[Cite as *In re K.M.*, 2017-Ohio-1336.]

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

IN THE MATTER OF:	:	
K.M., K.H., JR., AND J.H.,	:	Case No. 16CA17 16CA18 16CA19
Adjudicated Dependent Children.	:	DECISION AND JUDGMENT ENTRY
	:	

APPEARANCES:

Lori Pritchard Hardin, Circleville, Ohio, for Appellant.

Kendra Kinney-Liebherr, Circleville, Ohio, for Appellee.

CIVIL CASE FROM COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 3-30-17
ABELE, J.

{¶ 1} This is a consolidated appeal from three Pickaway County Common Pleas Court, Juvenile Division, judgments that granted Pickaway County Job and Family Services Board (PCJFS), appellee herein, permanent custody of seven-year-old K.M., six-year-old J.H., and two-year–old K.H., Jr. A.H., the children's biological mother and appellant herein,[1] raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE LOWER COURT'S DECISION GRANTING

[1] Neither K.M.'s father (J.W.) nor K.H., Jr. and J.H.'s father (K.H.) appealed the trial court's judgments.

PERMANENT CUSTODY TO THE PICKAWAY COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND WAS, THEREFORE, RENDERED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

SECOND ASSIGNMENT OF ERROR:

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FACT THAT COUNSEL FAILED TO CROSS-EXAMINE ALL OF THE AGENCY'S WITNESSES, AND COUNSEL FAILED TO PRESENT ANY EVIDENCE, OTHER THAN THE TESTIMONY OF APPELLANT, IN HER CASE IN CHIEF."

I

BACKGROUND

{¶ 2} On August 21, 2014, appellant and K.H.[2] requested appellee's assistance. They reported that they recently lost their home and did not have a place to stay with the children. Appellee informed the parents that Haven House[3] could house appellant and the children. Haven House would not, however, be able to house K.H. Because appellant did not wish for her and the children to be separated from K.H., the parents rejected the Haven House option. Appellee next found another shelter that could house the family and transported the family to the shelter. Upon arrival, the parents learned that the shelter required males and females to sleep in separate locations. After learning about this rule, they chose not to stay at the shelter, and instead called friends to pick them up and drive them to Circleville. The next day, the parents again sought appellee's assistance. Appellee once more recommended Haven House, but the

[2] Although K.H. is not K.M.'s biological father, for ease of discussion and because K.M.'s father has had no involvement in her life, we will refer to appellant and K.H. collectively as the parents.

[3] According to http://ohiohopes.org/resources/haven-house- of-pickaway-county-2, Haven House is a domestic violence and

parents again declined. Appellee then agreed to take the children into foster care under a voluntary thirty-day agreement.

{¶ 3} On September 19, 2014, appellee filed complaints that alleged the three children to be dependent children and requested temporary custody or protective supervision. The complaint alleged that appellant and K.H. agreed to place the children in appellee's care for thirty days while they secured housing, but as the thirty-day agreement was about to expire, the parents had yet to secure a location to house the children. The trial court then placed the children in appellee's temporary custody.

{¶ 4} On November 17, 2014, the trial court adjudicated the children dependent. By that point, the parents had obtained employment and appellee had found an apartment for the family. The court thus placed the children with the parents, subject to protective supervision. Appellee developed a case plan for the parents that identified the following goals: (1) obtain and maintain safe, stable housing; (2) obtain and maintain employment; and (3) successfully complete budgeting classes.

{¶ 5} In December 2014, the parents informed their caseworker that they were short on funds to pay their rent, had lost their jobs, were being evicted, and would have nowhere to stay. Their caseworker additionally learned that K.M. had not enrolled in school and that after she had enrolled (with the caseworker's assistance), the school reported that K.M. arrived to school dressed in shorts and a t-shirt, even though it was snowing outside. When the caseworker questioned K.H. about K.M.'s inappropriate attire, K.H. explained that he had not seen K.M. when she left for school in the morning. Appellant, apparently, was no longer staying at the

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homeless shelter that houses women and children.

family's apartment, and thus, was unaware of K.M.'s school attire.

{¶ 6} Due to what appellee perceived to be deteriorating conditions, it sought the children's removal and placement with relatives. Shortly thereafter, the parents separated. Appellant moved in with friends, and K.H. moved to Perry County to live with his girlfriend and her five children.

{¶ 7} On January 12, 2015, the trial court entered an emergency custody order and placed each child with a relative. All of the children subsequently were removed, at different times, from their relative placements and placed in appellee's temporary custody: (1) on April 17, 2015, the trial court removed K.H., Jr. from his relative's care; (2) on July 23, 2015, the trial court removed J.H. from his relative's care; and (3) on February 18, 2016, the trial court removed K.M. from her relative's care. Upon their removal from the relative placements, the children were placed in a foster home. K.H., Jr. was placed in a home without either sibling, while J.H. and K.M. were placed in the same foster home.

A

PERMANENT CUSTODY PROCEEDINGS

{¶ 8} On June 10, 2016, appellee filed a motion that requested permanent custody of K.H., Jr. and alleged that the child had been in its temporary custody for twelve or more months of a consecutive twenty-two month period and that permanent custody is in the child's best interest.

{¶ 9} On July 28, 2016, appellee filed motions that requested permanent custody of K.M. and J.H. Appellee alleged that K.M. cannot be returned to either parent within a reason time, that J.H. has been in its temporary custody for twelve or more months of a consecutive

twenty-two month period, and that permanent custody is in the children's best interests.

1

Permanent Custody Hearing

{¶ 10} On September 7, 2016, the trial court held a hearing to consider appellee's permanent custody motions. Neither K.M.'s father nor K.H. (J.H. and K.H., Jr.'s father) appeared.

{¶ 11} Caseworker Dave Groff testified and explained the course of events after the children's January 2015 removal from the parents' custody. Shortly after the children's removal, appellant and K.H. separated. Appellant "kind of jump[ed] around with friends," and K.H. moved in with his girlfriend, B.T., who lived in Perry County with her five children. Perry County Children Services had been involved with B.T.'s children, and B.T.'s house had numerous problems: (1) the roof was falling apart; (2) the home had a lot of water damage; (3) the home did not have running water; (4) animal feces was located throughout the home; and (5) the home lacked overall cleanliness. At the time of the permanent custody hearing, some of those concerns had been alleviated. The roof had been repaired and the house had running water, but the house did not have heat and still lacked overall cleanliness.

{¶ 12} Caseworker Groff stated that despite appellee's assistance with referrals, funding, and transportation over the course of nearly two years, neither parent completed the case plan requirements. Appellant (1) did not obtain stable housing or employment, (2) left the state in September 2015 and did not return until December 2015, and (3) did not follow through with Integrated Services. K.H. (1) did not obtain employment, but instead, lives off the child support his girlfriend receives for her five children, and (2) has not made much progress with his mental

health counseling.

{¶ 13} Groff also explained that the parents demonstrated "constant problems" with their weekly visitation. He stated that the parents did not always arrive on time or did not show up at all, and that they sometimes would miss two or three weeks in a row. Additionally, when appellant left the state, she did not visit with the children for three months.

{¶ 14} Groff testified that the parents' lack of consistency negatively affected the children, J.H. most visibly. Groff indicated that when the parents failed to attend visits, J.H. would "throw major fits," had "meltdowns" with "[s]creaming, crying, [and] throwing things," and was "[v]ery hard to console." Groff stated J.H. even gave the "driver issues on the way home * * * not wanting to listen, getting out of his seatbelt, hitting windows on the van, throwing things." Groff testified that when the parents failed to attend visits, K.M. would become upset and sometimes cried.

{¶ 15} Groff explained that when the parents did attend visitations, they ordinarily appropriately interacted with the children. He related that K.H. could be "hands off" and spent "a lot of time in the bathroom or it seemed like he was always ill." The caseworker indicated that returning the children to the parents was not possible as of the date of the permanent custody hearing. He stated that over the course of nearly two years, neither parent has remedied the concerns that caused the children's removal, and he does not believe that "enough progress has been made to allow [him] to believe that here in the next six months[,] maybe even longer[,] that this could be resolved."

{¶ 16} Caseworker Groff explained that each child is thriving in foster care. K.H., Jr. was placed with his foster family in April 2015, when he was just over one year old. Groff

stated that K.H., Jr. is "very bonded with the foster parents" and that the foster parents are meeting all of his needs.

{¶ 17} Groff testified that in July 2015, J.H. entered his foster home and is doing "really well." Groff explained that J.H. appears happy, reports that he feels safe, and feels "very bonded" to his foster parents. Groff stated that J.H. refers to his foster parents as "mom" and "dad."

{¶ 18} Groff related that in February 2016, K.M. entered the same foster home as J.H. He indicated that K.M. has experienced "the biggest change" since entering the foster home. Groff stated that the foster mother, who is a teacher, worked with K.M. during the summer to improve her reading skills to grade-level. Groff also explained that K.M. has reached a healthier weight and appears happier. He testified that K.M. indicated that she would like to stay with the foster family.

{¶ 19} Groff stated that appellee did explore relative placements, but the homes either were unsuitable or unavailable to house additional residents. He opined that placing the children in appellee's permanent custody is in their best interests.

{¶ 20} J.H. and K.M.'s foster mother testified that J.H. has lived in her home for fourteen months and that K.M. has lived in the home for seven months. She stated that she feels very bonded to the children and hopes to adopt them.

{¶ 21} K.H., Jr.'s foster mother explained that K.H., Jr. has lived in her home for seventeen months. She feels bonded to the child and would like to make him "a permanent fixture in the home." She further stated: "He's already a part of the family. And we would be lost without him." The foster mother related that she has custody of her grandchild, who tells

everyone K.H., Jr. is his brother.

{¶ 22} The children's guardian ad litem indicated that all of the children are thriving in foster care and are bonded to the foster families. K.M. reports that she is "very happy where she's at and hopes that's where she gets to stay." The guardian ad litem testified that K.M. has "totally changed" for the better in foster care. She further related that J.H. appears "very happy" and "loves where he's at and hopes he stays." The guardian ad litem stated that K.H., Jr. is "a happy baby." She related her belief that placing the children in appellee's permanent custody is in their best interests.

{¶ 23} The guardian ad litem also testified that, although appellant interacted appropriately with the children during her visits, K.H. did not interact much at all. She indicated that the children "seem pretty happy [during their visits] unless one of the parents doesn't show up."

{¶ 24} Appellant testified and explained that for the last month and one-half, she has been living with a friend, and that for the past three months, she has been employed at Burger King. She thinks that if the court allowed her additional time, she would be able to obtain housing and take care of her children.

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Decisions

{¶ 25} On October 13, 2016, the trial court entered memorandum decisions determining that placing the children in appellee's permanent custody is in their best interests, that K.M. cannot or should not be placed with either parent, and that J.H. and K.H., Jr. have been in appellee's temporary custody for more than twelve out of the past twenty-two months.

K.M.

{¶ 26} In determining that K.M. cannot or should not be placed with either parent, the trial court found that K.M.'s father (J.W.) abandoned her. The court also found that appellant made little, if any, progress during the past two years and that she did not demonstrate the commitment to obtain and maintain safe, stable housing and to provide food, clothing and medical care for K.M. Specifically, the court found that (1) appellant does not have sufficient income to obtain independent housing, (2) she has not completed or attempted to complete basic budgeting programs that would train and equip her to provide for her family, and (3) she was discharged from Integrated Services due to a lack of contact and communication.

{¶ 27} The trial court evaluated K.M.'s best interest and found that K.M.'s foster mother established a good relationship with K.M, helped improve her academic performance, and helped K.M. follow a healthy diet. The court considered K.M.'s wishes and observed that the guardian ad litem stated that K.M. indicated a desire to stay in the foster home with her brother. The court additionally reviewed K.M.'s custodial history and found that (1) she lived with appellant and K.H. until she was five-and-one-half-years old, (2) between September 2014 and November 2014, she was in appellee's temporary custody, (3) she lived with appellant and K.H. from November 2014 through January 2015, and (4) she was placed with K.H.'s mother from January 2016 until February 2016. The court further determined that K.M. needs a legally secure permanent placement that cannot be achieved without granting appellee permanent custody.

J.H.

{¶ 28} In its memorandum decision concerning J.H., the trial court observed that K.H. did not appear at the permanent custody hearing and did not offer any evidence. The court

found that J.H. has been in appellee's temporary custody for more than twelve out of the past twenty-two months.

{¶ 29} The trial court evaluated J.H.'s best interest and found that he lived with his parents for approximately one-half of his life and with his aunt for a few months. The court noted that J.H. enjoys his relationship with the foster parents and refers to them as "mom" and "dad." The court found that J.H. lacked the maturity to express his wishes.

{¶ 30} The trial court additionally determined that J.H. needs a legally secure permanent placement that he cannot achieve without granting appellee permanent custody. The court found that neither parent has made progress over the course of two years and explained that neither parent

> demonstrated or committed to the agency the dedication necessary to obtain and maintain safe, stable housing and otherwise financial security for providing food, clothing and medical care. The parents let down J.H. when they failed to appear for their scheduled visits. He has the hardest time of any of the children dealing with these cancelled visits.

The court continued:

> [T]he current foster placement provides J.H. with an opportunity to thrive, be nurtured and raised in a secure protective environment. He is residing with his sister. The foster mother indicates an intention to adopt J.H. and his sister, K.M., if the opportunity presents itself to them. Due to the parents' failure to commit them to eliminating the conditions that led to the removal of the child from their custody, the court believes that J.H.'s need for a legally secure permanent placement cannot be achieved without a grant of permanent custody to the agency.

K.H., Jr.

{¶ 31} In its memorandum decision concerning K.H., Jr., the trial court observed that K.H. did not appear at the permanent custody hearing and did not offer any evidence. The court found that K.H., Jr. has been in appellee's temporary custody for over sixteen months, and thus,

that he has been in appellee's temporary custody for twelve or more months of a consecutive twenty-two month period.

{¶ 32} When the trial court reviewed K.H., Jr.'s best interest, it found that he "has had more interaction and interrelationship with his foster parents and foster family than his birth parents. In fact, at the time of the hearing, K.H., Jr. was thirty months old and had lived with the same foster family for seventeen of those months." The court noted that (1) the foster mother is very bonded to K.H., Jr., (2) the foster mother's six-year-old grandchild (of whom she has custody) thinks of K.H., Jr. as his brother, and (3) the foster mother hopes K.H., Jr. permanently lives at her house. The court noted that K.H., Jr. is too young to directly express his wishes.

{¶ 33} The trial court further determined that the parents failed to make sufficient progress in order to be able to provide K.H., Jr. with a legally secure permanent placement. The court found that K.H., Jr.'s current foster home allows him "to thrive, be nurtured and raised in a secure protective environment. He is being nurtured and provided for appropriately with foster parents, who have bonded with him and likewise him with them." The court thus determined that K.H., Jr.'s needs a legally secure permanent placement that cannot be achieved without granting appellee permanent custody.

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Judgments

{¶ 34} On October 14, 2016, the trial court entered judgments that placed each child in appellee's permanent custody. These appeals followed.

II

FIRST ASSIGNMENT OF ERROR

{¶ 35} In her first assignment of error, appellant asserts that the trial court's judgment is against the manifest weight of the evidence. In particular, she argues that the record does not contain clear and convincing evidence to support the trial court's findings that (1) the children could not be placed with either parent within a reasonable time or should not be placed either parent, or (2) placing the children in appellee's permanent custody is in their best interest.

A

STANDARD OF REVIEW

{¶ 36} 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.

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'"

Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary 1594 (6th Ed.1990).

{¶ 37} 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* at ¶20, quoting *Tewarson v. Simon,* 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001), quoting *Thompkins,* 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *accord In re Pittman,* 9th Dist. Summit No. 20894, 2002–Ohio–2208, ¶¶23–24.

{¶ 38} The question that we 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). 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.") *In re Adoption of Lay,* 25 Ohio St.3d 41, 42–43, 495 N.E.2d 9 (1986). *Cf. In re Adoption of Masa,* 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986) (stating that whether a fact has been "proven by

clear and convincing evidence in a particular case is a determination for the [trial] court and will not be disturbed on appeal unless such determination is against the manifest weight of the evidence"). Thus, if the 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.*, 4th Dist. Athens Nos. 12CA43 and 12CA44, 2013–Ohio–3588, ¶62; *In re R.L.*, 2nd Dist. Greene Nos.2012CA32 and 2012CA33, 2012–Ohio–6049, ¶17, quoting *In re A.U.*, 2nd Dist. Montgomery No. 22287, 2008–Ohio–187, ¶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.'"). Once the reviewing court finishes its examination, the court may reverse the judgment only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Thompkins,* 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). 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, quoting *Martin*, 20 Ohio App.3d at 175; accord *State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 39} Furthermore, when reviewing evidence under the manifest weight of the evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. *Eastley* at ¶21. As the *Eastley* court explained:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Id., quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶ 40} 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); a*ccord In re Christian*, 4th Dist. Athens No. 04CA10, 2004–Ohio–3146, ¶7. As the Ohio Supreme Court long-ago explained:

> In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record.

Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952).

{¶ 41} Furthermore, unlike an ordinary civil proceeding in which a jury has no contact with the parties before a trial, in a permanent custody case a trial court judge may have significant contact with the parties before a permanent custody motion is even filed. In such a situation, it is not unreasonable to presume that the trial court judge had far more opportunities to

evaluate the credibility, demeanor, attitude, etc., of the parties than this court ever could from a mere reading of the permanent custody hearing transcript.

B

PERMANENT CUSTODY STANDARD

{¶ 42} 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 that:

> (a) The child is not abandoned or orphaned 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 ending on or after March 18, 1999, 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.
>
> (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.
>
> (d) 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 ending on or after March 18, 1999.
>
> (e) The child or another child in the custody of the parent or parents from whose custody the child has been removed has been adjudicated an abused, neglected, or dependent child on three separate occasions by any court in this state or another state.

{¶ 43} Thus, before a trial court may award a children services agency permanent custody, it must find (1) that one of the circumstances described in R.C. 2151.414(B)(1) applies, and (2) that awarding the children services agency permanent custody would further the child's best interests.

C

2151.414(B)(1)

{¶ 44} In the case sub judice, the trial court determined that R.C. 2151.414(B)(1)(a) applies to K.M. and that R.C. 2151.414(B)(1)(d) applies to J.H. and K.H., Jr. The record contains clear and convincing evidence to support the court's findings. We initially note that appellant does not dispute that J.H. and K.H., Jr. have been in appellee's temporary custody for twelve or more months of a consecutive twenty-two month period. Furthermore, the record plainly indicates that both children have been in appellee's temporary custody for well-over twelve consecutive months out of the past twenty-two. We therefore reject appellant's argument that clear and convincing evidence fails to support the court's R.C. 2151.414(B)(1)(d) finding.

{¶ 45} Additionally, although appellant seems to argue that the trial court found that R.C. 2151.414(B)(1)(a) applied in each child's case, it appears that the court made this finding in K.M.'s case and not in J.H.'s or K.H., Jr.'s case. We therefore consider her R.C. 2151.414(B)(1)(a) argument as it relates to K.M.

{¶ 46} After our review, we believe that the record contains clear and convincing evidence to support the court's R.C. 2151.414(B)(1)(a) finding that K.M. cannot be returned to either parent within a reasonable time or should not be returned to either parent.[4] R.C. 2151.414(E) requires a court that is determining whether a child cannot be placed with either

[4] Although the trial court did not find that K.M. had been in appellee's temporary custody for twelve or more months of a consecutive twenty-two month period, we observe that R.C. 2151.414(B)(1) indicates that "a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated [abused, neglected, or dependent] or the date that is sixty days after the removal of the child from home." All of the children, including K.M., were adjudicated dependent on November 17, 2014, and initially were removed from the home on September 19, 2014. Thus, according to R.C. 2151.414(B)(1), K.M. seemingly entered appellee's temporary custody on November 17, 2014. Consequently, the evidence would appear to support a finding that when appellee filed its July 2016 permanent custody motion, K.M. had been in appellee's temporary custody for twelve or more months of a consecutive twenty-two month period. However, because R.C. 2151.414(B)(1)(d) was not a basis for the court's permanent custody decision pertaining to K.M., we do not need to specifically determine whether R.C. 2151.414(B)(1)(d) applies to K.M.'s situation.

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 following 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:"

> (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.
>
> * * * *
>
> (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;
>
> * * * *
>
> (10) The parent has abandoned the child.
>
> (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.
>
> * * * *
>
> (16) Any other factor the court considers relevant.

{¶ 47} In the case at bar, the record contains clear and convincing evidence to support findings under R.C. 2151.414(E)(1), (4), (10), or (14). Clear and convincing evidence shows that appellant failed continuously and repeatedly to substantially remedy the conditions that led to K.M.'s removal. K.M. was placed in appellee's temporary custody due to appellant's lack of a stable residence and income to provide for the child's basic needs. Over the course of two years, appellee offered services to appellant in order to help her obtain and maintain consistent

employment and a stable home. Appellant, however, did not consistently accept appellee's assistance and comply with the requirements in order to obtain assistance. Instead, she jumped around from employed to unemployed and from friend's house to friend's house. Additionally, she absented herself from the state for approximately three months, during which time she did not maintain contact with the children. Appellant's actions also demonstrate that she lacked a commitment to K.M. or displayed an unwillingness to provide K.M. with an adequate permanent home and an unwillingness to provide food, clothing, shelter, and other basic necessities for K.M. R.C. 2151.414(E)(4) and (14). *See generally In re A.F.*, 2nd Dist. Miami No. -- 2003-Ohio-4981, 2003 WL 22149657, ¶13 (determining that evidence supported finding that parent's delay in obtaining adequate employment demonstrated a lack of commitment). While we sympathize with appellant's plight, appellee offered her numerous resources that would have helped her improve her situation so that she might be able to maintain a stable home for the children, but appellant chose not to fully use those resources. Thus, although appellant claims that she will be able to provide K.M. with an adequate permanent home if given another six months (which she claims is a reasonable period of time), evidence concerning her past actions over the span of approximately two years clearly and convincingly support the trial court's R.C. 2151.414(E) findings.

{¶ 48} K.M.'s father has been completely absent from her life and did not participate in any case plan activities or otherwise demonstrate a commitment to K.M. Thus, R.C. 2151.414(E)(4) and R.C. 2151.414(E)(10) apply to K.M.'s father and show that she cannot be placed with him within a reasonable time or should not be placed with him.

{¶ 49} Consequently, we do not believe that the trial court's finding that K.M cannot be placed with either parent within a reasonable time or should not be placed with either parent is against the manifest weight of the evidence.

E

BEST INTEREST

{¶ 50} Appellant next challenges the trial court's determination that placing the children in appellee's permanent custody is in their best interests. R.C. 2151.414(D) directs a trial court to consider "all relevant factors," as well as specific factors, to determine whether a child's best interests will be served by granting a children services agency permanent custody. The listed factors include: (1) the child's interaction and interrelationship with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes, as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity; (3) the child's custodial history; (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 factors listed under R.C. 2151.414(E)(7) to (11) apply.[1]

[1] R.C. 2151.414(E)(7) to (11) state:

> (7) The parent has been convicted of or pleaded guilty to one of the following:
>
> (a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;
>
> (b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in

{¶ 51} Determining whether granting permanent custody to a children services agency will promote a child's best interest involves a delicate balancing of "all relevant [best interest]

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those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) An offense under section 2905.32, 2907.21, or 2907.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(f) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a), (d), or (e) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

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

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

factors," as well as the "five enumerated statutory factors." *In re C.F.*, 113 Ohio St.3d 73, 2007–Ohio–1104, 862 N.E.2d 816, ¶57, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006–Ohio–5513, 857 N.E.2d 532, ¶56; *accord In re C.G.*, 9th Dist. Summit Nos. 24097 and 24099, 2008–Ohio–3773, ¶28; *In re N.W.*, 10th Dist. Franklin Nos. 07AP-590 and 07AP-591, 2008-Ohio-297, 2008 WL 224356, ¶19. However, none of the best interest factors requires a court to give it "greater weight or heightened significance." *C.F.* at ¶57. Instead, the trial court considers the totality of the circumstances when making its best interest determination. *In re K.M.S.*, 3rd Dist. Marion Nos. 9-15-37, 9-15-38, and 9-15-39, 2017-Ohio-142, 2017 WL 168864, ¶24; *In re A.C.*, 9th Dist. Summit No. 27328, 2014–Ohio–4918, ¶46. In general, "[a] child's best interest is served by placing the child in a permanent situation that fosters growth, stability, and security." *In re C.B.C.*, 4th Dist. Lawrence Nos. 15CA18 and 15CA19, 2016-Ohio-916, 2016 WL 915012, ¶66, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 324, 574 N.E.2d 1055 (1991).

{¶ 52} In the case at bar, ample competent and credible evidence supports the trial court's finding that granting appellee permanent custody is in the children's best interests.

1

Children's Interactions and Interrelationships

{¶ 53} Appellant interacted appropriately with the children when she attended visitation. She did not consistently attend visitation, however, and the two older children, especially J.H., became emotionally distraught when appellant failed to attend visitation. Additionally, appellant left the state for approximately three months and did not have any interaction with the children during that time. Thus, while appellant may have had some positive interactions with

her children, her negative interactions (failing to attend visitations, absenting herself from the state) seem to have detrimentally impacted her two older children, especially J.H. Moreover, K.M. indicated that she hoped to stay with her foster family, which suggests that she feels that her relationship with the foster family is more positive than her relationship with appellant.

{¶ 54} K.M.'s father has not had any involvement in her life. K.M. lived with her stepfather's grandmother for just over one year, but K.M. was troubled and disobedient.

{¶ 55} J.H. and K.H., Jr.'s father did not engage with the children during visitations. Instead, he appeared preoccupied with his own needs. He did not attend the permanent custody hearing and he has not appealed the trial court's judgment granting appellee permanent custody of the children. Thus, his actions and inactions have not demonstrated that he feels strongly bonded to his children.

{¶ 56} All of the children are thriving in their foster homes and are bonded with their foster families. K.M. and J.H. live in the same foster home where they share a typical sibling relationship and enjoy the company of each other and their foster parents. K.H., Jr. is too young to verbalize his relationship with the foster family, but the foster family adores him. Both foster families hope to adopt the children.

{¶ 57} The foregoing evidence tends to show that the children have experienced their most positive interactions and interrelationships while in their foster homes.

2

Children's Wishes

{¶ 58} K.M. indicated that she is happy in the foster home and hopes to remain there. Although the trial court did not consider J.H.'s direct expression of his wishes, we note that the

record does contain evidence that he likewise expressed that he is happy in the foster home and hopes to remain there. K.H., Jr. is too young to directly express his wishes. The guardian ad litem believes that placing the children in appellee's permanent custody is in their best interest. *In re S.M.*, 4th Dist. Highland No. 14CA4, 2014-Ohio-2961, 2014 WL 3014037, ¶32, citing *C.F.* at ¶55 (noting that R.C. 2151.414 permits court to consider child's wishes as child directly expresses or through the guardian ad litem).

3

Custodial History

{¶ 59} The children entered appellee's temporary custody in September 2014 and were returned to the parents in November 2014. In January 2015, the trial court removed the children from the parents' care and placed each child with a different relative.

{¶ 60} K.M. lived with appellant from birth until she was approximately five and one-half years old. She was placed in appellee's temporary custody for approximately sixty days and then returned to appellant and K.H. for about two months. Between January 2015 and February 2016, she lived with her stepfather's mother. Since February 2016, she has lived in the same foster home. She has not lived under appellant's care since January 2015 and has never lived under her father's care. Thus, at the time of the permanent custody hearing, she had lived outside of appellant's care for over a year and one-half and in the same foster home for approximately seven months.

{¶ 61} J.H. lived with his parents from birth until he was a few weeks shy of his fourth birthday. He was placed in appellee's temporary custody for approximately sixty days and then

returned to his parents for about two months. Between January 2015 and July 2015, he lived in a relative's home. Since July 2015, J.H. has lived in the same foster home.

{¶ 62} K.H., Jr. lived with his parents from birth until he was approximately six months old. He was placed in appellee's temporary custody for approximately sixty days and then returned to his parents for about two months. Between January 2015 and April 2015, he lived in a relative's home. Since April 2015, K.H., Jr. has lived in the same foster home.

4

Legally Secure Permanent Placement

{¶ 63} "Although the Ohio Revised Code does not define the term, 'legally secure permanent placement,' this court and others have generally interpreted the phrase to mean a safe, stable, consistent environment where a child's needs will be met." *In re M.B.*, 4th Dist. Highland No. 15CA19, 2016-Ohio-793, 2016 WL 818754, ¶56, citing *In re Dyal*, 4th Dist. Hocking No. 01CA12, 2001 WL 925423, *9 (Aug. 9, 2001) (implying that "legally secure permanent placement" means a "stable, safe, and nurturing environment"); *see also In re K.M.*, 10th Dist. Franklin Nos. 15AP–64 and 15AP–66, 2015–Ohio–4682, ¶28 (observing that legally secure permanent placement requires more than stable home and income but also requires environment that will provide for child's needs); *In re J.H.*, 11th Dist. Lake No. 2012–L–126, 2013–Ohio–1293, ¶95 (stating that mother unable to provide legally secure permanent placement when she lacked physical and emotional stability and that father unable to do so when he lacked grasp of parenting concepts); *In re J.W.*, 171 Ohio App.3d 248, 2007–Ohio–2007, 870 N.E.2d 245, ¶34 (10th Dist.) (Sadler, J., dissenting) (stating that a legally secure permanent placement means "a placement that is stable and consistent"); Black's Law Dictionary 1354 (6th Ed. 1990)

(defining "secure" to mean, in part, "not exposed to danger; safe; so strong, stable or firm as to insure safety"); *id.* at 1139 (defining "permanent" to mean, in part, "[c]ontinuing or enduring in the same state, status, place, or the like without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient"). Thus, "[a] legally secure permanent placement is more than a house with four walls. Rather, it generally encompasses a stable environment where a child will live in safety with one or more dependable adults who will provide for the child's needs." *M.B.* at ¶56.

{¶ 64} Furthermore, a trial court that is evaluating a child's need for a legally secure permanent placement and whether the child can achieve that type of placement need not determine that terminating parental rights is "not only a necessary option, but also the only option." *Schaefer* at ¶64. Rather, once the court finds the existence of any one of the R.C. 2151.414(B)(1)(a)-(e) factors, R.C. 2151.414(D)(1) requires the court to weigh "all the relevant factors * * * to find the best option for the child." *Id.*

{¶ 65} In the case sub judice, we believe that the record contains abundant clear and convincing evidence to support the trial court's finding that the children need a legally secure permanent placement that cannot be achieved without granting appellee permanent custody. Over the course of two years, none of the parents (appellant, J.W., or K.H.) demonstrated the ability or willingness to provide the children with a legally secure permanent placement. Instead, appellant moved around, left the state for three months, and failed to establish a safe and stable home. J.H. and K.H., Jr.'s father moved in with his girlfriend who had five children. The caseworker reported that the house was extremely dirty, with animal feces throughout the home. The father did not obtain any means to support his children or to provide them with a

safe environment in which they could thrive. K.M.'s father had no involvement in K.M.'s life and showed no interest in providing her with a legally secure permanent placement. Appellee investigated relative placements, but none constituted legally secure permanent placements. The relative placements appellee initially used were unworkable. Appellee did not locate any other suitable relative placements. The evidence thus shows that the children need a legally secure permanent placement and that they cannot achieve this type of placement without granting appellee permanent custody.

{¶ 66} Appellant nevertheless asserts that the trial court should have afforded her an additional six months to establish a legally secure permanent placement for the children. The permanent custody statutes do not, however, contemplate leaving children in custodial limbo for an extended period of time while a parent attempts to gain a legally secure permanent placement. *See* R.C. 2151.415(D)(4) (prohibiting court from granting "an agency more than two extensions of temporary custody" and from ordering "an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier, regardless of whether any extensions have been previously ordered pursuant to division (D) of this section").

{¶ 67} Moreover, in the case at bar appellant had two years to obtain a legally secure permanent placement, but did not do so. She also fails to adequately explain why she believes that she can accomplish in six months what she was unable to accomplish in two years. Moreover, keeping children in limbo is not in their best interests. *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶20, quoting *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513–514, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982) ("'There is little that can

be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.'").

{¶ 68} Appellant also asserts that the trial court failed to consider whether appellee considered placing the children in a planned permanent living arrangement, which would have prevented a termination of her parental rights. R.C. 2151.353(A)(5) outlines the requirements that permit a trial court to place an adjudicated abused, neglected, or dependent child in a planned permanent living arrangement (PPLA). The statute states that the court may place the child in a PPLA upon the following conditions:

> if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child, that the child is sixteen years of age or older, and that one of the following exists:
>
> (a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care now and for the foreseeable future beyond the date of the dispositional hearing held pursuant to section 2151.35 of the Revised Code.
>
> (b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child, as determined in accordance with division (D)(1) of section 2151.414 of the Revised Code, and the child retains a significant and positive relationship with a parent or relative.
>
> (c) The child has been counseled on the permanent placement options available to the child, and is unwilling to accept or unable to adapt to a permanent placement.

{¶ 69} The statute unambiguously requires the agency to request a PPLA before a trial court may order a PPLA as its disposition. *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, 852 N.E.2d 1187, ¶32. "[A] juvenile court does not have the authority to place the child in a

planned permanent living arrangement when the agency does not request this disposition." *Id.* at syllabus Furthermore, the child must be sixteen years of age or older.

{¶ 70} In the case sub judice, appellee did not request the trial court to place any of the children in a PPLA. Thus, R.C. 2151.353(A)(5) did not permit the trial court to order the children to be placed in a PPLA. Additionally, none of the children are sixteen years of age or older. Consequently, R.C. 2151.353(A)(5) clearly is inapplicable to the facts in the case at bar.

{¶ 71} We believe that in the case sub judice, based upon a consideration of all of the evidence presented during the permanent custody hearing, as well as the trial court's unique position to observe the parties throughout the pendency of the case, the trial court reasonably could have formed a firm belief that permanent custody is in the children's best interest. We therefore do not believe that the trial court's finding that awarding appellee permanent custody is in the children's best interests is against the manifest weight of the evidence.

{¶ 72} We further point out that this case sub is especially unfortunate because appellant's primary problem in maintaining custody of her children was her lack of income and her homelessness. Thus, this is not the typical case in which a parent is addicted to drugs or alcohol and chooses a life of drugs or alcohol over his or her child. Instead, this is a case of a mother who seemingly loves her children, but failed to use the means at her disposal in order to provide for their basic necessities. Appellee provided appellant with numerous services over the course of two years in order to help appellant obtain and maintain a stable home for the children. Appellant chose not to take full advantage of those services in order to allow herself to become more self-sufficient and able to provide for her children's basic necessities. Thus, while we understand appellant's unfortunate circumstances, she did not use the available resources in order

to help herself. The permanent custody statutes do not permit a child to remain in a children services agency's temporary custody indefinitely in order to allow a parent to obtain and maintain a stable home, even when the parent is homeless. While appellant may not have chosen a life of drugs, alcohol, or crime over her children, she did choose a life of inaction or indolence. She did not to take the steps that would have enabled her to establish a safe and stable residence for her children. Appellant's children deserve permanency, stability, and security, not a parent who refuses to take action that would provide for their basic necessities. Appellant had nearly two years to show her willingness and ability to provide her children with permanency, stability, and security, but failed to demonstrate any commitment to those efforts. Her eleventh-hour attempts sadly are too little, too late.

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

III

SECOND ASSIGNMENT OF ERROR

{¶ 74} In her second assignment of error, appellant argues that she did not receive the effective assistance of counsel. She claims that trial counsel performed ineffectively by (1) failing to cross-examine all of appellee's witnesses, (2) failing to present any evidence, other than appellant's testimony, (3) waiving opening statement and giving "a very brief oral closing statement," (4) failing to argue that the children could be returned to her within a reasonable period of time, (5) failing to file a "written objection early on to [appellee]'s decision to file for court intervention prior to the expiration of the voluntary services period," and (6) failing to suggest a PPLA. We do not agree.

{¶ 75} 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, 2013 WL 839932, ¶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.'" *Id.*, quoting *Heston*.

{¶ 76} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687; *State v. Obermiller*, 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶83; *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. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶ 77} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v.*

Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 134 S.Ct. at 1088. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial."'" *Obermiller* at ¶85, quoting *State v. Pasqualone*, 121 Ohio St.3d 186, 2009–Ohio–315, 903 N.E.2d 270, ¶24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Furthermore, "'[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton*, 134 S.Ct. at 1088, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); *accord Hinton*, 134 S.Ct. at 1088, citing *Padilla*, 559 U.S. at 366; *State v. Wesson*, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81.

{¶ 78} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the

'counsel' guaranteed * * * by the Sixth Amendment." *Strickland,* 466 U.S. at 687; *e.g., Obermiller* at ¶84; *State v. Gondor,* 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; *State v. Hamblin,* 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 79} To establish prejudice, a defendant 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,* 134 S.Ct. at 1089, quoting *Strickland,* 466 U.S. at 694; *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. "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton,* 134 S.Ct. at 1089, quoting *Strickland,* 466 U.S. at 695. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. *State v. Clark,* 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; *State v. Tucker,* 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002). 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 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

{¶ 80} In the case at bar, assuming, arguendo, that trial counsel performed deficiently in any of the alleged respects, appellant cannot establish that prejudice resulted from the alleged deficient performance. Nothing trial counsel should have done, according to appellant, would have altered the evidence that (1) appellant absented herself from the state and from contact with her children for three months, (2) failed to make any substantial progress on finding a safe and stable home for her children or the means to provide for their basic necessities, (3) failed to avail herself of the services that would help her provide for the children's basic needs, and (4) the children are thriving in foster care and receiving the care they need and deserve. Appellant lost her parental rights by her own inactions, not by any alleged deficiency on her trial counsel's part.

{¶ 81} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENTS AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgments be affirmed and that appellee recover of appellant the 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 Pickaway County Common Pleas Court, Juvenile Division, to carry these judgments into execution.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.