

IN THE SUPREME COURT OF OHIO

IN RE CHARLES, CHAWNA & :  
CRAIG BEATTY, :  
DEPENDENT CHILDREN. :  
: :  
: :  
: :

Case No. 2006-1627

On Certified Conflict from  
the Tuscarawas County  
Court of Appeals, No.  
2006AP040022

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BRIEF OF AMICUS CURIAE JUSTICE FOR CHILDREN PROJECT  
IN SUPPORT OF APPELLEE CARA BEATTY

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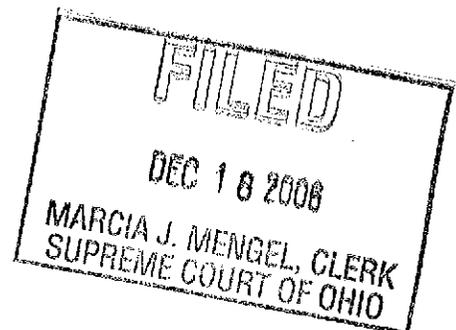


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## STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amicus Curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights. The Project has participated as amicus to this Court in numerous cases, including *In Re Adoption of Asente* (2000), 90 Ohio St.3d 91, *In Re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500 and *In Re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, as well as other cases currently pending decision.

Because of the important interests raised in this case, the Justice for Children Project hereby offers this amicus brief, and urges this Court to dismiss this case as not presenting an actual conflict, or alternatively to answer the certified question in the affirmative and affirm the judgment of the Tuscarawas County Court of Appeals. Amicus has no relationship to any of the individuals involved in this litigation. This brief is submitted pursuant to S. Ct. R. VI, Sec. 6.

## STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts the Statement of Case and Facts set forth in the Brief of the Appellee.

## ARGUMENT

**CERTIFIED CONFLICT QUESTION:** Whether a trial court is authorized to grant legal custody to a relative at the center of a permanent custody action where several months prior to the final permanent custody hearing the court determined that the home was appropriate for consideration of relative placement and the DJFS had conducted a home study and facilitated visitation in the home of the relative, when the relative has not filed a motion pursuant to R.C. 2151.353(A)(3) requesting custody.

Pursuant to R.C. 2151.415(F), juvenile courts may sua sponte modify prior orders of disposition to place abused, neglected, or dependent children in the permanent legal custody of relatives where such placement is in the child's best interest. It is certainly true that children are often best protected and their best interests are often better served by relative placements rather than foster care; moreover, children themselves logically want to maintain ties to their remaining relatives even where their parents are unable or unwilling to act in their interests. Given that the legislature specifically favors relative placements, which are "intended to be permanent in nature," see R.C. 2151.42(B), allowing such relative placements serves both the goal of permanency and the child's best interest. Thus, R.C. 2151.415(F) plainly governs in this case.

There is no persuasive policy justification for adopting a different rule, and certainly not the one urged by DJFS in this case. A relative's technical failure to file a motion for custody should not preclude a juvenile court from considering whether a placement with the relative is in the child's best interest—particularly not where, as in this case, there is ample evidence that the relatives were ready, willing and able to accept custody of the child. See, *e.g.*, Transcript at 89-93 (proffer of testimony and request for continuance). Nor should a county children services agency be permitted to veto such a placement in the clear absence of statutory authority. The decisionmaker in

such cases must be the same person who makes the neutral determination as to what is in the best interests of the child: the juvenile court.

- I. Ohio's juvenile courts have broad discretion to act in the best interests of children, and are not jurisdictionally precluded from making a post-dispositional placement of the child with a relative by the relative's technical failure to file a motion for custody

The state's apparent position in this case is that under R.C. 2151.353(A)(3), a juvenile court lacks jurisdiction to issue a post-dispositional order to place a child in the legal custody of relatives unless those relatives have previously filed a "motion requesting legal custody of the child." R.C. 2151.353(A)(3). See also Brief of Appellant at 11.

However, by its plain language R.C. 2151.353(A)(3) applies only to dispositional orders made immediately following an adjudication of abuse, neglect or dependency; modifications of such orders are governed by R.C. 2151.415, which allows the juvenile court to act sua sponte. See generally *In Re Rumschlag*, Stark App. No. 2005-CA-0254, 2006-Ohio-1184 at ¶8 ("R.C. 2151.415 governs modification and termination of prior dispositional orders . . . . [and] does not require the relative or interested individual to first file a motion for legal custody . . . "). Given that R.C. 2151.415(B), R.C. 2151.415(A)(3) and R.C. 2151.42 clearly establish the legislature's intent to allow juvenile courts to modify their prior dispositional orders, the trial court may properly exercise its jurisdiction sua sponte to modify its prior orders in virtually any way that is in the best interest of the subject child.

The general goal of Ohio's abuse, neglect, and dependency statutes is "[t]o provide for the care, protection, and mental and physical development of children subject to Chapter 2151 of the Revised Code, whenever possible, in a family

environment, separating the child from the child's parents only when necessary for the child's welfare." R.C. 2151.01(A). As this Court recognized in *In Re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, "matters involving a neglected or dependent child" are clearly "within the subject-matter jurisdiction" of the juvenile court. *Id.* at ¶11 (citing R.C. 2151.23(A)(1)). Ohio juvenile courts have liberal authority to make dispositional orders for abused, neglected or dependent children, as long as those orders are in the children's best interests. See generally *In Re Cunningham* (1979), 59 Ohio St.3d 100, 105. While it is well-established that parents "have a basic civil right to raise their children," and that parents "must be afforded every procedural and substantive protection the law allows," *In Re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411 at ¶3 (citations omitted), Ohio's child welfare statutes have been amended to promote the use of family solutions in achieving permanency for children, rather than allowing them to "stay in foster care indefinitely . . ." *In Re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359 at ¶22. Finally, under federal foster care requirements, states must "considering giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C.A. Sec. 671(a)(19).<sup>1</sup> In light of all these factors it is clear that relative placements, which both achieve immediate permanency for the subject child, see R.C. 2151.42(B), and allow parents to retain "residual parental rights,

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<sup>1</sup> The available data suggests that "public kinship caregivers request and receive fewer services for themselves and for the children in their care," that "[c]hildren in kinship care are less likely to have multiple placements," and that "[p]lans for children in kinship care are less likely to include adoption and more likely to include placement with a relative as their goal." See *Report to the Congress on Kinship Foster Care* (June 2000), available online at <http://www.aspe.hhs.gov/hsp/kinr2c00/>.

privileges, and responsibilities,” *In Re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191 at ¶21, must be seriously considered by Ohio juvenile courts whenever they may be appropriately made.

As this Court has observed, “statutes concerning the same subject matter must be construed *in pari materia*.” *In Re Hayes* (1997), 79 Ohio St.3d 46, 48-9 (interpreting dispositional statutes). Ohio’s dispositional statutes address different procedural mechanisms and different phases of an abuse, neglect, or dependency case. Specifically, R.C. 2151.353 generally controls initial dispositions based upon the original complaint, and R.C. 2151.415 governs modification of those dispositions. Accordingly, the controlling statute in this case is not, as the state’s certified question suggests, R.C. 2151.353, but rather R.C. 2151.415. The language of that statute is clear.

*The court, on its own motion or the motion of the agency or person with legal custody of the child, the child’s guardian ad litem, or any other party to the action, may conduct a hearing with notice to all parties to determine whether any order issued pursuant to this section should be modified or terminated or whether any other dispositional order set forth in divisions (A)(1) to (5) of this section should be issued. After the hearing and consideration of all the evidence presented, the court, in accordance with the best interest of the child, may modify or terminate any order issued pursuant to this section or issue any dispositional order set forth in divisions (A)(1) to (5) of this section. In rendering a decision under this division, the court shall comply with section 2151.42 of the Revised Code.*

R.C. 2151.415(F) directly authorizes juvenile courts to “*on its own motion . . . conduct a hearing . . . [and] issue any dispositional order set forth in divisions (A)(1) to (A)(5) of this section,*” and subsection (A)(3) specifically allows the court to issue “[a]n order that the child be placed in the legal custody of a relative or other interested individual.” In short, the juvenile court has jurisdiction to “modify or terminate” its prior order of temporary custody to a county children services agency, and “may issue” a new order

placing the child with a relative placement, so long as that relative placement is in the best interest of the child, R.C. 2151.415(F).

Finally, it must be reiterated that pursuant to R.C. 2151.42, orders granting legal custody to relatives (as opposed to those granting temporary custody to county children services agencies) are “intended to be permanent in nature” and cannot be modified without a change of circumstances and a finding that “modification or termination of the order is necessary to serve the best interest of the child.” R.C. 2151.42(B).

In sum, under Ohio’s statutes it is placement with a relative that is permanent, not continued foster care placement through a grant of custody to a county children services agency. Cf. *In Re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359 at ¶¶18-19 (recognizing “foster care drift” as the situation “when children in placement lose contact with their natural parents and fail to form any significant relationship with a parental substitute,” and that the major goal of child welfare reform was permanency). The appellant’s position is inconsistent with the authority the legislature has designated to the juvenile court, inconsistent with R.C. 2151.415, and inconsistent with Chapter 2151’s goals of permanency and best interest of the child. Because the question certified to this Court assumes the applicability of R.C. 2151.353 to this situation, the Court should reject it; however, if the certified question is addressed, the Court must resolve it in the affirmative and affirm the judgment of the Tuscarawas County Court of Appeals.

- II. This case is an improper vehicle for addressing the certified conflict question, as (1) the judgment of the court of appeals rests entirely on an evidentiary determination that cannot be resolved by the court's answer to that question, (2) the trial court's judgment entry fails to meet the requirements to terminate parental rights, and (3) the trial court failed to appoint separate counsel for the subject child even though there was a clear conflict between her placement wishes and the placement recommendation of her Guardian ad Litem

As this Court is well aware, the certified conflict question addresses the exercise of jurisdiction of a court to a particular post-dispositional placement where a motion requesting that placement has not previously been filed. However, that broad legal question was discussed in passing, and *not answered* in the appellate opinion under review. See generally *In Re Beatty*, 167 Ohio App.3d 730, 2006-Ohio-3698 at ¶133.

Rather, the opinion turns on a related but much narrower question: whether the trial court's decision to preclude the mother from calling potential relative placements as defense witnesses violated the mother's procedural due process rights. *Id.* at ¶23 (“[A]ppellant contends that her constitutional rights were violated when the trial court refused to allow her to call James and Carla Striker as witnesses at the permanent custody hearing. We agree.”). See also Brief of Appellant-Mother, Cara Beatty, filed in Tuscarawas App. No. 2006 AP 04 0022 at 17 (stating assignment of error that “[t]he trial court's refusal to allow mother's witnesses to testify was in violation of mother's constitutional rights as guaranteed by the United States and Ohio Constitutions”). By its own terms, the appellate court's decision rested on a procedural due process claim, based on facts unique to this case and unlikely to recur.

Under the particular facts and circumstances of this case we find that the trial court did err in excluding the testimony of the Strikers . . . . [T]he trial court permitted lengthy testimony during the case-in-chief presented by the TCJFS concerning the appropriateness of the Strikers as a placement alternative. *Fundamental fairness as well as due process would require the court to allow the appellant to rebut or to explain the testimony of the*

*TCJFS caseworker concerning the Strikers, and to argue that it would be in the best interest of the child to grant the Strikers legal custody rather than to grant permanent custody to the TCJFS.*

*Beatty*, 2006-Ohio-3698 at ¶¶33-4 (emphasis added). Even the briefest review of the appellate court's decision reveals that it rests on a procedural due process claim regarding the presentation of evidence that was not included in the certified question and not discussed in the state's merit brief. *Id.* at ¶¶33-39. For this reason, this case fails to present an actual conflict on the question before the court.

Furthermore, there are fatal flaws in the trial court's final judgment entry, precluding reversal of the appellate court's judgment. The trial court's entry completely fails to comply with R.C. 2151.414(B), in that the trial court fails to make the required determination that one of the four conditions listed under R.C. 2151.414(B)(1) exists. See *In Re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411 at ¶9 (quoting statute and holding that "before a court can grant permanent custody to the moving agency, it must 'determin[e] . . . by clear and convincing evidence that it is in the best interest of the child . . . and that any of the following [R.C. 2151.414(B)(1) conditions] apply.'" Here, the statutory basis for the trial court's award of permanent custody (that the child has been abandoned, orphaned, in temporary custody for twelve of twenty-two months, or that the child has not been abandoned, orphaned, or in custody for twelve of twenty-two months but cannot or should not be returned to the parents) is not present in the record. Compare Judgment Entry at 2-4 with R.C. 2151.414(B)(1) and *C.W.*, 2004-Ohio-6411 at ¶9. See also *In Re Hayes* (1997), 79 Ohio St.3d 46, 48 (noting that "parents 'must be afforded every procedural and substantive protection the law allows'"). A potential reason for the trial court's failure to make this required finding is that the court may well

have been following an out-of-date version of the relevant statutes. The trial court's judgment entry notes that the parents "failed continually and repeatedly for a period of six months or more to substantially remedy the conditions causing removal." Judgment Entry at 3. As the undersigned noted at oral argument in a different case from this same trial court, see argument in *In Re: Donald Adkins, Jr.*, No. 2006-0514, online at <rtsp://www.ollserver.state.oh.us/court/2006/2006-0514.rm> (discussion beginning at 3 minutes 25 seconds), this language was removed from the statute some ten years ago. See 1996 Ohio Laws File 132 (changes to R.C. 2151.414(E)(1)). The trial court's failure to make a required statutory finding, and its decision to instead make statutory findings irrelevant to the matter before demonstrate that its judgment is arbitrary and unreasonable.

Finally, even if the appellate court's opinion was erroneous as to the resolution of the procedural due process issue and even assuming that the trial court's judgment entry is sufficient to terminate the appellant Cara Beatty's parental rights over her daughter Chawna, there is plain error in the record that justifies the appellate court's reversal of the trial court judgment. The Guardian ad Litem's report directly states that Chawna "would like to be placed in the relative's home," but recommends that she "be placed in the permanent custody of the Department of Job and Family Services at this time." See Guardian ad Litem Report at 4 and 5. Chawna is an eleven year-old girl who is perfectly capable of enunciating her wishes for placement, and as such should have had separate counsel appointed by the trial court to advocate for her placement wishes upon the discovery of this conflict. See, e.g., *In Re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶¶27-29. Instead, Chawna was not provided counsel *at all*.

The trial court's failure to ensure that Chawna's rights were protected and her voice heard in this proceeding fully justifies the appellate court's decision to reverse the trial court's judgment. Cf. *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284 (holding that "where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as a basis thereof"). As amicus has previously argued to this Court, children have a fundamental right to retain their relationships with their parents that is protected by both the Ohio and United States Constitutions. See Brief of Amicus Curiae Justice for Children Project filed in *In Re Donald Adkins*, No. 2006-0514 at 2-6. The lack of attention paid to Chawna's rights and placement wishes by the trial court, standing alone, justifies the appellate court's judgment. See *Williams* at ¶28 ("Once we accept that the premise that the subject child is a party whose due process rights are entitled to protection, peripheral practical considerations fade in importance"). Given the fact that Chawna did not have counsel in either the trial court or the appellate court, amicus respectfully suggests that this Court would be justified in summarily affirming the appellate court's judgment on the authority of *Williams*.

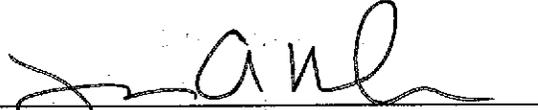
CONCLUSION

For all these reasons, *amicus curiae* requests that the appellant's appeal be dismissed for failure to present an actual conflict of law pursuant to S.Ct. Prac. R. IV Sec. 2(B), or alternatively that the appellant's proposed propositions of law be rejected and the judgment of the Tuscarawas County Court of Appeals be affirmed.

Respectfully submitted,



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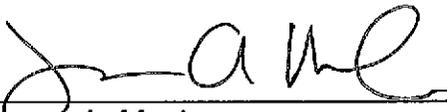
CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by regular U.S. mail on this 18th day of December, 2006:

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