[Cite as *In re T.L.M.*, 2010-Ohio-3553.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
T.L.M.	:	**CASE NOS. 2010-P-0008**
T.S.M.		**2010-P-0009**
A.L.M.	:	**and 2010-P-0010**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case Nos. 2009 JCF 1201, 2009 JCF 1202 and 2009 JCF 1203.

Judgment: Affirmed.

Brenna Lisowski, 13940 Cedar Road, #342, University Heights, OH 44118 (For Appellant, Crystal L. Moss, Mother).

Victor V. Vigluicci, Portage County Prosecutor, and *Allison B. Manayan*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee, Portage County Department of Job and Family Services).

Diana J. Prehn, Giulitto Law Office, L.L.P., 222 West Main Street, P.O. Box 350, Ravenna, OH 44266-0350 (Guardian ad litem).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Crystal L. Moss, appeals from the January 20, 2010 judgment entry and January 29, 2010 nunc pro tunc judgment entry of the Portage County Court of Common Pleas, Juvenile Division, divesting her of all parental rights and responsibilities of her three children, T.L.M. (d.o.b. 03/31/01), T.S.M. (d.o.b. 09/26/03), and A.L.M. (d.o.b. 01/24/07) (collectively "minor children"), and placing them in the

permanent custody of appellee, Portage County Department of Job and Family Services ("PCDJFS"), for adoption.

{¶2} On May 5, 2008, the minor children were removed from the care, custody, and control of appellant after T.L.M. and T.S.M. were found wandering alone on State Route 303 in Streetsboro, Ohio searching for food.

{¶3} On May 6, 2008, PCDJFS filed complaints alleging that T.L.M. and T.S.M. were abused, neglected, and dependent children, and that A.L.M. was a neglected and dependent child. Following a shelter care hearing, the minor children were placed in the interim predispositional custody of PCDJFS.

{¶4} In June of 2008, T.L.M. and T.S.M. were adjudicated as neglected children and all three minor children were found to be dependent.

{¶5} A dispositional hearing was held on July 29, 2008. A case plan was adopted and the minor children were placed in the temporary custody of PCDJFS.

{¶6} On November 30, 2009, PCDJFS filed a motion for permanent custody. Also on that date, the trial court appointed Diana J. Prehn ("GAL") as guardian ad litem and attorney for the minor children.

{¶7} A hearing was held on January 15, 2010.

{¶8} At that hearing, appellant failed to appear but was represented by her attorney. Prior to the presentation of evidence, Jesse Marlow, the father of T.S.M. and A.L.M., and Douglas Turner, the father of T.L.M., voluntarily surrendered their parental rights and neither is a party to the instant appeal. Also, prior to the presentation of evidence, appellant's representative moved to withdraw as counsel, moved to continue

the motion for permanent custody, and moved to dismiss all the permanent custody motions. The trial court denied all three motions.

{¶9} Amanda Morgan ("Morgan"), a social service worker with PCDJFS, was the sole witness to testify at the hearing. Morgan testified that appellant completed a psychological evaluation and was recommended to consult with a psychiatrist, attend anger management classes, and complete out-patient drug treatment due to the fact that she tested positive for marijuana. In regards to the drug allegations, Morgan indicated that appellant was supposed to do an evaluation with Town Hall II, but she did not complete it and she was discharged on November 8, 2008. On May 20, 2009, appellant went back to Town Hall II because she had blown a .10 with her probation officer on April 23, 2009. Again, appellant did not complete her treatment at Town Hall II and was discharged for unsuccessful completion. Appellant was arrested on July 13, 2009 for OVI. At the time of the hearing, Morgan testified that a warrant was out for appellant's arrest and that she also had a warrant through probation for a probation violation.

{¶10} Morgan stated that appellant lived with her mother and stepfather. The last time Morgan went to the residence was on September 25, 2009, but she was not privy to go inside and had to talk through the door. Appellant was supposed to find a job, which she did but then lost it within a month. Morgan testified that the last time appellant had any contact with the minor children was on July 7, 2009. Appellant missed between forty-six to forty-nine percent of total permitted visits with the minor children. Morgan believed that appellant abandoned the minor children.

{¶11} According to Morgan, T.S.M. and T.L.M. would like to be with appellant, but if they could not, they would like to remain at their current foster home and be adopted. Morgan indicated that A.L.M. saw appellant as a "friend" rather than her mother. Morgan opined that the minor children would not be able to achieve permanency unless the court grants permanent custody to PCDJFS.

{¶12} On January 19, 2010, the GAL filed her report, indicating the following: appellant's actions of being intoxicated, skipping visits, cancelling counseling appointments, lying, disappearing, failing to work on her case plan, and her inability to admit to any wrongdoing calls her ability to care and protect the minor children into question; appellant has been convicted of a second OVI, violated her probation, has warrants out for her arrest, and had disappeared; appellant has not and will not protect the minor children; appellant puts the minor children in danger; she has substance abuse issues; she appeared at a hearing intoxicated; appellant does not seem to have the ability to remain sober and/or continue with a plan of action to better herself or protect the minor children; appellant does not seem to care about the minor children's custody, well-being, placement, health, or mental status; the minor children are in need of significant counseling and psychiatric care; and the minor children are currently thriving in foster care. The GAL recommended that the minor children be placed in the permanent custody of PCDJFS.

{¶13} Pursuant to its January 20, 2010 judgment entry and its January 29, 2010 nunc pro tunc judgment entry, the trial court found by clear and convincing evidence that it is in the best interest of the minor children that they be placed in the permanent custody of PCDJFS for adoption, and permanently divested appellant of all of her

parental rights and responsibilities. It is from the foregoing judgments that appellant filed timely appeals asserting the following assignments of error for our review:[1]

{¶14} "[1.] THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION OF THE MOTHER TO DISMISS THE MOTIONS FOR PERMANENT CUSTODY AND PROCEEDED TO A HEARING[.]

{¶15} "[2.] THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE MOTION OF APPELLANT'S COUNSEL FOR AN ADJOURNMENT[.]

{¶16} "[3.] THE TRIAL COURT ERRED BY SUMMARILY DENYING THE REQUEST OF THE MOTHER'S ATTORNEY TO APPOINT COUNSEL FOR THE CHILDREN[.]"

{¶17} Preliminarily, we note that this court recently stated the following in *In re J.S.E., J.V.E.*, 11th Dist. Nos. 2009-P-0091 and 2009-P-0094, 2010-Ohio-2412, at ¶17-25:

{¶18} "'It is well established that a parent's right to raise a child is an essential and basic civil right.' *In re T.B.*, 11th Dist. No. 2008-L-055, 2008-Ohio-4415, ¶29, quoting *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, ¶22, citing *In re Hayes* (1997), 79 Ohio St.3d 46, 48, ***. 'The permanent termination of parental rights has been described as the family law equivalent of the death penalty in a criminal case.' Id., quoting *Phillips*, citing *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, ¶14, ***. See, also, *In re Smith* (1991), 77 Ohio App.3d 1, 16, ***. Based upon these principles, the Supreme Court of Ohio has determined that a parent must be afforded every procedural and substantive protection the law allows. (Citations omitted.) Id.

1. This court consolidated appellant's three appeals, Case Nos. 2010-P-0008, 2010-P-0009, and 2010-P-0010 for purposes of briefing, oral argument, and disposition.

{¶19} "'R.C. 2151.414 sets forth the guidelines that a juvenile court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates that the juvenile court must schedule a hearing and, provide notice, upon filing of a motion for permanent custody of a child by a public child services agency or a private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶20} "'Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (1) the child is not abandoned or orphaned (or has not been in the temporary custody of a public children services agency for 12 out of 22 months), 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; (2) the child is abandoned and the parents cannot be located; (3) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (4) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶21} "'Therefore, R.C. 2151.414(B) establishes a two-pronged analysis that the juvenile court must apply when ruling on a motion for permanent custody. In practice, the juvenile court will usually determine whether one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶22} "'If the child is not abandoned or orphaned (or has not been in the temporary custody of a public children services agency for 12 of 22 months), then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the juvenile court must consider all relevant evidence before making this determination. The juvenile court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the conditions are enumerated in R.C. 2151.414(E)(1) through (16) exist with respect to each of the child's parents.

{¶23} "'Assuming the juvenile court ascertains that one of the four circumstances listed in R.C. 2151.414(B)(1)(a) through (d) is present, then the court proceeds to an analysis of the child's best interest. In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates that the juvenile court must 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; and (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.

{¶24} "'The juvenile court may terminate the rights of a natural parent and grant permanent custody of the child to the moving party only if it determines, by clear and convincing evidence, that it is in the best interest of the child to grant permanent

custody to the agency that filed the motion, and that one of the four circumstances delineated in R.C. 2151.414(B)(1)(a) through (d) is present. Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.' Id. at ¶30-35, quoting *In re Lambert*, 11th Dist. No. 2007-G-2751, 2007-Ohio-2857, ¶70-75, quoting *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, ***.

{¶25} "***

{¶26} "*** [T]he appropriate standard of review is that 'we will not reverse a juvenile court's termination of parental rights and award of permanent custody to an agency if the judgment is supported by clear and convincing evidence.' *In re T.B*. at ¶36, quoting *In re Lambert* at ¶75, citing *In re Jacobs* (Aug. 25, 2000), 11th Dist. No. 99-G-2231, 2000 Ohio App. LEXIS 3859, *8. 'Clear and convincing evidence is more than a mere preponderance of the evidence; it is evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.' Id. at ¶35. (Citations omitted)." (Parallel citations omitted.)

{¶27} **First Assignment of Error:**

{¶28} In her first assignment of error, appellant argues that the trial court erred when it denied her motion to dismiss the motions for permanent custody and proceeded to a hearing. Appellant contends that PCDJFS's motions for permanent custody did not allege with sufficient specificity the grounds upon which it was proceeding, and thus, she lacked adequate notice for defending against the allegations.

{¶29} Juv.R. 19 provides:

{¶30} "An application to the court for an order shall be by motion. A motion other than one made during trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority and may be supported by an affidavit.

{¶31} "To expedite its business, unless otherwise provided by statute or rule, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

{¶32} In the case at bar, the November 30, 2009 motions for permanent custody state in the first paragraph that the minor children have "been in the custody of [PCDJFS] pursuant to a Dispositional Case Order since August 6, 2008." The motions further indicate that the minor children have "been in the temporary custody of [PCDJFS] for twelve or more months of a consecutive twenty-two month period, ending on or after March 18, 1999, pursuant to R.C. 2151.414(B)(1)(d)."

{¶33} In addition, pursuant to the best interest of the minor children in accordance with R.C. 2151.414(D)(1), the motions for permanent custody set forth the following: the minor children's bonds with their parents, themselves, and with other family members and significant persons; the wishes of the minor children; their custodial history; the minor children's need of a legally secure permanent placement, which cannot be achieved absent an award of permanent custody to PCDJFS; the failures of the parents to remedy the conditions which led to the removal of the minor children; the parents' abandonment of the minor children for more than ninety days; and that

appellant placed the minor children at substantial risk of harm two or more times due to alcohol and/or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan was filed.

{¶34} The record establishes that appellant was on notice of the grounds with respect to permanent custody of the minor children, as the motions filed by PCDJFS state with specificity the grounds upon which it was proceeding. As such, appellant had ample notice to defend herself against the allegations contained in the motions. Thus, the trial court did not err in denying appellant's motion to dismiss the motions for permanent custody of PCDJFS.

{¶35} Appellant's first assignment of error is without merit.

{¶36} **Second Assignment of Error:**

{¶37} In her second assignment of error, appellant maintains that the trial court erred when it refused to grant her counsel's oral motion for an adjournment, since it may have helped secure her presence, which would have provided her counsel a better opportunity to prepare a defense, and would not have been prejudicial to the minor children or PCDJFS.

{¶38} Juv.R. 23 states that: "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties." An appellate court will not reverse a trial court's decision denying a motion for continuance unless the trial court abuses its discretion. *In re Kangas*, 11th Dist. No. 2006-A-0010, 2006-Ohio-3433, at ¶24. "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. Further, an abuse of discretion may be found when the trial court "applies the wrong legal standard,

misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15.

{¶39} "In considering whether a trial court abused its discretion in denying a motion for continuance, a reviewing court considers the length of the requested delay, prior continuances requested and received, the presence or absence of legitimate reasons for the requested delay, appellant's participation or contribution to the circumstances giving rise to the request for a continuance, and any other relevant factors. *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, ***. While these factors provide basic guidance, we are mindful that '"(t)here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."' *Unger*, supra, at 67, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, ***." *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, at 21-22.

{¶40} In the instant matter, again, appellant was not present at the January 15, 2010 permanent custody hearing. A review of the transcript reveals that appellant's counsel indicated that appellant's absence was possibly due to her concern about warrants that had been issued for her arrest in criminal matters. Appellant's representative stated that he had no communication with appellant since April of 2009, despite his efforts to locate her. Appellant's attorney was unaware of any different avenues to pursue in order to find her. Appellant's counsel requested a continuance, the basis of which was to allow appellant additional time to resolve her pending criminal matters.

{¶41} We note that appellant's warrants and pending criminal charges did not constitute legitimate reasons to delay the permanent custody hearing. Appellant had the opportunity to attend the January 15, 2010 hearing, but failed to do so and failed to communicate with her attorney since April of the previous year. Also, there is nothing in the record showing any post-hearing attempts by appellant to justify her absence at the permanent custody hearing. The best interest of the minor children was to provide them with a legally secure and permanent placement. The trial court did not abuse its discretion in denying appellant's motion for a continuance.

{¶42} Appellant's second assignment of error is without merit.

{¶43} **Third Assignment of Error:**

{¶44} In her third assignment of error, appellant maintains that the trial court erred by denying her attorney's request to appoint counsel for the minor children, separate from the GAL, when it appeared that there was potentially a conflict or question regarding the minor children's wishes.

{¶45} Pursuant to R.C. 2151.352, indigent children, parents, custodians, or other persons in loco parentis are entitled to appointed counsel in all juvenile proceedings. See *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 48. "Generally, when an attorney is appointed as guardian *ad litem*, that attorney may also act as counsel for the child, absent a conflict of interest." *In re Janie M.* (1999), 131 Ohio App.3d 637, 639, citing R.C. 2151.281(H); *In re Smith* (1991), 77 Ohio App.3d 1, 14. "The roles of guardian *ad litem* and attorney are different." *In re Janie M.* at 639, citing *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232. "Therefore, absent an express dual appointment, courts should not presume a dual appointment when the appointed

guardian *ad litem* is also an attorney." *In re Janie M*. at 639, citing *In re Duncan/Walker Children* (1996), 109 Ohio App.3d 841, 844-845; *In re Kenneth R.* (Dec. 4, 1998), 6th Dist. No. L-97-1435, 1998 Ohio App. LEXIS 5669. (Emphasis sic.)

{¶46} Here, the record establishes that the GAL was specifically appointed as guardian ad litem and attorney for the minor children. Thus, a dual appointment existed and the minor children were with legal representation. Although appellant alleges that a potential conflict may have occurred, our review of the record reveals that no such conflict of interest existed. The GAL indicated that the minor children did not express any different wishes than her recommendation to have them placed into the permanent custody of PCDJFS. The GAL stated that the minor children never expressed to her any desire to return to the legal custody of appellant. In fact, the GAL's report maintains that the minor children were fearful of returning to appellant's custody.

{¶47} Again, according to PCDJFS social service worker Morgan, T.S.M. and T.L.M. would like to be with appellant, but if they could not, they would like to remain at their current foster home and be adopted. Morgan indicated that A.L.M., the youngest child, saw appellant as a "friend" rather than her mother. Appellant stresses that at least some legitimate fact question exists with respect to the older two children as a result of Morgan's testimony. We note, however, that a caseworker's testimony cannot be considered as an expression of the minor children's wishes in lieu of the GAL's report. See *In re Ridenour*, 11th Dist. Nos. 2003-L-146, 2003-L-147, 2003-L-148, 2004-Ohio-1958, at ¶47; R.C. 2151.414. We further note that Morgan, like the GAL, believed that the minor children would not be able to achieve permanency unless the court granted permanent custody to PCDJFS.

{¶48} In determining the best interest of the minor children, the trial court properly relied upon the GAL's report and recommendation that the minor children be placed in the permanent custody of PCDJFS. Thus, the trial court did not err by denying appellant's counsel's request for the appointment of independent counsel for the minor children since the GAL had a dual appointment, the minor children were legally represented, and there was no conflict of interest.

{¶49} Appellant's third assignment of error is without merit.

{¶50} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.