

ORIGINAL

IN THE SUPREME COURT OF OHIO

In The Matter Of:)	Case No. 2010-0180
)	
C. B.)	On Appeal From The
)	Cuyahoga County Court Of Appeals,
)	Eighth Appellate District
)	
)	Court of Appeals
)	Case No. 92775

**APPENDIX TO MERIT BRIEF
OF APPELLANTS C.B. AND THOMAS KOZEL, GUARDIAN AD LITEM**

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ORIGINAL

IN THE SUPREME COURT OF OHIO

In The Matter Of:

10-0180

C.B.

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 92775

JOINT NOTICE OF APPEAL OF
APPELLANT GUARDIAN AD LITEM THOMAS KOZEL
AND
APPELLANT C.B.

William D. Mason, Esq.
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FILED
JAN 20 2013
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SUPREME COURT OF OHIO

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GUARDIAN AD LITEM FOR CHILD

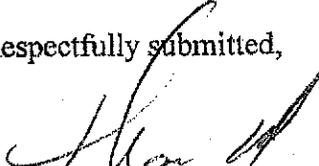
Joint Notice of Appeal of Appellant
Guardian ad litem Thomas Kozel
And
Appellant C.B.

Appellant Guardian ad litem Thomas Kozel and Appellant C.B. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, filed in the Court of Appeals Case No. 92775 on December 16, 2009 (which is attached and marked Exhibit A).

This case is one of public or great general interest, and involves whether or not a Guardian ad litem can appeal the trial court's decision to deny the agency's permanent custody motion and whether a child can appeal the trial court's ruling when the child is placed in the legal custody of her father when the Guardian ad litem strongly believes that neither decision is in the child's best interests.

This case is distinguishable from *In re: Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, Syllabus, which was relied upon by the Court of Appeals for its dismissal of the child's appeal and does not involve an agency's appeal of the denial of permanent custody.

Respectfully submitted,



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Guardian ad litem for Caroline Bartok

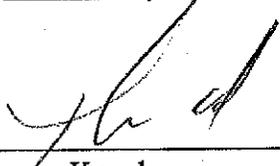


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Attorney for Child

CERTIFICATE OF SERVICE

A copy of the foregoing **Joint Notice of Appeal of Appellant Guardian ad litem Thomas Kozel and Appellant C.B.** was sent via ordinary U.S. mail to, James Price, Assistant Prosecutor, 8111 Quincy Ave., Rm 341, Cleveland, OH 44104, Greg Millas, Assistant Prosecutor, 8111 Quincy Ave., Rm 341, Cleveland, OH 44104, Dale M. Hartman, Attorney for Father, 12195 South Green Rd., University Heights, OH 44121, Carla Golubovic, Guardian ad litem for Mother, P.O. Box 29127, Parma, OH 44129, Betty Farley, Attorney for Mother, 1801 E. 12th St., Ste. 211, Cleveland, OH 44114, and George Coghill, Guardian ad litem for Father, 10211 Lake Shore Blvd., Bratenahal, OH 44108 on this 28 day of January, 2010.



Thomas Kozel
R. Brian Moriarty

DEC 16 2009

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 428743

Date 12/01/2009

Journal Entry

DISMISSED. SEE MOTION NO. 423594 OF SAME DATE.

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

[Handwritten Signature]



Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Handwritten Signature]

Judge SEAN C. GALLAGHER

VOL 695 PG 0827

FOR ALL DOCUMENTS TO BE FILED
CALL 216.265.6100

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 429111

Date 12/16/2009

Journal Entry

MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL, FOR RECONSIDERATION, OR,
ALTERNATIVELY, MOTION TO VACATE, OR, ALTERNATIVELY, MOTION FOR RELIEF FROM
JUDGMENT IS DENIED.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

RECEIVED FOR FILING

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Signature]
Judge SEAN C. GALLAGHER

VOL0695 P60818



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 429350

Date 12/16/2009

Journal Entry

SUA SPONTE, THE CLERK'S OFFICE IS INSTRUCTED TO VACATE THE DECEMBER 10, 2009 JOURNALIZATION DUE TO THE TIMELY MOTION FOR RECONSIDERATION FILED ON DECEMBER 9, 2009. THUS, THE JOURNALIZATION OF THIS COURT'S DENIAL OF THE MOTIONS FOR RECONSIDERATION SHALL BE DATED DECEMBER 16, 2009.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

RECEIVED FOR FILING

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. Fuerst* DEP.

Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Sean C. Gallagher
Judge SEAN C. GALLAGHER



VBL0695 PG0815

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 428743

Date 12/01/2009

Journal Entry

DISMISSED. SEE MOTION NO. 423594 OF SAME DATE.

**FILED AND JOURNALIZED
PER APP.R. 22(C)**

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

RECEIVED BY DECISION
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[Signature]



NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-003030 JAV/16

Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Signature]
Judge SEAN C. GALLAGHER

VOL0695 PG0827

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO. LOWER COURT NO.
92775 AD 06900501

JUVENILE COURT DIVISION

MOTION NO. 429111

Date 12/16/2009

Journal Entry

MOTION BY GUARDIAN AD LITEM, THOMAS KOZEL, FOR RECONSIDERATION, OR,
ALTERNATIVELY, MOTION TO VACATE, OR, ALTERNATIVELY, MOTION FOR RELIEF FROM
JUDGMENT IS DENIED.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

RECEIVED FOR FILING

DEC 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Adm. Judge, COLLEEN CONWAY COONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Signature]
Judge SEAN C. GALLAGHER

VOL 695 PG 0818



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee

COA NO.
92775

LOWER COURT NO.
AD 08900601

JUVENILE COURT DIVISION

MOTION NO. 428743

Date 12/01/2009

Journal Entry

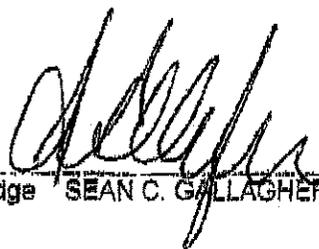
DISMISSED. SEE MOTION NO. 42, 594 OF SAME DATE.

DEC 01 2009

SMUB

Adm. Judge, COLLEEN CONWAY O'NEIL,
Concurs

Judge MARY J. BOYLE, Concurs


Judge SEAN C. GALLAGHER

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: CAROLINE BARTOK

Appellee
COA NO. 92775 LOWER COURT NO. AD 06900501
JUVENILE COURT DIVISION

MOTION NO. 423594

Date 12/01/2009

Journal Entry

MOTION BY APPELLEE, ANTHONY WYLIE, TO DISMISS FOR LACK OF A FINAL APPEALABLE ORDER IS GRANTED. SEE IN RE: K.M., CUYAHOGA APP. NOS. 87882 AND 87883, 2006-OHIO-4878 (AFFIRM 115 OHIO ST.3D 435, 2007-OHIO-5289, ON AUTHORITY OF IN RE: ADAMS, 115 OHIO ST.3D 86, 2007-OHIO-4840, SYLLABUS); R.C. 2505.02.

RECEIVED FOR FILING

DEC 01 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Adm. Judge, COLLEEN CONWAY C DONEY,
Concurs

Judge MARY J. BOYLE, Concurs

[Signature]
Judge SEAN C. GALLAGHER

YOLC 694 PRO 744

NOTICE MAILED TO COURSE
FOR ALL PARTIES TO COURT



COURT OF COMMON PLEAS, JUVENILE COURT DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: CAROLINE BARTOK

CASE NO : ADD6900501

JUDGE: Alison L. Floyd

Journal Entry and Findings of Fact
P/C Motion

This matter came on for hearing this 3rd day of November, 2008 before the Honorable Judge Alison L. Floyd upon the motion to modify temporary custody to Permanent Custody filed by the Cuyahoga County Department of Children and Family Services as to the child heretofore adjudged to be Dependent.

The following persons were present for the hearing: ANTHONY WYLIE, Father; CFS Prosecutor's Millis and Brewster; THOMAS KOZEL, Guardian ad Litem for CAROLINE BARTOK; GEORGE COGHILL, Guardian ad Litem for ANTHONY WYLIE; LORETHA KNIGHT, Caseworker.

Notices for these proceedings were issued by ordinary mail to all necessary parties. No Notice has been returned undelivered.

The Court finds that:

The Mother, MARY BARTOK, has counsel.

The Father, ANTHONY WYLIE, waives counsel.

On September 12, 2007, the Court finds that the mother had previously stipulated to the allegations of the motion. The Court accepted such stipulations pursuant to Ohio Juvenile Rule 29 after personally addressing the mother.

The Court heard testimony and accepted evidence.

Pursuant to R.C. 2151.414, the court finds that the allegations of the motion have not been proven by clear and convincing evidence.

The Court finds that:

The child is not abandoned or orphaned but has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period.

There are no relatives of the Child who are able to take permanent custody.

The Court further finds that as to the child's mother:

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 mother to remedy the problems that initially caused the child to be placed outside the home, the child's mother has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. The chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the mother that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year.

The mother 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. The mother has abandoned the child.

The Court further finds that as to the child's father:

Following the placement of the child outside the child's home and with reasonable case planning and diligent efforts by the agency to assist the father to remedy the problems that initially caused the child to be placed outside the home, the child's father has substantially remedied the conditions causing the child to be placed outside the child's home.

The Court finds that there was insufficient evidence presented to support the allegations that father has a chronic mental illness or chronic emotional illness of the father that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year.

The father has demonstrated a commitment toward the child by regularly visiting, or communicating with the child when able to do so, or by other actions showing a willingness to provide an adequate permanent home for the child. The father did not and has not abandoned the child.

The Court finds that: the continued residence of the child in the home would not be contrary to her best interest and welfare.

The Court further finds that reasonable efforts were made to prevent the removal of the child from her home, or to return the child to the home, and to finalize the permanency plan, to wit: reunification. *Case specific findings: Despite father's maladaptive and personality characteristics, father has substantially remedied the conditions causing the child to be placed outside the child's home by establishing paternity; participating in supervised and unsupervised visitation with the child; cooperating with the investigations of the agency regarding sexual abuse; maintaining employment and housing; completion of parenting classes; demonstrating a benefit from parenting classes and supervision; development of a parent-child relationship.*

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period; 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; and, the report of the Guardian Ad Litem, the Court does not find that there is clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child can be placed with one of the child's parents within a reasonable time or should be placed with either parent.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

The Motion for Permanent Custody is denied.

The order heretofore made committing the child to the temporary custody of the Cuyahoga County Department of Children and Family Services is terminated effective February 5, 2009. The child is committed to the protective supervision of CCDCFs with the legal custody of the father, Anthony Wylie, residing at 2720 Wooster Road, Apt. 4, Rocky River, Ohio 44116.

Amended case plan to be filed with the following modifications: reinstatement of unsupervised visitation; progressive implementation for in-home visitation, bi-weekly extended visitation, and overnight weekend visitation; referral for family preservation to assist child and parent with transition needs and services including appropriate day care, medical care, etc.

This matter is continued to February 27, 2009 at 9:30 a.m. for a custody review hearing pursuant to ORC §2151.147 (C), for preliminary hearing upon the CSEA's motion to establish support filed April 18, 2006 and Attorney Witt's motion for attorney fees filed 4-28-08.

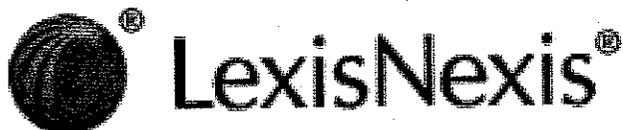
Parties are advised that they have thirty (30) days from the date of this entry to file an appeal with the Court of Appeals.

The clerk is directed to serve upon the parties' notice of this judgment and its date of entry upon the journal of the court pursuant to Civil Rule 58(B).



Judge Alison L. Floyd
February 01, 2009

Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,
Volume 10, Page 2556, February 05, 2009, cjdmh



1 of 4 DOCUMENTS

Deborah Dell, APPELLANT v. Richard Dell, APPELLEE

C. A. No. L-86-133

Court of Appeals of Ohio, Sixth Appellate District, Lucas County

1986 Ohio App. LEXIS 9510

December 31, 1986, Decided

PRIOR HISTORY: [*1] APPEAL FROM LUCAS COUNTY COMMON PLEAS COURT DOMESTIC RELATIONS DIVISION, Nos. DM 79-1077, JC 81-9793

COUNSEL: Nathan L. Silverman, for Appellant.

Julia Casey, Gardian Ad Litem, Melvin Pommeranz, for Appellee.

JUDGES: Peter M. Handwork, J., Alice Robie Resnick, J., and Arthur Wilkowski, J. CONCUR.

OPINION

DECISION AND JOURNAL ENTRY

This case comes before the court on appeal from the Domestic Relations Division of the Lucas County Court of Common Pleas. The matter concerns the denial by the trial court of appellant's pretrial motion to appoint an attorney-advocate for appellant's minor son. Trial is pending on a motion for change of custody. Appellant is the mother of the minor child in question.

Only one brief, that of appellant, has been submitted. Therefore, according to App. R. 18(C), this court accepts the statement of facts as set forth by appellant.

Appellant and appellee, the father of the minor child, were divorced in 1979. At this time custody of the minor in question was awarded to the father. Appellant contends that the ex-husband's physical abuse of her was the means of coercing her agreement to this custody arrangement. It is apparent from the record that the [*2] minor child has expressed to several different authorities

his desire to reside with appellant. The record shows that upon visiting the mother, the child begged not to be sent back to his father. The child is at this time residing with appellant, pending decision on the award of custody.

Upon making the minor child a party to this action, the trial court appointed one attorney as both the guardian ad litem for the child and his legal counsel. The attorney submitted a report to the trial court which stated that "The Guardian does not find a change of circumstances in the home of the custodian since the award of custody." Upon further inquiry, the trial court accepted the guardian ad litem's statement that she could properly represent the minor child, despite her beliefs concerning custody of the child.

It is appellant's contention that one and the same attorney should not act as both guardian and legal counsel where the findings of the guardian are at odds with the expressed wishes of the client -- child.

The single assignment of error is as follows:

"WHERE A CONFLICT ARISES BETWEEN THE ROLES OF LEGAL COUNSEL FOR A MINOR CHILD, AND GUARDIAN AD LITEM FOR SAID MINOR CHILD, [*3] AND THE SAME PERSON WAS PREVIOUSLY APPOINTED TO BOTH ROLES, IT IS ERROR FOR THE COURT TO REFUSE TO SEPARATE THE ROLES, BY DENYING A MOTION TO APPOINT NEW SEPARATE LEGAL COUNSEL TO ADVOCATE THE CHILD'S EXPRESS WISHES."

Domestic Relations Rule 20(h) sets forth the right to counsel of a minor child in a contested custody proceeding. The subsection of the rule states:

"In a contested matter involving custody *** either party or the Court may request the appointment of a guardian ad litem to represent the interests of the minor children involved.

"The guardian ad litem may be appointed as the investigator representing the best interests of the children, as legal counsel for the children as as both.

"The guardian ad litem's function shall be set forth in a judgment entry."

Implicit from paragraph two of the foregoing rule is the fact that a guardian ad litem may be necessary to represent the minor child's interest in an investigative capacity and in a legal capacity. Certainly, when possible, it would be most efficient and productive to have the guardian ad litem represent the child in both capacities. However, circumstances may arise where the guardian ad litem may not [*4] represent the child in both capacities, and separate counsel would be required for purposes of litigation. Appellant contends that this case represents a situation where a guardian ad litem may not take on both roles. This case involves a motion for change of custody, and concerns whether a child ten years of age may provide useful testimony concerning which parent is to have custody. Despite the fact that the child is not twelve years of age and may not choose which parent with whom he would like to live, the child's testimony, coupled with other relevant circumstances, should be given some effect in a particular situation. The appointment of a separate attorney to act as a legal counsel for a minor would serve to be the most efficient and best means of determining custody disposition, since the appointed legal counsel would act zealously to produce evidence concerning the custody issue.

Since the Domestic Relations Rule 20(h) recognizes that a guardian ad litem may be necessary in two separate capacities, we find it to be consistent with this rule to require the trial court to appoint two individuals to fulfill the separate roles, when there may be a conflict in representing the [*5] minor child. In this case, since the guardian ad litem does not believe a change of custody is in the best interest of the child and since the child allegedly would prefer to have a change of custody, there is a clear conflict between counsel and the child which necessitates the appointment of separate counsel.

Without question the positions of the guardian ad litem and the minor child are diametrically opposite. In such situations, separate counsel is necessary to protect the interest of all the parties. Further DR 5-102, as a general rule, requires an attorney to withdraw where he shall testify as a witness in his client's case. Since custody disputes between the parents oftentimes require the testimony of the guardian ad litem, the guardian would be unable to represent the minor child because the discipli-

nary rules would necessitate his withdrawal. This result is of particular significance where the guardian ad litem's position is in direct contradiction to the child's alleged wishes.

As further support for our holding, we note that in a recent case, *In re Baby Girl Baxter* (1985), 17 Ohio St. 3d 229, the Ohio Supreme Court reviewed the role of counsel and guardian ad litem, [*6] where the attorney was representing an individual, which appeared to be mentally incompetent in both capacities. The court initially recognized that the *juvenile rules* of procedure permit the appointment of a guardian ad litem to protect the interest of an incompetent adult in a juvenile proceeding. The rules further provide that appointed counsel may serve as a guardian ad litem. The court then reviewed the roles of an attorney and as a guardian ad litem for the incompetent person and stated:

"[W]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him* to withdraw as guardian. The court should not hesitate to grant such a request."

In *Baxter, supra*, the Supreme Court of Ohio then concluded that the incompetent adult was denied proper representation of counsel. This conclusion was apparently based upon the fact that the incompetent adult's [*7] counsel represented her both as a guardian ad litem and as counsel. The record discloses no other reason for the court's determination that the incompetent adult was denied proper representation. Thus, apparently the court found the incompetent to be denied proper representation merely from the fact that the attorney held both roles.

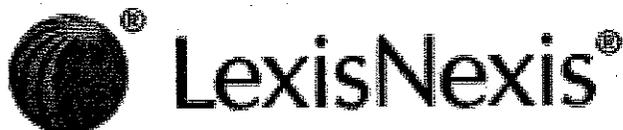
We find the decision in *Baxter, supra*, to support the decision we render here today. Like the decision in *Baxter*, the facts in this case indicate that counsel for Deborah Dell's child held the role of both a guardian ad litem and an attorney. Although counsel indicated that she did not see the necessity for dividing the roles, the record further discloses that she did not believe the child should undergo a change of custody, a position which was allegedly diametrically opposed to the position of the child. This position, coupled with the guardian ad litem's dual capacities, necessitates the appointment of separate counsel so as to permit the child to have proper representation. Since the child's interest would best be served by the appointment of two separate counsel, and since no undue prejudice would be rendered upon any of the participating [*8] parties, we find that in this case the appointment of separate counsel for each role, guardian ad

litem and trial counsel would best serve the interests of the parties. Where the best interests of the child are concerned, we find it preferable to settle the dispute on the side of caution, finding benefit in an additional point of view provided by separate legal counsel. Thus, we hold that as a general rule, barring extraordinary circumstances, the guardian ad litem may not hold the position of counsel for the minor child in a custody hearing, when the guardian ad litem takes a position in opposition to the expressed intentions of the minor child. Accordingly, the trial court erred when it failed to appoint separate counsel.

Appellant's sole assignment of error is found well-taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and judgment of the Lucas County Common Pleas Court, Domestic Relations Division, is reversed.

This cause is remanded to said court for the appointment of separate counsel for the custody issue and for further proceedings according to law. Costs to abide final determination.



1 of 1 DOCUMENT

IN RE: B.J.

APPEAL NO. C-081261

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2009 Ohio 6485; 2009 Ohio App. LEXIS 5434

December 11, 2009, Date of Judgment Entry on Appeal

NOTICE:

THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: [**1]

Civil Appeal From: Hamilton County Juvenile Court. TRIAL NO. F99-2491X. In re James, 113 Ohio St. 3d 420, 2007 Ohio 2335, 866 N.E.2d 467, 2007 Ohio LEXIS 1300 (2007)

DISPOSITION: Reversed and Cause Remanded.

HEADNOTES

CHILDREN -- APPELLATE REVIEW/CIVIL

SYLLABUS

The juvenile court's judgment transferring custody of a child to his parents from his grandparents was contrary to law: Neither R.C. 3109.04(E)(1)(a) nor R.C. 2151.42(B) provides that a change in the circumstances of the noncustodial parents may trigger a change in custody; and the custodial grandparents' resistance to a reunification plan was insufficient to establish the change in circumstances necessary to warrant a change in custody, when the grandparents had previously been awarded legal custody, and when the purpose of that order was to maintain custody with the grandparents until the child reached adulthood.

Where the Ohio Supreme Court had determined in a prior appeal that no change had occurred in the circumstances of the child, the law-of-the-case doctrine prevented the juvenile court on remand from finding on the same record that such a change had indeed occurred.

COUNSEL: Jeffrey A. Burd, Stephen R. King, and King & Koligian, LLC, for Appellants Rick and Cynthia Hutchinson.

Ross M. Evans and Katz, Greenberger, and Norton, LLP, for Appellees Damon and Jamie James.

JUDGES: HILDEBRANDT, P.J., SUNDERMANN [**2] and CUNNINGHAM, JJ.

OPINION*DECISION.*

Per Curiam.

[*P1] This case involving the change of custody of a child to his parents from his grandparents is on appeal in this court for the second time. We reverse the juvenile court's judgment awarding custody to the parents because it is contrary to law. But we remand the cause for the juvenile court's consideration of the parents' supplemental motion to modify the prior custody order.

[*P2] The parents, appellees Damon and Jamie James, have sought to regain custody of their son, B.J., born in 1999. Almost ten years ago, B.J. was adjudicated abused and dependent due to the conduct of his parents. Prior to the adjudication, by agreement of the parties, the Hamilton County Department of Human Services had

been awarded temporary custody, and B.J. had been placed with his maternal grandparents, appellants Rick and Cynthia Hutchinson. After the adjudication, the juvenile court committed him to the temporary custody of the department with continued placement with his grandparents. The department further developed a case plan for the parents. In May 2001, at the annual review of the case plan, the department asked the juvenile court to award legal custody of B.J. to his [**3] grandparents. The parents stipulated to that request, and the court found that awarding legal custody to the grandparents would be in the best interest of B.J. The court also allowed the parents supervised visitation with B.J.

[*P3] In February 2004, the parents moved to obtain custody of B.J.. Several months later, the juvenile court modified the prior custody order by awarding custody of B.J. to his parents. The court's decision rested on a finding that the Jameses were suitable parents and that it was in B.J.'s best interest to be with his parents; but the court did not determine that the best-interest inquiry was warranted by any change that had occurred in the circumstances of B.J. or his grandparents.

[*P4] The grandparents appealed that decision. They argued in part that the juvenile court could not have considered the parents' motion for a change in custody without first determining that a change in circumstances had occurred. They cited R.C. 3109.04(E), which provides that "[t]he court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the [**4] court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interests of the child."

[*P5] This court affirmed the judgment of the juvenile court transferring custody of B.J. from his grandparents to his parents. ¹ In doing so, we held that "when a nonparent has nonpermanent custody of a child, the requirement in R.C. 3109.04(E)(1)(a) that the child's parent must demonstrate a change in circumstances for either the child or the nonparent in order for the court to modify custody is unconstitutional." ² We concluded that the statute was unconstitutional because it deprived the Jameses of their fundamental right to parent their child, B. J. ³

1 *In re James*, 163 Ohio App.3d 442, 2005 Ohio 4847, 839 N.E.2d 39.

2 *Id.* at P19.

3 *Id.*

[*P6] The Ohio Supreme Court accepted a discretionary appeal "to review the constitutionality of R.C. 3109.04(E)(1)(a) as applied in [the Jameses'] case and, specifically, to consider whether a trial court, when modifying a prior decree allocating parental rights and responsibilities for [**5] the care of children, should consider only" the best interests of the child or must additionally determine a "change in circumstances" as set forth in the statute. ⁴

4 *In re James*, 113 Ohio St.3d 420, 2007 Ohio 2335, 866 N.E.2d 467, at P9.

[*P7] The supreme court determined that the grant of legal custody to the grandparents was, by statute, "intended to be permanent in nature," ⁵ a characterization contrary to this court's conclusion. And the court concluded that the provisions of R.C. 3109.04(E)(1)(a) "promote stability in the development of children and are not unconstitutional as applied when a noncustodial parent has not evidenced that a change has occurred in circumstances." ⁶

5 *Id.* at P22.

6 *Id.* at P20.

[*P8] Importantly, the supreme court expressly determined that the record did not establish a change in B.J.'s circumstances. ⁷ The court anticipated that in the future, "by evidencing a sufficient change in the child's circumstances to the court," the parents might be able to regain B.J.'s custody. ⁸

7 *Id.* at P18.

8 *Id.*

[*P9] The supreme court acknowledged that applying R.C. 3109.04(E)(1)--a statute that involves the allocation of parental rights--was awkward, but that it was appropriate because "the [**6] constitutional challenge before us arose from that statute and from the appellate court's analysis and conclusion," ⁹ and because of a legislative mandate that the juvenile court exercise its jurisdiction in child-custody matters in accordance with R.C. 3109.04. ¹⁰ The court noted in the decision that R.C. 2151.42(B) also addresses juvenile-custody cases. ¹¹

9 *Id.* at P24.

10 *Id.* at P25, citing R.C. 2151.23(F)(1).

11 *Id.* at P26.

[*P10] Ultimately, the supreme court reversed our judgment. The court, however, did not enter judgment for the grandparents; rather, the court "remanded the matter for further consideration in accordance with [its] opinion."

[*P11] After the remand, the case was assigned to a new judge. B.J. remained living with his parents and continued to have court-ordered companionship time with his grandparents, although the juvenile court reduced the amount of this time based on the testimony and report of a guardian ad litem ("GAL"). The parties agreed that the court could use the GAL's testimony and report for the sole purpose of modifying the companionship time. The Jameses urged the court to determine--based on the prior record--that they had demonstrated a change in B.J.'s circumstances [**7] as required by R.C. 3109.04(E)(1)(a). The Jameses took the position that "no additional testimony was required because there was already a substantial record established before the appeal" of the change in the circumstances of B.J.

[*P12] As a precaution, the Jameses filed a supplemental motion to modify the prior custody order, and they asked the court to receive new evidence if the court could not award custody of B.J. to them based upon the prior record.

[*P13] The juvenile court informed the parties that it would make a determination based on the prior record and that it would not accept new evidence. The court then found that the prior record had demonstrated a change in the circumstances of B.J., the Jameses, and the Hutchinsons. The court ultimately modified the custody order to award custody of B.J. to the Jameses.

[*P14] In this appeal, the Hutchinsons argue that the juvenile court's decision after the remand was contrary to law even though the court found a change in circumstances because (1) the finding with regard to the parents was irrelevant; (2) the finding with regard to them, as custodians, was not supported by sufficient evidence; and (3) the finding with regard to B. J. was contrary [**8] to the law-of-the-case doctrine

[*P15] We note that much of the prior record in this case that the juvenile court reviewed in 2008 to make the "change in circumstances" determination is missing--"the pleadings" and "all prior transcripts." But our resolution of the claimed error rests on issues of law, and the defect in the record does not impede our review of these issues

[*P16] We first address the relevant parties for the change-in-circumstances determination. A juvenile court can modify a child-custody order under R.C. 3109.04(E)(1)(a) only if the court finds, based on facts that have arisen since the time of the decree or that were unknown to it at that time, first that a change has occurred in the circumstances with regard to (1) "the child," (2) "the child's residential parent," or (3) "either parent subject to a shared-parenting decree," and second that the modification is necessary to serve the best interest of the child.

[*P17] Under this statute, the Jameses, who had only residual parenting rights when they moved to modify the child-custody order in 2004, were not appropriate individuals for the change-in-circumstances inquiry that could have triggered a best-interest inquiry and a modification [**9] of the prior decree allocating parental rights and responsibilities. ¹² The statute is designed "to spare children from a constant tug of war" by providing "some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment." ¹³

¹² See, generally, R.C. 3109.04(L) (further defining the terms used in the statute).

¹³ *In re James*, 113 Ohio St. 3d 420, 2007 Ohio 2335, at P15, 866 N.E.2d 467 (internal citations omitted).

[*P18] Further, a change in the circumstances of the parents could not have triggered a best-interest inquiry under R.C. 2151.42(B), the applicable juvenile statute for modifying the child-custody order at issue. This statute limits the change-in-circumstances determination to two individuals: (1) "the child" or (2) "the person who was granted legal custody." The Jameses did not fall into either of these categories.

[*P19] Thus, the commendable progress of the Jameses cited by the juvenile court was not pertinent to a "change in circumstances" determination. The supreme court's decision confirms this. ¹⁴

¹⁴ *Id.*

[*P20] Next we review whether the juvenile court's determination that a change in the circumstances of the grandparents could trigger [**10] the best-interest inquiry. The grandparents were the individuals granted legal custody in the order that the parents sought to modify, but they were not the parents of B.J. Although the change-in-circumstances determination for a modification under R.C. 3109.04 formerly applied to the "child" and the "custodian" of the child, ¹⁵ that broad language has been replaced with the specific terms "child," "residential parent," and "either parent subject to a shared-parenting decree." The amended law does not anticipate a nonparent custodian. Because of this change in the law and because the custody order originated in the juvenile court, we limit our analysis with regard to the grandparents to R.C. 2151.42(B).

¹⁵ See former R.C. 3109.04, amended eff. Apr. 11, 1991.

[*P21] R.C. 2151.42(B) expressly recognized the grandparents--"the individuals granted legal custody"--as the appropriate individuals for the change-in-

circumstances determination necessary for a modification of the child-custody order under that statute. With regard to a change in the circumstances of the grandparents, the juvenile court wrote, "[T]he Hutchinsons refused to do anything to help Jamie and Damon (the Jameses) in their efforts [**11] to regain custody or increase visitation time. This can be viewed as a change of circumstance."

[*P22] The grandparents argue, persuasively, that their resistance of the reunification plan could not have been viewed as a change in circumstances because, as pointed out by the Ohio Supreme Court, the transfer of legal custody that occurred when B.J. was adjudicated abused and dependent was intended to be "permanent in nature."¹⁶ The grandparents should not have been required to aid the parents toward reunification when the goal of R.C. 2151.42(B), under the circumstances of this case, was to maintain custody with the grandparents until B.J. reached adulthood.

¹⁶ *In re James*, 113 Ohio St. 3d 420, 2007 Ohio 2335, at P26, 866 N.E.2d 467, citing R.C. 2151.42(B).

[*P23] Thus, we conclude that the grandparents' "refus[al] to do anything to help Jamie and Damon in their efforts to regain custody or increase visitation time" could not have been used as a change in circumstance to support the juvenile court's decision awarding custody to the Jameses. We cannot affirm the juvenile court's decision on this basis.

[*P24] Finally, we address the juvenile court's change-in-circumstances determination with regard to B.J., "the child." B.J. was an appropriate [**12] individ-

ual for a change-in-circumstances determination under both statutes.¹⁷ But the grandparents argue that the law-of-the-case doctrine prevented a determination that a change had occurred in the circumstances of B.J. We agree.

¹⁷ See R.C. 3109.04(E)(1)(a); R.C. 2151.42(B).

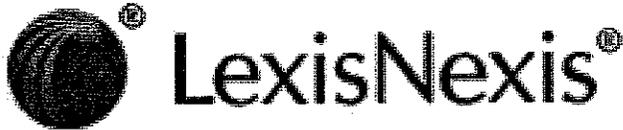
[*P25] The law-of-the-case doctrine provides that the decision of an appellate court on a legal issue remains the law of that case for proceedings both before the trial court and during subsequent review.¹⁸ In this case, the Ohio Supreme Court held that the facts presented in the prior record failed to demonstrate a change in the circumstances of B.J. Based upon this **same record**, the juvenile court found that a change had occurred in B. J.'s circumstances. This finding was contrary to the law-of-the-case doctrine and was, therefore, legally erroneous.

¹⁸ *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410.

[*P26] We conclude that the juvenile court erred by modifying the prior custody order because the record in this case does not evidence that a change in circumstances had occurred as required by statute. Accordingly, we reverse the juvenile court's judgment and remand the cause for the juvenile court's consideration [**13] of the parents' supplemental motion to modify.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., SUNDERMANN and CUNNINGHAM, JJ.



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Cited
As of: Sep 17, 2010

IN RE: P.S. [Appeal by mother]

No. 85917

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY

2005 Ohio 4157; 2005 Ohio App. LEXIS 3766

August 11, 2005, Date of Announcement of Decision

PRIOR HISTORY: . [**1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Common Pleas Court, Juvenile Division, Case No. AD-02900670.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: The Cuyahoga County Court of Common Pleas, Juvenile Division (Ohio), terminated the parental rights of respondent mother and granted permanent custody of her child to petitioner agency, pursuant to *Ohio Rev. Code Ann. § 2151.414*. The mother appealed.

OVERVIEW: The mother argued that the trial court erred in granting permanent custody. The appellate court held that there was clear and convincing evidence to support the trial court's award of permanent custody. The mother failed to take advantage of the services provided by refusing to allow a parent-aide into the home and failing to attend out-patient drug treatment. Also, she continued to test positive for marijuana (when she would appear for testing), failed to find stable and clean housing, failed to find steady employment, and failed to consistently attend the child's medical and therapy appointments. Because the child suffered from numerous medi-

cal conditions, she needed constant attention and help and she needed a safe and secure home so as not to injure herself or become ill. The mother failed to demonstrate that she was capable or willing to provide her child with the care and home she needed and deserved. Finally, there was no error in failing to appoint a separate attorney for the child as there was no clear conflict of interest between what the child desired and what the guardian ad litem was recommending.

OUTCOME: The judgment of the trial court was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Procedural Considerations > Rulings on Evidence

[HN1] A claim that a factual finding is against the manifest weight of the evidence requires an appellate court to examine the evidence and determine whether the trier of fact clearly lost its way. However, there is a presumption that the trial court's factual findings are correct because the trial court is in a better position to judge the credibility of the witnesses.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

Governments > Local Governments > Administrative Boards

[HN2] In order to terminate parental rights and grant permanent custody to a county agency, the record must demonstrate by clear and convincing evidence the existence of one of the conditions set forth in *Ohio Rev. Code Ann. § 2151.414(B)(1)(a)-(d)* and that permanent custody is in the best interest of the child. Clear and convincing evidence is that quantum of evidence which instills in the trier of fact a firm belief or conviction as to the allegations sought to be established. Review of the weight of the evidence in a permanent custody case is limited to whether competent, credible evidence exists to support the trial court's factual determinations.

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN3] When determining the best interest of the child, the court is required to consider all relevant factors, including but not limited to those listed in *Ohio Rev. Code Ann. § 2151.414(D)*.

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN4] See *Ohio Rev. Code Ann. § 2151.414(D)*.

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN5] Only one of the enumerated factors in *Ohio Rev. Code Ann. § 2151.414(D)* needs to be resolved in favor of the award of permanent custody.

Civil Procedure > Counsel > General Overview

Family Law > Guardians > Appointment

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

[HN6] Generally, in a permanent custody proceeding, when an attorney is appointed as guardian ad litem, that attorney may also act as counsel for the child, absent a conflict of interest. *Ohio Rev. Code Ann. § 2151.281(H)*. The appointment of separate individuals to serve as guardian ad litem and counsel for a child is only required if either the guardian ad litem or the trial court determines that a conflict exists between the role of guardian

ad litem and the role of an attorney. *Ohio R. Juv. P. 4(C)(2)*.

COUNSEL: For appellant [Mother]: DALE M. HARTMAN, ESQ., Woodmere, Ohio.

For appellee [Cuyahoga County Dept. of Children and Family Services (C.C.D.C.F.S.)]: WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, BY: JOSEPH C. YOUNG, ESQ., Assistant County Prosecutor, Cleveland, Ohio.

For Guardian ad litem, appellee: MARK WITT, ESQ., North Olmsted, Ohio.

JUDGES: SEAN C. GALLAGHER, JUDGE. PATRICIA ANN BLACKMON, A.J., AND COLLEEN CONWAY COONEY, J., CONCUR.

OPINION BY: SEAN C. GALLAGHER

OPINION

JOURNAL ENTRY AND OPINION

SEAN C. GALLAGHER, J.:

[*P1] Defendant-appellant, mother of child, appeals the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division, to award permanent custody of child ("P.S.") to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). Finding no error in the proceedings below, we affirm.

[*P2] The following facts give rise to this appeal. On February 28, 2002, CCDCFS filed a complaint alleging neglect and requesting a disposition of temporary custody regarding P.S. and her twin siblings. The children were [*P2] removed because of unsanitary living conditions, improper hygiene, and medical neglect. On June 11, 2002, the children were adjudged to be neglected and P.S. was placed in the temporary custody of CCDCFS, while her siblings were returned to appellant under an order of protective supervision. Upon proper motion, the order was extended.

[*P3] P.S. suffers from numerous medical conditions, including mental retardation and Ehler's Danlos Syndrome ("EDS"). EDS is a genetic disorder that affects connective tissue synthesis and structure. Consequently, the skin is fragile and hyperelastic, joints are unstable and hyperextensible, and blood vessels and tissue are fragile. P.S. wears leg and foot braces and until recently had a gastrointestinal tube because she had difficulty eating normal foods and gaining weight. She is significantly smaller than average; she is nine years old and weighs approximately 40 pounds. She has poor bowel and bladder control and requires frequent baths.

P.S. does not speak in full sentences. She attends physical, occupational, and speech therapy weekly. She sees a dietician, and she has many dental issues requiring regular visits to the dentist. Finally, P. S. [**3] sees her pediatrician and a medical specialist regularly.

[*P4] A case plan was developed by CCDCFS in an effort to assist appellant with reunification. It included services described as parenting education, family preservation, employment and psychological evaluation, as well as for establishing paternity. Subsequently added were drug testing and treatment, and ongoing counseling. In addition, appellant was to obtain and maintain stable housing and keep it free of rodents and insects, as well as keep the floors swept and clear of all objects. Appellant was to accompany P.S. to all medical appointments and help her with personal hygiene. Finally, appellant was to obtain her G.E.D. and employment.

[*P5] From February 2002 until the trial dates in November and December 2004, appellant failed to maintain stable and clean housing, failed to maintain employment for more than a month or two at a time, and failed to keep all of P.S.'s medical appointments. P.S.'s father is unknown.

[*P6] Appellant currently resides, along with her twins, with an adult family friend in a two-bedroom apartment. She does not pay rent. Neither she nor the other adult is employed. Appellant's [**4] housing is described as roach infested, cluttered, and overcrowded. P.S.'s guardian ad litem ("GAL") explained that "my feet stuck to the floor and made the sound of tearing adhesive when I moved."

[*P7] Originally, overnight visits were allowed; however, those ceased when the foster mother complained that P.S. would return in dirty clothing, not bathed, and without the toys and clothing that were sent with her. The foster mother bathed her at least three times a day because of P.S.'s frequent accidents. Further, P.S. would often become ill after overnight visits with appellant.

[*P8] When visitation was resumed in a public setting, appellant failed to provide lunch for P.S., as requested, nor did she bring anything to occupy the child, such as toys or books. Further, appellant required constant prompting to attend to her daughter's needs. In addition, appellant often sent others in her place.

[*P9] As for P.S.'s therapy and medical appointments, appellant was required to pick her up from school and take her daughter to her appointments; however, she failed to do so on several occasions. Appellant was then required only to attend the appointments, which she did sporadically.

[**5] [*P10] On November 17, 2003, CCDCFS filed a motion to modify temporary custody to permanent custody regarding P.S. Trial was had in November and December of 2004, and the court awarded permanent custody of P.S. to CCDCFS.

[*P11] Appellant appeals, advancing two assignments of error for our review. The first assignment of error states:

[*P12] "I. The trial court erred in granting permanent custody since (1) none of the circumstances set forth in *R.C. 2151.414(E)* were proven by clear and convincing evidence and (2) the judgment is against the manifest weight of the evidence."

[*P13] [HN1] A claim that a factual finding is against the manifest weight of the evidence requires us to examine the evidence and determine whether the trier of fact clearly lost its way. *In re: M.W., Cuyahoga App. No. 83390, 2005 Ohio 1302*. However, there is a presumption that the trial court's factual findings are correct, because the trial court is in a better position to judge the credibility of the witnesses. *Id.*

[*P14] [HN2] In order to terminate parental rights and grant permanent custody to a county agency, the record must demonstrate by clear [**6] and convincing evidence the existence of one of the conditions set forth in *R.C. 2151.414(B)(1)(a)-(d)* and that permanent custody is in the best interest of the child. Clear and convincing evidence is that quantum of evidence which instills in the trier of fact a firm belief or conviction as to the allegations sought to be established. *Cross v. Ledford (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118*. Our review of the weight of the evidence in a permanent custody case is limited to whether competent, credible evidence exists to support the trial court's factual determinations. *In re Starkey, 150 Ohio App.3d 612, 2002 Ohio 6892, 782 N.E.2d 665*.

[*P15] Appellant argues that there is no competent or credible evidence of any of the factors set forth in *R.C. 2151.414(E)* that would prevent appellant from parenting P.S. or from providing a permanent home within a reasonable time.

[*P16] In the instant case, *R.C. 2151.414(E)* is inapplicable because there is no factual dispute as to the trial court's finding that P.S. "is not orphaned but has been in temporary custody of a public children services agency [**7] or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period." P.S. was removed from her home on February 27, 2002 and had not returned as of the trial date in November 2004; therefore, she was in county custody for almost three years for purposes of *R.C. 2151.414(B)(1)(d)*. Conse-

quently, the court had no obligation to determine whether P.S. cannot or should not be placed with either parent within a reasonable time pursuant to R.C. 2151.414(B)(1)(a) and 2151.414(E). See, *In re: M.H., Cuyahoga App. No. 80620, 2002 Ohio 2968*. The only consideration at this point is whether permanent custody is in the best interest of the child pursuant to R.C. 2151.414(D). *In re: R.K., Cuyahoga App. No. 82374, 2003 Ohio 6333*.

[*P17] [HN3] When determining the best interest of the child, the court is required to consider all relevant factors, including but not limited to the following:

[HN4] "1) The interaction and interrelationship of the child with the child's parents, siblings, [**8] relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; "(2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard to the maturity of the child; "(3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999; "(4) The child's need for a legally secure placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; "(5) Whether any of the factors in division (E)(7) to (11) of this section apply in relation to the parents and child."

R.C. 2151.414(D).

[*P18] This court has found that [HNS] only one of these enumerated factors needs to be resolved in favor of the award of permanent custody. *In re Moore (Aug. 31, 2000), Cuyahoga App. No. 76942, 2000 Ohio App. LEXIS 3958*, citing, *In re Shaeffer Children (1993), 85 Ohio App.3d 683, 621 N.E.2d 426*; see, also, *In re M.Z., Cuyahoga App. No. 80799, 2002 Ohio 6634*; [**9] *In re Legg, Cuyahoga App. Nos. 80542 and 80543, 2002 Ohio 4582*.

[*P19] The trial court found that the "parents have failed to remedy the conditions which caused the removal of the child. Mother has demonstrated a relationship to or with the child but not a parent-child bond. The Court further finds that mother has not demonstrated a willingness or independent ability to parent attentively

and consistently, nurture, feed, clothe or seek additional visitation time to provide for the care of the child and her special needs. No evidence was presented to show that mother has demonstrated a desire to care and nurture the child independent of the help and care provided by others."

[*P20] We find clear and convincing evidence to support the trial court's award of permanent custody. The father has not established paternity and has abandoned the child. The appellant has failed to take advantage of the services provided by refusing to allow a parent aide into the home and failing to attend out-patient drug treatment. Furthermore, she continued to test positive for marijuana (when she would appear for testing), failed to find stable and clean housing, failed to find [**10] steady employment, and failed to consistently attend P.S.'s medical and therapy appointments.

[*P21] P.S. is a child who needs constant attention and help. She needs to be reminded to chew and swallow her food. She needs to be reminded to use the restroom. She needs a safe and secure home so as not to injure herself or become ill. The appellant has failed to demonstrate that she is capable or willing to provide P.S. with the care and home she needs and deserves.

[*P22] Appellant's first assignment of error is overruled.

[*P23] The second assignment of error states:

[*P24] "II. It was error not to appoint an attorney to represent the child."

[*P25] Appellant argues that it was error for the trial court not to appoint independent counsel for the child when she expressed a desire to return home. P.S. was appointed one person to serve as GAL and counsel for child.

[*P26] [HN6] "Generally, when an attorney is appointed as guardian ad litem, that attorney may also act as counsel for the child, absent a conflict of interest. R.C. 2151.281(H); *In re Smith, 77 Ohio App.3d 1 at 14, 601 N.E.2d 45*, see, also, [**11] Loc.R. 35(G) of the Court of Common Pleas of Cuyahoga County, Domestic Relations Division. This court stated in *In re Legg, Cuyahoga App. Nos. 80542 and 80543, 2002 Ohio 4582*, that 'the appointment of separate individuals to serve as guardian ad litem and counsel for a child is *only required if either the guardian ad litem or the trial court determines that a conflict exists between the role of guardian ad litem and the role of an attorney. Juv.R. 4 (C)(2)*.' (Emphasis added.)" *Jennings-Harder v. Yarmesch, Cuyahoga App. No. 83984, 2004 Ohio 3960*.

[*P27] In this case, the social worker initially noted that P.S. expressed a desire to go home; however, she

indicated that the child may not have the ability to understand because of her age and cognitive abilities. The trial court then referred P.S. to the court psychiatric clinic for an evaluation to determine whether the child was capable of understanding and expressing her needs and desires to a GAL or an attorney.

[*P28] The clinic's evaluation indicated that "while [P.S.] can indicate some preference with regard to simple issues, favorite toys, food, she has virtually no ability to contribute [**12] significantly to any issues of greater importance. [P.S.] has been assigned a Guardian Ad Litem to address the issues of her best interests. In a normal situation [P.S.] would be able to participate only minimally with regard to these issues. In this circumstance she is not able to participate at all in any decisions surrounding her best interests."

[*P29] Even so, the trial court indicated a willingness to take into consideration P.S.'s desires, as stated by the GAL and others in accordance with *R.C. 2151.414(D)(2)* with due regard for the child's maturity. At one point, P.S. reportedly began to act out when visitation with her mother was terminated and she expressed a desire to see her mother. Later, however, the GAL reported that P.S. expressed a desire to stay in her foster home and began to cry when she mistakenly thought she was going home. Further, the case aide testified that P.S. would defecate in her pants after visiting with her mother and hearing she may be returning home to her mother soon.

[*P30] We find that the trial court committed no error by not appointing a separate attorney for P.S. because there was no clear conflict of [**13] interest be-

tween what P.S. desired and what the GAL was recommending.

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 Cuyahoga County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. PATRICIA ANN BLACKMON, A.J., AND COLLEEN CONWAY COONEY, J., CONCUR.

SEAN C. GALLAGHER

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of [**14] Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also *S.Ct.Prac.R. II, Section 2(A)(1)*.

§ 3. Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

Ohio App. Rule 11.2 (2010)

Review Court Orders which may amend this Rule.

Rule 11.2. Expedited Appeals

(A) Applicability.

Appeals in actions described in this rule shall be expedited and given calendar priority over all other cases, including criminal and administrative appeals. The Ohio Rules of Appellate Procedure shall apply with the modifications or exceptions set forth in this rule.

(B) Abortion-related appeals from juvenile courts.

(1) Applicability.

App. R. 11.2(B) shall govern appeals pursuant to sections 2151.85, 2505.073, and 2919.121 of the Revised Code.

(2) General rule of expedition.

If an appellant files her notice of appeal on the same day as the dismissal of her complaint or petition by the juvenile court, the entire court process, including the juvenile court hearing, appeal, and decision, shall be completed in sixteen calendar days from the time the original complaint or petition was filed.

(3) Processing appeal.

(a) Immediately after the notice of appeal has been filed by the appellant, the clerk of the juvenile court shall notify the court of appeals. Within four days after the notice of appeal is filed in juvenile court, the clerk of the juvenile court shall deliver a copy of the notice of appeal and the record, except page two of the complaint or petition, to the clerk of the court of appeals who immediately shall place the appeal on the docket of the court of appeals.

(b) Record of all testimony and other oral proceedings in actions pursuant to sections 2151.85 or 2919.121 of the Revised Code may be made by audio recording. If the testimony is on audio tape and a transcript cannot be prepared timely, the court of appeals shall accept the audio tape as the transcript in this case without prior transcription. The juvenile court shall ensure that the court of appeals has the necessary equipment to listen to the audio tape.

(c) The appellant under division (B) of this rule shall file her brief within four days after the appeal is docketed. Unless waived, the oral argument shall be within five days after docketing. Oral arguments must be closed to the public and exclude all persons except the appellant, her attorney, her guardian ad litem, and essential court personnel.

(d) Under division (B) of this rule, "days" means calendar days and includes any intervening

Saturday, Sunday, or legal holiday. To provide full effect to the expedition provision of the statute, if the last day on which a judgment is required to be entered falls on a Saturday, Sunday, or legal holiday, the computation of days shall not be extended and judgment shall be made either on the last business day before the Saturday, Sunday, or legal holiday, or on the Saturday, Sunday, or legal holiday.

(4) Confidentiality.

All proceedings in appeals governed by App. R. 11.2(B) shall be conducted in a manner that will preserve the anonymity of the appellant. Except as set forth in App. R. 11.2(B)(7), all papers and records that pertain to the appeal shall be kept confidential.

(5) Judgment entry.

The court shall enter judgment immediately after conclusion of oral argument or, if oral argument is waived, within five days after the appeal is docketed.

(6) Release of records.

The public is entitled to secure all of the following from the records pertaining to appeals governed by App. R. 11.2(B):

- (a) The docket number;
- (b) The name of the judge;
- (c) The judgment entry and, if appropriate, a properly redacted opinion.

Opinions shall set forth the reasoning in support of the decision in a way that does not directly or indirectly compromise the anonymity of the appellant. Opinions written in compliance with this requirement shall be considered public records available upon request. If, in the judgment of the court, it is impossible to release an opinion without compromising the anonymity of the appellant, the entry that journalizes the outcome of the case shall include a specific finding that no opinion can be written without disclosing the identity of the appellant. Such finding shall be a matter of public record. It is the obligation of the court to remove any and all information in its opinion that would directly or indirectly disclose the identity of the appellant.

(7) Notice and hearing before release of opinion.

After an opinion is written and before it is available for release to the public, the appellant must be notified and be given the option to appear and argue at a hearing if she believes the opinion may disclose her identity. Notice may be provided by including the following language in the opinion:

If appellant believes that this opinion may disclose her identity, appellant has the right to appear and argue at a hearing before this court. Appellant may perfect this right to a hearing by

filing a motion for a hearing within fourteen days of the date of this opinion.

The clerk is instructed that this opinion is not to be made available for release until either of the following:

(a) Twenty-one days have passed since the date of the opinion and appellant has not filed a motion;

(b) If appellant has filed a motion, after this court has ruled on the motion.

Notice shall be provided by mailing a copy of the opinion to the attorney for the appellant or, if she is not represented, to the address provided by appellant for receipt of notice.

(8) Form 25-A.

Upon request of the appellant or her attorney, the clerk shall verify on Form 25-A, as provided in the Rules of Superintendence, the date the appeal was docketed and whether a judgment has been entered within five days of that date. The completed form shall include the case number from the juvenile court and the court of appeals, and shall be filed and included as part of the record. A date-stamped copy shall be provided to the appellant or her attorney.

(C) Adoption and parental rights appeals.

(1) Applicability.

Appeals from orders granting or denying adoption of a minor child or from orders granting or denying termination of parental rights shall be given priority over all cases except those governed by App. R. 11.2(B).

(2) Record.

Preparation of the record, including the transcripts and exhibits necessary for determination of the appeal, shall be given priority over the preparation and transmission of the records in all cases other than those governed by App. R. 11.2(B).

(3) Briefs.

Extensions of time for filing briefs shall not be granted except in the most unusual circumstances and only for the most compelling reasons in the interest of justice.

(4) Oral argument.

After briefs have been filed, the case shall be considered submitted for immediate decision unless oral argument is requested or ordered. Any oral argument shall be heard within thirty days after the briefs have been filed.

(5) Entry of judgment.

The court shall enter judgment within thirty days of submission of the briefs, or of the oral argument, whichever is later, unless compelling reasons in the interest of justice require a longer time.

(D) Dependent, abused, neglected, unruly, or delinquent child appeals.

Appeals concerning a dependent, abused, neglected, unruly, or delinquent child shall be expedited and given calendar priority over all cases other than those governed by App. R. 11.2(B) and (C).

History:

Effective 7-1-00; 7-1-01.

Rule 1. Scope of rules: applicability; construction; exceptions

(A) Applicability.

These rules prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts, with the exceptions stated in subdivision (C).

(B) Construction.

These rules shall be liberally interpreted and construed so as to effectuate the following purposes:

(1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;

(2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;

(3) to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and

(4) to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.

(C) Exceptions.

These rules shall not apply to procedure (1) Upon appeal to review any judgment, order, or ruling; (2) Upon the trial of criminal actions; (3) Upon the trial of actions for divorce, annulment, legal separation, and related proceedings; (4) In proceedings to determine parent-child relationships, provided, however that appointment of counsel shall be in accordance with **Rule 4(A) of the Rules of Juvenile Procedure**; (5) In the commitment of the mentally ill and mentally retarded; (6) In proceedings under **section 2151.85 of the Revised Code** to the extent that there is a conflict between these rules and **section 2151.85 of the Revised Code**.

When any statute provides for procedure by general or specific reference to the statutes governing procedure in juvenile court actions, procedure shall be in accordance with

these rules.

History:

Amended, eff 7-1-91; 7-1-94; 7-1-95.

Ohio Juv. R. 2 (2010)

Rule 2. Definitions

As used in these rules:

- (A) "Abused child" has the same meaning as in section 2151.031 of the Revised Code.
- (B) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent or otherwise within the jurisdiction of the court.
- (C) "Agreement for temporary custody" means a voluntary agreement that is authorized by section 5103.15 of the Revised Code and transfers the temporary custody of a child to a public children services agency or a private child placing agency.
- (D) "Child" has the same meaning as in sections 2151.011 and 2152.02 of the Revised Code.
- (E) "Chronic truant" has the same meaning as in section 2151.011 of the Revised Code.
- (F) "Complaint" means the legal document that sets forth the allegations that form the basis for juvenile court jurisdiction.
- (G) "Court proceeding" means all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.
- (H) "Custodian" means a person who has legal custody of a child or a public children's services agency or private child-placing agency that has permanent, temporary, or legal custody of a child.
- (I) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.
- (J) "Dependent child" has the same meaning as in section 2151.04 of the Revised Code.
- (K) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.
- (L) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.
- (M) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(N) "Guardian" means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.

(O) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(P) "Habitual truant" has the same meaning as in section 2151.011 of the Revised Code.

(Q) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(R) "Indigent person" means a person who, at the time need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(S) "Juvenile court" means a division of the court of common pleas, or a juvenile court separately and independently created, that has jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(T) "Juvenile judge" means a judge of a court having jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(U) "Juvenile traffic offender" has the same meaning as in section 2151.021 of the Revised Code.

(V) "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(W) "Mental examination" means an examination by a psychiatrist or psychologist.

(X) "Neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(Y) "Party" means a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court.

(Z) "Permanent custody" means a legal status that vests in a public children's services agency or a private child-placing agency, all parental rights, duties, and obligations, including the right to

consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(AA) "Permanent surrender" means the act of the parents or, if a child has only one parent, of the parent of a child, by a voluntary agreement authorized by section 5103.15 of the Revised Code, to transfer the permanent custody of the child to a public children's services agency or a private child-placing agency.

(BB) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(CC) "Physical examination" means an examination by a physician.

(DD) "Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:

(1) The court gives legal custody of a child to a public children's services agency or a private child-placing agency without the termination of parental rights;

(2) The order permits the agency to make an appropriate placement of the child and to enter into a written planned permanent living arrangement agreement with a foster care provider or with another person or agency with whom the child is placed.

(EE) "Private child-placing agency" means any association, as defined in section 5103.02 of the Revised Code that is certified pursuant to sections 5103.03 to 5103.05 of the Revised Code to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

(FF) "Public children's services agency" means a children's services board or a county department of human services that has assumed the administration of the children's services function prescribed by Chapter 5153 of the Revised Code.

(GG) "Removal action" means a statutory action filed by the superintendent of a school district for the removal of a child in an out-of-county foster home placement.

(HH) "Residence or legal settlement" means a location as defined by section 2151.06 of the Revised Code.

(II) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including but not limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(JJ) "Rule of court" means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the

Supreme Court and that is filed with the Supreme Court.

(KK) "Serious youthful offender" means a child eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code.

(LL) "Serious youthful offender proceedings" means proceedings after a probable cause determination that a child is eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code. Serious youthful offender proceedings cease to be serious youthful offender proceedings once a child has been determined by the trier of fact not to be a serious youthful offender or the juvenile judge has determined not to impose a serious youthful offender disposition on a child eligible for discretionary serious youthful offender sentencing.

(MM) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition.

(NN) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(OO) "Temporary custody" means legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person or persons who executed the agreement.

(PP) "Unruly child" has the same meaning as in section 2151.022 of the Revised Code.

(QQ) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

History:

Amended, eff 7-1-94; 7-1-98; 7-1-01; 7-1-02.

Review Court Orders which may amend this Rule.

Rule 4. Assistance of counsel; guardian ad litem

(A) Assistance of counsel.

Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

(B) Guardian ad litem; when appointed.

The court shall appoint a guardian ad litem to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

- (1) The child has no parents, guardian, or legal custodian;
- (2) The interests of the child and the interests of the parent may conflict;
- (3) The parent is under eighteen years of age or appears to be mentally incompetent;
- (4) The court believes that the parent of the child is not capable of representing the best interest of the child.
- (5) Any proceeding involves allegations of abuse or neglect, voluntary surrender of permanent custody, or termination of parental rights as soon as possible after the commencement of such proceeding.
- (6) There is an agreement for the voluntary surrender of temporary custody that is made in accordance with section 5103.15 of the Revised Code, and thereafter there is a request for extension of the voluntary agreement.
- (7) The proceeding is a removal action.
- (8) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) Guardian ad litem as counsel.

- (1) When the guardian ad litem is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist[s].

(2) If a person is serving as guardian ad litem and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian ad litem, the court shall appoint another person as guardian ad litem for the ward.

(3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian ad litem, the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian ad litem.

(D) Appearance of attorneys.

An attorney shall enter appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court of said representation.

(E) Notice to guardian ad litem.

The guardian ad litem shall be given notice of all proceedings in the same manner as notice is given to other parties to the action.

(F) Withdrawal of counsel or guardian ad litem.

An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown.

(G) Costs.

The court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.

History:

Amended, eff 7-1-76; 7-1-94; 7-1-95; 7-1-98.

ORC Ann. 2151.01 (2010)

§ 2151.01. Construction; purpose

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

History:

133 v H 320 (Eff 11-19-69); 148 v S 179, § 3. Eff 1-1-2002.

§ 2151.04. Dependent child defined

As used in this chapter, "dependent child" means any child:

(A) Who is homeless or destitute or without adequate parental care, through no fault of the child's parents, guardian, or custodian;

(B) Who lacks adequate parental care by reason of the mental or physical condition of the child's parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child's guardianship;

(D) To whom both of the following apply:

(1) The child is residing in a household in which a parent, guardian, custodian, or other member of the household committed an act that was the basis for an adjudication that a sibling of the child or any other child who resides in the household is an abused, neglected, or dependent child.

(2) Because of the circumstances surrounding the abuse, neglect, or dependency of the sibling or other child and the other conditions in the household of the child, the child is in danger of being abused or neglected by that parent, guardian, custodian, or member of the household.

History:

GC § 1639-4; 117 v 520; Bureau of Code Revision, 10-1-53; 129 v 1778 (Eff 10-27-61); 133 v H 320 (Eff 11-19-69); 142 v S 89 (Eff 1-1-89); 146 v H 274. Eff 8-8-96.

ORC Ann. 2151.414 (2010)

§ 2151.414. Hearing on motion for permanent custody; notice; determinations necessary for granting motion

(A) (1) Upon the filing of a motion pursuant to section 2151.413 [2151.41.3] of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section 2151.314 [2151.31.4] of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 [2151.35.3] of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section 2151.35 of the Revised Code. If the court issues an order pursuant to section 2151.353 [2151.35.3] of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code.

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B) (1) Except as provided in division (B)(2) of this section, the court may grant permanent

custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(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 or 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 and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section 2151.413 [2151.41.3] of the Revised Code, the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D) (1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 [2151.35.3] or division (C) of section 2151.415 [2151.41.5] of the Revised Code, the court shall consider all relevant factors, including, but not limited to, 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 or 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 and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(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.

For the purposes of division (D)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) If all of the following apply, permanent custody is in the best interest of the child and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency:

(a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

(b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 [2151.41.5] of the Revised Code.

(c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 [2151.35.3] of the Revised Code.

(d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code that one or more of the following 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.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code;

(3) The parent committed any abuse as described in section 2151.031 [2151.03.1] of the Revised Code against the child, caused the child to suffer any neglect as described in section 2151.03 of the Revised Code, or allowed the child to suffer any neglect as described in section 2151.03 of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(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;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04*, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12**, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161 [2923.16.1], 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(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 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) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a) or (d) 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 [2151.41.2] 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 [2151.35.3] or 2151.415 [2151.41.5] 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.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for 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.

(15) The parent has committed abuse as described in section 2151.031 [2151.03.1] of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, 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.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

History:

138 v H 695 (Eff 10-24-80); 142 v S 89 (Eff 1-1-89); 146 v H 274 (Eff 8-8-96); 146 v H 419 (Eff 9-18-96); 147 v H 484 (Eff 3-18-99); 148 v H 176 (Eff 10-29-99); 148 v H 448. Eff 10-5-2000; 152 v S 163, § 1, eff. 8-14-08; 152 v H 7, § 1, eff. 4-7-09.

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§ 2151.42. Consideration of whether return to parents is in best interest of child; certain orders granting legal custody intended to be permanent

(A) At any hearing in which a court is asked to modify or terminate an order of disposition issued under section 2151.353 [2151.35.3], 2151.415 [2151.41.5], or 2151.417 [2151.41.7] of the Revised Code, the court, in determining whether to return the child to the child's parents, shall consider whether it is in the best interest of the child.

(B) An order of disposition issued under division (A)(3) of section 2151.353 [2151.35.3], division (A)(3) of section 2151.415 [2151.41.5], or section 2151.417 [2151.41.7] of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child.

History:

147 v H 484 (Eff 3-18-99); 148 v H 176. Eff 10-29-99.

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018

[5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43, and 2323.55 of the Revised Code or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

History:

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.