

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

IN THE MATTER OF: : **OPINION**
SHILAR SALSGIVER, :
DEPENDENT CHILD : **CASE NO. 2002-G-2478**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 00 JN 000676.

Judgment: Reversed and Remanded.

Margaret E. Amer Robey, 14402 Granger Road, Cleveland, OH 44137, (For Appellant, Ruth Salsgiver, Mother).

David P. Joyce, Geauga County Prosecutor and *Brian M. Richter*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee, Geauga County Job and Family Services).

Chuck Vergon, Guardian ad litem, Court Appointed Special Advocate, 215 Main Street, Ste. 2-A, Chardon, OH 44024.

JUDITH A. CHRISTLEY, J.

{¶1} The instant appeal stems from a final judgment of the Geauga County Court of Common Pleas, Juvenile Division. Appellant, Ruth Salsgiver, seeks the reversal of the trial court's determination to terminate her parental rights over her natural

child, Shilar Salsgiver, and to award permanent custody of the child to appellee, the Geauga County Jobs and Family Services.

{¶2} Shilar Salsgiver (“Shilar”) was born in July 2000. For the first five months of her life, Shilar resided with appellant in Geauga County. Although Shilar’s natural father, James Geisert (“Geisert”), did not live with her and appellant during this period, he did visit her quite often and also provided some financial support to appellant.

{¶3} On December 12, 2000, appellant was admitted into a Geauga County hospital after she had overdosed on certain medication. Even though Shilar stayed with appellant’s landlord that night, she was taken into physical custody by appellee the next day. After appellee had filed a complaint alleging that Shilar was a dependent and neglected child, the trial court awarded temporary legal custody of the child to appellee. Shilar was then placed with a foster family in Geauga County.

{¶4} In February 2001, appellee amended its complaint to allege that Shilar was only a dependent child. Appellant then entered a plea of “true” to the complaint. Although Geisert did not enter a plea to the complaint, he did indicate to the trial court that he had no objection to a finding of “true” on the complaint. The trial court then made that exact finding.

{¶5} Immediately following the February 2001 hearing, the trial court adopted a case plan which appellee had recommended for the purpose of reunifying both appellant and Geisert with Shilar. In relation to appellant, the plan initially had four objectives. First, appellant had to complete an alcohol assessment and follow any recommendations for coping with this problem. Second, she had to subject herself to random alcohol testing. Third, she had to accept counseling for anger management.

Fourth, appellant had to see an income maintenance worker for the purpose of helping her to obtain employment and become financially independent from Geisert.

{¶6} After the foregoing case plan had been effective for approximately two months, the trial court adopted an amendment to the plan under which appellant was required to pay child support for Shilar.

{¶7} In regard to the first two objectives of the case plan, appellant initially took steps to satisfy these requirements for achieving reunification. After obtaining the assessment for alcohol abuse, she completed an intensive outpatient program, attended Alcoholics Anonymous meetings, and completed an aftercare program. In addition, the results of the random tests showed that appellant was no longer abusing alcohol.

{¶8} However, although she was scheduled to begin individual counseling for anger management after finishing her alcohol treatment, appellant did not attend any session with her counselor. Similarly, appellant failed to take any steps to contact the income maintenance worker. In relation to the fourth objective, she also did not take any steps to obtain consistent employment and failed to have her driver's license reinstated so that she did not have to rely upon Geisert for transportation. Finally, appellant did not make a support payment until after a contempt motion had been filed against her.

{¶9} Under the case plan, appellant was given two hours of supervised visitation with Shilar each week. Prior to July 2001, appellant was extremely consistent in exercising her visitation rights; as a result, appellee decided to award her two additional hours of visitation each week. However, since Geisert was unable to

transport her to appellee's offices, appellant never saw Shilar for the additional two hours. Moreover, beginning in September 2001, her use of the original two-hour visit became very sporadic. During that same time period, it became very difficult for appellee to contact appellant because she did not have a telephone and did not give appellee her proper address.

{¶10} In late November 2001, appellee moved the trial court for permanent custody of Shilar. Two months later, a two-day hearing was held on the matter. In this proceeding, appellee presented ten witnesses in support of its motion. In response, Geisert testified in his own behalf. Appellant did not present any evidence in her defense.

{¶11} On January 29, 2002, the trial court rendered a judgment in which it granted the motion for permanent custody and terminated the parental rights of both appellant and Geisert. As the basis for this decision, the trial court specifically found that Shilar could not be placed with appellant within a reasonable time because appellant had failed to remedy the conditions which had supported the original finding of dependency. The trial court also found that it would be in Shilar's best interests for permanent custody to be awarded to appellee.

{¶12} Appellant appealed the January 2002 judgment to this court. In *In Re Salsgiver*, 11th Dist. No. 2002-G-2411, 2002-Ohio-3712, we reversed the foregoing judgment on the basis that the trial court had failed to adequately discuss certain factors under R.C. 2151.414(D) for determining the best interests of Shilar. That is, this court held that the trial court had not fully discussed: (1) the nature of appellant's relationship with Shilar; and (2) Shilar's "wishes" on the custody issue, as expressed by the guardian

ad litem in the case. Nevertheless, although we remanded the action for “further proceedings” on the foregoing two points, we also held in our opinion that the trial court’s determination as to whether Shilar could be placed with appellant within a reasonable time had been supported by the evidence.

{¶13} Upon remand, the trial court issued an order in which it instructed the guardian ad litem to submit a supplemental report addressing the question of Shilar’s “wishes” as to the granting of permanent custody to appellee. Once the guardian ad litem had filed the supplemental report, the trial court rendered its second judgment on the motion for permanent custody. No new hearing was held before the trial court prior to the release of the second judgment.

{¶14} In its second judgment, the trial court found that, although appellant’s bond with Shilar had been stronger than the bond between Geisert and the child, the strength of that bond had not been sufficient to motivate appellant to satisfy all five objectives in the case plan. As to this point, the court further found that Shilar had developed a strong bond with her foster parents. In relation to Shilar’s wishes, the trial court again found that she was too young to formulate and express her own desires on this matter. The court did not make any specific finding concerning whether the guardian ad litem had expressed a view on the matter for Shilar.

{¶15} Based upon the foregoing and the findings it had made in its prior judgment, the trial court again ordered the termination of appellant’s parental rights. In now appealing this second judgment, appellant has assigned the following as error:

{¶16} “The trial court erred and abused its discretion in violation of appellant’s right to due process and to confront witnesses by ordering and accepting a new report

from the guardian ad litem.

{¶17} “The trial court erred in determining that granting permanent custody to the agency was in the best interest of the child.”

{¶18} Under her first assignment, appellant has raised three arguments concerning the propriety of the procedure the trial court followed upon remand. First, she contends that the trial court could not accept an additional report from the guardian ad litem because the court could only consider the evidence presented during the original hearing on the motion for permanent custody. Second, she asserts that the relevant statutory law did not allow the trial court to accept a new report after the close of the hearing. Third, she argues that, even if the trial court was allowed to accept the additional report, the court had to hold a new hearing so that she could have the opportunity to cross-examine the guardian ad litem on the “wishes” issue.

{¶19} In regard to appellant’s first argument, this court would agree that when an action is remanded to a trial court so that an additional finding of fact can be made, the court must usually predicate its decision on the evidence which had already been submitted by the parties. The courts of this state have generally held that, in conducting further proceedings upon remand, a trial court is required to start anew at the point in the prior proceedings where the first error occurred. See, e.g., *Webb v. Webb* (Sept. 2, 1999), 3rd Dist. No. 9-98-66. In light of this specific precedent, it follows that if the only error in the original proceedings occurred after the close of the evidence, the parties should not be given a new opportunity to present evidence. To this extent, appellant is generally correct in stating that if a party failed to submit sufficient evidence to carry its burden of proof originally, a remand for an additional finding of fact does not open the

door for the admission of new evidence.

{¶20} However, in the instant proceeding, appellee did not have the burden of proving what Shilar's wishes were regarding her custody; instead, the obligation to provide a statement on that point was on the guardian ad litem. As a result, this was not a situation in which the party who had the burden of proof on a particular issue was given a second chance to establish the necessary facts. Since appellee could not control whether the guardian ad litem had addressed that point in his original report, it follows that the failure of the guardian ad litem to address a relevant factor should not stop the trial court from rendering a final decision on the merits of appellee's motion for permanent custody. Thus, this court concludes that the trial court did not abuse its discretion in ordering the guardian ad litem to submit a supplemental report.

{¶21} As to appellant's second argument under this assignment, this court would begin our analysis by noting that R.C. 2151.414(C) expressly states that the "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 ***." In interpreting this statutory language, the courts of this state have concluded that the failure of the guardian ad litem to submit his report to the trial court in a timely manner constitutes a dereliction of duty and is considered reversible error. See, e.g., *In re Breslav* (Apr. 13, 2000), 8th Dist. No. 75468.

{¶22} However, after considering the requirements of R.C. 2151.414(C) in the context of the entire statutory scheme for the termination of parental rights, we hold that the purpose for requiring the guardian ad litem to submit his report prior to trial is to give the parties an opportunity to rebut any assertion contained in the report. As a result, it follows that the filing of the guardian's report after the completion of the trial would not

violate the purpose of this statute if the parties are given a full opportunity to submit evidence or arguments as to the report. Thus, the controlling issue in this assignment of error is the question raised under appellant's third argument: i.e., did the trial court err in considering the supplemental report without giving her the opportunity to challenge its propriety?

{¶23} As appellant correctly notes, the Supreme Court of Ohio has recently reviewed a question somewhat similar to the issue before us. In *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, the parent argued that the trial court had erred in not allowing her to cross-examine the guardian ad litem concerning his report. After referring to the fact that the reason for the submission of the guardian ad litem's report is to give a court an independent source of information, the Supreme Court concluded that the need for an independent source cannot outweigh a parent's due process right to defend herself fully against the possible termination of her rights to the child. Based upon this, the court held that both parties to a parental termination case have the right to cross-examine the guardian ad litem at trial.

{¶24} In support of the foregoing holding, the *Hoffman* court emphasized that its decision on this matter was supported by case law in other jurisdictions:

{¶25} "In *Mazur v. Lazarus* (App.D.C.1964), 196 A.2d 477, the court determined that the action of the court in basing its decision, at least in part, on investigative reports without opportunity for the parties to cross-examine the persons who prepared them violated due process requirements. The court expounded, '[T]he courts of this jurisdiction sometimes call to their aid experienced and disinterested trained social workers *** to make unbiased examinations of the qualifications of those seeking

custody of children, and the circumstances of the children themselves. But it has never been the practice to receive such reports after trial, with no opportunity for the parties to read them or to cross-examine the persons who prepared them. There is an obvious and fundamental unfairness in receiving evidence in this manner, for it violates due process requirements. It amounts to a private investigation by the court in assembling or receiving evidence, out of the sight and hearing of the parties, who are thus deprived of the opportunity to test, explain or rebut it.’ *Id.* at 479.” *Hoffman* at ¶ 20.

{¶26} Although the *Hoffman* opinion did not address the specific issue before this court, the legal underpinnings of the *Hoffman* logic support the conclusion in this case that the trial court erred in considering the supplemental report of the guardian ad litem in an ex parte manner. That is, the *Huffman* opinion stands for the proposition that, regardless of the substance of the report of the guardian ad litem, a parent should always be given the opportunity to present new evidence in regard to the report and to cross-examine the guardian ad litem as to the substance of his factual findings and recommendations. Without such an opportunity, not only is the parent denied complete due process prior to the termination of her parental rights, but the trial court’s decision is based on evidence which has not been subjected to the rigors of the adversarial process.

{¶27} As to the foregoing point, appellee asserts that any error on the part of the trial court was waived because appellant never requested the opportunity to submit any new evidence in response to the supplemental report. In support of this assertion, appellee emphasizes that a period of fourteen days elapsed between the filing of the new report and the release of the second judgment, and that appellant failed to take any

steps during that period to file any new motion or request an additional oral hearing on the matter.

{¶28} In regard to appellee's assertion, this court would note that, as part of its analysis in *Huffman*, the Supreme Court expressly stated that the parent in a "termination" proceeding must be given every procedural and substantive protection under the law because the effect of the termination of parental rights is similar to the imposition of the death penalty. *Id.* at ¶14. Thus, although we would agree that appellant's actions during the first remand were somewhat lackadaisical, we still hold that the trial court was required to schedule an additional hearing so that appellant could indicate whether she wanted to present new evidence in regard to the supplemental report and cross-examine the guardian ad litem on the report's contents. Since such an opportunity was not afforded to her, we ultimately conclude that the trial court violated her rights to due process by considering the supplemental report *ex parte*.

{¶29} Furthermore, our review of the trial transcript demonstrates that appellant never exercised her right to cross-examine the guardian ad litem on his original report. As to this point, this court would note that the *Huffman* court indicated in its opinion that the "cross-examination" issue had never been addressed previously by that court; thus, it is entirely possible that appellant failed to exercise this particular right simply because she did not know that the right existed. Since the instant action was still pending at the time the *Huffman* decision was issued in October 2002, equity dictates that appellant should also be afforded the opportunity to cross-examine the guardian ad litem about the contents of his original report before a final decision on the custody issue is made.

{¶30} In light of the foregoing analysis, this court holds that appellant's first

assignment of error is well taken. In order to afford appellant her complete right to due process, the trial court must hold an additional evidentiary hearing in which she has the opportunity to cross-examine the guardian ad litem on both of his reports and to present any new evidence in response to the contents of the second report. After the completion of this hearing, the trial court must issue new factual findings on the “best interests” question under R.C. 2151.414(D) and render a new final decision on appellee’s motion for permanent custody.

{¶31} Under her second assignment of error, appellant has asserted two arguments for our review. First, she contends that the trial court failed to make specific findings as to each of the four factors listed in R.C. 2151.414(D) for determining whether to grant permanent custody of the child to the children’s services agency. Second, she argues that the trial court’s “best interests” determination was against the manifest weight of the evidence.

{¶32} As to her first argument, this court would note that, in reversing the trial court’s first judgment in this case, we remanded the case so that the trial court could make findings concerning the factors in R.C. 2151.414(D)(1) and (2). Our review of the trial court’s new judgment indicates that the trial court did make a proper finding under R.C. 2151.414(D)(1); i.e., the court did discuss the nature of the relationship between appellant and Shilar. Specifically, the trial court found that appellant had had a strong emotional bond with Shilar and had been actively involved with her when the supervised visits had started in January 2001. However, the court also found that the bond appellant had with Shilar had been insufficient to motivate appellant to overcome the “barriers” which prevented her from satisfying the majority of the goals in her case plan.

{¶33} In regard to R.C. 2151.414(D)(2), our review of the new judgment also shows that the trial court has still failed to make a finding concerning the express wishes of the child on the matter. In our prior opinion, this court specifically stated that the trial court could not satisfy R.C. 2151.414(D)(2) merely by indicating that the child was incapable of stating her own desires on the matter:

{¶34} “Furthermore, the [trial] court, by way of discussing the second factor, the wishes of the child, stated that ‘[t]he child is not old enough to express a preference regarding her living arrangement.’ While it is true that Shilar was too young at the time of the hearing to express her wishes, the statute provides that the child’s wishes may be expressed through a guardian ad litem. Shilar’s guardian ad litem did express his estimation that it would be in Shilar’s best interest for appellant’s parental rights to be terminated and questioned Geisert’s ability to serve as the custodial parent. Failure to discuss Shilar’s wishes, expressed through her guardian ad litem, was also prejudicial error. ***” *In re Salsgiver*, 2002-Ohio-3712, at ¶ 26.

{¶35} In rendering its second judgment in this matter, the trial court made the identical mistake it committed in its first judgment. Instead of merely one sentence, the trial court in the second judgment gave a lengthy statement as to why Shilar could not state her own preference. The trial court then stated that it did not have the “luxury” of waiting until Shilar was sufficiently mature to make a final decision on the motion for permanent custody. At that point, the trial court’s analysis as to R.C. 2151.414(D)(2) ended; i.e., the trial court never made a specific finding in the second judgment concerning any statement or opinion of the guardian ad litem about the child’s best interests in this matter.

{¶36} As this court indicated in our first *Salsgiver* opinion, we would certainly agree that Shilar was not sufficiently mature in January 2002 to express her own wishes about the “permanent custody” issue. However, the act of making a specific finding as to Shilar’s capabilities was not sufficient to satisfy the trial court’s duty under R.C. 2151.414(D)(2). If the trial court cannot make a finding concerning the child’s wishes as expressed by her, it must then make a finding about her wishes as expressed by the guardian ad litem through his opinion as to her best interests.

{¶37} To the foregoing extent, appellant’s second assignment of error also has merit. As part of its new factual findings on the “best interests” issue under R.C. 2151.414(D), the trial court must make a specific finding about Shilar’s wishes as expressed through the opinion of the guardian ad litem concerning the child’s best interests.

{¶38} In light of the foregoing analysis under both assignments of error, the issue of whether the trial court’s “best interests” determination was against the manifest weight of the evidence has become moot for purposes of this appeal. That issue cannot be properly addressed until the trial court has held the additional evidentiary hearing and has rendered a new decision on appellee’s motion for permanent custody.

{¶39} As each of appellant’s two assignments of error is well taken, the judgment of the trial court is reversed, and the action is hereby remanded to the trial court for further proceedings consistent with this opinion. Specifically, the trial court is ordered to conduct an additional evidentiary hearing concerning both reports of the guardian ad litem, make new factual findings on the “best interests” issue under R.C.

2151.414(D), and render a new judgment on appellee's motion for permanent custody of Shilar.

DONALD R. FORD, P.J., and CYNTHIA WESTCOTT RICE, J.,
concur.