

IN THE SUPREME COURT OF OHIO
No. 06-503

IN RE: C.F., et al.

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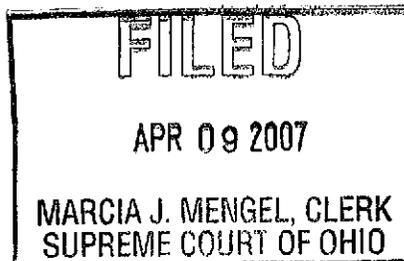
On a Notice of
Certified Conflict from
the Cuyahoga County
Court of Appeals,
Eighth District, Case
No. 85716

APPELLEE WAYNE FOSTER'S MOTION FOR RECONSIDERATION

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APPELLEE WAYNE FOSTER'S MOTION FOR RECONSIDERATION

Now comes Appellee Wayne Foster, by and through undersigned counsel, and files this motion for reconsideration pursuant to S.Ct. R. XI, Sec. 2, and requests this Honorable Court to reconsider the disposition of this case in light of its March 28, 2007 decision, *In re C.F.* (2007), 113 Ohio St. 3d 73, 2007 Ohio 1104. The reasons for reconsideration are set forth in the accompanying brief.

Respectfully Submitted,

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BRIEF

With this motion, Mr. Foster is *not* asking this Court to reexamine either of its holdings regarding the certified questions. Rather, this motion to reconsider simply requests that this Court modify its disposition of the case so as to remand it to the Eighth District Court of Appeals to address issues that have not been fully resolved by this Court's decision.

A. Background

On November 24, 2004, the juvenile court for Cuyahoga County ordered permanent custody of appellate Wayne Foster's minor children, C.F. and S.F., to appellant Cuyahoga County Department of Children and Family Services ("CCDCFS"), thereby severing Mr. Foster's parental rights. Mr. Foster challenged that determination on appeal before the Eighth District Court of Appeals, raising several assignments of error, including:

ASSIGNMENT OF ERROR I: THE TRIAL COURT'S AWARD OF PERMANENT CUSTODY TO DCFS, DESPITE DCFS'S FAILURE TO MAKE REASONABLE EFFORTS TO ELIMINATE THE CONTINUED REMOVAL OF THE CHILDREN FROM THEIR HOME AND TO RETURN THE CHILDREN TO THEIR HOME, VIOLATED STATE LAW AND APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II: THE TRIAL COURT'S DECISION TO AWARD PERMANENT CUSTODY TO DCFS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR III: THE TRIAL COURT'S FAILURE TO DISCUSS THE WISHES OF THE FOSTER CHILDREN AND THEIR RELATIONSHIP WITH MR. FOSTER IN DETERMINING THE BEST INTERESTS OF THE CHILDREN CONSTITUTES REVERSIBLE ERROR.

ASSIGNMENT OF ERROR VI: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ASCERTAIN THE WISHES OF THE CHILDREN AND ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION FOR IN CAMERA INTERVIEW OF CHILDREN.

The Court of Appeals sustained all four of the assignments of error set forth above and reversed the juvenile court's permanent custody order. *In re C.F.*, Cuyahoga App. No. 85716, 2006 Ohio 88, ¶ 48.¹

After obtaining a certification of a conflict from the Eighth District, DCFS filed a notice of certified conflict with this Court on March 10, 2006. DCFS did *not*, however, file a notice of appeal and a memorandum in support of jurisdiction pursuant to S.Ct. Prac. R. II, Section 2(A), R. III, Section 1, and R. IV, Section 4. On May 10, 2006, this Court determined that a conflict exists and ordered briefing on the following two specific questions of law:

1. Whether a reasonable efforts determination is required in motions for permanent custody filed pursuant to R.C. 2151.413?
2. Whether a trial court abuses its discretion by denying a request for an in camera interview in a permanent custody determination when there is nothing in the record to indicate that having the children testify would have been detrimental to them or that they did not desire to testify?

On March 28, 2007, this Court reached the following conclusions with respect to these two legal questions:

Issue One: "Except for some narrowly defined statutory exceptions, the state must make reasonable efforts to reunify before terminating parental rights. If the agency has not already proven reasonable efforts, it must do so at the hearing on a motion for permanent custody. However, the specific requirement to make reasonable efforts that is set forth in R.C. 2151.419(A)(1) does not apply in an R.C. 2151.413 motion for permanent custody."

Issue Two: In determining whether to consider the wishes of the child as expressed through the child's guardian ad litem or the child, a court is not required to consider "whether the children want to testify or whether testifying would be detrimental to them."

¹ The Court of Appeals overruled Mr. Foster's other three assignments of error.

In re C.F. (2007), 113 Ohio St. 3d 73, 2007 Ohio 1104, ¶¶ 4, 5 and 55. Based on its resolution of these two certified questions, this Court reversed the judgment of the court of appeals and reinstated the judgment of the trial court. *Id.* at ¶ 59.

B. Argument

In his motion to reconsider, Mr. Foster is *not* asking this Court to revisit either of its legal conclusions. Rather, due to the unique procedural posture of this case, Mr. Foster submits that this Court's decision does not fully dispose of the case and that it should be remanded to the Court of Appeals for further proceedings.

As noted above, the Eighth District sustained four assignments of error and reversed the trial court's decision because DCFS had not made reasonable efforts at reunification (AOE I), because the trial court's permanent custody decision was against the manifest weight of the evidence (AOE II), because the trial court failed to discuss the wishes of the children and their relationship with Mr. Foster in making its best interest determination (AOE III), and because the trial court abused its discretion in failing to hold an *in camera* hearing (AOE VI). DCFS's notice of certified conflict only squarely addressed the Eighth District's resolution of Foster's first (lack of reasonable efforts) and sixth (failure to hold an *in camera* hearing) assignments of error. Accordingly, this Court's opinion necessarily did not reach the Eighth District's resolution of Foster's second and third assignments of error. It is therefore appropriate for this Court to send the case back to the Eighth District to determine the impact of this Court's decision on the remaining two assignments of error.

1. The Eighth District must reconsider its conclusion that the trial court's permanent custody decision was against the manifest weight of the evidence (AOE II).

In his second assignment of error in the Eighth District, Wayne Foster argued that the trial court's permanent custody decision was against the manifest weight of the evidence. To

obtain permanent custody of Wayne Foster's children, CCDCFS had to prove, by clear and convincing evidence, *both* that permanent custody was in the children's best interest *and* that the Foster children cannot be placed with Mr. Foster within a reasonable time or should not be placed with him based on one of several factors in R.C. 2151.414(E). Mr. Foster asserted that CCDCFS failed to prove both requirements.

With respect to the 2151.414(E) factors, the trial court relied on three: 1) Parents failed "continually and repeatedly to substantially remedy the conditions" leading to the children's placement outside the home *notwithstanding* reasonable case planning and diligent efforts at reunification, R.C. 2151.414(E)(1); 2) Lack of commitment to the children, R.C. 2151.414(E)(2); and 3) Chronic chemical dependency, R.C. 2151.414(E)(4). Mr. Foster challenged all three findings on appeal. The Eighth District only addressed the (E)(1) factor and concluded that the agency had not employed reasonable case planning and diligent efforts at reunification. It did not decide whether Mr. Foster had "continually and repeatedly" failed to "substantially" remedy the conditions that led the children's removal and found it unnecessary to reach the (E)(2) or (E)(4) factors.

Although this Court disagreed with the Eighth District's conclusion that CCDCFS failed to employ reasonable case planning and make diligent efforts at reunification as required by (E)(1), *In re C.F.*, 2007 Ohio 1104 at ¶¶ 44-48, it did not consider the other required part of (E)(1)—whether Mr. Foster "continually and repeatedly" failed to "substantially" remedy the conditions that led the children's removal. Moreover, although this Court noted that the (E)(2) or (E)(4) factors "would have been sufficient grounds for the trial court to determine that the Foster children could not be placed with either parent within a reasonable time," *In re C.F.*, 2007 Ohio 1104 at ¶¶ 49-50, it, like the Eighth District, did not consider Mr. Foster's challenges to

these particular findings. Accordingly, this case should be remanded to the Eighth District to review these findings in light of this Court's opinion regarding the reasonable efforts of the agency.

As to the best-interest determination, the second requirement for permanent custody, it must also be reexamined by the Eighth District in light of this Court's recent decision. The Eighth District held *both* that the trial court erred in finding that permanent custody was in the best interest of the children *and* that, "in determining the best interest of the children," the court abused its discretion in not holding an *in camera* interview with the children for them to express their wishes. *In re C.F.*, Cuyahoga App. No. 85716, 2006 Ohio 88, ¶¶ 35 and 47. This Court's decision that the trial court did *not* need to hold an *in camera* hearing explicitly addresses only the second of the two holdings by the Eighth District. It may be that this Court's decision will affect the Eighth District's conclusion about the best interest determination. However, it may not. Because the Eighth District found the trial court should have heard directly from the children to ascertain their wishes, it necessarily truncated its analysis of the remaining factors relevant to determining whether permanent custody was in the best interest of the children.²

² R.C. 2151.414 (D) sets out the following relevant factors which a court must consider in ascertaining the best interest of the child:

- (1) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster care givers and out-of-home providers, and any other person who may significantly affect the child;
- (2) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
- (3) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999;

In short, this Court's resolution of the certified questions corrected the Eighth District's erroneous ruling regarding (1) CCDCFS's failure to employ reasonable case planning and diligent efforts at reunification and (2) the trial court's failure to hold an *in camera* hearing with the children. However, this Court's opinion did not resolve whether the trial court's best interest determination and determinations under R.C. 2151.414(E)(1),³ (E)(2), and (E)(4) were against the manifest weight of the evidence. That this Court did not reach these issues is quite understandable given the limited context in which the case was presented. With the benefit of this Court's direction, the Eighth District should reexamine Mr. Foster's arguments challenging the trial court's determination regarding the best interest of the children and the R.C. 2151.414(E) factors.

2. The Eighth District must reconsider its ruling that the trial court's failure to discuss the wishes of the children and their relationship with Mr. Foster in making its best interest determination requires reversal of the permanent custody decision (AOE III).

In his third assignment of error in the Eighth District, Mr. Foster argued that the trial court failed to discuss two required facets of R.C. 2151.414(D)'s mandatory criteria for determining the best interest of the children. Specifically, the trial court did not discuss the "interaction and interrelationship" between Mr. Foster and his children, nor did it even mention the children's wishes in its permanent custody decision. See R.C. 2151.414(D)(1) and (2). Mr. Foster argued that such a failure "renders the court's judgment facially defective and warrants reversal." *In re Salsgiver*, Geauga Case No. 2002-G-2412, 2002 Ohio 3713 at ¶¶ 26-27; *see also*

(4) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

(5) Whether any of the factors in divisions (E) (7) to (11) of this section apply in relation to the parents and child.

In re Bentley, Ashtabula Case No. 2004-A-0075, 2005 Ohio 1257, at ¶¶ 30-31; *In re Strong*, Franklin Case No. 01AP-1418 and 01AP-1419, 2002 Ohio 2247, at ¶¶ 48-49; *but see In re T.M.* (Sept. 30, 2004), Cuyahoga App. No. 83933, 2004 Ohio 5222, at ¶ 32. Although the Eighth District did not discuss this issue in detail, it clearly sustained this assignment of error.

Because CCDCFS did not file a discretionary appeal challenging the Eighth District's resolution of this assignment of error, this Court did not address this issue in resolving the certified conflicts presented by CCDCFS. This Court's reversal of the Eighth District's conclusion that the trial court abused its discretion in failing to hold an *in camera* hearing with the children does not necessarily affect Mr. Foster's third assignment of error. This Court's decision clarifies that the trial court was not required to hear directly from the children about their wishes. However, it does not address the trial court's failure to discuss the children's wishes as express through the guardian *ad litem* and their relationship with Mr. Foster in making its best interest determination. As such, the case should be remanded to the Eighth District for consideration of Foster's third assignment of error in light of this Court's opinion.

C. Conclusion

WHEREFORE, for the reasons set forth above, Appellee Wayne Foster respectfully asks this Court to grant his motion for reconsideration and modify the final paragraph of its opinion to state the following:

¶ 59 For the foregoing reasons, we reverse the court of appeals' resolution of the certified questions and remand the case to the court of appeals for further proceedings not inconsistent with this decision.

Respectfully Submitted,

³ As discussed above, this Court only considered the portion of R.C. 2151.414(E)(1) that was presented in the certified questions.

A handwritten signature in cursive script that reads "Cullen Sweeney". The signature is written in black ink and is positioned above a horizontal line.

Cullen Sweeney
Assistant Public Defender
Counsel of Record for Appellee

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was served by ordinary U.S. mail, on this 9 day of April 2007, upon the following:

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