available to her; and (2) despite reasonable case planning and diligent efforts by the agency to assist the parents in remedying the problems that initially caused the child to be placed outside the home, the parents have failed continuously and repeatedly to substantially remedy those conditions.[3]

{¶35} The trial court then went on to further list and apply many of the other factors set forth under R.C. 2151.414(E) regarding placement with a parent within a reasonable time. The trial court found: (1) the parents have not substantially remedied the conditions and have not utilized the services for counseling and domestic violence (R.C. 2151.414(E)(1)); (2) the parents are not affected by chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency that is so severe as to make them unable to provide an adequate permanent home (R.C.. 2151.414(E)(2)); (3) the parents have failed to demonstrate commitment to the child by failing to regularly attend visitation (R.C. 2151.414(E)(4)); (4) the parents have rejected treatment two or more times after a case plan or dispositional order for individual

[3] This is essentially the factor set forth under R.C. 2151.414(E)(1). It is used in determining whether a child cannot or should not be placed with either parent within a reasonable period of time.

counseling and domestic violence[4]; (5) the father has abandoned the child (R.C. 2151.414(E)(10)); (6) the mother's parental rights regarding three siblings were previously involuntarily terminated (R.C. 2151.414(E)(11)); (7) no evidence of the parents' unwillingness to provide food, clothing, shelter and other basic necessities for the child, or to prevent the child from suffering physical, emotional, or sexual abuse or neglect, other than as a result of being neglected[5] (R.C. 2151.414(E)(8)); and (8) the court lists other relevant factors such as "mother's ostensible comfort with occasional visitation as the extent of her commitment to meeting the needs of the child."

{¶36} Because the trial court had already found that C.P. was under the temporary custody of FCCS for 12 or more months of a consecutive 22-month period, it was unnecessary for the trial court to also analyze and apply the factors under R.C. 2151.414(E) in order to determine whether the child can or should be placed with either parent within a reasonable time, since only one of the four factors under R.C. 2151.414(B)(1) must be applicable, along with a best interest determination, in order to grant permanent custody to the agency. See *In re Damron*, 10th Dist. No. 03AP-419, 2003-Ohio-5810 (if the court has made a positive finding regarding the time spent in temporary custody with respect to R.C. 2151.414(B)(1)(d), it is not required to address R.C. 2151.414(B)(1)(a) or weigh the factors set forth under R.C. 2151.414(E)). Of course

---

[4] Although the trial court shall consider all relevant evidence under R.C. 2151.414(E), this is not an accurate application of one of the listed factors. It appears the trial court confused this circumstance as being akin to the factor set forth in R.C. 2151.414(E)(9), which references a parent who has placed the child at substantial risk of harm two or more times *due to drugs or alcohol* and who has rejected treatment two or more times after a case plan and dispositional order requiring treatment were journalized. There is no evidence in the record of that in the instant case. Additionally, there is no indication C.P. was placed at substantial risk of harm as a result.

[5] We point out that this child was never determined to be neglected. Instead, she was adjudicated as a dependent. Furthermore, there is no evidence in the record that mother "repeatedly withheld * * * food from the child when the parent has the means to provide [it][.]." R.C. 2151.414(E)(8).

the trial court could always make a finding in the alternative, but here it appears the trial court actually used the factors in R.C. 2151.414(E) to support its best-interest determination. This calls into question the sufficiency of the proof with respect to the court's conclusions.

{¶37} Again, we point out that these factors cited by the court go to the determination of whether the child could not or should not be returned to her mother within a reasonable time. With one exception, they are not statutorily applicable to the best interest determination. Although the trial court shall consider "all relevant factors," it is not evident that the trial court is doing that here. Instead, it is apparent the trial court has jumbled a variety of factors and applied all of them to its best interest of the child determination.

{¶38} Following the trial court's recitation and application of the factors set forth under R.C. 2151.414(E) regarding placement with a parent within a reasonable time, the trial court referenced the terms of the case plan, citing those it found mother failed to complete, and then determined that C.P. could not be placed with either parent within a reasonable time or should not be placed with either parent in the foreseeable future. The trial court then simply found a return to mother's home would not be in her best interests.

{¶39} In further analyzing the trial court's determinations, we look to the elements of the case plan and whether or not mother met those requirements. Pursuant to the case plan, the major objectives require mother to: (1) have no further incidents of domestic violence as either the victim or the aggressor and to attend domestic violence counseling; (2) attend parenting classes and demonstrate what she has learned, including improvement in her parenting skills; (3) maintain independent and suitable

housing with working utilities; (4) maintain employment and provide proof of employment; (5) attend counseling to help manage stress and deal with anger; (6) improve visitation.

{¶40} Mother contends that she has substantially complied with the objectives of the case plan. The testimony of the caseworker demonstrates the agency believes mother has complied with several of the components of the case plan. (Tr. 91-102, 106.)

{¶41} Mother submits that she has not been arrested as the aggressor in a domestic violence incident in several years. There was no evidence submitted to dispute this. Mother also testified she has eliminated the persons from her life who have victimized her in the past, including her former boyfriend, W.F., and her sister, E.P. By everyone's accounts, including that of the caseworker, the last domestic violence incident in which mother was involved as a victim was May of 2008, which was approximately six months prior to the permanent custody hearing. However, the caseworker testified that she would like to see mother continue to be domestic violence free after completion of counseling. (Tr. 118.) She also testified she had concerns that mother did not understand how domestic violence affects her children. (Tr. 125.)

{¶42} Mother produced evidence at trial that she had completed parenting classes and also testified to what she learned at those classes. The caseworker testified that she still had concerns about mother's parenting skills, but did admit that she had in fact seen some improvement in her parenting skills since mother's visitation had been increased from one to two hours per week. (Tr. 122-23.) She also admitted that mother had been more consistent in her visitation since the visitation hours had been increased. (Tr. 97.)

{¶43} Mother testified she had been employed as a shift supervisor at Tim Horton's for over one year. Although the FCCS caseworker testified that mother had

failed to provide proof of employment, mother appeared at the permanent custody hearing wearing her Tim Horton's uniform, and the caseworker admitted that she did believe that mother was employed. (Tr. 127.)

{¶44} Additionally, mother testified that, although she was terminated from counseling at Northwest Counseling, she did sign up for counseling at Family Focus and, at the time of the hearing, she had been attending for approximately three months. She argued her counseling was ongoing and not yet completed. FCCS acknowledged this, and the caseworker agreed that mother has made progress on completing her domestic violence counseling. (Tr. 117-18.) However, the FCCS caseworker testified that mother has previously attended counseling in the past for approximately three months before quitting. Additionally, she testified the agency would be relying upon "good reports" from the counseling agency to inform FCCS as to when it felt mother had completed counseling. (Tr. 117.)

{¶45} Regarding visitation, mother admitted to missing a significant number of visits, but testified that throughout the three or four month period prior to the permanent custody hearing, she had only missed two visits, one of which was due to pink eye and one of which was due to transportation problems. The agency did confirm this.

{¶46} With respect to the case plan, the trial court found that mother attended some visitation, approximately 55 of 103 weekly visits. The trial court also found mother did not complete parenting classes until July 20, 2008, and that she did not subsequently improve her parenting skills during visitation. The trial court further found mother did not successfully complete domestic violence and anger management counseling and that she had been terminated from counseling programs for lack of consistent attendance.

Additionally, the court found mother had failed to verify employment but that she had alleged employment for over a year. Finally, the trial court determined mother had established housing in February 2008.

{¶47} Based upon these findings, the trial court found by clear and convincing evidence that C.P. could not or should not be placed with mother within a reasonable time and that permanent custody to the agency was in C.P.'s best interest.

{¶48} Failure to successfully complete many of the significant elements of the case plan, despite several opportunities, is grounds for terminating parental rights. *In re Brofford* (1992), 83 Ohio App.3d 869, 878. Furthermore, mother's compliance with the case plan, or lack thereof, can go to determining whether she can be a permanent home for the child. *In re Brooks*, supra.

{¶49} Significantly, it is important to note that the Guardian ad Litem in this case, who has been the Guardian ad Litem for this family for the entire five-year period of the pendency of this case, recommended that permanent custody not be granted. The Guardian believed that mother had substantially complied with the requirements of the case plan. The Guardian ad Litem testified that mother's housing was appropriate, that she was now consistently attending visitation, that she had obtained stable employment, and that she was attending counseling. Specifically, the guardian opined:

> [S]he's been pretty much domestic violence free for about the past year. * * * I think that housing, by everyone's standards, is appropriate. I see her visitation schedule being somewhat consistent, and I see the counseling, while late and late getting started, absolutely, is she currently engaging in it, yes, the caseworker stated there was progress being made;[.]

(Tr. 12.)

{¶50} He further opined:

> I believe it is in [C.P.'s] best interest that we give mother additional time to continue working on the services. * * * [W]e're not looking at a mother who has drug and alcohol issues, we're not looking at a mother who has mental health issues that can't be worked on, we're looking at a mother who has not necessarily consistently engaged in services but has engaged in services throughout this case opening. I don't see it as so severe at this point to warrant a permanent custody.

(Tr. 17.)

{¶51} "Given the magnitude of a decision to permanently terminate parental rights, a decision granting permanent custody must indicate which statutes apply and which factors it has considered, and should reflect the court's careful and thorough analysis in reaching such a decision." *In the Matter of G.N.*, 170 Ohio App.3d 76, 2007-Ohio-126, ¶43.

{¶52} Here, we find the record contains competent, credible evidence upon which the trial court could have based its determination if it had properly applied all the relevant factors and articulated its reasoning. The trial court concluded under its present, flawed analysis that permanent custody to the agency was in the best interest of the child. However, given the evidence in the record, which contains evidence both in favor of and against permanent custody and which has been referenced above, there is also competent, credible evidence upon which the trial court could have concluded permanent custody was not in the child's best interest. As a reviewing court, we cannot substitute our judgment for that of the trial court. However, in the instant case, we are unable to determine which statutes and factors the court actually applied in making its best interest determination. It is unclear from the trial court's entry whether or not the trial court properly applied the process to be used in making this important determination.

{¶53} Given the court's confusion regarding the application of the statutory factors, we find the trial court's decision is not supported by sufficient evidence, findings or conclusions upon which the court could have formed a firm belief that the essential statutory elements had been met and that termination of mother's parental rights is in the child's best interest. For the foregoing reasons, we vacate the judgment and remand this matter for the trial court to properly identify and apply the correct statutory factors, including all of the relevant best-interest factors, and to also articulate the reasons for its determinations.

{¶54} Although the judgment of the trial court is vacated based upon the first assignment of error, we shall briefly address appellant's remaining assignments of error.

{¶55} In her second assignment of error, appellant asserts that she was deprived of her right to the effective assistance of counsel. Mother argues her counsel failed to object to various statements by the caseworker which constituted inadmissible hearsay and statements of which she had no personal knowledge. She also argues her counsel failed to present evidence of her financial stability and failed to present the testimony of various witnesses. Appellant contends there is a reasonable probability that, were it not for counsel's deficient performance, the outcome would have been different. We disagree.

{¶56} Parents who are parties in proceedings involving the termination of parental rights are entitled to the effective assistance of counsel. The right to counsel includes the right to effective assistance of counsel. *In re Brooks*, supra.

{¶57} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective

assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶58} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to succeed on her claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, she must demonstrate that her trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This requires a showing that her counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. If she can show deficient performance, she must next demonstrate that there exists a reasonable probability that, but for her counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶59} Appellant cannot make such a showing here with respect to the alleged inadmissible hearsay and/or statements lacking in personal knowledge. First, appellant has not demonstrated that counsel's failure to object to various portions of testimony was error. Second, even if it was, she cannot demonstrate prejudice.

{¶60} Assuming, arguendo, that the testimony is hearsay, much of the testimony to which appellant has directed our attention was also corroborated by appellant through her own testimony. For example, appellant admitted in her testimony that she had been terminated from counseling with Northwest. She also admitted she had initiated counseling with Family Focus. Furthermore, appellant had discussions regarding her termination from counseling with the caseworker, thereby making such information admissible. As another example, appellant also testified about the two most recent incidents of domestic violence involving her boyfriend and her sister, whereby she was the victim in both incidents. Thus, there is no prejudice here.

{¶61} As to the caseworker's opinion that C.P. is not bonded to mother, such testimony is admissible as a lay witness opinion under Evid. R. 701. *In re Jenkins* (June 28, 2001), 10th Dist. No. 00AP-1411. Furthermore, the caseworker's testimony with respect to visits that occurred beginning in August 2007 is not hearsay, as she became the caseworker at that point in time and was responsible for tracking mother's visitation schedule.

{¶62} Finally, as to the caseworker's testimony regarding events that occurred prior to her August 2007 involvement with the family, such as the family history, those facts were previously found and adjudicated in the prior permanent custody hearing involving the three older siblings. Furthermore, mother herself testified about much of the factual background and family history at issue here regarding the removal of her older children. Counsel's failure to object to this testimony from the caseworker was not error or prejudicial.

{¶63} Appellant also alleges counsel's failure to produce physical evidence of mother's financial stability is evidence of ineffective assistance of counsel. However, appellant has not demonstrated that this conduct was deficient. There has been no showing that pay stubs or other such physical evidence actually exists. Furthermore, mother's employment was only a secondary issue in this proceeding and was not seriously at issue since the caseworker admitted that she believed mother was in fact employed. Given this, appellant cannot show error or prejudice here.

{¶64} Finally, with respect to appellant's claim that counsel was deficient in failing to present testimony from her counselor and family, appellant has failed to produce anything to demonstrate that such testimony would have been favorable. Appellant is merely speculating that it would be positive testimony. Additionally, a decision involving the witnesses to be called at trial is a tactical or strategic decision, which typically does not result in an ineffective assistance of counsel claim. Appellant has not produced anything which would lead us to find otherwise.

{¶65} Based upon the foregoing, appellant has failed to demonstrate that her counsel was deficient and that she was prejudiced by such deficiency. Accordingly, appellant's second assignment of error is overruled.

{¶66} In her third assignment of error, appellant asserts the trial court's reliance upon the caseworker's testimony regarding the contents of various reports was plain error. We find this assignment of error was not timely raised. Appellant failed to raise this assignment of error in her original brief and only raised it for the first time in her reply brief. See *Hanlin-Rainaldi Constr. Corp. v. Jeepers!, Inc.*, 10th Dist. No. 03AP-851, 2004-Ohio-6250, ¶22 ("A reply brief may not raise new assignments, which were omitted from

appellant's original brief, especially where leave to file a new assignment was not sought from this court."). Therefore, we shall not address the merits of this argument and we overrule the third assignment of error.

{¶67} Accordingly, appellant's second and third assignments of error are overruled. Appellant's first assignment of error is sustained, and the judgment of the Franklin County Common Pleas Court, Division of Domestic Relations, Juvenile Branch is vacated, and this matter is remanded to that court for further proceedings, consistent with this decision.

Judgment vacated; cause remanded.

FRENCH, P.J., concurs in judgment only.
SADLER, J., concurs separately.

SADLER, J., concurring separately.

{¶68} I respectfully concur *in judgment only* with respect to the first assignment of error, and I concur in full with the resolutions of the second and third assignments of error. I concur in the judgment of reversal because I agree that the trial court did not clearly indicate whether it considered all of the best-interest factors – and only those factors – in conducting its best-interest analysis pursuant to R.C. 2151.414(D)(1).