ORIGINAL

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

REPLY BRIEF
OF APPELLANTS C.B. AND THOMAS KOZEL, GUARDIAN AD LITEM

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Table of Contents

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 3

Proposition of Law No. I: A minor child and/or her guardian ad litem may file an appeal from the denial of a motion to modify temporary custody to permanent custody filed by a public children's services agency in a juvenile court dependency proceeding. 3

Proposition of Law No. II: A minor child and/or her guardian ad litem may file an appeal from an award of legal custody in a juvenile court dependency proceeding. 8

Proposition of Law No. III. The failure to provide legal counsel to a minor child in a permanent custody case is a denial of due process and equal protection of the laws. 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDIX Appx. Page

UNREPORTED CASES:

Douglas v. Boykin, 121 Ohio App 3d 140, 143, 699 N.E. 2d 123 (12th Dist. Butler County 1997) 1

In re: B.L., 2009 Ohio 3649 (9th Dist. Wayne County 2009) 7

In re: T.E., 2006 Ohio 254 (9th Dist. Summit County 2006) 15

CONSTITUTIONAL PROVISIONS; RULES; STATUTES:

App. R. 4(B)(1) 23

Juv. R. 2(O) 23

Ohio. S. Ct. Prac. Section 2(B) 24

Ohio. S. Ct. Prac. R. Section 3.1 24

Ohio Rev. Code §2151.01 25

Ohio Rev. Code §2151.352 25

TABLE OF AUTHORITIES

Rules

App. R. 4(B)(1) 5

Juv. R. 2(O) 5

Ohio. S. Ct. Prac. Section 2(B) 3, 4

Ohio. S. Ct. Prac. R. Section 3.1 3, 4

Statutes

Ohio Rev. Code §2151.01 6, 7

Ohio Rev. Code §2151.352 10

Cases:

Application of Gault (1967), 387 U.S. 1 9

Douglas v. Boykin, 121 Ohio App 3d 140, 143, 699 N.E. 2d 123 (12th Dist. Butler County 1997) 9

Griffin v. Illinois (1956), 351 U.S. 12 7

Haines v. Kerner, 404 U.S. 519 1

In re: Adams (2007), 115 Ohio St. 3d 86 6

In re: Amos, 154 Ohio App. 3d 434, 436, 2003 Ohio 5014, 797 N.E. 2d 568 (3rd Dist. Crawford County 2003) 9

In re: B.L., 2009 Ohio 3649 (9th Dist. Wayne County 2009) 9

In re: T.E., 2006 Ohio 254 (9th Dist. Summit County 2006) 9, 10

In re: Williams, 101 Ohio St. 3d 398, 2004 Ohio 1500, 805 N.E. 2d 1110 10

Reply Brief

Appellee Anthony Wylie ("Appellee"), the natural father of C.B., filed Appellee's Merit Brief, *pro se.*

Appellee wastes little time in laying claim to special treatment because of his status as a *pro se* litigator. Appellee reminds this Court that *pro se* litigants ". . . must be held to '. . . less stringent standards than formal pleadings drafted by lawyers,'" quoting from *Haines v. Kerner*, 404 U.S. 519, 520-521. Appellee's Merit Brief, p. 1. Of course, when determining the merits of this appeal, all parties, including Appellee, must be treated equally.

Drafting a response to a *pro se* brief like Appellee's Merit Brief presents some unusual challenges. First, Appellee's Merit Brief contains personal attacks on the court-appointed *guardian ad litem* for C.B. and Appellants.[1] Such attacks are demeaning to the process and constitute a distraction from the real issues presented by this appeal. Accordingly, Appellants will not respond to any such attacks. Second, it appears that Appellee has an infinite number of complaints related to this litigation and felt compelled to include a rant about each and every one of those complaints in his brief. Like his personal attacks, these complaints serve only as a distraction from the real issues in this case and are not worthy of any response. Appellants will address any and all relevant arguments, but will not respond to the many petty, irrelevant rants set forth in Appellee's Merit Brief. Finally, Appellee writes in the stream of consciousness style. Hence, his material is somewhat disorganized and, at times, difficult to understand.

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[1] Thomas Kozel, Esq., is the second person to serve as the court-appointed *guardian ad litem* for the minor child. He was appointed after the withdrawal of Jeffrey Froude, the original *guardian ad litem*, who cited harassment by Appellee as the reason for his withdrawal. Kozel is described by Appellee as "unethical" and "underhanded." Appellee's Merit Brief, P. 6. Appellee describes Appellants as "sneaky," "manipulative," and "grossly underhanded." Id., p. 10.

Statement of the Case and Facts

The propositions of law related to this appeal present important issues of law. The factual disputes addressed by the trial court have little to do with the issues to be decided by this Court. All of the facts set forth in Appellants' Joint Merit Brief are supported by citations to the record and were included not only to give this Court an accurate summary of the proceedings and the evidence presented in the trial court, but to give this Court as much insight as possible into the parties and what is at stake in this case. If Appellants prevail in this appeal, the case will go back to the Court of Appeals for further proceedings on their appeal from the decision of the trial court. At that point, Appellee's feelings about what should and what should not be included in the record might need to be addressed, but at this point in the litigation, the evidence is not being weighed or reviewed so there is no need to address those matters.

One specific assertion made by Appellee must be addressed by Appellants. Appellee objects to the reference to an adjudication of abuse or neglect set forth in Appellants' Merit Brief. Appellee's Merit Brief, p. 41. The reference to an adjudication of abuse or neglect appears on page 4 of Appellants' Merit Brief where Appellants quote *verbatim* from a portion of the transcript where the affidavit in support of the complaint was read into the record. The quote set forth in Appellants' Merit Brief is accurate.[2] However, it appears that the statements in the affidavit are inaccurate or misleading, as there never was an adjudication of abuse or neglect, nor

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[2] At issue here, is the first paragraph of the affidavit, read into the record on September12, 2007, and appearing on page 6 of the transcript: "The child had been in the custody of the agency for 12 or more months of a consecutive [2] sic-month period, that the child was removed from the home on March 23, 2006, and that the child was adjudicated abused, neglected, or dependent on November 17th, 2006, and that temporary custody was granted on November 17th of 2006."

was abuse or neglect alleged in the original complaint or any subsequent motion filed by the agency.

Law and Argument

<u>Proposition of Law No. 1</u>: A minor child and/or her guardian ad litem may file an appeal from the denial of a motion to modify temporary custody to permanent custody filed by a public children's services agency in a juvenile court dependency proceeding.

Appellee claims that Proposition of Law No. 1 was not raised in Appellants' notice of appeal and that this Court, therefore, lacks jurisdiction to consider Proposition of Law No. 1. Appellee's Merit Brief, pp. 24-26, 30. This argument is without merit.

Ohio. S. Ct. Prac. R. Section 3.1 requires appellants to set forth their propositions of law in the memorandum in support of jurisdiction. In the present case, Appellants complied with *Ohio. S. Ct. Prac. R. Section 3.1.* Appellants are <u>not</u> required to set forth their propositions of law in the notice of appeal. *Ohio. S. Ct. Prac. Section 2(B)* provides:

> **(B) Contents of notice of appeal.**
>
> (1) The notice of appeal shall state all of the following:
>
> (a) The name of the court of appeals whose judgment is being appealed;
>
> (b) The case name and number assigned to the case by the court of appeals;
>
> (c) The date of the entry of the judgment being appealed;
>
> (d) That one or more of the following are applicable:
>
> (i) The case involves affirmance of the death penalty;
>
> (ii) The case originated in the court of appeals;

(iii) The case raises a substantial constitutional question;

(iv) The case involves a felony;

(v) The case is one of public or great general interest;

(vi) The case involves termination of parental rights or adoption of a minor child, or both;

(vii) The case is an appeal of a court of appeals determination under App.R. 26(B).

Appellants' notice of appeal is in full compliance with *Ohio. S. Ct. Prac. R. Section 2(B).*

Appellee makes a second procedural argument looking back to events which took place in the Court of Appeals. Appellee correctly points out that the natural mother of C.B. consented to the children's services agency's request for permanent custody and did not actively participate at trial. The natural mother then filed an appeal from the decision denying permanent custody -- a step that was certainly consistent with her position in the trial court. After the natural mother filed her notice of appeal, the *guardian ad litem* filed a separate "notice of cross appeal." The *guardian ad litem* then filed his assignments of error. In his Merit Brief filed with this Court, Appellee incorrectly asserts that it was improper for the *guardian ad litem* to file his own assignments of error after filing a notice of cross appeal. ("An Appellee cannot file their own assignments of error, and can only argue defensively the assignments of errors of the Appellant . . ." Appellee's Merit Brief, p. 34.) Appellee made the same argument in the Court of Appeals, but it was rejected. (While it may be true that the *guardian ad litem's* appeal was incorrectly designated as a "cross appeal," when it was, in reality, an appeal following the filing of a notice of appeal by another party which challenged the underlying judgment, the time for filing a cross

appeal and the time for filing an appeal after another party has filed an appeal is the same. See, *App. R. 4(B)(1)*. Accordingly, it would appear that the Court of Appeals was correct in refusing to dismiss the *guardian ad litem's* appeal on those grounds.) Ironically, the aforementioned issue is not now before this Court because Appellee failed to file a cross appeal to this Court.

Appellee advances yet another procedural argument. Appellee argues that the minor child never perfected an appeal to the Court of Appeals. Appellee argues that, "on March 10, 2009,[3] the child's *guardian ad litem* filed a notice of appeal [to the Court of Appeals] . . . the *guardian ad litem's* notice of appeal *did not state* he filed it on behalf of the child, thus it was filed by the *guardian ad litem* in an individual and pro se capacity as a party to the lower court proceedings." Appellee's Merit Brief, p. 4. Appellee argues that since the *guardian ad litem* did not specify that it was filed on behalf of the child, it was not filed on behalf of the child. Id., p. 5. This argument is without merit. *Guardian ad litem* means "a person appointed to protect the interests of a party in a juvenile court proceeding." *Juv. R. 2(O)*. As *guardian ad litem* for the minor child, Thomas Kozel was appointed to protect the interests of C.B. When he made an appearance or filed a pleading with the court in this case, "as *guardian ad litem* for the child," he did so in his representative capacity. As a *guardian ad litem*, Thomas Kozel has no individual interest. Hence, when a *guardian ad litem*, files a "Notice of Cross Appeal of Guardian Ad Litem," and refers to himself as "the *guardian ad litem* for the child," he is acting on behalf of the child and not in any individual capacity.[4] Indeed, this argument was rejected by the Court of Appeals and it not now

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[3] The docket reflect that the notice of appeal was filed on March 10, 2009, but it was actually filed on March 9, 2010, as Appellants' date-stamped file copy confirms.

[4] Admittedly, the analysis becomes a little more complicated when a conflict of interest has surfaced and the child is also represented by separately appointed counsel, but there

before this Court because Appellee did not file a cross-appeal to this Court.

In support of the decision of the Court of Appeals, which held that the denial of a motion to modify temporary custody to permanent custody is not a final, appealable order, Appellee cites *In re: Adams* (2007), 115 Ohio St. 3d 86. However, Appellee completely fails to address Appellants' contention that *Adams* is distinguishable from the present case.

Appellee also advances a public policy argument in support of his opposition to Proposition of Law No. 1. Appellee alleges that "preservation of the family unit" is one of the principal purposes of Chapter 2151 of the Ohio Revised Code, and argues that the objective of preservation of the family unit is furthered by not allowing any appeal from a denial of permanent custody. Id., pp. 30-31. This simplistic argument is without merit.

First, Appellee's characterization of the purposes of Chapter 2151 is flawed. *Ohio Rev. Code §2151.01* provides, in pertinent part:

> "The sections of Chapter 2151 of the Revised Code . . . 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, <u>whenever possible</u>, in a family environment, separating the child from the child's parents only <u>when necessary</u> 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 <u>the parties are assured a fair hearing</u>, and their constitutional and other legal rights are recognized and enforced." (Emphasis Added)

Section (A) makes it clear that, while there may be a preference for preservation of the family unit "whenever possible," that preference must give way when the child's welfare dictates

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was no such conflict here.

otherwise. By not allowing an appeal by the *guardian ad litem* or the child from a denial of permanent custody, the welfare of the minor child is placed at risk.

Second, *Ohio Rev. Code §2151.01(B),* which is conveniently overlooked by Appellee, sets forth another important purpose of Chapter 2151, to wit: to establish judicial procedures in which the parties are assured a fair hearing. Assurance of a fair hearing requires an equal opportunity for appellate review. Allowing appellate review when permanent custody is granted, but not allowing appellate review when permanent custody is denied is not in keeping with the assurance of a fair hearing contained in *Ohio Rev. Code §2151.01(B).*

Appellant also cites "the best interests of the child" in connection with his public policy argument. However, the best interests of the child are served only if the trial court gets it right. The best interests of the child are better served if the child or his guardian can appeal a decision denying permanent custody. Without an opportunity for appellate review, neglected, abused, and dependent children are at risk for being deprived of an opportunity to be placed in a stable, permanent home.

Finally, Appellee invokes due process of law in support of his opposition to Proposition of Law No. 1. But it is the decision of the Court of Appeals which operates to deny due process of law, not Appellant's in Proposition of Law No. 1. While appellate review may not be essential to due process of law, limitations or constraints placed upon the right of appeal once granted by Congress or a state legislature may run afoul of the constitution. See, *Griffin v. Illinois* (1956), 351 U.S. 12, 18-19. Allowing an appeal from an order granting permanent custody, but

prohibiting an appeal from an order denying permanent custody is arbitrary and unreasonable.[5] Additionally, such disparate treatment operates to deny equal protection of the law by giving parents a right of appeal, while arbitrarily denying the right of appeal to children.

<u>Proposition of Law No. 2</u>: A minor child and/or her guardian ad litem may file an appeal from an award of legal custody in a juvenile court dependency proceeding.

Appellee argues that Proposition of Law No. 2 was not set forth in Appellants' notice of appeal and that this Court, therefore, lacks jurisdiction to decide the issue. Appellee's Merit Brief, p. 34. This is the same groundless argument made by Appellee in connection with Proposition of law No. 1. As Appellants have demonstrated above, this argument is without merit.

Appellee also argues that it is improper for the *guardian ad litem* to file his own assignments of error after filing a notice of cross appeal. Appellee's Merit Brief, p. 34 This is another groundless argument made by Appellee in connection with Proposition of law No. 1. As Appellants have demonstrated above, it is also without merit.

The only substantive argument made by Appellee in connection with Proposition of Law No. 2 is that, because the trial court ordered legal custody with protective supervision, there is no final, appealable order. This argument is without merit. The order contains an award of custody. The inclusion of an order giving the children's services agency protective supervision does not change the character or finality of the order.

<u>Proposition of Law No. 3</u>. The failure to provide legal counsel to a minor child in a permanent custody case is a denial of due process and equal protection of the laws.

Appellee argues that Proposition of Law No. 3 was not set forth in Appellants' notice of

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[5] The rationale employed by this Court to justify prohibiting an appeal by a public services agency from an order denying permanent custody in *Adams, supra,* does not apply where it is a *guardian ad litem* or the child who is seeking to appeal the denial of permanent custody.

appeal and that this Court, therefore, lacks jurisdiction to decide the issue. Appellee's Merit Brief, pp. 35-37. This is the same groundless argument made by Appellee in connection with Propositions of Law No. 1 and 2. As Appellants have demonstrated above, this argument is without merit.

Next, Appellee claims that this issue was waived because there was no request for the appointment of counsel for the child in the trial court. Appellee's Merit Brief, p. 38. Even if there could be a waiver of the child's right to counsel by the *guardian ad litem*, mere silence or a failure to request the appointment of counsel would not be sufficient to support a waiver. The standard for waiving counsel is stringent; there must be an "'intentional relinquishment or abandonment' of a fully known right." *Application of Gault* (1967), 387 U.S. 1. Moreover, there is a presumption against waiver of counsel. *Douglas v. Boykin*, 121 Ohio App 3d 140, 143, 699 N.E. 2d 123 (12th Dist. Butler County 1997) ("Courts are to indulge in every presumption against waiver of a fundamental constitutional right, including the right to be represented by counsel. Therefore, a waiver may not be presumed from a silent record. Rather, the waiver must affirmatively appear in the record.")

The appointment of a *guardian ad litem* who happens to be an attorney does not necessarily satisfy the right to counsel. *In re: Amos*, 154 Ohio App. 3d 434, 436, 2003 Ohio 5014, 797 N.E. 2d 568 (3rd Dist. Crawford County 2003) ("The trial court appointed the *guardian ad litem* but did not appoint separate counsel. Indigent children are entitled to appointed counsel in all juvenile proceedings. Although the *guardian ad litem* was an attorney, the trial court should not presume dual appointment, absent express dual appointment, as the roles of *guardian ad litem* and attorney are different. Thus, the trial court erred by neither

appointing counsel to represent the indigent child not by obtaining a waiver of counsel from the *guardian ad litem*."

Appellee's reliance on *In re: B.L.*, 2009 Ohio 3649 (9th Dist. Wayne County 2009), is misplaced. In *B.L.* it was the parent, not the child, who complained on appeal about the trial court's failure to appoint counsel for the child in the trial court. Quoting from *In re: T.E.*, 2006 Ohio 254 (9th Dist. Summit County 2006), the court stated:

> "Although some courts have held that a parent cannot waive the issue of the children's right to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 7th Dist. No. 04-BE-9, 158 Ohio App. 3d 679, 2004 Ohio 4544, at P31, 821 N.E.2d 1039, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1, 13, 601 N.E.2d 45.
>
> "The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion." *In re T.E.*, at P8-9.

Clearly, the child, through her *guardian ad litem*, has standing to raise an issue related to the failure of the trial court to appoint counsel to represent her. She is asserting a right, through her *guardian ad litem*, on behalf of herself, not someone else. Additionally, unlike the parent in *In re: T.E.*, the child in the present case has no ulterior motive that contravenes the intent of the legislature in termination of parental rights proceedings.

Finally, in *In re: Williams*, 101 Ohio St. 3d 398, 2004 Ohio 1500, 805 N.E. 2d 1110. In *Williams*, this Court held that, under *Ohio Rev. Code §2151.352*, the child in termination of parental rights proceedings is a party whose due process rights are entitled to protection and that any such child is entitled to independent counsel in certain circumstances. Id, ¶29. The implication was that "courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child." Id., ¶17.

In the present case, the court initially made a dual appointment. The child's original *guardian ad litem* was appointed to serve as both the *guardian ad litem* and the attorney for the child. However, when the original *guardian ad litem* withdrew, the trial court appointed a new *guardian ad litem,* but did not appoint an attorney for the child. More importantly, there is no indication that, after the original guardian had withdrawn, the trial court endeavored to make the kind of determination contemplated by this Court in the *Williams* decision. The failure of the trial court to undertake such a determination constitutes an abuse of discretion and a denial of due process of law, particularly after the trial court had previously determined that the circumstances of this case required the appointment of counsel for the child.

Conclusion

For the reasons set forth herein, the Court should reverse the decision of the Court of Appeals and remand the case to the trial court for a new hearing with instructions to appoint counsel to represent the child in the trial court or, in the alternative, remand the case to the Court of Appeals with instructions to reinstate Appellants' appeals from the denial of the agency's motion for permanent custody and the award of legal custody to the father.

Respectfully submitted,

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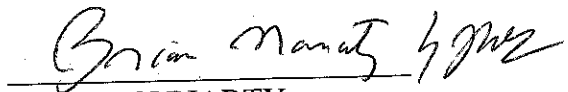

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Certificate of Service

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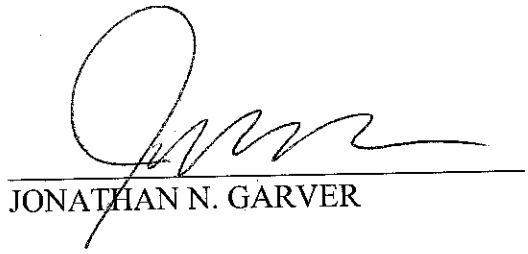

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APPENDIX

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*121 Ohio App. 3d 140, *; 699 N.E.2d 123, **;*
*1997 Ohio App. LEXIS 2978, ****

TRISTA DOUGLAS, Plaintiff-Appellee, - vs - MATTHEW BOYKIN, Defendant-Appellant.

CASE NO. CA97-01-006

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER COUNTY

121 Ohio App. 3d 140; 699 N.E.2d 123; 1997 Ohio App. LEXIS 2978

July 7, 1997, Decided

DISPOSITION: [*1]** Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant child support obligor appealed from a ruling of the Butler County Juvenile Court (Ohio), which, in plaintiff mother's action, on his Ohio R. Civ. P. 60(B) motion to vacate a judgment establishing paternity and ordering child support, relieved him from prospective application, but held him responsible for the arrearage that had accrued until the date he received blood test results excluding him as the father.

OVERVIEW: According to a magistrate's report/journal entry, the obligor waived his rights to counsel and blood testing in a paternity action, and admitted paternity. The trial court ordered him to pay child support, but he never did, so contempt proceedings were brought more than a year later. The obligor requested appointed counsel. Several months later, the obligor questioned his paternity for the first time, presenting evidence that he was in jail when the baby was conceived, was impotent, and that blood test results excluded him. The obligor filed an Ohio R. Civ. P. 60(B) motion to vacate the paternity judgment and order. The trial court relieved the obligor from future child support but held him responsible for the arrearage. On appeal, the court affirmed, concluding first that under Ohio R. Juv. P. 37 at the time the obligor acknowledged paternity, the magistrate's record sufficed to prove waiver of counsel. The court held that because the obligor's motion upon newly discovered evidence was made more that a year after judgment, the refusal to grant relief was not an abuse of discretion, and that the mother and child were entitled to rely upon the paternity admission and court order.

OUTCOME: The court affirmed the juvenile court's judgment relieving the obligor of future child support obligation, but holding him responsible for arrearage.

CORE TERMS: paternity, rights to counsel, juvenile's, newly, discovered evidence, waived, child support, journal entry, assignments of error, blood testing, waivers of counsel, juvenile proceedings, child support arrearage, prospective application, former version, affirmatively, appointed, appoint, genetic, paternity action, counsel to represent, per week, reasonable time, abuse of discretion, present case, divorce decree, retroactive, mandatory, equitable, impotent

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Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
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Family Law > Paternity & Surrogacy > General Overview

HN1 An indigent paternity defendant has a constitutional right to appointed counsel when the state is a plaintiff in a paternity action. A waiver of the right to counsel must be voluntary, knowing, and intelligent. Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel. Therefore, a waiver may not be presumed from a silent record. Rather, the waiver must affirmatively appear in the record. More Like This Headnote |

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Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Family Law > Paternity & Surrogacy > Proof of Paternity > Evidence > Blood Tests
HN2 A former version of Ohio R. Juv. P. 37 only required a juvenile court to make a record of proceedings upon the request of a party or upon the court's own motion. Thus, unlike Ohio R. Crim. P. 42(C), 22, which expressly require that waivers of counsel be recorded, Ohio R. Juv. P. 37 does not contain such a mandatory requirement. More Like This Headnote

Civil Procedure > Counsel > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
HN3 A valid waiver of counsel in juvenile proceedings can be found despite the absence of a transcript. There is a reluctance to require a transcript to be made in juvenile proceedings, when the rules explicitly do not require one unless a request is made. Where a referee's report/journal entry affirmatively states that a juvenile waived his right to counsel after the referee explained it to him, a court can find a valid waiver of counsel. More Like This Headnote | Shepardize: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
HN4 A transcript should not be a mandatory requirement for a valid waiver of counsel in juvenile proceedings under the former version of Ohio R. Juv. P. 37. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
HN5 A trial court's ruling upon a Ohio R. Civ. P. 60(B) motion will not be reversed absent an abuse of discretion. More Like This Headnote | Shepardize: Restrict By Headnote

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview
HN6 Ohio R. Civ. P. 60(B) provides, in part, that on motion and upon such terms are just, a court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Ohio R. Civ. P. 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from judgment. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > General Overview
HN7 In order to prevail on an Ohio R. Civ. P. 60(B) motion, a party must show the following: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Ohio R. Civ. P. 60(B)(1)-(5); and (3) the motion is made within a reasonable time, and where the grounds for relief are Ohio R. Civ. P. 60(B)(1),(2), or (3), not more than one year after judgment, order or proceeding was entered or taken. More Like This Headnote | Shepardize: Restrict By Headnote

COUNSEL: John F. Holcomb, Butler County Prosecuting Attorney, Linda R. Skuta, 210 S. Second Street, Hamilton, Ohio 45011, for plaintiff-appellee.

Robinson & Lipnickey, Co., L.P.A., Susan C. Lipnickey, Park Place West, Oxford, Ohio 45056, for defendant-appellant.

JUDGES: WALSH, J. YOUNG, P.J., concurs. KOEHLER, J., concurs in part and dissents in part.

OPINION BY: WALSH

OPINION

[*142] [124]** OPINION

WALSH, J. Defendant-appellant, Matthew Boykin, appeals from a ruling of the Butler County Juvenile Court on his Civ.R. 60(B) motion denying relief from judgment for a child support arrearage.

On June 22, 1992, plaintiff-appellee, Trista Douglas, gave birth to Tristen Dante Boykin. On April 26, 1994, the Butler County Child Support Enforcement Agency filed a paternity complaint, on behalf of appellee, alleging that appellant was the natural father of Tristen. According to a magistrate's report/journal entry, appellant waived his rights to counsel and blood testing and admitted paternity on July 28, 1994. The trial court ordered appellant to pay $ 20 per week in child support effective April 26, 1994.

Appellant never made a child support payment and contempt proceedings were initiated **[***2]** against him in June 1995. When appellant appeared at a hearing on July 18, 1995, he requested that counsel be appointed. Appellant appeared at a hearing with his appointed counsel on November 14, 1995, and questioned his paternity for the first time. On November 30, 1995, appellant filed a Civ.R. 60(B) motion to vacate the judgment establishing paternity and the support order of $ 20 per week.

On November 27, 1996, appellant presented evidence that he was in jail during the time that the baby was conceived and that he was impotent. In addition, appellant presented blood test results that he received on September 18, 1996 **[*143]** which excluded him as the father of the minor child. After finding that appellant was not the father, the trial court filed an entry relieving appellant from prospective application of the child support order but held him responsible for the child support arrearage that had accrued from April 26, 1994, to September 18, 1996.

On appeal, appellant assigns the following two assignments of error:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO APPOINT COUNSEL TO REPRESENT HIM AT THE BEGINNING OF THE **[***3]** COURT OF COMMON PLEAS, JUVENILE DIVISION, PROCEEDING.

[125]** Assignment of Error No. 2:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT IN FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B).

In his first assignment of error, appellant argues that the trial court erred by failing to appoint counsel to represent him at the beginning of the paternity action. *HN1* An indigent paternity defendant has a constitutional right to appointed counsel when the state is a plaintiff in a paternity action. State ex rel. Cody v. Toner (1983), 8 Ohio St. 3d 22, 456 N.E.2d 813. A waiver of the right to counsel must be voluntary, knowing, and intelligent. *State v. Gibson* (1976), 45 Ohio St. 2d 366, 345 N.E.2d 399. Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel. *In re East* (1995), 105 Ohio App. 3d 221, 224, 663 N.E.2d 983, quoting *Brewer v. Williams* (1977), 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232. Therefore, a waiver may not be presumed from a silent record. *East* at 224, citing *Carnley v. Cochran* (1962), 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884. Rather, the waiver must affirmatively appear in the record. *Id.*, citing **[***4]** *State v. Haag* (1976), 49 Ohio App. 2d 268, 360 N.E.2d 756.

Initially, we note that this decision is based upon the former version of Juv.R. 37 that was in effect at the time that appellant acknowledged his paternity and waived his rights to counsel and blood testing. *HN2* The former version of Juv.R. 37 only required a juvenile court to make a record of proceedings upon the request of a party or upon the court's own motion. [1] Thus, unlike Crim.R. 42(C) and **[*144]** Crim.R. 22 which expressly require that waivers of counsel be recorded, Juv.R. 37 does not contain such a mandatory requirement.

FOOTNOTES

1 An amendment to Juv.R. 37, effective July 1, 1996, now requires the juvenile court to record proceedings before a magistrate. Subsection (A) of the rule states:

Records of proceedings. The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly and delinquent cases; and proceedings before magistrates. In all other proceedings governed by these rules, a record shall be made upon request of a party or upon motion of the court. The record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic or video recording device.

[*5]** Since appellant did not make a request, the record does not contain a transcript of the hearing where appellant entered his acknowledgement and waiver. Appellant now contends that since a transcript does not exist, the record contains no evidence that he waived his right to counsel.

The Eight District Court of Appeals has found *HN3* a valid waiver of counsel in juvenile proceedings despite the absence of a transcript. *East* at 225; see, also, *In re Adams*, 1996 Ohio App. LEXIS 3921 (Sept. 12, 1996), Cuyahoga App. No. 69887, unreported. The court expressed its reluctance "to require a transcript to be made in juvenile proceedings, when the rules explicitly do not require one unless a request is made." *East* at 224. Since a referee's report/journal entry affirmatively stated that a juvenile waived his right to counsel after the referee explained it to him, the court found a valid waiver of counsel. *East* at 224-225; but, see, *In re Kriak* (1986), 30 Ohio App. 3d 83, 506 N.E.2d 556 (holding that journal entry indicating the court advised a juvenile of his right to counsel was not adequate to show valid waiver of juvenile's statutory right to counsel).

We agree with the Eighth District Court of Appeals that *HN4* a transcript **[***6]** should not be a mandatory requirement for a valid waiver of counsel in juvenile proceedings under the former version of Juv.R. 37. Moreover, we find that the facts in the present case are analogous to *East* and the record affirmatively demonstrates that appellant waived his right to counsel despite the absence of a transcript. On the July 28, 1994 report/journal entry, the magistrate made a handwritten notation which stated that appellant "was advised of his right to counsel and blood testing and waived same **[**126]** after being duly sworn and cautioned." The report/journal entry was signed by appellant. Therefore, we conclude that the record contains affirmative evidence that appellant waived his right to counsel and the trial court did not err in failing to appoint counsel at the beginning of the paternity action. Accordingly, appellant's first assignment of error is overruled.

In his second assignment of error appellant argues that the trial court erred in not granting his Civ.R. 60(B) motion for relief from judgment. [2] *HN5* A trial court's ruling upon a Civ.R. 60(B) motion will not be reversed absent an abuse of **[*145]** discretion. *Rose Chevrolet v. Adams* (1988), 36 Ohio St. 3d 17, 20, 520 N.E.2d 564. *HN6* **[***7]** Civ.R. 60(B) provides in relevant part:

On motion and upon such terms are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been **[***8]** reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from judgment.

FOOTNOTES

2 Although appellant argues that the trial court erred by "not granting" his Civ.R. 60(B) motion, a review of the entry reveals that the trial court granted partial relief to appellant. After making a finding that appellant was not the father, the trial court relieved appellant from prospective application of the child support but held him responsible for the arrearage that had accrued.

HN7 In order to prevail on a Civ.R. 60(B) motion, a party must show the following: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and (3) the motion is made within a reasonable time, and where the grounds for relief are Civ.R. 60(B)(1),(2) or (3), not more than one year after judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113.

In *Strack v. Pelton* (1994), 70 Ohio St. 3d 172, 637 N.E.2d 914, a husband acknowledged paternity in a divorce decree that was entered in 1978. Nine years later, genetic tests excluded the husband as the father and he filed a Civ.R. 60(B) motion for relief from judgment. The Supreme Court held that the husband's motion was properly denied because the genetic tests constituted newly discovered evidence under Civ.R. 60(B)(2) and the motion was not filed within one year after the entry of the divorce decree.

In the **[***9]** present case, appellant requested relief from judgment pursuant to Civ.R. 60(B)(1),(4) and (5). However, like the husband in *Strack*, appellant's motion was based upon newly discovered evidence in the form of genetic tests that excluded him as the father and newly discovered evidence that he was impotent. Therefore, since Civ.R. 60(B)(2) specifically addresses newly discovered evidence, it is the provision of the rule that applies to appellant's claim and he

cannot invoke the less specific provisions of Civ.R. 60(B). See *Strack* at 174.

Since appellant's motion based upon newly discovered evidence was made more than a year after judgment, the refusal of the trial court to grant **[*146]** retroactive relief to appellant was not an abuse of discretion. [3] Additionally, it would be inequitable to grant appellant retroactive relief for his child support arrearage, because appellee and the child were entitled to rely upon appellant's admission of paternity and the resulting court order for child support during the period that appellant was believed to be the father. See *Emery v. Emery* (1995), 101 Ohio App. 3d 559, 562, 656 N.E.2d 5. Accordingly, **[**127]** appellant's second assignment of error is overruled. **[***10]**

FOOTNOTES

[3] The trial court's decision to relieve appellant of his responsibility for prospective support is not assigned as error by appellee on cross-appeal. Therefore, it is not necessary for us to consider that aspect of the trial court's decision.

Judgment affirmed.

YOUNG, P.J., concurs.

KOEHLER, J., concurs in part and dissents in part.

CONCUR BY: KOEHLER (In Part)

DISSENT BY: KOEHLER (In Part)

DISSENT

KOEHLER, J., concurring in part and dissenting in part. In this cause, the court on appellant's Civ.R. 60(B)(1), (4) and (5) motion heard testimony and received evidence that appellant was sterile at the time of conception; was incarcerated at the time of conception; that scientific blood testing established he was not the father of the child; and further the court received testimony from the mother that appellant was not the father.

In spite of the great pressure on the court to make somebody beside the state pay for the unfortunate child, the trial court granted appellant's Civ.R. 60(B) motion and vacated the **[***11]** previous finding of paternity. In this holding of the trial court and the majority in affirming that decision, I agree.

However, I must ask how can the same motion be allowed on the basis of newly discovered evidence as to paternity and be denied as to Civ.R. 60(B)(4) which requires a showing that it is no longer equitable that the judgment should have prospective application and was filed at a reasonable time but more than one year after the judgment.

Both facets of appellant's motion are based upon newly discovered evidence, and if one is timely filed under *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113, why not the other?

Once again, the facts will not support the fiction. I must continue to resist making the civil rules the "obligor" for child support, and therefore, I dissent.

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*2009 Ohio 3649, *; 2009 Ohio App. LEXIS 3132, **

IN RE: B. L. and J. L.

C.A. Nos. 09CA0016, 09CA0017

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, WAYNE COUNTY

2009 Ohio 3649; 2009 Ohio App. LEXIS 3132

July 27, 2009, Decided

PRIOR HISTORY: [1]**
APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO. CASE Nos. 07-0108-AND 08-0717-PCU.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, a mother and a father, sought review of the judgment of the Wayne County Court of Common Pleas, Juvenile Division (Ohio), which, pursuant to R.C. 2151.414, terminated their parental rights and placed one of their two children in the permanent custody of appellee children services agency and the other child in the legal custody of her aunt and uncle.

OVERVIEW: Appellants' children were removed from their home and placed in the agency's custody. After a hearing, the trial court placed the younger child in the permanent custody of the agency and the older child in the legal custody of her aunt and uncle. The court held that the trial court properly found that the children had been in the agency's custody for more than 12 of the prior 22 months; thus, the first prong of the permanent custody test was satisfied. The awards of permanent custody and legal custody, respectively, were in the best interest of the children as the evidence showed that the parents had limited interaction with their children during the almost two-year pendency of the case, that the father struggled with alcohol addiction and anger management, that the mother did not regularly attend visits with the children, that the children did not have an emotional closeness to the mother, and that the children were doing well in their placements. Further, the trial court never concluded that it did not have the authority to extend permanent custody beyond the sunset date; instead, the concluded that its decision on the issue would be guided by the best interests of the children.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: custody, best interest, aunt, temporary, uncle, legal custody, placement, alcohol, parental rights, assignments of error, juvenile, counselor, interaction, foster parents, psychologist, sunset, prong, foster home, incarceration, progress, adjusted, sobriety, case plan, clear and convincing evidence, domestic violence, reversible error, terminate, pendency, foster, mental illness

LEXISNEXIS® HEADNOTES Hide

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Child Custody > Awards > Standards > Best Interests of Child
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

HN1 Before a juvenile court can terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has

been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under § 2151.414(D). § 2151.414(B)(1)-(2). More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Reversible Errors
HN2 To demonstrate reversible error, a party has the burden to demonstrate error as well as prejudice resulting from that error. A prejudicial error is defined as one which affects or presumptively affects the final results of the trial. More Like This Headnote

Family Law > Child Custody > Awards > Standards > Best Interests of Child
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview
HN3 When determining whether a grant of permanent custody is in the children's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives. More Like This Headnote

Family Law > Child Custody > Awards > Legal Custody > General Overview
Family Law > Child Custody > Awards > Standards > Best Interests of Child
HN4 A trial court's disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead leaves intact residual parental rights, privileges, and responsibilities. R.C. 2151.011(B)(17). Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child. Although other best interest factors may apply to a legal custody determination, it has also held that the best interest factors set forth in R.C. 2151.414(D) provide guidance in determining whether a grant of legal custody is in the best interest of the child. More Like This Headnote

Family Law > Family Protection & Welfare > Children > Services
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview
HN5 See R.C. 2151.415(D)(4).

Civil Procedure > Counsel > Appointments
Civil Procedure > Appeals > Reviewability > Preservation for Review
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview
HN6 Where no request was made in the trial court for counsel to be appointed for the children in a permanent custody case, the issue will not be addressed for the first time on appeal. More Like This Headnote

COUNSEL: CLARKE W. OWENS, Attorney at Law, for Appellant.

CONRAD OLSON, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

KARIN WIEST, Attorney at Law, for GAL.

JUDGES: WHITMORE, Judge. MOORE, P. J., DICKINSON, J., CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

WHITMORE, Judge.

[*P1] Appellants, Carrie L. ("Mother") and Phillip L. ("Father"), appeal from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated their parental rights and

placed their two minor children in the permanent custody of Wayne County Children Services Board ("CSB"). This Court affirms.

I

[*P2] Mother and Father are the natural parents of B.L., born February 25, 1999, and J.L., born December 10, 2001. The family was already involved with CSB through a voluntary case plan to address B.L.'s poor school attendance when CSB filed this involuntary case in January 2007. Police removed both children from the home pursuant to Juv.R. 6 after receiving a call from B.L. that she and her brother had been left **[**2]** in the care of Father, who was in the home in violation of a protective order and was under the influence of alcohol and drugs. Although the details of the protective order are not clear from the record, Father was prohibited from having contact with Mother or the children, apparently due to an incident of domestic violence. Mother and Father were still married at that time, but they obtained a divorce during the pendency of this case.

[*P3] After the children were taken into custody, CSB learned that they had been exposed to their parents' long history of domestic violence and alcohol abuse and Mother's serious mental illness. CSB was also concerned that the parents had neglected their children's medical and dental needs. J.L.'s baby teeth were so badly decayed that he had to have all of them pulled. The decay was so extensive that it had also damaged J.L.'s permanent teeth, and his dentist had not yet determined whether the permanent teeth could be saved.

[*P4] The goals for reunification focused primarily on the parents' need to resolve their problems with drug and alcohol abuse, domestic violence, and Mother's need to receive treatment for her mental illness. The parents were also required **[**3]** to attend parenting classes, visit their children regularly, and provide for their basic needs. During the first year that the children were in agency custody, however, the parents made minimal progress toward any of these goals. Father made some progress during the second year, but Mother did not seek treatment for her mental illness and became involved in criminal activity that led to her incarceration. [1]

FOOTNOTES

1 No further details about Mother's conviction are set forth in the record.

[*P5] After a brief stay in a foster home, the children were placed together in the home of an aunt and uncle. Although B.L. adjusted well to living there, J.L. exhibited unacceptable behavior that his aunt and uncle were unable to control. J.L. would frequently threaten others in the home, swear at his aunt, and act out sexually toward his sister and cousins. J.L. was moved to a foster home, but his inappropriate behavior again led to his removal from that home. J.L. was later placed in the home of another foster family where he apparently adjusted well to living with the foster parents and their four children.

[*P6] On June 30, 2008, CSB moved for permanent custody of J.L. and moved for B.L. to be placed in the legal **[**4]** custody of her aunt and uncle. Following a hearing on those motions as well as the parents' oral request for an extension of temporary custody, the trial court placed J.L. in the permanent custody of CSB and placed B.L. in the legal custody of her aunt and uncle.

[*P7] Mother and Father separately appealed and this Court later consolidated the two appeals. Mother and Father each raise two assignments of error.

II

Mother's Assignment of Error Number One

"THE JUVENILE COURT ERRED BY GRANTING PERMANENT CUSTODY OF [J.L.] TO [CSB], BECAUSE THE ORDER WAS NOT SHOWN BY CLEAR AND CONVINCING EVIDENCE TO BE IN [J.L.'S] BEST INTEREST AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Father's Assignment of Error Number One

"THE TRIAL COURT'S GRANT OF PERMANENT CUSTODY OF J.L TO [CSB] AND LEGAL CUSTODY OF B.L. TO RELATIVES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE AGENCY FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUCH A DISPOSITION WAS IN THE BEST INTEREST OF THE CHILDREN."

[*P8] This Court will address Mother's and Father's first assignments of error together because they are closely related. Each parent has maintained that the evidence did not support the trial court's decision to terminate **[**5]** their parental rights to J.L. *HN1*Before a juvenile court can

terminate parental rights and award to a proper moving agency permanent custody of a child, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1)-(2); see, also, *In re William S.* (1996), 75 Ohio St.3d 95, 99, 1996 Ohio 182, 661 N.E.2d 738.

[*P9] The trial court found that the first prong of the permanent custody test was satisfied for several reasons, including that J.L. had been in the temporary custody of CSB for more than 12 of the prior 22 months. Neither parent has challenged that finding. Although Mother challenges the trial court's alternate findings under R.C. 2151.414(E), any error in those findings would not constitute reversible error. *HN2*To demonstrate reversible **[**6]** error, Mother has the burden to demonstrate error as well as prejudice resulting from that error. *Lowry v. Lowry* (1988), 48 Ohio App.3d 184, 190, 549 N.E.2d 176, citing *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 28, 26 Ohio B. 12, 496 N.E.2d 959. "A prejudicial error is defined as one which affects or presumptively affects the final results of the trial." *Miller v. Miller*, 5th Dist. No. 06CA3, 2006 Ohio 7019, at P12. Mother has not disputed that the trial court's "12 of 22" finding under R.C. 2151.414(B)(1)(d) was supported by the evidence, which satisfied the first prong of the permanent custody test, so she cannot demonstrate reversible error.

[*P10] Mother and Father both challenge the best interest prong of the permanent custody test. *HN3*When determining whether a grant of permanent custody is in the children's best interests, the juvenile court must consider all the relevant factors, including those enumerated in R.C. 2151.414(D): the interaction and interrelationships of the children, the wishes of the children, the custodial history of the children, and the children's need for permanence in their lives. See *In re S.N.*, 9th Dist. No. 23571, 2007 Ohio 2196, at P27.

[*P11] Father further **[**7]** maintains that the trial court erred in placing B.L. in the legal custody of relatives. The juvenile *HN4*court's disposition of legal custody to a relative is a less drastic disposition than permanent custody to a children services agency because it does not terminate parental rights but instead "leaves intact 'residual parental rights, privileges, and responsibilities.'" *In re Shepherd*, 4th Dist. No. 00CA12, 2001 Ohio 2499, at *7, quoting R.C. 2151.011(B)(17). "Although there is no specific test or set of criteria set forth in the statutory scheme, courts agree that the trial court must base its decision on the best interest of the child." *In re N.P.*, 9th Dist. No. 21707, 2004 Ohio 110, at P23, citing *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003 Ohio 5984, at P11.

[*P12] For ease of discussing the best interests of both children, because this appeal involves challenges to the trial court's dispositions of legal custody of one child and permanent custody of the other, this Court will apply the permanent custody best interest factors set forth in R.C. 2151.414(D). Although this Court has recognized that other best interest factors may apply to a legal custody determination, it has also held **[**8]** that the best interest factors set forth in R.C. 2151.414(D) "provide guidance in determining whether a grant of legal custody is in the best interest of the [child.]" *In re T.A.*, 9th Dist. No. 22954, 2006 Ohio 4468, at P17; see, also, *In re B.G.*, 9th Dist. No. 24187, 2008 Ohio 5003, at P11.

[*P13] During the almost two-year pendency of this case, the parents had limited interaction with their children. Father had no interaction with the children during the first year of this case, primarily due to the protection order that was in place. During the second year of the case, Father visited his children on a weekly basis, except during the several weeks that he was either incarcerated or hospitalized. Father's interaction was never expanded beyond weekly, supervised visitation because he failed to resolve his long-term drinking problem or his anger management issues.

[*P14] For well over a year after the children were removed from the home, Father kept abusing alcohol and his alcohol abuse continued to cause serious problems in his life. For example, during August 2007, Father stumbled into a bonfire while he was intoxicated and suffered burns that were severe enough to require hospitalization in the **[**9]** Akron Children's Hospital burn unit. During February 2008, although Father had started an anger management program, he assaulted the fifteen-year-old son of a friend while he was intoxicated. Although the original charge of assault was reduced, Father was criminally convicted as a result of the incident. One week after he was released from jail, he was admitted to a hospital psychiatric ward due to an emotional breakdown. Father entered an alcohol treatment program shortly afterward, where he remained at the time of the hearing, but admitted that he had done so because he would be able to avoid eight months' incarceration on criminal charges if he completed the program. [2]

FOOTNOTES

2 CSB again failed to present evidence about the nature of the criminal charges connected to the potential eight months of incarceration.

[*P15] Mother's interaction with her children was also limited to weekly supervised visitation, but Mother did not attend visits on a regular basis. Mother missed many visits and, because she usually had called CSB to confirm that she would be attending, the children often sat and waited for her and were disappointed by her failure to show. At the time of the permanent custody hearing, **[**10]** Mother was having no interaction with her children because she was incarcerated.

[*P16] When Mother did visit with the children, according to the psychologist who observed a family visit, the children seemed to lack emotional closeness to her. The psychologist explained that the children repeatedly went to the case aide rather than Mother for direction or praise. This psychologist, who had also evaluated Mother individually, testified that she had diagnosed Mother with bipolar disorder and delusional disorder and that the degree to which Mother suffered from those disorders made it difficult for her to parent her children. The psychologist had also diagnosed Mother with borderline intellectual functioning due to her IQ of 70. The psychologist further explained that Mother was very dependent on others, had very little sense of self, tended to project blame onto others, and lacked any insight into why CSB was involved with her family.

[*P17] Due to their long-term exposure to their parents' serious problems, J.L. and B.L. worried about their parents and felt the need to protect or take care of them. B.L., because she was older than J.L., had also assumed the role of her brother's caretaker. The children's **[**11]** counselors expressed concern about B.L. and J.L. feeling the need to protect and care for others in their family and explained that these feelings were not normal or healthy for such young children.

[*P18] There was evidence that both children were well cared for in their current placements. J.L. had been living in the same foster home for almost a year and had adjusted well to living there. The foster parents had been working with him to provide structure and consistency and to address his academic delays. J.L. had become bonded to the foster parents and their children, and the foster parents expressed an interest in adopting J.L.

[*P19] B.L. was likewise doing well in her placement with her aunt and uncle. B.L. had become involved in cheerleading and softball for the first time and was enjoying these new activities. The aunt testified that she and her husband were prepared to provide B.L. with a permanent home.

[*P20] Several witnesses testified that there was a bond between J.L. and B.L. and that this was a bond that should be maintained. Although the parties expressed concern about placing the children in different homes, there was also evidence that J.L.'s foster parents and B.L.'s aunt and uncle **[**12]** were willing to work together to maintain a relationship between the two siblings.

[*P21] Each of the children had expressed their wishes in counseling. J.L., who was seven years old at the time of the hearing, had told his counselor that he would like his parents, who had divorced during the pendency of this case, to get back together and to live with him. Such a placement was not possible and, therefore, was not an option for the court. J.L. also told his counselor that he was happy living with his foster family and was bonded with that family.

[*P22] B.L., who was nine years old, told her counselor that she enjoyed living with her aunt and that she would like to stay there. The counselor further explained that B.L. had adjusted well to living with her aunt and uncle, was doing well in school, and had many friends. On the other hand, the counselor testified that B.L. was afraid to return to her father's home and that she preferred to stay with her aunt.

[*P23] The guardian ad litem expressed her opinion that permanent custody was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. She emphasized the unresolved problems of the parents and that Father, **[**13]** the only parent who was working on the goals of the case plan, had failed to make any progress until he was court ordered to do so.

[*P24] The custodial history of these children included almost 21 months spent in the temporary custody of CSB. As already detailed, the parents did not make substantial progress toward reunification during this prolonged period.

[*P25] After nearly two years living in temporary placements, both children were in need of a legally secure permanent placement. The evidence was clear that neither parent was in a position to provide the children with a suitable home. Mother had serious mental health issues and had failed to comply with the mental health component of the case plan. Moreover, at the time of the hearing, Mother was incarcerated.

[*P26] Father had failed to adequately address his long history of drug and alcohol problems.

vl

Father's counselor testified that Father needed to become sober to parent his children appropriately. Although he had been maintaining sobriety at the time of the hearing, he was in a controlled alcohol treatment program. More than one witness explained that remaining sober while in a controlled treatment environment was not sufficient to demonstrate **[**14]** an ability to remain sober. The psychologist who evaluated Father testified that she would want to see Father maintain sobriety outside a controlled environment for at least 8 to 12 months for him to demonstrate his sobriety.

[*P27] Although Father suggested at the hearing that the agency had not given him enough time to demonstrate sobriety, he was the one who waited nearly 15 months to start a treatment program that he was able to stick with. Moreover, Father admitted that he had entered and stayed in the treatment program because it was an alternative to serving eight months' incarceration on a criminal conviction.

[*P28] Permanent custody was not the only permanent placement option for B.L. CSB had been able to find a less drastic permanent placement for B.L. in the legal custody of relatives. She had been living in the home of her aunt and uncle and was doing well there.

[*P29] On the other hand, although J.L. initially had been placed in the home of his aunt and uncle, his behavior was uncontrollable and he posed a threat to the other children living there. The aunt and uncle testified that they were willing to help maintain a relationship between J.L. and B.L., but that they were unable to provide **[**15]** a permanent home for J.L.

[*P30] CSB had been unable to find any other suitable relative placement for J.L. J.L. had been adjusting well to the foster home where he had been living for almost a year, and the foster parents had expressed an interest in adopting him. Therefore, the trial court reasonably concluded that a legally secure permanent placement could only be achieved by granting permanent custody of J.L. to CSB.

[*P31] There was ample evidence before the trial court to support its conclusion that permanent custody to CSB was in the best interest of J.L. and that legal custody to her aunt and uncle was in the best interest of B.L. Mother's and Father's first assignments of error are overruled.

Mother's Assignment of Error Number Two

"THE JUVENILE COURT ERRED IN ITS INTERPRETATION OF CASE LAW ON THE ISSUE OF THE NATURE OR SCOPE OF ITS AUTHORITY TO EXTEND TEMPORARY CUSTODY BEYOND THE STATUTORY SUNSET DATE."

[*P32] Mother contends that the trial court erred in concluding that it lacked authority to extend temporary custody beyond the so-called two-year "sunset date" or two years after CSB filed its complaint. See R.C. 2151.415(D)(4). At the hearing, the trial court had several motions pending before **[**16]** it, including the parents' request that it extend temporary custody for another six months. Because the two-year sunset date was approaching, however, the parties discussed and briefed in writing the legal issue of whether the trial court had authority to extend temporary custody beyond the two-year period.

[*P33] At issue was R.C. 2151.415(D)(4), which at the time of the hearing provided, in relevant part:

> *HN5*"No court shall grant an agency more than two extensions of temporary custody *** and the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier[.]"

[*P34] Although the statutory language seems to indicate that a trial court has no authority to extend temporary custody beyond the sunset date, Mother cites authority from another appellate district that held otherwise. See *In re N.B.*, 8th District No. 81392, 2003 Ohio 3656, at P11-13. This Court need not determine whether the trial court had authority to extend temporary custody beyond the sunset date, however, because that issue is not raised by this appeal. In its judgment entry, although the **[**17]** trial court briefly discussed the lack of binding legal authority on this question, it did not take a position on the issue. Instead, the court explained that even if it had authority to extend temporary custody any further, its decision would be guided by the best interests of the children. The court then explained why an extension of temporary custody was not in the best interests of these children. The trial court had explained in a previous section of its judgment entry that permanent custody was in the best interest of J.L. and legal custody to relatives was in the best interest of B.L.

[*P35] Because this Court found no merit in the parents' first assignments of error regarding the

best interests of the children, Mother has failed to demonstrate any error. Mother's second assignment of error is overruled.

Father's Assignment of Error Number Two

"THE TRIAL COURT DENIED [FATHER] AND THE CHILDREN THEIR DUE PROCESS RIGHTS BY FAILING TO APPOINT SEPARATE COUNSEL FOR THE CHILDREN DESPITE THE CONFLICT OF INTEREST OF THE GUARDIAN AD LITEM IN EXPRESSING THE 'BEST INTEREST' OF THE CHILD WHICH WAS CONTRARY TO THE WISHES OF THE CHILD."

[*P36] Father contends that the trial court erred by failing to appoint **[**18]** independent counsel for the children. None of the parties raised this issue at any time in the trial court, but Father raises it for the first time on appeal to this Court. As this Court has repeatedly stated, HN6 "'where no request was made in the trial court for counsel to be appointed for the children, the issue will not be addressed for the first time on appeal.'" *In re T.E.*, 9th Dist. No. 22835, 2006 Ohio 254, P7, quoting *In re K.H.*, 9th Dist. No. 22765, 2005 Ohio 6323, at P41, citing *In re B.B.*, 9th Dist. No. 21447, 2003 Ohio 3314, at P7. Other appellate districts have also held that this issue must be raised in the trial court to preserve it for appellate review. See, e.g., In re Graham, 4th Dist. No. 01CA57, 2002 Ohio 4411, at P31-33; *In re Brittany T.*, 6th Dist. No. L-011369, 2001 Ohio 3099, at *6.

[*P37] Father has not asserted that the trial court committed plain error, nor has he explained why this Court should delve into this issue for the first time on appeal. In *In re T.E.*, this Court explained its rationale for not addressing this issue when a parent raised it for the first time on appeal:

> "Although some courts have held that a parent cannot waive the issue of the children's right **[**19]** to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 7th Dist. No. 04-BE-9, 158 Ohio App. 3d 679, 2004 Ohio 4544, at P31, 821 N.E.2d 1039, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1, 13, 601 N.E.2d 45.
>
> "The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward **[**20]** a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion." *In re T.E.*, at P8-9.

[*P38] Because Father did not timely raise this issue in the trial court, this Court will not reach the merits of his challenge. Father's second assignment of error is overruled.

III

[*P39] The assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing **[**21]** in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE

FOR THE COURT

MOORE, P. J.

DICKINSON, J.

CONCUR

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*2006 Ohio 254, *; 2006 Ohio App. LEXIS 204, **

IN RE: T. E. and L. E.

C. A. No. 22835

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2006 Ohio 254; 2006 Ohio App. LEXIS 204

January 25, 2006, Decided

PRIOR HISTORY: **[**1]** APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF SUMMIT, OHIO. CASE Nos. DN 3-7-642, DN 3-7-643.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: The Summit County Court of Common Pleas, Juvenile Division (Ohio), terminated respondent mother's parental rights to her two minor children and placed them in the permanent custody of petitioner agency, pursuant to Ohio Rev. Code Ann. § 2151.414. The mother appealed.

OVERVIEW: The mother argued that the trial court erred in not appointing counsel for the children. The appellate court held that the trial court did appoint an attorney to serve as both attorney and guardian ad litem to the children. With respect to the appointment of independent counse, since the children's wishes appeared to be in conflict with the attorney/guardian ad litem's recommendation, the mother had the opportunity at the permanent custody hearing to timely assert the children's rights, and therefore her derivative rights, but she chose not to. Further, there was ample evidence before the trial court from which it could have concluded that the mother had failed to substantially remedy the conditions that caused the agency to remove the children from the home, including the mother's alcohol dependency, her involvement in violent relationships, and her lack of stability. Finally, the trial court did not lose its way in concluding that permanent custody was in the children's best interest. The older child had taken on the parental role since the mother acted more like a child.

OUTCOME: The judgment of the trial court was affirmed.

CORE TERMS: custody, guardian ad litem, alcohol, parental rights, best interests, prong, planning, boyfriend, juvenile, domestic violence, violent, journal entry, assignments of error, ex-husband, placement, urine samples, dual capacity, reasonable time, convincing, appointed, appoint, temporary, case plan, tested positive, probation officer, appointing, screening, violence, progress, sobriety

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Counsel > Appointments
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

HN1 Pursuant to Ohio Rev. Code Ann. § 2151.352, as clarified by Ohio R. Juv. P. 4(A) and Ohio R. Juv. P. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances. Although the court did not specify what "certain circumstances" require the appointment of independent counsel, it did affirm the decision of the Court of Appeals of Ohio, Eleventh Appellate District, which held that the trial court must appoint independent legal counsel when it becomes apparent that a

conflict exists between the views of the attorney/guardian ad litem and the wishes of the children. More Like This Headnote

Civil Procedure > Counsel > Appointments
Family Law > Guardians > Appointment
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

HN2 In a permanent custody proceeding, if an attorney is serving in the dual capacity of attorney and guardian ad litem for the child and a conflict arises between the responsibilities of those two roles, both Ohio Rev. Code Ann. § 2151.281(H) and Ohio R. Juv. P. 4(C) explicitly require that the trial court appoint a new guardian ad litem, not a new attorney. More Like This Headnote

Civil Procedure > Counsel > Appointments
Civil Procedure > Appeals > Reviewability > Preservation for Review
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

HN3 In a permanent custody proceeding, where no request was made in the trial court for counsel to be appointed for the children, the issue will not be addressed for the first time on appeal. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Justiciability > Standing > Third Party Standing
Civil Procedure > Counsel > Appointments
Civil Procedure > Appeals > Reviewability > General Overview
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview

HN4 In an appeal of the termination of a parent's own parental rights, the parent has standing to raise the issue of his or her children's right to counsel only insofar as it impacts his or her own parental rights. More Like This Headnote | *Shepardize:* Restrict By Headnote

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

HN5 The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. More Like This Headnote

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > General Overview
Family Law > Parental Duties & Rights > Termination of Rights > Involuntary Termination > Abandonment

HN6 Before a juvenile court can terminate parental rights and award permanent custody of a child to a proper moving agency, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under Ohio Rev. Code Ann. § 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under Ohio Rev. Code Ann. § 2151.414(D). Ohio Rev. Code Ann. § 2151.414(B)(1) and 2151.414(B)(2). Each prong of the permanent custody test requires proof by clear and convincing evidence. Ohio Rev. Code Ann. § 2151.414(B)(1). Clear and convincing evidence is that which will produce in the trier of fact a firm belief or conviction as to the facts sought to be established. More Like This Headnote

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

HN7 When determining whether a grant of permanent custody is in the child's best interest, the juvenile court must consider the following factors: (1) 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; (2) 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; (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 12 or more months of a consecutive 22 month period ending on or after March 18, 1999; and (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency. Ohio Rev. Code Ann. § 2151.414(D)(1)-(4). Although the trial court is not precluded from

considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors. More Like This Headnote

COUNSEL: JOSEPH M. KERNAN, Attorney at Law, Akron, Ohio, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, Akron, Ohio, for Appellee.

JUDGES: BETH WHITMORE. SLABY, P. J., MOORE, J., CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

[*P1] Appellant, Bernadette E. ("Mother"), has appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her two minor children and placed them in the permanent custody of Summit County Children Services Board ("CSB"). This Court affirms.

[*P2] Mother is the natural mother of T.E., born May 17, 1995, and L.E., born June 19, 2000. The father of the children, Mother's ex-husband, [1] is not a party to this appeal. During July 2003, CSB removed these children from their home pursuant to Juv.R. 6 because **[**2]** Mother had left them home alone while she went to see her boyfriend, whose home was a twenty-minute drive from hers. On her return trip, Mother was pulled over by the police and cited for driving under the influence of alcohol. Mother informed the police at that time that she had left her children home alone.

FOOTNOTES

1 Although it is undisputed that the couple obtained a divorce, it is not clear from the record when the divorce occurred.

[*P3] CSB focused its case planning efforts on its primary concerns about Mother's parenting ability: her history of alcohol and substance abuse, a history of domestic violence in the home, and her lack of stable housing and employment. During the next 23 months, however, Mother made "minimal progress" on her case plan. On January 19, 2005, CSB moved for permanent custody of both children. Following a hearing, the trial court found that permanent custody was in the best interests of the children and that the children could not or should not be returned to Mother's home because **[**3]** she had failed to remedy the conditions that led to the removal of the children. Consequently, the trial court terminated Mother's parental rights and placed T.E. and L.E. in the permanent custody of CSB. Mother has timely appealed, raising three assignments of error, two of which will be consolidated for ease of review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN NOT APPOINTING COUNSEL FOR THE SUBJECT CHILDREN."

[*P4] Mother has asserted that the trial court erred in not appointing counsel for the children. A review of the record reveals, however, that the trial court did appoint an attorney to serve in the dual capacity of attorney and guardian ad litem for the children. Although Mother has asserted that the trial court record includes no journal entry explicitly appointing an attorney to serve in this dual capacity, she is mistaken. Through a journal entry filed August 11, 2003, the trial court appointed Attorney Tony Paxton to serve as both attorney and guardian ad litem for the children. He continued to serve in that capacity throughout the remainder of the case.

[*P5] Mother has also asserted that, because T.E. had expressed a desire **[**4]** to be reunited

with her, the trial court should have appointed independent legal counsel to represent the children. HN1"Pursuant to R.C. 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel *in certain circumstances.*" *In re Williams*, 101 Ohio St. 3d 398, 2004 Ohio 1500, 805 N.E.2d 1110, at syllabus. (Emphasis added.) Although the *Williams* court did not specify what "certain circumstances" require the appointment of independent counsel, it did affirm the decision of the Eleventh District Court of Appeals, which held that the trial court must appoint independent legal counsel when it becomes apparent that a conflict exists between the views of the attorney/guardian ad litem and the wishes of the children. [2]

FOOTNOTES

2 It should be noted that, HN2if an attorney is serving in the dual capacity of attorney and guardian ad litem for the child and a conflict arises between the responsibilities of those two roles, both R.C. 2151.281(H) and Juv.R. 4(C) explicitly require that the trial court appoint a new guardian ad litem, not a new attorney.

[5]** **[*P6]** There was evidence presented at the permanent custody hearing that T.E. wanted to return to Mother's home. As the guardian ad litem explained, however, in his fifteen years' experience as a guardian ad litem, he has found that most children of T.E.'s age state that they want to return home. The guardian ad litem explained that he did consider the stated wishes of T.E., but did not believe that it was in her best interest to return to Mother's home. He recommended that both children be placed in the permanent custody of CSB.

[*P7] Although there was an apparent conflict between the wishes of T.E. and the recommendation of the guardian ad litem, none of the parties raised a challenge at the hearing to the ability of the guardian ad litem to continue serving in the dual capacity of attorney and guardian ad litem for the children. As this Court stated in *In re K.H.*, 9th Dist. No. 22765, 2005 Ohio 6323, at P41, HN3"where no request was made in the trial court for counsel to be appointed for the children, the issue will not be addressed for the first time on appeal." Id., citing *In re B.B.*, 9th Dist. No. 21447, 2003 Ohio 3314, at P7. Other **[**6]** appellate districts have also held that this issue must be raised in the trial court to preserve it for appellate review. See, e.g., *In re Graham*, 4th Dist. No. 01CA57, 2002 Ohio 4411, at P31-33; *In re Brittany T.* (Dec. 21, 2001) 6th Dist. No. L-01-1369, 2001 Ohio 3099.

[*P8] Mother has not asserted that the trial court committed plain error, nor has she explained why this Court should delve into this issue for the first time on appeal. Although some courts have held that a parent cannot waive the issue of the children's right to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore*, 158 Ohio App. 3d 679, 2004 Ohio 4544, at P31, 821 N.E.2d 1039, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. HN4This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App. 3d 1, 13, 601 N.E.2d 45.

[*P9] HN5The Ohio General Assembly and the Ohio Supreme Court have **[**7]** required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion. The first assignment of error lacks merit.

Assignment of Error Number Two

"THE JUDGMENT OF THE TRIAL COURT THAT THE CHILDREN CANNOT OR SHOULD NOT BE PLACED WITH APPELLANT WITHIN A REASONABLE TIME WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

Assignment of Error Number Three

"THE JUDGMENT OF THE TRIAL COURT THAT THE BEST INTERESTS OF THE CHILDREN WOULD BE SERVED BY **[**8]** THE GRANTING OF PERMANENT CUSTODY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

[*P10] Mother has contended that the trial court erred in granting CSB's motion for permanent custody because the agency failed to establish each of the prongs of the permanent custody test.

[*P11] *HN6* Before a juvenile court can terminate parental rights and award permanent custody of a child to a proper moving agency, it must find clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 months of the prior 22 months, or that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on an analysis under R.C. 2151.414(E); and (2) the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2); see, also, *In re William S.* (1996), 75 Ohio St. 3d 95, 99, 1996 Ohio 182, 661 N.E.2d 738.

[*P12] **[**9]** Each prong of the permanent custody test requires proof by clear and convincing evidence. See R.C. 2151.414(B)(1). Clear and convincing evidence is that which will produce in the trier of fact "'a firm belief or conviction as to the facts sought to be established.'" *In re Adoption of Holcomb* (1985), 18 Ohio St. 3d 361, 368, 18 Ohio B. 419, 481 N.E.2d 613, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus. Mother has asserted that CSB did not meet its burden on either prong of the test. We disagree.

[*P13] The trial court found that the first prong of the test was satisfied because T.E. and L.E. could not or should not be placed with either parent within a reasonable time. Specifically, the trial court found that CSB had established that Mother "failed continuously and repeatedly to substantially remedy the conditions causing the [children] to be placed outside [their] home." R.C. 2151.414(E)(1).

[*P14] The following evidence supported the trial court's conclusion that Mother had failed to substantially remedy the conditions that caused T.E. and L.E. to be placed outside the home.

[10]** **[*P15]** This case began after Mother left her children, then ages three and eight, at home alone and drove for twenty minutes to her boyfriend's house. On the return trip, the police stopped Mother and cited her with driving under the influence of alcohol, her second such offense in less than two years. [3] Mother was also charged with child endangerment for leaving her children home alone.

FOOTNOTES

3 Although the trial court indicates that this was Mother's fourth offense, this Court found no such evidence in the record.

[*P16] Mother's problem with substance abuse was one of the primary focuses of her case plan, with a goal that she achieve and maintain sobriety. At various times during the case planning period, however, Mother tested positive for alcohol and cocaine. Mother also tested positive for opiates during this time, but CSB did not dispute that she had a prescription for Vicodin because she had been injured during an altercation with her boyfriend. The case worker expressed concern, however, that **[**11]** Mother continued using Vicodin for an entire month after the incident occurred.

[*P17] Although Mother did eventually complete an outpatient substance abuse program, she failed to satisfy the requirements of her follow-up treatment: that she attend Alcoholics Anonymous ("AA") meetings once or twice a week and that she submit urine samples for drug an alcohol screening three times per week.

[*P18] Mother testified that she was attending AA meetings regularly, but she submitted documentation to verify her attendance at only 12 meetings. On cross-examination by the guardian ad litem, Mother was unable to explain much about AA's 12-step program. For example, she could not identify the first step of the program or what step she was currently on. Mother also testified that she did not have an AA sponsor at that time. The trial court reasonably concluded that Mother had not been attending AA meetings on a regular basis.

[*P19] Although Mother insisted that she had achieved sobriety, she made no demonstration to CSB that she had. Mother was required to submit urine samples for drug screening three times per week throughout the case planning period, for a total of well over **[**12]** 200 samples, but she submitted only 54. Of the 54 samples that she did submit, several of them tested positive for drugs or alcohol.

[*P20] CSB has indicated in other cases that when a parent only sporadically submits urine samples, the agency reasonably concludes that they are not maintaining sobriety. For example, on

one specific occasion when Mother visited her probation officer, the probation officer suspected that she was "high" so he ordered her to go immediately submit a urine sample for screening, but Mother did not submit a sample that day. According to Mother's testimony, she did not have time to submit the sample because she had to get back to work. The probation officer testified, however, that Mother told him she did not have time to submit the sample because she had a tanning appointment. The guardian ad litem also emphasized that Mother did not even seem to recognize that she had a problem with alcohol.

[*P21] Another key concern of CSB was Mother's history of domestic violence in the home that predated the removal of the children. Mother had a violent relationship with her ex-husband as well as with another man with whom she was romantically involved during **[**13]** this period. During the case planning period, Mother did little to remedy her destructive pattern of involving herself in violent and abusive relationships. In fact, additional incidents of domestic violence occurred, two of which were severe enough to come to the attention of CSB.

[*P22] On one occasion, Mother became involved in a fight with her ex-husband when the children were present. During that incident, a glass door was broken and T.E. was injured by some of the broken glass from the door. T.E. called "911" for assistance. Although Mother testified that she did not fight in front of her children, this apparently was not an isolated incident. T.E.'s counselor testified that T.E. told her about repeatedly being exposed to violence between Mother and T.E.'s father as well as between Mother and her boyfriend.

[*P23] During another incident, Mother was involved in an altercation with her boyfriend and was injured so severely that she was visibly bruised on her face and was unable to walk. Although the caseworker talked to Mother and discussed options of how Mother could get assistance, such as going to the battered woman's shelter or to having her mother stay with her, **[**14]** Mother instead chose to return to the home of her ex-husband, with whom she also had a violent past.

[*P24] Although Mother did eventually obtain a divorce from her husband, she had done nothing to address her long history of involving herself in violent relationships. Her case plan required her to obtain professional help through anger management classes and relationship counseling. She did not complete relationship counseling and she failed even to start anger management classes.

[*P25] Mother failed to obtain a psychological assessment, also required by her case plan, to address the concerns of CSB that she suffered from depression. Mother contended that she did not obtain a psychological assessment because she could not afford it. The evidence demonstrated, however, that Mother opted to spend large sums of money on other things, such as purchasing a car at a time when her driver's license was suspended, rather than using the money to take steps toward reunification with her children.

[*P26] Mother also made little progress toward achieving stability in her housing or employment. At the time of the permanent custody hearing, Mother had adequate housing and was **[**15]** employed, but she had not demonstrated any stability. Mother had been employed at four different part-time jobs and lived in four different places during the case planning period.

[*P27] There was ample evidence before the trial court from which it could conclude that Mother failed to substantially remedy the conditions that caused CSB to remove T.E. and L.E. from the home. Thus, the first prong of the permanent custody test was satisfied.

[*P28] Next, Mother challenges the trial court's conclusion that permanent custody was in the children's best interests. *HN7* When determining whether a grant of permanent custody is in the child's best interest, the juvenile court must consider the following factors:

> "(1) 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;
>
> "(2) 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;
>
> "(3) The custodial history of the child, including whether the child has been in the temporary custody **[**16]** of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999; [and]
>
> "(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency[.]" R.C. 2151.414(D)(1)-(4). [4]

FOOTNOTES

4 The factor set forth in R.C. 2151.414(D)(5) is not relevant in this case.

[*P29] Although the trial court is not precluded from considering other relevant factors, the statute explicitly requires the court to consider all of the enumerated factors. See *In re Smith* (Jan. 2, 2002), 9th Dist. No. 20711, at 6, 2002 Ohio 34; see, also, *In re Palladino*, 11th Dist. No. 2002-G-2445, 2002 Ohio 5606, at P24.

[*P30] Although the children were initially placed under protective supervision in their father's home, they were later removed from his home due **[**17]** to domestic violence and placed in the temporary custody of CSB. The evidence demonstrated that Mother attended weekly visits with her children on a regular basis and that there was a bond between Mother and both children. Mother's visits failed to progress beyond weekly, supervised visits, however, and the visits were even highly supervised for a period. CSB remained concerned about Mother's problem with drugs and alcohol and the history of domestic violence in the home. During the case planning period, as explained above, the children were exposed to violence and T.E. was even injured by glass from a door that was broken during one fight.

[*P31] According to the guardian ad litem, who observed Mother's interaction with her children, Mother acted more like a sibling to her children than a parent. Mother liked to play with T.E. and L.E., but she did not talk much to them, nor did she set appropriate boundaries for the younger child, L.E. In fact, during the visits, it was often T.E. who stepped in to set boundaries and correct the behavior of L.E. The guardian ad litem noted that, for a long time, T.E. had acted as a parent to L.E. The guardian ad litem was also concerned that **[**18]** T.E. had spent a great deal of time worrying about her mother and her violent relationships.

[*P32] The guardian ad litem spoke on behalf of the children. Although he indicated that T.E. had expressed a desire to return to Mother's home, he emphasized that T.E. had been forced to act in a parental capacity in that home because Mother acted more like a child. The guardian ad litem recommended that the children be placed in the permanent custody of CSB, emphasizing that the children should be able to move on to a better life and not have to worry about their mother and her problems.

[*P33] The custodial history of the children included a period of almost two years living outside Mother's home. During the time that the children did live with their mother, they were exposed to ongoing violence in the home between their parents and T.E. had assumed the role of caretaker to her younger brother. As the counselor for T.E. stressed, she continued to have the same concerns for the safety and welfare of these children as she did in 2003.

[*P34] There was also evidence that each child was in need of a legally secure permanent placement and there were no other permanent placement **[**19]** options available such as legal custody to a relative. Thus, the trial court reasonably concluded that permanent custody was the only permanency option available.

[*P35] Given the evidence before the trial court, we find that it did not lose its way concluding that permanent custody was in the best interests of T.E. and L.E. The second and third assignments of error are not well taken.

III

[*P36] The assignments of error are overruled and the judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of **[**20]** Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE

FOR THE COURT

SLABY, P. J.

MOORE, J.

CONCUR

Service: **Get by LEXSEE®**
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App R 4 Appeal as of right—when taken

(A) Time for appeal

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals. If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion. In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R 53(D)(4)(e)(i) or (ii) or Rule 40(D)(4)(e)(i) or (ii) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion. In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution. In an appeal by the prosecution under Crim. R. 12(K) or Juv. R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ.R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ.R. 54(B).

(C) Premature notice of appeal

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of "entry" or "entered"

As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ.R. 58(A) or Crim.R. 32(C).

(Adopted eff. 7-1-71; amended eff. 7-1-72, 7-1-85, 7-1-89, 7-1-92, 7-1-96, 7-1-02, 7-1-09)

Juv R 2 Definitions

As used in these rules:

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

S.Ct. Prac. R. 2.2. Institution of appeal from court of appeals

(B) Contents of notice of appeal

[See Appendix A for a sample notice of appeal from a court of appeals.]

(1) The notice of appeal shall state all of the following:

(a) The name of the court of appeals whose judgment is being appealed;

(b) The case name and number assigned to the case by the court of appeals;

(c) The date of the entry of the judgment being appealed;

(d) That one or more of the following are applicable:

(i) The case involves affirmance of the death penalty;

(ii) The case originated in the court of appeals;

(iii) The case raises a substantial constitutional question;

(iv) The case involves a felony;

(v) The case is one of public or great general interest;

(vi) The case involves termination of parental rights or adoption of a minor child, or both;

(vii) The case is an appeal of a court of appeals determination under App. R. 26(B).

(2) In an appeal of right under S.Ct. Prac. R. 2.1(A)(1), a date-stamped copy of the court of appeals judgment entry that is being appealed shall be attached to the notice of appeal. For purposes of this rule, a date-stamped copy of the court of appeals judgment entry shall mean a copy bearing the file stamp of the clerk of the court of appeals and reflecting the date the court of appeals filed its judgment entry for journalization with its clerk under App. R. 22. If the opinion of the court of appeals serves as its judgment entry, a date-stamped copy of the opinion shall be attached.

(3) In a discretionary appeal or claimed appeal of right, if a party has timely moved the court of appeals to certify a conflict under App. R. 25, the notice of appeal shall be accompanied by a notice of pending motion to certify a conflict, in accordance with S.Ct. Prac. R. 4.4(A), that a motion to certify a conflict is pending with the court of appeals.

S.Ct. Prac. R. 3.1. Memorandum in support of jurisdiction

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal.

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) A table of contents, which shall include the propositions of law;

(2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;

(3) A statement of the case and facts;

(4) A brief and concise argument in support of each proposition of law.

(C) Except in postconviction death penalty cases, a memorandum shall not exceed fifteen numbered pages, exclusive of the table of contents and the certificate of service.

(D)(1) A date-stamped copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memorandum. For purposes of this rule, a date-stamped copy of the court of appeals judgment entry shall mean a copy bearing the file stamp of the clerk of the court of appeals and reflecting the date the court of appeals filed its judgment entry for journalization with its clerk under App. R. 22.

(2) In postconviction death penalty cases, the appellant shall also attach the findings of fact and conclusions of law entered by the trial court.

(3) The appellant may also attach any other judgment entries or opinions issued in the case, if relevant to the appeal. The memorandum shall not include any other attachments.

(E) Except as otherwise provided in S.Ct. Prac. R. 2.2(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk shall refuse to file the notice of appeal.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 4-1-02, 7-1-04, 1-1-08, 1-1-10)

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.

(2000 S 179, § 3, eff. 1-1-02; 1969 H 320, eff. 11-19-69)

2151.352 Right to counsel

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child.

(2005 H 66, eff. 9-29-05; 2000 S 179, § 3, eff. 1-1-02; 1975 H 164, eff. 1-13-76; 1969 H 320)