

[Cite as *In re B.S.*, 2021-Ohio-4319.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

IN RE B.S., ET AL. :  
 : Nos. 110534 and 110535  
Minor Children :  
 :  
 :  
 :  
[Appeal by Mother] :

---

JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: December 9, 2021**

---

Civil Appeal from the Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case Nos. AD-19-906755 and AD-19-906756

---

***Appearances:***

Gregory T. Stralka, *for appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Joseph C. Young, Assistant Prosecuting Attorney, *for appellee* Cuyahoga County Division of Children and Family Services.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Appellant, the mother of two children, A.S. and B.S., appeals the grant of permanent custody to the Cuyahoga County Division of Children and Family Services (hereinafter referred to as “CCDCFS” or “the agency”). Because the juvenile

court did not err in determining permanent custody was in the best interest of the children, we affirm the judgment.

## **I. Procedural History and Facts**

**{¶ 2}** On May 31, 2019, the CCDCFS filed a complaint alleging A.S. and B.S. were neglected children. Temporary custody of the children was given to CCDCFS. The removal of the children in May 2019 was the second time the children were placed in temporary custody with the agency. On May 1, 2020, CCDCFS filed a motion to modify temporary custody to permanent custody alleging that appellant failed to engage with CCDCFS and had not seen the children since August 2019. After numerous continuances, on May 3, 2021, the juvenile court held a hearing on the motion to modify custody. At the time of trial in May 2021, both children had been in temporary custody for nearly two years.

**{¶ 3}** Testimony from a CCDCFS extended services worker assigned to the children's cases for two years encompassed the children's prior cases, the children's current case plans, and appellant's engagement with CCDCFS. The children had previously been removed from appellant and placed in the temporary custody of CCDCFS. Their father then became their legal guardian. The current cases at issue arose in May 2019 while the children were in their father's care; however, during the pendency of these cases, the father passed away in November 2020.

**{¶ 4}** The CCDCFS extended services worker testified that at the time of trial, B.S., aged ten, was residing in a residential facility after being verbally and physically aggressive as well as causing property damage in a prior placement. B.S.

was diagnosed with ADHD and ODD and was in group and individual counseling. His case plan called for working toward placement with a maternal aunt who contacted CCDCFS concerning custody after the children's father passed away. A.S., aged 12 at the time of trial, was residing in a foster home as of April 2021 and mental health services were being coordinated. A.S. had recently moved from a previous foster home because of verbal and physical aggression.

{¶ 5} The CCDCFS extended service worker's testimony indicated appellant did not engage in any services as requested by CCDCFS and failed to remain in contact with the agency despite the agency's attempt to contact her. This behavior mirrored her behavior in the prior cases when the children were first removed. Appellant however did visit the children while they were living with their father. The CCDCFS worker indicated that in August 2019, while at the father's home, appellant appeared for a visit, although she had cocaine residue on her nose and engaged in inappropriate behavior. After that visit, appellant's contact with the children was via phone. At the end of 2019, the agency terminated the phone contact between appellant and B.S. because the calls escalated B.S.'s negative behaviors. Thereafter, appellant stopped contact with CCDCFS.

{¶ 6} Appellant contacted the agency in January 2021 but visitation could not resume because appellant had no further contact with the agency until the end of March 2021 when appellant informed the agency that she began outpatient substance abuse treatment that month.

{¶ 7} The guardian ad litem (“GAL”) reported that she was involved with the children in this case and the prior case and gave her oral recommendation, stating that “I have no choice but to recommend permanent custody. This isn’t the first case with these kids. We actually had another case previously and it’s a really sad situation and [appellant] has not worked the case plan unfortunately and, of course, we know that dad has passed away. So there is just no other option.” The GAL indicated that she had not spoken with B.S. and did not know the child’s current wishes. The GAL indicated that A.S. “was angry and really wouldn’t talk to me.”

{¶ 8} At the close of the testimony, the juvenile court received exhibits and argument. During argument, appellant’s counsel requested that the motion for permanent custody be denied and that appellant be allowed to continue to work with the agency in order to regain custody of her children, noting appellant was engaged with the children in 2019 and reengaged with the agency in 2021. Counsel further argued that because the GAL did not report on the children’s current wishes regarding custody, they were entitled to an attorney and to have their wishes heard.

{¶ 9} At the end of the hearing, the juvenile court briefly reviewed the facts and noted that although 2020 was a difficult year for everybody, visitation was conducted and that court proceedings and visitation did occur, but appellant did not engage with the agency or her children. The juvenile court concluded that CCDCFS had met its burden and that the motion for permanent custody would be granted.

{¶ 10} The juvenile court issued written opinions in the children’s cases. In both opinions, the trial court determined that the children could not be placed with

appellant within a reasonable time. In making this finding, the juvenile court noted that appellant did not substantially remedy the conditions causing the children to be placed outside her home, did not successfully complete a case plan that would lead to the family's reunification, and that appellant had a chemical dependency that made appellant unable to provide a permanent home for the children within one year of the hearing.

{¶ 11} The juvenile court further found that appellant neglected the children and demonstrated a lack of commitment to them where she did not regularly visit, communicate with, or support her children when able to do so. The trial court determined:

Upon considering the interaction and interrelationship of the child with the child's parent, siblings, relatives, and foster parents; the wishes of the child; the custodial history of the child, including whether the child has 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 (12) or more months of a consecutive twenty-two (22) month period; the child[ren's] need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; 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[ren] and the child[ren] cannot be placed with the mother within a reasonable time or should not be placed with the mother.

## **II. Law and Argument**

A. The juvenile court determined that CCDCFS met its burden of proof to establish that permanent custody should be granted and that the grant of permanent custody was in the best interests of the children.

{¶ 12} In her first and second assignments of error, appellant challenges the sufficiency of the evidence presented at the hearing as to the decision to award

custody, as well as arguing that the grant of permanent custody was not in the best interest of the children. Appellant's first and second assignments of error provide:

1. The Department of Children and Family Services failed to present sufficient evidence to establish that permanent custody was in the best interests of the children.
2. The Department of Children and Family Services failed to present sufficient evidence to establish a basis upon which permanent custody could be granted.

**{¶ 13}** Within these arguments, appellant posits that because the children's wishes were not relayed to the juvenile court, the evidence was insufficient to make a determination upon custody. We first note that a juvenile court's decision to grant permanent custody will not be reversed when the record contains competent, credible evidence by which it could have found that the essential statutory elements for an award of permanent custody have been established by clear and convincing evidence. *In re B.P.*, 8th Dist. Cuyahoga Nos. 107732 and 107735, 2019-Ohio-2919.

**{¶ 14}** R.C. 2151.414(B) provides that permanent custody of a child may be awarded to a children services agency if the court finds, by clear and convincing evidence, that (1) it is in the best interest of the child to grant permanent custody of the child to the agency, and (2) that any of the conditions listed in R.C. 2151.414(B)(1)(a)-(e) apply. In this case, the juvenile court found that the children could not be placed with appellant within a reasonable period of time or should not be placed with her. This finding satisfies one of the conditions listed in R.C. 2151.414(B)(1) and was supported by testimony that appellant had substance abuse

issues, did not engage in any recommended treatment, and was unable to meet the basic needs of the children.

**{¶ 15}** In addition to this finding, and before granting permanent custody to the agency, the juvenile court was also required to determine if the grant of permanent custody was in the children's best interest. In making this determination, the juvenile court was to consider "all relevant factors," including, but not limited to the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents, and out-of-home providers and any other person who may significantly affect the child; (2) the wishes of the child as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child; (3) the custodial history of the child; (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody; and (5) whether any of the factors set forth in R.C. 2151.414(E)(7) to (11) apply. R.C. 2151.414(D)(1)(a)-(e).

**{¶ 16}** In conducting a best-interest analysis under R.C. 2151.414(D), "[t]he court must consider all of the elements in R.C. 2151.414(D) as well as other relevant factors. There is not one element that is given greater weight than the others pursuant to the statute." *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. In these cases, the juvenile court found that the children's best interest was met by awarding permanent custody to the agency and the orders

granting custody to CCDCFS demonstrate that it considered the relevant factors pursuant to R.C. 2151.414(D).

{¶ 17} Appellant argues that the court erred because it did not have evidence of the children’s specific wishes regarding custody at the time of the hearing and, therefore, the juvenile court could not make the determination that an award of custody to the agency was in the best interest of the children. Although the juvenile court is required to consider each of the factors in R.C. 2151.414(D) in making a permanent custody determination, “only one of these enumerated factors needs to be resolved in favor of the award of permanent custody.” *In re S.C.*, 8th Dist. Cuyahoga No. 102350, 2015-Ohio-2410, ¶ 30.

{¶ 18} This court has recognized that a court need not follow the children’s wishes concerning placement if the evidence “supports the court’s finding that permanent custody was in the children’s best interest.” *In re R.H.*, 8th Dist. Cuyahoga No. 84051, 2004-Ohio-5734, ¶ 28. The Ninth District considered a similar argument where there was no evidence of a child’s wishes regarding custody in *In re N.G.*, 9th Dist. Lorain No. 12CA010143, 2012-Ohio-2825, ¶ 27, finding:

[A]lthough the trial court was required to consider each of the statutory best interest factors, none of these factors is controlling, nor is any factor given greater weight or heightened importance. *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, ¶ 36, 857 N.E.2d 532. Rather, the trial court is required to weigh the totality of evidence on all of the factors to reach a best interest decision. *Id.* at ¶ 63-64.

The Ninth District held that “the trial court’s failure to ascertain the child’s wishes will not constitute reversible error if there was substantial evidence on the



remaining factors to support the trial court's conclusion that permanent custody was in the child's best interest." *Id.* at ¶ 28.

{¶ 19} CCDCFS presented sufficient evidence to demonstrate that permanent custody was in the children's best interest. That evidence included the facts that the children had been removed from appellant in prior cases, they had been in agency custody for nearly two years at the time of trial, and that appellant had failed to engage with the children or the agency for lengthy periods of time. This evidence provided sufficient evidence to support the juvenile court's best interest finding. *See* R.C. 2151.414(D)(1)(c) (regarding the children's custodial history); R.C. 2151.414(D)(1)(d) (regarding the need for permanency). The lack of a child's expressed wishes does not mandate the outcome of a custody determination, does not indicate a failure of the sufficiency of evidence, and does not preclude the juvenile court from making a decision upon a motion for permanent custody. Accordingly, appellant's first and second assignments of error are overruled.

B. The juvenile court was not required to further appoint counsel for the children under the circumstances of this case.

{¶ 20} Appellant's third assignment of error reads:

3. The trial court committed reversible error when it failed to appoint separate counsel for the children for the permanent custody motion.

{¶ 21} Within this assignment of error, appellant argues that because the GAL did not ascertain the wishes of the children, the juvenile court erred by not appointing individual counsel. The Ohio Supreme Court found, after examining R.C. 2151.352, Juv.R. 4(A), and Juv.R. 2(Y), that "a child who is the subject of a

juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances.” *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, syllabus. The Ohio Supreme Court did not delineate the specific circumstances in which independent counsel is required.

{¶ 22} After *Williams, supra*, courts have examined when it is necessary to appoint counsel for children in a permanent custody case where a child’s wishes are either unknown or where a conflict exists between the child’s wishes and the recommendation from a guardian ad litem. In order to necessitate appointment of counsel, a conflict must be demonstrated with evidence “that the child has repeatedly and consistently expressed the affirmative desire to return to the parent’s home.” *In re L.M.*, 9th Dist. Summit No. 26772, 2013-Ohio-2669, ¶ 31, quoting *In re B.W.*, 9th Dist. Medina No. 12CA0016-M, 2012-Ohio-3416, ¶ 42, citing *In re J.P.-M.*, 9th Dist. Summit Nos. 23694 and 23714, 2007-Ohio 5412, ¶ 56, and *In re J.B.*, 9th Dist. Summit No. 23436, 2007-Ohio-620, ¶ 22-23.

{¶ 23} Courts have also found ““there is no need to consider the appointment of counsel based upon a child’s occasional expression of a wish to be with a parent or because of a statement made by an immature child.”” (Emphasis deleted.) *In re E.S.*, 2d Dist. Clark No. 2016-CA-36, 2017-Ohio-219, ¶ 49, quoting *In re J.W.*, 2d Dist. Clark Nos. 2013-CA-113, 2013-CA-114, and 2014-Ohio-2814, ¶ 44, quoting *In re B.S.*, 5th Dist. Tuscarawas No. 11AP100041, 2012-Ohio-1036, ¶ 33; *see also In re B.J.L.*, 4th Dist. Washington No. 18CA14-16, 2019-Ohio-555,

¶ 48; *In re M.C.*, 6th Dist. Lucas No. L-09-1271, 2010-Ohio-1360, ¶ 52 (appointment of counsel was not required where the guardian ad litem's recommendation contradicted the wishes of the child).

{¶ 24} Only after testimony was concluded did appellant's counsel raise the issue appointing counsel for the children. There was no evidence presented regarding the children's wishes, and appellant's counsel did not argue a conflict existed between the children's wishes and the recommendation of the GAL. Where there was no indication that a conflict existed that rose to the level of requiring appointment of counsel for the children and given the entirety of the evidence, we cannot say that the juvenile court erred by not appointing additional counsel to represent either A.S. or B.S. under these circumstances. Appellant's third assignment of error is overruled.

### **III. Conclusion**

{¶ 25} Our review of the record reflects that although the juvenile court did not have evidence of the wishes of the children, the juvenile court did consider the relevant statutory factors in determining the best interest of the children pursuant to R.C. 2151.414(D). Further, we find that the trial court had sufficient evidence upon which it based the decision to grant permanent custody to CCDCFS and that such award of custody would be in the best interest of the children. Under the circumstances of these cases, and where no evidence was presented that a conflict existed between the GAL's recommendation of permanent custody and the

children's wishes, the juvenile court did not err by not appointing individual counsel for either or both of the children.

**{¶ 26}** Judgment affirmed.

It is ordered that appellee recover from 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 common pleas court, juvenile division, 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.

---

MICHELLE J. SHEEHAN, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
LISA B. FORBES, J., CONCUR