

IN THE SUPREME COURT OF OHIO

In the Matter of:

Malcolm Williams
Neglected and Dependent Child

In the Matter of:

Shaquille Williams
Neglected and Dependent Child

-vs-

Geauga County Job and Family Services

Appellant

Case No.: 03-1466

On Appeal From the
Geauga County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case Nos. 2003-G-2498;
2003-G-2499

**BRIEF OF *AMICI CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AND THE JUSTICE FOR CHILDREN PROJECT IN SUPPORT OF
APPELLEE DAKOTA WILLIAMS**

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INTEREST OF THE AMICI CURIAE

Amicus Curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families and the direct legal representation of children and their interests in the courts. Through its production of scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. In its representation of individual clients through the Justice for Children Practicum, a one-semester course open to eligible third-year law students certified as Legal Interns by the Ohio Supreme Court, the Justice for Children Project strives to advance the cause of children's rights.

The Project is grateful for the assistance provided by many law students in the preparation of this brief. The Project acknowledges in particular the assistance of students Megan Boiarsky, Melissa Callais, and Stephanie Vermeer.

The Justice for Children Project has undertaken the role of *Amicus Curiae* in this litigation as part of its overall mission to secure a legal solution that would benefit the children in this permanent custody proceeding and urges reversal of the trial court's finding that the appointment of counsel for the children was not necessary. The Justice for Children Project has no relationship to any of the individuals involved in this litigation.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a statewide association of over six hundred (600) public defenders and private attorneys who practice primarily in the fields of criminal and juvenile law. The Association was formed for charitable, educational, legislative and scientific purposes with the goal of advancing the interests of society and protecting the rights of citizens and other persons subjected to the laws of the State of Ohio and the United States.

The OACDL has an interest in protecting the integrity of the justice system and ensuring fair and equal treatment under the law. In juvenile proceedings, the Association has supported the due process and counsel rights of those youth charged with delinquency offenses as well as those children who are the subject of permanent custody motions. The Association firmly believes that children in permanent custody proceedings must have a voice in the courtroom and that their rights must be protected by attorneys who serve as their advocates. Because of the nature of these proceedings, the right to counsel is morally necessary, statutorily protected, and constitutionally guaranteed. The action of the trial court in the present case had the effect of depriving the children of their family without a voice in the proceeding and an advocate for their position. The OACDL urges this Court to reject the holding of the trial court and adopt a broad rule protecting the due process rights of children in permanent custody cases. In addition, the Association asks this Court to require trial courts to conduct hearings when there is any information indicating that the wishes of the child differ from the recommendation of the child's guardian ad litem.

STATEMENT OF THE CASE AND FACTS

Amici hereby accept and adopt the Statement of the Case and Facts set forth in the Merit Brief of Appellee Dakota Williams.

ARGUMENT

FIRST PROPOSITION OF LAW

A child has constitutional rights to appointed counsel in a permanent custody proceeding.

It is well settled that children have constitutional rights; those rights do not mature and come into being only when children reach the age of majority. *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788. The rights of Malcolm and Shaquille to be heard and represented in a permanent custody proceeding are grounded not only in the Ohio Juvenile Rules but in the United States and Ohio Constitutions. Amici curiae respectfully submit that the actions of the trial court below infringed on the children's First Amendment rights of association. Moreover, because Malcolm and Shaquille have a fundamental right to maintain and pursue a parent-child relationship pursuant to the Fourteenth Amendment to the United States Constitution and Sections 1 and 16, Article I, of the Ohio Constitution, the failure to provide these children with appointed counsel violates their federal and state procedural due process rights.

A. Children have a fundamental right to family integrity under the Substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment Substantive Due Process Clause mandates that the state provide an adequate reason for any deprivation of life, liberty, or

property. The adequacy of that reason turns on the nature of the right infringed; thus, if the proposed state action infringes on a fundamental right, substantive due process is satisfied only if the proposed action serves a compelling governmental purpose. Moreover, such action mandates strict scrutiny by the reviewing court; that is, the court must be persuaded that a truly vital governmental interest is served by the action in question. *See, e.g., Washington v. Glucksberg* (1977), 521 U.S. 702, 719-21, 138 L.Ed.2d 772, 117 S.Ct. 2258.

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. The family unit garners considerable constitutional protection precisely because the institution of the family is “deeply rooted” in our history and tradition and provides the means for the inculcation and transmission of important moral and cultural values. *Id.* at 503-04, 97 S.Ct. at 1938. Moreover, the concept of a family is a broad one, encompassing not just a nuclear family but an extended family as well, which may include aunts, grandparents, or even cousins. *Id.* at 504, 97 S.Ct. at 1938. As the United States Supreme Court noted in *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, the importance of the family “stems from the *emotional attachments* that derive from the intimacy of daily association” (emphasis added), not from any biological relationship. Thus the right to maintain and pursue intimate familial associations is a fundamental right protected by the Substantive Due Process Clause of the Fourteenth Amendment. *Moore v. City of East Cleveland*, 431 U.S. at 503, 97 S.Ct. at 1938.

Moreover, these rights are rights of the family and of the individuals in that association; they are not simply the rights of parents to the care, custody, control, or upbringing of their children. For example, the Court in *Moore v. City of East Cleveland*, 431 U.S. at 502, 97 S. Ct. at 1937, held that the Due Process Clause protects more than just parental rights and authority; it also protects the sanctity of the family and familial rights. Nor are the hallmarks of living in a family--intimacy and emotional attachment--only experienced by parents. The Court has noted that these characteristics, even advantages, of familial arrangements are important to all the individuals involved because of "the emotional attachments that derive from the intimacy of daily association." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. at 844, 97 S. Ct. at 2109. Because the right to maintain familial relationships is a fundamental right, substantive due process provides heightened protection against any state regulation. *Troxel v. Granville* (2000), 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49.

As the child's voice is seldom heard, the United States Supreme Court has never explicitly clarified whether children have a substantive due process right to maintain and pursue their relationships with their parents. The Court nevertheless has alluded to the child's right to familial integrity. In *Santosky v. Kramer* (1982), 455 U.S. 745, 760, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599, the Court noted that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship." In *Troxel v. Granville*, Justice Stevens, in his dissenting opinion, noted that "children are in many circumstances possessed of constitutionally

protected rights and liberties.” *Troxel*, 530 U.S. at 88 n.8, 120 S.Ct. at 2072 n.8 (Stevens, J., dissenting). The Court’s “prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.” *Id.* at 88-89, 120 S.Ct. at 2072 (Stevens, J., dissenting). Thus, it is “extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too do children have these interests.” *Id.* at 88, 120 S.Ct. at 2072 (Stevens, J., dissenting).

The lower federal courts also have recognized the child’s liberty interest in maintaining the parent-child relationship. The Second Circuit has held that “the most essential and basic aspect of familial privacy [is] the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.” *Duchesne v. Sugarman* (C.A. 2, 1977), 566 F.2d 817, 825. Similarly, the Seventh Circuit Court of Appeals found “equally fundamental...the right of a child to be raised and nurtured by his parents.” *Doe v. Heck* (C.A.7., 2003), 327 F.3d 492, 518 (citing *Santosky v. Kramer*, 455 U.S. at 760, 102 S.Ct. 1388, 71 L.Ed.2d 599). The First Circuit, too, has recognized the child’s right to maintain and preserve the parent-child relationship. *Suboh v. District Attorney’s Office of Suffolk Dist.* (C.A. 1, 2002), 298 F.3d 81, 91 (child has a liberty interest in being in care and custody of parent).

In the case at bar, there is little doubt that Malcolm and Shaquille have a liberty interest at stake. Malcolm and Shaquille have not only a biological but an

emotional bond to their mother that directly implicates familial attachments. In fact, the record below is replete with references to the difficulty Malcolm has had in being separated from his mother. *In re Williams*, ¶ 27. The state proposes to sever that bond permanently. Malcolm and Shaquille’s right to family integrity thus is directly infringed by the state’s decision to irrevocably terminate the parent-child relationship.

B. Children have a substantive due process right to family integrity under Article I, Section 16 of the Ohio Constitution.

Article I, Section 16, when read in conjunction with Sections 1, 2, and 19, affords protection analogous to that provided by the Fourteenth Amendment Due Process Clause. *State ex. rel Heller v. Miller* (1980), 61 Ohio St. 2d 6, 8, 399 N.E.2d 66, 67. “As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the Ohio Constitution.” *Id.* Of course, state courts may rely on their own constitutions to provide broader protection for individual rights independent of protections afforded by the United States Constitution. “The Ohio Constitution is a document of independent force. . . . [S]tate courts are unrestricted in according greater civil liberties and protection to individuals and groups.” *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 35, 616 N.E.2d 163, 164.

Ohio has long recognized the importance of familial relationships. The right to raise a child is an “essential” civil right. *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680. Because the parental right to custody is paramount, the decision to terminate that right is “the family law equivalent of the death penalty

in a criminal case.” *Id.* But this Court also has recognized the “child has legal and constitutional rights and that the juvenile courts were created, in part, to protect those rights.” *In re Baby Boy Blackshear* (2000), 90 Ohio St.3d 197, 200, 736 N.E.2d 462. Thus this Court has stated that both “a parent and child have substantial, protected rights in their family relationship under the due process clause” of the federal and Ohio Constitutions. *State ex rel. Heller v. Miller*, 61 Ohio St.2d at 10, 399 N.E.2d at 68.

Both Malcolm and Shaquille have a substantial interest in maintaining their relationship with their mother. Malcolm has consistently expressed a desire to be reunited with his mother, a fact acknowledged by other adults working closely with Malcolm and his mother. *In re Williams*, ¶ 20. Moreover, the attachments that a child as young as Shaquille have formed with his primary caregiver are extremely important to the child’s development. That loss of attachment can have far-reaching and negative consequences for the child. See, e.g., Nancy Weinfield, *Comments on Lamb’s “Placing Children’s Interests First,”* 10 Va. J. Soc. Pol’y & L. 120, 121 (2002). To terminate the parent-child relationship without a significant understanding of the effects on Shaquille clearly implicates his right to familial integrity.

C. Children may not be deprived of a protected liberty interest without due process of law under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

The Fourteenth Amendment to the United States Constitution establishes that “no state [shall] deprive any person of life, liberty, or property, without due process of law.” To apply procedural due process, a state must take action to

deprive an individual of a protectable interest in life, liberty, or property. See *Bd. of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 570-73, 92 S.Ct. 2701, 3 L.Ed.2d 548. Judicial action qualifies as state action for procedural due process purposes. *Shelley v. Kraemer* (1948), 334 U.S. 1, 14, 68 S.Ct. 836, 92 L.Ed. 1161. The Supreme Court clearly has established that familial relationships are a liberty interest encompassed by the due process clause. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. at 499, 97 S.Ct. 1932, 52 L.Ed.2d 531.

In 1976, the Supreme Court created a three-part balancing test to determine what process is due when an individual has been deprived of a liberty interest. *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18. The three factors set out by *Mathews* are:

[F]irst, the private interest that will be affected through the procedures used; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Three critical procedural due process rights are the right to notice, a meaningful hearing, and counsel. *In re Gault* (1967), 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527. The Supreme Court has determined that these rights extend to children when their protected liberty interests are threatened by state action. *Id.* at 28-31.

1. The children's liberty interest is substantial as it involves their right to continue an intimate relationship.

In this case, the private interest affected is substantial. Both children have a familial relationship that is at risk of being permanently terminated by the proceedings below. Moreover, it is clear that the relationship between the children and their mother is a close one. Malcolm, who is now seven years old, has lived with his mother for substantial periods of time and clearly has a strong emotional bond with her. Shaquille, who is now almost three-and-a-half years old, also has lived with his mother at critical times in his emotional development.

2. Erroneous deprivation of the children's rights is likely when they have not been afforded counsel and the opportunity to be heard.

The risk of erroneous deprivation in this case is great, and the severity of this risk entitles Malcolm and Shaquille to representation by counsel during any proceeding that could potentially limit their ability to maintain and pursue the parent-child relationship. See *Gault*, 387 U.S. at 28-31, 87 S.Ct. 1428, 18 L.Ed.2d 527. By excluding the children from the lower court proceeding, the trial court deprived the children of their right to familial integrity. If this Honorable Court continues to deny the children a voice, the Court may permanently sever a parent-child relationship that is irreplaceable.

In addition, the trial court's refusal to appoint independent counsel for the children was inadequate to guarantee the children's constitutional right to maintain and preserve the parent-child relationship. There is little doubt that

“counsel is often indispensable to the realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.” *Gault*, 387 U.S. at 40, 87 S.Ct. 1428, 18 L.Ed.2d 527 (citing the New York Family Court Act, § 241). It is clear from the facts of this case, that none of the adults involved could act as a disinterested best friend on behalf of the children. Rather, the other parties are urging on this Court a particular outcome that best serves their own interests. But it is clear that the children have separable interests and strong feelings about their relationship with their mother; without having heard from Malcolm and Shaquille, the lower court could not have considered all the relevant evidence. Bringing that evidence to light would best be accomplished by appointing an attorney for the children who is obligated to zealously advocate for her clients’ express preferences.

The case at bar thus differs from the facts of *Smith v. Organization of Foster Families for Equality and Reform*. In that case, the Supreme Court held that due process did not require the direct participation of the child or the child’s representative in a foster care pre-removal hearing. 431 U.S. at 852, 97 S. Ct. at 2113-14. But the circumstances in *Smith v. Organization of Foster Families for Equality and Reform* differ radically from those here. The relationship which was to be protected was a relationship between foster parent and foster child; thus the adult’s interest would be coextensive with that of the child. *Id.* at 850-52, 97 S. Ct. at 2112-13. Moreover, parental custody was not at issue because the placement decision was not final or

irrevocable, so the Court found that consultation with the child about the child's wishes was adequate. *Id.* at 852, 97 S. Ct. at 2113-14.

Furthermore, a child, unlike an adult, may have special need of counsel in these matters. In *Lassiter v. Department of Social Services* (1981), 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640, the Supreme Court held that the appointment of counsel to an indigent parent in a termination of parental rights proceeding was to be made on a case-by-case basis. *Id.* at 31-32, 101 S. Ct. at 2162. Among the factors to be considered in making the appointment are whether there are no troublesome points of law, whether an expert will testify for the state, and if the weight of the evidence is sufficiently great that presence of counsel would not have made a qualitative difference. *Id.* at 32-33, 101 S. Ct. at 2162-63. Obviously, these factors envision the parent as a fully competent and capable participant in the legal proceeding. Certainly, the same could not be said for a child, particularly a very young child who will have very little experience in these matters.

It is instructive that the United States Supreme Court has extended the right to counsel to children as a matter of due process in other contexts when the state seeks to take custody away from the parent. For example, in *Gault*, the Court explicitly held that as a matter of due process, the child has a constitutional right to counsel in any delinquency proceeding "which may result in commitment to an institution in which the juvenile's freedom may be curtailed." *Gault*, 387 U.S. at 41, 87 S.Ct. 1428, 18 L.Ed.2d 527. The child "needs the assistance of counsel to cope with problems of law, make skilled inquiry into the facts, [and] to insist

upon regularity of the proceedings.” *Id.* at 36, 87 S.Ct. 1428, 18 L.Ed.2d 527. Similarly, in *Schall v. Martin* (1984), 467 U.S. 253, 275-76, 104 S.Ct. 2403, 81 L.Ed.2d 207, the Court upheld the pretrial detention of minors, finding that the procedural safeguards in place, which included the right to counsel, were adequate as a matter of due process.

The costs and burdens imposed on the state to provide these additional procedural safeguards is minimal. In a case such as this, where termination of parental rights is contested, the costs of these additional procedural safeguards would be minimal. Providing the children notice and an opportunity to be heard would not add significantly to the costs already assumed by the state in providing the parties with a judicial forum for the resolution of their dispute. Moreover, the cost of providing the children with court-appointed legal counsel would add little additional burden on the state.

For these reasons, procedural due process mandates that Malcolm and Shaquille be given independent appointed counsel to represent their interest before the court below.

D. Freedom of association under the First Amendment to the United States Constitution and Section 3, Article I of the Ohio Constitution, protects familial relationships. Children have a right to maintain and pursue their relationship with their parent under the First Amendment to the United States Constitution and Section 3, Article I of the Ohio Constitution.

Freedom of association under the First Amendment not only means the right to associate for purposes of First Amendment activities like speech, assembly, and the exercise of religion, *Roberts v. United States Jaycees* (1984), 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462; it also protects “choices to

enter into and maintain certain intimate human relationships that must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” 468 U.S. at 617-18. The Supreme Court in *Roberts* held that the First Amendment offers certain “highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.” 468 U.S. at 618. Although the United States Jaycees, a nonprofit membership organization, was not the kind of “highly personal relationship” protected by the First Amendment, 468 U.S. at 620; family relationships are protected by the Bill of Rights. “[F]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” 468 U.S. at 619-20.

Although this appears to be an issue of first impression for this Court, the Sixth Circuit Court of Appeals recently has rejected state regulations that impermissibly infringe on the associational rights of families. In *Dotson v. Grayson* (2002), 39 Fed. Appx. 991, 992, the court held that a complaint was improperly dismissed for failure to state a claim when the plaintiff alleged a violation of his First Amendment right of association because he was prohibited by prison officials from corresponding with his daughter. Similarly, the Sixth Circuit found that a prison regulation banning non-contact visits with prisoners’ minor siblings, nieces, and nephews violated the inmates’ First Amendment rights of association. *Bazzetta v. McGinnis* (C.A. 6, 2002), 286 F.3d 311, 317-18.

Lastly, the court struck down a city ordinance that banned individuals arrested for or convicted of drug crimes from certain “drug exclusion zones” on right of association grounds. In *Johnson v. Cincinnati* (C.A. 6, 2002), 310 F.3d 484, 505, *reh’g & suggestion for reh’g en banc denied* (2003), the court found that the ordinance in question violated the intimate associational rights of a grandmother who had been arrested but never convicted of a drug crime and thus could not assist with the rearing of her grandchildren who lived in a drug exclusion zone. In scrutinizing these various state regulations, the Sixth Circuit has required “close analysis” when they “interfere with the parent-child bond [which is] specially protected by the Constitution.” *Id.* at 500 (citing *Bazzetta*, 286 F.3d at 317); *Dotson v. Grayson*, 39 Fed. Appx. at 992.

In the case at bar, the actions of the trial court warrant close analysis because they directly interfere with the parent-child bond. By denying Malcolm and Shaquille independent counsel, the trial court precluded Malcolm and Shaquille from participating in a proceeding affecting one of the most important rights recognized under the Constitution—the right to intimate association. The appointment of counsel for the children was a simple and expedient way to ensure that their rights of association were fully taken into account. The trial court erred by refusing counsel to the children.

SECOND PROPOSITION OF LAW

Children who are the subject of permanent custody motions are parties to the case and, thereby, entitled to appointed legal counsel under Juv. R. 4 and R.C. 2151.352.

A, The plain language of the statute and the rule unequivocally provide children in juvenile court proceedings with a right to counsel.

Under both statute and rule, a juvenile court is required to appoint counsel to represent children who are the subject of proceedings to terminate of parental rights. The court below properly recognized this right in this case. Its opinion is legally correct and consistent with the plain language of both statute and rule. It is also supported by the overwhelming weight of legal authority.

Juv. R. 2(Y) unequivocally provides as follows:

“Party” means **a child who is the subject of a juvenile court proceeding**, the child’s spouse, if any the child’s parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child’s custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court.

A child’s right to counsel is apparent when this language is read in conjunction with Juv. R. 4(A), which states in pertinent part that, “[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent.” These rights shall arise when a person becomes a party to a juvenile court proceeding.

In addition, there is a separate statutory right to counsel under R.C. 2151.352, which states that “a child or the child's parents, custodian, or other person *in loco parentis* of such child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152.”

In *In re Alfrey*, 203-Ohio-608, the Second Appellate District held that children who are the subject of permanent commitment motions are not parties entitled to separate representation. This finding simply ignored the law on this issue. The *Alfrey* court simply concluded that “[t]he children were not parties to the action, and the Juv. R. 4(B)(5) requirement applies to a person who is a ‘party.’” The court did not consider the definition of party contained in Juv. R. 2(Y) and ignored the statute and rules governing a child’s right to counsel as a party to a juvenile proceeding.

Appellant’s position on whether the child is a party is similarly confused. Appellant now urges that children have no right to counsel. But at two points in the hearings below, counsel for Appellant argued that Malcolm’s statements were admissible because he is a party.

MR. RICHTER: Of Malcolm, for a five year old child, **he’s a party to this case** and he’s going to be discussing some information that Ms. Williams has told him in regard to this case. (Tr. 15)

* * *

MR. RICHTER: Just to argue that it’s an exception against the hearsay rule. It’s an admission against interest, **he’s definitely a party to the case**, it’s in the matter of Malcolm Williams or in the matter of Shaquille Williams and he would also almost be unavailable, a five year old child to put on the stand? (Tr. 17)

The fact that the trial court assigned a guardian *ad litem* to the children does not cure the error.¹ As parties to the permanent commitment action, the children were entitled to be represented by counsel in addition to receiving a guardian ad litem. There is a fundamental distinction between the roles of attorney and guardian *ad litem* that easily and frequently conflict. According to Juv. R. 4(C)(1), a dual appointment of an attorney to serve in both capacities is possible “providing no conflict between the roles exists.” Accordingly, this Court held in *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232, 17 Ohio B. 469, 479 N.E.2d 257, that

Juv. R. 4(C) expressly allows appointed counsel to also serve as guardian ad litem. Appellant now argues that Heflin, who served as both her attorney and guardian ad litem in juvenile court, had conflicting duties and that he, therefore, failed to provide her with proper representation.

The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law. DR 7-101; DR 7-102.

With the exception of the holding in *Alfrey*, in which the Second District ignored the Juv. R. 2(Y) definition of party, appellate districts have uniformly recognized that children are entitled to be represented by counsel in juvenile proceedings. In *In re Clark* (2001), 141 Ohio App.3d 55, 2001-Ohio-4126, 749

¹ For that matter, the fact that the trial court appointed an attorney after *Williams I* does not cure the error. The court directed the attorney to investigate the wishes of the child and report the results. Either due to the restrictive nature of the court's order or otherwise, the performance of the attorney fell far short of the zealous representation required of legal advocates for children.

N.E.2d 833, the Eighth Appellate District held that children in permanent custody cases have a right to their own counsel, independent of attorneys appointed for other parties. According to the court, at 60-61,

R.C. 2151.352 governs the entitlement to appointed counsel in juvenile proceedings, and states that a lawyer "must be provided for a child not represented by his parent, guardian, or custodian." Pursuant to the definitions of R.C. 2151.011(B) (16), the children's GAL does not qualify as their "guardian," as she is not authorized to "exercise parental rights" over the children. Therefore, whatever representation the GAL might have provided has no bearing on whether the children were entitled to a lawyer. Furthermore, neither Clark, McKinney, nor Newell could be considered as representing the children here; there should be no dispute that they and their lawyers represented their own interests in this proceeding. Finally, although CCDCFS is properly considered the children's "custodian" under R.C. 2151.011(B) (11), its prosecution of the permanent custody complaint cannot be considered a direct representation of the children as contemplated by R.C. 2151.352, because CCDCFS sought permanent custody and argued solely for that result. The children were not otherwise represented in the proceedings and R.C. 2151.352 required appointment of counsel to represent them. *In re Janie M.* (1999), 131 Ohio App. 3d 637, 639, 723 N.E.2d 191, 192-93; *State ex rel. Asberry v. Payne* (1998), 82 Ohio St. 3d 44, 48, 693 N.E.2d 794, 798.

The following year, the Eighth District reiterated its holding in *In re Legg*, 2002-Ohio-4582.

Similar results were reached by other appellate districts. In *In re Janie M.* (1999), 131 Ohio App. 3d 637, 639, 723 N.E.2d 191, 192-193, the Sixth District held that "under the plain language of R.C. 2151.352, indigent children are entitled to appointed counsel in all juvenile court proceedings." In *In re Stacey S.* (1999), 136 Ohio App. 3d 503, 1999-Ohio-1989, 737 N.E.2d 92, the Sixth District

further noted that children were entitled to appointed counsel as they are parties, as defined under Juv. R. 2 and applied to Juv. R. 4. In *In re Emery*, 2003-Ohio-2206, the Fourth District concluded that the right to counsel for children in permanent custody cases was guaranteed by both statute and rule. The Court held, at ¶¶8-9,

{8} Juv.R. 2(Y) defines "party" to include "a child who is the subject of a juvenile court proceeding." The effect of Juv.R. 2(Y) is to erase any doubt that both the parent and child are parties to all types of juvenile court proceedings that are covered by the rules. Banks-Baldwin Editor's Comment to Juv.R. 2(Y). Juv.R. 15(A) provides that "the court shall cause the issuance of a summons directed to the child * * * and any other persons who appear to be proper or necessary parties." However, the rule also provides that "[a] child alleged to be abused, neglected, or dependent shall not be summoned unless the court so directs." Juv.R. 15(A). Thus, while an allegedly dependent child is a necessary party, the child need not receive a summons according to the rule.

{9} R.C. 2151.352 addresses the rights of a party to be represented by counsel in juvenile proceedings. In *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 48, 693 N.E.2d 794, 1998 Ohio 596, 82 Ohio St. 3d 44, 1998 Ohio 596, 693 N.E.2d 794, the Supreme Court of Ohio construed that statute and found: "under the plain language of R.C. 2151.352, indigent children * * * are entitled to appointed counsel in all juvenile proceedings." Juv.R. 4(A) also provides that every party has the right to be represented by counsel and "every child * * * [has] the right to appointed counsel if indigent." According to Juv.R. 4(A), these rights arise "when a person becomes a party to a juvenile court proceeding." Thus, it is clear that the five Emery children were parties who had the right to appointed counsel upon being named in the complaints.

In *In re Tucker*, 2003-Ohio-1212, the Eleventh District held that "Juv.R. 4 provides that every child has the right to be represented by counsel during

proceedings in the juvenile court.” In *In re Borders*, 2002-Ohio-2578, the Twelfth Appellate District followed existing precedent and the plain language of R.C. 2151.352 in holding that “indigent children are entitled to appointed counsel in all juvenile court proceedings.” *Borders*, at ¶23. Finally, in *In re Swisher*, 2003-Ohio-5446, the Tenth District adopted the principles set forth in *Williams*. In *Swisher*, the Court of Appeals held that a Juvenile Court must appoint an attorney in addition to a guardian ad litem for a child in a permanent custody case unless the court determines that no conflict between the roles exists. In the absence of separate counsel or a dual appointment, there is no guarantee that the children are represented during the proceedings. *Swisher*, ¶46.

The holding in *Williams* is also consistent with constitutional guarantees and public policy interests. As indicated above, children who are the subject of permanent custody proceedings also have a constitutional right to counsel that arises from due process and association rights. Because the hearing will necessarily result in the destruction of the family, it is imperative that children have a right of access to courts and an independent voice in the proceedings. Their interests in the proceedings are no less than their parents.

B. The rationale set forth in *Alfrey* is inconsistent with Ohio law and is contrary to the best interests of children.

In *Alfrey*, the trial court granted a permanent custody motion after refusing to appoint counsel for children who opposed the motion yet whose court-appointed guardian ad litem recommended that parental rights be terminated. At the close of the evidence, the trial court questioned three of the four children who were the subject of the motion. All three children expressed a strong desire to

stay with their mother. The trial court then denied a request to appoint counsel on the ground that the children were represented by the guardian ad litem, who apparently was not a licensed attorney and who had urged the court to reject the children's wishes. This left the children with no advocate to represent their interests in an action that is often described as the family law equivalent of the death penalty.

On appeal, the Second District opined that had the guardian ad litem been an attorney, she could not have ignored her ethical responsibility to zealously represent the interests of her clients. She would have been required to support the children's "view or resign representation." *Alfrey*, ¶18. The trial court, under *Baxter*, R.C. 2151.281(H), and Juv. R. 4(C), then would have been compelled to appoint a new guardian ad litem. The Court of Appeals then took a further, untenable position – that the children could not have an attorney to act as their advocate because they are not parties to juvenile proceedings and do not have an independent right to counsel. As noted above, this holding is inconsistent with due process and freedom of association protections, with state statutory provisions, with the juvenile rules, and with the overwhelming weight of legal authority.

The Court in *Alfrey* also erred in asserting that the interests of children in permanent custody proceedings cannot be adequately protected by the parent's attorney. The Court argued that R.C. 2151.281(B) required the juvenile court to appoint counsel in permanent custody proceedings only when children are not represented by parent, guardian, or custodian. The appellate court concluded

that the interests of children who oppose permanent custody motions are aligned with their parents, who then would represent them in the proceedings. The reasoning is problematic because no attorney-client relationship was ever established in the case. The children did not have a chance to consult with the parent's attorney, to consider their options or to prepare an independent defense. The court also ignored the likelihood that the interests of the children might not be truly aligned with the parent's interests. The children might not wish to terminate parental ties yet might oppose being returned to their parent. In the Court's rush to find a simple and convenient solution, it ignored the complexity of the proceedings and the risk of sharing counsel when fundamental and often conflicting interests are at stake.

The argument in *Alfrey* was rejected for similar reasons by the Eighth Appellate District in *Clark*. In *Clark*, the appellate court determined that the parents' attorneys represented their own clients' interests and could not be expected to represent the children's interests. This position is consistent with the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which were adopted in 1996. The standards define the "child's attorney" as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." The comment to the standard emphasizes that child clients have particularized needs that must be addressed through independent counsel.

These Standards explicitly recognize that the child is a separate individual with potentially discrete and

independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

It would be inappropriate for a child in a permanent custody proceeding to share an attorney with a person who has similar interests. A court may never assume that the particular position of the child will always be consistent with the position of another party.

Finally, a juvenile court cannot abrogate its responsibility to provide counsel to children in permanent custody proceedings because of concerns with expediency and cost. The appellate court in *Alfrey* based its decision, in part, on its "concern about the burdens imposed on the juvenile court by a holding that counsel must be appointed to represent children in an R.C. 2151.414 proceeding when their desires conflict with the guardian ad litem's recommendation." *Alfrey*, ¶29. The court chose finances and expediency over the children's rights to be represented and heard on the state's attempts to forever take away their mother. The court cynically concluded that "[i]t is difficult to discern what benefit another attorney or attorneys could bring to the children" beyond what their mother's attorney could provide them. This holding ignores the possibility that the position

of the parties might not be fully aligned, that Appellant's counsel might not have full access to children who are placed through the agency seeking permanent custody or that the children have an independent right to counsel as parties to the proceedings and under the state and federal Constitutions.

The holding in *Alfrey* was legally flawed and morally incorrect. It is wholly improper to deny children access to independent counsel to serve as their advocates on motions to terminate parental ties. Juvenile statutes and rules unequivocally recognize that children are parties to juvenile proceedings and have a right to appointed counsel. This is only fair. They must have advocates to guarantee that their voices are heard and their wishes are considered. In reaching its decision in *Alfrey*, the Second District ignored Juv. R. 2(Y) and misinterpreted R.C. 2151.352, R.C. 2151.281, and Juv. R. 4. The reasoning contained in *Alfrey* was properly rejected by every other state appellate district that considered it. It should not be adopted as law in this State.