Supreme Court of Ohio Clerk of Court - Filed November 29, 2021 - Case No. 2021-0533

IN THE SUPREME COURT OF OHIO

IN RE J.H., A Minor Child [Appeal by A.H., Mother]	)	C.A. Case No. **2021-0533**
Appellant.	)	On Appeal From The Cuyahoga County Court of Appeals, Eighth Judicial Dist. No. CA-19-109332
	)	

MERIT BRIEF OFAPPELLANT A.H.(MOTHER)

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INTRODUCTION

> 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 pursuant to O.R.C. §2151.352. The court's failure to comply with statutory works to have a negative impact on all parties involved including an already overburdened judicial system

This case is about the judicial system's duty to honor the same statutory due process right to appointment of counsel of an indigent, parent under a custody and visitation rights order, who has been alleged to be unfit and requested a review hearing to challenge the continued necessity of the court ordered parental custodianship and visitation, as she had during the Juvenile Court's initial findings, judgment and order.

In fact, R.C. §2151.352 mandates that the trial court ascertain whether the party knows of the party's right to counsel before proceeding in the matter. Both the lower Juvenile Court and Court of Appeals in Ohio equivocated in honoring this right. In crafting this statutory scheme of due process protection for indigent, parents during initial proceedings and subsequent review hearings, the General Assembly intended to provide for the right to counsel pursuant to R.C. §2151.352. Because the statute contains the word "shall," the provision must be construed as mandatory. Dorrian v. Scioto Conservancy Dist. (1971), 27 Ohio St.2d 102.

This mandate protects the right of an otherwise vulnerable citizen, who has had his right to make decisions removed by judicial power, to fully challenge that decision in a future judicial review. It is the duty of this Court to ensure that Ohio's most vulnerable citizens is given a fair opportunity to make that case, as required by the statutes. To do so, this Court should uphold the statutory due process right to counsel under R.C. §2151.352 so that it is held in accordance with Chapter 120 of the Revised Code. And also determine whether legislature intended the right to appointed counsel to extend to the appeal process in child custody matters.

This case also gives this Honorable Court an opportunity to help resolve or alleviate the negative impact indigent pro se filings have on an already overburdened judicial system. In April 2006, the Supreme Court of Ohio's Task Force on Pro Se and Indigent Litigants published findings that pro se litigants pose a huge challenge for the courts. Task Force on Pro Se and Indigent Litigants, Report and Recommendation of the Supreme Court Task Force on Pro Se and Indigent Litigants, (2006). "[O]ur courts are overwhelmed with a flood of pro se litigants, who represent as much as eighty percent of the caseloads." Justice Earl Johnson, Jr., "And Justice for All": When Will the Pledge be Fulfilled? Judges' 5, 7 (2008).

It is well researched and founded that pro se litigants neglect court and statutory deadlines and have a difficult time grasping the law and rules of the court. Beverly W. Snukals and Glen H. Sturtevant, Jr., Pro Se Litigation: Best Practices from a Judge's Perspective, 42 U. Rich. L. Rev. 93 (2007) (citing Drew A. Swank, Comment, The Pro Se Phenomenon 19 B.Y.U. J. Pub. L. 384 (2005) (quoting Tiffany Boxton, Note, Foreign Solutions to the U.S. Pro Se Phenomenon, 34. Case W. Res. J. Int'l. L. 114 (2002).

Typically pro se litigants fail "to present necessary evidence, and suffer from procedural error, are ineffective when examining witnesses, and fail to properly object to evidence." ABA Coalition for Justice, Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts, (2010). See also Johnson, 47 Judges' J. at 5. In a 2010 survey by the American Bar Association's Coalition for Justice of 1,176 judges, in which 986 judges completed the survey, 94% of judges said that failing to present necessary evidence was the most common problem for a pro se person. ABA Coalition for Justice at 4.

Eighty-nine percent of judges "said that [unrepresented] parties were impacted by procedural errors." Id. Eight-five percent of judges said that unrepresented parties were

ineffective at examining witnesses. Id.

Pro se parties may even argue with witnesses and call them liars. Jona Goldschmidt, How Are Courts Handling Pro Se Litigants? 82 Judicature (1998). Eighty-one percent of judges said that unrepresented parties failed to properly object to evidence. ABA Coalition for Justice at 4. Seventy-seven percent of judges surveyed said that unrepresented parties made ineffective arguments. Id. They "do not provide legal research or support for their positions; they fail to prepare judgments and orders, or prepare orders that are improper or unenforceable." Id. at 12; see also Snukals and Sturtevant, 42 U. Rich. L. Rev. at 96; Goldschmidt, 82 Judicature at 18.

These issues affect not only the unrepresented party and the court, but they also affect the other party, the court staff, lawyers, and the court system as a whole, by impacting the efficiency and speed of the court. Snukals and Sturtevant, 42 U. Rich. L. Rev. at 96. Seventy-eight percent of the judges surveyed stated that the court was negatively impacted when parties were unrepresented or not well represented because, according to 90% of the judges surveyed, these parties slow down the court procedure. ABA Coalition for Justice at 4, 12. Fifty-six percent of the courts surveyed said that they were seeing an increase in requests.

The judges were from 37 states, Puerto Rico, and one Native American court. ABA Coalition for Justice at 7. Forty-one percent of the judges surveyed were from urban areas. Id. at 8. The national population is 79% metropolitan, and 69% of the judges surveyed were from metropolitan areas. Id. 10 "The judge survey was sent by mail to 612 judges non-randomly chosen from among all state court judges at all levels of court in urban, rural, and suburban jurisdictions.

Here, of the surveys mailed, 133 (22 percent) were completed and returned. Another mailed survey was sent to a sample of 237 court administrators in all levels of state trial courts

who are members of the National Association for Court Management. Of these, 98 (41 percent) were returned." Goldschmidt, 82 Judicature at 22. 22 for court appointed counsel. Id. at 14. When the judges were asked how the courts could be more efficient, eighty-six percent responded that it could be accomplished if both parties were represented. Id.

R.C. 2151.23(A)(2) governs a child custody proceeding between a parent and a nonparent. The hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability. See R.C. 2151.04 "As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, `dependent child' includes any child reads:

> "(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;
>
> "(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian.

A.H., was appointed a GAL, but never received the process due under the statue to secure an appointment of counsel by the lower courts. In this instance, a parent, such as A.H., who is representing herself in court, is sure to slow down the court process and to negatively impact the court even more significantly than the average pro se litigant. The Supreme Court of Ohio's Task Force on Pro Se and Indigent Litigants found that individuals with disabilities, including mental illness, may not benefit from pro se support, and "should be considered for full representation…." Task Force on Pro Se and Indigent Litigants at 23.

In order for the impact of unrepresented parties in child custody review hearings on the court to be minimized, it would be logical for the court to appoint counsel, so that the court can have effective and efficient hearings. Appellant A.H. sets forth the many ways the failure to appoint counsel to indigent parents will continue to negatively impact the judicial system, if this Honorable Court declines to take judicial action.

A. Impact on Judges.

"[J]udges suffer more than anyone other than the parties when litigants lack counsel." Johnson, 47 Judges' J. at 5. Judges depend on parties to present relevant evidence and focused legal arguments. Without assistance from attorneys, pro se litigants frequently fail to present critical facts and legal authorities that judges need to make correct rulings. Pro se litigants also frequently fail to object to inadmissible testimony or documents and to counter erroneous legal arguments.

This makes it difficult for judges to fulfill the purpose of our justice system—to make correct and just 23 rulings. King v. King, 162 Wash. 2d 378 (2007), Amicus Brief of Retired Trial Judges at 12 (Emphasis sic). Because of these issues, judges often guide pro se parties through the process, but doing so comes with its own set of issues. Judges face an even greater challenge when litigants are mentally ill or otherwise vulnerable.

Canon 1 of the Code of Judicial Conduct states that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." (Emphasis sic). Jud. Cond. R.1.2, entitled Promoting confidence in the judiciary, further states that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." (Emphasis sic).

Canon 2 of the Code of Judicial Conduct states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." (Emphasis sic). Jud. Cond. R.2.2, entitled Impartiality and fairness, further states that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." (Emphasis sic). In juxtaposition to these Canons and Codes is Jud. Cond. R.2.6(A), entitled Ensuring the right to be

heard, which states that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Official Comment [1A] to Jud. Cond. R.2.6 expands this even further by stating that: The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard.

By way of illustration, individual judges have found the following affirmative, non prejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making 24 referrals to any resources available to assist the litigant in the preparation of the case. It is a difficult task for judges to balance the appearance of impartiality while helping one of the parties present his or her case. Goldschmidt, 82 Judicature at 16.

Forty-two percent of the judges surveyed by the ABA were concerned about compromising the impartiality of the court in order to prevent injustice, such as by acting in place of an attorney for the unrepresented party. ABA Coalition for Justice at 4, 13. In a survey done by the American Judicature Society/Justice Management Institute, many judges "cited the ethical duty of maintaining judicial impartiality as the primary problem in cases where one party appears pro se." Goldschmidt, 82 Judicature at 17.

A helpful judge may explain the legal process, why a particular question is irrelevant or hearsay, and why laying a foundation is necessary. Snukals and Sturtevant, 42 U. Rich. L. Rev. at 97 (citing Supreme Court of Virginia Pro Se Litigation Planning Committee, Self-Represented Litigants in the Virginia Court System: Enhancing Access to Justice, 7 (2002), available at

http://www.docstoc.com/docs/3292738/SelfRepresented-Litigants-in-the-Virginia-Court SystemEnhancing-Access-to# (accessed July 27, 2012)).

A judge who provides no guidance spends time muddling through the case and listening to irrelevant and unnecessary testimony and looking at irrelevant and unnecessary exhibits. Id. at 97. Some judges may be more lenient with procedural rules and pro se parties, while others are not, out of fairness to the opposing party who must follow the rules. Goldschmidt, 82 Judicature at 17. Some judges may go so far as to raise objections on behalf of the pro se party and question witnesses. Id. at 19.

The only way for a judge not to have to be concerned about balancing impartiality with the right to be heard is by appointing counsel for the unrepresented party. With counsel, the judge will no longer have to balance the needs of a pro se party and impartiality.

B. Impact on other court personnel

Seventy-one percent of judges surveyed by the ABA were concerned by the time their staff devoted to assisting pro se parties, because they require more staff for assistance. ABA Coalition for Justice at 4, 12. In the American Judicature Society/Justice Management Institute's survey, 66% of court managers stated that "… the average daily proportion of their staff time that is devoted to providing pro se assistance … [was] 1 to 25 percent; 23 percent said that it was 26 to 50 percent; and 11 percent said it took between 51 to 100 percent of their time." Goldschmidt, 82 Judicature at 20.

Pro se litigants suffering from mental illness or other impairments may require even more staff assistance than other pro se litigants. "In addition to explaining how to file a lawsuit and determining which courtroom a pro se litigant should report to, clerks have the added difficulty of deciding how to approach questions such as 'How should I complete this form?' or 'What

should I say to the judge?' without subjecting themselves to civil liability and criminal penalties for the unauthorized practice of law." Snukals and Sturtevant, U. Rich. L. Rev. at 96–97 (citing Goldschmidt, et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers, http://www.ncsconline.org/WC/Publications/KIS_ProSe Meet Challenge.pdf; Supreme Court of Virginia Pro Se Litigation Planning Committee, at 19).

Ohio's unauthorized practice of law statute states that: No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned, either by using or subscribing the person's own name, or the name of another person, unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules…. R.C. 4705.01 (A). No person who is not licensed to practice law in this state shall do any of the following: (1) Hold that person out in any manner as an attorney at law; … (3) Commit any act that is prohibited by the supreme court as being the 26 unauthorized practice of law. (C) … (2) Any person who is damaged by another person who commits a violation of division (A)(3) of this section may commence a civil action to recover actual damages from the person who commits the violation of R.C. 4705.07. "Whoever violates division (A)(1) or (2) of section 4705.07 of the Revised Code is guilty of a misdemeanor of the first degree." R.C. 4705.99.

Clerks must be careful not to interpret courts' orders for pro se litigants, provide proper wording for court documents, or explain the consequences of filing a case. Snukals and Sturtevant, 42 U. Rich. L. Rev. at 98 (citing Virginia Pro Se Litigation Planning Committee at 63). Court staff fear the penalties of unauthorized practice of law and, therefore, will refuse to answer many questions. Goldschmidt, 82 Judicature at 20. The probate court can help alleviate this fear and free up court staff time by providing counsel for all incompetent wards in not only

the original case, but also in the review hearing.

C. Impact on opposing parties and attorneys.

"[R]epresented litigants suffer increased legal fees as their attorneys bill for the increased time the courts spends dealing with inexperienced pro se litigants." Snukals and Sturtevant, 42 U. Rich. L. Rev. at 97 (citing Brenda Star Adams, Note, "Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts, 40 New Eng. L. Rev. 308 (2005) ("[W]hen judges take extra time to explain proceedings to a pro se litigant, hourly fees for the opposing litigant rise, and this ultimately encourages more people to represent themselves.

One major problem, therefore, is that pro se litigation breeds more pro se litigation."). "The pro se problem is, then, self-perpetuating: The increasing assistance from judges and self-service centers diminishes the demand for affordable attorneys by helping those that would otherwise employ those attorneys, yet most pro se litigants are forced to represent themselves precisely because affordable attorneys are unavailable." Snukals and Sturtevant, 42 U. Rich. L. Rev. at 97 (citing Adams, 40 New Eng.L. Rev. at 314.)

In the present case, the Juvenile Court can help stop this vicious cycle by appointing counsel not only in the original custody hearing, but also in modification of custody, visitation and parenting rights and responsibility hearings.

D. Appointing counsel is not unduly burdensome for the Courts.

Because the amount of cases for modifications of custody are minimal per County each year, appointing counsel in a modification review hearing is not unduly burdensome for the Juvenile courts. Furthermore, only indigent parents and children are entitled to court-appointed counsel. Juv.R.4. This limits the amount of times a court would have to appoint counsel and

limits the amount of attorney fees that the court would have to pay for counsel. Cuyahoga County Court, the venue of A.H.'s child custody case, has sufficient funds available with which to pay for court-appointed counsel for indigent parties in custody or guardianship hearings. R.C. 2111.51 requires each county to establish an indigent fund.

For example, "Expenditures from the fund shall be made … only for payment of any cost, fee, charge, or expense associated with the establishment, opening, maintenance, or termination of a guardianship for an indigent ward." R.C. 2111.51 (Emphasis added). Only [i]f a probate court determines that there are reasonably sufficient funds in the indigent guardianship fund * * * to meet the needs of indigent guardianships in that county, * * * may [the court] declare a surplus in the indigent guardianship fund and expend the surplus funds for other guardianship expenses or for other court purposes. In this instance a similar fund could be established for the sole purpose of providing indigent parents with the much needed legal resources to achieve a just and fair results.

E. Impact on minorities and the poor in Ohio

In Ohio and the United States, multiple racial minority groups experience poverty at rates disproportionate to their percentage of the population. In 2018, Black Ohioans made up 12 percent of the population, but 25 percent of Ohioans in poverty, as compared to 11 percent of white Ohioans living in poverty and consisting of 79 percent of the population. See The Kaiser Family Foundation, Poverty Rate by Race/Ethnicity, https://www.kff.org/other/state-indicator/povertyrate-byraceethnicity.

The Sentencing Project used data projections made by the U.S. Bureau of Justice Statistics. (accessed Nov. 12, 2019). Racial disparities in wealth and poverty contribute to disparities in the impact of court debt obligations. For example, many jurisdictions see racial

disparities in numbers of license suspensions for nonpayment of court debt. Mario Salas & Angela Ciolfi, Legal Aid Justice Center, Driven by Dollars: A State-byState Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt, (2017), available at https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf (accessed Nov. 12, 2019). In 2017, Ohio had over two million license suspensions for failure to have insurance, appear in court or pay a fine, or pay child support. (Emphasis added)

Ohio Poverty Law Center, Moving Forward: Driver's License Amnesty Initiative, (2019), https://www.columbuslegalaid. org/moving-forward/ (accessed Nov. 21, 2019) 2. As of 2010, 83 percent of Ohio workers drove themselves to work. In areas with limited public transportation and jobs, workers with suspended licenses were often forced to give up their jobs or break the law by driving to work. Id.

As people of color are disproportionately poorer and more likely to be involved in the child custody system, they are likewise at a disproportionate risk of being harmed both by any disincentive to call child custody and incentives for law enforcement to overreach in enforcing non-violent domestic related crimes to increase municipalities' revenue.

FACTUAL BACKGROUND

This case arises from J.H. and K.M. children, whose parents lost visitation rights, legal guardianship and custody. In the years prior to 2013 the family hit hard financial troubles, which resulted in a period of homelessness. Although, the family had assistance and found temporary shelter at the McDonald House (shelter home located in Cleveland, Ohio) Thereafter, Cuyahoga Child Protective Services became involved as a result of the mother's illness, which resulted in a period of hospitalization. Consequently, in March of 2013, the children were adjudicated to be dependent children.

On April 4, 2014, the juvenile court ordered the children into custody. After which the issues stemming from the grant of custody went through a series of multiple pro se filings, appeals and remands. However, the issues presented here for discretionary appeal focuses on the filing of requested relief requested by A.H. beginning in 2015. In the year 2015, Mother filed a pro se motion to "modify custody and visitation and set visitation," asking the Juvenile Court to place the children in her custody or, alternatively, that she be granted additional visitation with them.

Subsequently, a guardian ad litem ("GAL") was appointed for the children. Mother requested an attorney, but independent counsel was never appointed; instead she was also appointed a GAL who represented conflicting[1] interests. As a result of the conflict, Mother's GAL subsequently filed a motion to withdraw and the trial court still refused to appoint A.H. an independent counsel. And the court refused to appoint any of the children an independent counsel. Instead, the court appointed Mother a new GAL for the second time.

The court held a hearing on Mother's motion and issued a decision on each child. Relative to J.H., the younger child, the magistrate denied Mother's requests to modify custody and for visitation, determining that it was in the best interest of J.H. if his custodian retained sole legal custody of him, and Mother had **no** visitation with him. (Emphasis added).

On April 12, 2019, 15 days after the magistrate issued her decision, A.H. (Mother) filed objections to the magistrate's decision in an untimely fashion. She could not afford a transcript of the hearing. On April 18, 2019, the juvenile court approved and adopted the magistrate's decision. In a separate related set of proceedings, A.H. filed motions which were denied and she

[1] "… , most lawyers cannot look in two different directions at once." United States v. Roy, 855 F.3d 1133, 1177 (11th Cir.2017) (en banc), certiorari denied, --- U.S. ---, 138 S.Ct. 1279, --- L.Ed.2d --- (2018).

filed a notice of appeal and was not able to afford transcripts so none was made a part of this appeal record. However, as stated by the dissenting Justice Mary Eileen Kilbane in The Eighth District Court of Appeals: "I respectfully dissent and would reverse and remand for the appointment of trial counsel. Mother was appointed a G.A.L. not once but twice by the trial court. The record reflects that mother requested trial counsel" See J.E. and Opinion, as attached to Notice of Appeal as Appendix sA.

As such, the appointment of a GAL twice and A.H.'s indigent status, and motion for appointment of counsel is on the record, and yet the trial court refused to grant her request for legal counsel. The appeal before this Court was brought solely to assert an indigent Mother's statutory right to appointed counsel, when requested, to challenge the continued necessity of her guardianship.

ARGUMENT

Proposition of Law I: Hearings where a change of custody and visitation are at issue a parent does not need to show prejudice by pointing to the transcript of the proceedings to support a reversal on appeal when the juvenile court fails to appoint legal counsel when required by law that very fact itself demonstrates plain error on the record

In State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6 [15 O.O.3d 3], this Honorable Court held at paragraph two of the syllabus:

> "In actions instituted by the state to force the *permanent,* involuntary termination of parental rights, the United States and Ohio Constitutions' guarantees of due process and equal protection of the law require that **indigent parents be provided with counsel and a transcript at public expense for appeals as of right."** (Emphasis added.)

It is beyond dispute that when the State seeks to remove a child over a parent's objection, the constitutional right to counsel attaches immediately. The right not only attaches in the trial court when adversarial proceedings are initiated, but also it attached to the appeal process itself after judgment in the trial court. The right to appeal should be immediately advised at the time judgment is entered against an indigent parent acting without counsel.

To provide meaningful access to the courts and fairness, appointment of counsel should have been ordered by the trial court to represent an indigent parent concerning custody, on direct appeal including, but not limited to providing a transcript of proceedings at the state's expense. The fact that A.H. was not provided with appointment is upon the face of the record. No transcript was needed to determine A.H. was appointed a GAL twice, to her detriment. In fact, the dissenting Justice Kilbane succinctly stated so in her dissent in pertinent part concluding:

"…*The record reflects* that mother requested trial counsel" Id.

As such, the case should be remanded for new trial proceedings in which A.H. is represented by state funded counsel. Because Ohio's various court divisions have an inconsistent approach on what an indigent parent receives in a particular situation, a statutory interpretation is needed as it relates to appointment of counsel. And in the case sub judice a transcript is not needed to determine whether the denial of the right to counsel resulted in substantial prejudice.

The Heller Court, at Id, not only supports the proposition that A.H. was entitled to court appointed counsel in the trial court, but also on appeal. In the present case, both the trial court and Eighth Appeals Judicial District appear to hold "A.H. did not specifically file a motion requesting for an appointment of counsel based on her indigence status." However, the statutory law is clear, where an indigent parent appears before the court; it has a mandatory to ascertain

whether the party knows of the party's right to counsel.

Juv.R. 4(A) in pertinent part states as follows: "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. In the pres ent case, the Eighth District Appellate Court found that A.H. was not entitled to citing the last sentence of Juv.R.4(A): "*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."* The last sentence in Juv. R. 4(A) was added in 1994.

Then, the Court of Appeals set forth its plain error analysis and also states A.H. indigent and pro se failed to provide a transcript on appeal. However, the Court makes no mention of the correlating language under R.C.§2151.352, and Chapter 120 of the Ohio Revised Code, which *provides a statutory right to appointed counsel in juvenile proceedings that goes beyond constitutional requirements*. See State ex rel. Asberry v. Payne, 82 Ohio St.3d 44, 46, 1998-Ohio -596, 693 N.E.2d 794. (Emphasis added)

Specifically, R.C. §2151.352, the statutory equivalent to Juv.R.4(A), provides, in relevant part, as follows:

> "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. of the Revised Code **and if, as an indigent person,** any such person is unable to employ counsel, to have counsel provided for the person pursuant to Chapter 120 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 or to be represented by the county public defender or the joint county public defender and **shall provide counsel upon request pursuant to Chapter 120. of the Revised Code.**" (Emphasis added)

Here, contrary to the Court's position that A.H. an indigent parent's failure to file a pro se motion requesting appointment counsel, object to the Magistrate's findings, provide a transcript on appeal resulted in a waiver of the issue, under the law the opposite holds true. To restate, R.C. §2151.352 mandates, "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." Id, R.C. §2151.352.

Here, the Juvenile Court and Appeal Court presume an indigent, unemployed mother with a disability should have known her rights under the state statute and Rules of Juvenile Procedure. She did not. The Juvenile Court displayed a blatant disregard for carrying out its mandatory duty, as set forth under law. Not only did the Juvenile Court fail to ascertain whether A.H. knew she had the right to appointment of counsel, but also failed to appoint counsel for the purpose of appeal.

Although Appellant A.H. could not find statutory law that mandates the Juvenile Court to provide A.H. with both an appeal counsel and the transcripts, the following argument is dispositive to the issue. Ohio law holds that a party cannot effectively appeal without a transcript and counsel. Id State, ex rel. Heller, infra.

This Court further elaborated that If parties "continue their appeal *pro se,* without benefit of a transcript, any appeal[2] will be ineffectively presented." Id Heller. As was stated in another

[2] The phrase in Section 2 of Article I that " * * *[g]overnment is instituted for their [the people's] equal protection and benefit" is essentially identical to the Fourteenth Amendment's equal protection clause. *Kinney* v. *Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St. 2d 120, 123. Section 16 of

case precedent from this Court “the relator need not follow a suicidal course under the "ordinary course of the law" doctrine. State, ex rel. Tulley, v. Brown (1972), 29 Ohio St. 2d 235, 237.

Finally, It is beyond question that due process of law affords a child the right to be represented by legal counsel at all stages in proceedings in juvenile court. *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527; *In re Agler* (1969), 19 Ohio St.2d 70, 48 O.O.2d 85, 249 N.E.2d 808; R.C. 2151.352; Juv.R. 4(A), 29(B)(3) and (4). This right to counsel may be waived pursuant to Juv.R. 29. Because that choice involves the intentional abandonment of a known right, the record must demonstrate that the waiver was knowingly, intelligently and voluntarily made. *Gault, supra; In re Johnson, supra.*

At the beginning of the adjudicatory proceeding the juvenile court must inform unrepresented parties of their right to counsel, determine if those parties are waiving their right to counsel, and appoint counsel for an unrepresented party who does not waive that right. Juv.R. 29(B)(3) and (4). Before a court can satisfy itself and determine that a waiver of the right to counsel has been given knowingly, intelligently, and her request for appointment of counsel. By failing to appoint counsel capable of assisting the court in ensuring that A.H.'s constitutional and statutory rights were protected, the court failed to discharge its duty under R.C. 2151.281. This fact that A.H. had no representation by counsel in these proceedings is upon the face of the record. *In re Johnson* (1995), 106 Ohio App.3d 38, 665 N.E.2d 247.*Johnson, supra.*

WHEREFORE, Appellant’s first proposition of law has merit.

Article I guarantees that "* * *every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law* * *." When read in conjunction with Sections 1, 2 and 19, Section 16 is the equivalent to the Fourteenth Amendment's due process clause. *Direct Plumbing Supply Co.* v. *Dayton* (1941), 138 Ohio St. 540; *Akron* v. *Chapman* (1953), 160 Ohio St. 382. 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.

Proposition of Law II: An Appellate Court errs when it fails to find the trial court committed plain errors, and omissions in failing to secure a waiver in open court showing that the parent's right to counsel was knowingly, voluntarily and intelligently entered, as well as ensuring the parent received due process of law and a fair and adequate hearing

Ohio law holds, parental termination cases have been likened to the family-law equivalent of the death penalty in a criminal case. In re R.K., 152 Ohio St.3d 316, 2018-Ohio-23, 95 N.E.2d 394, ¶ 1; In re M. Children, 1st Dist. Hamilton No. C-180564, 2019-Ohio-484, ¶ 13. "Hence, it is critical that the rights of a parent who faces the permanent termination of parental rights are appropriately protected." In re R.K. at ¶ 1. Included in those rights is the right to counsel at all stages of the proceedings, as provided for in R.C. 2151.352 and Juv.R. 4. Id.; In re W.W.E., 2016-Ohio-4552, 67 N.E.3d 159, ¶ 25-26 (10th Dist.).

Nevertheless, there are differences between criminal cases in which "the litigant may lose his physical liberty if he loses the litigation" and cases involving the termination of parental rights. In re W.W.E. at ¶ 38, quoting Lassiter v. Dept. of Social Servs., 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). A parent can waive the right to counsel in a parental action. In re R.K. at ¶ 5; In re M. Children at ¶ 15. Waiver is the "intentional relinquishment or abandonment of a known right." In re R.K. at ¶ 5, quoting State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2822, 74 N.E.3d 464, ¶ 20. In determining whether a parent has waived the right to counsel, courts have considered whether the waiver was knowingly, voluntarily, and intelligently made. In re M. Children at ¶ 15; In re W.W.E. at ¶ 36.

In re M. Children, 1st Dist. Hamilton No. C-180564, 2018-Ohio-484, the court reversed a juvenile court decision granting permanent custody of a mother's child to HCJFS because the magistrate failed to engage in a sufficient colloquy to determine if mother was competent to waive the right to counsel and whether she had knowingly, intelligently, and voluntarily waived

that right under the "unique facts" of that case. Id. at ¶ 3 and ¶ 25.

Like, In re M. Children the magistrate in the present case by appointing a guardian ad litem to protect mother's interests, the magistrate necessarily determined that mother appeared to be mentally incompetent. Moreover, in strikingly similarities the magistrate then allowed this seemingly incompetent person "to fire" her attorney, allow counsel for the mentally incompetent mother to withdraw, and or waive representation of counsel and required mother to proceed pro se.Id. at ¶ 20.

As a result of the court's action, in this instance, plain error occurs on the record where mother-A.H.'s waiver occurs but no signed waiver and most importantly no evidence that a colloquy ever took place. In relevant part, the juvenile court's Judgment Entry in relation to this appeal reads:

> "The following persons were present for the hearing: Maureen T. Savino GAL for Child; A.H.[3], Party Involved; Gregory Stralika, GAL for Mother; A. H., Mother; S.W., Legal Custodian.

It must be noted, A.H., the mother was compelled to appear at the hearing without legal counsel and to act in pro se. Moreover, the court's appointment of guardian ad litem for mother left A.H. with an impression that the GAL was to assist and represent A.H.-mother in all legal matters. However, in all actuality the court required mother to represent herself during all proceedings and hearings even though it had not first held a colloquy to determine whether the waiver of right to counsel was knowingly, voluntarily and intelligently entered.

Even more, mother expressly stated numerous times during past proceedings, including on appeal that she needed re-appointment of representation of effective counsel. The record

[3]The names of the parties involved have been modified for privacy purposes as they do not appear in this fashion in the locked or sealed Journal Entries, within the J.E. all of the parties names and relationships appear in full.

below reflects that the parents A.H. and C.W. (Father)has mental health issues including but not limited to depression. And, here the record contains nothing to rebut the presumption that the mother or father was competent, and knowingly, voluntarily, and intelligently waived the right to counsel. Therefore, the magistrate erred in failing to inquire into the mother's[4]competency, and hold a colloquy even though it had appointed her a GAL. See In re W.W.E., 2016-Ohio-4552, 67 N.E.3d 159, at ¶ 46; In re D.C.H., 9th Dist. Summit No. 22648, 2005-Ohio-4257, at ¶ 8-15.

Further, the magistrate's decision to appoint a GAL to help father in representing himself was not so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion. See Blakemore v. Blakemore, 5 Ohio St.3d 217, 218, 450 N.E.2d 1140 (1983); In re Patterson, 1st Dist. Hamilton No. C-090311, 2010-Ohio-766, ¶ 20.

A.H., Mother further argues that on February 25, 2019, during a previous evidentiary on OCSS's motion to intervene and to establish the court to enter a child support order for J.H., this Honorable Court's Feb. 20, 2020 Journal Entry and Opinion at **{¶3}**states:

> "Mother was advised that she had the right to be represented by counsel at the hearing but waived that right. Although Mother received and signed a notice of hearing, **she did not appear for the hearing**."
>
> (Emphasis added).

See 2/20/20 J.E. and Opinion In Re J.H. C.A. No. 108565, Id at **{¶3}.**

The language in the recorded here makes no sense. To explain, it would have been impossible for the court to advise A.H. (Mother) of the right to be represented by counsel, or for her to have waived that right, at a hearing she did not appear for.Here, in acknowledging the absence of legal representation of counsel, as well as the absence of both A.H. the mother's

[4] The father was a no show at the hearing proceeding.

waiver of the right to counsel in the hearing and a colloquy it may be inferred where "the total circumstances of the individual case, including the background, experience and conduct of the parent" indicate that the parent has waived (or not knowingly, voluntarily and intelligently waived) the right to counsel. See In re M. Children, 1st Dist. Hamilton No. C-180564, 2019-Ohio-484, at ¶ 15; In re W.W.E., 2016-Ohio-4552, 67 N.E.3d 159, at ¶ 39; In re A.S., 8th Dist. Cuyahoga Nos. 94098 and 94104, 2010-Ohio-1441, ¶ 27; In re Rachal G., 6th Dist. Lucas No. L-02-1306, 2003-Ohio-1041, ¶ 14.

The acts or inactions against ensuring the mother's right representation of counsel, due process and a fair hearing constitutes plain error. See State v. Frazier, 73 Ohio St.3d 323, 332, 652 N.E.2d 1000 (1995). According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is not found unless it can be concluded that but for the error, the outcome of the trial would have been different. State v. Waddell, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996).

Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Haney, 12th Dist. Clermont No. CA2005-07-068, 2006-Ohio-3899, 2006 WL 2106173, ¶ 50, quoting State v. Long, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

A parent's relationship with his or her child is among the "associational rights" sheltered by the Fourteenth Amendment to the United States Constitution against unwarranted usurpation, disregard, or disrespect by the state. M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). Ohio courts have found that the due-process rights provided by the Fourteenth Amendment and those provided by Article I, Section 16 of the Ohio Constitution are coextensive. Direct Plumbing Supply Co. v. Dayton, 138 Ohio St. 540, 544-545, 38 N.E.2d 70

(1941).

The fundamental requisites of due process of law in any proceeding are notice and the opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965), quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). It is "flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

In the context of parental rights, due process requires that the state's procedural safeguards ensure that the proceeding is fundamentally fair. Santosky v. Kramer, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).Whether procedural due process has been satisfied generally requires consideration of three distinct factors:

> (1), the private interest that will be affected by the official action;
>
> (2), the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3), the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See Mathews v. Eldridge, 424 U.S. 319, 335(1976).

In the present case, regarding the first factor, A.H. the mother has a significant private interest. The United States Supreme Court has stated that parents' interest in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Also, Ohio has long held that parents who are "suitable" have a "paramount" right to the custody

of their children. In re Perales, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977), citing Clark v. Bayer, 32 Ohio St. 299, 310 (1877); In re Murray, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990).

Moreover, the mother has participated in several hearings in relation to the permanent termination of her parental rights. At least one Ohio court has described the permanent termination of parental rights as "the family law equivalent of the death penalty in a criminal case." In re Smith (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54. Therefore, A.H. the mother here "must be afforded every procedural and substantive protection the law allows." In re Hayes, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

In closing, it is beyond dispute that the termination of parental rights implicates a fundamental liberty interest. Stanley v. Ill., 405 U.S. 645, 651, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551, 558-59 (1972). The U.S. Supreme Court has emphasized: the inviolability of the family unit, noting that "[t]he 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.'" The interests of parents in this relationship have thus been deemed fundamental and are constitutionally protected. Id Stanley.

CONCLUSION

In closing, if Appellant A.H., the mother would have had the representation of effective assistance counsel as she requested, many if not all procedural mistakes and unfavorable judgments would not have occurred in this case. Consequently, Appellant A.H. the mother would have been much further along in the reunification process with her children, as she is today in a much better position to return to being the custodial parent to directly provide the support, love, care, and affection for her children, which is in their best interest.

WHEREFORE, Appellant A.H., the mother prays that the Honorable Court reviewing this case continues the work of Justice Moyer and finds that this Appeal Brief has Merit and address the great public interest of indigent parents and help to eradicate the collective negative impact as described above.

Respectfully submitted,

/ s / *A. H.*
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Merit Brief of A.H., was served on all parties via electronic court filing system and/or regular U.S. Mail-email as addressed to Appellees' in pro se, or counsel of record on this 29th day November, 2021, to:

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APPENDICIES

IN THE SUPREME COURT
OF THE STATE OF OHIO

IN RE J.H., A Minor Child [Appeal by A.H., Mother]	)	C.A. Case No.
APPELLANT	)	ON APPEAL FROM THE CUYAHOGA COUNTY COURT OFAPPEALS EIGHTH
	)	APPELLATE DISTRICT CASE NO. CA-19-109332
	)	

NOTICE OF APPEAL OF
APPELLANT.A.H.(MOTHER)

Notice of Appeal of Appellant A.H. (Mother) hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No.109332 on March 11. 2021. This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

s/ A.H
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I certify that on April 11, 2021 a copy of this Notice of Appeal was sent by ordinary U.S. mail to the parties as follows:

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APPENDIX A

APPENDIX B