[Cite as *In re Joiner*, 2004-Ohio-1158.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

IN THE MATTER OF:	**:**	**O P I N I O N**
JEROME JOINER AND TAQUAN AND JAONTAE MATTHEWS	**:**	**CASE NO. 2003-A-0110**

Civil Appeal from the Ashtabula County Court of Common Pleas, Juvenile Division, Case No. 03 JF 6.

Judgment: Affirmed.

Phillip L. Heasley, Ashtabula County Public Defender, Inc., 4817 State Road #202, Ashtabula, OH 44004-6927 (For Appellant-Latasha Sheffey).

Luke P. Gallagher, Lafferty Law Office, 365 Main Street, P.O. Box 499, Conneaut, OH 44030-0499 (For Appellee-Ashtabula County Children Services Board).

Lisa V. Nelson, P.O. Box 755, Willoughby, OH 44096-0755 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Latasha Sheffey ("Sheffey") appeals the September 5, 2003 judgment entry of the Ashtabula County Court of Common Pleas, Juvenile Division, terminating Sheffey's parental rights in regards to Jerome Joiner ("Jerome"), Taquan Matthews ("Taquan"), and Jaontae Matthews ("Jaontae") and granting permanent custody to the

Ashtabula County Children Services Board ("ACCSB").[1] For the reasons stated below, we affirm the decision of the trial court in this matter.

{¶2} Sheffey is the natural mother of Jerome, born September 29, 1998, Taquan, born August 31, 1999, and Jaontae, born December 9, 2000. In a previous custody case, which began in July 2000, two of the children were removed from Sheffey's custody. These children were placed in the custody of the ACCSB on July 31, 2000. The case plan associated with this initial matter listed the following concerns: "1. lack of parenting skill, 2. possible lack of basic needs for the children, 3. psychological status of mother, 4. no established paternity for either alleged father ***, [and] 5. housing/stability." The case plan required Sheffey to attend parenting classes, to receive a psychological evaluation, to submit to random drug testing, to submit to a drug and alcohol assessment, to find and maintain suitable housing, and to establish paternity of the children. A guardian ad litem prepared a report regarding this matter. The GAL expressed concerns regarding the conditions of the home in which Sheffey was living, Sheffey's ability to provide for the children's basic needs, and Sheffey's drug and alcohol use. The GAL recommended that the children be temporarily placed in the custody of the ACCSB. Sheffey failed to fulfill any of the requirements of the case plan. The trial court dismissed the matter "for failure to timely hold an adjudication and disposition hearing within the statutory time limitations" on August 27, 2002. The children subsequently were returned to Sheffey in September, 2002.

1. The judgment entry also terminated the parental rights of Fred Matthews, the father of Taquan and Jaontae, and Nathan Joiner or Rhamaud Hill, the alleged putative fathers of Jerome, neither of whom took part in these proceedings. None of the fathers filed an appeal of the trial court's decision in this matter.

{¶3} On February 8, 2003, the Ashtabula Fire Department was dispatched to Sheffey's residence because the fire alarm in her apartment had been activated. As part of their investigation, the firefighters knocked on the door of Sheffey's apartment. Sheffey was not home at the time, but her three children were present along with the 12 year old babysitter and the babysitter's younger brother. The babysitter was unable to unlock the door from the inside and, after some coaxing, passed the key to the door through a window so the firefighters could gain entrance. This whole incident took in excess of five minutes.

{¶4} Upon gaining entrance to the apartment, the firefighters observed the condition of the residence. The firefighters also observed the oven door open with the oven on. Being concerned for the safety of the children, the firefighters contacted the police. Angela Randolph ("Randolph"), a neighbor of Sheffey, volunteered to watch the children until Sheffey returned home. The children were left with Randolph.

{¶5} The ACCSB was subsequently contacted on February 10, 2003, and unsuccessfully attempted to make contact with Sheffey at that time. The following day, Katie Lane ("Lane"), Terri Jo Mickle ("Mickle"), and a college intern went to Sheffey's residence to investigate. They were eventually able to gain access to the apartment. Although Sheffey was not present, Fred Matthews ("Matthews") and the children were there. Lane observed the condition of the children and the condition of each room. Matthews informed Lane that Sheffey and the children were in the process of moving.

{¶6} That same day, the ACCSB filed a request for ex parte emergency temporary custody of the children, which the trial court granted. On February 12, 2003, the ACCSB filed a verified complaint for permanent custody of each of the children.

The children were appointed the same GAL that was appointed in the first matter. Sheffey submitted to a drug test on February 13, 2003, in which she tested positive for marijuana and alcohol. A shelter care hearing was held on February 13, 2003, where the trial court found probable cause to remove the children from Sheffey's custody.

{¶7} A case plan was filed on March 11, 2003, documenting concerns over the parents' abilities to meet the children's daily physical, educational and medical needs, and that the children had been subject to previous permanent custody proceedings. Upon request of Sheffey's attorney, a concurrent case plan was filed on April 3, 2003. This plan documented the following concerns: "1. The children in custody will have their daily physical, medical and emotional needs met[;] 2. Mother and father may have substance/alcohol abuse concerns[;] 3. Mother and/or father may not have adequate income to care for themselves or their children[;] 4. Mother and/or father may lack adequate safe housing for themselves and the children[;] 5. Mother and father may have mental health concerns[; and] 6. Mother and father may lack appropriate parenting skills."

{¶8} An adjudicatory hearing was held before a magistrate on May 8, 2003. The ACCSB proffered testimony from Lane, Lt. Shawn Gruber of the Ashtabula Fire Department ("Lt. Gruber"), Mickle, Hugh Hubbard ("Hubbard"), Sheffey's landlord, and Randolph. Lane testified that Matthews acknowledged that Sheffey and the children were moving, but that they did not know where their new residence was located. In describing the condition of the apartment, Lane testified as follows:

{¶9} "There was something dark smeared on the walls. I don't know if it was food or it it was feces. I wasn't going to touch it or smell it, I mean there was no way I

was going to do that. It looked dark, and that's the impression that I got that it was some type of food or feces.

{¶10} "***

{¶11} "*** There was food in the kitchen cupboards; however, one of the cupboards was hanging down over the stove that could have been a fire hazard. It was just barely hanging on the wall just above the stove. *** Into the bedrooms, there was one bed in all the bedrooms. It was a mattress that didn't have appropriate bedding on it. On the floor, there was [sic] some plastic bags full of clothes. They were wet. They seemed to be moldy. There was [sic] puddles of water on the floor. At the time, I don't know what they were, but it was – I mean it was splashing, and there was [sic] no curtains. *** When you walked on the carpet, my feet stuck to the floor. In fact, my shoe came off one time it was so sticky."

{¶12} Lane also described the condition of the children:

{¶13} "The children were dirty. They were inappropriately dressed. They had some respiratory concerns. They were sniffling and coughing and they were just very dirty. They smelled of urine."

{¶14} Lane further testified that Sheffey admitted to using marijuana, that Sheffey denied that anything "was wrong with the home" and that the oven was being used as a heat source. Lane also testified that Sheffey acknowledged locking the children in the apartment, but that Sheffey stated that doing so "wasn't that bad" and that since there was no fire, "there's no concern." Lane concluded that, in her opinion, there was neglect in the home.

{¶15} Lt. Gruber testified regarding the incident surrounding the fire department's response to the fire alarm and the ordeal in gaining access to Sheffey's apartment. Lt. Gruber further testified regarding his observations of the condition of the apartment. These observations generally conformed to the description given by Lane. Lt. Gruber testified that since the cupboard above the stove was hanging within six to eight inches of the stove top, this presented a fire hazard. Lt. Gruber further testified that he observed the oven ignited with the door open and that the babysitter informed him that she was told to leave the oven on with the door open by Sheffey.

{¶16} Hubbard testified that he observed the children playing outside without supervision. Hubbard's description of the residence also generally conformed with those given by Lane and Lt. Gruber. Hubbard stated that the apartment had been completely remodeled prior to Sheffey moving in. Hubbard further testified that he was forced to evict Sheffey for failing to pay rent and that she never informed him of any problems she had with the apartment. He also stated that he received numerous complaints regarding Sheffey from other neighbors. Finally, Hubbard testified that the heating units in the bedrooms were not working properly because they either had foreign objects stuck into them or the on/off switch had been broken off the unit.

{¶17} Randolph testified that although Sheffey kept the apartment in order when she first moved in, that it progressively got worse. Randolph also testified Sheffey was utilizing the stove as a heating source.

{¶18} Sheffey testified on her own behalf. She acknowledged her drug use and that she continues to drive without a license because, as she stated, "I don't care." Sheffey also admitted to using the oven as a heat source. She also testified that she

kept the apartment clean and orderly. She further testified that she informed Hubbard of all the problems at the apartment, but that he refused to act and that she never informed her babysitter to leave the oven on with the door open. When confronted with the conflicting testimony from the other witnesses, Sheffey claimed they were all lying.

{¶19} On March 10, 2003, the magistrate conducted the dispositional phase of the hearing. The ACCSB proffered testimony from Aprile Phipps ("Phipps"), a homemaker with the ACCSB, and Ann Lynch ("Lynch"), a caseworker with the ACCSB. Phipps testified regarding her involvement with the reunification of Sheffey and her children in the first case. Phipps testified that Sheffey failed to obtain any improvement in regards to the issues under the first case plan. She also testified that the apartment was kept in order at the beginning of her involvement, but that it progressively deteriorated. Phipps further testified she has concerns regarding Sheffey's "judgment, her consistency, her lack of stability, and her lack of knowledge and skills to gain stability and consistency to maintain a home and care for her children."

{¶20} Lynch testified regarding the first custody matter. She stated that the matter was initiated because Sheffey and her children were present at a drug bust. She further testified that Jerome's father has never been confirmed and that neither alleged father has had any contact with Jerome. Lynch also testified that Sheffey has failed to comply with any aspect of the concurrent case plan. Lynch testified that Sheffey acknowledged that she does not have a job or a permanent residence. Lynch stated that no other relative has contacted her to inquire about obtaining custody of the children, that the children are adoptable, and that the children need a stable, permanent home.

{¶21} Again, Sheffey testified on her own behalf. She admitted that she does not have a residence and that she usually stays with either her father, her sister, or her aunt. Although Sheffey testified that she is planning on getting a residence, she stated that she is unemployed and that she has not even began to look for a residence. She further acknowledged her drug use, that she failed to comply with the case plan, and that she failed to show up for a drug test.

{¶22} The GAL filed a report on behalf of the children on May 9, 2003. The report stated the on going concerns in this matter:

{¶23} "I have been involved as the guardian ad litem for this family's children since Jerome and Taquan were taken into temporary custody by ACCSB on or about July 31, 2000. Sadly, many of the same problems that existed in 2000 are still present in 2003, despite extensive services provided to the parents by the Children's Services.

{¶24} "Specifically, the unfit condition of Mother's house has repeatedly been at issue. Twice Mother had homemaker services involved with her family. Mother's ability to maintain a stable residence has also repeatedly been at issue. She has a history of being evicted from her housing and of having difficulties paying utilities. She has been unable to maintain a job for any length of time. She lost her driver's license and has not to date received it back. She admittedly continues to drive even without a license. Also, Mother's drug use has repeatedly been an issue. Jaontae was born on December 9, 2000 with drugs in his system. Note that this was after ACCSB took custody of her other children. ***

{¶25} "*** Despite Fred Matthew's lack of efforts toward reuniting with his children, Mother has continued to have Fred living with the minor children and herself.

This is also concerning because of the admitted and documented past history of domestic violence between Mother and Mr. Matthews. Another issue which has not been addressed by either parent."

{¶26} Based on these concerns, the GAL made the following recommendations:

{¶27} "I believe that it is clear from the on going and reoccurring problems in Mother's home that she is not able to parent her children and keep them safe. Mother has consistently shown very poor judgment and limited insight in caring for her children. Her children would likely have died had there been an actual fire in her residence when she left the children locked in her home with a 12 (12) year old babysitter who [had] no way to contact anyone for help. *** Mother admittedly continued to use drugs after the children were returned to her care last fall. ***

{¶28} "All of the children had ring worm when they were removed in February. They were also dirty and had colds. At least one of the children has ongoing asthma problems that sometimes requires the use of [a] breathing treatment. Another child has had seizure problems within the last year. It was reported by the homemaker and neighbors that Mother has a difficult time keeping control of her children.

{¶29} "*** [T]his Guardian Ad Litem believes it would be in the best interest of the children for permanent custody to be granted to the Ashtabula County Children's Services Board. These children are in desperate need of a safe, secure, and stable home. Mother has had almost three years to accomplish this and to date still has not."

{¶30} The magistrate found that the children were neglected and awarded permanent custody to the ACCSB. Sheffey timely filed objections to the magistrate's decision. The trial court overruled Sheffey's objections and adopted the magistrate's

decision. Thus, the trial court ordered that Sheffey's parental rights be terminated as to each of the children and granted permanent custody of each of the children to the ACCSB.

{¶31} Sheffey timely appealed this decision and raises the following assignments of error:

{¶32} "[1.] The magistrate's decision awarding permanent custody of the subject children to Children Services erroneously found that the subject children were in temporary custody of Ashtabula County Children Services for 12 or more months of a consecutive 22 month period.

{¶33} "[2.] Children's Services failed to prove by clear and convincing evidence that reunification of the subject children with their parents was not possible, and the juvenile court therefore erred in awarding permanent custody of the subject children to the state.

{¶34} "[3.] Children's Services failed to prove by clear and convincing evidence that an award of permanent custody was in the subject children's best interests, and the juvenile court therefore erred in awarding permanent custody of the subject children to the state.

{¶35} "[4.] The magistrate's decision awarding permanent custody of the subject children to Children Services failed to apply the statutory best interest factors under R.C. 2151.414(D) to the facts of the case.

{¶36} "[5.] The juvenile court erred by allowing impermissible hearsay into the permanent custody proceedings."

{¶37} Since the first four assignments of error challenge the trial court's termination of Sheffey's parental rights and the award of permanent custody of the children to the ACCSB, they will be considered together. Sheffey claims that since the children were returned to her in September 2002, the children were not in the temporary custody of the ACCSB for twelve months of a consecutive 22 month period as required by R.C. 2151.414(B)(1)(d). Sheffey also argues that the ACCSB failed to prove by clear and convincing evidence that reunification of the children with Sheffey was not possible and that the award of permanent custody was in the children's best interests. Finally, Sheffey asserts that the trial court failed to properly consider the factors enumerated in R.C. 2154.414(D).

{¶38} "An appellate court will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence." *In re Taylor* (June 11, 1999), 11th Dist. No. 97-A-0046, 1999 Ohio App. LEXIS 2620, at *8 (citations omitted). Clear and convincing evidence is that measure of proof "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. It is more than a preponderance of the evidence, but not to the level of beyond a reasonable doubt. Id.

{¶39} R.C. 2151.414(B)(1)(d) provides that "the court may grant permanent custody of a child to a movant if the court determines at the hearing ***, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that *** [t]he child has been in the temporary custody of one or more public children services

agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period."

{¶40} In this case, the children were in temporary custody of the ACCSB from July 31, 2000, to September 2002. At the time of the filing of the motion for permanent custody, February 12, 2003, the children had been in the custody of the ACCSB for 16 of the previous 22 consecutive months. Thus, the trial court did not err in finding that the requirement of R.C. 2151.414(B)(1)(d) had been met.

{¶41} Once the trial court makes the determination that R.C. 2151.414(B)(1)(d) is met, the trial court only needs to consider whether an award of permanent custody is in the best interests of the children. *In re Stillman*, 11th Dist. No. 2003-A-0063, 2003-Ohio-6228, at ¶51. It is unnecessary to make any other findings. Id.

{¶42} Since, as discussed above, the trial court properly found that the requirements of R.C. 2151.414(B)(1)(d) were met, the only other issue it had to address was the best interests of the children. Thus, in granting permanent custody to the ACCSB, the trial court did not err by failing to make a finding that reunification of the children with Sheffey was not possible.

{¶43} In making a determination of the best interests of the child at a permanent custody hearing, "the court shall consider all relevant factors, including, but not limited to, ***: (1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers ***, 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 ***; (3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services

agencies or private child placing agencies for twelve or more months of a consecutive twenty two month period ***; (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; (5) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child." R.C. 2151.414(D).

{¶44} "[T]he provisions of R.C. 2151.414(D) are mandatory and 'must be scrupulously observed.'" *In re Smith*, 11th Dist. No. 2002-A-0098, 2003-Ohio-800, at ¶13 (citation omitted). Thus, the record must reflect that the magistrate considered all five factors of R.C. 2151.414(D) before making his or her decision.

{¶45} In this case, the magistrate enumerated each of the requisite five factors. In her findings, the magistrate extensively discussed the interaction between the children and Sheffey since the ACCSB got involved with the family in 1999. The magistrate further found that the children have "always been placed together and [the] ACCSB is searching for a foster home that would adopt all three children." The magistrate also found that the fathers have little, if any, contact with the children and that none of Sheffey's relatives "have come forward to assume custody or show an interest in adopting these children." The magistrate detailed her conclusion that the ACCSB should be granted permanent custody and that, in doing so, the children's best interests would be served. The magistrate also discussed the long custodial history of the children and detailed the period of time the children spent in temporary custody of the ACCSB over the past 22 months. The magistrate finally discussed the children's need for "a stable, secure environment on a permanent basis" and Sheffey's inability to provide such an environment due to her failure to complete any aspect of the case

plans, her continued drug use, her inability to secure a residence and employment, and Sheffey's refusal "to remedy the situation which continually leads to these children['s] removal."

{¶46} Based on the foregoing, the record reflects that the magistrate considered the factors enumerated in R.C. 2151.414(D) before making her decision. The foregoing also supports the trial court's judgment, by clear and convincing evidence, that the termination of Sheffey's parental rights and the grant of permanent custody of the children to the ACCSB is in the best interests of the children.

{¶47} Sheffey's first four assignments of error are without merit.

{¶48} In her fifth assignment of error, Sheffey argues that Lane's testimony about the facts contained in the referral report was inadmissible hearsay. Sheffey also argues that Hubbard's testimony regarding the complaints he received from Sheffey's neighbor was inadmissible hearsay.

{¶49} "The Rules of Evidence shall apply in hearings on motions for permanent custody." Juv.R. 34(I). Hearsay is an out of court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). A business record "made at or near the time by, or from information transmitted by, a person with knowledge" that is kept in the regular course of business and that is made as a regular practice of the business is not excluded by the hearsay rule. Evid.R. 803(6).

{¶50} Evidentiary rulings are within the discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Long* (1978), 53 Ohio St.2d 91, 98. An abuse of discretion consists of more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Berk v.*

Matthews (1990), 53 Ohio St.3d 161, 169 (citation omitted). Reversal, under an abuse of discretion standard, is not warranted merely because appellate judges disagree with the trial judge or believe the trial judge erred. Id. Reversal is appropriate only if the abuse of discretion renders "the result *** palpably and grossly violative of fact and logic [so] that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222 (citation omitted).

{¶51} In this case, Sheffey's attorney objected to Lane's testimony regarding the referral report numerous times. Only once did the trial court overrule these objections, after the ACCSB laid a foundation to establish the referral report as a business record. In laying the business records foundation, Lane testified regarding the procedure of creating the report and that the report is kept in the normal course of the ACCSB and it is the ACCSB's regular practice to make such a report. Thus, Lane's testimony regarding the report was properly admitted. See *In re Lloyd* (Apr. 16, 1996), 10th Dist. Nos. 95APF11-1435, 95APF11-1436, and 95APF11-1437, 1996 Ohio App. LEXIS 1557, at *12-*13.

{¶52} Moreover, Lane's testimony regarding the report was limited to the general descriptions of the concerns contained in the report, such as the incident with the fire department, the condition of the apartment, the use of the oven as a heat source, and the fire hazard created by the cupboard above the stove. There was extensive testimony proffered at the hearing regarding these concerns, other than that proffered in Lane's general description of these concerns as noted in the report. Thus, any potentially erroneous admission of Lane's testimony would not be prejudicial. As such,

it would be harmless. See *In re Thurlby* (June 15, 2001), 11th Dist. No. 2000-A-0088, 2001 Ohio App. LEXIS 2714, *14 ("The erroneous admission of *** evidence is harmless if additional information, separate and apart from the erroneously admitted evidence, has been offered to prove that which the challenged evidence was offered to prove."); *In re S* (1995), 102 Ohio App.3d 338, 343 ("appellants must demonstrate not only that there was error but that such error operated to their prejudice.").

{¶53} Thus, we cannot find that the trial court abused its discretion in admitting Lane's testimony concerning the referral report.[2]

{¶54} In Hubbard's testimony regarding the complaints he received about Sheffey, Hubbard did not testify as to the contents of these complaints. Rather, Hubbard testified that he received complaints about Sheffey. In clarifying what constitutes a complaint, Hubbard gave general examples of typical complaints he receives from tenants. Hubbard did *not* testify regarding the nature of the complaints he received about Sheffey. Thus, Hubbard's testimony was not offered to prove the truth of the complaints, but, instead, was offered to prove that Hubbard had received complaints.

{¶55} Moreover, even assuming Hubbard's testimony regarding these complaints was erroneously admitted, Sheffey has failed to establish she was prejudiced by the admission of this testimony. Since the magistrate's extensive 15 page decision never referred or discussed the purported complaints received by Hubbard, it is clear that the magistrate did not rely on this testimony in making her decision. Further, there was other sufficient evidence proffered, as discussed above, to support the

2. It must be noted that the referral report was initially proffered into evidence, but that the ACCSB withdrew its motion to admit the report into evidence.

magistrate's decision. Any potentially erroneous admission of this testimony would, therefore, be harmless. *In re S*, 102 Ohio App.3d at 343. Thus, we cannot find that the trial court abused its discretion in admitting Hubbard's testimony regarding the complaints he received about Sheffey.

{¶56} Sheffey's fifth assignment of error is without merit.

{¶57} For the foregoing reasons, we hold that Sheffey's assignments of error are meritless. The decision of the Ashtabula County Court of Common Pleas, Juvenile Division, is affirmed.[3]

JUDITH A. CHRISTLEY, J., concurs.

WILLIAM M. O'NEILL, J., dissents with a dissenting opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶58} I respectfully disagree with the opinion of the majority. "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.'"[4] Thus, "the parties to such an action must be afforded every procedural and substantive protection the law allows."[5]

3. Although the dissent argues that the decision should be reversed and remanded on the basis that the children were not appointed counsel in this matter, this claimed error was neither raised in the court below, nor in the current appeal. This issue is, therefore, not properly before this court. *Cremeans v. Internatl. Harvester Co.* (1983), 6 Ohio St.3d 232, 236. Thus, it is not necessary to consider this issue on appeal. See id.; *State v. Terrell*, 1st Dist. No. C-020194, 2003-Ohio-3044, at ¶31; *State v. Fleming*, 2nd Dist. No. 18501, 2001-Ohio-1497, 2001 Ohio App. LEXIS 3422, at *17; *State v. Mann* (Feb. 2, 2000), 9th Dist. No. 19436, 2000 Ohio App. LEXIS 273, at *12, n2; *Juan v. Harmon* (Mar. 5, 1999), 1st Dist. No. C-980587, 1999 Ohio App. LEXIS 833, at *3.

4. *In re Hayes* (1997), 79 Ohio St.3d 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16.

5. *Smith*, 77 Ohio App.3d at 16.

{¶59} In juvenile court proceedings, "[e]very party shall have the right to be represented by counsel."[6] "'Party' means a child who is the subject of a juvenile court proceeding."[7] Thus, "[a] child *** is entitled to representation by legal counsel at all stages of [juvenile court] proceedings."[8] "This right is a basic presumption in all juvenile court proceedings."[9] Although the court may appoint the guardian ad litem to also serve as the child's counsel,[10] the court must specifically state that it is making such a dual appointment and, in doing so, make a finding that no conflict exists.[11]

{¶60} In this case, the trial court appointed Lisa Nelson ("Nelson") as guardian ad litem for the children. Although Nelson is an attorney, the record does not demonstrate that the trial court also appointed Nelson as the children's attorney. It is important to note that the services performed, as guardian ad litem, appear to have been rendered with a high degree of compassion and competence. I take no issue with that aspect of this case. However, the competence of the guardian ad litem is not the issue. The lack of representation is. Since we cannot presume that Nelson was acting as the children's attorney,[12] the children were not represented by counsel in the proceedings below. Thus, the children were denied their basic right to an attorney.[13]

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6. Juv.R. 4(A).

7. Juv.R. 2(Y).

8. R.C. 2151.352.

9. *In re Williams*, 11th Dist. Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, at ¶19.

10. Juv.R. 4(C)(1).

11. *Williams*, 2003-Ohio-3550, at ¶20, citing *In re Clark*, 141 Ohio App.3d 55, 60, 2001-Ohio-4126.

12. See *In re Janie M.* (1999), 131 Ohio App.3d 637, 639 ("absent an express dual appointment, courts should not presume a dual appointment when the appointed guardian *ad litem* is also an attorney.")

{¶61} I would, therefore, reverse the decision of the trial court and remand the matter for further proceedings in order to grant the children their right to counsel.

13. See *Clark*, 141 Ohio App.3d at 61; *In re Borntreger*, 11th Dist. No. 2001-G-2379, 2002-Ohio-6468, at ¶64.