

IN THE SUPREME COURT OF OHIO

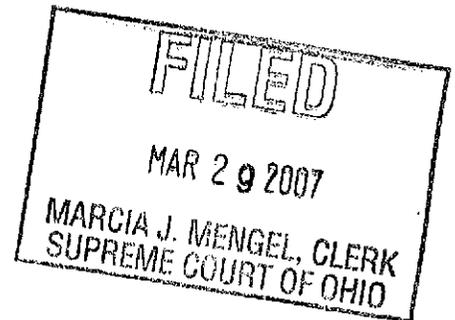
In The Matter Of:) Case No. 06-1695
Lee Adams, Jr., et al.)
) On Appeal From The Cuyahoga
) County Court Of Appeals
) Eighth Appellate District
)
) Court of Appeals Case No. 87881
)
)

MERIT BRIEF OF APPELLEES ADAMS CHILDREN

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

Jean M. Brandt (0041487)
1028 Kenilworth Avenue
Cleveland, Ohio 44113
(216) 621-1610
(216) 621-1633 (fax)
GUARDIAN AD LITEM FOR APPELLEES, ADAMS CHILDREN

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



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, Ohio 43216-1008
(614) 464-5634
(614) 719-4812 (fax)
jjkulewicz@vssp.com
mjmittell@vssp.com
COUNSEL FOR APPELLEE, MICHELLE ADAMS

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

Steven E. Wolkin (0009048) (COUNSEL OF RECORD)
820 West Superior Avenue, Suite 510
Cleveland, Ohio 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

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS1

ARGUMENT.....2

Proposition of Law No. 1 Child Services Agency Cannot Appeal a Juvenile Court’s Denial of the Agency’s Motion to Transform an Award of Temporary Custody into an Order for Permanent Custody.....2

 A. Juvenile Rule 34(J) does not create a right to appeal.....3

 B. The County does not have a common law right to appeal every dispositional order.4

 C. An order continuing legal custody with the County does not create a final order from which the County can appeal.5

CONCLUSION11

TABLE OF AUTHORITIES

STATUTES

R.C. 2505.02	Passm.
R.C. 2151.353	8
R.C.2151.414	8

CASES

<i>Atkinson v. Grumman Ohio Corp.</i> (1988), 37 Ohio St 3d. 80, 532 N.E. 2d 851	4
<i>Bell v. Mt. Sinai Med. Ctr.</i> (1993), 67 Ohio St. 3d 60, 616 N.E. 2d 181	7
<i>Blisset's Case</i> , Lofft 748, 98 Eng. Rep. 899 (K.B. 1774).....	6
<i>Commonwealth v. Briggs</i> , 16 Pick 203 (Mass. 1834).....	6
<i>Gehm v. Timberline Post & Frame</i> , 112 Ohio St. 3d 514, 2007 Ohio 607, ___ N.E.2d ___	5
<i>In re C.F.</i> , 113 Ohio St.3d 73, 2007 Ohio 1104, ¶ 4, ___ N.E.2d ___	2,8,10
<i>In re D.A.</i> 113 Ohio St. 3d 88, 2007 Ohio 1105, ___ N.E.2d ___	4, 8
<i>In re K.M.</i> 2006 Ohio 4878.....	2
<i>In re Murray</i> (1990), 52 Ohio St. 3d 155, 556 N.E. 2d 1169	Passm.
<i>In re N.B.</i> , 100 Ohio St.3d 1425, 2003 Ohio 5232	9
<i>In re N.B.</i> , 2003 Ohio 3656.....	9
<i>In re N.B.</i> , 2004 Ohio 859, ¶ 2	9
<i>In re Young Children</i> (1996) 76 Ohio St. 3d 632, 669 N.E. 2d 1140	8
<i>State ex rel. Cuyahoga Ct. Dept. of Children & Family Serv. v. Floyd</i> , 2003-Ohio-184.....	9
<i>State ex rel. Fowler v. Smith</i> (1994), 68 Ohio St. 3d 357	5

OTHER

“Emergence of a Modern American Family Law: 1796-1851,” 73 N.W.
Univ. L. Rev. 1038.....6

Kent, James, *Commentaries on Am. L.2d* 1:32 (1826-1830).....6

Mason, Mary Ann, *From Father’s Property to Children’s Rights:
The History of Child Custody in the United States,*
(Columbia Univ. Press, 1994).....6

STATEMENT OF FACTS

Appellees Lee Adams, Jr., Anthony Adams, and Starla Adams (the “Adams children”) peacefully and happily resided with their parents until a complaint was filed against a step-brother regarding an assault on the oldest child, then age 12. The Adams children were placed in the temporary custody of Appellant Cuyahoga County Department of Children and Family Services (the “County”) and placed with the minister of their church. The Juvenile Court later found that the parents had made substantial progress toward achieving the goals of the case plan, and approved a plan for reunification. The County interfered with the plan by filing a motion for permanent custody. The Juvenile Court denied the County’s motion, and entered Findings of Fact, including the following:

The Court finds that the parents . . . have **regular and consistently visited** with their children while the children were in the temporary custody of CCDCFS.

The Court finds that the **parents were so committed to visitation** that they when they were put in the position of maintaining employment, for example, or seeing their children, they chose to see their children.

The Court finds that there is **a strong bond between these children and their parents**. Severing this bond would have extremely negative impact on the children—particularly for the two teenage boys.

The Court further finds that it would be extremely harmful to the siblings to separate them from each other.

The Court finds that the parents have **complied with the case plan and remedied the reason for the initial removal**. The children were originally removed due to abuse that an older brother was inflicting on Lee Jr. That older brother no longer resides in the home.

* * *

The Court finds that **the psychological evaluation done by Dr. Waltman of the Juvenile Court Diagnostic Clinic**

**recommended against granting permanent custody to
CCDCFS**

See Amended Journal Entry (emphasis added) [Supplement to Mother’s Appellee Brief, SUPP0052-53]. Based upon in camera discussions with the children, the Juvenile Court found, “They adamantly wish to return to their parents’ home.” *Id.* Despite the successes of the Adams family during this difficult process, the County failed in its duty to support the Adams’ efforts to reunify. The County ignored the desires of the Adams children. The County disregarded the conclusions of the physiologist. The County rejected the conclusions of the guardian ad litem. The County disobeyed the order of the Juvenile Court to work toward reunification. Instead, the County through a wrench into the reunification process by filing an appeal it knew it would lose.

ARGUMENT

Proposition of Law No. 1: A Child Services Agency Cannot Appeal a Juvenile Court’s Denial of the Agency’s Motion to Transform an Award of Temporary Custody into an Order for Permanent Custody.

This matter presents the court with the opportunity to end the County’s practice of using the appellate process to avoid its obligation to reunify deserving families. The instant case is just one example of the County’s overly aggressive efforts to permanently wrest custody of children from responsible parents where any objective observer would find reunification to be in order. This Court is holding *In re K.M.*, 2006 Ohio 4878, for a ruling in the instant case. Other instances of the County’s bad faith appeals and discussed later in this brief. By consistently treating custody proceedings as adversarial, the County has abandoned its duties to the families it was created to serve. The day this brief was filed, this court resolved a certified conflict involving the County, “the state must make reasonable efforts to reunify the family before terminated parental rights.” *In re C.F.*, 113 Ohio St.3d 73, 2007 Ohio 1104, ¶ 4, ___ N.E.2d _____. The County should again be reminded of its proper role.

The County appealed from an order that extended a previous order granting temporary custody of the Adams children to the County. To reiterate, the County appealed from an order granting legal custody *to the County*. The alleged grounds for the interlocutory appeal was that the County was dissatisfied with the temporary nature of the order. The County, however, cannot appeal from an order upon which it prevailed. Moreover, the County does not have a substantial right that was violated. Accordingly, the Court of Appeals justly dismissed the appeal for want of a final appealable order.

A. Juvenile Rule 34(J) does not create a right to appeal.

The crux of the County's argument is that Juv.R. 34(J) gives the County the right to appeal from an order that denies the County's motion for permanent custody because the County was party to the proceeding. The County's argument is strained. Juv.R. 34(J) does not create a right to appeal. It merely requires the court to advise the parties of any appellate right they might have.

Advisement of rights after hearing. At the conclusion of the [dispositional] hearing, the court shall advise the child of the child's right to record expungement and, where any part of the proceeding was contested, advise the parties of their right to appeal.

Juv.R. 34(J). The very title of the rule, "**Advisement of rights after hearing**", indicates that the rule does not create substantive rights. Moreover, the County's contention that the County would be entitled to special notice of when its appellate rights are triggered is absurd. The County is a savvy litigator—as demonstrated by its adversarial briefing of this appeal. The County is not the intended recipient of the advisement that Juv.R. 34(J) requires. It certainly is not the recipient of substantive rights that the rule does not create.

B. The County does not have a common law right to appeal every dispositional order.

The County next claims that it is being deprived “a property interest . . . without due process of law.” [Appellant’s Merit Brief, 4], *citing Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851. It is simply absurd to argue that the County has a constitutional right to due process from its own county courts. Constitutional rights are granted to natural persons, not governments. This abstract point will not be belabored because the County was not deprived any property right either.

The County relies upon the seminal case of *In re Murray* (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169, to argue that the an order continuing a temporary custody order is a final appealable order. The distinction that the County fails to recognize is that a child services agency does not have the same rights as a parent. *Murray* rightfully spoke of parents’ “fundamental”, “essential”, “cardinal” and “basic civil right”, natural right, and “paramount liberty interest” to raise their children. *Id.* at 157; *See also, In re D.A.*, 113 Ohio St.3d 88, 2007 Ohio 1105, ¶¶ 9-10, ___ N.E.2d ___. The County possesses none of these rights or liberties. The *Murray* Court concluded that these special parental rights are “substantial rights” that vest parents with the ability to appeal an order continuing temporary custody with the County. *Id.* The text accompanying the *Murray* footnote the County cites expressly references the paramount “rights of parents who have been deprived of the custody of children to appellate review to determine if such deprivation meets the requirements justifying such deprivation.” *Id.* at 159. The County does not, and should not, possess rights equal those of parents. *Murray* did not grant the County the appellate rights it now claims.

- C. An order continuing legal custody with the County does not create a final order from which the County can appeal.

The analysis of the issue presented in this case, like most issues involving interlocutory appeals, “again calls [the court] into the morass of the final-and-appealable-order statute, R.C. 2505.02.” *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007 Ohio 607, ¶ 7, ___ N.E.2d ___.

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a **substantial right** in an action that in effect determines the action and **prevents a judgment**;
- (2) An order that affects a **substantial right** made in a **special proceeding** or upon a summary application in an action after judgment;

* * *

- (4) An order that grants or denies a **provisional remedy** and to which **both** of the following apply:

- (a) The order in effect **determines the action** with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
- (b) The appealing party would not be afforded a **meaningful and effective remedy** by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B) (emphasis added). Of the above alternative provisions, the County argues division (B)(2) applies here. The County, without analysis, relies upon Justice Douglas’s conclusory concurring opinion in *Murray* to support its argument that child custody proceedings are “special proceedings”. No other member of the *Murray* Court joined the concurrence. The

Douglas concurrence carries no precedential value. A historical analysis is necessary to determine whether the State had the power to terminate parental rights prior to 1853.¹

The final order statute defines “special proceeding” to be “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2). The State possessed the equitable power to assume custody of children long before 1853. The doctrine of *parens patriae* originated in Roman law. See Blacks Law Dict. (8th Ed.), 1144. English Common Law applied *parens patriae* to terminate parental rights. See, e.g., *Blisset’s Case*, Lofft 748, 98 Eng. Rep. 899 (K.B. 1774) (“the public right to superintend the education of its citizens necessitated doing what appeared best for the child, notwithstanding the father’s natural right.”). The American States followed this doctrine. See, e.g., *Commonwealth v. Briggs*, 16 Pick 203 (Mass. 1834)(quoting *Blisset’s Case*); See also, Kent, James, *Commentaries on Am. L.2d.* 1:32 (1826-1830); “Emergence of a Modern American Family Law: 1796-1851,” 73 N.W. Univ. L. Rev. 1038, 1085 (1979); Masson, Mary Ann., *From Father’s Property to Children’s Rights: The History of Child Custody in the United States*, (Columbia Univ. Press, 1994). The State possessed the equitable power to terminate parental rights and custody prior to 1853. Accordingly, R.C. 2505.02(B)(2) is inapplicable.

As mentioned above, the *Murray* Court did not rely upon division (B)(2) for its holding. The court instead chose the correct, more arduous course of interpreting division (B)(1). The County does not even argue that division (B)(1) applies for the obvious reason that an order continuing temporary custody with the County does not “prevent a judgment” in favor of the

¹ Unfortunately, Appellee Michelle Adams reaches the same conclusion as the County by relying upon *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 360 (“Proceedings in the juvenile division . . . are **special statutory proceedings** pursuant to Civ.R. 1(C)(7)”). The Adams children quibble with their mother in a minor respect. The term of art “special statutory proceedings” interpreted in *Fowler* is from Civ.R. 1 and is used to decide when the Civil Rules will be relaxed. That term should not be confused with the term “special proceeding” employed in R.C. 2505.02 that decides when a case can be appealed.

County. Even if it did, the County cannot find shelter behind divisions (B)(1), or for that matter (B)(2), because the County does not have a “substantial right” to permanent custody of the Adams children. “An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181. To the Adams children’s dismay, the County maintains temporary custody of them to this day. Moreover, the County is not precluded from seeking an award of permanent custody in the future. The County’s right to what it perceives as appropriate relief has not been foreclosed. Accordingly, any substantial right it might possess has not been affected.

Since *Murray* was decided, division (B)(4) has been added to Section 2505.02. Division (B)(4) expressly governs provisional remedies. Division (B)(4) squares best with this matter. An order of *temporary* custody is unquestionably provisional. To earn the right to appeal under division (B)(4), the prospective appellant must show that the provisional order determines the case, preventing a judgment in favor of the prospective appellant, and that the appellant could not obtain a meaningful and effective remedy by appealing after a final judgment. See R.C. 2505.02(B)(4). The County was awarded legal custody, albeit temporary custody, of the Adams children. The County has not lost the right to pursue permanent custody in the future. The County’s temporary custody of the Adams children does not prevent the County from prevailing in this matter. Once custody of the Adams children is finally returned to the Adams parents—as they so dearly deserve and the Adams children so desperately want—the County will have the right to appeal from that order.² If the County is eventually awarded permanent custody, then it will have no need to appeal. Because Section 2505.02(B)(4) denies the County the right to an interlocutory appeal, the judgment of the court of appeals must be affirmed.

² Of course, the County should exercise the discretion not to appeal.

To avoid this fate, the County trots out a parade of horrors, which, quite frankly, are not that horrible. The short parade circles around the argument that the current law precludes the County from “addressing legal issues related to the erroneous judgments.” [Appellant’s Merit Brief, 8]. This simply isn’t true. As already discussed, the County can pursue an appeal if permanent custody is returned to the parents. Moreover, the two arguments the County wants to pursue on the merits are not compelling. It first argues that the juvenile court is without authority to extend a temporary custody order beyond two years. This issue is not pressing because this Court has already concluded otherwise in unambiguous syllabus law. *In re Young Children* (1996), 76 Ohio St.3d. 632, 669 N.E.2d 1140 (“The passing of the statutory time period (‘sunset date’) pursuant to R.C. 2151.353(F) does not divest juvenile courts of jurisdiction to enter dispositional orders.”); *In re C.F.*, 113 Ohio St. 3d, at ¶ 29 (“under R.C. 2151.413(D)(3)(b), an agency may not file for permanent custody under R.C. 2151.413(D)—the ‘12 months out of 22’ rule—‘[i]f reasonable efforts to return the child to the child’s home are required under section 2151.419’ and the agency has not provided the services required by the case plan”.) Moreover, the County is not harmed by the extension of the temporary custody order. The County’s fallback argument is that the judgment was against the manifest weight of the evidence. This is a difficult standard for the County to prove. The County was required to prove its case by clear and convincing evidence. R.C. 2151.414(B)(1); *In re D.A.*, 113 Ohio St.3d, at ¶ 12. The odds are low that a juvenile court would be reversed for not granting permanent custody to the County—especially where the County retains temporary custody. A child custody case should not be placed on hold so the County can attempt to surmount this steep slope.

If in some unimaginable instance, continuing the temporary custody order wreaked havoc and the parents were unwilling to appeal, surely the children’s attorney or the guardian ad litem

would appeal. In the exceedingly rare instance where this double redundancy failed to protect the children, the County would possess the right to seek a writ of mandamus or prohibition. There is no reason to carve out a right for an overzealous children services agency to appeal orders on which it prevailed.

The *In re N.B.* line of cases demonstrates the perils of permitting the County to appeal orders continuing temporary custody with the County. The Juvenile Court denied the County's motion for permanent custody on March 7, 2002. The County appealed, presenting assignments of error almost identical to those presented below in this matter. Over a year later on July 10, 2003, the Court of Appeals disposed of the County's baseless arguments with ease. *In re N.B.*, 2003 Ohio 3656. This court refused to accept the County's appeal on October 8, 2003. *In re N.B.*, 100 Ohio St.3d 1425, 2003 Ohio 5232. As the County proudly noted in its brief, it obtained a writ of prohibition preventing the Juvenile Court from conducting a hearing in N.B. "on whether a reasonable time has elapsed such that the children should be placed or returned to mother."³ *State ex rel. Cuyahoga Cty. Dept. of Children & Family Serv. v. Floyd*, 2003-Ohio-184, ¶ 2. The Juvenile Court finally regained jurisdiction over the case nineteen months after it ruled upon the County's motion. Once the matter was remanded to the Juvenile Court, the County stubbornly moved for permanent custody a second time, and started the process all over again. *In re N.B.*, 2004 Ohio 859, ¶ 2. The County is repeatedly pursuing appeals it knows it cannot win as a means of avoiding compliance with Juvenile Court orders requiring the County to seek reunification.

³ Although this issue is not before the Court, the Adams Children question the wisdom of the 8th District prohibiting the Juvenile Court from entering further dispositional orders based upon facts that develop while an appeal is pending. *Cf., In re Murray*, 52 Ohio St.3d, at 160. For example, even if the County should have prevailed upon its first motion for permanent custody in *In re N.B.*, a subsequent finding that the mother completed the reunification plan and is entitled to regain permanent custody should prevail over the disposition of the appeal that focuses on an aged snapshot in time.

This case is a prime example of the wrong-headedness of the County's posturing. The Adams children were temporarily removed from their parents' home because of an assault by a non-resident step-brother upon the eldest child. There has never been a finding that the parents mistreated the children. The trial court determined that the parents have been working diligently toward reunification. The trial court recounted the professional and personal sacrifices the parents have made to regain custody of their children. The foster parents and court psychologist are supportive of the reunification plan. The children, who live at home several days each week, want to return home permanently. The guardian ad litem supports reunification. Yet, the County drags it heels. During the time this appeal has been pending, reunification should have been completed. Yet, this case sits inactive because the County refuses to allow the Adams family to live the normal life they deserve. The County has dismally failed to "make reasonable efforts to reunify the family before terminating parental rights." *In re C.F.*, 113 Ohio St.3d, at ¶ 4. Not only does the County not have a legal right to appeal—it does not have the moral right to keep this family separated any longer than it already has.

CONCLUSION

A child services agency does not have the right to appeal from an order continuing a previous order awarding temporary child custody to that agency. Accordingly, the judgment of the court of appeals should be affirmed.

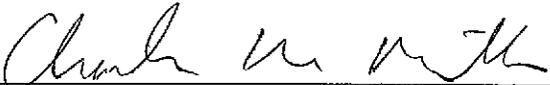
Respectfully submitted,



Charles M. Miller (0073844)
Keating Muething & Klekamp, PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Tel: (513) 579-6967
Fax: (513) 579-6457
cmiller@kmlaw.com
Attorney for Appellees, Adams Children

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLEES ADAMS CHILDREN was served upon the following parties by ordinary U.S. mail, this 28th day of March 2007.



Charles M. Miller

Christopher J. Pagan
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
Cuyahoga County Prosecuting Attorney
Joseph C. Young
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
Melissa J. Mitchell
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5634
(614) 719-4812 (fax)
jjkulewicz@vssp.com
mjmittell@vssp.com
COUNSEL FOR APPELLEE, MICHELLE
ADAMS

Jean M. Brandt
1028 Kenilworth Avenue
Cleveland, Ohio 44113
(216) 621-1610
(216) 621-1633 (fax)
GUARDIAN AD LITEM FOR
APPELLEES, ADAMS CHILDREN

Steven E. Wolkin
820 West Superior Avenue, Suite 510
Cleveland, Ohio 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