[Cite as *In re A.S.*, 2014-Ohio-4282.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 13 MA 182
	)	
A.S.	)	
	)	OPINION
	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Juvenile Division, of Mahoning County, Ohio
Case No. 11 JC 670

JUDGMENT: Vacated and Remanded.

APPEARANCES:

For Appellant A.Y.:

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For Appellee MCCS:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 24, 2014

[Cite as *In re A.S.*, 2014-Ohio-4282.]
WAITE, J.

{¶1} Appellant A.Y. is the mother of minor child A.S., and is challenging the judgment of the Mahoning County Court of Common Pleas, Juvenile Division, granting permanent custody of the child to Mahoning County Children's Services (MCCS). Appellant argues that the court should have held a hearing to determine whether A.S., who was five at the time of the final hearing, should have been given separate appointed counsel, or at least given a hearing on the matter of separate counsel. This case is analogous to another Seventh District case, *In re Moore,* 158 Ohio App.3d 679, 2004-Ohio-4544, which involved two children, ages five and six, who did not have counsel in their custody proceedings and no hearing was held to assess whether counsel should be appointed. *Moore* was reversed and remanded so that a hearing could take place regarding the appointment of separate counsel. Applying the same rationale to this appeal, the judgment of the trial court is vacated and the matter is remanded for further proceedings.

History of the Case

{¶2} On May 20, 2011, Appellant was stopped for a traffic violation. Police discovered there was an active warrant for her arrest and took her into custody. She had left her 3-year-old child, A.S. (d.o.b. 9/19/07) alone while she was out driving, and the child was placed in the custody of MCCS. Appellant was later charged with child endangerment. Appellant was provided a case plan that included a complete drug and alcohol assessment and that she follows the recommendations of the assessment, undergoing random drug tests, completing mental health treatment, and obtaining safe and stable housing. After Appellant's repeated failures to follow the

case plan, MCCS filed for permanent custody of the child. Final hearing before a magistrate began on February 26, 2013, and concluded on March 12, 2013. Seven witnesses testified at the hearing.

{¶3} The magistrate found that Appellant had numerous arrests, convictions and jail sentences while the child was in the custody of MCCS, had failed to follow through on numerous drug and mental health programs provided for her as part of her case plan, continued to use drugs and alcohol almost up to the date of the hearing, refused multiple random drug tests, and constantly provided excuses for failing to attend drug treatment appointments. Appellant was unemployed and lived with her boyfriend, who beat her in front of the child. The magistrate ordered A.S. to be permanently committed to MCCS with the power of adoption. Appellant filed objections, and an additional hearing was held on October 23, 2013. The court took some new evidence, and it was revealed that Appellant continued to ignore the case plan even after the magistrate's hearing, refused to take random drug tests, had recently tested positive for cocaine and alcohol use, continued to amass convictions, continued to refuse to deal with her mental health problems, and failed overall to achieve the terms of the case plan. The court overruled the objections and adopted the magistrate's decision on October 30, 2013. This timely appeal followed.

{¶4} The assignments of error will be discussed in reverse order because assignment of error number two is dispositive of this appeal.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN FAILING TO ASCERTAIN THE WISHES OF THE CHILD AND DETERMINING WHETHER SHE REQUIRED INDEPENDENT COUNSEL.

{¶5} Appellant argues that a child is a party to juvenile proceedings and has a separate right to counsel, citing *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1100, syllabus. Appellant cites our decision in *In re Moore,* 158 Ohio App.3d 679, 2004-Ohio-4544, for the proposition that a five-year-old child whose wishes were never ascertained was entitled to a hearing to determine whether separate counsel should have been appointed. Appellant is correct. It is well-established that a parent's right to raise a child is an essential and basic civil right: "The rights to conceive and to raise one's children have been deemed 'essential, * * * basic civil rights of man,' * * * and '[r]ights far more precious * * * than property rights.' " (Citations omitted.) *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). The permanent termination of parental rights has been described as, "the family law equivalent of the death penalty in a criminal case." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (1991).

{¶6} Based upon these principles, the Ohio Supreme Court has determined that a parent who is at risk of losing all parental rights over his or her child, "must be afforded every procedural and substantive protection the law allows." (Citation omitted.) *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, ¶14.

{¶7} R.C. 2151.352 states: "A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised

Code." In *Williams*, the Ohio Supreme Court, interpreting the plain language of R.C. 2151.352, concluded: "[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." *Williams* at syllabus; accord *In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, 951 N.E.2d 398. "[C]ourts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child." *Williams* at ¶17. The main problem in *Williams* was that the trial court failed to even hold a hearing to determine whether the child, who was six years old at the time of the final hearing, should have independent representation. *Id.* at ¶7. The child had consistently expressed a desire to be with the parent, but this desire was in conflict with the recommendation of the guardian ad litem to terminate parental rights. *Williams* did not specify the parameters surrounding when a child should be given independent appointed counsel, but it was clear that the child was, at the very least, due a hearing on the matter.

{¶8} Appellee argues that this issue was waived because Appellant failed to raise it at the trial court level. However, we decisively rejected that argument in *Moore*: "The Supreme Court [in *Williams*] accepted the idea that children involved in parental rights termination proceedings are parties whose due process rights are entitled to protection. It would be unfair to deny one party (the child) his or her due process rights because another party (the mother or father) failed to raise the issue for the child." (Citation omitted.) *Id.* at ¶31. As we noted in *Moore*, no one had

raised the issue of counsel for the child at trial in the *Williams* case either, and the job and family services agency in *Williams* claimed on appeal that the issue had been waived. *Moore* at ¶28-29. The waiver argument was reviewed by the Eleventh District Court of appeals and rejected. *In re Williams*, 11th Dist. Nos. 2002-G-2454, 2002-G-2459, 2002-Ohio-6588, ¶23. *Williams* was eventually affirmed by the Ohio Supreme Court, which held that a child is a party to juvenile proceedings and has a right to counsel in some circumstances pursuant to R.C. 2151.352. *Williams* at syllabus. If the question of the appointment of independent counsel was held not to be waived in *Williams*, it could not be waived in the instant matter particularly since the fact pattern is so similar: the child showed an interest in remaining with the parent, the guardian ad litem recommended terminating parental rights, and no hearing was held on the issue of appointing counsel for the child.

{¶9} Additionally, waiver of the right to counsel cannot be presumed in termination of custody cases. *In re J.S.*, 184 Ohio App.3d 310, 2009-Ohio-5189, 920 N.E.2d 1011, ¶15-16 (6th Dist.). This is particularly true when the waiver doctrine is being applied to a five-year-old child. Waiver is the "intentional relinquishment or abandonment of a known right." There is no indication that A.S., as a party to the action, intentionally relinquished the right to counsel. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶105.

{¶10} Appellant also cites to *Moore*, a Seventh District case even more analogous to the facts now before us. *Moore* involved a five-year-old and six-year-old whose desires as to custody were unknown and whose guardian ad litem recommended permanent custody without taking into account or inquiring into the

children's feelings and desires. *Moore* also noted that it was not discernible from the record whether the children actually required counsel. *Id.* at ¶37. The instant appeal also involves a five-year-old and there is very little evidence in the record as to the child's wishes, or even whether an inquiry was made as to the child's wishes. There is some evidence in the record that the child had an expectation she would be going home to her mother and was showing signs of stress over her current foster care situation. (3/12/13 Tr., pp. 129-130.) The guardian ad litem testified that she did not ask the child's wishes because of her young age. (3/12/13 Tr., p. 182.) A guardian ad litem who fails or refuses to ascertain the child's wishes about custody cannot be said to be representing the child's interests. *In re T.V.*, 10th Dist. Nos. 04AP–1159, 04AP–1160, 2005-Ohio-4280. Even though the record is replete with the mother's shortcomings, "without any evidence of the children's wishes before it, the court did not make, and could not have made, the meaningful determination *Williams* requires as to whether the children need separate counsel." *Id.* at ¶72. "Following *In re Williams*, 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[.]" *In re Brooks*, 10th Dist. Nos. 04AP–164, 04AP–202, 04AP–165, 04AP–201, 2004-Ohio-3887, ¶87. As in *In re Moore* and *In re T.V.*, there was no attempt in the instant case to discover A.S.'s feelings about custody. Yet, the guardian ad litem recommended in favor of granting MCCS permanent custody. This case is very similar to *Moore*, and like *Moore*, it must be remanded for the trial court to hold a hearing regarding whether A.S. should be appointed separate counsel.

{¶11} The dissent attempts to distinguish this case from *Moore* by noting that the guardian ad litem in *Moore* was a layperson, whereas in this case the guardian ad litem was an attorney. While this is a distinction, it serves to emphasize rather than undermine the conclusion that a hearing regarding appointment of counsel for the child should have taken place in this case. *Williams* made clear that the role of guardian ad litem is different than that of counsel, and that the two roles can and do conflict with each other. A guardian ad litem looks after the best interests of the child, whereas counsel must determine and zealously represent the child's wishes. *Williams* at ¶19. A guardian ad litem cannot act as the child's counsel unless specifically appointed to do so, and only where there is no conflict between the two roles. *Id.* When the guardian ad litem in this case specifically decided not to find out A.S.'s wishes regarding custody, both the guardian ad litem (who was an attorney) and the court should have realized that there may be a conflict between the guardian ad litem and the child and that the guardian ad litem could not represent the child as counsel. Both the court and the guardian ad litem should also have been aware that a five-and-one-half-year-old child may very well possess the maturity to express his or her wishes.

{¶12} The dissent would apply the waiver doctrine in this appeal because it assumes that Appellant's arguments regarding the appointment of counsel are a delaying tactic and are not made to vindicate the rights of the child. There is nothing in the record to support this conclusion. The dissent relies on the same waiver arguments rejected in *Williams* and in our *Moore* decision. Although the dissent would find waiver due to its concern about undue delay in the resolution of

permanent custody cases, the delay in such cases is not the fault of the child. Certainly the burden on the trial court of conducting a brief hearing or inquiry about the possible wishes of a child regarding custody, and whether separate counsel is needed to defend those wishes, is minimal compared to the enormity of the possible consequences, which is that the child may never have contact with his or her natural parents again. Any nominal delay caused by the appeal of such cases where a hearing on the matter should have been held but was not should be minimized due to the expedited nature of custody cases on appeal. App.R. 11.2(C).

{¶13} Appellant's second assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 1

> THE CLEAR AND CONVINCING EVIDENTIARY STANDARD REQUIRED FOR CHILDREN SERVICES TO TAKE PERMANENT CUSTODY OF A CHILD IS SUPPORTED BY THE DUE PROCESS CLAUSE, THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THERE IS AN ABUSE OF DISCRETION WHEN THAT STANDARD IS NOT MET RESULTING IN A CONSTITUTIONAL VIOLATION.

{¶14} As the matter is being remanded for a new hearing to determine whether the child should have separate counsel appointed, this removes any reason to address the weight of the evidence. The court must issue a new judgment regarding permanent custody regardless of its determination as to appointing independent counsel for the child. There is no way to predetermine the content of

that new judgment entry, making it premature to rule on the manifest weight of the evidence in this case. Appellant's first assignment of error is therefore moot.

Conclusion

{¶15} The record reflects that the permanent custody case under review involves a five-year-old child. The child was not asked about her desires regarding custody, was not provided independent counsel, and was not given a hearing as to whether she should be appointed counsel. A child is a party to a juvenile custody proceeding and has a right in some cases to independent counsel. When it is not clear whether the child should have counsel, and particularly where the wishes of the child have not been ascertained, the court is required to hold a hearing on the matter. The judgment of the trial court is vacated and the case is remanded for a hearing on whether to appoint counsel for A.S. Appellant's first assignment of error regarding the manifest weight of the evidence is moot since the judgment has been vacated.

Donofrio, J., concurs.

DeGenaro, P.J., dissents; see dissenting opinion.

DeGenaro, P.J., dissents.

{¶16} Because I take a different views of the facts here as well as the general and specific holdings in *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, and *In re Moore,* 158 Ohio App.3d 679, 2004-Ohio-4544, 821 N.E.2d 1039 in light of the Ninth District's decision in *In re T.E.*, 9th Dist. Summit No. 22835, 2006-Ohio-254, I respectfully dissent.

{¶17} The majority acknowledges *Williams* held that the determination of whether a child needs independent counsel should be made on a case-by-case basis, Majority, *supra*, at ¶7; nonetheless, the Ohio Supreme Court did not create a bright-line rule which the majority's analysis appears to suggest. For example, *Williams* noted that in some situations a dual guardian ad litem/attorney appointment can be made, and is proper, provided that dual capacity has been expressly made. *Williams* at ¶17-18. The logical inference is that in another case, it may not be appropriate. The linchpin is that the determination regarding a minor child's need for independent counsel is to be made on a case-by-case basis.

{¶18} The majority continues its analysis by rejecting Appellee's contention that Appellant has waived this argument based upon our prior decision in *Moore.* And while perhaps not rising to the level of concluding *Moore* is inapplicable, in *Moore* the guardian ad litem was a lay person, whereas here she was an attorney. This should not be any more dispositive than the fact that the child here and in *Williams* and *Moore* are of tender years. All the facts and circumstances of each case should be evaluated on a case-by-case basis. *Williams* is controlling precedent with regard to the general principles of law enunciated therein; however, the facts to which it applied those general legal conclusions are unique to that case. Said differently, while the legal holdings are controlling, its factual holdings have only persuasive value.

{¶19} In this vein, I find the legal analysis in *In re T.E.* more persuasive, as well as its facts, which are more analogous to this case procedurally.

> Mother has not asserted that the trial court committed plain error, nor has she explained why this Court should delve into this issue for the

> first time on appeal. Although some courts have held that a parent cannot waive the issue of the children's right to counsel because such a result would unfairly deny the children their right to due process, see, e.g., *In re Moore,* 158 Ohio App.3d 679, 2004-Ohio-4544 at ¶ 31, we disagree that the reasoning applies to this case. Mother has not appealed on behalf of her children and is not asserting their rights on appeal. This is Mother's appeal of the termination of her own parental rights and she has standing to raise the issue of her children's right to counsel only insofar as it impacts her own parental rights. See *In re Smith* (1991), 77 Ohio App.3d 1.
>
> The Ohio General Assembly and the Ohio Supreme Court have required courts to expedite cases involving the termination of parental rights, to prevent children from lingering in foster care for a number of years. See, e.g., R.C. Chapter 2151; App.R. 11.2. Mother should not be permitted to impose an additional delay in the proceedings by raising a belated challenge for the first time on appeal, under the auspices of defending her children's due process rights. She had the opportunity at the permanent custody hearing to timely assert their rights, and therefore her derivative rights, but she chose not to. This Court is not inclined to reward a parent for sitting idly on her rights by addressing an alleged error that should have been raised, and potentially rectified, in the trial court in a much more timely fashion.

Id. at ¶ 8-9.

{¶20} So too here. Although raising other objections, Appellant did not raise the lack of counsel for A.S. in the trial court. Nor has she argued any prejudice to herself or the child, merely arguing the child's wishes were not considered, without demonstrating how the case would have come out otherwise, but for the purported error. Appellant did not assign this error to vindicate the child's rights, but rather her own; arguing it is a basis to reverse the permanent custody order. Thus, this appears

to be a delay tactic. Accordingly, Appellant's second assignment of error is meritless, given the specific facts of this case.

{¶21} Regarding Appellant's first assignment of error, as summarized by the majority, there is clear and convincing evidence supporting the trial court awarding Appellee permanent custody of A.S. Majority, *supra*, at ¶2-3. Additionally, A.S. had been in Appellee's custody since age three and was five at the time of the permanent custody hearing. Appellant was terminated from or left no less than four intensive outpatient treatment opportunities, and her criminal activities spanned four counties. Accordingly, this assignment of error is meritless.

{¶22} For these reasons, the trial court's decision should be affirmed, and permanent custody of A.S. awarded to Appellee.