

IN THE SUPREME COURT OF OHIO

In the Matter of:	:	
C.F., ET AL.	:	Case No. 2006-0503
	:	
Cuyahoga County Department of	:	
Children and Family Services,	:	
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County Court
	:	of Appeals, Eighth
v.	:	Appellate District
	:	
Wayne Foster	:	
	:	Court of Appeals
Appellee.	:	Case No. 85716
	:	

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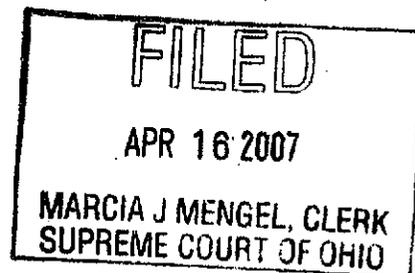
MEMORANDUM OF APPELLANT CUYAHOGA COUNTY  
DEPARTMENT OF CHILDREN AND FAMILY SERVICES  
OPPOSING APPELLEE, WAYNE FOSTER'S MOTION FOR RECONSIDERATION

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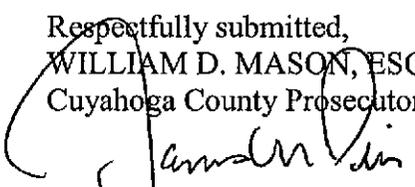
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MEMORANDUM OF APPELLANT CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES OPPOSING APPELLEE WAYNE FOSTER'S MOTION FOR RECONSIDERATION

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Now comes Appellant, Cuyahoga County Department of Children and Family Services (*CCDCFS*), by and through counsel, and pursuant to S. Ct. Prac. R. XI, Section 3(A), and respectfully requests that this Honorable Court deny Appellee's Motion for Reconsideration in *In re C.F.*, (2007), 113 Ohio St. 3d 73, 2007 Ohio 1104, for the reasons more fully stated in the attached brief which is made a part of this memorandum.

Respectfully submitted,  
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## MEMORANDUM IN OPPOSITION

On March 28, 2007, this Honorable Court issued its decision in *In re C.F.*, Ohio St.3d, N.E.2d, 2007 WL 777284, 2007-Ohio-1104 (Ohio, Mar 28, 2007) (NO. 2006-0503, 3110), therein reversing the judgment of the Eighth District Court of Appeals and reinstating the judgment of the trial court. Appellee, Wayne Foster submits that this Honorable Court should reconsider its decision to reinstate the trial court's judgment as follows: "[t]his Court's decision does not fully dispose of the case and [the matter] should be remanded to the Court of appeals for further proceedings." See Appellee's Motion at p. 3. Mr. Foster specifically maintains that the Eighth District Court of Appeals, (and this Honorable Court), neglected to consider his second and third assignments of error. The Eighth District's opinion however states, "appellant's first, second, third, and sixth assignments of error are sustained" indicating that the Appellee's assertion is mistaken. *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88 at {¶ 48}. In the case at bar, all the errors assigned and briefed were addressed by the court in writing, stating the reasons for the court's decision as to each. See App. R. 12(A). Furthermore, the court did not identify any assignment of error as moot. There is no evidence to support Appellee's claims. Consequently, his Motion for Reconsideration should be overruled.

### *The Assignments of Error*

In *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, Appellee prevailed on following four assignments of error:

- I. The trial court's award of permanent custody to DCFS, despite DCFS' 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.

- II. The trial court's decision to award permanent custody to DCFS was against the manifest weight of the evidence.
- 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.
- 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.

As shown below, the court approached assignments of error *one and two together*, and assigned errors *three and six together*:

"Appellant presents seven assignments of error for our review.

In his *first and second assignments of error*, appellant contends that the trial court erred in granting permanent custody of the children to CCDCFS because the agency failed to make reasonable efforts for reunification of the children with him and because granting permanent custody of the children to CCDCFS was against the manifest weight of the evidence, respectively.

In his *third and sixth assignments of error*, appellant contends that the trial court erred by failing to discuss the wishes of the children and their relationship with him in determining their best interest and that the trial court abused its discretion by denying his motion for an in camera interview of the children, respectively.

Because these assignments of error are interrelated, we consider them together." *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, {¶ 19}. [Emphasis added].

*R. C. 2151.414(E)(1) vs. Findings of Fact and Conclusions of Law*

Initially it must be noted that there is no evidence that the court of appeals' decision was based on R.C. 2151.414(E)(1). (Findings of Fact, p. 3, ¶ 3). R.C. 2151.414(E)(1) was not referenced in the court's holding, and the only similarity between the court's opinion and R.C. 2151.414(E)(1) was the phrase "reasonable case planning and diligent efforts." *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, at

{¶ 34}.

“Upon review, we find appellant's argument that the trial court abused its discretion in finding that CCDCFS used reasonable efforts to reunify appellant with the children persuasive. - - We find that reasonable case planning and diligent efforts by CCDCFS would have necessitated a case plan for appellant during the time he was in the process of reunifying with the children.” *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, at {¶ 34}.

Even if one assumes, *arguendo*, that the court based its decision on the lower court's (E)(1) finding, there is no foundation for Appellee's assertion that the Eighth District incompletely addressed R.C. 2151.414(E)(1).

The court reviewed the record and recounted the testimony of CCDCFS supervisor, Pamela Cameron, psychologist and chemical dependency counselor, Dr. Douglas Waltman, CCDCFS social worker, Jeff Konkoly, group facilitator for the battered men's program at the Greater Cleveland YWCA, William Siefert-Kessell, guardian *ad litem* for the children, Dale Hartman, and the Appellee, Wayne Foster. Most, if not all of this testimony, addressed the things that Mr. Foster had, or had not done, to resolve the problems that caused the children to be placed outside the home. The court did not challenge the reliability of any of this testimony. *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, {¶¶ 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17}.

R.C. 2151.414(E)(1) provides “ *Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.*”

The Appellee's argues that the court addressed the condition subsequent, i.e., "[f]ollowing the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home," before the condition precedent, i.e., "the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home." Of course, in context of R.C. 2151.414(E)(1), reasonable case planning and diligent efforts are immaterial until a parent has failed to substantially remedy the conditions responsible for their child's removal. If the court of appeals did in fact address "reasonable case planning and diligent efforts" in context of (E)(1), it *by necessity*, had to have already established that Mr. Foster failed to substantially remedy the conditions responsible for the children's removal.

R.C. 2151.414(E)(2) & (E)(4)

Appellee next asserts that after determining that "the agency had not employed reasonable case planning and diligent efforts at reunification, [the court of appeals] ... found it unnecessary to reach the (E)(2) or (E)(4) factors" Appellee's Motion at p. 4.

However, as shown below, the court of appeals acknowledged the trial court's findings with respect to each of the sections cited by the Appellee:

"Here, the trial court found that three of the factors [under R.C. 2151.414(E)] were applicable:

3. Following placement outside the home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the children to be placed outside the home, the parents have failed continually and repeatedly to substantially remedy the conditions causing the children to be placed outside the home. R.C. 2151.414(E)(1).

4. The parents have demonstrated a lack of commitment toward the children by failing to regularly support, visit or communicate with the children when able to do so, or by other actions have shown an unwillingness to provide an adequate, permanent home for the children. R.C. 2151.414(E)(4).

5. Mother and father suffer from chronic chemical dependencies that are so severe that they are unable to provide an adequate, permanent home for the children at the present time, and as anticipated, within one year after the Court's hearing on CCDCFS' motion to modify temporary custody to permanent custody. R.C. 2151.414(E)(2).” *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, at {¶¶ 31, 32, 33}.

The court did not challenge the trial court's findings under R.C. 2151.414(E)(2) or (E)(4). There were seven assignments of error. Appellee's first, second, third, and sixth assignments of error were sustained, his fourth, fifth, and seventh were overruled, none were deemed moot. Therefore, all assignments of error were resolved. *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88 at {¶ 48}.

#### Best Interest

Appellant argues that “[t]he 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 trial court abused its discretion in not holding an *in camera* interview with the children” Appellee Motion, at 5.

The Appellee merely separated the court of appeals' *holding*, which reads—

**“we find that the trial court abused its discretion in finding that granting CCDCFS permanent custody was in the best interest of the children”**

from its *reasoning*—

**“there is nothing in the record to indicate that having the children, who are parties to the action, testify would have been detrimental to them or that they did not desire to testify. Thus, we find that in determining the best interest of the children, the court abused its**

**discretion by not allowing them, at least, the opportunity to express their desires and the court the opportunity to observe their demeanor, assess their maturity and weigh the credibility of their testimony.”** *In re C.F.*, 2006 WL 60775 (Ohio App. 8 Dist.), 2006-Ohio-88, {¶¶ 36-47}.

The court of appeals made its decision regarding assignments of error three and six and provided written reasons for its conclusion as required under App. R. 12, which provides:

“On an undismissed appeal from a trial court, a court of appeals shall do all the following: \* \* (c) unless an assignment of error is made moot by a ruling on another assignment of error, [the court] must decide each assignment of error and give reasons in writing for its decision.” App. R. 12(A)(1)(c)

Appellee unreasonably argues that the court of appeals issued two incomplete opinions: the first, a holding without a written explanation; the second, a written explanation without a holding. This proposition is implausible.

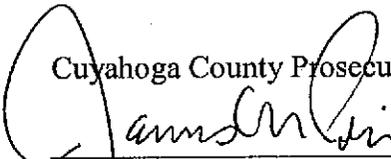
It is clear that there was *only one error* identified by the court of appeals with respect to assignments of error three and six, and it concerned “the wishes of the child[ren], as expressed directly by the child[ren] or through the child[ren]’s guardian ad litem” under R.C. 2151.414(D)(2).

Conclusion

Appellant, CCDCFS, respectfully requests that this Honorable Court deny Appellee's *Motion for Reconsideration* in *In re C.F.*, (2007), 113 Ohio St. 3d 73, 2007 Ohio 1104, to affirm its decision to reverse the decision of the Eighth District Court of Appeals, and to reinstate the judgment of the trial court.

Respectfully submitted,  
WILLIAM D. MASON, ESQ.

Cuyahoga County Prosecuting Attorney

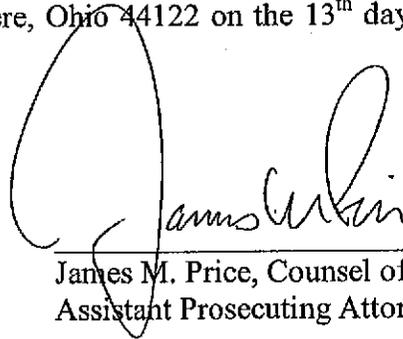


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by: James M. Price, Counsel of Record  
Assistant Prosecuting Attorney  
COUNSEL FOR APPELLANT

Proof of Service

I certify that a copy of Appellant's *Memorandum in Opposition to Appellee's Motion for Reconsideration* was sent by ordinary U.S. mail to Appellee, Wayne Foster, through counsel, Cullen Sweeney, Esq., 310 Lakeside Avenue, Cleveland, Ohio 44113; Guardian ad Litem for Appellee, Theodore Amata, Esq., 1831 West 54<sup>th</sup> Street, Cleveland, Ohio 44102; and, Guardian ad Litem for the children, Dale M. Hartman, Esq., 27600 Chagrin Boulevard, Suite 340, Woodmere, Ohio 44122 on the 13<sup>th</sup> day of April, 2007.



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