

ORIGINAL

IN THE SUPREME COURT OF OHIO

	:	Case No.	12-2122
In re: I.A.,	:	On Appeal from the Montgomery	
a minor child	:	County Court of Appeals	
	:	Second Appellate District	
		Case No. 25078	

NOTICE OF CERTIFIED CONFLICT

Montgomery County Prosecuting Attorney

Office of the Ohio Public Defender

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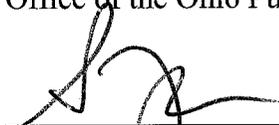
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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Minor-child I.A. hereby gives notice that the Second District Court of Appeals issued an order certifying that its October 26, 2012 judgment in this case, *In re I.A.*, 2d Dist. No. 25078, 2012-Ohio-4973, conflicts with the Fifth District's judgment in *In re B.G.*, 5th Dist. No. 2011-COA-012, 2011-Ohio-5898, and certified to this Court the following question of law: If a court commits a child to a secure facility, does R.C. 2152.83(B)(1) permit the court to conduct a classification hearing at the time of disposition? (December 13, 2012 Decision and Entry, attached). S.Ct. Prac.R. 4.1.

Respectfully submitted,

Office of the Ohio Public Defender



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CERTIFICATE OF SERVICE

A copy of the foregoing **Notice of Certified Conflict** was served by ordinary U.S. Mail, postage-prepaid, this 19th day of December, 2012, to the office of Michele Phipps, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, P.O. Box 972, Dayton, Ohio 45422.



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GREGORY A. BRUSH
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MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN RE:

I. A.

:
: Appellate Case No. 25078

:
: Trial Court Case No. 2011-9975

:
: (Juvenile Appeal from
: Common Pleas Court)

.....
DECISION AND ENTRY

Rendered on the 13th day of December, 2012
.....

PER CURIAM:

This matter comes before the Court on the motion to certify a conflict to the Ohio Supreme Court filed under App.R. 25 by the appellant, I.A. I.A. argues that our October 26, 2012 judgment in this case, *In re I.A.*, 2d Dist. Montgomery No. 25078, 2012-Ohio-4973, conflicts with the Fifth District's judgment in *In re B.G.*, 5th Dist. Ashland No. 2011-COA-012, 2011-Ohio-5898. We agree.

"[A]t least three conditions must be met before and during the certification of a case ***." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993). One, the asserted conflict between the certifying court's judgment and the judgment of an appellate

court in another district “*must* be ‘upon the same question.’” (Emphasis sic.) *Id.* Two, the conflict must be on a rule of law. *Id.* And three, the certifying court’s journal entry or opinion must clearly set forth the conflicting rule of law. *Id.* These conditions are satisfied in this case.

The present case and *In re B.G.* both involved the application of R.C. 2152.83, “[t]he statute that controls the procedure for juvenile sex-offender classification,” *State ex rel. Jean-Baptiste v. Kirsch*, --- Ohio St.3d ---, 2012-Ohio-5697, --- N.E.2d ---, ¶ 25. Division (B)(1) of the statute provides that, if certain conditions are met, which they are in this case, “[t]he court that adjudicates a child a delinquent child * * * may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child’s release from the secure facility a hearing for the purposes described in division (B)(2) of this section * * *”. R.C. 2152.83(B)(1).

The question on which I.A. asserts there is a conflict concerns when a court that commits a child to a secure facility may hold a division (B)(2) hearing. The Fifth District held in *In re B.G.* that the hearing may be held only when the child is released from the secure facility: “The statute should be construed as permitting the court to classify the child at disposition unless the child is sent to a secure facility, in which case it may classify the child upon release. The use of the word ‘may’ indicates the court has discretion to decide whether, not when, to classify the child.” *In re B.G.* at ¶ 32. In our opinion in the present case, we rejected the Fifth District’s *In re B.G.* interpretation. We said that division (B)(1) is clear that a court may hold the hearing either at disposition or when the child is released: “Under division (B), in the case of a committed juvenile, a court has the (limited) discretion to, in effect, choose the time at which to classify a juvenile as a juvenile-offender registrant.” *In re I.A.* at ¶ 16.

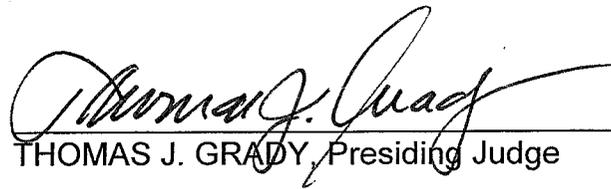
The state agrees that both cases involve the application of R.C. 2152.83(B)(1). But it contends that there is no conflict. It points out that *In re B.G.* bases its conclusion on the legislature's intent with respect to division (B)(1). In our decision in this case, we concluded that division (B)(1) is not ambiguous and simply applied its plain meaning. In sum, *In re B.G.* does not consider ambiguity; we did not consider the legislature's intent. While the state correctly identifies the differing bases of the two judgments, the reasons that support a judgment are not relevant to the conflict analysis. A conflict exists between two judgments when they are, at least in part, the product of differing conclusions on the same question of law. Thus a conflict may exist even if neither court gave any reason to support its conclusion.

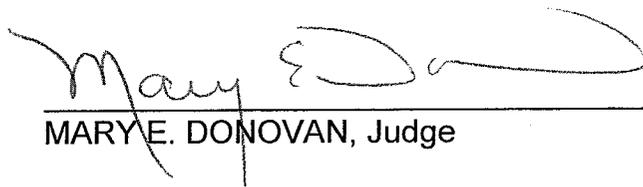
Our judgment in this case conflicts with the judgment in *In re B.G.* We certify to the Ohio Supreme Court the following question of law:

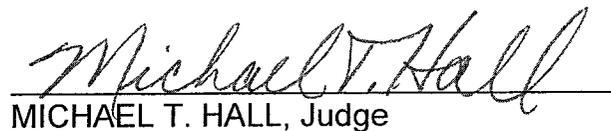
If a court commits a child to a secure facility, does R.C. 2152.83(B)(1) permit the court to conduct a classification hearing at the time of disposition?

The motion to certify a conflict is sustained.

IT IS SO ORDERED.


 THOMAS J. GRADY, Presiding Judge


 MARY E. DONOVAN, Judge


 MICHAEL T. HALL, Judge

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:df

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN RE:

I. A.

Appellate Case No. 25078

Juvenile Court No. 2011-9975

(Juvenile Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 26th day of October, 2012.
.....

MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. #0069829, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Appellee

SHERYL A. TRZASKA, Atty. Reg. #0079915, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215
Attorney for Appellant

.....
HALL, J.

{¶ 1} “John”¹ was adjudicated a delinquent juvenile for committing rape in 2011 when he was 14 years old.² At the disposition hearing,³ the juvenile court committed John to the Department of Youth Services’s legal custody for at least one year and potentially until he turns 21 years old. The court ordered that he be placed in a secure facility. Also at the hearing, the court classified John as a juvenile-offender registrant and ordered him to comply with the sex-offender registration and notification requirements in R.C. Chapter 2950. The court did not impose the chapter’s victim- or community-notification provisions. Finally, the court determined that John is a Tier III sex offender/child-victim offender.

{¶ 2} John appeals the juvenile court’s application of R.C. Chapter 2950 to him. In the first of two assignments of error, John contends that the application violates R.C. 2151.01 and 2152.01 and the Due Process Clauses of the Ohio and United States Constitutions. In the second assignment of error, he contends that classifying him as a juvenile-offender registrant before his release from the secure facility violates R.C. 2152.83.

I. Applying R.C. Chapter 2950 to Juveniles

{¶ 3} John contends that applying R.C. Chapter 2950 to juveniles violates R.C. 2151.01(B), 2152.01(A) and (B), and due process. The state does not argue the merits of this contention. Instead, it contends that John waived appellate review of this issue

¹To enhance readability, we refer to the appellant, I.A., by this pseudonym.

²The complaint alleges that John’s act violated R.C. 2907.02(A)(1)(b), engaging in sexual conduct with a person less than 13 years of age. The act would be a first-degree felony if committed by an adult. John admitted to the complaint’s allegations.

³The complaint was filed in Clark County Juvenile Court, and that court adjudicated him delinquent. The case was then transferred to Montgomery County Juvenile Court for disposition because Montgomery was John’s home county.

because he did not raise it in the juvenile court. Although John, in his reply brief, tacitly admits that he did not raise this issue, he urges us to exercise our discretion and consider the issue nevertheless.

{¶ 4} “Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue.” *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. However, “[t]he waiver doctrine * * * is discretionary.” *In re M.D.*, 38 Ohio St. 3d 149, 527 N.E.2d 286 (1988), syllabus. Even in a case of clear waiver, an appellate court may “consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it.” *Id.*; see *In re J.F.*, 178 Ohio App.3d 702, 2008-Ohio-4325, 900 N.E.2d 204, ¶ 84 (2d Dist.) (saying that “parties may raise plain error on appeal, even where objections were not filed in juvenile court”). Courts will consider unraised issues when doing so “best serve[s]” “the interests of justice.” *In re A.R.R.*, 4th Dist. Ross No. 09CA3105, 2009-Ohio-7067, ¶ 4. Since John is a juvenile, and because this issue is applicable throughout juvenile sex offenses, we think that the interests of justice are best served by considering whether R.C. Chapter 2950 may be applied to him.

{¶ 5} John argues that R.C. Chapter 2950 may not be applied to a juvenile because the law is punitive⁴ and a juvenile may not be criminally punished. The statutes that John cites concern the purposes and goals of Ohio’s juvenile system. R.C. 2151.01(B)

⁴The Ohio Supreme Court in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16, considered whether R.C. Chapter 2950 is remedial or punitive for purposes of determining whether the law is retroactive. The Court concluded that “[f]ollowing the enactment of S.B. 10 * * * R.C. Chapter 2950 is punitive.”

pertinently provides that the section should be “liberally interpreted and construed so as 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.” And R.C. 2152.01 pertinently provides:

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender’s actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

(B) Dispositions under this chapter shall be *reasonably calculated to achieve the overriding purposes* set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child’s * * * conduct.

(Emphasis added.) Punishment, John points out, is not one of the statutory purposes or goals, but this does not mean that sex offender registration requirements may not be imposed. The Ohio Supreme Court has said that “[p]unishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation.” *In re Caldwell*, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996). Placing a juvenile in a secure facility for several years is undoubtedly punishment. But courts may order juvenile detention to achieve the goals of public protection and juvenile rehabilitation. Similarly, while imposing R.C. Chapter 2950’s registration and notification requirements may be punishment, doing so may help achieve these same goals, as the juvenile court in this case

explained:

[I]t gives the youth motivation to understand that if they've been classified * * * if you do better through your treatment, you can have it reduced or I can declassify you.

Many psychologists have determined that that motivation is a good motivation to give a youth that can successfully help that youth complete sex offender treatment.

(Disposition Tr. 15).

{¶ 6} It is not clear from John's argument how or why applying R.C. Chapter 2950 to juveniles violates due process. Nor does the argument clearly say whether the due-process violation is procedural or substantive. Since the argument does not mention the way in which the juvenile court here went about applying R.C. Chapter 2950, we understand the alleged violation to be one of substantive due process. The Eleventh District has rejected such an argument and held that applying R.C. Chapter 2950 to juveniles is constitutional. *In re Goodman*, 161 Ohio App. 3d 192, 2005-Ohio-2364, 829 N.E.2d 1219, ¶ 20 (11th Dist.). The court said that juveniles are not a suspect class and that R.C. Chapter 2950 implicates no fundamental constitutional right. *Id.* at ¶ 19, citing *In re R.L.*, 8th Dist. Cuyahoga Nos. 84543, 84545, 84546, 2005-Ohio-26, ¶ 16 (saying that "juveniles have never been treated as a suspect class and legislation aimed at juveniles has never been subjected to the test of strict scrutiny," quoting *In re Vaughn*, 12th Dist. Butler No. CA89-11-162, 1990 WL 116936, *5 (Aug. 13, 1990)). Scrutinizing the law using the rational-basis test, the Eleventh District concluded that "the General Assembly's legitimate interest of protecting the public from sexual offenders, regardless of age, bears

a rational relationship to the registration requirements of R.C. Chapter 2950 as it applies to juveniles.” *Id.* at ¶ 20. We agree with the Eleventh District’s reasoning and conclusion.⁵

{¶ 7} The first assignment of error is overruled.

II. The Timing of Juvenile-Offender-Registrant Classification

{¶ 8} John contends that under the division of R.C. 2152.83 that applies to him the juvenile court is permitted to impose the juvenile-offender-registrant classification only on his release from the secure facility to which the court sent him. The state contends that the division gave the court the choice to classify John either at the time of his disposition or at the time of his release.

{¶ 9} The juvenile-offender-registrant classification procedure that a court must follow depends on the juvenile’s age. Division (A) of section 2152.83 applies to a juvenile who was 16 or 17 years old at the time he committed the offense. See R.C. 2152.83(A)(1)(b). When division (A) applies the juvenile court “*shall* issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody

⁵The Ohio Supreme Court held in *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, that R.C. 2152.86 violates procedural due process because it automatically imposes lifelong registration and notification requirements on a certain class of juvenile sex offenders called public-registry-qualified juvenile-offender registrants. *In re C.P.* at ¶ 86. The Court found that “PRQJORs are subject to more stringent registration and notification requirements than other juvenile-offender registrants.” *Id.* at ¶ 12. And “[s]uch requirements are imposed upon [these] juveniles without the participation of a juvenile judge.” *Id.* at ¶ 86. In particular, the automatic Tier III sex offender classification “fails to meet the due process requirement of fundamental fairness.” *Id.* at ¶ 85.

But the Court contrasted the procedure used for PRQJORs with that used for traditional juvenile-offender registrants. The Court noted that the imposition of R.C. Chapter 2950’s requirements on the latter juveniles “rests within the juvenile court’s discretion,” *id.* at ¶ 20, because it is the court that determines these juveniles’ tier classification. John is a traditional juvenile-offender registrant, and it was the juvenile court that classified him as a Tier III sex offender. Therefore the due-process holding in *In re C.P.* does not apply here.

of a secure facility, *shall* issue at the time of the child's release from the secure facility an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06." (Emphasis added.) R.C. 2152.83(A)(1). Division (B) applies when the juvenile was 14 or 15 at the time he committed the offense. See R.C. 2152.83(B)(1)(b). Under division (B) the court is not required to classify the juvenile as a juvenile-offender registrant. Instead, the court, "on the judge's own motion, *may* conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, *may* conduct at the time of the child's release from the secure facility a hearing" to determine whether the juvenile should be classified. (Emphasis added.) R.C. 2152.83(B)(1) and (B)(2). Here the juvenile court correctly applied division (B),⁶ because John was 14 years old when he committed the offense for which he was adjudicated delinquent.

{¶ 10} If John had been 16 or 17 years old when he committed the offense, the juvenile court would be required to wait. Division (A) uses the word "shall," a word typically interpreted as imposing a duty or requirement. And Ohio courts appear to agree that if a court commits a juvenile to a secure facility, division (A) not only requires the court to classify the juvenile as a juvenile-offender registrant but also requires the court to do so when the juvenile is released. See, e.g., *In re B.G.*, 5th Dist. Ashland No. 2011-COA-012, 2011-Ohio-5898, ¶ 32; *In re H.P.*, 9th Dist. Summit No. 24239, 2008-Ohio-5848, ¶ 14; *In re P.B.*, 4th Dist. Scioto No. 07CA3140, 2007-Ohio-3937, ¶ 7; *In re Thomas*, 8th Dist. Cuyahoga Nos. 83579, 83580, 2004-Ohio-6415, ¶ 13. As one court has reasoned, "[t]he

⁶At the hearing, the juvenile court referred to division (A), (Tr. 10), as did defense counsel, (Tr. 13). The references appear simply to be mistakes.

plain language of R.C. 2152.83(A)(1) indicates that a juvenile court must classify a juvenile at disposition unless it commits the juvenile to a secure facility. In the case where a juvenile is committed to a secure facility, it must wait to classify the juvenile upon his release from the secure facility.” *In re H.P.* at ¶ 14. But the language used in division (A) differs from that used in division (B), in particular, division (B) uses the permissive word “may,” and courts do not agree on what this division means. Thus the issue here concerns not *whether* the juvenile court should have classified John as a juvenile-offender registrant but *when* it did so. This issue is one of statutory interpretation.

{¶ 11} “The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.” *State v. Hairston*, 101 Ohio St. 3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. The first place to look for intent is the statute’s language, *id.* at ¶ 12, reading the “[w]ords and phrases * * * in context and constru[ing] [them] according to the rules of grammar and common usage.” R.C. 1.42. If the language unambiguously reveals its meaning, “there is no occasion to resort to other means of interpretation.” *Id.*, quoting *Slingluff* at paragraph two of the syllabus. It is important to remember that “[t]he question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.” *Id.*, quoting *Slingluff* at paragraph two of the syllabus. Therefore “a court may engage in statutory interpretation when the statute under review is ambiguous.” *Id.*; accord R.C. 1.49. The question here, then, is whether division (B) of section 2152.83 is ambiguous. If it is, division (B) must be interpreted to determine the legislature’s intent. But if it isn’t ambiguous, no interpretation is necessary. The language must simply be applied. *Id.* at

¶ 13.

{¶ 12} The Fifth District has recently interpreted “may” as referring to *whether* not *when* a court imposes the juvenile-offender-registrant classification: “[T]he use of the word ‘may’ does not indicate the court has discretion regarding when to classify the child. Instead, the word ‘may’ indicates the court has discretion to determine whether the child should be classified.” *In re B.G.*, 2011-Ohio-5898, at ¶ 37. The court reasoned that construing “may” as referring to when “is not what the Legislature intended.” *Id.* at ¶ 32. Rather, “the Legislature intended for the court to classify the child only after determining whether the disposition and treatment provided for the child in a secure setting was effective.” *Id.* at ¶ 37. “To hold otherwise,” said the court, “would mean that children sixteen or seventeen years of age will not be classified until they have completed whatever programs DYS [Department of Youth Services] considers appropriate while they are in the secure facility, but a younger child could be determined to be a juvenile offender prior to receiving the benefit of whatever programs are available and appropriate in the secure setting.” *Id.* at ¶ 39. Its interpretation, said the court, is “more in accord with the purpose and goals of the juvenile justice system.” *Id.* at ¶ 40. With respect to the timing of classification, then, the Fifth District interprets division (B) much as it (and most other courts) interpret division (A).

{¶ 13} But the Fifth District has not always interpreted division (B) this way. In at least three previous cases, the court concluded that the division’s plain language places the timing issue within a juvenile court’s discretion. *See In re Carr*, 5th Dist. Licking No. 08 CA 19, 2008-Ohio-5689; *In re McAllister*, Stark App. No.2006CA00073, 2006-Ohio-5554;

In re Callahan, Ashland App. No. 04COA064, 2005-Ohio-735.⁷ In these cases (unacknowledged in the recent decision discussed above) the court said that “the General Assembly’s use of the word ‘may’ and the use of the conjunction ‘or’ triggers the trial court’s discretion regarding *when* to make a sexual predator determination.” (Emphasis added.) *In re Callahan* at ¶ 11. “The use of the word ‘may’ in the statute,” said the court, “provides a trial court with *discretion* on whether to classify a juvenile and at *what times* to classify the juvenile.” (Emphasis added.) *In re McAllister* at ¶ 10; see *In re Carr* at ¶ 21 (concluding that “the classification times set out in R.C. 2152.83[(B)(1)] [are] directory and not mandatory”). “Therefore,” the court concluded, “the trial court has two times when it may consider classification under R.C. 2152.83(B)(1): 1) at the time of disposition, or 2) at the time of release from a secure facility.” (Emphasis added.) *Id.* at ¶ 9.

{¶ 14} The Fourth District applies division (B) to reach the same conclusion. Citing the reasoning in the earlier Fifth District decisions, the Fourth District has concluded that “when an offender is fourteen years of age at the time of the offense, a court possesses discretion to make the sexual offender determination *either* at the time of disposition or at the child’s release.” (Emphasis sic.) *In re P.B.*, 2007-Ohio-3937, at ¶ 9.⁸ The practical effect of the differing language, said the court, is that if division (A) applies courts have no discretion when to classify a juvenile but if division (B) applies they do. *Id.* at ¶ 8. The

⁷The Fifth District’s decision in *In re Kristopher W.*, 5th Dist. Tuscarawas No. 2008 AP 03 0022, 2008-Ohio-6075, while not directly resolving the issue, suggests that, in this case too, the court would have concluded that timing is discretionary. See *In re Kristopher W.* at ¶ 16-17.

⁸“As our Fifth District colleagues have noted, the Ohio General Assembly’s use of the word ‘may’ and the conjunction ‘or’ in subsection (B)(1) triggers a court’s discretion as to when to make the sexual predator classification.” *In re P.B.* at ¶ 8.

Fourth District relied on a plain-meaning rule of statutory interpretation: “We recognize that courts must follow a statute’s plain language, regardless of the wisdom of the particular statutory provision.” *Id.*

{¶ 15} We agree that the meaning of what the legislature did enact in division (B) is not ambiguous, so we must reject any effort to determine what the legislature intended to enact. The difference in language between division (B) and division (A) is more than merely one word. Under division (B) classification as a juvenile-offender registrant is not automatic; a hearing must first be held after which the court must decide whether classification is appropriate. The hearing may be conducted at disposition or it may be conducted on a committed-juvenile’s release, or the hearing need not be conducted at all. Division (B) states only that a court “may” conduct a hearing at either time—a court “may” choose not to conduct a hearing at either time, or perhaps a court “may” choose to conduct a hearing at both times. Of course, this choice exists only in a case in which the juvenile is committed to a secure facility.⁹

{¶ 16} Under division (B), in the case of a committed juvenile, a court has the (limited) discretion to, in effect, choose the time at which to classify a juvenile as a juvenile-offender registrant. Therefore the juvenile court here had the discretion to classify John as

⁹Appellant argues that division (B)(1) should be read as two independent sentences connected by the conjunction “or.” In such a reading, the first conjunct would provide: “The court * * * may conduct at the time of disposition of the [juvenile] * * * a hearing” to determine when the juvenile could be classified. And the second conjunct would provide: “[I]f the court commits the [juvenile] * * * to the custody of a secure facility, [the court] may conduct at the time of the [juvenile]’s release from the secure facility a hearing” to determine when the juvenile could be classified. We believe that would be a strained reading of the statute.

a juvenile-offender registrant at disposition.¹⁰

{¶ 17} The second assignment of error is overruled.

{¶ 18} The judgment of the juvenile court is affirmed.

.....

GRADY, P.J., and DONOVAN, J., concur.

Copies mailed to:

Mathias H. Heck
Michele D. Phipps
Sheryl A. Trzaska
Hon. Anthony Capizzi

¹⁰John does not contend that the juvenile court abused its discretion by classifying him at this time.

Gwin, P.J.

{¶ 1} Appellant B.G., a minor child, appeals a judgment of the Court of Common Pleas, Juvenile Division, of Ashland County, Ohio, which found he is a delinquent child by reason of having committed two acts of rape, which would be felonies if committed by an adult. The court classified B.G. as a juvenile offender registrant with a duty to comply with RC. 2905.04, 2905.041, 2950.05, and 2950.06. The court also classified appellant a Tier III sex offender subject to community notification. Appellant assigns four errors to the trial court:

{¶ 2}“I. THE JUVENILE COURT VIOLATED B.G.’S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WHEN IT CLASSIFIED HIM AS A JUVENILE SEX OFFENDER REGISTRANT WITHOUT PROVIDING HIM THE OPPORTUNITY FOR ALLOCUTION, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 2 AND 16 OF THE OHIO CONSTITUTION, CRIM. R. 32, JUV. R. 29, AND JUV. R. 34.

{¶ 3}“II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM FOR B.G. IN VIOLATION OF OHIO REVISED CODE SECTION 2151.281 (A) AND JUVENILE RULE 4 (B).

{¶ 4}“III. THE TRIAL COURT ERRED WHEN IT CLASSIFIED B.G. AS A JUVENILE OFFENDER REGISTRANT BECAUSE IT DID NOT MAKE THAT DETERMINATION UPON HIS RELEASE FROM A SECURE FACILITY, IN VIOLATION OF R.C. 2152.83 (B)(1).

{¶ 5}“IV. THE TRIAL COURT ERRED WHEN IT ORDERED B.G. TO BE SUBJECT TO COMMUNITY NOTIFICATION.”

{¶ 6} The record indicates B.G. was fourteen years old at the time of the offenses. The original complaint alleged he was a delinquent child for three counts of rape, but on October 5, 2010, the court accepted his admission of true to two of the charges, and dismissed the third. The victims in the case were B.G.'s eight year old sister and two cousins, aged six and two.

{¶ 7} As early as the shelter care hearing, the court addressed appellant's grandparents and ordered them to have no contact between appellant or with any of the victims. The court indicated they were to have no children residing in their home and if the court found out there were children in the home, the Department of Job and Family Services would immediately take action.

{¶ 8} At the detention hearing on July 2, 2010, the State advised the court appellant had been in the custody of his grandparents, who had been aware of the abuse, but did very little to prevent it. The State argued the grandparents facilitated the abuse by telling the victim not to tell anyone what had happened. The court directed B.G. to have no contact either directly or indirectly with any of the alleged victims in the case. The court also directed he was not to have any contact with the grandparents.

{¶ 9} Subsequently, at the disposition hearing, the State elaborated on appellant's family background. The State alleged B.G.'s father, uncle, and possibly another family member had been charged with sex offenses. The prosecutor indicated appellant's father had been accused of sexual offenses committed against B.G.'s two older sisters, and it would not be a surprise to learn appellant had also been victimized.

{¶ 10} Officer Kim Mager of the Ashland County Police Department testified the grandparents had caught appellant in the act repeatedly, and failed to contact Children's

Protective Services, the police, or any other party. The officer indicated the grandparents had scolded appellant and threatened that he would end up in jail like his father. However, they permitted appellant to continue to be around the victims.

II.

{¶ 11} In appellant's second assignment of error, he argues the trial court should have appointed a guardian ad litem for him. We agree.

{¶ 12} Our standard of reviewing the court's decision whether to appoint a guardian ad litem is the abuse of discretion standard. *In Re: Sappington* (1997), 123 Ohio App. 3d 448, 454, 704 N.E.2d 339. The Supreme Court has repeatedly defined the term "abuse of discretion" as implying the court's attitude is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

{¶ 13} R.C. 2151.281 and Juv. R. 4 both deal with the appointment of a guardian ad litem. R.C. 2151.281 (A) provides the court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child when the court finds that there is a conflict between the child and the child's parent, guardian or legal custodian.

{¶ 14} Juv. R. 4 (B) provides: "the court shall appoint a guardian ad litem to protect the interest of the child or incompetent adult in the juvenile court proceeding when: *** (2) the interest of the child and the interest of the parent may conflict***"

{¶ 15} Juv. R. 4 therefore requires the appointment of a guardian ad litem where there is a possibility of conflict, while the statute requires appointment only if the court finds there is an actual conflict of interest. *Sappington*, *supra*, at 453. The relevant

question on appeal is whether the record reveals an actual or potential conflict of interest which required the appointment of a guardian ad litem. *Id.*

{¶ 16} In *Sappington*, supra, the seventeen year old child was accused of domestic violence against his mother, and his father accompanied him to the hearing. When the child expressed an interest in speaking with an attorney, the father, in open court, persuaded him it was unnecessary. The court of appeals found although the magistrate had not made a finding there was a potential or actual conflict of interest, it was implicit in the facts and circumstances of the case. In the case at bar, the court did not find a potential or actual conflict, but found it necessary to enter a no-contact order with appellant's legal custodians. The evidence before the court was that the grandparents had not taken action to prevent the abuse and had not attempted to get assistance to deal with the situation.

{¶ 17} The State cites us to *In Re: Becera*, Eighth App. No. 79715, 2002-Ohio-678, where the parent was a victim in a domestic violence case. The court there found the pertinent question was whether the parent was acting in a parental role sufficient to protect the juvenile's rights. The court found it was significant that the child was represented by counsel. The court noted a guardian ad litem would not necessarily have made the recommendations the child wanted, if the guardian found those recommendations were not in the child's best interest. The court concluded no guardian ad litem was required to protect the child's interests.

{¶ 18} R.C. 2151.281 (H), and Juv. R. 4 (C) permit an attorney to serve both as counsel and as guardian ad litem for a child in a juvenile court proceeding, provided the

court makes an explicit dual appointment and no conflicts arise in the dual representation. Here, the court did not order dual representation.

{¶ 19} The Supreme Court has recognized the roles of guardian ad litem and of attorney are not always compatible, because they serve different functions. The role of a guardian ad litem is to investigate the juvenile's situation and to ask the court to do what the guardian determines to be in the child's best interest. The role of the attorney is to zealously represent the client within the bounds of law. *In re: Baby Girl Baxter* (1985), 17 Ohio St. 3d 229, 479 N.E.2d 257.

{¶ 20} Here, the court felt the custodial grandparents were so unsuitable that it entered a no-contact order, which in effect prevented them from taking any steps to protect the rights of appellant and of all three victims. The court clearly found they had nothing positive to offer any of the children. The record does not show any other adult coming forward to fill the role of parent or guardian ad litem. This fourteen year old boy pled true to very serious charges with only his counsel to advise him.

{¶ 21} We find the trial court erred in not appointing a guardian ad litem for appellant. The second assignment of error is sustained.

III. & IV.

{¶ 22} In his third assignment of error, appellant argues the court erred in classifying him as a juvenile offender registrant because it could only do so upon his release from a secure facility. In his fourth assignment, he argues the court erred in finding him to be subject to community notification.

{¶ 23} R.C. 2152.83 controls the classification of a child as a juvenile offender registrant. Section (A) applies to children sixteen or seventeen years of age at the time

of the offense. It provides “the court that adjudicates a child as a delinquent child *shall* issue as part of the dispositional order or, if the court commits the child *** to the custody of a secure facility, *shall* issue at the time of the child’s release from a secure facility in order that classifies the child a juvenile offender registrant.***” (emphasis added.)

{¶ 24} This language has been construed to mean if the court commits the child to the Ohio Department of Youth Services, it must wait until the child is released to make the classification. See, e.g., *In Re: J.B.*, Morrow App. No. 2011-CA-0002, 2011-Ohio-4530; *In the Matter of: P.B.*, Scioto App. No. 07-CA-3140, 2007-Ohio-3937.

{¶ 25} However, the statute treats a fourteen or fifteen year old child differently. Under those circumstances, the statute provides:

{¶ 26} “(B)(1) The court that adjudicates a child a delinquent child, on the judge’s own motion, *may* conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, *may* conduct at the time of the child’s release from the secure facility a hearing for the purposes described in division (B)(2) of this section if all of the following apply:

{¶ 27} “(a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

{¶ 28} “(b) The child was fourteen or fifteen years of age at the time of committing the offense.

{¶ 29} “(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender

registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.” (emphasis added).

{¶ 30} R.C. 2152.82 deals with juvenile offenders with prior sexual offenses and R.C. 2152.86 refers to children found to be serious youthful offenders. Neither section applies to appellant.

{¶ 31} R.C. 2152.83 (B) has been construed as permitting the court to choose when to classify the child, that is, either at the time of disposition or the time of the child’s release. *In the Matter of P.B.*, supra.

{¶ 32} We find this is not what the Legislature intended. The statute should be construed as permitting the court to classify the child at disposition unless the child is sent to a secure facility, in which case it may classify the child upon release. The use of the word “may” indicates the court has discretion to decide whether, not when, to classify the child. The court may determine no hearing is necessary, or may hold a hearing but decline to classify the child, based upon the individual circumstances of the case.

{¶ 33} This interpretation of the statute is supported by the subsequent section. Subsection (B)(2) provides:

{¶ 34} “(2) A judge shall conduct a hearing under division (B)(1) of this section to review the effectiveness of the disposition made of the child and of any treatment provided for the child placed in a secure setting and to determine whether the child should be classified a juvenile offender registrant. The judge may conduct the hearing on the judge’s own initiative or based upon a recommendation of an officer or employee of the department of youth services, a probation officer, an employee of the

court, or a prosecutor or law enforcement officer. If the judge conducts the hearing, upon completion of the hearing, the judge, in the judge's discretion and after consideration of the factors listed in division (E) of this section, shall do either of the following:

{¶ 35} “(a) Decline to issue an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code;

{¶ 36} “(b) Issue an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and that states the determination that the judge makes at the hearing held pursuant to section 2152.831 of the Revised Code as to whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender.”

{¶ 37} This language supports the interpretation that the Legislature intended for the court to classify the child only after determining whether the disposition and treatment provided for the child in a secure setting was effective. The statute does not require the court to classify the child as any type of juvenile offender registrant. Thus, we find the use of the word “may” does not indicate the court has discretion regarding when to classify the child. Instead, the word “may” indicates the court has discretion to determine whether the child should be classified.

{¶ 38} The timing of the classification is the same for either sixteen and seventeen years old pursuant to R.C. 2152.83 (A) and for fourteen and fifteen years old under (B): at disposition, unless the child is referred to a secure facility, in which case

the court must wait until the child has completed his or her stay in the secure facility to determine whether treatment received there was effective.

{¶ 39} To hold otherwise would mean that children sixteen or seventeen years of age will not be classified until they have completed whatever programs DYS considers appropriate while they are in the secure facility, but a younger child could be determined to be a juvenile offender prior to receiving the benefit of whatever programs are available and appropriate in the secure setting.

{¶ 40} Our reading of the statute is also more in accord with the purpose and goals of the juvenile justice system. In the case of *In the matter of W.Z.*, Sandusky App. No. S-09-036, 2011-Ohio-3238, the Court of Appeals for the Sixth District succinctly summarized:

{¶ 41} “*** [J]uvenile proceedings are ‘civil’ rather than criminal and, in theory, the priority of the juvenile system has been rehabilitation, rather than punishment. Society generally refuses to penalize youth offenders as harshly or to hold them to the same level of culpability as adults, who are older and, presumably, wiser and more mature. *** In addition, an essential tenet of the juvenile system has been to maintain the privacy of the youthful offender. Although juveniles may be denied certain procedural rights afforded to adult criminal defendants, such as public indictment or trial by jury, they are protected from the publicity and stigma of criminal prosecution.” *Id.* at paragraphs 23-24, citations deleted. We find a court should give a child all possible benefit of rehabilitation and treatment before deciding to order him or her to comply with the registration and community notification similar to that required of adult offenders.

{¶ 42} We find the trial court's classification of appellant as a juvenile offender registrant subject to community notification was premature, and it should make the determination, if at all, after appellant is released from DYS custody.

{¶ 43} The third and fourth assignments of error are sustained.

I.

{¶ 44} In his first assignment of error, appellant urges the court failed to provide him with the opportunity for allocution at the classification hearing. The statute does not address this issue.

{¶ 45} Because we find the court should have delayed the classification hearing until after appellant's release from DYS custody, we find the issue is premature.

{¶ 46} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, of Ashland County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

Edwards, and Delaney, JJ., concur.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

