[Cite as *In re J.W.*, 2013-Ohio-468.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
J.W., Jr.,	:	No. 12AP-696 (C.P.C. No. 10JU-06-8640)
(J.W., Sr.,	:	(REGULAR CALENDAR)
Appellant).	:	
In the Matter of:	:	
B.W.,	:	No. 12AP-697 (C.P.C. No. 10JU-06-8639)
(J.W., Sr.,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on February 12, 2013

Robert J. McClaren, for Franklin County Children Services.

Jacob P. Ort, Guardian ad Litem.

Paul Giorgianni, for appellant.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch

TYACK, J.

{¶ 1} J.W., Sr., is appealing from the trial court's granting of permanent custody of J.W., Jr., and B.W., to Franklin County Children Services ("FCCS"). J.W., Sr., assigns seven errors for our consideration:

> 1. Appellant was completely deprived of his right to counsel prior to and after FCCS filed its motion for permanent custody.

> 2. Appellant was denied his right to effective assistance of counsel while he had counsel.
>
> 3. The Juvenile Court erred by dismissing Appellant as a party.
>
> 4. The Juvenile Court erred by overruling Appellant's motion to be joined as a party.
>
> 5. The Juvenile Court erred by removing Appellant from the case plan.
>
> 6. The Juvenile Court erred by refusing to entertain (and/or by summarily overruling) Appellant's motion for legal custody.
>
> 7. The Juvenile Court erred by entertaining FCCS's motion for permanent custody to the exclusion of Appellant's motion for legal custody.

{¶ 2} By way of factual background, J.W., Sr. thought he was the biological father of J.W., Jr. and B.W. He participated in the court proceedings and was part of the reunification or case plan until a court hearing in September 2011 removed him as a party to the cases based on DNA testing which revealed that someone else was the biological father of each of the children. As the husband of the mother of the children and the father figure the children had known, he attempted to continue his involvement in the hearings to determine the custodial status of the children.

{¶ 3} J.W., Sr. had been visiting with the children while they were in foster care until his visitation rights were cut off following the finding he was not the biological father of the children. The children were in foster care with J.W., Sr.'s sister, who was afraid to let him continue seeing the children for fear FCCS would move the children out of her care and/or look unfavorably on her desire to adopt the children if permanent custody were to be granted to FCCS.

{¶ 4} J.W., Sr. filed a motion seeking custody of the children, but could not afford a lawyer to represent him on all the matters pending. An effort was made to have counsel appointed for him on a theory that he should be considered in loco parentis for purposes of R.C. 2151.352 and Juv.R. 4(A).

{¶ 5} Juv.R. 4(A) reads:

> Every 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. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

{¶ 6} J.W., Sr. was not a party after it was determined that he was not the biological father of the children, so Juv.R. 4(A) would block him from receiving the benefit of appointed counsel unless statutory authority, especially R.C. 2151.352 provides otherwise. In fact, it does.

{¶ 7} R.C. 2151.352 reads, in part:

> 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. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of section 2151.23 of the Revised Code. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

{¶ 8} R.C. 2151.352, on its face, does not bar appointment of counsel for non-parties and indicates that any person in loco parentis is entitled to counsel in juvenile court proceedings regarding custody.

{¶ 9} The issue then becomes whether the juvenile court should have considered J.W., Sr. in loco parentis for purposes of the permanent custody proceedings and therefore a person entitled to counsel in these proceedings. We find under the facts of this case that J.W., Sr. should have been considered in loco parentis and therefore entitled to counsel.

{¶ 10} FCCS argues that J.W., Sr. was not in loco parentis because on the date the permanent custody hearing was finally heard, the children had been out of J.W., Sr.'s care for two years while in foster care. FCCS bases this argument on its interpretation of our earlier case *In re: C.M.*, 10th Dist. No. 07AP-933, 2008-Ohio-2977.

{¶ 11} In *In re: C.M.*, Rosetta J. contested the granting of permanent custody of her great grandchildren C.M. and M.M. C.M. was a four-year-old girl and M.M. was a three-year-old boy born to Rosetta J.'s teenage granddaughter D.M. D.M. was in the custody of Rosetta J. when C.M. was born, but D.M.'s unruly behavior made it impossible for D.M. to stay with Rosetta J. This led to D.M. being placed with D.M.'s mother, but D.M. absconded and abandoned C.M. D.M.'s mother could not care for C.M. with D.M. gone, so C.M. went to emergency care and then foster care. Eventually, D.M. re-emerged and was placed with C.M. in a common foster care placement.

{¶ 12} D.M. was pregnant again and soon gave birth to M.M. D.M. received custody of both children, but not for long. When M.M. was nine months old, FCCS again got custody of both children and placed them in the care of Rosetta J. for about one month. The children were then placed in a different foster home.

{¶ 13} D.M. was placed with her children a few months later, but absconded with the children. This led to FCCS initiating another action for custody of the children as dependent minors.

{¶ 14} Approximately one year after the children had left Rosetta J's care (the one month of care), Rosetta J. moved to be joined as a party in the custody proceedings. The juvenile court allowed her to be joined as a party. One month later, FCCS moved for permanent custody.

{¶ 15} Rosetta J. also sought custody of C.M. and M.M. D.M., the mother of the children, also filed a motion asking that the children be placed with Rosetta J. The court expressly overruled Rosetta J.'s motion for custody and, by inference, overruled D.M.'s motion by granting permanent custody to FCCS.

{¶ 16} The facts of *In re: C.M.* are significantly different from the facts involving J.W., Jr. and B.W. Rosetta J. had only had possession of the children for one month in the three years before when she filed her motion. The actions of FCCS did not block her involvement with her great grandchildren. Rosetta J. gave up her role in loco parentis due to her inability to control her grandchild. The great grandchildren, C.M. and M.M., had minimal time to bond with Rosetta J. due to their mother's actions and misconduct.

{¶ 17} We do not find *In re: C.M.* controlling or even persuasive in addressing J.W., Sr.'s situation. J.W., Sr. was not responsible for reduced contact with the children once the genetic parentage was ascertained. He had served as the father figure for a much longer period of time for J.W., Jr. and B.W. than Rosetta J. had for her great grandchildren. We also can reasonably infer that he had contact with J.W., Jr. and B.W. while the children were in the care of J.W., Sr's sister until he was removed as a party to the case and his sister became justifiably afraid her care for J.W., Jr. and B.W. and/or potential to adopt the children would be jeopardized if her brother J.W., Sr. continued to see the children regularly.

{¶ 18} Under the somewhat unique facts of this case, we find that J.W., Sr. should be considered in loco parentis. We also expressly reject the proposition that FCCS can cut a person off from contact with minor children and then argue the person cannot have the benefit of appointed counsel because they are no longer in loco parentis.

{¶ 19} We sustain the first assignment of error.

{¶ 20} Our finding with regard to the first assignment of error significantly impacts the merits of the other assignments of error. We cannot say J.W., Sr. had ineffective assistance of counsel when he had no counsel to help him develop the facts and issues for most of the proceedings. This renders the second assignment of error moot.

{¶ 21} We also cannot adequately address whether J.W., Sr. should have been made a party to the action without knowing what additional facts could be developed.

The third and fourth assignments of error are therefore not ripe for determination and therefore moot.

{¶ 22} We cannot say the juvenile court did not adjudicate J.W., Sr.'s motions or fail to act in the best interests of the children based upon the evidence it had. The juvenile court expressly ruled on J.W., Sr.'s motion for custody and attempted to look out for the best interests. J.W., Sr.'s motion was not excluded from consideration. We cannot speculate about the trial court's rulings had J.W., Sr. been able to develop his own evidence with the help of counsel, but based upon the evidence actually before the trial court, the fifth, sixth, and seventh assignments of error are overruled at this time.

{¶ 23} Because we find J.W., Sr. should have had appointed counsel to assist him in addressing the motions he filed for custody of the children, we vacate the trial court's granting of permanent custody to FCCS. We remand the case to the juvenile court for trial counsel to be appointed and for the opportunity of J.W., Sr. to have his motions for custody further considered. We do not reinstate the rights of the natural mother of the children, who chose to have the issue uncontested as to her. We also do not reinstate any rights of the biological fathers of the children. The issue on remand is limited to the merits of J.W., Sr.'s. request to be the custodian of the children once he has had the opportunity, with the assistance of counsel, to develop the facts supporting his motion for custody.

Judgments affirmed in part and overruled in part; judgments vacated and remanded for further proceedings.

McCORMAC, J., concurs.
BRYANT, J., concurs separately.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

BRYANT, J., concurring separately.

{¶ 24} Although appellant was determined not to be the biological father of the children at issue, I agree with the majority that he acted in loco parentis. Accordingly,

pursuant to Juv.R. 4(A) and R.C. 2151.352, he, as an indigent, was entitled to appointed counsel. Because he was not afforded that right, I would vacate the judgments as to appellant, would sustain appellant's first and second assignments of error, and would remand for further proceedings to allow the trial court to adjudicate the issues related to appellant's remaining assignments of error with the benefit of the participation of appellant's counsel.