[Cite as *In re Hilyard*, 2006-Ohio-1977.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

In the Matter of:	:	Case Nos. 05CA630, 05CA631,
		05CA632, 05CA633,
Alyssalyn Hilyard,	:	05CA634, 05CA635,
Jessicalyn Hilyard,		05CA636, 05CA637,
Angela Hilyard, Andy Hilyard,	:	05CA638, 05CA639
Bradlee Hilyard,		
Michelle Hilyard,	:	
James Hilyard, Jr.,		
Edward Hilyard,	:	DECISION AND JUDGMENT ENTRY
St. James Hilyard, and		
Justin Hilyard,	:	
		Released 4/13/06
Adjudicated Abused, Neglected	:	
and Dependent Children.		
	:	

APPEARANCES:

Dana E. Gilliland, Wellston, Ohio, for Appellant Judy Sledd.

Timothy P. Gleeson, Vinton County Prosecuting Attorney, McArthur, Ohio, for Appellee Vinton County Department of Job and Family Services.

Harsha, P.J.

{¶1} Judy Sledd is the paternal grandmother of ten children whose mother and father, James and Michelle Hilyard, lost their parental rights in a neglect/dependency proceeding. Ms. Sledd, who sought custody on her own behalf, appeals the court's decision granting custody of the children to the Vinton County Department of Job and Family Services ("VCDJFS")[1].

[1] While Sledd has captioned her notice as a "cross appeal," this characterization is improper and we treat it as one of several appeals from the court's final order. See App.R. 3.

{¶2} First, Ms. Sledd asserts that the trial court erred in failing to join her as a party to the initial complaint and proceeding on VCDJFS' motion for permanent custody without providing her requisite notice of the proceedings. We conclude the trial court did not err because Ms. Sledd was not a necessary party to the proceedings, and because she had adequate, actual notice of them.

{¶3} Next, she contends the trial court erred in finding it was not in the best interests of the children to grant custody of them to her or the children's aunt. However, the record provides ample support for the trial court's findings that neither Ms. Sledd nor the paternal aunt were suitable for placement and that it was in the children's best interest for VCDJFS to assume legal custody over them.

{¶4} Third, Sledd argues the trial court erred in failing to appoint separate counsel and a guardian ad litem for the children. Because there is no evidence that the dual representation resulted in an actual or apparent conflict, we conclude the court did not err in appointing a licensed attorney to serve as both guardian ad litem and legal counsel for the children.

{¶5} Next, Sledd claims the trial court erred by relying upon hearsay contained in the guardian ad litem's report. We agree the trial court erred to the extent it considered the

hearsay but conclude this was harmless error in light of the court's minimal consideration of that evidence and the existence of other admissible evidence in the record.

{¶6} Finally, she asserts the trial court erred in failing to obtain sufficient evidence of the children's wishes. She essentially waived this issue by withdrawing a motion for the court to interview the children regarding their wishes. Moreover, the record contains sufficient evidence from which the court could determine the children's wishes. Because competent, credible evidence exists to support the trial court's judgment in that regard, we affirm.

I. FACTUAL BACKGROUND

{¶7} In June 2003, VCDJFS filed separate complaints alleging neglect and dependency concerning each of the ten Hilyard children, who then ranged in age from nine months to 12 years old. The court removed the children from their parents' home, which was determined to be not fit for habitation, and placed them in the temporary custody of VCDJFS. Ms. Sledd was residing in the Hilyard's home when conditions there required removal of the children. The court appointed attorneys to represent the mother, Michelle Hilyard, and the children's father, James Hilyard, and appointed Sandra Brandon, a licensed attorney, as guardian ad litem for all the children.

{¶8} In September 2003, an adjudication hearing occurred on the neglect and dependency allegations. The children's parents and their counsel, the guardian ad litem, and appellant were all present.

{¶9} The court entered an order of adjudication and found by clear and convincing evidence: all ten of the children were dependent children under R.C. 2151.04; five of the children were neglected children under R.C. 2151.03 due to the father's and mother's educational neglect of the children; three of the children were neglected children under R.C. 2151.03 due to problems with lice, body odor and dental neglect; two of the children were dependent children under R.C. 2151.04 because their condition or environment was such to warrant the state, in the interests of the children, in assuming their guardianship. Immediately following its adjudication of the children, the court made a disposition of temporary custody to VCDJFS and ordered the agency to develop a case plan that contained a goal of reunification with the parents.

{¶10} In November 2003, both parents were arrested and charged with the rapes of two of their children. That same month, Sledd filed a pro se motion for custody of all ten children, together with an affidavit of indigency requesting counsel; she received appointed counsel a week later. By agreement of the parties and with the court's permission, VCDJFS

set up supervised visitation for one to two hours a month between Sledd and the children.

{¶11} At the annual review hearing held in May 2004, Christine Garvin, the children's paternal aunt, also filed a motion for legal custody together with an affidavit of indigency requesting court-appointed counsel. At the hearing, the court ordered appointed counsel for Garvin and a home study on Garvin's and Sledd's residences for possible placement of the children.

{¶12} In July 2004, VCDJFS filed a motion requesting permanent custody of each of the ten children. At a hearing held in September 2004, the court explained the rights and potential consequences associated with a permanency hearing. Those present at the hearing included the children's father, mother, Garvin, Sledd, and their respective appointed counsel.

{¶13} In October and November 2004, the children's father and mother were both convicted of two counts of sexual battery under R.C 2907.03(A)(5), which involves a parent engaging in sexual conduct with his or her child. The court sentenced the father to a prison term of ten years and the mother to a prison term of five years.

{¶14} By a November 2004 order, the court appointed Brandon, who was the children's guardian ad litem, to also serve as the children's attorney. The guardian ad litem reviewed agency records and met with both parents, the children, Sledd, Garvin

and her family, other family members, and the children's foster parents. The guardian ad litem prepared reports in September 2003 and December 2004 detailing her investigation and recommendations. In her December 2004 report and in her testimony at the permanent custody hearing held in March 2005, Brandon opined that neither Sledd nor Garvin was a suitable relative placement; instead she recommended that permanent custody of all of the children be granted to VCDJFS. No party or other attorney in the case objected to Brandon's dual representation until the permanent custody hearing.

{¶15} In May 2005, the court found by clear and convincing evidence that the children's best interest would be served by granting permanent custody to VCDJFS. Specifically, under R.C. 2151.414(B)(1)(d), the trial court found that all ten children had been in the temporary custody of VCDJFS for 12 months or more of a consecutive 22-month period and that the children should not and cannot be placed with the father and mother.

{¶16} Concerning the best interests of the children, the court found under R.C. 2151.414(D)(1) and (2) that none of the children were bonded to their parents, Sledd or Garvin, but had bonded with their foster parents and families, and the children whose wishes were considered either had no preference as to their placement or did not wish to live with their parents or either relative. Under R.C. 2151.414(D)(3), the court found

that the children had been in the temporary custody of VCDJFS since June 12, 2003. Under R.C. 2151.414(D)(4), the trial court found that the Hilyard children's parents, grandmother and aunt were not suitable placements for the children, all the children were doing well in their foster homes where their various needs were being met, and permanent placement of the children with their foster families could not be achieved without a grant of permanent custody to VCDJFS. Under R.C. 2151.414(D)(5) and (E)(7), the trial court found that the children should not and cannot be placed with either their father or mother because both parents had been convicted of two counts of sexual battery concerning their children. The court denied Garvin's and Sledd's motions for legal custody of the children and entered judgment granting legal custody of all ten Hilyard children to VCDJFS.

II. ASSIGNMENTS OF ERROR

{¶17} In her appeal, Ms. Sledd raises the following assignments of error:

1. The trial court erred in not joining Judy Sledd as a party to the initial complaint for the reason that she resided in the child's home at the time of the complaint under R.C. 2151.27.

2. The trial court erred to the prejudice of appellant in proceeding on appellee Vinton County Department of Job and Family Service's Motion for permanency when appellant had not been afforded her

due process rights in service of process and in personam jurisdiction therein.

3. The trial court erred by not finding that it was in the best interests of the children that they be placed with Judy Sledd or other suitable relative placement, at the shelter care proceeding, dispositional hearing, and during the best interest phase of the trial on the VCDJFS permanency motion.

4. The trial court erred in failing to appoint an attorney in addition to a guardian ad litem to represent the interests of the children in violation of their rights.

5. The trial court erred to the prejudice of appellant by admitting and relying upon the guardian ad litem reports that contained clear hearsay information.

6. Further, the prejudice to appellant of the admission of the GAL report and its underlying hearsay reports included references to psychological examinations performed upon the appellant to which no waiver of the physician-patient privilege was obtained.

7. The trial court erred to the prejudice of appellant by not obtaining evidence of the children's wishes in a permanency proceeding and by not requiring the guardian ad litem to report on the children's wishes or present evidence of the children's wishes other than through the guardian's reports, a hearsay document. Therefore, the court's findings on best interests is against the weight of the evidence.

III. LEGAL STANDARDS GOVERNING PERMANENT CUSTODY DECISIONS AND OUR REVIEW

A. Burden of Proof

{¶18} An award of permanent custody must be based upon clear and convincing evidence. R.C. 2151.414(B)(1). The Ohio Supreme Court has defined "clear and convincing evidence" as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-104.

B. Standard of Review

{¶19} Even under the clear and convincing standard, our review is deferential. If the trial court's judgment is supported by some competent, credible evidence going to all the essential elements of the case, an appellate court must affirm the judgment and not substitute its judgment for that of the trial court. *In re Myers III,* Athens App. No. 03CA23, 2004-Ohio-657, ¶7, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. The credibility of witnesses and weight of the evidence are issues primarily for the trial court, as the trier of fact. *In*

re Ohler, Hocking App. No. 04CA8, 2005-Ohio-1583, ¶15, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

C. Parental Rights and Children's Best Interest

{¶20} A parent's right to raise his or her child is an "essential" and "basic civil right." *In re Murray* (1990), 52 Ohio St.3d 155, 157, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551. A parent's rights, however, are not absolute. While termination of parental rights is an alternative of last resort, it is authorized when necessary for the welfare of the child. *In re Cunningham* (1979), 59 Ohio St.2d 100, 105; *In re Wise* (1994), 96 Ohio App.3d 619, 624. "[T]he natural rights of a parent are * * * always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed.' " *In re Cunningham,* quoting *In re R.J.C.* (Fla.App.1974), 300 So.2d 54, 58.

D. The Agency's and Court's Responsibility

{¶21} R.C. 2151.413(D)(1) requires a public children's services agency that has had temporary custody of a child for 12 or more months of a consecutive 22-month period to file a motion requesting permanent custody of the child. R.C. 2151.414(A)(1) then requires the trial court to hold a hearing. The primary purpose of the hearing is to allow the trial court to determine whether permanently terminating the parental relationship and

awarding permanent custody to the agency would serve the child's best interests. See R.C. 2151.414(A)(1).

{¶22} R.C. 2151.414(B)(1)(d) permits a trial court to grant permanent custody of a child to an agency if the court determines, by clear and convincing evidence, that the child's best interest would be served by the award of permanent custody and the child has been in the temporary custody of the agency for 12 or more months of a consecutive 22-month period.

{¶23} R.C. 2151.414(D) requires the trial court to consider all relevant factors in determining whether the child's best interests would be served by granting the permanent custody motion. These factors include but are not limited to: (1) the interrelationship of the child with others; (2) the wishes of the child; (3) the custodial history of the child; (4) the child's need for a legally secure placement and whether such a placement can be achieved without permanent custody; and (5) whether any of the factors in divisions (E)(7) to (11) apply[2]. Under R.C. 2151.414(E), the court must also find that the child cannot be placed with either of the child's parents within a

[2] R.C. 2151.414(E)(7) is applicable here and provides: (7) The parent has been convicted of or pleaded guilty of one of the following: * * * (d) An offense under section * * * 2907.03 * * * of the Revised Code * * * and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense; (e) A conspiracy or attempt to commit, or complicity in committing an offense described in division (E)(7)(a) or (d) of this section. * * * "

reasonable time or should not be placed with the child's parents.

IV. NOTICE OF PROCEEDINGS ON COMPLAINT AND MOTION FOR CUSTODY

{¶24} Sledd's first two assignments of error are related. In effect, they assert she was a necessary party to the proceedings for purposes of receiving notice of VCDJFS' complaint and its subsequent motion for permanent custody of the Hilyard children because she was a member of the Hilyard children's household at the time the dependency-neglect complaint was filed. Sledd argues that since she was not personally served with a summons notifying her of the proceedings, the trial court lacked both subject matter and personal jurisdiction to proceed on VCDJFS' complaint and its motion for permanent custody, thus rendering the judgments void.

{¶25} R.C. 2151.28(C)(1) provides that "[t]he court shall direct the issuance of a summons to * * * the parents, guardian, custodian, *or* other person with whom the child may be, and any other persons that appear to the court to be proper or necessary parties to the proceedings[.]" (Emphasis added.) A "party" includes the child who is the subject of the juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or in appropriate cases, the child's custodian,

guardian, or guardian ad litem, the state, and any other person specifically designated by the court. Juv.R. 2(Y)

{¶26} Sledd is the paternal grandmother of the Hilyard children. A grandparent is a necessary party to juvenile cases only if: (1) the grandparent has a legal right to or a legally protectable interest in custody or visitation with the child, *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, (2) the grandparent is the child's legal custodian, *In re Bowman* (1995), 101 Ohio App.3d 599, or (3) the child's parent is under age 18, Juv.R. 2(Y). This last criterion clearly is not an issue here.

{¶27} Ms. Sledd has not demonstrated that she had a legal right or legally protected interest in custody or visitation with the children. Although the court permitted her to have supervised visitation with the children, its order was clearly temporary in nature and did not create an absolute right of association with them. See, *In Re Schmidt* (1986), 25 Ohio St.3d 331 at 336. Moreover, the temporary order occurred after the initiation of the proceedings. This temporary order was insufficient to entitle her to joinder as a necessary party or to statutory notice due such a party. See, *In re Goff,* Portage App. No. 2003-P-0068, 2003-Ohio-6087; *In re Massengill* (1991), 76 Ohio App.3d 220.

{¶28} Furthermore, appellant was not the legal custodian or guardian of any of the children, regardless of her residency in

the household or any "help" she provided the children's parents in taking care of the children prior to the time the dependency-neglect petition was filed. Appellant does not dispute that the children's parents were the children's legal custodians who, as necessary parties, were given statutory notice of the initial complaint and the permanent custody proceedings.

{¶29} Because statutory notice of VCDJFS' initial complaint and its motion for permanent custody was provided to the Hilyard children's parents, the trial court had jurisdiction to proceed on the agency's motion for permanent custody. Contrary to appellant's assertion, the notification requirements of R.C. 2151.28(C)(1) implicate personal jurisdiction, not subject matter jurisdiction, which is conferred by R.C. 2151.23 and invoked by filing the complaint. See, *In re Kincaid* (Oct. 27, 2000), Lawrence App. No. 00CA3.

{¶30} Furthermore, Sledd had actual notice of the permanent custody proceedings. She and her counsel, who had been served with a copy of VCDJFS' permanent custody motion, were both present at the September 2004 pretrial hearing when the trial court discussed the rights and potential consequences associated with the permanency hearing. Appellant and her counsel also were present at the March 2005 permanent custody hearings, where she was given an opportunity to be heard but declined to testify on her own behalf. See, *In re Webb* (1989), 64 Ohio App.3d 280,

finding no prejudice where complaining party had actual notice of the proceedings.

{¶31} Accordingly, we hold the trial court did not err in proceeding upon the motion for permanent custody. Appellant's first and second assignments of error are meritless.

V. PLACEMENT OF CHILDREN

{¶32} Sledd agrees that the trial court correctly found under R.C. 2151.414(B)(1) that an award of custody to the children's mother or father would be detrimental to the children due to the parents' conviction and incarceration for crimes of rape against some of the children. But, she argues in her third assignment of error, when the court's findings closed the door to the parents, they should have opened it to her and to Garvin, who Sledd contends had suitable homes for the children. Sledd asserts the trial court erred in failing to consider and find that it was in the best interests of the children that they be placed with her or Garvin as suitable relative placements. While Sledd clearly can appeal from the denial of her motion for custody, we have doubts about her standing to raise issues concerning the denial of Garvin's motion. Assuming without deciding she can do so, we nonetheless reject both arguments.

{¶33} A court considering a permanent custody motion in a dispositional hearing possesses discretion to award legal custody to either parent or to another person who files a proper

motion requesting legal custody. See R.C. 2151.353(A)(3); *In re Keaton,* Ross App. No. 04CA2785, 2004-Ohio-6210; *In re Dyal,* Hocking App. No. 01CA11, 2001-Ohio-2383; *In re Patterson* (1999), 134 Ohio App.3d 119. A juvenile court is not required to consider relative placement before granting the motion for permanent custody. Nor must the court find, by clear and convincing evidence, that a relative is an unsuitable placement option prior to granting the permanent custody request. *In re Keaton; In re Dyal, supra.* Relatives seeking the placement of the child are not afforded the same presumptive rights that a natural parent receives as a matter of law. Id.; *In re Davis* (Oct. 12, 2000), Cuyahoga App. No. 77124.

{¶34} The willingness of a relative to care for a child does not alter the statutory factors to be considered in granting permanent custody. *In re Keaton; In re Dyal; In re Jefferson* (Oct. 25, 2000), Summit App. No. 20092. The child's best interests are served by the child being placed in a permanent situation that fosters growth, stability, and security. *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 324. 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. *In re Keaton; In re P.P.,* Montgomery App. No. 19582, 2003-Ohio-1051.

{¶35} The trial court is vested with discretion to determine what placement option is in the child's best interest, and the court's exercise of that discretion should be accorded the utmost respect. *In re Keaton; In re Dyal; In re Patterson,* supra. See, e.g., *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. Therefore, an appellate court will not overturn a trial court's custody decision unless the trial court has acted in a manner that can be characterized as arbitrary, unreasonable or capricious. *In re Dyal,* supra, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶36} Contrary to Sledd's argument, the record reflects that VCDJFS and the trial court did consider placement of the children with her and Christine Garvin but found them unsuitable to assume legal custody of the children. And while it is questionable at best that Sledd has standing to raise Garvin's interest in custody, we will address it briefly.

A. Evidence Concerning Garvin

{¶37} Garvin did not file a motion for custody of the children until May 26, 2004, almost a year after VCDJVS assumed temporary custody of the children and had placed the children in foster care. VCDJFS conducted a study of Garvin's home for possible relative placement and set up visitation for her with the Hilyard children.

{¶38} Garvin testified at the permanent custody hearing about why she should be awarded legal custody of the children. She testified she was 32 years old and was married with four children: two children from her current marriage, and two sons from prior relationships. Garvin acknowledged that she had allowed her oldest son to live with her mother, Sledd, almost since birth and made little or no attempt to make sure that his needs, particularly his educational needs, were being met. Garvin admitted that sometimes she did not even have an address or phone number to reach her son or Ms. Sledd.

{¶39} Garvin testified that she earns annually approximately $25,000 as a bus driver. Her husband, who is unable to work due to seizures, earns no income but has applied for social security disability income. The home study conducted on Garvin showed that she lives in a small, nice three-bedroom home in a good area but that the home would be very crowded if the five people already living in the home were joined by ten more children. Garvin testified that if she were granted legal custody of the children she and her husband would remodel her home or possibly buy a larger home to accommodate the children.

{¶40} Garvin admitted that she had only seen the children two times since 1998 and was now a stranger to several of the children. She testified that she did not believe that her

brother, the Hilyard children's father, committed the acts of sexual battery for which he was convicted.

B. Evidence Concerning Sledd

{¶41} Three separate home studies were conducted on Ms. Sledd—one by the Franklin County Department of Job and Family Services ("FCDJFS") and two by VCDJFS during the subject proceedings. A FCDJFS caseworker testified that Sledd was the subject of investigation in 1995 when she was the primary caretaker of a niece and the niece's infant son; the agency found her to be noncompliant and frequently could not be found at addresses she provided. The caseworker testified that Sledd hid the baby in a pile of clothes in a basement when the agency attempted to remove the baby from her care. The baby was very dirty and had cradle cap on his scalp and red marks on his chin. The agency removed the niece and baby from Sledd's care.

{¶42} The record indicates Sledd continued to move frequently and did not maintain a stable residence. The latest of two home studies by VCDJFS in this case indicated that her home was small with four people already living there. Her visits with the children were described as chaotic, with her lacking control over the children. During one visit, she promised gifts to the children if they would chose to live with her. Some of the children were reported as having nightmares after visitation with her. Perhaps most notably, she failed to

protect the children from the incidents of abuse and neglect alleged in the complaint, which she admits occurred while she was a member of the Hilyard household.

{¶43} The record clearly indicates that VCDJFS and the trial court considered Sledd and Garvin as placement options for the Hilyard children but concluded neither was suitable and should not be granted legal custody of the children. The record supports this conclusion. Because competent and credible evidence supports the trial court's determination that it is in the best interests of the children that permanent custody of them be granted to VCDJFS, we overrule appellant's third assignment of error.

VI. APPOINTMENT OF LEGAL COUNSEL AND GUARDIAN AD LITEM

{¶44} In her fourth assignment of error, Sledd asserts the trial court erred in permitting one person to serve as both guardian ad litem and legal counsel for all ten children because the children had conflicting legal interests and at least one of them expressed a desire to live with a family member. She contends the court did not sufficiently inquire whether there was a conflict between the interests of the children and the position of the guardian ad litem in this case.

{¶45} As previously noted, the trial court appointed Sandra Brandon, a licensed attorney, as the guardian ad litem for all ten Hilyard children and subsequently appointed Brandon in a

separate entry to also serve as legal counsel for them. The trial court directed Brandon to notify it within 14 days of her appointment as the children's attorney if she believed there was any conflict of interest in her dual representation.

{¶46} Attorney Brandon did not notify the court she believed there might be a potential conflict of interest. Brandon did advise the court, however, that Angela had expressed an interest at one time in living with a family member, Ms. Sledd, her grandmother. The court inquired into Angela's expressed wishes, and Brandon further advised the court that Angela was not serious about it and was more concerned about staying in contact with her siblings.

{¶47} Brandon stated her belief that no conflict in interest existed in her serving as the children's guardian ad litem and attorney, and the court agreed. Notably, Brandon was also subject to full cross-examination by the parties regarding her investigation of the case.

{¶48} R.C. 2151.281 and Juv.R. 4(B) mandate that the juvenile court appoint a guardian ad litem to protect the interests of a child in a juvenile court proceeding involving allegations of abuse or neglect of the child. Under R.C.

2151.352[3] and Juv.R. 4(A)[4], every child who is the subject of a juvenile court proceeding also has the right to be represented by counsel and, if indigent, to be appointed counsel to represent the interests of the child. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 48; *In re Emery,* Lawrence App. No. 02CA40, 2003-Ohio-2206, ¶9. R.C. 2151.281(H) and Juv.R. 4(C)(1) permit a licensed attorney to serve as both attorney and guardian ad litem for a child in juvenile court proceedings provided the court makes an explicit dual appointment and no conflicts arise due to the dual representation. See *In re Emery; In re Duncan/Walker Children,* supra at 844-845. The court expressly ordered dual representation in this case. Thus, we focus on the issue of conflicts.

{¶49} As recognized in Juv.R. 4(C)(1), the roles of guardian ad litem and attorney are not always compatible, as they serve different functions. *In re Baby Girl Baxter* (1985), 17 Ohio

---

[3] R.C. 2151.352 provides, in relevant part, that "[a] child, or the child's parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or chapter 2152 of the Revised Code and if, as an indigent person, any such person is unable to employ counsel, to have counsel provided for the person * * *. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them."

[4] Juv.R. 4(A) provides that "[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute."

St.3d 229, 232; *Emery,* supra. "The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the child's best interest. The role of the attorney is to zealously represent his client within the bounds of the law." Id. Thus, a conflict between the roles may arise when a child's wishes differ from what the guardian ad litem believes is in the child's best interests. In that event, the attorney must bring potential conflicts to the attention of the court, and where he or she fails to do so, the court may be obliged to act sua sponte. See *In re Howard* (1997), 119 Ohio App.3d 201, 206. A new guardian ad litem should be appointed if either the court or the attorney finds there is a conflict. R.C. 2151.281(H); Juv.R. 4(C)(2). We conduct a de novo review of the record to determine if evidence of a conflict existed that would have required the trial court to appoint independent counsel for some or all of the children. See, *In re Baby Girl Baxter*, supra; *Williams*, infra; *In re Brooks*, Franklin App. No. 04AP-164, 2004-Ohio-3887, ¶ 79-87, appeal not allowed, 103 Ohio St.3d 1495, 2004-Ohio-5605.

{¶50} The Ohio Supreme Court has concluded that a child who is the subject of a juvenile court proceeding to terminate parental rights is entitled to independent counsel *in certain circumstances. In re Williams,* 101 Ohio St.3d 398, 2004-Ohio-1500, syllabus, ¶17. A court's determination whether a child

actually needs independent counsel should be made on a case-by-case basis, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child. *In re Williams,* ¶17; *In re Brooks,* supra, at ¶¶ 79, 87. Generally the appointment of independent counsel is warranted where 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. Id.

{¶51} Here, unlike the circumstances in *Williams,* the record does not reflect that any of the Hilyard children "consistently and repeatedly" expressed a strong desire or had interests that were inconsistent with the recommendations of the guardian ad litem. Cf. *In re Smith* (1991), 77 Ohio App.3d 1. Upon being advised by the guardian ad litem that one of the children had at one time expressed in interest in living with appellant, the court appropriately made further inquiry and was advised that the child was not serious and was more concerned about staying in contact with her siblings. No contrary evidence was adduced. Cf. *In re Emery* (remanding for further proceedings because the trial court did not inquire further upon being advised that one of the children's desires regarding custody may not have been consistent with the guardian ad litem's recommendation).

{¶52} Because appellant has failed to demonstrate either an apparent or actual conflict in the guardian ad litem's dual representation as attorney for the children, we conclude the trial court conducted an appropriate inquiry and proceeded accordingly. Thus, we overrule appellant's fourth assignment of error.

VII. CONSIDERATION OF GUARDIAN AD LITEM REPORT

{¶53} Prior to the permanent custody hearing, VCDJFS submitted the guardian ad litem's December 2004 report, which recommended that all ten Hilyard children be placed in the permanent custody of the agency. Counsel for the children's father, mother, and paternal grandmother and aunt objected to the court's consideration of the report on the ground that it contained hearsay. In her fifth and sixth assignments of error, Sledd pursues her objection to the hearsay contained in the guardian ad litem's report. She claims she was prejudiced by the trial court's consideration of purported statements by the children and a psychological examination performed upon her.

{¶54} R.C. 2151.414(C) requires that a written report of the guardian ad litem "shall be submitted to the court" before or at the time of the permanent custody hearing, and provides that the report not be submitted under oath. The agency does not seriously dispute the hearsay nature of the Guardian Ad Litem's report. Rather, the agency contends the statutory requirement

implicitly requires the court to consider the report when ruling on the merits of the motion. The agency supports this contention by asking rhetorically, what is the use of requiring the report if the court cannot use it? This question fails to recognize explicit directives in the juvenile rules and the differing purposes that the report serves.

{¶55} Juv.R. 34(B)(2) allows the use of hearsay evidence at most dispositional hearings. But it specifically acknowledges the requirements of Juv.R. 34(I) that the Rules of Evidence "shall apply" in hearings on motions for permanent custody. See, *In re Mack*, 148 Ohio App.3d 626, 629-30, 2002-Ohio-4161.

{¶56} Moreover, both the Guardian Ad Litem Standards Task Force, the Supreme Court of Ohio, March 28, 2002 Report and the Report and Recommendations of the Advisory Committee on Children, Families and the Courts, Supreme Court of Ohio, Office of Judicial and Court Services, December 2005 Report and Recommendations are consistent with this position. The Guardian Ad Litem Standards Task Force recommended that the report not be considered by the court as substantive proof of the merits of the motion for permanent custody. See Recommendation Eleven. Likewise, the Advisory Committee report recommended that the report shall not be considered as substantive proof of the need for termination of parental rights. See Recommendation Eleven.

{¶57} Both committees focus on the purpose of the Guardian Ad Litem report as being to advise the court of the activities and investigation of the Guardian Ad Litem to allow the court to determine whether the Guardian Ad Litem is fulfilling its duty to the child and the court. Both Committees strongly caution against using the Guardian Ad Litem's report as substantive evidence going to the merits of the motion for permanent custody.

{¶58} Thus, we conclude to the extent that the court admitted the Guardian Ad Litem's report and considered it as substantive evidence, it erred. However, this does not end our analysis, as we still must determine whether this error was prejudicial. See *In re Mack*, supra at 630. We conclude appellant was not unfairly prejudiced by the trial court's consideration of the GAL report.

{¶59} First, there is no indication that the court considered a psychiatric examination apparently performed upon Sledd. Rather, the trial court merely noted in its summary of testimony that a *Franklin County Department of Job and Family Services caseworker* testified Sledd underwent a psychiatric/psychological assessment in 1995 or 1996. The court did not attribute this information to the GAL report. Neither the testimony nor the judgment contain any reference to the results of Sledd's psychological assessment, and there is no

indication that the court gave any weight to the fact that assessment occurred.

{¶60} Second, the trial court did not reference the GAL report as support for its findings under R.C. 2151.414(D)(4) that neither Sledd nor Garvin would be legally secure placements for the children. While the court did note in its denial of their motions for permanent custody that the GAL did not consider either Sledd or Garvin to be suitable relatives to assume custody of the children, the GAL expressed that opinion in her testimony at trial, where it was subject to full cross-examination.

{¶61} Indeed, the trial court's only reference to the GAL report is in its findings of fact under R.C. 2151.414(D)(2), concerning the wishes of the children. Specifically, the court referenced the portion of the GAL's report describing the purported wishes of four of the oldest children, none of whom reportedly wished to live with their parents, aunt or grandmother. The court additionally noted under this best interest factor that none of the children expressed their wishes directly to the court because the children's parents, aunt and grandmother had withdrawn their joint motion for the children to do so. Moreover, the court found that even though Sledd had made false promises of gifts to the children if they would

promise to live with her, all of the ten children are bonded with their foster parents and families.

{¶62} Our review of the trial court's reference in its judgment to the GAL report reveals that it was minimal in nature. To the extent the court considered the GAL's report concerning the wishes of the children, this error was harmless because the court's ultimate conclusion that termination of parental rights was necessary finds abundant support in other admissible evidence. See *In re Mack,* supra at 633-34. We discern no prejudice to Sledd in the court's fleeting references to the GAL report in reaching its conclusion. Sledd's fifth and sixth assignments of error are overruled.

VIII. SUFFICIENT INFORMATION REGARDING THE CHILDREN'S WISHES

{¶63} In her seventh, and final, assignment of error, Sledd asserts the trial court failed to obtain sufficient evidence of the children's wishes other than through the guardian ad litem's report.

{¶64} Notably, the children's father, mother, Sledd, and Garvin withdrew a joint motion that had requested the court to conduct *in camera* interviews of the older children to directly ascertain the desires of the children and to determine whether they were being adequately represented. The court noted it was prepared to conduct the interviews as requested. Having

withdrawn the motion for the court to conduct in camera interviews with the children, Sledd should not now be heard to complain that the court did not conduct a sufficient inquiry into the children's wishes.

{¶65} However, the guardian ad litem, a VCDJFS caseworker, and foster parents with whom the children were placed presented evidence concerning the children's wishes. Thus, we hold that sufficient evidence of the children's wishes was before the trial court. Appellant's final assignment of error is meritless.

IX. CONCLUSION

{¶66} Having overruled all of Sledd's assignments of error, we affirm the judgment of the trial court granting permanent legal custody of the Hilyard children to VCDJFS.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.