[Cite as *In re Qu.W.*, 2015-Ohio-2202.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

IN THE MATTER OF: Qu.W., Qi.W., AND Qa.W.	**:**	**O P I N I O N**
	:	**CASE NO. 2015-A-0016**
	:	

Appeal from the Ashtabula County Court of Common Pleas, Juvenile Division, Case No. 13 JC 97.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Susan Thomas,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Appellee, Ashtabula County Children Services Board).

Anita B. Staley, P.O. Box 1442, 1610 East Prospect Road, Ashtabula, OH 44005-1442 (For Appellant, Kourtnie Wiser).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Kourtnie Wiser, appeals the judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, granting the motion of appellee, Ashtabula County Children Services Board ("ACCSB"), to modify temporary custody to permanent custody. At issue is whether the court erred in awarding permanent custody of appellant's three young children to ACCSB. For the reasons that follow, we affirm.

{¶2} This is appellant's second case with ACCSB involving the children. In the first case, appellant and Cory Wiser, the children's biological parents, separated in November 2012. They have a sporadic, turbulent, and violent relationship and both of them abuse drugs. In that month, ACCSB removed their two children, Qu. (born 11-19-07) and Qi. (born 1-20-09), and obtained temporary custody of them. On February 4, 2013, appellant and Mr. Wiser reconciled. At that time, the two children returned home with their parents while ACCSB maintained protective supervision.

{¶3} On September 6, 2013, ACCSB was notified that when the Wisers' third child, Qa., was born on August 17, 2013, he tested positive for opiates and was treated at Rainbow Babies and Children's Hospital due to withdrawal symptoms. On September 6, 2013, ACCSB once again removed the children and obtained temporary custody of them. ACCSB placed the children in a foster home. ACCSB has continually had temporary custody of all three children since September 6, 2013.

{¶4} On September 17, 2013, appellant entered Hitchcock House, a drug rehab facility, and the children were taken from their foster home and permitted to stay with her. However, a few days later, appellant left the facility before completing the program, and the children were returned to the same foster home where they have remained during the pendency of this case.

{¶5} On November 1, 2013, appellant and Cory resumed weekly visitation with the three children at ACCSB. At that time, Qa. was four months old. Between November 2013 and January 2015, out of 32 scheduled visits, appellant attended 27. She was a no-show for three visits and cancelled two others.

{¶6} On December 9, 2013, ACCSB filed a second complaint alleging abuse as to Qa. and dependency as to Qu. and Qi. and requesting the children be placed in ACCSB's temporary custody. On that date, the court held an emergency shelter care hearing and found probable cause to remove the children and to continue the temporary custody order regarding all three children. This gave rise to a new case, which is the matter before us.

{¶7} On December 18, 2013, ACCSB filed a case plan.

{¶8} On January 15, 2014, an adjudicatory hearing was held on the complaint. Appellant stipulated to a finding that Qa. was abused and that her other two children were dependent. ACCSB was granted temporary custody of the children.

{¶9} On August 6, 2014, ACCSB filed a motion requesting modification of temporary custody to permanent custody.

{¶10} On December 1, 2014, Ariana Tarighati, the court-appointed guardian ad litem, filed her report and recommendation.

{¶11} On December 4, 2014, the trial court's magistrate held a hearing on ACCSB's motion. At that hearing, Cory Wiser, the children's father, stipulated that the children have been in ACCSB's temporary custody for 12 months out of a consecutive 22-month period and that it was in the children's best interests that they be placed in the permanent custody of ACCSB. Appellant also stipulated the children had been in the temporary custody of ACCSB 12 out of 22 consecutive months. Appellant told the magistrate she wanted to see if there were any relatives willing to take legal custody of the children, so the court continued the best interest hearing, as to appellant only, to January 15, 2015.

{¶12} Katie Balog, visitation supervisor for ACCSB, testified she supervises visits at Room to Grow, which is the visitation center for ACCSB.

{¶13} Ms. Balog said she supervised appellant's visitation with the children between November 2012 and January 2013 and between November 2013 and January 2015. She said that appellant and the two older children seemed to be close and had good interaction. However, there did not seem to be a bond between appellant and Qa., the baby. During visitation, appellant would regularly leave Qa. by himself and made no effort to connect with him. She would not feed the baby until a case worker would suggest she should.

{¶14} Ms. Balog discussed with appellant her plans for the children if she could not achieve reunification with them. Appellant said she wanted the two older children to live with her sister, Linda Hudson, but that the baby should stay with his foster parents because they are the only parents he has ever known.

{¶15} Ms. Balog said appellant was aware that all three children had been living together in the same foster home since September 6, 2013, and never expressed any concerns with the care the children were receiving from their foster parents.

{¶16} Jennifer Mochoskay, caseworker for ACCSB, testified she has been assigned to this family for two and one-half years, from July 2012 to date.

{¶17} As of the date of trial, the children had been in this same foster home for 16 months since September 6, 2013, except for the few days they stayed with appellant while she was at Hitchcock House.

{¶18} Ms. Mochoskay said she has visited the children at their foster home 20 times. All three children live with the foster parents and their three children. Appellant's

children have adjusted well to living in the foster home. Appellant's children have a close bond with the foster parents' children and interact well with them. Ms. Mochoskay said the baby is very bonded with his foster parents. She said that, while the older children have a good relationship with their foster parents, the older children are not quite as bonded as the baby because they are older and more reserved. She said the foster parents treat the Wiser children the same as their own children.

{¶19} Ms. Mochoskay said she has no concerns with the care the Wiser children receive in the foster home.

{¶20} Ms. Mochoskay said that, at appellant's request, she investigated appellant's sister, Linda Hudson, to see if she would be interested in taking legal custody of appellant's two older children. Ms. Mochoskay visited Ms. Hudson in her house. She lives with her own three young children and her boyfriend. Ms. Hudson said that she was willing to take legal custody of appellant's children, but that she does not have enough room for them. She said she might be willing to move, but at this point, there is not enough room for the children.

{¶21} Ms. Mochoskay had six concerns about placing the children in Ms. Hudson's house. First, this would require separating the children because appellant said she only wanted Ms. Hudson to take the two older children; appellant wanted the baby to stay with his foster parents. Ms. Mochoskay said it would not be in the children's best interests to separate them because they have a close bond with each other.

{¶22} Second, Ms. Mochoskay said that Ms. Hudson does not have room for two, let alone three, additional children in her home. She only has two bedrooms. Each

is very small, about 10 feet by 10 feet, and the house is so small, no other room could be converted into a bedroom. Ms. Hudson's two boys (ten-year old twins) sleep in one bedroom, and Ms. Hudson and her seven-year old daughter sleep in the second bedroom in the same bed. Ms. Hudson's boyfriend sleeps in the hallway because there is no room for him to sleep anywhere else in the house.

{¶23} Third, Ms. Mochoskay said Ms. Hudson works full-time and this means her boyfriend would be responsible for caring for appellant's children. Ms. Mochoskay said that Ms. Hudson's boyfriend is not capable of doing that because he is functioning below a normal intelligence level.

{¶24} Fourth, Ms. Mochoskay said appellant's baby has special medical needs. He has been hospitalized several times over the last year and will continue to need hospital care. He would require a parent or caregiver to stay with him 24 hours a day, seven days a week while he is in the hospital and to give him around-the-clock care after he is released. She said that if Ms. Hudson took the baby, neither of the adults in her house would be capable of providing that level of care to him.

{¶25} Fifth, Ms. Mochoskay has concerns regarding Ms. Hudson's custodial history. Her child was removed from her house for nearly one year some years ago due to neglect because the house was dirty. Ms. Mochoskay said that when she recently visited Ms. Hudson's house, it was still dirty.

{¶26} Sixth, Ms. Mochoskay said that appellant first told her about Ms. Hudson possibly being interested in taking the children eight months ago. At that time, she met with Ms. Hudson and told her she could apply for custody, but she never did.

{¶27} Ms. Mochoskay testified that, based on her investigation, she does not recommend that appellant's children be placed with Ms. Hudson.

{¶28} In contrast, Ms. Mochoskay said the children's foster parents provide a stable home for them. She said that all three children are in need of a legally secure, permanent placement and that this cannot be achieved without a grant of permanent custody to ACCSB.

{¶29} Rana Stowers-Hudson testified that she and her husband have been licensed foster parents for 10 years and that the three Wiser children first came to live with them on September 6, 2013. She said that, except for three days in September 2013, when the children stayed with their mother at a rehab facility, they have continually lived with them.

{¶30} Mrs. Stowers-Hudson said that when the children first came to live with them, the baby, Qa., was only three weeks old; Qu. was four years old; and Qi. was five. She said that the baby is an "opiate baby" and was still in withdrawal when he first came to live with them. She said Qa.'s respiratory and gastrointestinal systems are compromised, which is common for opiate babies. He has been hospitalized five times in the last year, each time for at least five days. When he was very young, he had bronchiolitis, which is also common in opiate babies. It caused scarring on his lung tissue. He has asthma and often a simple cold will prevent him from breathing, requiring hospitalization. He requires and receives breathing treatments in their home. He often needs epinephrine, which affects his heart rate. This requires him to be hospitalized so his heart can be monitored.

{¶31} Mrs. Stowers-Hudson said that both Qu. and Qi., the two older children, have been diagnosed with post-traumatic stress disorder. They require and receive intensive therapy in their home with a therapist.

{¶32} Mrs. Stowers-Hudson said her biological children think of these children as family and they have always accepted them as siblings. She said that Qu. and Qi. have a close bond with Qa., the baby, and are very helpful with and attentive to him.

{¶33} Mrs. Stowers-Hudson testified that she and her husband are willing and able to meet the needs of all three children. She said she and her husband have bonded with the children and, if they were to become available for adoption, she and her husband would apply to adopt them.

{¶34} Ariana Tarighati, the guardian ad litem, said that when she prepared her report in early December 2014, the children were unable to articulate their wishes due to their tender years (7, 6, and 1). More recently, the two older children told her they love their parents and want to live with them, but wish their father was not sick so much. They also said they love the Hudsons and want to live with them. They said they never felt safe when they lived with their parents. When they were with them, they were constantly moving and were never sure whether they were going to eat.

{¶35} Ms. Tarighati said that with their foster parents, for the first time the children feel safe and loved. She said the two older children are unrelentingly loyal to their parents no matter what hardships they put them through, but, she said, the children need a place where they feel safe and can have a normal childhood.

{¶36} In her report, Ms. Tarighati stated that neither parent had complied with the case plan. Appellant had admitted continued drug use and both parents have failed

to comply with drug treatment. Neither parent has maintained employment or stable housing. The children's father was presently incarcerated on numerous felony charges. She said that neither parent has shown they are capable of providing an adequate, permanent home for the children. Ms. Tarighati said the children are thriving with their foster parents. Qa.'s medical needs are being appropriately addressed. The children are bonded to their foster family. The guardian recommended that permanent custody of the children be given to ACCSB.

{¶37} Appellant presented no witnesses and, thus, ACCSB's evidence was undisputed.

{¶38} On January 15, 2015, the magistrate issued her decision. The magistrate found that Qu., Qi, and Qa. cannot or should not be placed with either parent now or in the foreseeable future; that appellant's sister Linda Hudson is not an appropriate placement for the children; that there are no appropriate relatives to assume the care or custody of the children; that they have been in the temporary custody of ACCSB for 12 or more months out of a consecutive 22-month period; and that the children's best interests will be served by a grant of permanent custody. The magistrate made findings under all the best-interest factors in R.C. 2151.414(D), and recommended that ACCSB's motion to modify temporary custody to permanent custody be granted. Appellant did not file any objections to the magistrate's decision.

{¶39} On February 4, 2015, the trial court entered judgment adopting the magistrate's decision and granting ACCSB's motion to modify temporary custody to permanent custody. Appellant appeals the court's judgment, asserting three assignments of error. For her first, she alleges:

{¶40} "The trial court erred in finding that it was in the children's best interests to be placed in permanent custody when there was an appropriate relative who was willing to take them into legal custody."

{¶41} Before addressing appellant's argument, three preliminary matters must be addressed. First, appellant is challenging the trial court's finding that Ms. Hudson was not a suitable relative. However, on appeal, appellant is limited to challenging how the trial court's decision impacted her rights, not the rights of her relatives. *In re K.M.*, 9th Dist. Medina No. 14CA0025-M, 2014-Ohio-4268, ¶36, *discretionary appeal not allowed at* 141 Ohio St.3d 1422, 2014-Ohio-5567. Thus, appellant can only challenge whether the trial court's decision to terminate her parental rights was proper. *Id*.

{¶42} Here, appellant is challenging the court's award of permanent custody to ACCSB, rather than to Ms. Hudson; appellant is not challenging the termination of her own parental rights. She therefore lacks standing to make this argument.

{¶43} Second, there is no factual basis for the claimed error because Ms. Hudson did not file an application for custody of the children and the trial court did not overrule such an application. *In re C.J.*, 6th Dist. Lucas No. L-13-1037, 2013-Ohio-3056, ¶43.

{¶44} Third, appellant did not file any objections to the magistrate's decision. "[A] party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party has objected to that finding or conclusion * * *." Juv.R. 40(D)(3)(b)(iv).

{¶45} Because appellant did not file any objections to the magistrate's findings that (1) "[t]he maternal aunt is not an appropriate placement for the children," and (2)

"there are no appropriate relatives to assume the care or custody of [the] children," she waived the right to challenge the trial court's adoption of these findings on appeal.

{¶46} In any event, even if appellant had standing; if there was a factual basis for this appeal; and if appellant had filed objections to the magistrate's decision, appellant's argument would still lack merit because the trial court's decision to grant permanent custody to ACCSB, rather than Ms. Hudson, is supported by the evidence.

{¶47} An appellate court reviews a trial court's adoption of a magistrate's decision for an abuse of discretion. *In re Simkins*, 11th Dist. Trumbull No. 2002-T-0173, 2003-Ohio-1884, ¶10. This court has stated the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. Ashtabula No. 2009-A-0011, 2010-Ohio-2156, ¶24.

{¶48} Appellant argues the trial court erred by granting permanent custody to ACCSB because her sister was interested in assuming legal custody of the children. Appellant argues the court was required by R.C. 2151.412(G) to place the children with a family member before granting permanent custody. We disagree.

{¶49} R.C. 2151.412 (G), in relevant part, states:

{¶50} The agency and the court shall be guided by the following general priorities:

{¶51} * * *

{¶52} (5) If the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with either, if no *suitable* member of the child's extended family * * * is willing to accept legal custody of the child, and if the agency has a

> reasonable expectation of placing the child for adoption, the child should be committed to the permanent custody of the public children services agency * * *. (Emphasis added.)

{¶53} It has been held that the language in R.C. 2151.412 is precatory rather than mandatory, and that the statute merely sets out discretionary guidelines for the court to consider, which the court is not obligated to follow. *In re Halstead*, 7th Dist. Columbiana No. 04 CO 37, 2005-Ohio-403, ¶4.

{¶54} "The child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security." *In re Dylan B*., 5th Dist. Stark No. 2007-CA-00362, 2008-Ohio-2283, ¶66. "Accordingly, a court is not required to favor a relative if, after considering all the factors, it is in the child's best interest for the agency to be granted permanent custody." *Id*.

{¶55} "A trial court's statutory duty, when determining whether it is in the best interest of a child to grant permanent custody, does not include finding by clear and convincing evidence that no suitable relative was available for placement." *Id*. at ¶67, citing *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513. "'The statute requires a weighing of all relevant [best interest] factors * * *. R.C. 2151.414 requires the court to find the best option for the child once a determination has been made [granting permanent custody] pursuant to R.C. 2151.414(B)(1)(a) through (d). The statute does not make the availability of a [suitable relative] an all-controlling factor. The statute does not even require the court to weigh that factor more heavily than other factors.'" *Dylan B., supra*, quoting *Schafer, supra*, at ¶64.

{¶56} Contrary to appellant's argument, ample evidence was presented that Ms. Hudson was not a suitable relative for placement purposes. *First*, while appellant argues on appeal that ACCSB should have placed all three children with Ms. Hudson, appellant told Ms. Balog and Ms. Mochoskay of ACCSB that she only wanted her sister to be considered for taking custody of her two oldest children. Thus, if Ms. Hudson was to take custody, this would have resulted in separating the children, which, due to their close bond, Ms. Mochoskay said would not be in their best interests. *Second*, while Ms. Hudson said she was willing to take legal custody of appellants' children, she told Ms. Mochoskay she does not have enough room for them. Although she said she might be willing to move, she did not say she had any plans or intention to move or that she had the means with which to do so. *Third*, Ms. Mochoskay said that Ms. Hudson works full-time so her boyfriend would be responsible for caring for the children. She said that because the boyfriend functions at below-normal intelligence, he is incapable of performing that role. Further, Ms. Mochoskay testified that neither of the adults in Ms. Hudson's house is capable of providing the special care that Qa. needs. *Fourth*, Ms. Mochoskay testified that Ms. Hudson lost custody of one of her own children for nearly one year due to the dirty conditions in her house and her house is still dirty. *Fifth*, although Ms. Mochoskay advised Ms. Hudson she could file an application for custody if she was interested in doing so, she never did. *Sixth*, Ms. Mochoskay, an experienced caseworker, testified she does not recommend that appellant's children be placed with Ms. Hudson. In fact, no witness testified in support of Ms. Hudson's suitability for placement, not even appellant or Ms. Hudson herself.

{¶57} We therefore hold the trial court did not abuse its discretion in finding that Ms. Hudson was not an appropriate placement for the children.

{¶58} For her second assigned error, appellant contends:

{¶59} "The trial court erred by failing to consider adequately whether the children should have been appointed counsel to advocate for their wishes regarding permanent custody."

{¶60} R.C. 2151.414(D)(2) requires the court to consider the children's wishes "as expressed directly by the child or through the child's guardian ad litem, with due regard for the child's maturity."

{¶61} "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, syllabus. The "certain circumstances" referred to include instances where a conflict exists between the guardian's recommendation and the child's desires. *In re Williams*, 11th Dist. Geauga Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, ¶18. "Generally, the appointment of independent counsel is warranted when a child has '*repeatedly* expressed a desire' to remain or be reunited with a parent but the child's guardian ad litem believes it is in the child's best interest that permanent custody of the child be granted to the state." (Emphasis added.) *In re Hilyard*, 4th Dist. Vinton Nos. 05CA600 through 05CA609, 2006-Ohio-1965, ¶36. *Accord Williams, supra*, at ¶7. When a child lacks the maturity to express his or her wishes and nothing otherwise indicates that the child's wishes conflict with the guardian ad litem, a juvenile court is not required to

appoint counsel for the child. *In re L.W.*, 9th Dist. Summit Nos. 26861 and 26871, 2013-Ohio-5556, ¶20. The determination of whether a conflict of interest exists between the guardian and the child is a legal issue that we review de novo. *See In re McLean*, 11th Dist. Trumbull No. 2005-T-0018, 2005-Ohio-2576, ¶54.

{¶62} In the present case, the two older children did not repeatedly express the desire to stay with their parents. They only said it once during an interview with the guardian ad litem after she filed her report.

{¶63} Moreover, the children's stated desire to live with their parents was equivocal at best. The guardian ad litem said the children told her they love their parents and want to live with them, but wish their father was not sick so much. However, the children also said they love the Hudsons and want to live with them.

{¶64} Further, the children's stated wishes were consistent with the guardian's recommendation. The children told the guardian they never felt safe when they lived with their parents. They said that when they were with them, they moved around constantly and were never sure whether they were going to eat.

{¶65} The guardian testified that for the first time in their lives, the children feel safe and loved with the Hudsons. Thus, the children's position was consistent with the guardian's recommendation to grant permanent custody to ACCSB. While the court did not expressly find there was no conflict of interest between the children's wishes and the guardian's recommendation, any error resulting from the court's failure to make this finding is harmless since the children's desires were consistent with the guardian's recommendation. *See In re Kangas*, 11th Dist. No. 2006-A-0010, 2006-Ohio-3433, ¶46.

{¶66} Finally, and perhaps most importantly, there was no conflict between the children's wish to live with their parents and the guardian's recommendation because appellant wants the children to live with her sister, not her, and the children never said they want to live with Ms. Hudson. In these circumstances, the children's desire about wanting to stay with their parents is irrelevant because, if appellant was successful on appeal, legal custody would be given to Ms. Hudson, not to appellant.

{¶67} In view of the foregoing, there was no conflict between the children's desires and the guardian ad litem's recommendation. Consequently, the trial court did not err in not appointing separate counsel for the children.

{¶68} For her third and final assignment of error, appellant alleges:

{¶69} "Appellant was denied the effective assistance of trial counsel as guaranteed by the Sixth Amendment to the Ohio States Constitution and Section 10, Article I of the Ohio Constitution."

{¶70} When presented with a claim of ineffective assistance of counsel in proceedings to terminate parental rights, Ohio courts apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 685 (1984). *In re Ridenour*, 11th Dist. Lake Nos. 2004-L-168, 2004-L-169, and 2004-L-170, 2005-Ohio-349, ¶9. To demonstrate ineffective assistance of counsel, a party "* * * must show that counsel's performance was deficient and * * * that the deficient performance was so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re Colbert*, 11th Dist. Ashtabula No. 2000-A-0028, 2000 Ohio App. LEXIS 5249, *7 (Nov. 9, 2000).

{¶71} Appellant argues counsel was ineffective for not asking the court to appoint separate counsel for the children. However, in light of our holding under the

second assigned error that there was no conflict between the children's wishes and the guardian's recommendation, the appointment of independent counsel would not have been warranted. Thus, a request to appoint separate counsel would have lacked merit, and counsel is not ineffective where he does not make a meritless request.

{¶72} For the reasons stated in this opinion, the assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Ashtabula County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.