

**IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO**

In the Matter of

THANH VU

No:

Regular Calendar

In the Matter of

HAU VU,

No:

Regular Calendar

BRIEF OF APPELLANT ATTORNEY/GUARDIAN AD LITEM

**APPEAL FROM THE FRANKLIN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
(02-JU 13885- Hau Vu)
(03-JU 907 – Thanh Vu)**

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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

FIRST ASSIGNMENT OF ERROR

The Trial Court Erred In Ordering Permanent Commitment Of Hau Vu To Franklin County Children Services Without Appointing Counsel For Hau Vu.

SECOND ASSIGNMENT OF ERROR

The Trial Court Erred In Its Determination That Granting Permanent Commitment To FCCS Of Hau Vu And Thanh Vu Was In Their Best Interest.

THIRD ASSIGNMENT OF ERROR

The Trial Court Erred By Failing To Determine By Clear And Convincing Evidence That Hau Vu And Thanh Vu Could Not Be Placed With Appellant-Mother Within A Reasonable Time Period.

FOURTH ASSIGNMENT OF ERROR

The Trial Court Erred In Ordering Permanent Commitment Of Hau Vu And Thanh Vu Because The Guardian Ad Litem Before The Trial Court Had A Conflict Of Interest And Should Have Withdrawn

I. Procedural History

On September 12, 2002, Franklin County Children Services (hereinafter “FCCS”) filed complaint 02 JU 13885 with Franklin County Juvenile Court in which they alleged Hau Vu to be a neglected and dependent minor. Complaint, (02 JU 13885) No. 1. On the same day, the Franklin County Public Defenders Office was appointed to act solely as guardian ad litem for Hau. Appointment of GAL (02 JU 13885), No.4. As a result of the uncontested dependency adjudication, FCCS was granted temporary custody of Hau on November 8, 2002. Judgment Entry (02 JU 13885), No. 41, 49.

Because Thanh Vu was born to Appellant-mother while she was incarcerated, FCCS alleged Thanh to be a dependent minor and filed complaint 03 JU 907 on January 21, 2003. Complaint (03 JU 907), No. 2. Again, the Franklin County Public Defenders Office was appointed to act solely as guardian ad litem for Thanh on that same day. Appointment of GAL (03 JU 907), No. 5. Thanh was adjudicated a dependent minor and temporary custody was awarded to FCCS on March 21, 2003. Judgment Entry (03 JU 907), No. 28.

On August 28, 2003, FCCS filed a Motion to Extend Temporary Custody (hereinafter “TCC”) and for Case Plan Amendment and requested the trial court find that compelling reasons existed to excuse FCCS from filing for permanent custody of Hau. Motion to Extend TCC (02 JU 13885), No. 64. At Hau’s scheduled annual review on September 12, 2003, the trial court granted a continuance and ordered unsupervised visitation between the parents and the child. Motion for Continuance (02 JU 13885), No. 76. On November 28, 2003 the trial court extended temporary custody of Hau to FCCS for six months based on a finding that there had been significant progress on the case plan. Judgment Entry (02 JU 13885), No. 89.

On December 31, 2003, FCCS filed a Motion to Extend TCC and for Case Plan Amendment and requested that the trial court find that compelling reasons existed to excuse FCCS from filing for permanent custody of Thanh. Motion to Extend TCC (03 JU 907), No. 38. On January 28, 2004, the trial court extended temporary custody of Thanh to FCCS based on findings that there had been significant progress on the case plan, as well as compelling reasons that permanent custody was not in the best interest of the child. Judgment Entry (03 JU 907), No. 58.

On March 9, 2004, Motions for Permanent Custody were filed by FCCS for both Hau and Thanh. Motion for Permanent Custody (02 JU 13885), No. 94 and (03 JU 907), No. 62. On March 12, 2004, the trial court granted a continuance until May 13, 2004 and ordered that visitation could be expanded upon additional progress on the case plan. Motion for Continuance (02 JU 13885), Nos. 97-104 and (03 JU 907), Nos. 65-68. Subsequent to the filing of the motions for permanent court commitment, on May 18, 2004, the Magistrate ordered unsupervised visitation between Appellant-mother and the children. Visitation Order (02 JU 13885), No. 129 and (03 JU 907), No. 86.

On October 15, 2004, the trial court ordered permanent commitment (hereinafter "PCC") of Hau Vu and his brother, Thanh Vu to Franklin County Children Services. Permanent Custody Judgment Entry (02 JU 13885), No. 146 and (03 JU 907), No. 104. These orders divested the children's mother, Appellant-mother Thuy Bui, and their father, Appellee Hoai Vu, of any and all parental rights with the exception of the right to appeal. Appellant-mother filed Notice of Appeal on October 27, 2004. Notice of Appeal (02 JU 13885), No. 152 and (03 JU 907), No. 111.

II. Statement of Facts

Hau Vu was placed in temporary custody of FCCS on September 13, 2002. At that time, Hau was three years old. From the time Appellant-mother was released from jail in June of 2003, when Hau was approximately 3 ½, Hau had regular contact with his mother. See, Semiannual Administrative Review (hereinafter “SAR”)(02 JU 13885), No. 55; Motion to Extend TCC (02 JU 13885), No. 64; Motion for Continuance (02 JU 13885), No.73-77, (court ordered unsupervised visitation); Magistrate’s Decision to extend TCC and finding significant progress on case plan (02 JU 13885), No. 85; Motion for Continuance (02 JU 13885), No. 97-104, (court allows FCCS to expand visitation upon progress of case plan); Visitation Order (02 JU 13885), No. 129, (granting unsupervised visitation). Moreover, between her release from jail in June of 2003 and the grant of PCC on October 15, 2004, Appellant-mother made significant progress on her case plan. See, Motion To Extend TCC (02 JU 13885) No. 64; Motion for Continuance (02 JU 13885), Nos. 73-77, (court ordered unsupervised visitation); Order to extend TCC and finding significant progress on case plan (02 JU 13885), No. 85; Motion for Continuance (02 JU 13885), No. 97-104, (allowing FCCS to expand visitation upon progress of case plan); Visitation Order (02 JU 13885), No. 129, (granting unsupervised visitation).

The FCCS case plan submitted and made an order by the trial court pursuant to Hau’s dispositional hearing required the following of Appellant-mother: to complete an alcohol or drug assessment and follow through with all recommendations; complete random urine screens; complete a psychological evaluation and follow through with all recommendations; complete parenting classes and receive a certificate of completion; obtain and maintain appropriate

housing and employment; and not engage in any further criminal activity. Case Plan (02 JU 13885), No. 43.

Because Thanh was born while Appellant-mother was incarcerated, the trial court awarded FCCS temporary custody of Thanh on January 23, 2003. Magistrate's Order (03 JU 907), No. 7-9. Thanh was placed with his brother Hau in foster care immediately after his birth. Transcript of September 22, 2004, p. 81, ln. 1. Like Hau, Thanh had regular contact with Appellant-mother following her release from jail in June of 2003. See, above. Hau and Thanh have remained together in the same foster home since the initial placement. Transcript of September 22, 2004, p. 80, lns. 23-25.

In the memoranda attached to the Motions to Extend TCC and for Case Plan Amendment for Hau and Thanh, filed on August 28, 2003 and December 31, 2003, respectively, FCCS contended that, "there are compelling reasons to show that permanent custody is not in the best interest of this child." Motion to Extend TCC (02 JU 13885), No. 64 and (03 JU 907), No. 38. In support of its contention, FCCS cited to the fact that Appellant-mother was currently visiting and maintaining contact with the children; that she provided clean urine screens; that she enrolled in parenting classes and that Appellant-mother needed "more time to complete the case planning services toward reunification with th[e] child[ren]." Id.

During the SAR held on November 10, 2003, FCCS noted that following Appellant-mother's release from jail she had quickly completed the following case plan requirements: an alcohol and drug assessment; psychological evaluation; parenting classes; and established housing and employment. See, SAR (02 JU 13885), No. 81 and (03 JU 907), No. 31. Furthermore, Appellant-mother and the boys had begun unsupervised visits and, aside from Appellant-mother changing the visit times, FCCS reported that the visits had otherwise gone

well. *Id.* In addition, the SAR noted that, at that time, Appellant-mother was on a wait list for counseling. *Id.* The SAR apparently was amended immediately prior to filing, however, and the caseworker noted that Appellant-mother had a positive drug screen on October 23, 2003, after having seven clean and six “no reports.” SAR (02 JU 13885), No. 81 and (03 JU 907), No. 31. As a result, visitation was restricted to supervised visitations at the agency. *Id.* Subsequent to this visitation restriction, however, FCCS filed the above-cited Motions to Extend TCC on November 28, 2003 and December 31, 2003, in which FCCS indicated that Appellant-mother was making progress on the case plan. Motion to Extend TCC (02 JU 13885), No. 64 and (03 JU 907), No. 38.

In the three month time period between the trial court’s granting of the Extension of TCC and FCCS filing for Permanent Custody there is no indication on the record that conditions deteriorated regarding the case plan or Appellant-mother’s behavior. Appellant-mother’s own testimony during the trial that she tested positive for cocaine in January of 2004 is the only reference on the record regarding this time period. Transcript of September 22, 2004, p. 39, *Ins.* 10-12. In fact, FCCS reported in May, 2004 that Appellant-mother had consistently tested negative for drugs since December 30, 2003 and that she was attending drug and alcohol counseling. SAR (02 JU 13885), No. 116 and (03 JU 907), No. 76. Furthermore, during the May SAR, FCCS’s recommendation regarding the children’s custody arrangement for the following six months was for the less-restrictive Court Ordered Protective Supervision. *Id.* As a result, the trial court again granted Appellant-mother unsupervised visitation with Hau and Thanh until the trial date in September. Magistrate’s Order (02 JU 13885), No. 129 and (03 JU 907), No. 86.

Appellant-mother testified at trial as to the history of her housing situation during the course of the proceedings. Appellant-mother lived with the Appellee-father in an apartment on Komo from August 2003 until February 2004. Transcript of September 22, 2004, p. 11, Ins. 15-22. The two parents then moved together to an apartment on Primrose from February 2004 until August 2004. Transcript of September 22, 2004, p. 8, Ins. 22-25, to p.9, Ins. 1-5. Appellee-father was subsequently incarcerated and because the Primrose lease was in his name, Appellant-mother was forced to seek alternative housing on August 20, 2004. *Id.* Appellant-mother then lived with an employer in Lancaster for a week, but moved back to Columbus when her car broke down and she wasn't able to get to the visits with her children. Transcript of September 22, 2004, pg. 10, Ins. 9-12. Appellant-mother then stayed with friends for a week while she waited for approval of her lease application for an apartment on Haviland. Transcript of September 22, 2004, pg. 9, Ins. 9-17. Appellant-mother signed a lease for the apartment on Haviland on September 18, 2004. Transcript of September 22, 2004, pg. 8, Ins. 6-23.

Thus, Appellant-mother demonstrated significant commitment to the children by actions that show a willingness to provide an adequate permanent home and to substantially remedy the conditions that caused the children to be placed outside the home.

ARGUMENT

The United States Supreme Court has emphasized the importance of the parent-child relationship and the parental right to custody. "Until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship." *Santosky v. Kramer* (1982), 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599. Similarly, the Ohio Supreme Court has recognized the parental right to custody to be paramount,

thus making the decision to terminate the parental right “the family law equivalent of the death penalty in a criminal case.” *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680.

Further, the right to familial association is not simply the right of the parent to care, custody and control, or upbringing of their children, but rather it is the right of the entire family and of the individuals in that association. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531. The United States Constitution and the Ohio Constitution provide substantive and procedural rights to children who are at risk of a termination of parental rights. See generally, *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 110.

In order to protect the rights of children in termination of parental rights proceedings, the Supreme Court of Ohio held in *In re Williams* that “pursuant to R.C. § 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), 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, 805 N.E.2d 110, 2004-Ohio-1500 at ¶ 28-29. In accordance with this fundamental concept, this Honorable Court has held that a trial court must conduct an inquiry into the express wishes of a child subject to a termination of parental rights proceeding and that children as young as three years old may be capable of expressing such wishes. *In re Swisher*, 10th Dist. Nos. 02AP-1408, 02AP-1409, 2003-Ohio-5446 and *In re Brooks*, 10th Dist. Nos. 04AP-164, 04AP-202, 04AP-165, 04AP-201, 2004-Ohio-3887 (*Brooks II*), respectively.

The trial court erred by failing to appoint counsel for Hau Vu and failing to consider the express wishes of Hau when it terminated parental rights and granted permanent custody to FCCS. The record of the trial court is devoid of any evidence that Hau Vu had independent counsel or that there was any inquiry into his express wishes. In fact, the individual charged

with determining and protecting the child's interests had a conflict of interest, and should have withdrawn as guardian ad litem. Thus, the trial court could not determine by clear and convincing evidence that termination of parental rights was in the best interest of Hau and Thanh Vu. In addition, the record lacks clear and convincing evidence that the children could not be placed with Appellant-mother within a reasonable period of time.

For these reasons, this Honorable Court must reverse the decision of the trial court and remand the case for further proceedings not inconsistent with *Williams*, and respecting the fundamental rights of Hau and Thanh to maintain their familial relationships.

I. The Trial Court Erred In Ordering Permanent Commitment Of Hau Vu To FCCS Without Appointing Counsel For Hau Vu.

The trial court impermissibly infringed upon the due process rights of Hau Vu by depriving him of his right to counsel and his right to have his wishes, interests, and desires taken into consideration at the termination of parental rights proceedings. See, *In re Williams*, 101 Ohio St.3d 398, 805 N.E.2d 110, 2004-Ohio-1500.

A. The Trial Court Erred By Failing To Appoint Counsel For Hau Vu Pursuant To *In re Williams*.

It is well established that the law of Ohio, through the statutory right created by R.C. § 2151.352, surpasses the constitutional requirements governing the right to appointed counsel. *In re Williams*, 101 Ohio St.3d 398, 805 N.E.2d 110, 2004-Ohio-1500 at ¶ 15, citing *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46, 693 N.E.2d 794. The Ohio Supreme Court recently affirmed that “pursuant to R.C. § 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), 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, 805 N.E.2d 110, 2004-Ohio-1500 at ¶ 29. Recently, the Seventh

District found that the Ohio Supreme Court's decision in *Williams* applies retroactively and requires the Court of Appeals to "determine whether, under the particular facts and circumstances in th[e] case, the trial court should have appointed counsel to represent [the children] or at least conducted an investigation into whether it should appoint counsel." *In re Moore*, 158 Ohio App.3d 679, 2004-Ohio-4544 at ¶ 33.

In the present case, Hau Vu, as the subject of dependency proceedings, was a party to the proceedings pursuant to Juv.R. 2(Y), and was thus entitled to representation by counsel pursuant to Juv.R. 4(A) and R.C. § 2151.352. The Public Defender's Office was appointed solely as the guardian ad litem for Hau Vu. Appointment of GAL (02 JU 13885), No.4. Although, the FCCS Motion for Permanent Custody was filed on March 9, 2004, prior to the *Williams* decision, the pretrial did not occur until July and the trial did not take place until September, months after the *Williams* decision. Nevertheless, the trial court never provided counsel to either child. The trial court's failure to do so constitutes reversible error. Thus, this Honorable Court must reverse and remand this case for a determination consistent with *Williams*.

B. The Trial Court Erred By Terminating Parental Rights When The Record Was Devoid Of Evidence Of Hau's Express Wishes

This Honorable Court has held that where no counsel is appointed, a termination of parental rights may still stand where "upon a thorough review of the entire record, based upon the uncontroverted testimony of [the disinterested witness] that the children desire not to be returned to their Appellant-mother's custody, along with abundant evidence supporting the trial court's findings that the children's best interests are served by awarding permanent custody to FCCS." *In re Brooks*, 10th Dist. Nos. 04AP-164, 04AP-202, 04AP-165, 04AP-201, 2004-Ohio-3887 (*Brooks II*). Moreover, this Honorable Court established in *In re Swisher*, 10th Dist. Nos.

02AP-1408, 02AP-1409, 2003-Ohio-5446, that a child as young as three may be able to express distinct desires regarding the outcome of a parental rights termination hearing.

1. The Trial Court Erred By Failing To Consider Hau Vu's Wishes Based Solely On His Age.

This Honorable Court, in *In re Swisher*, 10th Dist. Nos. 02AP-1408, 02AP-1409, 2003-Ohio-5446, found reversible error when the trial court failed to consider the wishes of young children in a termination of parental rights proceeding. This Honorable Court found while the youngest child who was two years old at the time of trial may have been too young to express her wishes, the other four children “were arguably capable of expressing their wishes.” *Id.* at ¶ 37. Thus, the trial court committed reversible error when it failed to consider the wishes of the children ages six, five, four and three years old. *Id.*

In the case presently before the Court, the trial court found that the “children’s wishes concerning permanent custody were not expressed because of young age.” Permanent Custody Judgment Entry (02 JU 13885), No. 146 at p. 5 and (03 JU 907), No. 104-105 at p. 5. However, at the time of trial, Hau was five years old. Therefore, pursuant to *Swisher*, the trial court’s failure to consider Hau’s wishes is reversible error.

2. The Trial Court Erred By Failing To Make A Determination Of Hau Vu's Wishes.

This Honorable Court has held that there is no error where the trial court fails to provide independent counsel for the child if there is credible evidence on the record that the children’s wishes, interests or desires have been determined and considered by the trial court in termination of parental rights proceedings. *In re Brooks*, 10th Dist. Nos. 04AP-164, 04AP-202, 04AP-165, 04AP-201, 2004-Ohio-3887 (*Brooks II*). In *Brooks II*, this Court held that there was enough credible evidence on the record regarding the children’s wishes as to placement that the

appointment of independent counsel was unnecessary. *Id.* at ¶ 87. In that case, the credible evidence as to the children’s wishes originated from the testimony of a counselor, a caseworker and a psychologist, all of whom had personally interacted with the children in some capacity. *Id.*, *passim*. Nevertheless, this Honorable Court cautioned that “juvenile courts and guardians ad litem would be well advised to more specifically ascertain and address the wishes of the children so as to guard against denial of the children’s right to counsel.” *Id.* at ¶ 87.

In the case presently before the Court, there is no evidence on the record of the wishes, interests, or desires of Hau Vu regarding his relationship with either parent. Only two witnesses testified at trial and neither of the two witnesses testified as to the wishes, interests or desires of Hau. Moreover, the report of the guardian ad litem makes no reference to Hau’s express wishes. Report of Guardian ad Litem (02 JU 13885), No. 141 and (03 JU 907), No. 109. The guardian ad litem’s sole reference to Hau’s wishes in the record was a statement made during his closing argument that the children “being very young really, [are]... limited in how they can express what their desires are and that is shown by interactions...” Transcript of September 22, 2004, p. 171, *lns.* 18-20. Such a generalization is in no way instructive for the court with regard to establishing the child’s express preferences. Such a statement fails even to clarify whether Hau’s wishes diverged from the recommendation of the guardian ad litem as required by Loc.Juv. R. 4(D)(1)(l)(2), which requires a guardian to make known on the record whether the child’s wishes diverge from his determination of the child’s best interest. Most surprisingly, there is no evidence on the record that the guardian ad litem ever met, interviewed or interacted with Hau; therefore, making it impossible for the guardian to determine the scope of Hau’s ability to express his wishes and making it impossible for the guardian to determine what Hau’s “interactions” did, in fact, indicate.

In the case presently before the Court, there is no credible evidence on the record that Hau's wishes, interests or desires were determined and considered by either the guardian ad litem or the trial court, thus making the trial court's award of permanent custody to FCCS reversible error.

II. The Trial Court Erred In Its Determination That Granting Permanent Commitment To FCCS Of Hau Vu And Thanh Vu Was In Their Best Interest.

Ohio law requires that the trial court take into consideration all the statutory factors enumerated in R.C. § 2151.414(D) when making a best interest determination. Districts throughout Ohio have emphasized the importance of the enumerated factors under R.C. § 2151.414(D) in determining the best interest of a child. In *In re Morgan*, 3d Dist. App. Nos. 9-04-02, 9-04-03, 2004-Ohio-4018, at ¶ 47-48, the appellate court determined that there was no error when the trial court enumerated within the findings of fact its analysis for each prong of R.C. § 2151.414(D). In *In re Smith*, 9th Dist. App. No. 20711, 2002-Ohio-34, the Ninth District Court of Appeals held that the trial court committed reversible error by basing its determination of best interest on factors not enumerated in R.C. § 2151.414(D). *Id.* at 14. The Ninth District recognized that while a trial court is not precluded from using other relevant factors, "the statute explicitly requires the court to consider all of the enumerated factors." *Id.* at 6. Like the above-cited cases, the Eleventh District has held "that the provisions of R.C. § 2151.414(D) are mandatory and must be scrupulously observed." *In re Ridenour*, 11th Dist. Nos. 2003-L-146, 2003-L-147, 2003-L-148, 2004-Ohio-1958 at ¶ 36, quoting, *In re Meyer*, 11th Dist. No. 2003-A-0064, 2003-Ohio-4605 at ¶ 24 (internal quotations omitted). Furthermore, the Eleventh District has held that "the failure to discuss each of the factors set forth in R.C. § 2151.414(D) when reaching a determination concerning the best interest of the child is prejudicial error." *Id.* quoting, *In re Jacobs*, (Aug. 25, 2000) 11th Dist. No. 99-G-2231, at 13.

In fact, this Honorable Court has explicitly required that a trial court express considerations of all relevant factors in its findings and entry when terminating parental rights. *In re Brooks*, 10th Dist. No. 03AP-282, 2003-Ohio-5348 (*Brooks I*). In *Brooks I*, this Court found that in order for trial courts to find by clear and convincing evidence that the termination of parental rights is in the best interest of a child, the trial court must “state those findings on the record, such that it is clear to all parties that the decision is supported by the facts.” *Id.* at ¶ 23, citing *In re Strong*, Franklin App. No. 01AP-1418, 2002-Ohio-2247. See also, *In re Johnson*, (July 22, 2004) 10th Dist. No. 03AP-1264, 2004-Ohio-3886 (competent, credible evidence found to satisfy each of the enumerated factors under R.C. § 2151.414(D) making the determination of the best interest of the children proper). Thus, in order to avoid reversal, a trial court’s determination of best interest must include an express consideration of all statutory factors.

A. The Trial Court Erred By Failing To Consider All Of The Statutory Factors Necessary To Determine The Best Interest Of Hau Vu And Thanh Vu.

R.C. § 2151.414(D) states that, “in determining the best interests of a child at a hearing held pursuant to a division of (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court *shall* consider all relevant factors, including, but not limited to, the following: 1) [t]he 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; 2) [t]he 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) [t]he 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 ending on or after March 18, 1999; 4) [t]he child’s need for legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; 5) [w]hether any of the factors in divisions of (E)(7) to (11) of this section apply in relation to the parents and child.” R.C. § 2151.414(D)(emphasis added).

1. The Record Lacks Competent, Credible Evidence That The Trial Court Considered The Interactions And Interrelationships Of Hau Vu And Thanh Vu With Others, As Required By R.C. § 2151.414(D)(1)

R.C. § 2151.414(D)(1) provides that the court “shall consider all relevant factors” including “[t]he 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.” R.C. § 2151.414(D)(1).

The Judgment Entry terminating parental rights and placing Hau and Thanh Vu in the permanent custody of FCCS is devoid of any express reference or consideration of R.C. § 2151.414(D)(1). However, the record reflects that Appellant-mother had approximately four months of unsupervised visitation following the motion for permanent custody. Visitation Order (02 JU 13885), No. 129 and (03 JU 907), No. 86-88. The trial court’s granting of unsupervised visitation between Appellant-mother and the children is competent, credible evidence that there were significant interactions and interrelationships between the children and Appellant-mother. Moreover, the record indicates that there was significant bonding between Appellant-mother and the children. The record indicates that the Appellant-mother and her children not only had visitation, but also had consistent and continuous interactions by telephone. See, SAR(02 JU 13885), No. 55; Motion to Extend TCC (02 JU 13885), No. 64; Motion for Continuance (02 JU 13885), No.73-77, (court ordered unsupervised visitation); Magistrate’s Decision to extend TCC

and finding significant progress on case plan (02 JU 13885), No. 85; Motion for Continuance (02 JU 13885), No. 97-104, (court allows FCCS to expand visitation upon progress of case plan); Visitation Order (02 JU 13885), No. 129, (granting unsupervised visitation); SAR (02 JU 13885), No. 116 and (03 JU 907), No. 76; Transcript of September 22, 2004, p. 80, Ins. 18-20, and p. 143, In. 12. Additionally, during the termination of parental rights trial, the caseworker testified as to “some bonding” between the children and Appellant-mother and testified that the children were very bonded with their foster family. Transcript of September 22, 2004, p 80, Ins. 11-15; p. 81, Ins. 24-25; p. 82, In. 1. However, during her own testimony Appellant-mother described that she called the children every day and that the boys gave her hugs both at the beginning and at the end of their visits. Transcript of September 22, 2004, p.143, Ins. 7-24.

Due to the extent of contact with Appellant-mother, it is foreseeable that an abrupt termination of this parent-child relationship would have a traumatic effect on Hau and Thanh. The trial court failed to consider explicitly the evidence regarding the relationship between the children and Appellant-mother, or the effect of terminating that relationship, when determining the interactions and interrelationships of the children with the parents as is required by R.C. § 2151.414(D)(1).

Due to the lack of competent, credible evidence on the record that it was in the best interest to terminate parental rights and grant permanent custody to FCCS pursuant to R.C. § 2151.414(D)(1), the trial court’s determination of best interest was improper. Therefore, this Court should reverse and remand in order to make a proper of determination of the best interest of the children based on all of the enumerated factors in R.C. § 2151.414(D), including the interactions and interrelationships as required by R.C. § 2151.414(D)(1).

2. The Record Lacks Competent, Credible Evidence That The Trial Court Considered The Wishes Of Hau Vu, As Required By R.C. § 2151.414(D)(2)

R.C. § 2151.414(D)(2) provides that the court “shall consider all relevant factors” including “[t]he 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.” R.C. § 2151.414(D)(2).

This Court, in *In re Swisher*, 10th Dist. Nos. 02AP-1408, 02AP-1409, 2003-Ohio-5446, found error when the trial court failed to consider the wishes of children, ages 6, 5, 4, and 3 years old, in determining the best interest of those children as required by R.C. § 2151.414(D)(2). Furthermore, this Court advised that trial courts should make sure that the report of a guardian ad litem in a termination of parental rights proceeding “contain a recommendation regarding permanent custody, an evaluation of the children’s competency and their best interest, and a statement of the children’s wishes to the extent they have them, unless the children will be testifying at the hearing or will be interviewed in chambers.” *Id.* at ¶ 43.

In the present case, there is a complete lack of evidence with regard to the children’s wishes, as required by R.C. § 2151.414(D)(2). The “Report of the Guardian Ad Litem” submitted to the court the day of the termination of parental rights trial, contains no fact specific analysis regarding the best interests factors enumerated in R.C. § 2151.414(D). Report of the Guardian Ad Litem (02 JU 13885), No. 141 and (03 JU 907), No. 109. The report contains no recommendation regarding permanent custody; no evaluation of the children’s competency; no evaluation of their best interest; and no statements of the children’s wishes. *Id.* In his oral recommendation at trial, the guardian ad litem asserted that the children “being very young really, they’re limited in how they can express what their desires are and that is shown by interactions....” Transcript of September 22, 2004, p. 171, lns. 18-20. A mere assertion based

upon nothing but the age of the children is not sufficient to establish lack of competency in expressing their wishes. *In re Swisher*, 10th Dist. Nos. 02AP-1408, 02AP-1409, 2003-Ohio-5446. Thus, without more, the guardian ad litem's assertion was not sufficient to meet the court's burden in establishing the children's best interest based on R.C. § 2151.414(D)(2).

At the time of trial, Hau was five years old. The record is devoid of any evaluation of Hau's ability to communicate his wishes with regard to placement. The court never interviewed Hau in order to determine his maturity level; the guardian ad litem never met, interviewed, or interacted with Hau to determine his wishes; and, there is no other credible evidence on the record indicating Hau's wishes, or any affirmative determination that he was incapable of expressing such wishes. Thus, the trial court erred in concluding that it was in the best interest of Hau Vu pursuant to R.C. § 2151.414(D)(2) to terminate parental rights and grant permanent custody to FCCS.

B. The Trial Court Erred By Failing To Determine By Clear And Convincing Evidence That Granting Permanent Commitment To FCCS Of Hau Vu and Thanh Vu Was In Their Best Interest.

In order to protect parents' fundamental right to rear their children, the United States Supreme Court has mandated that in order to terminate parental rights, the standard of proof must be that of "clear and convincing evidence." *Santosky v. Kramer* (1982), 455 U.S. 746, 769, 102 S.Ct. 1388, 71 L.Ed.2d 599. Clear and convincing evidence is the "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of certainty as required beyond a reasonable doubt as in criminal cases." *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 104, 495 N.E.2d 23.

Where the burden of proof at the trial court level is clear and convincing evidence, “a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54 citing *Ford v. Osborne*(1887), 45 Ohio St. 1, 12 N.E. 526, paragraph two of the syllabus. In examining whether a trial court had sufficient evidence, it is “firmly established that judgments supported by some competent, credible evidence going to *all the essential elements* of the case will not be reversed by a reviewing court.” *Id.*(emphasis added).

This Court has generally held that a proper determination of the best interest of a child is based on clear convincing evidence when the child’s best interest is supported by competent, credible evidence on the record. In *In re Johnson*, (July 22, 2004) 10th Dist. No. 03AP-1264, 2004-Ohio-3886, this Court found the testimony by two experts in child and family therapy, the biological mother, and the lay guardian ad litem, all of whom had met with and interacted with the children, constituted competent, credible evidence sufficient to uphold a termination of parental rights. *Id.* at ¶ 28, 29, 30, 32.

Expanding upon what constituted clear and convincing evidence of the best interest of a child, this Court found that a record lacked clear and convincing evidence when the trial court failed to expressly state the findings regarding the best interest of the child “such that it is clear to all parties that the decision is supported by the facts.” *In re Brooks*, 10th Dist. No. 03AP-282, 2003-Ohio-5348 (*Brooks I*) at ¶ 23, citing *In re Strong*, Franklin App. No. 01AP-1418, 2002-Ohio-2247. In *Brooks I*, this Court found that the trial court lacked clear and convincing evidence that granting permanent custody to the agency was in the best interest of the children, thus finding it necessary to reverse and remand the action for a proper determination of the best interest of the children. *Id.*

In the present case, the record lacks clear and convincing evidence that it was in the best interest of Hau Vu and Thanh Vu to terminate parental rights and grant permanent custody to FCCS. The guardian ad litem, being the individual charged with “perform[ing] whatever functions are necessary to protect the best interests of the child...,” including such acts as investigation, pursuant to R.C. § 2151.281(I), failed in such duties, thus not providing the court with any competent or credible evidence of the best interest of Hau Vu and Thanh Vu. In addition, there were no experts, no psychologists, nor any other disinterested party that testified during the trial as to the best interest of Hau Vu or Thanh Vu. Therefore, the trial court was unable to properly determine by clear and convincing evidence it was in the best interest of the children to terminate parental rights and grant permanent custody to FCCS, as required by R.C. § 2151.414(B)(1). Finally, the trial court failed to state its determination of the best interest of Hau Vu or Thanh Vu “such that it is clear to all parties that the decision is supported by the facts.” *Brooks I* at ¶ 23. See, generally, Findings of Facts (02 JU 13885), No. 150 and (03 JU 907), No. 105.

The trial court therefore erred in determining that there was clear and convincing evidence it was in the best interest of Hau Vu and Thanh Vu to terminate parental rights and to grant permanent custody to FCCS. This case must therefore be reversed and remanded for a proper determination of what is in the best interest of Hau Vu and Thanh Vu.

C. The Trial Court Erred In Terminating Parental Rights As To Thanh Vu Because Hau And Thanh Have A Constitutional Right As Siblings To Maintain Their Familial Relationship.

Children have constitutional rights. Those rights do not mature and come into being only when one attains the age of majority, *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 74, 596 S.Ct. 2831, 49 L.Ed.2d 788; rather, the United States Supreme

Court has made clear that certain provisions of the Constitution extend to those who have not yet reached adulthood. *See, e.g., In re Gault* (1967), 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527. Children have a right to maintain a sibling relationship under the substantive and procedural due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, §§ 1 and 16 of the Ohio Constitution. The children also have a right to maintain their relationship pursuant to the Association Clause of the First Amendment to the United States Constitution and Article I, § 3 of the Ohio Constitution.

1. Hau And Thanh Have A Federal Constitutional Right To Maintain Their Relationship, So Permanent Custody Cannot Be In Thanh's Best Interest If It Is Not In Hau's Best Interest.

A right may be fundamental even though not mentioned explicitly in the text of the Constitution. The United States Supreme Court has held that liberties “deeply rooted in this Nation’s history and tradition” are fundamental rights. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct 1932, 52 L.Ed.2d 531. It is a matter of well-established constitutional jurisprudence that “freedom of choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur* (1974), 414 U.S. 632, 639-640, 94 S.Ct. 791, 39 L.Ed.2d 52.

These fundamental rights to familial association are not simply the rights of the parent to care, custody and control, or upbringing of their children, but rather they are the rights of the entire family and of the individuals in that association. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct 1932, 52 L.Ed.2d 531. In *Moore v. City of East Cleveland*, 431 U.S. at 502-03, the United States Supreme Court held that the Due Process Clause not only protects parental rights and authority, but also the sanctity of family and familial rights. The importance of family “stems from the *emotional attachments* that derive from the intimacy of daily

association,” not from any biological relationship. *Smith v. Organization of Foster Families for Equality and Reform* (1977), 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (emphasis added). Thus the right to maintain and pursue these intimate familial associations is a fundamental right protected by the due process clause of the Fourteenth Amendment. *Moore v. City of East Cleveland*, 431 U.S. at 503.

While the United States Supreme Court has never had the opportunity to determine whether siblings have a due process right to maintain and pursue their relationship, other federal and state courts have explicitly held that siblings do in fact possess such a fundamental right. *Rivera v. Marcus* (C.A.2 1982), 696 F.2d 1016 (substantive due process clause protected the liberty interests of half-siblings because half-sister had important liberty interest in maintaining the integrity and stability of her family); *L.H. v. G. and H.* (N.J. Super. Ct. 1985), 497 A.2d 215, 218 (siblings found to have natural and inalienable right to establish and nurture their relationship with one another); *In re Adoption of Anthony* (N.Y. Fam. Ct. 1982), 448 N.Y.S.2d 377, 381 (ongoing visitations ordered between siblings when one child has been placed for adoption).

In recognizing the liberty interest of maintaining and pursuing a sibling relationship, courts have relied upon the emotional attachment among siblings to determine the importance of the familial relationship and the protection due. *Whalen v. County of Fulton* (C.A.2 1997), 126 F.3d 400, 405-06 (right to maintain sibling relationship will be granted protection under the substantive due process clause when siblings lived together and had an ongoing relationship). Furthermore, courts have reaffirmed the importance of the sibling relationship in finding that a state cannot interfere with a sibling relationship and the existence of a policy which interferes with one’s liberty interest in sibling associations may warrant judicial relief. *Aristotle P. v.*

Johnson (N.D. Ill. 1989), 721 F. Supp. 1002, 1007-08 (holding that motion to dismiss §1983 claim inappropriate where plaintiffs have alleged that the state failed to facilitate visits between siblings involuntarily placed in foster care).

To uphold the termination of parental rights and the granting of permanent custody to FCCS as to Thanh would jeopardize the sibling relationship between Thanh and Hau. Hau and Thanh are biological brothers who have lived together in the same foster home since January 2003. Transcript of September 22, 2004, p. 81, ln. 3-18. At that time, Hau was three years old and Thanh was four days old. *Id.* at lns. 6-18. Hau and Thanh have not been separated since that time and the two have formed a strong emotional bond. Based upon their intimate and daily associations and the bond between them, Hau and Thanh have a federal due process right to maintain and pursue their relationship, a right that is fundamental. If it were determined that the termination of parental rights as to Hau was reversible error, but the termination of rights as to Thanh was sound, the boys' sibling relationship and the rights associated with that relationship would be at risk. Thus, in order to preserve the rights of Hau and Thanh to maintain their relationship, this Honorable Court must reverse and remand the termination of parental rights and commitment of Thanh to the permanent custody of FCCS.

2. Hau and Thanh Have A State Constitutional Right To Maintain Their Relationship, So Permanent Custody Cannot Be In Thanh's Best Interest If It Is Not In Hau's Best Interest.

State courts are not precluded from relying on their own constitutions to provide broader protections for individual rights independent of protections afforded by the United States Constitution. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163 (stating in paragraph one of the syllabus, "[t]he Ohio Constitution is a document of independent force...[s]tate courts are unrestricted in according greater civil liberties and protection to

individuals and groups.”). While the Ohio Supreme Court has never had the opportunity to explicitly recognize a constitutional right to maintain a sibling relationship, the foundation for such a right exists within Ohio law. Article I, §1 of the Ohio Constitution protects the liberty of the individual. *American Cancer Society v. City of Dayton* (1953), 160 Ohio St. 114, 122, 114 N.E.2d 219.

Within the traditions and values in Ohio law, there is recognition of the importance of familial relationships and protection for sibling relationships. The Second District Court of Appeals discussed parental rights as one of “those rights secured by natural law which Article I, Section 1 of the Ohio Constitution was intended to protect from infringement by the police power of the state.” *State v. Hause* (Aug. 6, 1999), 2d. Dist. No.17614 (relying on Ohio Const. Art. I, § 1 and *Santosky v. Kramer* (1982), 455 U.S. 745). Similarly, *State v. Suchomski* (1991) 58 Ohio St.3d 74, 567 N.E.2d 1304, supported the related notion that parents have a right to raise their children by imposing reasonable physical discipline.

Similar to the cases which recognize the special nature of familial relations, numerous Ohio statutes demonstrate the recognition and value Ohio places upon the special relationship between siblings. For example, R.C. § 2151.414(D)(1) requires that in determining the best interest of a child in a hearing on a motion for permanent custody, the trial court shall consider all relevant factors including, “[t]he 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[.]” (emphasis added). Similarly, the Ohio legislature recognized the special status of birth siblings in promulgating R.C. § 3107.49, which controls the release of information from an adopted person’s file. R.C. § 3107.49 authorizes the Ohio Department of Health to assist only two categories of people in uncovering this information:

birth parents and birth siblings. Such statutes indicate the intent of the Ohio legislature to afford protection to the sibling relationship.

To uphold the termination of parental rights and the granting of permanent custody to FCCS as to Thanh would jeopardize the sibling relationship between Thanh and Hau. In the case presently before this Court, Hau and Thanh are biological brothers that have lived together in the same foster home since January 2003. Transcript of September 22, 2004, p. 81, ln. 3-18. At that time, Hau was three years old and Thanh was four days old. Id. at lns. 6-18. Hau and Thanh have not been separated since that time and the two have formed an emotional bond. Based upon their intimate and daily associations, Hau and Thanh have a state due process right to maintain and pursue their relationship. For this reason, this Honorable Court must reverse and remand the granting of permanent custody as to Thanh, to preserve the relationship between Hau and Thanh and protect their rights to maintain and pursue their sibling relationship.

III. The Trial Court Erred By Failing To Determine By Clear And Convincing Evidence That Hau Vu And Thanh Vu Could Not Be Placed With Appellant-Mother Within A Reasonable Time Period.

R.C. § 2151.414(E) states that in order for a trial court to determine “whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence.” R.C. § 2151.414(E) further mandates that a court find by clear and convincing evidence that one or more of the enumerated factors in R.C. § 2151(E)(1) through R.C. § 2141(E)(16) exists. R.C. § 2151.414(E)(1) provides 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. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties." R.C. § 2151.414(E)(1). Further, R.C. § 2151.414(E)(4) states that, "[t]he parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child." R.C. § 2151.414(E)(4).

Where the burden of proof at the trial court level was clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54 citing *Ford v. Osborne* (1887), 45 Ohio St. 1, 12 N.E. 526, paragraph two of the syllabus. In examining whether a trial court had sufficient evidence, it is "firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court." *Id.*

In finding that Hau Vu and Thanh Vu could not be placed with either parent within a reasonable period of time, the trial court found the following "parental deficiencies":

The parents have failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the home for over two years.

The parents have failed to adequately utilize the services including social services, other rehabilitations and material resources.

The parents have shown an inability to provide an adequate permanent home for the child at the present time and in the foreseeable future.

The parents have demonstrated a lack of commitment to the child by actions that show an unwillingness to provide an adequate permanent home.

The child's parents have demonstrated significant deficiencies and problems, which will not permit the child to be placed with either of his parents within a reasonable period of time and the child, should not be placed with either parent.

Permanent Custody Judgment Entry (02 JU 13885), No. 146 and (03 JU 907), No. 105. Thus, in finding that Hau Vu and Thanh Vu could not "be placed with either parent within a reasonable period of time or should not be placed with the parents," the trial court relied on R.C. §§ 2151.414(E)(1) and 2151.414(E)(4).

In contrast to its own conclusion as to parental deficiencies, the trial court simultaneously found that Appellant-mother had completed the case plan requiring parenting classes, drug assessment and counseling and mental health evaluation. Permanent Custody Judgment Entry, Findings of Fact (02 JU 13885), No. 150 and (03 JU 907), No. 105. The record indicates that within five months of her release from jail, Appellant-mother completed a drug and alcohol assessment, a psychological evaluation, and parenting classes as required by the case plan and was on a wait list for counseling. SAR (02 JU 13885), No. 81 and (03JU 907), No. 31.

Despite the trial court's conclusion as to parental deficiencies in failing to adequately utilize services, the record shows that the Appellant-mother did in fact utilize the services prescribed by the case plan. In fact, she completed the services prescribed, including a drug and alcohol assessment, a psychological evaluation, and parenting classes as required by the case plan and was on a wait list for counseling. The record is devoid of evidence as to what the specific services Appellant-mother failed to utilize, thus not providing any competent, credible evidence that her "failure to utilize" services was a justifiable conclusion.

Despite the trial court's conclusion that Appellant-mother showed an inability to provide an adequate permanent home, the record shows that Appellant-mother actively worked to improve her economic situation in order to provide an adequate, permanent home. Appellant-

mother maintained employment while she attended cosmetology classes and until she received her Nail Technician licensure in May 2004. Transcript of September 22, 2004, p. 120, Ins. 18-25 and p.157, Ins. 20-25 to p.158, Ins. 1-25. At that point, Appellant-mother acquired the typical unpaid internship, after which she was hired as a Nail Technician. Transcript of September 22, 2004, p. 159, Ins. 21-25. From that point forward, Appellant-mother has consistently received income by being employed as a Nail Technician. Transcript of September 22, 2004, p. 123, Ins. 11-24. Appellant-mother's continued employment paired with her improved education, is competent, credible evidence that Appellant-mother was motivated to improve the family's economic position and better provide for herself and her children.

In contrast to the trial court's conclusion that Appellant-mother has demonstrated a lack of commitment toward Hau Vu and Thanh Vu, evidence on record shows the contrary. Appellant-mother visited with the children and spoke daily to the children by telephone prior to the termination of parental rights. SAR (02 JU 13885), No. 116 and (03 JU 907), No. 76; Transcript of September 22, 2004, p. 80, Ins. 18-20; Transcript of September 22, 2004, p. 138, In. 6 to p. 139, In. 6; Transcript of September 22, 2004, p. 143, Ins.7-25 to p. 144, Ins. 1-7. In fact, the Appellant-mother at various times has had periods of unsupervised visitations with the children, including after FCCS filed its motion for permanent custody. See, SAR(02 JU 13885), No. 55; Mtn to Extend TCC (02 JU 13885), No. 64; Motion for Continuance (02 JU 13885), No.73-77, (court ordered unsupervised visitation); Magistrate's Decision to extend TCC and finding significant progress on case plan (02 JU 13885), No. 85; Motion for Continuance (02 JU 13885), No. 97-104, (court allows FCCS to expand visitation upon progress of case plan); Visitation Order (02 JU 13885), No. 129, (granting unsupervised visitation).

Further, there is no evidence on the record that any of Appellant-mother's housing has in fact been inadequate. Appellant-mother testified at trial as to the history of her housing situation during the course of the proceedings. Appellant-mother lived with the Appellee-father in an apartment on Komo from August 2003 until February 2004. Transcript of September 22, 2004, p. 11, Ins. 15-22. The two parents then moved together to an apartment on Primrose from February 2004 until August 2004. Transcript of September 22, 2004, p. 8, Ins. 22-25, to p.9, Ins. 1-5. Appellee-father was subsequently incarcerated and because the Primrose lease was in his name, Appellant-mother was forced to seek alternative housing on August 20, 2004. *Id.* Appellant-mother then lived with an employer in Lancaster for a week, but moved back to Columbus when her car broke down and she wasn't able to get to the visits with her children. Transcript of September 22, 2004, pg. 10, Ins. 9-12. Appellant-mother then stayed with friends for a week while she waited for approval of her lease application for an apartment on Haviland. Transcript of September 22, 2004, pg. 9, Ins. 9-17. Appellant-mother signed a lease for the apartment on Haviland on September 18, 2004. Transcript of September 22, 2004, pg. 8, Ins. 6-23.

The only concern asserted as to the adequacy of Appellant-mother's housing was that Appellant-mother was cohabitating with the father of the children and the father had not completed the parenting classes and other services prescribed by the case plan. Transcript of September 22, 2004, p. 86, Ins. 18-25 to p. 87, ln. 23. Based upon the father's failure to complete the services necessary to remedy the conditions causing the children to be placed outside the home, Appellant-mother has in fact established separate, permanent housing immediately prior to the termination trial. Transcript of September 22, 2004, p. 8, Ins. 6-23. There is no evidence on the record that Appellant-mother's newly established housing is

inadequate in any manner. It is thus contrary to the evidence to conclude that Appellant-mother is unable to provide an adequate permanent home or that she demonstrated a lack of commitment to the children by not providing an adequate permanent home.

The trial court also found that “the parents have missed over 50% of the drug screens. The mother’s drug of choice is cocaine.” Permanent Custody Judgment Entry (02 JU 13885), No. 146 at p. 2 and (03 JU 907), No. 105 at p. 2. Arguably, the trial court used this finding to underpin its conclusion that the “child’s parents have demonstrated significant deficiencies...” Id. at p. 5. However, the record reflects that Appellant-mother completed all of the services prescribed by the case plan including a drug and alcohol assessment. Transcript of September 22, 2004, p. 35, lns. 5-10. Credible testimony was presented by Appellant-mother that any missed screens were the result of either her lack of transportation or her mother mistakenly throwing away the paperwork regarding specific urine screens. Id. at p. 36, lns.13-21. Furthermore, the record indicates that Appellant-mother was granted unsupervised visitation subsequent to the alleged missed drug screens. Transcript of September 22, 2004, p.136, lns. 11-25 to p. 138, ln. 5. If the missed drug screens were not sufficient to preclude Appellant-mother from having unsupervised visitation, it can hardly be considered competent, credible evidence for the purpose of terminating parental rights. Thus, it is not clear that the trial court had sufficient evidence to satisfy the requisite degree of proof to terminate the parental rights of Appellant-mother.

Finally, there is evidence on the record that it may have been possible for the children to be placed with the Appellant-mother within a reasonable period of time. FCCS granted the Appellant-mother unsupervised visitation in May of 2004 subsequent to filing its motion for permanent custody, which suggests that reunification was a foreseeable outcome. Visitation

Order (02 JU 13885), No. 129 and (03 JU 907), No. 86-88. In fact, the SAR date April 22, 2004 reflects the agency's anticipation that the motion for permanent custody would be withdrawn provided the parents "continue[d] to do well." SAR (03 JU 907), No. 76. The SAR further indicated that the Appellant-mother had been drug-free for over four months and was attending drug and alcohol counseling at Project Linden. *Id.* At the April 22, 2004 SAR, the agency recommended that the children's custody arrangement for the following six months be modified from temporary custody to FCCS to court ordered protective supervision, a significantly less restrictive custody arrangement. *Id.* Moreover, on May 18, 2004, the magistrate ordered that the Appellant-mother was to have unsupervised visitations with the children. Visitation Order (02 JU 13885), No. 129 and (03 JU 907), No. 86-88. Despite these facts in the record, there is no evidence as to why FCCS proceeded on its motion to terminate parental rights or as to what changed factually to cause them to do so.

Therefore, the trial court erred in determining that the children could not be placed with either parent within a reasonable period of time because there was not clear and convincing evidence to make such a determination. This case must therefore be reversed and remanded for a proper determination of whether the children could be placed with either parent within a reasonable period of time.

IV. The Trial Court Erred in Ordering Permanent Commitment of Hau Vu and Thanh Vu Because the Guardian Ad Litem Before the Trial Court Had a Conflict of Interest and Should Have Withdrawn.

The public defender representing Hau and Thanh Vu as guardian ad litem faced a conflict of interest throughout the proceedings to terminate parental rights and the Supreme Court of Ohio has held that such a conflict constitutes reversible error. *State v. Manross* (1988), 40 Ohio St.3d 180, 532 N.E.2d 735; *State v. Gillard* (1997), 78 Ohio St.3d 548, 679 N.E.2d 276.

A. The Guardian Ad Litem Was Ethically Bound To Withdraw As Guardian Ad Litem Because His Office Represented Appellant-Mother In Criminal Proceedings That Formed A Basis For the Trial Court's Decision To Terminate Parental Rights.

Ohio has modeled its code of professional responsibility on the American Bar Association's Model Code of Professional Responsibility. *Sarbey v. Natl. City Bank, Akron* (1990), 66 Ohio App.3d 18, 583 N.E.2d 392. Disciplinary rule 5-105(A) prohibits an attorney from accepting employment if it would be likely to involve him in representing differing interests. Code of Prof.Resp., DR 5-105(A). Disciplinary rule 5-105(D) requires that if a lawyer must decline employment under a rule, no other lawyer affiliated with him or his firm may accept such employment. Code of Prof.Resp., DR 5-105(D).

Separate public defenders are not independent of one another, as a public defender's office is a single legal entity. *State v. Dillman* (1990), 70 Ohio App.3d 616, 591 N.E.2d 849 (overruled on other grounds). In *State v. Buchanan* (June 10, 1997), 10th Dist. No. 96APA11-1527, this Honorable Court found that an improper conflict of interest arose when the Franklin County Public Defender's office, which represented defendant Buchanan in his criminal proceedings, was also appointed to represent his alleged child victims as guardian ad litem. *Id.* at *2. Representing Buchanan as counsel and his children as guardian ad litem qualified as improper dual representation, even though the representation of the children was solely as guardian ad litem. *Id.*

At the time it was appointed guardian ad litem for Hau and Thanh Vu, the Franklin County Public Defender's office (hereinafter "PD") was representing Appellant-mother in criminal proceedings. The PD was therefore obligated to decline representation of Hau and Thanh in the termination of parental rights proceeding where Appellant-mother's rights were at risk. However, the PD continued to represent both parties in its respective roles as attorney for

Appellant-mother and guardian ad litem for the children. Although the PD was appointed to represent Hau and Thanh solely in the capacity of guardian ad litem, such representation is implicated by the prohibitions in the Code of Professional Responsibility and by Ohio case law.

Pursuant to disciplinary rule 5-105(D) and this Court's prior holdings, it was improper for anyone in the PD's office to represent the children. Code of Prof.Resp., DR 5-105(D). The Franklin County Public Defender's office is analogous to any other law firm, and attorneys are precluded from representing interests inapposite to those of a client represented by other individuals within the office. *State v. Dillman* (1990), 70 Ohio App.3d 616, 591 N.E.2d 849 (overruled on other grounds). Thus, the guardian ad litem had a responsibility to withdraw as guardian ad litem, and he ignored that responsibility. Due to this improper conduct and the existing conflict of interest, this Honorable Court must reverse and remand this case so that all parties involved may have fair representation at the termination of parental rights proceedings.

B. The Guardian Ad Litem's Representation Of Appellant-Mother In Other Proceedings Created The Appearance Of Impropriety

Canon 9 of the Code of Professional Responsibility provides that lawyers should avoid even the appearance of impropriety. EC 9-6. *Columbus Bar Assn. v. Plymale* (2001), 91 Ohio St.3d 367, 371, 745 N.E.2d 413; *Kala v. Aluminum Smelting and Refining Company, Inc.* (1998), 81 Ohio St.3d 1, 5, 688 N.E.2d 258. In fact, the duty of an attorney to avoid the appearance of impropriety creates a duty for the court to "safeguard the preservation of the attorney-client relationship" in order to "maintain public confidence in the legal profession and assist in protecting the integrity of the judicial proceeding." *Kala v. Aluminum Smelting and Refining Company, Inc.* (1998), 81 Ohio St.3d 1, 5, 688 N.E.2d 258.

When one law firm represents two parties with diverging interests, the appearance of impropriety arises. In fact, the appearance of impropriety can arise in situations broader than one

firm representing two opposing parties. For example, in situations where an attorney leaves a law firm and becomes employed by another law firm representing an opposing party to a client of the former law firm, the presumption of shared confidences arises. Such a presumption is that an “attorney takes with him or her any confidences gained in the former relationship and shares those confidences with the new firm.” *Kala v. Aluminum Smelting and Refining Company, Inc.* (1998), 81 Ohio St.3d 1, 5, 688 N.E.2d 258. The presumption of shared confidences requires the attorney and the new law firm to be disqualified from the case at issue. *Id.*

In the case presently before this Court, the PD represented both Appellant-mother as her criminal defense attorney and Hau and Thanh Vu as guardian ad litem in proceedings against her. Such divergent interests give rise to the presumption of shared confidences and creates an appearance of impropriety, requiring the PD to be disqualified from his representation as the children’s guardian ad litem. A confidential, attorney/client relationship existed between Appellant-mother and the PD. The PD’s duties to Appellant-mother existed at the time it accepted appointment as guardian ad litem for Hau and Thanh Vu in the dependency and termination of parental rights proceedings.

In representing Hau and Thanh Vu as guardian ad litem, the PD had access to confidences that arose out of the PD’s representation of Appellant-mother in other proceedings. While it is clear on the record that his recommendation was for the children to be placed in the permanent custody of FCCS, the record is unclear as to upon what information the guardian ad litem relied in making that recommendation. Transcript of September 22, 2004, p.169, lns. 19-23. It is not beyond belief that the guardian ad litem could have been unfairly influenced by confidential information within the PD’s office as to Appellant-mother’s other proceedings, her probation, or any other confidential information contained within Appellant-mother’s file. The

fact that the guardian ad litem could have been influenced by confidential information regarding Appellant-mother indicates the possibility of improper conduct. As guardian ad litem, he represented interests which may have been, and which he ultimately represented were, in opposition to another client, thus requiring him to withdraw himself as guardian ad litem.

The PD conceded that an improper conflict existed in its representation when it moved this Court to allow it to withdraw as guardian ad litem-Appellee counsel. In its motion to withdraw as appellate counsel, the PD stated that it was currently representing Appellant-mother on a case in which she is on probation to the Franklin County Common Pleas Court, and that it also represented her on the underlying felony. The motion stated that the felony conviction and resulting probation were discussed during the course of the permanent custody trial, and because of this conflict the PD asked to withdraw as guardian ad litem. Thus, the PD should not have accepted the appointment as guardian ad litem in the first place and should have withdrawn prior to the termination trial in order to ensure that no appearance of impropriety tainted the proceedings.

CONCLUSION

For the reasons set out above, the trial court erred in terminating the parental rights of Appellant-mother and granting permanent custody of Hau Vu and Thanh Vu to FCCS and this Honorable Court must reverse and remand this case for a proper proceeding consistent with the constitutional rights of Hau Vu and Thanh Vu and consistent with Ohio law.

Wherefore, Appellant-Guardian ad litem respectfully requests that this Honorable Court reverse and remand the decision of the trial court for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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