

failed to follow either the basic due process requirements enshrined in the United States and Ohio constitutions, or the particular due process provisions of R.C. 2151.414 – especially those regarding effective assistance of counsel – we reverse the decision of the trial court, and remand for further proceedings.

{¶2} On May 26, 2005, TCCSB filed a motion for permanent custody of Chantel, age 8 years, who had been adjudged a dependent child on or about February 11, 2004. According to the court’s judgment entry, the adjudicatory hearing on the motion for permanent custody was held July 28, 2005. The trial court’s docket contains no formal entry of trial for that date, and the court reporter’s transcript indicates the hearing was held July 7, 2005. The dispositional hearing was held February 9, 2005. Jasmin was not present at the hearings because she was incarcerated at that time.

{¶3} The trial court terminated Jasmin’s parental rights and granted permanent custody of Chantel to TCCSB by a judgment entry filed September 23, 2005. Jasmin filed a timely notice of appeal, making the following assignments of error:

{¶4} “[1]. The trial court erred in awarding permanent custody to appellee when appellant was not afforded effective assistance of counsel.

{¶5} “[2]. The trial court erred to the prejudice of Ms. Roque by failing to hold the new permanent custody hearing with the participation of appointed counsel for Chantel when she was sufficiently mature enough to express her wishes and there was a conflict between her interests and those expressed by the guardian ad litem.”

{¶6} We deal with the errors assigned in order.

{¶7} At the outset, we note the termination of parental rights is “*** the family law equivalent of the death penalty ***.” *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005

Ohio 3774, at ¶22, citing *In re Hoffman*, 97 Ohio St.3d 92, 2002 Ohio 5368, at ¶14. See, also, *In re Murray* (1990), 52 Ohio St.3d 155, 157 (parents have a “fundamental liberty interest” in the care, custody, and management of their children, and an “essential” and “basic civil right” to raise them). Accordingly, when the state initiates a permanent custody proceeding, parents must be provided with fundamentally fair procedures in accordance with the due process provisions of the Fourteenth Amendment to the United States Constitution, and Section 16, Article I of the Ohio Constitution. *In re Sheffey*, 167 Ohio App.3d 141, 2006-Ohio-619, at ¶21. This includes effective assistance of counsel. *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, paragraph two of the syllabus; *In re Ridenour*, 11th Dist. Nos. 2004-L-168, and 2004-L-169, and 2004-L-170, 2005-Ohio-349, at ¶9; *In re Brewster* (Mar. 25, 1994), 11th Dist. No. 91-P-2365, 1994 Ohio App. LEXIS 1317, at 3, citing *Jones v. Lucas Cty. Children Services Bd.* (1988), 46 Ohio App.3d 85, 86.

{¶8} While Jasmin couches her first assignment of error in terms of ineffective assistance, the record indicates that multiple failures by both her appointed counsel, and the trial court, led to a complete denial of her right to counsel and related due process rights.

{¶9} Effective counsel is one who “*** plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington* (1984), 466 U.S. 668, 685. “*** [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.” *Id.* Hence, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct

so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

{¶10} In *United States v. Cronin* (1984), 466 U.S. 648, the Supreme Court held that a per se violation of the right to counsel exists “*** when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” *Id.* at 659, fn. 25. The Court further observed there may be “*** some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659-660.

{¶11} When presented with ineffective assistance of counsel claims in proceedings to terminate parental rights, Ohio courts apply the two-prong *Strickland* test. *Ridenour* at ¶9. To demonstrate ineffective assistance of counsel, a party “*** must show that counsel’s performance was deficient and *** that the deficient performance was so serious as to deprive [her] of a fair trial, a trial whose result is reliable.” *In re Colbert* (Nov. 9, 2000), 11th Dist. No. 2000-A-0028, 2000 Ohio App. LEXIS 5249, at 7, citing *State v. Post* (1987), 32 Ohio St.3d 380, 388. In evaluating such claims, an appellate court must determine whether counsel’s performance fell below an objective standard of reasonableness, and whether prejudice resulted. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Prejudice exists when “the result of the trial would have been different” but for counsel’s ineffectiveness. *Id.* at paragraph three of the syllabus. Courts must always recall that properly-licensed counsel is presumed competent, *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301;

and, that trial counsel must be afforded deference regarding trial strategy. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, at ¶52.

{¶12} Unfortunately, in this case, it is clear the performance of Jasmin's appointed counsel was deficient, meeting the first prong of the *Strickland* test. At the time of the permanent custody hearing, Jasmin's counsel had not spoken to her in eight months. Counsel failed to attend review hearings; failed to participate in discovery; failed to challenge hearsay evidence submitted at the permanent custody hearing;¹ and failed to cross-examine effectively the state's witnesses. Jasmin's counsel allowed three letters from her to the trial court, pleading for its help, to suffice for Jasmin's participation in the permanent custody hearing – and failed to object to their admission as evidence against her.

{¶13} The second prong of the *Strickland* test is always more difficult to prove: how the ineffectiveness of counsel prejudiced a party by altering the outcome of the trial. However, essential due process rights cannot simply be waived away. Cf. *In re Salsgiver*, 11th Dist. No. 2002-G-2477, 2003-Ohio-1206, at ¶29. The lack of meaningful discovery and cross-examination in this case, the admission of hearsay and complete disregard for Jasmin's statutory and constitutional due process rights makes it impossible to glean from the record the reliability of the state's case. In substance, counsel's failure to assert Jasmin's rights meant no real trial could be had, nor record made. When there is no possibility for a fair trial, it is inherently prejudicial to the integrity of the trial, and thus, to the parties, including appellant herein. Due to the failure of Jasmin's counsel to participate, there is no possibility that a fair trial, one with

1. A caseworker was permitted, without objection, to testify regarding Jasmin's urine screens. This is inadmissible hearsay. *In re T.V.*, 10th Dist. Nos. 04AP-1159 and 04AP-1160, 2005-Ohio-4280, at ¶57-58.

a reliable outcome, resulted from the proceedings herein. This fulfills the second prong of the *Strickland* test.

{¶14} The first assignment of error has merit.

{¶15} It is only with the greatest reluctance that an appellate court finds merit in a claim for ineffective assistance of counsel. The trial court shares responsibility in this matter because it has the duty to appoint counsel for indigent defendants, many of whom, through the effects of poverty, ignorance, illiteracy or mental illness cannot choose who will represent them. For many, their children are all they have. An indigent may not have the right to counsel of his or her own choosing – but the right to competent counsel remains. *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558. The trial court is guardian of this right.

{¶16} In this case, the file evidences few attempts to make proper service on the parents. Neither Jasmin nor Chantel's father executed any waiver of counsel. The trial court conducted the permanent custody hearing like a pretrial. Hearsay was freely offered and accepted as evidence. The trial court referenced prior hearings at which Jasmin was either not present, or was unrepresented by counsel, yet no prior sworn testimony is of record. Though the trial court was well aware of Jasmin's place of incarceration, it made no effort to arrange her transportation to the permanent custody hearing, or otherwise arrange for her participation. It allowed her to be represented by counsel who had not spoken with his client in eight months.

{¶17} Contrary to the trial court's assertion in one of its judgment entries, Jasmin was no mere observer to these proceedings: she was – or should have been – a participant. She had a right to be present or participate at the hearing. Cf. *Sheffey* at

¶12, fn. 1; *In re Thompson* (Apr. 26, 2001), 10th Dist. Nos. 00AP-1358 and 00AP-1359, 2001 Ohio App. LEXIS 1890, at 19. She was not.

{¶18} In lieu of appearance, the trial court may make other arrangements so a parent can witness and participate in the hearing, guaranteeing that parent's rights to due process and confrontation of witnesses. See, e.g., *Sheffey* at ¶12, fn. 1; see, also, *Jordan v. Ivanchuk* (Dec. 15, 1989), 11th Dist. No. 88-T-4102, 1989 Ohio App. LEXIS 4713, at 6-9. The trial court herein made no such arrangements.

{¶19} The trial court had a duty to read Jasmin's rights to her on the record, and to obtain a knowing waiver of those rights. Cf. *Sheffey* at ¶23. It did not. In cases pertaining to the termination of parental rights, failure to comply with Juv.R. 29(D) has been found to be plain error. *In re Elliott*, 4th Dist. Nos. 03CA65 and 03CA66, 2004-Ohio-2770, at ¶15; *In re Aldridge*, 4th Dist. No. 02CA2661, 2002-Ohio-5988, at ¶16.

{¶20} We are mindful that Jasmin's counsel had a duty to protect her rights, and the trial court was responsible for the basic integrity of the proceedings herein.

{¶21} By her second assignment of error, Jasmin asserts the trial court erred by failing to hold a new permanent custody hearing with the participation of appointed counsel for Chantel, since Chantel was sufficiently mature to express her wishes, and those wishes conflicted with the views expressed by her guardian ad litem. We agree.

{¶22} "Pursuant to R.C. 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances." *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, syllabus. The "certain circumstances" referred to include instances where a conflict exists between the

guardian's recommendation, and the child's desires. Cf. *In re Williams*, 11th Dist. Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, at ¶18. Where a potential discrepancy between the child's wishes and the guardian ad litem's recommendation exists, the trial court must, at least, investigate, and determine if the child is of sufficient maturity to benefit from separate counsel. Cf. *Id.* at ¶18. "At a minimum, the court should conduct an in-camera, recorded interview with the child before making a lack of maturity to benefit from having appointed counsel decision." *Id.*

{¶23} In this case, the guardian ad litem recommended to the trial court that Jasmin's parental rights be terminated. The TCCSB case supervisor for Chantel testified at the permanent custody hearing that Chantel "**** would ultimately like to be with her mom *** [.]". In view of this clear conflict, the trial court was required, at the least, to determine if Chantel was old enough to benefit from separate counsel. We note that a presumption exists that a minor child is entitled to separate counsel in termination of parental rights proceedings, *even when there is no conflict between the guardian ad litem's recommendations and the child's expressed wishes. Williams*, at ¶19-22.

{¶24} The trial court, at a minimum, was required in this case to interview Chantel, on the record, to determine if she was of sufficient maturity to benefit from separate counsel. It failed to do so.

{¶25} The second assignment of error has merit.

{¶26} The judgment of the trial court is reversed and the matter is remanded for

further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

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{¶27} The majority incorrectly concludes that trial counsel for Jasmin Roque was constitutionally ineffective and that counsel's performance prejudiced Jasmin's interests in the proceedings. I respectfully dissent.

{¶28} The majority bases its decision on the facts that Jasmin's trial counsel had not communicated with Jasmin for eight months prior to the permanent custody hearing and that the trial court did not make arrangements for Jasmin, who was incarcerated at the time, to be present at the hearing. The majority asserts "that Jasmin's counsel had a duty to protect her rights, and the trial court was responsible for the basic integrity of the proceedings herein." The majority fails to acknowledge, however, ***that Jasmin is responsible for these shortcomings in the proceedings.***

{¶29} At the close of the permanent custody hearing, Jasmin's trial counsel addressed the court as follows:

{¶30} Counsel: "For the record, I would inform the Court that I have not been in contact with my client for a period of time in excess of eight months. We have sent letters to the Trumbull County Jail, which we believe was where she was located at the time of the last hearing. She called and made two appointments in the early part of

2005 and had failed to appear for those two appointments. And I have had no further contact with my client.”

{¶31} Court: “I would note, I think it was in the adjudicatory [hearing], at one of the other hearings, she had appeared and the Court had inquired why she would bother asking for a lawyer if she wasn’t going to use one. ***”

{¶32} Counsel: “She -- we did have several meetings, and she was active in the case dating back to '04, but nothing in 2005.”

{¶33} Court: “Yeah. February 2004 the Court note indicates that mom had been -- had come in and asked for court appointed counsel. She had been given your name and address and telephone number. She was advised it was her responsibility to notify you, and that she had not done so, and that the first time she met you was at that adjudicatory hearing.”

{¶34} Counsel: “Right. We had some follow-up meeting on April 7, 2004.”

{¶35} The record also indicates that Jasmin was personally served with notice of the hearing at the Trumbull County Jail on May 27, 2005, two months prior to the July 28, 2005 hearing.

{¶36} The record clearly demonstrates that it was Jasmin who neglected to contact her attorney for eight months prior to the hearing, despite counsel’s attempts at contacting Jasmin.

{¶37} On June 27, July 11, and July 26, 2005, Jasmin wrote the court directly asking for “another chance” to prove that she could be a “fit” parent for Chantel. In these letters, Jasmin notes that she has also written children’s services and was in contact with her case manager. Jasmin does not mention appointed counsel at all. She

neither indicates that she was unable to contact counsel nor complains that she has not been in contact with counsel.

{¶38} Jasmin's failure to contact her attorney is consistent with her behavior following her indictment for trafficking drugs within a school zone, during which time she failed to visit regularly with Chantel, failed to make support payments for Chantel, and failed to submit to drug screens.

{¶39} Jasmin's failure to take an active interest in the legal proceedings to terminate her parental rights does not constitute ineffective assistance of counsel.

{¶40} The majority also faults counsel for failing to object to testimony that Jasmin had tested positive for opiates and oxycontin in March 2005 and for allowing the letters written to the court to be admitted into evidence. Neither of these failures, however, compromises the basic fairness of the proceedings.

{¶41} The trial court found that Jasmin "has not demonstrated long term sobriety and abstinence from illegal substances." This finding is not only supported by the single drug screen testified to at the hearing, but by the fact that Jasmin failed to submit to drug screens throughout 2005 until her incarceration in May. In other words, if the testimony regarding the failed drug screen were stricken from the record, the trial court's conclusion that Jasmin failed to demonstrate "long term sobriety and abstinence from illegal substances" would still be valid based on her failure to submit to drug screening. Cf. the testimony of Michael Sylvester, children's services supervisor of extended care services, that "we considered her failure to take the screens as positives."

{¶42} The letters written by Jasmin to the court are admissible as voluntary admissions. Jasmin's trial counsel moved to admit the letters because they were the

only communications from Jasmin that existed regarding the termination of her parental rights. Without these letters, there would have been no evidence that Jasmin was opposed to the termination of her parental rights.

{¶43} Moreover, the letters do not constitute inadmissible hearsay because they were not admitted to prove the truth of any factual matter before the court. They simply attest Jasmin’s love for Chantel and desire for another opportunity to prove that she could effectively parent Chantel. While Jasmin admits to having “made mistakes” and to “fail[ing] to complete a lot” in the letters, she never elaborates on what those mistakes or failures were. Nevertheless, Jasmin’s mistakes and failures are well attested by other evidence in the record. Jasmin’s letters contribute nothing to the establishment of the factual record in this case or the court’s decision to terminate her parental rights.

{¶44} Under the second assignment of error, the majority concludes that the trial court, “at a minimum,” should have conducted an in camera interview with Chantel, on the record, to determine if she was of sufficient maturity to benefit from separate counsel. The majority misconstrues the issue before this court.

{¶45} In *In re Williams*, 11th Dist. Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, this court held that an inquiry into the child’s level of maturity should be made “[w]hen *** the court is informed of the child’s expressed desire to remain with his natural parent.” *Id.* at ¶18. In the present case, Chantel never expressed an unequivocal desire to remain with Jasmin.

{¶46} The guardian ad litem’s report states that Chantel “expressed *** that she likes where she is [in foster care], considers the foster mother a ‘mother’ but appreciates

the difference; and would be happy living there.” At the permanent custody hearing, the trial court queried the guardian ad litem about Chantel’s preference:

{¶47} Court: “Did you ask her where she would like to stay?”

{¶48} Guardian: “Yes, I did, and she did say that she wanted to stay with the foster mother.”

{¶49} Court: “Does she show any type of anxiety or any distress by not being with her mother?”

{¶50} Guardian: “Did not appear to at all, no.”

{¶51} The trial court made the same inquiry of Sylvester, a children’s services supervisor:

{¶52} Court: “Is this child old enough to express her wishes?”

{¶53} Sylvester: “Yes.”

{¶54} Court: “And, to your knowledge, has she expressed her wishes as to where she’d like to be?”

{¶55} Sylvester: “Yes.”

{¶56} Court: “And what are those wishes?”

{¶57} Sylvester: “I think she would ultimately like to be with her mom in a stable safe environment, and she says that. But she’s very comfortable in the foster home and she does not want to leave the *** foster home.”

{¶58} Chantel’s desire to “ultimately” live with Jasmin in a stable, safe environment does not require the appointment of independent counsel, particularly in light of Chantel’s desire to remain in her presently stable, safe foster home. Virtually every child involved in such proceedings as these would like, on some level, to live with

their natural parents provided those parents could provide a safe and stable home. Since there is no indication that Jasmin is presently capable of providing such a home for Chantel, there is no conflict between Chantel's wishes and the recommendation of the guardian ad litem that Jasmin's parental rights be terminated.

{¶59} Without question “the *fundamental* or *primary* inquiry at the dispositional phase of these juvenile proceedings” is the best interests and welfare of the child. These are of “paramount importance.” *In re Cunningham* (1979), 59 Ohio St.2d 100, 106 (emphasis sic); also *In re Stillman* (11th Dist.), 155 Ohio App.3d 333, 2003-Ohio-6228, at ¶52; *Winfield v. Winfield*, 11th Dist. No. 2002-L-010, 2003-Ohio-6771, at ¶21. Ultimately, it is Chantel's life and future which are at stake in these proceedings, not those of Jasmin.

{¶60} The decision of the court below should be affirmed.