



another; however, both were married to other people. The child was conceived when the child's father (Father) engaged in an extramarital affair with Mother while he was separated from his wife. Father and his wife have reunited. They have been married 24 years and have two children. Mother has three other sons. Following P.R.'s birth, Father initially denied the child was his. However, once paternity was established, Father became involved in the child's life. Unfortunately, because of the circumstances surrounding the child's conception and the events which led Father to break off his relationship with Mother, there is animosity between Father, his wife, and Mother, and very little communication, if any, between the parents regarding the child's well being, medical care, potty training, and social activities.

{¶3} In 2006, Mother was granted custody of the child by the Butler County Common Pleas Court, Domestic Relations Division; Father was granted parenting time and ordered to pay child support. On March 14, 2007, the Butler County Department of Job and Family Services (the Agency) filed a complaint alleging that P.R. was a dependent child. The complaint alleged that Mother had hit one of her older sons in the face with a belt for soiling himself. P.R. and his two older brothers were removed from Mother's custody (her fourth son was not born yet). P.R. was placed in the temporary custody of his maternal grandmother.

{¶4} Initially, Father was not notified or made aware of the Agency's action against Mother. Once he became aware of it, he moved for temporary custody of P.R. which was granted by the juvenile court on May 3, 2007. A few days later, Father moved for legal custody of his son.

{¶5} Meanwhile, Mother was charged with child endangering for hitting her older son with a belt. The charge was held in abeyance pending Mother's compliance with the case plan filed by the Agency. In the fall of 2007, the criminal charge was dismissed following Mother's completion of the case plan services; Mother regained custody of her two older sons; the Agency closed its case against Mother; and the Agency was severed as a party

and is no longer involved in this case.

{¶6} On June 21, 2007, P.R. was adjudicated dependent. He remained in the temporary custody of Father. Custody hearings were held on April 1-2, 2008. On April 3, 2008, the magistrate granted legal custody of P.R. to Father. Applying the best interest of the child standard set forth in R.C. 3109.04(F), the magistrate found it was in P.R.'s best interest to grant Father legal custody of the child and to grant Mother extended parenting time. Mother's objections to the magistrate's order were overruled by the juvenile court.

{¶7} Mother now appeals, raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS ANALYSIS OF THE APPLICABLE STATUTORY FACTORS AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO [FATHER]."

{¶10} Assignment of Error No. 2:

{¶11} "THE COURT'S CUSTODY ORDER IS NOT IN THE CHILD'S BEST INTEREST AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} In her first and second assignments of error, Mother argues that the juvenile court erred in awarding legal custody of P.R. to Father upon a finding that such placement was in the child's best interest. We disagree.

{¶13} It is well-established that a court must make its custody decision in accordance with the best interest of the child. *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶26. A juvenile court's standard of review in legal custody proceedings is by a preponderance of the evidence. *Id.*; *In re Nice*, 141 Ohio App.3d 445, 455, 2001-Ohio-3214. A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re M.D.* at ¶26.

{¶14} A juvenile court's custody decision will not be reversed absent an abuse of

discretion. Id. at ¶27. The discretion granted to a juvenile court in custody matters should be accorded the utmost respect, given the nature of the proceedings and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. Id. Thus, an appellate court affords deference to the findings of a judge or a magistrate regarding witness credibility. Id.

{¶15} Further, in determining whether a decision of a trial court is against the manifest weight of the evidence, an appellate court is guided by the presumption that the trial court's findings were correct. Id. at ¶28; *In re Peterson* (Aug. 28, 2001), Franklin App. No. 01AP-381. Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by the reviewing court. *In re M.D.*, 2007-Ohio-4646 at ¶28; *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶16} Our review of the record shows that the juvenile court considered the relevant factors under R.C. 3109.04(F) in making its best interest determination, and that the evidence presented during the custody hearings supports the juvenile court's findings.

{¶17} As the magistrate noted, this is admittedly a close case and both parents stand on an equal footing under most of the statutory factors. Both Mother and Father want legal custody of P.R.; are caring and loving parents who have a deep bond with the child; and will honor and facilitate visitation rights of the other parent as ordered and delineated by the juvenile court. P.R. has healthy and positive relationships with his siblings on both parents' side; is well adjusted in either parent's home; is actively involved in family activities on both parents' side; goes to daycare when Father and his wife are at work; and has many friends at the daycare center. Noting that the child had been in Father's care for a year during which he learned to talk and walk, bonded with Father and Father's family, and was now in a

routine, the guardian ad litem recommended that P.R. remain with Father and that he be placed in the legal custody of Father with liberal visitation rights for Mother.

{¶18} Father and his wife have two children and have been married 24 years. While Father engaged in some extramarital affairs over a year, he and his wife have reunited and have a closer, stronger marriage. Father has been employed for 29 years by the same employer; his wife has been employed for 23 years by the same employer. They have lived in their house for 16 years.

{¶19} At the time of the custody hearings, Mother had four sons from three different fathers. She was separated from the father of her two older sons and had filed for divorce, and was living with her paramour (the father of her fourth child). She was not employed and was supported financially by her paramour who worked two jobs. She was attending school three evenings a week to become a medical assistant. She testified that she would graduate in ten months but considered pursuing an additional degree after graduation.

{¶20} As noted earlier, the Agency became involved with Mother's children and Mother was criminally charged after hitting one of her sons in the face with a belt. The Agency has never been involved with Father's children. Both Mother and her paramour smoke; P.R. has had two respiratory infections, bronchitis, and has come back from his mother's home smelling of cigarette smoke. There is a lack of any meaningful communication between the parents regarding P.R.'s health, and a lack of communication, coordination, and/or cooperation regarding his well being, potty training, and social activities.

{¶21} Mother argues that since she was the child's primary caregiver until the Agency's involvement, the juvenile court abused its discretion and lost its way in determining that granting legal custody to Father was in P.R.'s best interest. The record shows that the juvenile court thoroughly considered both the beneficial and detrimental aspects of placing P.R. with either parent, including the fact Mother had been P.R.'s primary caregiver, in

making its best interest determination.

{¶22} Upon thoroughly reviewing the record, we find that the juvenile court did not abuse its discretion in granting legal custody of P.R. to Father. Competent, credible evidence supports the juvenile court's determination that granting legal custody of P.R. to Father was in the child's best interest. Mother's first and second assignments of error are overruled.

{¶23} Assignment of Error No. 3:

{¶24} "[MOTHER] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶25} Mother argues she received ineffective assistance of counsel because her trial counsel failed to (1) present evidence regarding Mother's participation in the case plan services, and (2) cross-examine the guardian ad litem. The record shows that the guardian ad litem did not testify at the custody hearings but orally explained why she recommended that legal custody be granted to Father and not to Mother.

{¶26} To establish ineffective assistance of counsel, Mother must show that her trial attorney's performance was both deficient and prejudicial. *In re Z.C.*, Warren App. Nos. CA2005-06-065, CA2005-06-066, CA2005-06-081, and CA2005-06-082, 2006-Ohio-1787, ¶22. Mother must first show that her counsel's performance "fell below an objective standard of reasonableness." *Id.* Mother must also "overcome the presumption that the challenged action might be considered sound trial strategy." *Id.* Mother "must then demonstrate the existence of a reasonable probability that, but for her counsel's professional errors, the outcome of the proceeding would have been different." *Id.* (Internal citations omitted.) Mother bears the burden of establishing both prongs before her trial counsel's performance will be deemed ineffective. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

{¶27} Mother first argues that she received ineffective assistance of counsel because her trial counsel failed to present evidence regarding Mother's participation in the case plan

services. During the custody hearings, trial counsel was unable to present two witnesses from the Agency and/or from a program Mother was required to complete because trial counsel had failed to timely issue subpoenas for the two witnesses. During trial counsel's argument as to why the untimely subpoenas should not be quashed, the magistrate exclaimed: "My God, you're committing malpractice."

{¶28} Notwithstanding the magistrate's exclamation in a moment of irritation, we find that trial counsel's failure to present evidence of Mother's participation in the case plan services was not ineffective assistance. At the time of the custody hearings, the Agency had closed its case against Mother six months earlier, and was no longer a party in the proceedings which had essentially become a private matter between the child's parents. Thus, Mother's participation in the case plan services was not an issue.

{¶29} Further, the juvenile court had before it, and so noted, evidence of Mother's participation in *and* successful completion of the case plan. The juvenile court indicated during the hearings that it would consider such evidence and in fact did. In its decision, the magistrate found that Mother "completed all case plan services regarding the incident which led to [P.R.] being found to be a dependent child, [and] has successfully been reunited with her other children[.]" Finally, Mother fails to explain how the outcome would have been different had the witnesses been allowed to testify.

{¶30} Next, Mother asserts in a conclusory manner that she was prejudiced by her counsel's failure to cross-examine the guardian ad litem.

{¶31} We must accord deference to counsel's trial tactics and cannot examine counsel's choices through hindsight. *In re Shores*, Allen App. Nos. 1-07-16, 1-07-17, 2007-Ohio-5193, ¶29. An appellate court reviewing an ineffective assistance of counsel claim must not scrutinize trial counsel's strategic decision to engage, or not engage, in a particular line of questioning on cross-examination. *State v. Revels*, Butler App. Nos. CA2001-09-223,

CA2001-09-230, 2002-Ohio-4231, ¶128.

{¶32} In the present case, the record reveals no basis for this court to conclude that cross-examination of the guardian ad litem would have revealed any facts that would have changed the outcome of the trial, or would even have been favorable to Mother. *In re Brooks*, Franklin App. Nos. 04AP-164, 04AP-202, 04AP-165, and 04AP-201, 2004-Ohio-3887, ¶40; *In re A.L.D.*, Franklin App. No. 08AP-238, 2008-Ohio-3626. In fact, trial counsel's decision not to cross-examine the guardian ad litem may very well demonstrate counsel's competence and skill in light of the fact the guardian ad litem expressed strong support for Father's motion for legal custody. *Id.* at ¶41. We therefore find that trial counsel's decision not to cross-examine the guardian ad litem was not ineffective assistance.

{¶33} Mother's third assignment of error is overruled.

{¶34} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *In re P.R.*, 2009-Ohio-4135.]