IN THE SUPREME COURT OF OHIO

In the Matter of:	*	**Case No: 06-1627**
	*	
CHARLES BEATTY	*	
CHAWNA BEATTY	*	**On Appeal from**
CRAIG BEATTY	*	**Court of Appeals,**
	*	**Fifth Appellate District**
	*	**Tuscarawas County,**
	*	
	*	**Court of Appeals**
	*	**Case No. 2006 AP 04 0022**

REPLY BRIEF OF APPELLANT TUSCARAWAS COUNTY JOB & FAMILY SERVICES

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RESPONSE TO APPELLEE'S PROPOSITION OF LAW 1:

Due to a clerical oversight, Appellant's Motion to Certify Conflict of July 25, 2006 was filed one day late in the Fifth District Court of Appeals pursuant to the time requirements listed in App. Rule 25(A). The Appellee promptly brought this to the attention of the Fifth District in her Response filed on August 4, 2006. A conflict was noted and properly certified by the Fifth District through a judgment entry dated August 21, 2006. Thus, the Fifth District had the opportunity to overrule Appellant's Motion, but failed to do so. Appellant then timely filed Notice of the Certified Conflict before this Court on August 28, 2006.

The Fifth District had the opportunity to overrule Appellant's motion as being untimely, but instead chose to certify the conflict. Appellant is now respectfully requesting that this Court address the conflict as it is one that, despite the recent amendments to Ohio Rev. Code §2151.353(A)(3), is still legitimate and has the likelihood of presenting further confusion for other courts if left unresolved.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 2:

At the time Appellant sought certification of the within conflict, the previous version of Ohio Rev. Code §2151.353(A)(3) was in effect. The previous version of the statute read:

> (A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:
>
> ****
>
> (3) Award legal custody of the child to either parent or to any person who, prior to the dispositional hearing, files a motion requesting legal custody of the child;
>
> ****

This particular provision was altered by amendment effective September 21, 2006 and now reads:

> (A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:
>
> ****
>
> (3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings. A person identified in a complaint or motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person identified signs a statement of understanding for legal custody that contains at least the following provisions:
>
> ****

The provision as amended creates more flexibility in terms of who may make a request for legal custody; allowing any party to file a motion identifying a proposed legal custodian. This will certainly decrease difficulties in future cases where the parents are supportive of proposing a legal custodian, and thus are able to file a motion on that individual's behalf.

While this revised provision, if available at the time, may have properly allowed Appellee to file a motion on behalf of the Strikers, the version that was in effect at the time did not technically allow it. The trial court's interpretation of Ohio Rev. Code §2151.353(A)(3) served as the basis for its' decision to exclude the testimony of the Strikers. As more thoroughly briefed in Appellant's Merit Brief, the strict interpretation of the statute used by the trial court in this case is directly in conflict with the interpretation of the statute that other appellate courts have applied. This state of affairs was the driving force behind Appellant seeking certification of this conflict and the situation still presents an active conflict.

The amendments to the provision will certainly decrease future difficulties in some cases, however, absent the identification of an individual as a proposed legal custodian in a filed motion or complaint, the issue still remains as to whether the filing of a formal motion is required in light of the conflicting case law.

The arguments contained in Appellee's merit brief make the assumption that the Strikers were identified as proposed legal custodians and that the revision of the law moots the certified conflict. Unfortunately, since the legislature did not offer guidance as to what constitutes identification, the revision thus presents an additional issue which may cause confusion in the courts. Appellant would argue that there is a distinction between exploring a possibility for placement and identifying an individual as a proposed legal custodian as the law requires.

Upon receiving the approval of a home study on the Strikers, the trial court in a judgment entry dated December 28, 2005 directed Appellant to begin pre-placement visits in order to assess whether Chawna could be placed with the Strikers. As instructed, the agency began these visits to determine whether the placement was a viable possibility or not. The agency even filed

a motion to continue the full hearing on its permanent custody request as it pertained to Chawna so that this possibility could be fully explored.

Ultimately, Job & Family Services believed the placement of Chawna into the home of Carla and James Striker was not in her best interest. There were many ongoing concerns which were fully explained at trial that included: the extent to which Chawna even knew the Strikers, and vice versa; the ability and willingness of the Strikers to provide the necessary structure for Chawna; changes in Chawna's behaviors once the Strikers became involved; and concerns over communication and dedication regarding visitation and educational issues. (Tr. at 13-15).

Appellant argues that neither the judgment entry of December 28, 2005 directing the agency to explore the Strikers as a placement possibility, nor the Appellant's motion to continue of January 18, 2006 identified the Strikers as proposed legal custodians as required by the now revised provision. As a result, the certified conflict is still exists and is in need of resolution.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 3:

Appellant certainly appreciates the seriousness of proceedings involving the termination of parental rights and the requirement that the parents receive due process under the law. However, as more fully explained in Appellant's merit brief, Appellant argues that the decision of the trial court to exclude the testimony of the Strikers as witnesses for the mother was based on its interpretation of former Ohio Rev. Code §2151.353(A)(3). The procedural determination to exclude the Striker's as witnesses should not have been overturned on appeal absent an abuse of discretion.[1] The opinion issued from the Fifth District does not address how the trial court's interpretation of the statute at issue and its' resulting procedural determination constituted an abuse of discretion. Thus its reversal of the trial court's decision on those grounds was improper. In the interest of guaranteeing the due process rights of all the involved parties in this case and in future cases, Appellant sought certification of the within conflict.

[1] *Miller v. Lint* (1980), 62 Ohio St.2d 209 at 214.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 4:

Appellee's argument that failure of the trial court to appoint counsel for Chawna constituted reversible error is being raised for the first time in its Merit Brief and is not properly before this Court. As the record indicates, counsel for Appellee failed to bring this issue to the attention of the trial court. Had this issue been raised at the trial court level, it could have been properly addressed and remedied if necessary. As a matter of fact, counsel for Appellee again failed to raise this issue in its appeal to the Fifth District Court of Appeals.

It is a well established principle that issues which are not raised at the trial court level, are waived in most circumstances on appeal.[2] The plain error doctrine, which originated as a criminal law concept, permits plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the court.[3] However, the application of the plain error doctrine in civil cases such as this one, should only occur in extremely rare cases under exceptional circumstances.[4]

In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.[5]

Appellant argues that the particular circumstances of the case show that there was not a strong enough basis indicating that appointment of counsel for Chawna was necessary; and thus

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[2] *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427. See also: *State v. Childs* (1968), 14 Ohio St.2d 56; *State v. Awan* (1986), 22 Ohio St.3d 120; *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116

[3] *Goldfuss*

[4] *Id.* at Syllabus.

[5] *Id.* at 121.

the plain error doctrine should not be applied. As a result, Appellant argues that this issue is not properly before the Court.

There is clear evidence that the Guardian ad Litem agreed with the agency's position that placement of Chawna with the Striker's was inappropriate.[6] Appellee asserts that there is clear evidence that there was a conflict between the recommendation of the Guardian and Chawna's wishes. However, the caseworker's testimony indicates that Chawna vacillated in her desires.[7]

This Court has held that a child who is the subject of a juvenile court proceeding to terminate parental rights is entitled to independent counsel in certain circumstances.[8] Subsequent courts have interpreted this holding to require that counsel be appointed in circumstances when a child consistently and repeatedly expresses a desire regarding placement, but the child's guardian ad litem believes it is in the child's best interest that permanent custody of the child be granted to the state.[9] The record does not indicate that Chawna consistently and repeatedly expressed a desire to be placed with the Strikers. On the other hand there is every indication that Chawna's wishes fluctuated. The caseworker felt that her wishes vacillated, while the guardian felt that she wished to be placed with the relatives.[10] Based upon the lack of consistent expression of a desire to be placed with relatives and the concerns raised about the appropriateness of placement with the Strikers, the trial court's decision not to appoint independent counsel for Chawna does not constitute error. Consequently, the plain error doctrine should not be applied. As a result, this issue is not properly before the Court and should have properly been raised before the trial court, or at a minimum, in the Court of Appeals.

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[6] Guardian ad Litem Report, January 18, 2006,
[7] Tr. at 50-51.
[8] *In re Williams* (2004), 101 Ohio St.3d 398 at syllabus, ¶17.
[9] *In re Hilyard*, 2006-Ohio-1965; *In re Brooks*, 2004-Ohio-3887
[10] Tr. at 50-51; Guardian ad Litem Report, January 18, 2006.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 5:

Appellee's argument that no genuine conflict exists in this case is without merit. The entire basis for the Fifth District Court of Appeals decision centered around the interpretation of former Ohio Rev. Code §2151.353(A)(3). Its' decision to reverse the trial court decision on due process grounds came directly out of its interpretation of the statute which conflicted with the trial court's interpretation. The certification of this conflict directly seeks to settle this matter as it has also occurred in several other jurisdictions. If the certified question is answered in favor of Appellant then the very basis for determining that mother's due process rights were violated is undermined. Therefore, the point on which the conflict exists may have an effect on the judgment of the certifying court.

Appellant has also responded to Appellee's other arguments which contend that affirmance of the decision is proper on other grounds. Appellant feels that these arguments also lack merit and that this case must properly proceed to determination of the certified issue.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 6 & BRIEF OF AMICUS CURIAE:

"It is longstanding law that the interpretation of a statute rests on the legislature's intent."[11] The intent of the legislature resides first in the words used in the statute.[12] If those words are unambiguous, we need go no further.[13]

Both the current and former Ohio Rev. Code §2151.353(A)(3) unambiguously state that the filing of a written motion is required in order for an individual to be considered for placement. The statute as revised allows for an individual who has not filed a formal written motion to be considered for placement if he or she was identified in a complaint or motion from a party as a proposed legal custodian and then follows certain subsequent requirements. No changes were made by the legislature to the general requirement that the filing of a formal written motion was necessary.

Therefore, Appellant reasserts that Ohio Rev. Code §2151.353(A)(3) properly applies to the case at bar and unambiguously states that a formal written motion must be filed by an individual in order to be considered for placement. The certified conflict submitted in the within case will properly resolve interpretation issues that have arose despite this unambiguous wording.

Amicus argues that Ohio Rev. Code §2151.353 was not the proper statute to apply at the permanent custody stage in the case. Instead, Amicus argues that Ohio Rev. Code §2151.415 should have governed this case. Ohio Rev. Code §2151.415(F) allows a trial court to modify a prior disposition on its own motion, thus Amicus argues that the certified issue is not properly the issue of contention.

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[11] *State ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124.
[12] *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105.
[13] *State v. Tuomala* (2004), 104 Ohio St.3d 93 at ¶ 21.

While it may be true that Ohio Rev. Code §2151.415(F) does provide the authority for a trial court to modify a previously imposed disposition sua sponte, any action of the court must also be in the best interest of the child and is discretionary. The issue of which statute to apply at a certain point in these cases also causes quite a bit of confusion. In fact, it is unfortunate that this issue was not also requested to be certified.

Even assuming that Ohio Rev. Code §2151.415 should have governed this case, the trial court's actions were within its proper discretion and did not constitute error. As mentioned above, Ohio Rev. Code §2151.415(F) is purely discretionary and the court must of course be acting in the best interest of the child. In the case at bar, adequate evidence was presented during the course of the hearing to indicate that placement with the Strikers was not in Chawna's best interest. This possible placement was thoroughly investigated and neither the Agency, nor the Guardian ad Litem was prepared to make a recommendation for placement. Again, absent an abuse of discretion, the trial court's decisions on a procedural matter should not have been overturned.

Amicus also contends that the judgment entry of March 13, 2006 fails to make a finding as required by Ohio Rev. Code §2151.414(B)(1) and is thus fatally flawed. However, Amicus fails to note that the entry clearly contains the statutory language as required. The entry reads "Based upon the facts presented at the evidentiary hearing and the recommendation of the Guardian ad Litem, the Court finds that Chawna Beatty cannot and should not be placed with either parent within a reasonable time."[14] This language clearly satisfies Ohio Rev. Code §2151.414(B)(1)(a) which states:

> (a) The child is not abandoned or orphaned or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more

[14] *In re Beatty*, Judgment Entry, March 13, 2006 at 3.

> months of a consecutive twenty-two month period ending on or after March 18, 1999, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

Therefore, Amicus' contention is improper and mistaken.

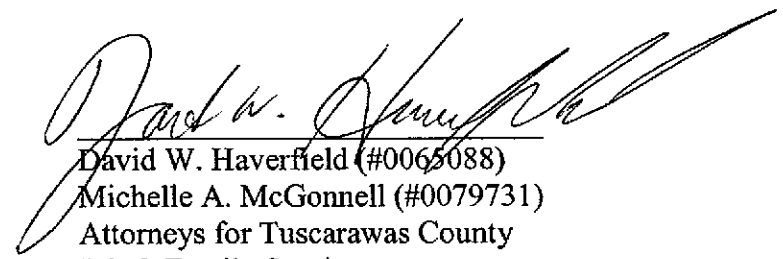
Finally, while Appellee incorporated Proposition I of the Amicus in its Merit Brief; the issue raised in that proposition has been waived by Appellee as it is being raised for the first time in the case. Much like Appellee's fourth proposition of law, the plain error doctrine should not be applied in this instance. As a result, this issue is not properly before the Court and should have properly been raised before the trial court, or at a minimum, in the Court of Appeals.

RESPONSE TO APPELLEE'S PROPOSITION OF LAW 7:

One of the main tenets of Appellant's position in this case centers around the idea that the Fifth District Court of Appeals was required to make a finding that the trial court abused its discretion in making its procedural determination to exclude the Strikers as witnesses of the Appellee. The opinion of the Fifth District makes no mention of an abuse of discretion as it was required to do, and thus the issue was not available to be raised until issuance of that opinion. Therefore, Appellant maintains that this is indeed the proper venue in which to raise this argument. Appellant also contends that resolution of the certified conflict is the proper means by which to address this issue.

CONCLUSION

Wherefore, Appellant Tuscarawas County Job & Family Services respectfully moves this Court to affirm each of the propositions of law set forth based on the arguments contained in the Appellant's Merit Brief and within this Reply Brief and reverse the decision of the Court of Appeals.



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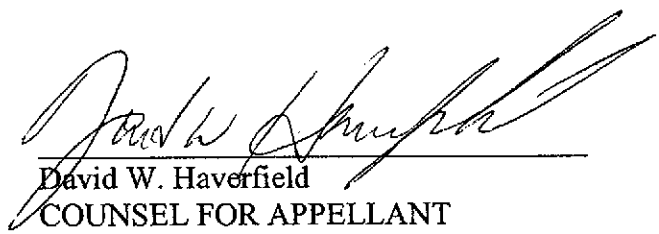

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