

**IN THE SUPREME COURT OF OHIO**

IN RE J.F. AND J.A.F.

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On Appeal from the  
Jackson County Court of Appeals,  
Fourth Appellate District  
  
Case No: 2021-1172

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BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER, LEGAL AID  
SOCIETY OF COLUMBUS, SOUTHEASTERN OHIO LEGAL SERVICES, FAMILY AND  
YOUTH LAW CENTER AT CAPITAL UNIVERSITY LAW SCHOOL, NATIONAL  
ASSOCIATION OF COUNSEL FOR CHILDREN, AND NATIONAL COALITION FOR A  
CIVIL RIGHT TO COUNSEL IN SUPPORT OF APPELLANT L.A.'S JURISDICTIONAL  
APPEAL

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## **TABLE OF AUTHORITIES**

### **Cases**

*In re Williams*, 101 Ohio St. 3d 398, 2004-Ohio-1500, 805 N.E.2d 1110

### **Statutes**

R.C. § 2151.352

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Ohio Rules of Superintendence Rule 48.02(D)

## STATEMENT OF INTEREST OF AMICI CURIAE

This case implicates the fundamental right of children to familial association and the circumstances under which they are entitled to independent counsel to protect and assert that right. The issues presented by the case are of importance to the undersigned amici. The Office of the Ohio Public Defender, Legal Aid Society of Columbus, Southeastern Ohio Legal Services, Family and Youth Law Center at Capital University Law School, National Association of Counsel for Children, and National Coalition for a Civil Right to Counsel share the goal of securing justice and resolving fundamental problems for those who are low income and/or vulnerable. Relating to their missions, the undersigned legal services organizations regularly file amicus briefs in cases, such as the instant appeal, where outcomes may affect important rights or obligations of Ohioans, providing input to jurists and government officials who are addressing decisions of great public interest. Accordingly, the undersigned legal services organizations join this *amici curiae* brief to support the right to appointed counsel for children in child welfare and permanent custody cases, a process that will aid courts in determining what is in the best interests of the children at the center of these cases.

The Office of the Ohio Public Defender (“OPD”) is a state agency, designed to represent criminal defendants, adults, and juveniles, and to coordinate defense efforts throughout Ohio. The OPD, through its Juvenile Department, provides juveniles who have been adjudicated delinquent their constitutional right to access to the courts. See *John L. v. Adams*, 969 F.2d 228, 1992 U.S. App. LEXIS 16208 (6th Cir.1992). Like this Court, the OPD is interested in the effect of the law that this case will have on parties who are or may someday be involved in similar litigation. Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system, ensuring equal treatment under the law, and safeguarding the rehabilitative purpose of the juvenile court system. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio’s juvenile rules and laws.

The Legal Aid Society of Columbus and Southeastern Ohio Legal Services are non-profit organizations that provide civil legal aid and advocacy to combat unfairness and injustice and to help people rise out of poverty. Part of their mission is to ensure equal access to the courts which includes advocating for a right to counsel in certain civil matters for those who cannot afford an attorney and ensuring a child's interests are accurately presented when a court is weighing questions of custody.

The Family and Youth Law Center at Capital University Law School ("FYLaw") is a nationally recognized non-profit organization devoted to improving child welfare and adoption law, policies, and systems. Through education, advocacy, and research, FYLaw advocates for child welfare and adoption laws across the nation to work to provide children the stable families they deserve. FYLaw believes that good laws, sound policies, and equitable decisions promote safe, permanent homes for all children, whether through reunification with parents, placement with relatives, long-term foster care, or adoption. FYLaw joins this *Amici Curiae* brief to offer a national perspective, gained through years of work on behalf of children and families.

Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to advancing the rights, well-being, and opportunities of youth impacted by the child welfare system through access to high-quality legal representation. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an *amicus curiae* program. Through the *amicus curiae* program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at [www.naccchildlaw.org](http://www.naccchildlaw.org)

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association that advances the right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of over 300 participants from 40 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others. NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel where basic human needs are at stake (such as the right to parent), including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association’s Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates unanimously) that urges federal, state, and territorial governments to recognize a right to counsel in certain civil cases.<sup>1</sup> By promoting such a civil right to counsel in cases about an indigent party’s fundamental rights, NCCRC works tirelessly to try to close the national “justice gap” in the United States, which results in low-income Americans receiving no—or inadequate—legal help for 86% of the civil legal problems they face.<sup>2</sup>

### **EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves the substantial question of the proper standard for determining when children’s expressed wishes sufficiently differ from the recommendations of the guardian ad litem

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<sup>1</sup>American Bar Association, *Resolution 112A* (Aug. 2006), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf).

<sup>2</sup>Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017), available at <https://www.lsc.gov/mediacenter/publications/2017-justice-gap-report>.

so as to require the appointment of independent counsel for children in cases involving abuse, neglect or termination of parental rights.

Though legal mandates require these cases to move swiftly through the court system, the decisions made in the span of a few short years impact the child for life in countless ways. Yet the unreasonable standards developed by many of the Courts of Appeal, as described below, threaten to deprive children of meaningful participation and courts of critically important information in these proceedings. For these reasons, it is a matter of public or great general interest for this Court to establish a standard that protects the ability of children to have their voices heard in proceedings that affect their fundamental right to familial association.

### **STATEMENT OF THE CASE AND FACTS**

The amicus brief hereby adopts the Statement of Facts included in the Memorandum in Support of Jurisdiction by Appellant L.A.

### **ARGUMENT**

#### **I. In *In re Williams*, this Court Left Unanswered the Standard for Determining Whether a Child is Entitled to Independent Counsel.**

R.C. § 2151.352 provides that in juvenile court proceedings, “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.” In *In re Williams*, 101 Ohio St. 3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, a termination of parental rights case, this Court confronted a split between the Courts of Appeal as to whether children are parties to a juvenile proceeding such that § 2151.352 is triggered and the trial court must decide when to appoint independent counsel for the child. This Court held that children are in fact parties based on the plain language of the juvenile court rules. *Id.* at 405.

However, the only certified question in *Williams* was whether children are parties, not the standard to apply for appointment if they are parties. As part of its holding, *Williams* stated that “a child who is the subject of a juvenile court proceeding to terminate parental rights is ... entitled to independent counsel in certain circumstances”, *Id.*, but it did not elaborate upon those circumstances, nor did it address what a trial court should do where the child’s wishes are ambiguous or unclear. In fact, it acknowledged that it had declined review of an earlier appeal in the same case where the Court of Appeals had applied a standard for when to appoint independent counsel. 101 Ohio St. 3d 398 at 400.

## **II. The Courts of Appeal Have Adopted Unreasonable Standards for Determining When Children Should be Appointed Independent Counsel.**

While not part of its holding, *Williams* appeared to endorse the concept that “courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the child's guardian ad litem being appointed to represent the child.” *Id.* at 403. Such language does not establish an elevated or strict standard. Similarly, Rule 48.02(D) of the Ohio Rules of Superintendence simply states, “A court shall appoint a separate attorney to represent a child in abuse, neglect, dependency, unruly, and delinquency cases in which the wishes of the child differ from the recommendations of the guardian ad litem.” Thus, under the rule, court must appoint independent counsel simply when the child’s wishes “differ” from the guardian ad litem’s recommendations.

However, the Fourth District, where this case originates, has adopted a test requiring proof that a child “*consistently and repeatedly* expressed a *strong* desire that differs and is otherwise inconsistent with the guardian ad litem’s recommendations” (emphasis added). *Matters of J.F. and J.A.F.*, 4<sup>th</sup> Dist. Jackson. Nos. 21CA2, 21CA3, 2021-Ohio-2713 (Aug. 3, 2021). The same standard has been adopted by the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and



Twelfth Districts.<sup>3</sup> In the instant case, the Fourth District applied this standard to find that J.A.F. had not been entitled to independent counsel, notwithstanding that the guardian ad litem informed the court that J.A.F. wanted to be with his mother L.A., had “expressed love for Mother, believed that he would be going home at some point, and questioned when he would be able to go home.” *J.F. and J.A.F.*, 2021-Ohio-2713, ¶ 23.

In affirming the denial of independent counsel for J.A.F., the Fourth District also relied on precedent from the Fourth and Ninth Districts that “simply because a child is bonded to a parent \* \* \* or even expects to be returned to a parent does not mean that the child has ‘an affirmative desire to return to [the parent's] home and live with [the parent] on a permanent basis.’”<sup>4</sup> This standard further weakens the weight given to a child’s expressed wishes in evaluating the need for independent counsel.

The requirements of “consistent”, “repeated”, and “strong” desires on behalf of the child do not appear in *Williams*. In fact, while *Williams* observed that the Court of Appeals below in that case had applied a “consistently expresses a desire to be with a parent” standard, it pointed out that “[t]his court declined discretionary review of that decision.” 101 Ohio St. 3d 398 at 400. Nor did *Williams* address the concept of discounting a young child’s bond with the parents or expectations of returning home in evaluating the need for independent counsel.

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<sup>3</sup> *In the Matter of L.J. and M.J.*, 2<sup>nd</sup> Dist. Clark, No. 2015–CA–85 (Apr. 22, 2016); *In re D.M.*, 3<sup>rd</sup> Dist. Crawford No. 3-18-06, 2019-Ohio-1497 (Apr. 22, 2019); *In the Matter of J.E.*, 5<sup>th</sup> Dist. Knox No. 15CA19, 2016-Ohio-1500 (Apr. 8, 2016); *In re Brown*, 7<sup>th</sup> Dist. Columbiana No. 04CO59, 2005-Ohio-4374 (Aug. 16, 2005) *In re K.S.*, 8<sup>th</sup> Dist. Cuyahoga No. 109928, 2021-Ohio-694 (Mar. 11, 2021); *In re A.T., T.R., J.T., L.T., A.T.*, 9<sup>th</sup> Dist. Summit No. 23065, 2006-Ohio-3919 (Aug. 2, 2006); *In re J.P.*, 10<sup>th</sup> Dist. Franklin No. 15AP–193, 2015-Ohio-4687 (Nov. 12, 2015), *In re B.K.*, 12<sup>th</sup> Dist. Butler No. CA2010–12–324, 2011-Ohio-4470 (July 8, 2016);  
<sup>4</sup> *Id.* (citing to *In re C.T.L.A.*, 4<sup>th</sup> Dist. Hocking No. 13CA24, 2014-Ohio-1550, ¶ 19, and *In re A.T.*, 9<sup>th</sup> Dist. Summit No. 23065, 2006-Ohio-3919, ¶ 61.

**III. Appointment Of Independent Counsel for the Child Should Occur Whenever There Is Any Evidence That the Child’s Wishes Differ from the Best Interests Recommendation of the Guardian Ad Litem.**

Should this Court grant the jurisdictional appeal, amici intend to submit an amicus brief explaining why the aforementioned standards adopted by the Courts of Appeal are both unrealistic and unresponsive to the need to protect the significant legal interests of children in abuse, neglect, and termination of parental rights cases. The brief would argue for a standard consistent with Rule 48.02(D), which is to examine simply whether the wishes “differ” from the guardian ad litem’s recommendations, and offer the court information about how such a standard would be consistent with current research on legal representation of children, best practices, and models used in peer states. Such a brief would articulate the following arguments.

First, expecting children to express a single desire “consistently” *and* “repeatedly” *and* “strongly,” especially in the context of highly traumatic and confusing legal proceedings and especially where very young children are involved, is detached from both the realities of these proceedings and the developmental capabilities of children. This conceptualization oversimplifies the current understanding of the spectrum of childhood development, communicative abilities, interaction skills, and ability to convey needs or wishes such that application of any one of them would deprive children of their right to be heard. Furthermore, it is confusing and impracticable, as Ohio has not established uniform, statewide standards around the frequency of guardian ad litem visits with child clients.<sup>5</sup> Therefore, the standard used by the court in this case inequitably places the onus on children to reiterate their preferences during an unspecified series of meetings,

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<sup>5</sup> See Rules of Superintendence for the Courts of Ohio, [https://www.supremecourt.ohio.gov/ruleamendments/documents/Guardian%20Ad%20Litem%20Amendments%20\(As%20Adopted%20with%20Changes%20Notes\).pdf](https://www.supremecourt.ohio.gov/ruleamendments/documents/Guardian%20Ad%20Litem%20Amendments%20(As%20Adopted%20with%20Changes%20Notes).pdf)

held over an unspecified period of time, in order to trigger their eligibility for independent counsel.

Second, the expression of ambiguous desires by a child, especially a very young one, is a factor in favor of appointing counsel, not against it. In such situations, counsel is needed to speak confidentially with the child and offer legal advice in order to attempt to help the child resolve the ambiguity while ensuring the child understands the legal consequences of the proceeding as much as possible (which can help with the ambiguity). Giving weight to a child's ambiguous wishes in analyzing whether to appoint independent counsel should not be conflated with giving weight to such wishes in a decision to reunite the child with the parents. With the former, giving weight to such ambiguous wishes merely triggers the appointment of an attorney who can clarify and advocate for those wishes to the extent possible; it does not restrict the trial court's ultimate determination of the best interests of the child.

Third, automatically discounting a child's express wishes simply because the child is of "tender years" impermissibly increases the burden on very young children to justify the need for independent counsel, children who are least able to meet such a burden precisely because of their tender years. While the child's level of maturity is relevant in evaluating the child's expressed wishes, trial courts should be cautious in relying on this factor to deny independent counsel.

Fourth, key policy statements from experienced organizations, such as the American Bar Association's *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*,<sup>6</sup> encourage states to provide independent counsel for all children in permanency cases, and such a policy weighs in favor of a more rational and equitable standard for

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<sup>6</sup> American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (101A) (2011), *available at* [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba\\_model\\_act\\_2011.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf)

appointment. And the proposed brief will inform the court about the landscape of this issue in peer states, including many that automatically appoint independent counsel for all children and youth in cases, and others that use a clearer and more coherent standard to guide appointment.

### CONCLUSION

Given the seriousness of the child's interests at stake in abuse, neglect, and termination of parental rights cases, proper resolution of the questions raised by this case is critical to protect Ohio children and therefore of great public interest. As such, we respectfully urge this Court to grant the jurisdictional appeal.

Respectfully submitted,

A handwritten signature in blue ink that reads "Dg Althaus". The signature is written in a cursive, flowing style.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Brief of Amici Curiae was served via regular U.S. Mail on September 17, 2021, upon the following:

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