

IN THE SUPREME COURT OF OHIO

In The Matter Of: : On Appeal from the Cuyahoga
Lee Adams, Jr., et al. : County Court of Appeals, Eighth
: Appellate District
: Case No. 06-1695
:
:

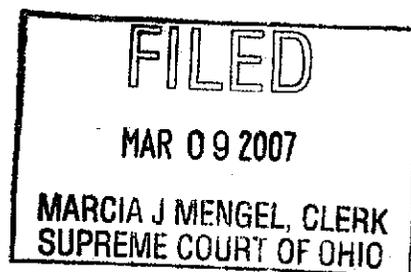
MERIT BRIEF OF APPELLEE LEE ADAMS

Christopher J. Pagan (0062751)(COUNSEL OF RECORD)
Repper, Pagan, Cook, Ltd.
1501 First Avenue
Middletown, OH 45044
(513) 424-1823
(513) 424-3135 (fax)
cpagan@cinci.rr.com

COUNSEL FOR APPELLEE, LEE ADAMS

William D. Mason (0037540)
Cuyahoga County Prosecuting Attorney
Joseph C. Young (0055339)
Assistant Prosecuting Attorney
3955 Euclid Avenue
Cleveland, Ohio 44115
(216) 432-3345
(216) 431-4113 (fax)
Jyoung@cuyahogacounty.us

COUNSEL FOR APPELLANT, CCDCFS



John J. Kulewicz (0008376) (COUNSEL OF RECORD)
Melissa J. Mitchell (0028492)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634
(614) 719-4812 (fax)
jjkulewicz@vssp.com
mjmitchell@vssp.com

COUNSEL FOR APPELLEE, MICHELLE ADAMS

Jean M. Brandt (0041487)
1028 Kenilworth Avenue
Cleveland, OH 44113
(216) 621-1610
(216) 621-1633 (fax)

Charles M. Miller (0073844) (COUNSEL OF RECORD)
Keating Muething & Klekamp PLL
One East Fourth St., Ste 1400
Cincinnati, OH 45202
(513) 579-6967
(513) 579-6457 (fax)
cmiller@kmklaw.com

COUNSEL FOR APPELLEES, ADAMS CHILDREN

Jodi M. Wallace (0068987)
6495 Brecksville Road, Suite 3
Independence, Ohio 44131
(216) 901-0219 (phone/fax)

GUARDIAN AD LITEM FOR APPELLEES, ADAMS CHILDREN

Harvey E. Tessler (0016189)
Suite 801
850 Euclid Avenue
Cleveland, OH 44114
(216) 566-7744

GUARDIAN AD LITEM FOR APPELLEE, LEE ADAMS, Sr.

Steven E. Wolkin (0009048) (COUNSEL OF RECORD)
Suite 510
820 West Superior Avenue
Cleveland, OH 44113-1384
(216) 861-0808
(216) 861-1588 (fax)

COUNSEL FOR AMICUS CURIAE GUARDIAN AD LITEM PROJECT,
A PROJECT OF THE CUYAHOGA COUNTY BAR ASSOCIATION

TABLE OF CONTENTS

Page

<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>ARGUMENT</u>	1
Proposition of Law: In a juvenile court action for neglect and dependency, the interim denial of a motion to modify temporary custody to permanent custody is not a final order that a children services agency may appeal, because the court does not determine the outcome of the action or affect a substantial right of the agency when it issues such an order.	1
A. Affecting a substantial right under R.C. 2505.02(B)	2
A1. The nature of the substantial right	3
A2. The nature of the order’s affect on the right	4
A3. The harm that the order causes to the litigant’s ability to invoke his right	5
<u>CONCLUSION</u>	5
<u>PROOF OF SERVICE</u>	7

TABLE OF AUTHORITIES

CASES:

Page

In re K.M., 8th Dist., 2006-Ohio-4878..... 2, 6

In re Murray (1990), 52 Ohio St.3d 155..... *passim*

In re Ware, 2nd Dist., 2002-Ohio-4686 3

In re Wilkinson, (Montgomery County App. 1996), 1996 WL 132196..... 2, 3, 6

Prudential Ins. Co. of Am. v. Corporate Circle, Ltd. (1995), 103 Ohio App.3d 93 4

State v. Chalender (1994), 99 Ohio App.3d 4 5

CONSTITUTIONAL PROVISIONS; STATUTES; RULES:

R.C. 2505.02(B)(1)-(2) 2, 6

R.C. 2151.413(D)(1) 3

Lee and Michelle Adams are litigating a child dependency case against the Cuyahoga County Department of Children and Family Services. Lee and Michelle seek reunification with their children; the agency seeks to sever that relationship. The agency's recent motion for permanent custody was denied, and the children were ordered to remain in the temporary custody of the agency. The agency sought review of that decision; but the Eighth District Court of Appeals dismissed the case for lack of a final-and-appealable order.

The narrow issue before this Court is whether the trial court's order that denied the agency's motion for permanent custody and continued the children's temporary custody with the agency is a final-and-appealable order.

Lee and Michelle's interests are aligned. Michelle has already filed a brief. Lee will not duplicate her persuasive arguments. Instead, his brief will attack the agency's contention that *In re Murray* (1990), 52 Ohio St.3d 155 is the controlling precedent.

STATEMENT OF THE CASE AND FACTS

Lee adopts the statement of the case and facts from Michelle's brief.

ARGUMENT

Proposition of Law: In a juvenile court action for neglect and dependency, the interim denial of a motion to modify temporary custody to permanent custody is not a final order that a children services agency may appeal, because the court does not determine the outcome of the action or affect a substantial right of the agency when it issues such an order.

Two district courts have addressed our issue. *In re Wilkinson*, (Montgomery County App. 1996), 1996 WL 132196; and *In re K.M.*, 8th Dist., 2006-Ohio-4878. Both courts held that an order denying an agency's motion for permanent custody and continuing a child's temporary custody with the agency was not an appealable order. *In re Wilkinson*, (Montgomery County App. 1996), 1996 WL 132196, *1-2; and *In re K.M.*, 8th Dist., 2006-Ohio-4878, ¶ 2. And both courts utilized the same rationale: that the court's order did not *affect* a substantial right of the agency, as contemplated by R.C. 2505.02(B). *In re Wilkinson*, (Montgomery County App. 1996), 1996 WL 132196, *1-2; and *In re K.M.*, 8th Dist., 2006-Ohio-4878, ¶ 2

The agency, however, contends that *Wilkinson* and *K.M.* were wrongly decided. It further contends that *In re Murray* (1990), 52 Ohio St.3d 155 is the controlling precedent. In *Murray*, this Court held that a parent could appeal, as a final order, an adjudication that her child was neglected/dependent and a disposition that awarded temporary custody to the agency. *Id.* at syllabus.

Murray does not control. An explanation of how a substantial right is affected proves that *Murray* is not controlling, and that the agency has erroneously relied upon it.

A. Affecting a substantial right under R.C. 2505.02(B)

A final order is one that affects a substantial right. R.C. 2505.02(B)(1)-(2). Affect is a term-of-art. To determine affect, the court must measure the impact of the order on the aggrieved litigant. That measurement entails three aspects: 1) the nature of the right; 2) the nature of the order's affect on the right; and 3) the harm that the order causes to the litigant's ability to invoke his right. *In re Wilkinson*, (Montgomery County

App. 1996), 1996 WL 132196, *1-2. The greater the impact on the litigant's right, the more likely that the order will be characterized as final-and-appealable.

A1. The nature of the substantial right

The parties to a case do not necessarily possess the same sort of rights. For example, Lee and Michelle maintain a constitutionally protected right to the care, custody, and management of their children. *In re Murray* (1990), 52 Ohio St.3d 155, 157. The agency does not possess that right. At very best, the agency has a mere statutory right to a judgment granting permanent custody upon proof that Lee and Michelle are unfit. R.C. 2151.413(D)(1). The agency and Lee/Michelle are not similarly situated with respect to the nature of their respective rights.

This distinction is critical to our case, and is exemplified by *In re Ware*, 2nd Dist., 2002-Ohio-4686. The *Ware* facts are analogous to ours: the trial court overruled the agency's motion for permanent custody and continued the child's temporary custody with the agency. *Id.* at ¶ 1. The difference, however, is that *Ware*'s parent appealed, and the agency sought dismissal for lack of a final order. *Id.* The agency relied on *Wilkinson*, *supra*, " * * * which likewise involved an appeal from an order denying a motion filed by MCCS for permanent custody and continuing temporary custody * * *." *Id.* at ¶ 2. The court distinguished *Wilkinson*. It observed that the parent and the agency do not possess the same sort of rights. *Id.* at ¶ 3. Because the parent's constitutional right is paramount, it will be affected by any order that causes any separation from a child. But the same cannot be said for the agency. Its statutory right to permanent custody is not paramount, and will not be affected by the mere continuation of a temporary custody order. For these

reasons, the court allowed Ware's appeal, but would not have allowed the agency's appeal. *Id.* at ¶ 4.

Other cases have accepted this important distinction. For example, in receivership cases, the parties also do not possess the same sort of rights. The party that loses control over his business and property suffers more dramatically than the party that seeks to impose the receiver due to financial loss. On this basis, the courts have held that an order that appoints or removes a receiver is final-and-appealable, but an order that denies the appointment is interlocutory. See, *Prudential Ins. Co. of Am. v. Corporate Circle, Ltd.* (1995), 103 Ohio App.3d 93, 101 (citing cases).

The *Murray* holding is predicated on this distinction. A parent is more dramatically affected by a temporary custody order than the agency.

A2. The nature of the order's affect on the right

The parties to a case are not affected by an order in the same way. For example, the instant order that continued temporary custody with the agency extended the time that Lee and Michelle's constitutional rights would be diminished. The agency was not so affected. Its right to a permanent custody judgment was inchoate, did not diminish on a day-to-day basis, and ultimately depended on proof *at some undefined point in the case* that Lee and Michelle were unfit to parent. Viewed in this way, the agency was not affected by the temporary custody order. The order merely preserved its status quo.

The *Murray* holding endorses this premise. By allowing a parent to appeal even a temporary deprivation of custody, it recognized that a parent's constitutional rights are

diminished by each passing day, and that a divided family does not preserve the status quo.

A3. The harm that the order causes to the litigant's ability to invoke his right

The parties to a case are not prejudiced by an order to the same degree. For example, the instant order that continued temporary custody with the agency forecloses Lee and Michelle from *any* remedy for each day that it erroneously remains in place. This justifies the *Murray* rule permitting a parent's appeal. The agency, however, is not affected to the same degree. The temporary custody order only limits the agency's current ability to obtain a permanent custody judgment; it did not permanently foreclose that outcome (because the agency could file another motion); nor did it prevent the agency from vindicating its position on appeal after final judgment.

An order affects a party when its immediate effect is to foreclose a current remedy, and where there would be no effective mode of relief on appeal after final judgment. *State v. Chalender* (1994), 99 Ohio App.3d 4, 6-7.

In permitting a parent's appeal, the *Murray* court recognized the degree to which a parent is harmed by a temporary custody order; *Murray* did not address the degree to which the agency is harmed.

CONCLUSION

Murray held that that a parent could appeal, as a final order, an adjudication that her child was neglected/dependent and a disposition that awarded temporary custody to the agency. 52 Ohio St.3d at the syllabus. *Murray* has not been extended to an agency's

appeal of an order denying its motion for permanent custody and continuing a child's temporary custody with the agency. *In re Wilkinson*, (Montgomery County App. 1996), 1996 WL 132196; and *In re K.M.*, 8th Dist., 2006-Ohio-4878. In this circumstance, the order insufficiently *affects* the agency's rights, as affect is understood by R.C. 2505.02(B)(1)-(2).

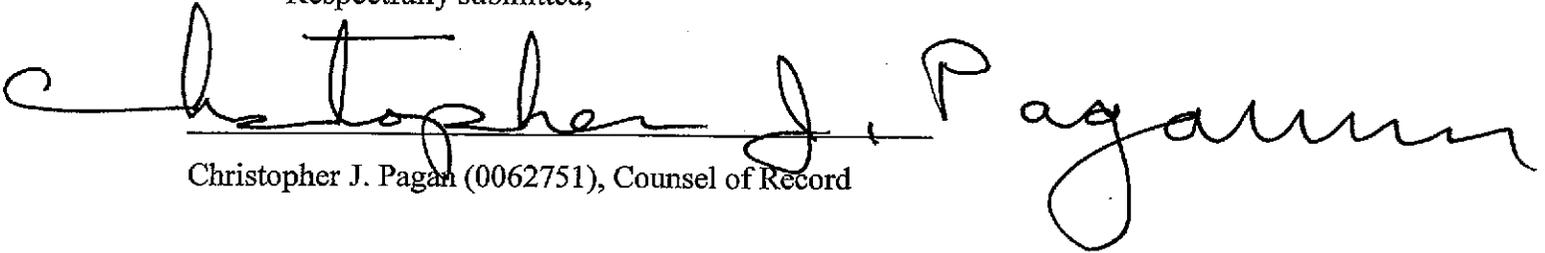
Affect is a term-of-art, and measures the order's impact on the litigant. In our case, the agency was not sufficiently impacted by the temporary custody order to be affected under R.C. 2505.02(B)(1)-(2). The nature of its right was both statutory and inchoate; the order merely preserved the agency's status quo, and did not alter its legal position; the agency did not lose its opportunity to file another motion for permanent custody; and, finally, the agency was not deprived of a right to appeal the denial of its motion when the case is prosecuted to final judgment. The district courts correctly considered these factors, and correctly declined to extend *Murray* to permit an agency's appeal.

A parent, however, is differently situated. His rights are sufficiently impacted to be affected. A parent's right to the care, custody, and management of a child is of a constitutional nature; an order that places a child in the temporary custody of another diminishes the parent's constitutional right on each day it is in place; and, the parent's inability to appeal a temporary custody order would forever foreclose a remedy for each day that an erroneous order was in place. The *Murray* court correctly considered these factors as a basis for its holding permitting a parent's appeal.

For these reasons, Lee submits that *Murray* is not controlling precedent, and that the agency is in error in seeking its extension to our facts.

To the Court, the instant brief is

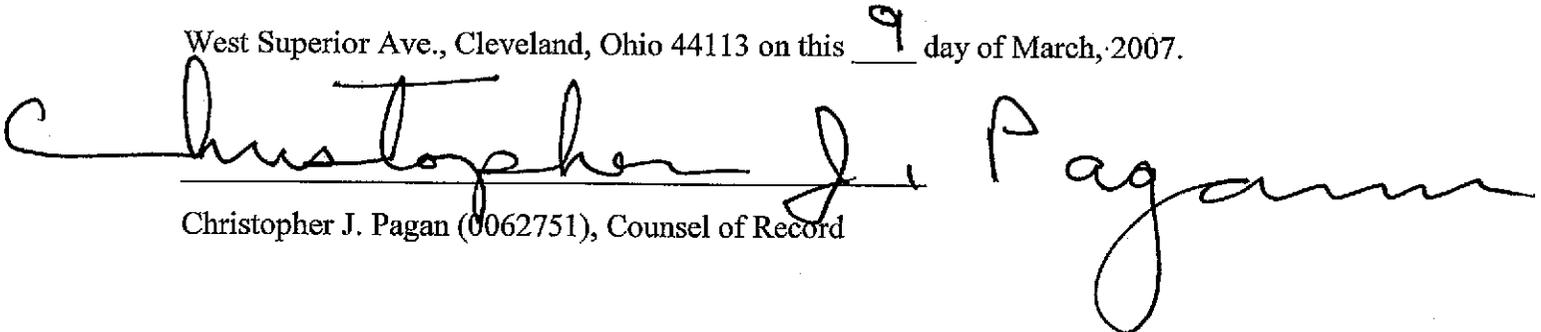
Respectfully submitted,



Christopher J. Pagan (0062751), Counsel of Record

PROOF OF SERVICE

I certify that a true copy of the foregoing Merit Brief was sent by ordinary U.S. Mail to John Kulewicz, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216, Joseph C. Young, Assistant Prosecuting Attorney, 3955 Euclid Ave., Cleveland, Ohio 44115, Jean M. Brandt, 1028 Kenilworth Ave., Cleveland, Ohio 44113, Charles M. Miller, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202, Jodi M. Wallace, 6495 Brecksville Road, Suite 3, Independence, Ohio 44131, Harvey E. Tessler, Suite 801, 850 Euclid Ave., Cleveland, Ohio 44114, and Steven E. Wolkin, Suite 510, 820 West Superior Ave., Cleveland, Ohio 44113 on this 9 day of March, 2007.



Christopher J. Pagan (0062751), Counsel of Record