

**IN THE COURT OF APPEALS OF IOWA**

No. 6-480 / 06-0718  
Filed August 9, 2006

**IN THE INTEREST OF S.F.,  
Minor Child,**

**S.F., Minor Child,**  
Appellant.

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Appeal from the Iowa District Court for Clinton County, John G. Mullen,  
District Associate Judge.

A minor appeals from the juvenile court's entry of a permanency order.

**VACATED AND REMANDED.**

Cheryl J. Newport of Newport & Newport, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney  
General, Michael L. Wolf, County Attorney, and Joel Walker, Assistant County  
Attorney, for appellee State.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

**HECHT, J.**

Sierra, who was born in 1991, was adjudicated as a child in need of assistance (CINA) under Iowa Code section 232.2(6)(f) (2003) in March of 2004 and placed in shelter care pending disposition. The basis for her adjudication was her serious mental impairment<sup>1</sup> for which she had been committed. Following her adjudication, Sierra went through a variety of placements, including foster care, shelter care, and group foster care.

On February 13, 2006, a hearing was held on the State's motion to modify a prior dispositional order in which it requested that Sierra be placed at the Iowa Juvenile Home. At this hearing, Sierra's guardian ad litem/attorney, David Pillars, asked that the court bifurcate the roles of guardian ad litem and attorney. Pillars noted that, as Sierra's guardian ad litem, he concurred with the Department of Human Service's (DHS) recommendation for placement at the Iowa Juvenile Home; however, he believed Sierra required separate counsel due to her stated desire to return to the care of her mother. In its subsequent order, the court stated: "The Court finds that the role of the attorney and guardian ad litem for the child should be separated." The court's order also modified Sierra's placement and placed her in the Iowa Juvenile Home.

A permanency hearing was held in April of 2006. Although Pillars was still serving as guardian ad litem, no attorney had yet been appointed to represent Sierra. Following the hearing, the court changed the permanency goal from family reunification to another planned placement arrangement and approved

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<sup>1</sup> Sierra has been diagnosed with oppositional defiant disorder and attention deficit hyperactive disorder.

Sierra's placement at the Iowa Juvenile Home. Also, the court again stated that it would accept attorney Pillars's recommendation to appoint separate counsel. Appointment of new counsel, however, was never accomplished. Sierra appeals, contending her fundamental right to be represented by counsel at the permanency hearing was violated.

### **Scope of Review.**

We generally review permanency proceedings de novo. *In re K.C.*, 660 N.W.2d 29, 32 (Iowa 2003). However, considering the statutory discretion granted to the court with regard to the bifurcation of the roles of guardian ad litem and attorney, we agree with the State that our review of the juvenile court's failure to appoint counsel is for abuse of discretion. See Iowa Code § 232.89(4) (2005) (providing the court "*may* appoint a separate guardian ad litem . . . .") (emphasis added).

### **Analysis.**

Iowa Code section 232.89(2) provides that "[u]pon the filing of a petition, the court shall appoint counsel and a guardian ad litem for the child identified in the petition as a party to the proceedings." The same individual may serve in both capacities. Iowa Code § 232.89(4). The same person filling both functions "obviates the expensive and burdensome practice of appointing both a guardian ad litem and attorney for each child in a family to ensure that the child's expressed wishes as well as best interests are advocated." *In re J.P.B.*, 419 N.W.2d 387, 391 (Iowa 1988). Section 232.89(4) further provides:

However, the court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the

child as guardian ad litem, or a separate guardian ad litem is required to fulfill the requirements of subsection 2.

Sierra maintains her lack of counsel deprived her of, among other things, her ability to cross-examine witnesses at the dispositional and permanency hearings, to submit evidence and testimony on her behalf, to object to exhibits which were offered by the State, and to attempt to prove the progress she had made through April. She further claims prejudice may be presumed as a result of the denial of her request for independent counsel.

It is apparent that not only attorney Pillars, but also the court, comprehended a conflict between the roles of guardian ad litem and attorney under the circumstances of this case. Pillars stated at the permanency hearing:

Your Honor, I would at this time state that last time I spoke with Sierra at the last hearing and just previous to today's hearing, it is my understanding Sierra does wish to go home and reunify with her mother and return to her mother's home and does not agree with the Iowa Juvenile Home placement. With that in mind, I believe that Sierra and I, as her Guardian ad litem, have a conflict in what we both feel is in her best interests. Previously I had reported to the court I felt there was a conflict and asked that an independent attorney be appointed to represent Sierra individually and I would be the Guardian ad litem. Again I would ask that the court grant that and appoint an attorney for her.

Later in the permanency hearing, after ordering Sierra to remain in the Iowa Juvenile Home, the court noted its agreement regarding bifurcation and stated:

In the meantime, I'm going to accept Mr. Pillars's recommendation and I'm going to appoint you a separate counsel. He's going to be—continue to be your Guardian ad litem, but you're going to have somebody else that you can talk to that's going to be advocating for you—what you want, so that's their sole responsibility. I don't know who that is yet. I'll have to pick somebody from the list that I think will do a good job for you. All right?

Upon our de novo review of the record, we agree that a conflict existed such that “the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the child as guardian ad litem.” Iowa Code § 232.89(4).

Our review of the record reveals that at least twice attorney Pillars requested that the roles of attorney and guardian ad litem be bifurcated, and at least twice that the court agreed and noted that separate counsel would be appointed. However, such counsel was never appointed. Moreover, it is clear that Pillars acted solely in his role of guardian at litem at the permanency hearing because he expressed his agreement with the recommendation of DHS and advocated for Sierra’s placement at the Iowa Juvenile Home.

We conclude the juvenile court abused its discretion when it failed to appoint legal counsel for Sierra after twice noting that this would be done. We vacate the permanency order, remand for the appointment of counsel for Sierra, and order that a new permanency hearing be held. We find this to be appropriate in that Sierra’s guardian ad litem and her attorney will likely make quite distinct arguments. *Compare In re G.Y.*, 486 N.W.2d 288, 289 (Iowa 1992) (noting that “[b]ecause justice by no means requires duplicitous arguments, it would be wholly unnecessary, and an obvious waste of the public treasury” to appoint separate counsel where the child’s wishes and best interests did not diverge).

**VACATED AND REMANDED.**