**[Cite as *In re M.S.*, 2015-Ohio-1847.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**Nos. 102127 and 102128**

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## IN RE: M.S., ET AL.
## Minor Children

[Appeal By F.S., Father]

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**JUDGMENT:**
REVERSED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. AD 11909571 and AD 119109572

**BEFORE:** E.A. Gallagher, J., Jones, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** May 14, 2015

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EILEEN A. GALLAGHER, J.:

**{¶1}** In this consolidated appeal, defendant-appellant F.S., the father, appeals from the Cuyahoga County Juvenile Division Court's decisions granting permanent custody of his daughter, M.S., and son, J.S., to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). For the following reasons, we reverse and remand.

**Factual and Procedural Background**

**Initial Period of Temporary Custody**

**{¶2}** On May 25, 2011, appellant's minor children, M.S. (date of birth November 2, 2006) and J.S. (date of birth April 29, 2009) were removed from the custody of appellant and the children's mother (the "mother")[1] pursuant to an ex-parte telephonic order. The next day, CCDCFS filed a complaint and a motion for pre-dispositional temporary custody. The complaint alleged that M.S. and J.S. were neglected because the parents had no stable housing for the children, had substance abuse problems that prevented them from providing safe and adequate care for the children and had a history of engaging in domestic violence in front of the children, placing them at risk. The trial court granted CCDCFS emergency temporary custody of the children.

**{¶3}** On July 25, 2011, appellant and the mother stipulated to the allegations of an amended complaint and the children were adjudicated to be neglected.[2] A case plan was

[1]Appellant and the children's mother are married.

[2]Specifically, appellant and the mother stipulated that: (1) at the time of the complaint, the

approved that was designed to reunite the children with their parents. Under the case plan, appellant and the mother were to successfully complete a domestic violence program, successfully complete a drug and alcohol program, live a life free of drug use, submit to regular urine screens, successfully complete a parenting education program, attend employment services if unable to locate employment on their own and maintain clean and stable housing. In addition, because he had reported a history of depression, appellant was to undergo a mental health evaluation and to follow any related recommendations related to his mental health.

**Return of M.S. and J.S. to the Custody of Their Parents**

**{¶4}** In August 2011, following a dispositional hearing, the children were returned to their parents and placed in the protective supervision of CCDCFS. As of that time, appellant had made substantial progress toward completion of the case plan. He had completed parenting education classes, a drug and alcohol treatment program and a psychological evaluation and was involved with a domestic violence program. In addition, the mother had completed parenting classes, was attending a drug and alcohol treatment program and domestic violence classes and had obtained employment. The parents had established stable and appropriate housing for the children.

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parents had no working utilities; (2) the mother has a substance abuse problem but recently began intensive outpatient treatment; (3) appellant has a substance abuse problem, i.e., marijuana, but had been clean since May 25, 2011; (4) the parents have a history of engaging in domestic violence, placing the children at risk and that, in January 2011, appellant hit the mother and knocked out a tooth and (5) appellant has an anger management problem that interferes with his ability to care for the children.

**{¶5}** From August 2011 until March 2013, the children remained with one or both of their parents under the protective supervision of CCDCFS. In April 2012, the trial court extended protective supervision until Novemer 25, 2012. After the children were returned to their parents, appellant's and the mother's compliance with the case plan was less consistent. The mother stopped attending classes and terminated her employment. In November 2012, the mother was found to be in contempt for failure to complete a substance abuse treatment program, failure to maintain her sobriety and failure to complete a domestic violence program. It was also discovered around this time that the mother had mental health issues. The mother attempted suicide while the children were in the house, and M.S. observed her mother being carried out of the home on a stretcher by EMS personnel. In December 2012, the children saw police arrest the mother for domestic violence against appellant.

**{¶6}** After the children were returned to their parents, appellant initially continued with services but then suffered a relapse. Marilyn Henderson, the CCDCFS social worker assigned to the case from August 2011 to September 2013, testified that she would sometimes receive voicemail messages from appellant in which he indicated that the mother was drinking and out of control and that he wanted to leave with the children. Henderson testified that in response to these calls, she recommended that appellant go to a shelter, which he did from time to time. She testified that in 2012 when appellant moved out with the children, initially, "he did pretty well with the kids." M.S. was enrolled in school, and appellant made progress on services. Rachel Redcross, a

wrap-around specialist with the East End Neighborhood House who worked with appellant from November 2011 until early 2013, testified that during this time, appellant "was really trying." She testified that he would consistently follow up with services, that he obtained schooling and daycare for the children, took care of the children and their needs, obtained his GED, searched for a job and was briefly employed. She testified that when she observed the children with appellant, they were happy. In November 2012, CCDCFS filed a motion to extend protective supervision and appellant filed a motion for legal custody.

**{¶7}** In or around December 2012 or January 2013, however, appellant was asked to leave the shelter at which he had been staying with the children due to non-compliance with its rules. Henderson testified that appellant failed to notify CCDCFS of his and the children's whereabouts and that he was ultimately found back at the mother's apartment.

**{¶8}** On January 23, 2013, CCDCFS filed a motion to modify protective supervision to temporary custody and to withdraw its prior motion to extend protective supervision. According to Henderson, the factors that led CCDCFS to seek temporary custody of the children included that M.S. had missed approximately 58 days of kindergarten,[3] continuing domestic violence and ongoing marijuana and alcohol use by the parents that Henderson believed to be a "trigger" for domestic violence. Following a

[3]It is unclear from the record why M.S. missed school during this time period, e.g., whether it was because she was not enrolled in kindergarten for a period of time or was just not regularly attending school, or precisely when during this time period this occurred, e.g., whether she missed school for a large block of time or was not consistently attending school.

dispositional review hearing in March 2013, appellant and the mother agreed to modify the protective custody to a granting of temporary custody to CCDCFS.

**Second Period of Temporary Custody**

**{¶9}** For several months after the children were placed in the temporary custody of CCDCFS a second time, the parents made little progress. Henderson and Larry Epstein, the supervisor who oversaw the handling of the case at CCDCFS, testified that the mother was in and out of drug treatment. She failed to complete any drug treatment or domestic violence programs, failed to maintain her sobriety and only intermittently received mental health services.

**{¶10}** With respect to appellant, Henderson testified that despite having previously completed a drug treatment program, appellant had several positive drug tests for alcohol or marijuana and refused to submit to other drug screens. In addition, despite having completed a domestic violence program, appellant committed another act of domestic violence against the mother in June 2013. Although the children did not witness the domestic violence itself, they witnessed appellant's arrest when the children were present for an in-home visit with the parents in July 2013. Henderson testified that appellant also failed to consistently receive counseling for his mental health issues.

**{¶11}** Because the prior programs the parents had participated in did not have the desired impact, Henderson testified that an amended case plan was approved, pursuant to which the parents were to once again complete parenting education classes, drug

treatment and a domestic violence program. The parents were also required to submit to drugs screens and receive mental health counseling and treatment.

**{¶12}** On November 27, 2013, CCDCFS filed a motion for permanent custody of the children. Appellant and the mother thereafter filed separate motions for legal custody. A hearing on the motions was held on September 11, 2014.

**{¶13}** In the fall of 2013, appellant once again became more actively involved in services, completing a second parenting education program in October 2013. However, CCDCFS claimed that he had made no significant progress with respect to the domestic violence, drug treatment or mental health aspects of the amended case plan. Henderson testified that although appellant was reportedly planning to participate in a domestic intervention education and training program in connection with his 2013 domestic violence conviction, CCDCFS received no information confirming that he had, in fact, participated in the program.[4]

**{¶14}** Epstein testified that shortly before the September 2014 hearing, appellant had started a new drug and alcohol treatment program and had taken steps to continue with his mental health counseling (which he had stopped attending five months earlier) but that much remained to be done to comply with the amended case plan.

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[4]In November 2013, Henderson was transferred to another department and the case was assigned to Mildred Worthy. Worthy went out on medical leave several weeks later and the case was then assigned to social worker Ken Aaron. Aaron was the social worker assigned to the case from late December 2013 or early January 2014 until he left CCDCFS in early September 2014. Neither Worthy nor Aaron testified at trial.

**{¶15}** Epstein testified that as of the time of the hearing, the mother was living in a new apartment and appellant was reportedly living with his paternal grandfather. Epstein testified that appellant's housing situation was healthy and appropriate for the children. However, the mother testified that most days, the appellant was living with her in her apartment.

**{¶16}** Epstein and Henderson testified that when the children were removed from the custody of their parents they were found to be healthy. There were no signs of any maltreatment or physical abuse by the parents. Although Henderson and Epstein expressed continuing concerns regarding the children being exposed to domestic violence between the parents in the home, they had no concerns regarding appellant's ability to otherwise properly care for and parent his children. Henderson testified that "it's what happens when [the parents] are together," i.e., "the fighting and the chaos that the family are involved in that creates the problem." Whenever appellant went back to the mother "the chaos and the fighting continued." Epstein testified that he supported permanent custody in the case because "[t]hese kids need stable caregivers" and that in his view, neither parent could properly "care for their children separately or together until they get the services they need."

**{¶17}** With respect to how the children were progressing in their foster care placement, Henderson and Epstein testified that while in foster care, the children's needs were being met and that the children were receiving counseling for behavioral issues. They testified that M.S.'s behavioral issues and school performance were reportedly

improving but that she had been struggling in school and was held back a year while in the temporary custody of CCDCFS.

**{¶18}** Throughout the time the children were in temporary custody, the parents maintained regular, consistent visitation with their children.[5] It was undisputed that appellant had a very good, healthy, affectionate and appropriate relationship with his children. No monitoring or supervision of visitation was necessary. Henderson described appellant as a "hands on" father who was very affectionate and "involved" with his children. Henderson, Epstein and Redcross each testified that the children clearly loved their parents, wanted to be with their parents and were very happy when they were with their parents. Epstein testified, however, that he did not believe the strong familial bond between the parents and children was enough "not to pursue permanent custody." He testified that because of the history of domestic violence between the parents and their continued marijuana and alcohol use, "you never know what's going to happen" and that, in his view, the children have "just been lucky that they have not been hurt or injured."

**{¶19}** Epstein testified that neither parent had any relatives who served as any type of "support system" for the family or with whom the children could be placed apart from

[5]Evidence was presented that during the three-month period from approximately July to September 2013, the parents failed to visit with their children. However, this occurred when Henderson, who coordinated the visits, was out on medical leave. There was evidence that the parents had contacted the foster mother to inquire about visiting the children during this time period and, in fact, had arranged for a visit with the foster mother at their home in July 2013, but that the foster mother thereafter refused to permit visitation without going through CCDCFS. Even when there was no visitation between the parents and children, there was evidence that the parents communicated by telephone with the children at the foster home. Regular, consistent visitation resumed when Henderson returned from leave.

their parents. Epstein further testified that the children were not in an adoptive foster home and that CCDCFS would, therefore, attempt to "match" the children with a family for adoption if it was awarded permanent custody.

**The Guardian ad Litem's Report and Recommendation**

**{¶20}** The trial court also heard from the children's guardian ad litem ("GAL").[6] The GAL submitted a report in which he recommended that permanent custody be granted to CCDCFS and testified regarding his recommendation at the hearing. The mother and appellant objected to the GAL's report on the ground that it was not filed seven days before the hearing[7] as required under Sup.R. 48(D) and Loc.R. 20 of the Court of Common Pleas of Cuyahoga County, Juvenile Division ("Cuyahoga Cty. Juv. Loc.R.") and moved to continue the permanent custody hearing based on the untimely filing. Because neither the mother nor appellant could identify anything specific in the report that was surprising to them or as to which they would need additional time to prepare, the trial court denied the motion. Neither appellant nor the mother moved to strike the GAL's report or otherwise argued that the GAL report should not be considered by the trial court due to any alleged deficiencies with his report or investigation.

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[6] The attorney who served as the children's guardian ad litem at the time of the permanent custody hearing (the "GAL") was appointed on July 22, 2014 after the original guardian ad litem apparently withdrew from the case and her replacement became the attorney for M.S. after filing a conflict motion.

[7] The GAL's report was filed on September 8, 2014. The GAL had not sought an extension of the deadline for submitting his report and offered no explanation as to why his report was not timely submitted.

**{¶21}** In concluding that permanent custody was in the children's best interests, the GAL noted in his report that although the parents had addressed some of the agency's concerns, including completing parenting classes and receiving mental health counseling, concerns regarding substance abuse and domestic violence remained. The GAL noted that neither parent had completed a substance abuse program or had been able to demonstrate his or her sobriety for any significant period of time. However, the GAL stated that the "biggest concern with the parents" was the "terrible domestic violence history at issue with this family." As he explained:

> The father has had one domestic violence conviction where the mother was the victim, and he had another arrest for domestic violence against the mother, but that case was dropped for want of prosecution. To me, the drug problem is not as important as the domestic violence problem is. The parents have allegedly moved out of their home together and secured independent housing. Unfortunately, they still appear to be involved, because upon my arrival at the mother's home for a home visit one morning, I discovered the father, who had just woken up, and had showered and left her apartment. I have great concerns about the mother's well-being in this relationship. She seems to be extremely scared of the father, and does not seem to be able to remove herself from his influence. She has been offered opportunities to separate herself from him, but has not been able to do so.
>
> This is even more saddening, when you consider that the mother has a loving relationship with the children, who wish to be with her. No one can doubt the mother's love for the children, which can be easily seen as she talks about them. The problem still remains: the existence of this domestically violent relationship will put the children at risk.

**{¶22}** The GAL concluded that "[w]hile some progress has been made in this case, it does not appear that enough has been done to ensure the safety of the children, were they to be placed back with either parent."

**{¶23}** The GAL offered a similar view at the hearing. He testified that his recommendations had not changed based on the testimony presented and that the primary reason he recommended that permanent custody be awarded to CCDCFS was "domestic violence issues" and his concern that if the children were returned to the parents they would be at risk of physical danger or psychological injury from witnessing acts of domestic violence involving their parents:

> Q. [Counsel for CCDCFS]: * * * You are recommending permanent custody?
>
> A. I am.
>
> Q. Why?
>
> A. The concern I have isn't necessarily the drug issues that the parents may or may not still have. It's domestic violence issues.
>
> In discussing with the mother, I talked to somebody who seemed afraid of the father. I didn't necessarily get to visit the father's home. We had a visit set up and he was unavailable at that visit, but when I went to visit the mother's home, the father was there and she indicated today that they're living together.
>
> Based on their past history and while the children may not have been injured, I echo [the] concerns that anytime children are in the presence of domestic violence, they're placed at risk, and at this point I think the danger is too great for the children to be returned to the parents. * * *

> THE COURT: The Court has a question regarding that, and that is, you said that your concern is that the children could get physically injured. What about other concerns, other injuries other than physical injuries?
>
> THE WITNESS: * * * I think that, yes, physical injury is not the only concern. Emotional damage can arise from simply witnessing or hearing domestic violence acts.
>
> THE COURT: Psychological injury?
>
> THE WITNESS: Psychological injury, yes.

**{¶24}** On October 10, 2014, after hearing testimony from Henderson, Epstein, Redcross, the mother, the mother's mental health counselor and the GAL, the trial court terminated both parents' parental rights and awarded permanent custody of the children to CCDCFS.

**{¶25}** Appellant appealed[8] and has assigned the following two assignments of error for review:

> Assignment of Error I: The trial court erred to the prejudice of appellant in granting permanent custody, when guardian ad litem's investigation and report were inadequate and fell below the minimum standard required.
>
> Assignment of Error II: The trial court committed error to the prejudice of appellant, contrary to the sufficiency and manifest weight of the evidence by determining permanent custody was in the children['s] best interest.

**Law and Analysis**

**{¶26}** We take our responsibility in reviewing cases involving the termination of parental rights and the award of permanent custody very seriously. '"All children have

[8]The mother has not appealed.

the right, if possible, to parenting from either [biological] or adoptive parents which provides support, care, discipline, protection and motivation."' *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 66, quoting *In re Hitchcock*, 120 Ohio App.3d 88, 102, 696 N.E.2d 1090 (8th Dist.1996). Likewise, a "parent's right to raise a child is an essential and basic civil right." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 67, quoting *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). By terminating parental rights, the goal is to create "a more stable life" for dependent children and to "facilitate adoption to foster permanency for children." *In re N.B.* at ¶ 67, citing *In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, *5 (Aug. 1, 1986). However, termination of parental rights is "'the family law equivalent of the death penalty in a criminal case.'" *In re J.B.*, 2013-Ohio-1704, at ¶ 66, quoting *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 14. It is, therefore,"an alternative [of] last resort." *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21.

**Standard for Terminating Parental Rights and Awarding Permanent Custody to CCDCFS**

**{¶27}** To terminate parental rights and grant permanent custody to a county agency, the trial court must find by clear and convincing evidence: (1) the existence of any one of the conditions set forth in R.C. 2151.414(B)(1)(a) through (d) and (2) that granting permanent custody to the agency is in the best interest of the child.

**{¶28}** The conditions set forth in R.C. 2151.414(B)(1)(a) through (d) are as follows:

(a) The child is not abandoned or orphaned, has not 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, or has not 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

**{¶29}** In determining whether permanent custody is in the best interest of the child, R.C. 2151.414(D)(1) directs that the trial court "shall consider all relevant factors," including, but not limited to, the following:

(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

> (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
>
> (c) 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
>
> (d) 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;
>
> (e) 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)(1).

**{¶30}** "Clear and convincing evidence" is that measure or degree of proof that is more than a "preponderance of the evidence," but does not rise to the level of certainty required by the "beyond a reasonable doubt" standard in criminal cases. *In re M.S.*, 8th Dist. Cuyahoga Nos. 101693 and 101694, 2015-Ohio-1028, ¶ 8, citing *In re Awkal*, 95 Ohio App.3d 309, 315, 642 N.E.2d 424 (8th Dist.1994), citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987). It "produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re M.S. at ¶ 18*; *see also In re J.F.*, 11th Dist. Trumbull No. 2011-T-0078, 2011-Ohio-6695, ¶ 67 (a permanent custody decision "'based on clear and convincing evidence requires overwhelming facts, not the mere calculation of future

probabilities"') (emphasis omitted), quoting *In re A.J.*, 11th Dist. Trumbull No. 2010-T-0041, 2010-Ohio-4553, ¶ 76.

**{¶31}** We review a trial court's determination of a child's best interest under R.C. 2151.414(D) for abuse of discretion. *In re D.A.*, 8th Dist. Cuyahoga No. 95188, 2010-Ohio-5618, ¶ 47. An abuse of discretion is more than a mere error of law or judgment; it implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). While a trial court's discretion in a custody proceeding is broad, it is not absolute. "A trial court's failure to base its decision on a consideration of the best interests of the child constitutes an abuse of discretion." *In re N.B.*, 8th Dist. Cuyahoga No. 101390, 2015-Ohio-314, ¶ 60, citing *In re T.W.*, 8th Dist. Cuyahoga No. 85845, 2005-Ohio-5446, ¶ 27, citing *In re Adoption of Ridenour*, 61 Ohio St.3d 319, 574 N.E.2d 1055 (1991).

**Deficiencies in GAL's Investigation and Report**

**{¶32}** In his first assignment of error, appellant contends that the trial court erred in proceeding with the permanent custody hearing and granting permanent custody to CCDCFS because the GAL's report and investigation failed to comply with Sup.R. 48(D) and R.C. 2151.414(C). Appellant argues that due to the deficiencies in the GAL's report and investigation, the trial court's judgment should be reversed and the case remanded for a new permanent custody hearing "or any other relief this Honorable Court deems just."

**{¶33}** The role of a guardian ad litem in a permanent custody proceeding is to protect the child's interest, to ensure that the child's interests are represented throughout the proceedings and to assist the trial court in its determination of what is in the child's best interest. *See, e.g., In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, 951 N.E.2d 398, ¶ 14, citing R.C. 2151.281(B) and Sup.R. 48(B)(1). This is accomplished by the guardian ad litem conducting an investigation of the child's situation and then making recommendations to the court as to what the guardian ad litem believes would be in the child's best interest. *In re J.C.*, 4th Dist. Adams No. 07CA833, 2007-Ohio-3781, ¶ 13.

**{¶34}** R.C. 2151.281 and Sup.R. 48 address the role and responsibilities of a guardian ad litem. *See also* Cuyahoga Cty. Juv. Loc.R. 17, 20. R.C. 2151.281(I) provides that a guardian ad litem;

> shall perform whatever functions are necessary to protect the best interest of the child, including, but not limited to, investigation, mediation, monitoring court proceedings, and monitoring the services provided the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, and shall file any motions and other court papers that are in the best interest of the child.

Sup.R. 48(D)(13) provides:

> A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest, a guardian ad litem shall, at a minimum, do the following, unless impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case:
>
> (a) Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present;

(b) Visit the child at his or her residence in accordance with any standards established by the court in which the guardian ad litem is appointed;

(c) Ascertain the wishes of the child;

(d) Meet with and interview the parties, foster parents and other significant individuals who may have relevant knowledge regarding the issues of the case;

(e) Review pleadings and other relevant court documents in the case in which the guardian ad litem is appointed;

(f) Review criminal, civil, educational and administrative records pertaining to the child and, if appropriate, to the child's family or to other parties in the case;

(g) Interview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records;

(h) Recommend that the court order psychological evaluations, mental health and/or substance abuse assessments, or other evaluations or tests of the parties as the guardian ad litem deems necessary or helpful to the court; and

(i) Perform any other investigation necessary to make an informed recommendation regarding the best interest of the child.

**{¶35}** Sup.R. 48(F) further provides:

A guardian ad litem shall prepare a written final report, including recommendations to the court, within the times set forth in this division. The report shall detail the activities performed, hearings attended, persons interviewed, documents reviewed, experts consulted and all other relevant information considered by the guardian ad litem in reaching the guardian ad litem's recommendations and in accomplishing the duties required by statute, by court rule, and in the court's Order of Appointment.

**{¶36}** In actions to terminate parental rights, "[a]ll reports, written or oral, shall be used by the court to ensure that the guardian ad litem has performed those responsibilities

required by section 2151.281 of the Revised Code." Sup.R. 48(F)(1)(a). Unless waived by all parties or the due date is extended by the court, the GAL's final report in a permanent custody proceeding shall be filed with the court and made available to the parties "no less than seven days before the dispositional hearing." Sup.R. 48(F)(1)(a); *see also* Cuyahoga Cty. Juv. Loc.R. 20.

**{¶37}** Appellant first argues that the trial court erred in proceeding with the permanent custody hearing because the (1) GAL's report was late[9] and (2) the GAL misstated the case number in his report.

**{¶38}** Although it is undisputed that the GAL report was filed three days before the hearing instead of seven days before the hearing as specified in Sup.R. 48 and Cuyahoga Cty. Juv. Loc.R. 20, there is nothing in the record that suggests that appellant was prejudiced by the GAL's untimely submission of his report. Although appellant claimed that he lacked adequate time to prepare for cross-examination of the GAL, he failed to identify any new or surprising information in the GAL's report that he was not fully prepared to address. Appellant had the opportunity to review the report before the hearing, an opportunity to cross-examine the GAL regarding his report and recommendation at the hearing and the trial court granted appellant leave to make a motion to continue the proceedings to a second hearing date if he found something

[9]Although appellant cites both Sup.R. 48 and R.C. 2151.414(C) in support of his argument that the GAL's report was untimely, with respect to the submission of the GAL's report, R.C. 2151.414(C) states: "A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing * * * ."

surprising in the GAL's report or testimony as the hearing progressed. However, appellant never made such a motion.

**{¶39}** Likewise, there is nothing in the record to suggest that appellant was in any way prejudiced by the fact that the GAL listed the wrong case number on his report. The case number referenced in the GAL report was off by one digit. Typographical errors occur. Appellant does not contend that he did not recognize the GAL's report as relating to this case based on the error or was for some reason unable to promptly access the GAL's report as a result of the error. A motion to amend the case number referenced in the GAL's report was made and granted during the hearing. Because appellant has not established any prejudice resulting from the delay in the filing of the GAL's report or the typographical error in the case number, we find that the trial court did not abuse its discretion in proceeding with the hearing over these objections.

**{¶40}** Appellant also argues that the trial court erred in proceeding with the permanent custody hearing because (1) the GAL failed to list the dates he interviewed family members in his report and (2) the GAL failed to view an interactional visit between appellant and the children prior to making his permanent custody recommendation. He contends that, based on these deficiencies, the GAL's report and investigation fell below the minimum standards required by Sup.R. 48(D)(13) and that he was prejudiced as a result.

**{¶41}** We agree with appellant that there appear to some serious deficiencies with the GAL's investigation and report in this case. CCDCFS asserts that the GAL

interviewed "all necessary parties" and that he provided the dates of those interviews during his cross-examination at the hearing. However, based on our review of the record, there appears to be an issue as to whether the GAL, in fact, interviewed appellant. Although the GAL stated in his report that he interviewed the social worker, the foster parent, the children and both parents, when asked to provide the dates of those interviews during the hearing, the GAL stated that he had not met with appellant. The GAL testified that appellant had called him and left a message for him, advising him that he was unavailable to meet on the date that had been scheduled for his appointment and asking him to reschedule. The GAL further testified that he attempted to call appellant one time but could not leave a message and did not attempt to contact appellant again:

> THE COURT: * * * There was a question about not having dates of when you did interviews or whatever. Offhand, do you know what your dates would be?
>
> THE WITNESS: I interviewed the mother on July 26th, had an appointment scheduled for the father for I believe July 28th or 29th, which was unavailable. Father called me and left a message asking to reschedule.
>
> I attempted to call him one time. I could not leave a message. I did not attempt to contact him after that, and I believe I saw the children on the 8th or the 9th of August. That I'm not as certain of.

**{¶42}** Thus, it does not appear that the GAL interviewed appellant.[10] Sup.R. 48(D)(13)(d). There is likewise no evidence in the record that the GAL interviewed

[10] That the GAL did not interview appellant appears to be confirmed by the fact that the GAL's report contains no mention of any discussions with or observations relating to appellant

M.S.'s teacher or the children's counselors. Sup.R. 48(D)(13)(g). Although the parents had regular visitation with their children,[11] the GAL also failed to view the parents' interactions with their children and offered no explanation as to why he failed to do so. Sup.R. 48(D)(13)(a). CCDCFS claims that the GAL's failure to personally witness the appellant's interaction with his children was insignificant because was able to "educate himself" regarding the parent-child interaction from other sources in the case and was not a "crucial element" of the GAL's duties in the case because it "was not the basis for removal." Although it is true that in this case there was ample evidence that the parents' interaction with their children was positive, it does not explain why the GAL failed to view an interactive visit.

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(unlike the mother). Likewise, no dates were provided at the hearing for the GAL's interviews with the social worker (or any information regarding specifically which social worker(s) he interviewed) or foster parent. In addition, although the GAL testified at the hearing that he spoke at some point with the children's prior guardian ad litem to determine what her recommendation would have been, it is unclear from the record which guardian ad litem he spoke with, i.e., whether it was the children's original guardian ad litem or the guardian ad litem who briefly replaced her and then became counsel for M.S.

[11]In an attempt to explain the GAL's failure to view the interaction between appellant and his children, CCDCFS argues that the parents were difficult to reach and went three months without visiting their children. As stated above, however, the GAL testified that he only attempted to call appellant once. The three-month period during which the parents did not have visitation with their children occurred more than a year before the GAL was appointed as the children's guardian ad litem. The record otherwise reflects that appellant was very consistent with his visitation with the children. Although a guardian ad litem is not, in fact, required to perform all of the tasks specified under Sup.R. 48(D)(13) and need only make "reasonable efforts to become informed about the facts of the case and to contact all parties," it does not appear based on the record before us that "reasonable efforts" were made to investigate the facts and circumstances relating to appellant in this case.

**{¶43}** The unexplained omissions and inaccuracies in the GAL's report outlined above, call into question the thoroughness of GAL's investigation and the reliability of his recommendation regarding what is in the best interests in the children, particularly as it relates to appellant. Although the GAL states in his report that he "cannot recommend legal custody to either of the parents," because the GAL apparently never interviewed appellant, did not view any interaction between appellant and the children and appears to have based his recommendation on incomplete or inaccurate facts as they relate to the relationship between appellant and the mother, it does not appear from the GAL's report or testimony that he conducted a sufficient investigation to enable him to properly assess whether there were any circumstances under which the children could be appropriately placed with appellant at some reasonable time in the future.

**{¶44}** In this case, however, the report of the GAL was just one of the factors the trial court indicated it considered in determining that a grant of permanent custody to CCDCFS was in the best interests of M.S. and J.S. Counsel had the opportunity to cross-examine the GAL and to highlight the deficiencies in his investigation through that examination. Although a trial court is generally obligated to consider a recommendation of a guardian ad litem, it is "not bound to adopt" it. *In re J.B.*, 8th Dist. Cuyahoga Nos. 98566 and 98567, 2013-Ohio-1706, ¶ 152. The "ultimate decision" is for the trial judge who "must act upon a consideration of all evidence presented." *Id.*, citing *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 34. It is unclear from the record to what

extent, if any, the trial court relied on the GAL's report in determining that permanent custody was in the children's best interests.

**{¶45}** As this court and others have recognized, "'Sup.R. 48 provides * * * good guidelines for the conduct of a guardian ad litem in meeting his or her responsibilities in representing the best interest of a child in order to provide the court with relevant information and an informed recommendation.'" *In re C.O.*, 8th Dist. Cuyahoga Nos. 99334 and 99335, 2013-Ohio-5239, ¶ 14, quoting *In re K.G.*, 9th Dist. Wayne No. 10CA16, 2010-Ohio-4399, ¶ 12. However, the Rules of Superintendence are only "general guidelines for the conduct of the courts" and "do not create substantive rights in individuals or procedural law.'" *In re C.O.* at ¶ 14, quoting *In re K.G.* at ¶ 11, citing *Sultaana v. Giant Eagle*, 8th Dist. Cuyahoga No. 90294, 2008-Ohio-3658, ¶ 45. As such, it has been generally held that a guardian ad litem's failure to comply with Sup.R. 48 is not, in and of itself, grounds for reversal of a custody determination. *See, e.g., In re C.O.* at ¶ 14; *In re K.G.* at ¶ 9-13; *Allen v. Allen*, 11th Dist. Trumbull No. 2009-T-0070, 2010-Ohio-475, ¶ 31; *Miller v. Miller*, 4th Dist. Athens No. 14CA6, 2014-Ohio-5127, ¶ 14-18.

**{¶46}** Recognizing this hurdle, appellant urges us to follow *Nolan v. Nolan*, 4th Dist. Scioto No. 11CA3444, 2012-Ohio-3736. In *Nolan,* the trial court appointed a guardian ad litem to conduct an investigation and prepare a report regarding the child's best interest in a child custody case in which the father objected to the mother's request to terminate a shared parenting plan and to designate her as the child's residential parent.

*Id.* at ¶ 5-7. The guardian ad litem, however, performed only a limited investigation. *Id.* at ¶ 8. He failed to interview the child one-on-one, failed to investigate or interview the mother's live-in boyfriend, failed to interview the child's half-sister, school personnel and medical-health providers (despite the child having ADHD and behavioral issues) and did not visit either parent's home. *Id.* at ¶ 25. Nevertheless, the guardian ad litem recommended that it would be in the child's best interest to terminate the shared parenting plan and to appoint the mother as residential custodian. *Id.* at ¶ 9. The trial court granted mother's request, and the father appealed, arguing that the guardian ad litem's report and testimony should have been stricken because his investigation fell below the minimum standards set forth in Sup.R. 48. *Id.* at ¶ 24. The Fourth District agreed. It reversed the trial court's decision, concluding that while Sup.R. 48 sets forth only "general guidelines" for a guardian ad litem to follow and "does not have the force of law," it "should not be ignored." *Id.* at ¶ 25-27. The court held that the guardian ad litem's investigation "fell so far below the minimum standards of Sup.R. 48(D)(13)" that his testimony and report could not be considered competent and credible evidence of the child's best interest and should have been stricken from the record and that the trial court, therefore, abused its discretion by considering the guardian ad litem's testimony and report. *Id.* at ¶ 26. The court, however, limiting its holding "to the specific facts of [the] case" and stated that it did not "intend to create a bright-line rule regarding the minimum standards of Sup.R. 48(D)(13)." *Id.* at ¶ 27.

**{¶47}** As detailed above, we believe that there were serious deficiencies with the GAL's report and investigation in this case. However, we need not decide whether the GAL's investigation fell so far below the minimum standards that his report and recommendation should not have been considered by the trial court because we find, for the reasons set forth below, that even considering the GAL's report and recommendation, the record lacks clear and convincing evidence that termination of appellant's parental rights and an award of permanent custody to CCDCFS is in the best interest of M.S. and J.S.

**{¶48}** Accordingly, appellant's first assignment of error is overruled.

**Best Interest of the Child**

**{¶49}** In his second assignment of error, appellant argues that the trial court's finding that an award of permanent custody to CCDCFS was in the best interests of M.S. and J.S. was not supported by clear and convincing evidence and was against the manifest weight of the evidence.

**{¶50}** Where, as here, clear and convincing evidence is required, a reviewing court will examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the degree of proof. *In re T.S.*, 8th Dist. Cuyahoga No. 92816, 2009-Ohio-5496, ¶ 24, citing *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence." *In re S.D.*, 8th Dist. Cuyahoga Nos. 99410, 99411, and 99412,

2013-Ohio-3535, ¶ 13, citing *In re B.M.*, 8th Dist. Cuyahoga No. 96214, 2011-Ohio-5176, ¶ 32.

**{¶51}** Although the trial court found otherwise,[12] the record reflects that R.C. 2151.414(B)(1)(d) is satisfied because M.S. and J.S. have been in the temporary custody of CCDCFS for 12 or more months of a consecutive 22-month period. At the time of the hearing, M.S. and J.S. had been in the temporary custody of CCDCFS for more than one year and five months. Accordingly, the issue for us to decide is whether the record contained clear and convincing evidence that it is in the best interests of M.S. and J.S. for appellant's parental rights to be terminated and for the children to be placed in the permanent custody of CCDCFS. We find that the present record lacks clear and convincing evidence that an award of permanent custody to CCDCFS and termination of appellant's parental rights is in the best interests of the children and that the trial court, therefore, abused its discretion in awarding permanent custody to CCDCFS.

**{¶52}** Although a trial court is required to consider each relevant factor under R.C. 2151.414(D)(1) in making a determination regarding permanent custody, "'no one factor

[12]In its October 10, 2014 journal entries and findings of fact, the trial court found as to each M.S. and J.S. that the child was "not abandoned or orphaned or has not been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period." Accordingly, the trial court proceeded with an analysis under R.C. 2151.414(E), finding as to each child that "[f]ollowing the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home," and that, therefore, the children could not be placed with either parent within a reasonable time or should not be

is given greater weight than the others pursuant to the statute.'" *In re T.H.*, 8th Dist. Cuyahoga No. 100852, 2014-Ohio-2985, ¶ 23, quoting *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. Further, only one of the enumerated factors needs to be resolved in favor of an award of permanent custody for the trial court to terminate parental rights. *In re A.B.*, 8th Dist. Cuyahoga No. 99836, 2013-Ohio-3818, ¶ 17; *In re N.B.*, 2015-Ohio-314 at ¶ 53. The best interest determination focuses on the child, not the parent. *In re N.B.* at ¶ 59, citing *In re Mayle*, 8th Dist. Cuyahoga Nos. 76739 and 77165, 2000 Ohio App. LEXIS 3379, *17-18 (July 27, 2000), citing *Miller v. Miller*, 37 Ohio St.3d 71, 75, 523 N.E.2d 846 (1988).

**{¶53}** In its October 10, 2014 journal entries and findings of fact, the trial court stated that it considered each of the factors listed in R.C. 2151.414(D)(1)(a)-(d) and the report of the GAL in determining that granting permanent custody of M.S. and J.S. to CCDCFS and terminating appellant and the mother's parental rights were in the children's best interests. The trial court did not explain its evaluation of those factors or specifically which factor or factors led it to conclude that an award of permanent custody to CCDCFS and termination of appellant's parental rights was in the children's best interests.[13] Rather, each of the trial court's October 10, 2014 journal entries simply tracks the language of R.C. 2151.414, stating, in relevant part, as follows:

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placed with either parent in accordance with R.C. 2151.414(B)(1)(a).

[13]This court has previously held that R.C. 2151.414 "'does not require the court to list those factors or conditions it found applicable before making its determination that * * * permanent custody is in that child's best interest.' It requires only that the trial court consider all relevant factors." *In*

Pursuant to [R.C. 2151.414], the Court finds that the allegations of the motion have been proven by clear and convincing evidence. It is therefore ordered that the motion to modify temporary custody to permanent custody is hereby granted.

The court finds that the child is not abandoned or orphaned or has not been in temporary custody of a public children services agency or private child placing agency under one or more separate orders of disposition for twelve or more months of a consecutive twenty-two month period.

The court further finds that the continued residence of the child in the home will be contrary to her best interest and welfare.

The court finds that CCDCFS has made reasonable efforts to finalize the permanency plan. * * *

Upon considering the interaction and interrelationship of the child with the child's parents, siblings, relatives, and foster parents; the wishes of the child; 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; 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; and the report of the guardian ad litem, the court finds by clear and convincing evidence that a grant of permanent custody is in the best interests of the child and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

The court further finds that following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed

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*re T.M.,* 8th Dist. Cuyahoga No. 83933, 2004-Ohio-5222, ¶ 32, quoting *In re I.M.*, 8th Dist. Cuyahoga Nos. 82669 and 82695, 2003-Ohio-7069, ¶ 27. Accordingly, the trial court was not required to "specifically discuss each of the factors set forth in R.C. 2151.414(D) when rendering its judgment." *In re T.M.* at ¶ 32.

continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home.

**{¶54}** Every parental rights termination case involves the difficult balance between maintaining a biological parent-child relationship and protecting the best interests of a child. The value of having a biological parent who cares for and loves a child and with whom the child wants to be with cannot be underestimated, particularly when there is no one else in the child's life who fills that role. Familial bonds are not easily replaced, if ever, and they should not be permanently severed without careful consideration of all of the potential costs.

**{¶55}** Although "[f]amily unity and blood relationship are vital factors to carefully and fully consider," we also recognize that the paramount consideration is always the best interest of the child. *In re J.B.*, 8th Dist. Cuyahoga No. 98546, 2013-Ohio-1704, ¶ 111, citing *In re T.W.*, 8th Dist. Cuyahoga Nos. 86084, 86109, and 86110, 2005-Ohio-6633, ¶ 15. We appreciate that "[a] child's best interests require permanency and a safe and secure environment," *In re E.W.*, 8th Dist. Cuyahoga Nos. 100473 and 100474, 2014-Ohio-2534, ¶ 29, and that "[t]o protect the child's interest," neither the existence of a biological relationship or a "good relationship" is controlling in and of itself. *In re J.B.*, 2013-Ohio-1706 at ¶ 163, citing *In re T.W.*, 8th Dist. Cuyahoga Nos. 86084, 86109 and 86110, 2005-Ohio-6633, ¶ 15.

**{¶56}** The first two factors under R.C. 2151.414(D)(1) — the interaction and interrelationship of the child with the child's parents (and any other person who may

significantly affect the child) and the wishes of the child — clearly weigh in favor of preserving the family relationship. There is no question that both M.S. and J.S. have a strong, loving relationship with appellant. The record reflects that appellant has had consistent visitation with his children and that there were no concerns regarding his interactions with them. There is no evidence that appellant ever physically abused his children, maltreated them or otherwise caused them any harm. M.S., through her attorney, clearly expressed a strong, consistent desire to be reunited with appellant. With respect to J.S.'s wishes, the record is less clear, given his age, but it appears that he too has expressed a desire to be with appellant. There is no evidence the children have any significant bond with anyone other than their parents. No other relatives are involved in the children's lives and the children's foster placement is not an adoptive situation. The agency's plan upon award of permanent custody to CCDCFS is to have the children continue in the system and "go to matching" with the hope that the children will one day be matched with someone who wants to adopt them.

**{¶57}** CCDCFS acknowledges these facts but argues that substantial competent, credible evidence nevertheless supported the trial court's award of permanent custody to the agency based on R.C. 2151.414(D)(1)(d) — i.e., the children's need for a legally secure permanent placement and whether that placement can be achieved without a grant of permanent custody to the agency. CCDCFS asserts that the record contains clear and convincing evidence supporting the trial court's findings that (1) appellant had "failed continuously and repeatedly to substantially remedy the conditions causing the [children]

to be placed outside the [children's] home" and (2) the children "cannot be placed with [appellant] within a reasonable time or should not be placed with either parent" and that this was sufficient to satisfy R.C. 2151.414(D)(1)(d).[14] We disagree.

**{¶58}** There are without question some serious issues that remain to be addressed in this case before appellant could be reunited with his children. Nevertheless, we cannot say that the present record contains *clear and convincing evidence* that the "remedy of last resort" — permanent termination of appellant's parental rights — is in M.S. and J.S.'s best interests at this time.

**{¶59}** The CCDCFS's primary concerns in seeking permanent custody center around "continuing domestic violence between the parents,"[15] the possibility of physical injury or emotional or psychological harm to the children resulting from the domestic violence and a belief that the parents' marijuana and/or alcohol use "trigger" incidents of domestic violence. The CCDCFS's concerns are certainly justified, but appear to rest more on possibilities than clear and convincing evidence of a likelihood of harm to the

[14]As to the custodial history of the children under R.C. 2151.414(D)(1)(c), this factor is arguably mixed. The children lived with their parents for several years prior to involvement by CCDCFS. After being taken into custody the first time, the children were reunited with their parents for a year-and-a-half before being taken back into temporary custody, where they have been since March 2013. As of the time of the hearing, the children had been with their current foster family for a couple of months. There has been no claim that any of R.C. 2151.414(E)(7) to (11) is applicable here. R.C. 2151.414(D)(1)(e).

[15]The record reflects that appellant had been involved in two incidents of domestic violence against the mother — one in 2011 that led to the children's removal from the home the first time and one in June 2003 after the children had been removed from the home. The record also reflects the mother committed an act of domestic violence against appellant in December 2012.

children that could not be remedied and would preclude their successful reunification with appellant at any reasonable time in the future.[16]

**{¶60}** Although the record reflects that as of the time of the hearing, appellant had not completed several aspects of the amended case plan, including successfully completing a second domestic violence program and second drug treatment program and receiving consistent mental health counseling for his depression,[17] the record also reflects that appellant had taken significant steps toward completing the original case plan and remedying the conditions that caused the children to be removed from the home in the past. As Henderson testified, during the fall of 2012, appellant came very close to reunification with his children. Redcross similarly testified that during the time she was

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[16] Further, although the social workers and GAL testified regarding the possible psychological injury that they believed could result if the children were to observe their parents engaging in domestic violence against one another, no mention was made of the emotional and psychological injury that is undoubtedly likely to result if the children's relationships with both parents are permanently and irrevocably severed, particularly given that the children already receive counseling for behavioral problems and appear to have no strong, loving relationship with anyone other than their parents. Ordinarily, where relevant, the trial court might receive such information through the guardian ad litem's report and recommendation. The guardian ad litem typically interviews the children, the children's parents and the children's teachers and counselors and includes information regarding the results of that investigation in his or her report. Because of the deficiencies with the GAL's investigation, however, the GAL's report and recommendation did not provide a basis for consideration of that factor in this case.

[17] Appellant claims that CCDCFS "failed to help him fulfill" his amended case plan and that after Henderson transferred to a new position in November 2013, no new referrals for services were made for almost a year. However, there is no evidence in the record that any new referrals were required in order to obtain the services appellant needed in order to comply with the amended case plan.

working with appellant (from November 2011 until early 2013), he consistently followed up with services, obtained schooling and daycare for the children, took care of the children and their needs, obtained his GED, searched for a job and was briefly employed. Indeed, in a November 13, 2012 report, the children's original guardian ad litem had recommended, based on the progress appellant had made at that time, that legal custody be granted to the father.

**{¶61}** This case is a particularly difficult one. It is clear that appellant is not yet at a place where legal custody of his children could be appropriately awarded to him and the children have been in the temporary custody of CCDCFS for a lengthy period of time. Nevertheless, upon careful consideration of the record, we cannot say, based on the present facts, that the record contains competent, credible, clear and convincing evidence that a legally secure permanent placement cannot be achieved without a grant of permanent custody to the agency or that it is otherwise in the best interest of the M.S. or J.S. to terminate appellant's parental rights and grant permanent custody of the children to CCDCFS at this point in time. Accordingly, we conclude that the trial court abused its discretion in determining that termination of appellant's parental rights and granting permanent custody to CCDCFS was in the best interest of M.S. and J.S. Appellant's second assignment of error is sustained.

**{¶62}** This case is reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
EILEEN T. GALLAGHER, J., DISSENTS

EILEEN T. GALLAGHER, J., DISSENTING:

**{¶63}** I respectfully dissent from the majority's decision to remand this case to the trial court for further proceedings. The majority suggests that if appellant is given more time to work on his case plan, his behavior might improve such that he may be able to provide the best home for his children. I believe the children need stability now more than a mere possibility that appellant might change.

**{¶64}** Although the children had only been in temporary custody for one year and five months at the time CCDCFS filed a motion for permanent custody on November 27, 2013, this case dates back to May 25, 2011, when the children were first removed from their parents' home. The children have been in temporary custody twice and were under CCDCFS supervision for approximately 18 months prior to their second removal.

Throughout these two and half years, appellant has been working on his domestic violence and substance abuse problems without improvement.

**{¶65}** When the social worker assigned to this case was asked whether things could improve if appellant was given more time, she replied: "You always hope there'll be change, but the history of this case and the back and forth, I don't see any change taking place." Another social worker testified:

> These kids need stable caregivers. Their parents love them very much, but my feeling is that they cannot provide appropriately for these children because of their own problems and the problems they have with each other.

**{¶66}** Both R.C. 2151.414(B)(1)(d) and 2151.414(D)((1)(c) require the court to consider whether "the child has been in the temporary custody of one or more public services agencies * * * for twelve or more months in a consecutive twenty-two-month period." As its name implies, temporary custody is intended to be short term because keeping a child in limbo is not in the child's best interest.

**{¶67}** I am also concerned by the fact that M.S. had to repeat a year of school because she missed 58 days of kindergarten during the time appellant had her in his custody. During that time, the social worker left several messages for appellant to make himself available or to call her, and he did nothing. (Tr. 31.) The evidence showed that M.S.'s school performance was improving while in foster care, but she was continuing to struggle academically. The children need a stable home in which to heal and grow.

**{¶68}** By the time of the dispositional hearing, appellant had had over two and a half years to correct the conditions that caused the children to be removed in the first place, and he has failed to do so, despite all the services and support the agency provided to him. I am not convinced that more time will make any difference and the children need permanency now. They also need protection from the ongoing threat of domestic violence. Therefore, I believe permanent custody is in the children's best interests.