[Cite as *In re A.G.*, 2017-Ohio-6892.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105254

IN RE: A.G., ET AL.

[Appeal by M.G., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 15913872, AD 15913873, and AD 15913874

BEFORE: McCormack, P.J., Stewart, J., and Jones, J.

RELEASED AND JOURNALIZED: July 20, 2017

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TIM McCORMACK, P.J.:

{¶1} Appellant M.G. ("Mother") appeals from the juvenile court's decision terminating her parental rights and awarding permanent custody of her minor children, A.G., M.K., and J.G., to the Cuyahoga County Division of Children and Family Services ("CCDCFS" or "agency"). After a thorough review of the record and applicable law, we affirm the juvenile court's decision.

Procedural History and Substantive Facts

{¶2} In October 2015, the CCDCFS filed a complaint alleging that siblings A.G., M.K., and J.G. (9, 8, and 3 years of age, respectively, at the time the complaint was filed) were abused and dependent, and the agency sought permanent custody of the minor children.[1] The complaint stemmed from an incident of domestic violence in the home, during which the children's father, W.K. ("Father"), "grabbed, shook, and threw" A.G. into large stereo speakers. A.G. hit her head on the speakers, and her glasses were broken. Mother and Father then engaged in a physical altercation while the children were home. Father was arrested and charged with domestic violence and child

[1] At the time of this incident, Mother and Father had another minor child, who was not in the home at the time of the October 2015 incident. This child was previously adjudicated abused and neglected and was in the temporary custody of the agency. When this matter came on for a dispositional hearing concerning A.G., M.K., and J.G., the agency also moved for this fourth child's temporary custody to be modified to permanent custody, and the court heard the matters together. As a result of the hearing, the court granted the agency's motion concerning the fourth child and awarded permanent custody of the child to the agency. This appeal, however, concerns the trial court's decision as it related to A.G., M.K., and J.G., not the fourth child. We therefore only address the issues as they relate to the three named children subject to this appeal.

endangering, and, the arrest ultimately resulted in a conviction. The court ordered the children into the emergency custody of the agency.

{¶3} In July 2016, the court held a hearing on adjudication, for which Mother was present. At this time, Mother, who was represented by counsel, stipulated to an amended complaint and the court found Mother's admission to be knowing, intelligent, and voluntary. The agency presented the testimony of the social worker in this matter, Antoinette Willis, who testified regarding the children's prior involvement with the agency, specifically noting they were in protective supervision and/or temporary agency custody, dating back to May 2014. Willis indicated that all three of the children had been previously adjudicated neglected and all three of the children were at some time in the temporary custody of the agency, and the agency submitted evidence of the adjudications. Willis also testified regarding Father's conviction for two counts of domestic violence, and the agency submitted as evidence the journal entry of Father's conviction. Thereafter, the court found the children to be abused and dependent.

{¶4} In September 2016, the court held a dispositional hearing on the agency's motion for permanent custody. Willis again testified on behalf of the agency, explaining the extensive history of the agency's involvement with the children: Initially, in 2014, A.G. and M.K. were placed in protective supervision due to educational neglect. Upon receiving the case, the agency became aware that both girls were raped in 2013 by Father's best friend while this friend lived in their home. Willis stated that Father and Mother purportedly permitted the friend to share a bedroom with A.G. and M.K.

{¶5} Later in 2014, an incident occurred in the home wherein another of the children (who is not a subject of this appeal) was severely burned due to the lack of supervision from the parents. At this time, all of the children were removed from the home. A.G.'s and M.K.'s protective supervision was modified to temporary custody, and J.G. was also committed to the emergency temporary custody of the agency. J.G. was then adjudicated neglected.

{¶6} Willis testified that a case plan was developed with the goal of reunification with the parents. The case plan included parenting and basic needs classes, domestic violence services, supportive services, and counseling for the parents and the children. The family completed Family Preservation Services, Mother was engaging in counseling services, and the girls (A.G. and M.K.) were receiving counseling on trauma focus, because of their history of rape, and cognitive behavioral therapy. Additionally, because of Father's extensive history of domestic violence, Father attended anger management classes and Mother attend the domestic violence education classes. Willis stated that the agency continually worked with the family to also ensure that the girls received the requisite counseling. In February 2015, the children were returned to the parents with protective supervision.

{¶7} Willis testified that in July 2015, new concerns arose concerning domestic violence and physical abuse in the home. The children had reported that they were being "whooped with a race track," their parents were hitting each other and throwing objects, the girls were being forced to clean the house before they could eat, and the

children were forced to stand in a corner for extended periods of time. Willis testified that she requested protective services be extended for a little bit longer, in hopes that the Mother and the girls would begin to benefit from the counseling services and Father would have no substance abuse concerns. However, in October 2015, the incident of domestic violence that was the impetus for the complaint in this present matter occurred, wherein Father threw A.G. into the speakers, causing A.G. to hit her head and her glasses to break.

{¶8} Willis testified that as a result of the October incident, the children were returned to emergency custody with the agency, and case plan services were provided for the family to address the new concerns. Willis stated that Mother's case plan objectives included continuing with her counseling services and maintaining the basic needs and counseling for the children. Father's case plan included substance abuse counseling, basic needs, and employment assistance, and domestic violence counseling. Willis testified that Father has not progressed on his case plan, he has not completed any further services since the children were returned to the agency, he has not visited the children since before July 2016, and his whereabouts are "questionable."

{¶9} Willis testified that she has many concerns regarding Mother. First, she stated that Mother and Father have not resolved their relationship issues, she believes the domestic violence will continue, she stated that the children are fearful of Father and have not felt safe when he has visited, she does not believe Mother would utilize a safe sight

for visitation with Father, and she believes that if Father does not get the help he needs, matters will worsen for the children.

{¶10} When asked about Mother's progress on her case plan, Willis noted there was a "long delay" in Mother engaging in domestic violence counseling. Additionally, Willis testified that Mother's "decision-making" on behalf of the children "has not been very sound." Willis explained that Mother's home has been "a revolving door" with people, mostly males, coming and going through the home. Mother has engaged in relationships that do not promote a healthy environment for the children. Namely, after Father had been arrested, Mother became involved in a relationship with a registered sexual offender. Willis relayed an incident during a "pop-up" visit where this new boyfriend caused A.G. to become visibly upset to the point that A.G. needed to be removed from the visit. Willis stated that although Mother indicated she would end this relationship, there is evidence that someone else is in the home with Mother, such as the scent of marijuana and cigarettes in the ashtray. Willis also stated that Mother was aware that her new boyfriend was a sexual offender and she attempted to defend him.

{¶11} Willis testified that Mother has not been visiting M.K., who resides in a residential treatment center. When M.K. resided at Beech Brook, from February 2016 until June 2016, Mother visited M.K. only once, in April, upon the insistence of Willis and the guardian ad litem. When Beech Brook closed, M.K. was transferred to Guidestone in June 2016. Willis stated that despite the plan for weekly visitation and

the agency providing Mother with the means to access paratransit bus service, Mother had never visited M.K. at Guidestone.

{¶12} Willis testified that both A.G. and M.K. have stated that they would like to return home to their mother. However, A.G. has also expressed her concerns about being returned to her mother. Specifically, A.G. told Willis that she knows that even if they get to go home, "they will be back in the system because nothing will ever change between mom and dad." A.G. indicated that she loves her parents, but she is afraid of what might happen with Mother and Father at home together. A.G. also expressed frustration in being the one responsible for her siblings.

{¶13} Finally, Willis testified that Mother repeatedly becomes involved in abusive relationships. She explained that prior to this case, Mother lost permanent custody of another child due to the domestic violence issues in her relationship with that child's father.[2] Willis therefore believes that permanent custody with the agency is in the children's best interests.

{¶14} Jean A. Homrighausen, a therapist from Beech Brook who worked with M.K. and continues to work with A.G., testified regarding the children's treatment. Both children have been diagnosed with post-traumatic stress disorder and are being treated with medication. Homrighausen stated that M.K. endured a lot of trauma in her home, including domestic violence between Mother and Father and sexual abuse by an "uncle." M.K. suffered from extreme bedwetting and uresis and she would have long,

[2] This child to which Willis refers is Mother's oldest child and is not a part of this appeal.

raging outbursts and become "disassociative." M.K. told Homrighausen that she was always afraid because of the "screaming and hair-pulling and yelling and cursing and the police," and she could not sleep at night because of her fear. Homrighausen worked with M.K. on how M.K. could feel safe, how to manage her anger, and how to be truthful and stop blaming herself for what was happening in the home.

{¶15} Homrighausen noted similar concerns regarding A.G. She stated that although A.G. is not as explosive or subject to violent outbursts like her sister, A.G. is very manipulative and stubborn, she becomes very confused, and she blames herself "for everything." Homrighausen attributed this behavior to the trauma A.G. suffered. A.G. also witnessed violence in the home between her parents. A.G. did not feel safe in the home, and she believed it was her job to protect her siblings from the violence. Homrighausen stated that she worked with A.G. on reassuring her, working on her anger management, feeling safe, being able to share, and not feeling at fault all the time.

{¶16} Homrighausen testified that the girls would appear to make progress in therapy, but they would regress after having contact — either on the phone or in visitations — with a parent. Homrighausen stated that because the girls suffered "extensive and lengthy" trauma, they would need continued therapy, with M.K.'s treatment being more extensive because "her behaviors are much more severe."

{¶17} Finally, Melanie R. Giamaria, guardian ad litem ("GAL") for the children, testified that although she initially recommended continued temporary custody for A.G., M.K., and J.G., she now believes that permanent custody is in the best interest of the

children. She attributes this change to the fact that Mother was not visiting M.K. at Guidestone and this nonvisitation was a repeat of Mother's not visiting M.K. at Beech Brook. Giamaria testified that she was very concerned that Mother was not visiting with M.K. and encouraging her progress, stating that M.K. is a very unhealthy child and she believed that "if something doesn't change," M.K.'s condition will worsen. Giamaria also testified that although the girls expressed a desire to return to their mother because they love her, the girls also did not believe they would feel safe with Mother or that Mother would make choices that would keep them safe.

{¶18} After the hearing, the trial court granted the agency's motion for permanent custody. The court found clear and convincing evidence that the children cannot be placed with one of the parents within a reasonable time or should not be placed with either parent.

{¶19} The court found that, under R.C. 2151.414, several factors existed in support of its determination:

> (E)(1) Following the placement of the children outside the children'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 children to be placed outside the home, the parents have failed continuously and repeatedly to substantially remedy the conditions causing the children to be placed outside the home.
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> (E)(4) The parents have demonstrated a lack of commitment toward the children by failing to regularly support, visit, or communicate with the children when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the children.
>
> (E)(10) The Father has abandoned the children.

> (E)(14) & (15) The parent for any reason is unwilling...to prevent the children from suffering physical, emotional, or sexual abuse or physical, emotional, or [mental] neglect. The parent has committed abuse against the child or allowed the child to suffer neglect, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.
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> [F]ather was convicted of felony domestic violence against A.G. after she was reunified the first time. [F]ather was convicted of domestic violence against [M]other. His whereabouts are presently unknown. The testimony was that the children were "terrified" of [Father].
>
> [M]other has been and may still be in a relationship with a convicted sex offender. She knew he was a convicted sex offender. She knew that both of her daughters were raped by their father's friend while he was living with them and sleeping in their room. The man is now in prison for these crimes. She knew or should know that her daughters have suffered tremendously * * * from these rapes. And yet she brought another sex offender to a visit. At the visit, the man sat down next to A.G., who became so upset that she had to be removed. At this same visit, [M]other told A.G. that what happened to M.K. was A.G.'s fault.

{¶20} The trial court also found the "extensive emotional special needs" of M.K. relevant to its consideration of permanent custody:

> At the time of trial, M.K. was a resident of Ohio Guidestone. One witness testified that because of the sexual abuse she suffered at the hands of a man who was living with her parents, who she was instructed to call "uncle," and because of the way her parents handled that abuse, she is now so out of touch with her own body that she suffers urinary incontinence and sometimes wears pull-ups. She is nine years old.

> At the age of nine, M.K. has been in 13 different placements in less than a year. Two of those placements were/are long term residential care [facilities] — which is a last resort for any child by law. She was in Beech Brook from February 2016 until June 2016 when Beech Brook closed its residential treatment facility. Therefore, she has been in 11 different placements in approximately six months because she has so many issues with rage and violence. Her former therapist testified that her mental health issues are so severe that it would take a motivated family at least a year to learn from treatment providers how to manage those issues. [F]ather is entirely absent and based on [M]other's lack of visitation while M.K. was and is in residential treatment, there is clear and convincing evidence that it is not in M.K.'s interest to be reunified now and that she cannot be reunified within a reasonable period of time.

{¶21} The court further found that permanent custody is in the children's best interests. In so finding, the court noted that it considered the interaction and interrelationship of the children with their parents, siblings, relatives, and foster parents; the wishes of the children; the custodial history of the children; the children's need for a legally secure permanent placement; and whether any other statutory factors applied. The court also noted that the guardian ad litem's recommendation of permanent custody was a significant factor in its decision granting permanent custody. Finally, the court noted that it considered the fact that A.G. has been in the same foster home since

November 2013 and is bonded to her foster mother, and J.G. has been in the same foster home since his first removal.

{¶22} Before terminating the emergency temporary custody and committing the children to the permanent custody of the CCDCFS for the purposes of adoption, the trial court noted as follows:

> The testimony in this case and the GAL reports over the course of both removals establish a heart breaking pattern of physical, sexual, and emotional abuse and neglect. It's overwhelming. The conditions causing removal have not been remedied and the failure to remedy those conditions is evidence of a lack of commitment and an unwillingness to provide an adequate permanent home for these children. Enough is enough.

{¶23} Mother now appeals the decision of the trial court, assigning three errors for our review.

Assignments of Error

> I. The trial court committed error when it proceeded with the permanent custody hearing without complying with 25 U.S.C. 1912.
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> II. The trial court committed error when it terminated [Mother's] parental rights and granted permanent custody to CCDCFS.
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> III. [Mother] was denied her right to effective assistance of counsel guaranteed to her by [R.C.] 2151.352 and [Juv.R.] 4.

Indian Child Welfare Act

{¶24} In her first assignment of error, Mother contends that the trial court erred when it failed to comply with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. 1912. Specifically, Mother argues that the trial court failed to inquire, at any of the seven

hearings, whether Father or Mother had any Native American ancestry, and therefore, it violated the ICWA.

{¶25} The ICWA was enacted due to the "special relationship" between the United States and the Indian tribes and their members and in response to the "alarmingly high percentage" of Native American children who were being removed from their homes by nontribunal agencies and placed in non-Native American foster or adoptive homes. *See* 25 U.S.C. 1901. The Act established procedural safeguards in child custody proceedings where the subject child is a child of Native American descent. *In re N.H.*, 8th Dist. Cuyahoga No. 103574, 2016-Ohio-1547, ¶ 10.

{¶26} A tribe has exclusive jurisdiction over child custody proceedings in situations in which the Native American child resides or is domiciled within its reservation. 25 U.S.C. 1911(a). Where the subject child does not reside on a reservation, however, child custody proceedings may be initiated in a state court. 25 U.S.C. 1911(b). In that case, the state court, "in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe." *Id.* Where the court knows, or has reason to know, in "any involuntary [child custody] proceeding in a state court," that an Indian child is involved, "the party seeking * * * termination of parental rights to [] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe * * * of the pending proceedings and of their right of intervention." 25 U.S.C. 1912(a).

{¶27} To invoke the provisions of the ICWA, there must be a preliminary showing that a custody proceeding involves a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. *In re N.H.* at ¶ 12; 25 U.S.C. 1903(4)(defining an "Indian child"). The party who asserts the applicability of the ICWA therefore bears the burden of proving that a child meets the definition of an "Indian child." *In re N.H.* In order to meet this burden, the party asserting the applicability of the Act must do more than raise the mere possibility that the subject child has Native American ancestry as defined in the statute. *Id.*, citing *In re B.S.*, 184 Ohio App.3d 463, 2009-Ohio-5497, 921 N.E.2d 320 (8th Dist.); *In re D.S.*, 8th Dist. Cuyahoga No. 101906, 2015-Ohio-2042 (finding noteworthy the fact that Father failed to present any evidence suggesting the child is of Native American descent or that the parent belongs to an Indian tribe).

{¶28} This court has held that where the parties have been provided several opportunities, through various hearings, to assert the applicability of the ICWA and fail to do so, the trial court does not err by proceeding with the permanent custody hearing, because the ICWA was inapplicable. *In re N.H.*, 8th Dist. Cuyahoga No. 103574, 2016-Ohio-1547, at ¶ 18 (finding no error where neither the parent nor her counsel raised the issue of ancestry at any of the hearings); *see also In re: A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 42 (finding no error where the court inquired of the child's ancestry in the presence of the parents and neither parent indicated the ICWA applied).

{¶29} Here, the trial court specifically asked the social worker Willis at the emergency custody hearing in October 2015, if any of the children had Native American ancestry. Willis replied, "To our knowledge, no." Mother, who was present at the hearing and represented by counsel, did not voice any objection or offer a correction to this statement or submit additional information. Nor did she request a transfer to a tribal court. Then, at the conclusion of the hearing, the trial court found "no Native American ancestry that we are aware of in this matter." Once again, Mother did not challenge the court's statement or offer a suggestion or information on the children's ancestry.

{¶30} Also, Mother and Father had several additional opportunities to assert that the children are "Indian" children under the Act. In December 2015, Mother and Father, who were both present and represented by counsel, were arraigned on the complaint. At this time, the court reviewed the parents' rights and both parents indicated that they understood the allegations and their rights. Neither parent asserted during the hearing that any of the children had Native American ancestry, either on their own or through counsel. At the adjudicatory hearing in July 2016, Mother, Mother's counsel, and Father's counsel were present, and once again, no one asserted that the ICWA applied. Finally, Mother, Mother's counsel, and Father's counsel were present for the dispositional hearing in September 2016. At no time during this hearing did Mother inform the court that her children had Native American ancestry.

{¶31} Moreover, despite raising the issue as an assigned error on appeal, Mother fails to make any allegation, on appeal, of Native American ancestry or identify any of the

children as an "Indian child" under the Act. *See In re: A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, ¶ 43 (finding noteworthy the fact that the appellant fails to allege Native American ancestry on appeal).

{¶32} Mother asserts on appeal that the court was duty-bound to inquire of the parents concerning the children's ancestry, and she cites to *In re. R.G.*, 8th Dist. Cuyahoga No. 104434, 2016-Ohio-7897, in support. In that case, outside the presence of the parents, the court made an ICWA inquiry of the CCDCFS case manager, who purportedly had no knowledge of the children's ancestry. In finding the trial court was obligated to inquire of the parents regarding the children's ancestry, this court determined that the ICWA inquiry should be addressed to "either of the relevant parties with actual knowledge of [the child's] ancestry." *Id.* at ¶ 18. Relevant to the court's decision in *In re R.G.* was the fact that neither parent was in court when the court made the inquiry. Here, however, the inquiry regarding the children's ancestry was made at the initial hearing in October 2015 in the presence of Mother and Mother's counsel, and neither Mother nor her counsel interjected.

{¶33} In light of the foregoing, we find that Mother fails to meet her burden regarding the applicability of the ICWA. Her first assignment of error is overruled.

Permanent Custody

{¶34} In her second assignment of error, Mother argues that the decision to award permanent custody to the CCDCFS was in error. Mother essentially contends that the

court's order resulted from Father's continued domestic violence abuse rather than "anything that M.G. did."

{¶35} We note, initially, that parents have a constitutionally protected interest in raising their children. *In re M.J.M.*, 8th Dist. Cuyahoga No. 94130, 2010-Ohio-1674, ¶ 15, citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). That interest, however, is "'always subject to the ultimate welfare of the child.'" *Id.*, quoting *In re B.L.*, 10th Dist. Franklin No. 04AP-1108, 2005-Ohio-1151, ¶ 7.

{¶36} R.C. 2151.414 sets forth a two-prong analysis to be applied by a juvenile court in adjudicating a motion for permanent custody. R.C. 2151.414(B). First, it authorizes the juvenile court to grant permanent custody of a child to the public agency if, after a hearing, the court determines, by clear and convincing evidence, that any of the four factors apply: (a) the child is not abandoned or orphaned, but the child cannot be placed with either parent within a reasonable time or should not be placed with the child's parents; (b) the child is abandoned; (c) the child is orphaned, and there are no relatives of the child who are able to take permanent custody; or (d) the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for 12 or more months of a consecutive 22-month period. R.C. 2151.414(B)(1)(a)-(d); *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, ¶ 41.

{¶37} The trial court in this case determined that the children cannot be placed with either parent within a reasonable time or should not be placed with the children's parents, in accordance with R.C. 2151.414(B)(1)(a). In the event that the trial court

makes such a determination, the court must consider the factors outlined in R.C. 2151.414(E). *In re R.M.*, 8th Dist. Cuyahoga Nos. 98065 and 98066, 2012-Ohio-4290, ¶ 14. The presence of only one factor will support the court's finding that the child cannot be reunified with a parent within a reasonable time. *Id.*

{¶38} The relevant factors a court considers include, but are not limited to, the following:

> (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;
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> * * *
>
> (4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;
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> * * *
>
> (10) The parent has abandoned the child;
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> * * *
>
> (14) The parent for any reason is unwilling 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 physical, emotional, or mental neglect;

> (15) The parent has committed abuse * * * against the child or caused or allowed the child to suffer neglect * * *, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety; and
>
> (16) Any other factor the court considers relevant.

R.C. 2151.414(E).

{¶39} Regarding the first factor, substantial compliance with a case plan is not dispositive in and of itself on the issue of reunification and does not preclude a grant of permanent custody to a social services agency. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 139. "'The issue is not whether the parent has substantially complied with the case plan, but whether the parent has substantially remedied the conditions that caused the child's removal.'" *Id.*, quoting *In re McKenzie*, 9th Dist. Wayne No. 95CA0015, 1995 Ohio App. LEXIS 4618 (Oct. 18, 1995).

{¶40} The second prong of the two-part permanent custody analysis provides that if the court finds that one of the four conditions set forth in R.C. 2151.414(B)(1) applies, the court must determine, by clear and convincing evidence, whether permanent custody is in the best interest of the child. *In re E.C.*, 8th Dist. Cuyahoga No. 103968, 2016-Ohio-4870, ¶ 29.

{¶41} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D)(1) mandates that the juvenile court consider all relevant factors, including the following:

> (a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;
>
> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
>
> (c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period * * *;
>
> (d) 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 * * *.
>
> (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

{¶42} Only one of the factors enumerated in R.C. 2151.414(D) needs to be resolved in favor of the award of permanent custody in order for the court to terminate parental rights. *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 53; *In re Z.T.*, 8th Dist. Cuyahoga No. 88009, 2007-Ohio-827, ¶ 56.

{¶43} Regarding this court's review on appeal, we are cognizant that a juvenile court's termination of parental rights and award of permanent custody to an agency is not reversed unless the judgment is not supported by clear and convincing evidence. *In re J.G.*, 8th Dist. Cuyahoga No. 100681, 2014-Ohio-2652, at ¶ 47; *In re: Dylan C.*, 121 Ohio App.3d 115, 121, 699 N.E.2d 107 (6th Dist.1997). "Clear and convincing evidence" is evidence that "'will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *In re R.M.*, 8th Dist. Cuyahoga Nos. 98065 and 98066, 2012-Ohio-4290, at ¶ 12, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477,

120 N.E.2d 118 (1954). The evidence must be more than a preponderance, but it does not rise to the level of certainty that is required beyond a reasonable doubt in criminal cases. *Cross*.

{¶44} Here, the evidence shows that Mother has failed continuously and repeatedly to substantially remedy the conditions causing the children to be removed from the home. Mother has demonstrated a lack of commitment to the children and an unwillingness to provide an adequate permanent home for them.

{¶45} The children were initially removed from the home due to a domestic violence incident involving Father, in which Father "grabbed, shook, and threw" A.G. into large stereo speakers. At that time, Father and Mother engaged in a physical altercation while the children were home. As a result, Father was convicted of domestic violence against Mother and A.G. Although Father has abandoned his children and may no longer pose a threat to them, Mother continues to engage in behavior that presents opportunities of abuse toward her children. Despite Mother's knowledge that her daughters had been raped by a family friend, Mother knowingly engaged in a relationship with a convicted sex offender and brought this person into her home. The record shows that A.G. became so upset by this man's company during a scheduled visit that she had to be removed from the group. As the trial court notes, Mother knew or should have known that her daughters had "suffered tremendously" from the prior rapes. In fact, M.K. has been in a residential treatment facility due to the extreme trauma she has suffered, and both girls are receiving therapy.

{¶46} Additionally, Mother has demonstrated a lack of commitment toward her children by failing to regularly visit with them. As the record shows, Mother failed to visit M.K. at Beech Brook until the GAL insisted she do so, and after M.K. moved to Guidestone, Mother stopped visiting entirely.

{¶47} Finally, the record shows that M.K. suffers from extensive emotional special needs. Due to the sexual abuse she suffered from the family friend, and because of the manner in which her parents handled the abuse, M.K., who was 8 years old at the time the complaint was filed, suffers urinary incontinence. She has been in 13 different placements in less than one year, and two of those placements have been residential treatment facilities, which are considered treatments of last resort for any child. The evidence shows that M.K.'s mental health issues are extensive.

{¶48} Based on the trial testimony, we find there was clear and convincing evidence to support the trial court's determination under R.C. 2151.414(E) that the children cannot be placed with Mother within a reasonable period of time. Despite reasonable case planning and diligent efforts by the agency, Mother has failed to remedy the conditions that caused the children to be placed outside the home. Additionally, Mother has demonstrated a lack of commitment toward the children, an unwillingness to provide an adequate home for the children, and an unwillingness to prevent the children from continuing to suffer abuse.

{¶49} Regarding the second prong of the analysis — the best interest of the children, the trial court considered the following: the interaction and interrelationship of

the children with their parents, siblings, relatives, and foster parents; the wishes of the children; the custodial history of the children; and the children's need for a legally secure permanent placement. The court also noted that the GAL's recommendation of permanent custody was a significant factor in its decision granting permanent custody.

{¶50} The evidence establishes that the children have been removed from the home on more than one occasion. At different times over the past couple of years, the children were under protective supervision and/or temporary custody. J.G. was committed to the temporary custody of the agency and adjudicated neglected. He has been in the same foster home since his initial removal. A.G. has been in the same foster home since 2013 and she has bonded with her foster mother. And as previously noted, M.K. has been in 13 different placements in less than one year, including two residential treatment facilities.

{¶51} The evidence also shows that although the children love their mother and purportedly enjoy their visits with her, Mother has failed to visit with at least one of the children. Moreover, the therapist testified that the girls would appear to make progress during therapy, but they would regress after having contact — either on the phone or in person — with a parent.

{¶52} The record also shows that although the children have expressed a desire to return home with their mother, they have also expressed concerns about living with her. Specifically, A.G. has stated that even if they are returned to Mother, she believes that nothing will change with her mother and they will always be "in the system." The GAL

testified that the girls do not believe they will be safe with Mother or that Mother would make choices that would keep them safe. In fact, the social worker testified that Mother has engaged in relationships that do not promote a healthy environment for the children, and Mother's home has become a "revolving door" for "mostly males" coming to her home. Finally, the GAL testified that since learning that Mother has failed to visit with M.K., she has recommended permanent placement of the children with the agency, stating, specifically, that if something does not change soon, M.K.'s already severe condition will worsen.

{¶53} In light of the foregoing, we find that the court considered the relevant statutory factors. We further find that clear and convincing evidence in the record supports the trial court's determination that permanent custody to the agency is in the children's best interest.

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

Ineffective Assistance

{¶55} In her third assignment of error, Mother contends that she was denied the effective assistance of counsel guaranteed by R.C. 2151.352 and Juv.R. 4. In support, she argues that trial counsel "did nothing in defense of the allegations" and allowed Mother to stipulate to the amended complaint. Mother further argues that trial counsel failed to offer witnesses or present evidence at the adjudication and dispositional hearings. Finally, Mother alleges that trial counsel proceeded with a plea prior to receiving responses to Mother's discovery request.

{¶56} An indigent parent is entitled to the effective assistance of appointed counsel when the state seeks to terminate her parental rights. *In re A.C.*, 8th Dist. Cuyahoga No. 99057, 2013-Ohio-1802, at ¶ 45. "'[T]he test for ineffective assistance of counsel used in criminal cases is equally applicable in actions seeking to force the permanent, involuntary termination of parental' rights." *Id.*, quoting *In re P.M.*, 179 Ohio App.3d 413, 2008-Ohio-6041, 902 N.E.2d 74, ¶ 15 (2d Dist).

{¶57} To establish a claim of ineffective assistance of counsel, Mother must show that her trial counsel's performance was deficient in some aspect of her representation and that deficiency prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶58} Counsel's performance will be considered deficient only when that performance falls below an objective standard of reasonableness. *Strickland* at 688. Under *Strickland*, our scrutiny of an attorney's representation must be highly deferential and we must indulge "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 689. Mother must therefore overcome the presumption that the challenged action is sound trial strategy. *Id.* Trial strategy does not constitute ineffective assistance of counsel. *State v. Benitez*, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334, ¶ 31, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 111.

{¶59} To show prejudice, the appellant must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 12. A "reasonable probability" is "probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland* at 694.

{¶60} Mother argues that trial counsel "did nothing in defense of the allegations." Yet, she concedes that counsel effectively negotiated amendments to two allegations in the complaint. For example, in Allegation No. 5, the statement regarding an "extensive history" of engaging in domestic violence was changed to read "history" of engaging in domestic violence, thus deleting the reference to "extensive." Also, that allegation was amended to include the fact that "Mother has indicated that she has re-engaged in services." Additionally, Allegation No. 6 was amended by removing "Mother" from the allegation of the use of inappropriate punishment as a form of discipline. Mother fails to show how trial counsel's performance as it related to the amended complaint was deficient.

{¶61} Mother also argues that trial counsel failed to offer witnesses or present evidence at the adjudication and dispositional hearing. First, this court will not second guess counsel's decision to call witnesses on Mother's behalf. Failing to call witnesses is a common trial tactic and does not necessarily constituted ineffective assistance of counsel. *State v. Duncan*, 8th Dist. Cuyahoga No. 99665, 2013-Ohio-5746, ¶ 10. Second, Mother fails to identify on appeal what witnesses or evidence could have been

presented or how the witness testimony or the evidence would have assisted in her defense.

{¶62} Finally, Mother contends that trial counsel proceeded with a plea prior to receiving responses to Mother's discovery request. The record, however, indicates that the agency filed discovery responses on two occasions before the July 7, 2016 adjudication hearing — on December 29, 2015, and July 1, 2016. The record also demonstrates that the agency supplemented its discovery with continued responses on August 3 and August 10, well before the dispositional hearing of September 21, 2016.

{¶63} In light of the foregoing, and because Mother fails to identify how the purported deficiencies prejudiced her or how the result of the permanent custody hearing would have been any different absent these alleged deficiencies, Mother's final assignment of error is overruled.

{¶64} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the juvenile court to carry this judgment into execution.

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

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TIM McCORMACK, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, SR., J., CONCUR