

IN THE SUPREME COURT OF OHIO

IN RE: BRAYDEN JAMES,

a Minor

Cynthia and Richard Hutchinson

Appellants

-v.-

Damon and Jamie James

Appellees

Supreme Court of Ohio  
Case Number: 2005-1994

On Appeal from the  
Hamilton County Court of Appeals,  
First Appellate District

Hamilton County Court of Appeals  
Case No. C-040533

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**MOTION FOR RECONSIDERATION BY APPELLEES  
AND MEMORANDUM OF LAW IN SUPPORT**

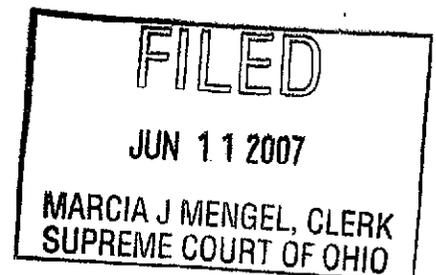
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**MOTION**

Comes now Appellees Damon and Jamie James ("Parents"), pursuant to S. Ct. Prac. R. Rule 11, Section 2, to respectfully request that this Honorable Court reconsider its decision on the merits in this case, reported as *In re James*, 2007-Ohio-2335, decided and entered May 30, 2007.

Respectfully submitted:

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(with authority)

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## MEMORANDUM OF LAW

### Preliminary Statement

Appellees Damon and Jamie James (“Parents”) hereby move this Honorable Court for reconsideration of its decision in this case. At the outset, Parents would like to make this Court aware that the majority opinion appears to contain a misstatement that may cause extreme prejudice to Parents upon remand. In addition, Parents move for reconsideration because:

- Appellants-Grandparents failed to move the trial court for findings of fact and conclusions of law under Civil Rule 52 thus, regardless of this Court’s constitutional rulings, the trial court’s general order transferring legal custody to Parents must stand.
- Brayden James has his own constitutional right to be raised by his natural parents when they are suitable, which the trial court found is the case here.

Both of these issues were raised in Parent’s Merit Brief but not addressed by this Court. Both deserve this Court’s consideration; the former because it is inexorably interwoven with the syllabus law that was declared and the latter because, despite being a procedural matter, should have been outcome-determinative as between the Parties.

#### **I. This Court’s majority opinion contains a misstatement of the record that may cause extreme prejudice to Parents upon remand.**

In the majority opinion, this Court stated: “In this case, the record does not establish a change in Brayden’s circumstances, but that failure does not prevent Jamie and Damon from ever regaining custody of him.”<sup>1</sup> Parents take issue with this statement, which on remand might be construed as this Court’s holding as a matter of law, as if it were sitting as the fact-finder, that no change in Brayden James’ circumstances occurred.

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<sup>1</sup> *In re James*, 2007-Ohio-2335 at ¶18.

As explained more fully in the next section, the trial court issued a general entry transferring legal custody to Parents (T.d. 224) (the “Entry”). Grandparents failed to move for findings of fact and conclusions of law. Consequently, the entry did not state the trial court’s finding *either* that there had been *or* that there had not been such a change in circumstances.

Notably, the First Appellate District made its own inquiry into the record to determine that there had been positive changes sufficient to meet the best interest test.<sup>2</sup> Further, the First District specifically found at least one change in Brayden: “Chapman (the court appointed investigator) observed Brayden in his parents’ home and stated, ‘I didn’t see any fear, any distrust, any negative reaction to his father. He seemed very comfortable.’”<sup>3</sup>

But the First District made no separate inquiry into whether the best interest factors also constituted a change in circumstances because that district had previously held that this additional requirement was unconstitutional when applied between parents and grandparents.<sup>4</sup>

Justice Stratton, in her dissenting opinion, stated that there was evidence in the record of a change in Brayden James’ circumstances.

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<sup>2</sup> *In re Brayden James*, (Hamilton) 2005-Ohio-4847 ¶ 66 (“Since the time that the Hutchinsons initially took custody of Brayden, both Damon and Jamie have made extensive efforts to improve their relationship and their situation. Through all their difficulties, they have remained married. Damon has completed several parenting programs and has volunteered to take more. Damon has undergone individual counseling, and Damon and Jamie together have participated in over 23 sessions with a parenting specialist. In the fall of 2003, the Jameses had another son, Zander, a full brother to Brayden. At the time of the trial court’s ruling, they had cared for Zander without incident. Damon and Jamie have also purchased a home and demonstrated that they have the financial ability to care for Brayden.”)

<sup>3</sup> *Id.* at ¶39.

<sup>4</sup> *In re Brayden James*, (Hamilton) 2005-Ohio-4847 ¶ 8 (“In *Moorman v. Moorman*, this court held that in a custody dispute between a parent and a nonparental custodian, the sole issue for the trial court to determine was the child’s best interest.”)(citing *Moorman v Moorman*, (May 16, 1979), Hamilton App. Case No. C-780227, 1979 Ohio App. Lexis 8706, unreported)

I believe that there is sufficient evidence in the record on which this court may rely on remand to find this child's circumstances have changed. We have held that a trial judge has wide latitude to consider all issues that may warrant a change in circumstances.<sup>5</sup>

This Court in *Davis v Flickinger* declared that the requirement for a change is not for a "substantial change" but rather *any* change.<sup>6</sup>

Parents submit they presented at trial and placed into the record relevant facts and circumstances that went to both change in circumstances and best interest.

Presumably, this Court's disposition to "remand for further proceedings" constitutes authority for, and possibly even an invitation to, review the record to determine whether there was a change in circumstances and/or to hold additional evidentiary hearings on the issue. The reason that Parents bring paragraph 18 to this Court's attention is that, under the law-of-the-case doctrine, the statement as written might be construed as a conclusive finding of fact thereby foreclosing Parents from either highlighting the changes in circumstances that are already in the record or supplementing the record in further evidentiary hearings.

A review of the arguments in this case reveals that Parents never took the position at any time or at any level, from pretrial through the instant motion, that there was no change in Brayden James' circumstances. And it is only on appeal that Grandparents raised the issue at all. At trial, Grandparents never argued against a change in circumstances, they never argued that the

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<sup>5</sup> *In re James*, 2007 Ohio 2335 at ¶49 (J. Stratton dissenting) (citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159, syllabus)

<sup>6</sup> *Davis v. Flickinger* (1997), 77 Ohio St. 3d 415, 417; 1997-Ohio-260; 674 N.E.2d 1159 (syllabus)

1. R.C. 3109.04 requires a finding of a "change in circumstances." Such a determination when made by a trial judge should not be disturbed, absent an abuse of discretion.

2. In determining whether a change in circumstances has occurred so as to warrant a change in custody, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change.

changes Parents presented must for some reason not be considered, nor did they ever establish as a matter of fact that no change in circumstances occurred.

This Court can and should take judicial notice that the trial judge, Judge Sylvia Hendon, now sits on the bench of the First Appellate District. Accordingly, it may not be possible to place into the record the findings she would have made had Grandparents followed Civil Rule 52 and timely asked for such findings.

Parents believe that the inference that might arise from this Court's statement as written would be inappropriate. Hence, Parents respectfully request that paragraph 18 of this Court's opinion be removed or modified to read: "In this case, the trial court's general entry did not address whether there had been or had not been a change in Brayden James' circumstances."

Making this small but important change will provide the trial court with the flexibility required to ensure that justice will be done for Parents, Grandparents and for Brayden James.

**II. Appellants-Grandparents failed to move the trial court for findings of fact and conclusions of law under Civil Rule 52; accordingly, the trial court's general judgment transferring legal custody to Parents must stand.**

Reasons for issuing a writ of certiorari include whether the matter involves a substantial constitutional question or is one of great public importance. S. Ct. Prac. R. Rule 3 Section 1(B) (2). In setting forth syllabus law on the constitutionality of R.C. § 3109.04 as between grandparents and parents, this Court has provided guidance on such a matter.

But Parents submit that this Court should also address a procedural issue that is outcome determinative so justice can be done between the Parties.

The record establishes that on July 19, 2004, after a full hearing, the trial court issued a general entry restoring custody to Parents while allowing Grandparents liberal visitation. T.d.

224. Obviously, the reason that the trial court did not make specific findings of fact regarding either best interest or change in circumstances is that Grandparents failed to make such a request as the civil rules not only entitle but require them to do.

Civil Rule 52, styled, Findings by the Court, provides: “When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment ...”

Parents properly raised this issue in their Argument Section 1(A) at page 9 of their Merit Brief (footnote in original):

[A]t no time did Grandparents argue that the changed circumstances Parents presented at the hearings were irrelevant or so insubstantial that they should not be considered in the analysis of Brayden’s best interest. Because Grandparents did not move for findings of fact and conclusions of law under Civil Rule 52, the validity of the judgment is presumed.<sup>7</sup>

Albeit not a lofty matter of constitutional or great public import, this issue should nevertheless be addressed by this Court because it is a matter of great import for Brayden James.

Parents submit that this entire appeal could have been avoided in the first place had Grandparents so moved. Under these facts, this Court should have held that Grandparents waived the right to challenge the trial court’s decision as between the parties themselves. Therefore, Parents respectfully request this Court – while leaving the syllabus law stand – direct the trial court to carry into execution its original general entry restoring legal custody to Parents.

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<sup>7</sup> *Fletcher v. Fletcher*, (1994) 68 Ohio St. 3d 464, 468; 1994-Ohio-434; 628 N.E.2d 1343 (“When a trial court, sitting without a jury, determines an issue but does not make separate findings of fact and conclusions of law, a reviewing court will presume the validity of that judgment as long as there is evidence in the record to support it.”)

**III. Brayden James has his own fundamental right to be raised by his natural parents when they are suitable, which the trial court found to be the case here.**

Parents respectfully submit that this Court's opinion overlooks an important issue inexorably interwoven within the syllabus law and inherent within the application of R.C. § 3109.04 in this context: namely, whether a child has a fundamental constitutional right to be raised by natural parents when in the child's best interest. The constitutionality of this statute as between parents and grandparents cannot be truly resolved without addressing the child's rights. When a statute infringes on a fundamental right, the normal presumption in favor of constitutionality is reversed and the statute is presumed unconstitutional.<sup>8</sup>

It is axiomatic that children are citizens of the states and of the United States who are also entitled to constitutional protection.<sup>9</sup> Parents recognized this issue as being sufficiently important to be included in the heading of their argument for their counter to Appellant's Second Proposition of Law, sub-argument A, in which Parents stated (emphasis added): "The requirement for a change of circumstances is not necessary to a compelling interest and it is an unconstitutional infringement on both Parents' *and Brayden's* rights."

Parents explained in their Merit Brief at page 13:

Regardless of the labels assigned to the parties' status, Parents submit that *Brayden has his own paramount and fundamental right to a decision made in his best interest.* (emphasis added) When viewed in this light, the collective weight of Parents' right (however characterized) *along with Brayden's right to be with them when it is in his best interest* (emphasis in original), must outweigh the rights of Grandparents with mere legal custody.

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<sup>8</sup> *San Antonio Independent School Dist. v. Rodriguez*, (1973), 411 U.S. 1, 61, 93 S.Ct. 1919 ("Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty (interest) created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications.")(citing "numerous cases that illustrate this principle")(J. Stewart concurring)

<sup>9</sup> See *In re Gault* (1967), 387 US 1, 13; 87 S.Ct. 1428 ("[N]either the Fourteenth Amendment (due process) nor the Bill of Rights is for adults alone.").

The First District in *Brayden James* held at the syllabus that “substantial competent credible evidence supported the court’s decision that restoring custody was in [Brayden’s] best interest.”

Later in their brief, Parents argued that Grandparents’ position frustrated the purpose of the statutory scheme and undermined the state’s compelling interest to provide for the best interest of the child by turning the change-in-circumstances requirement from a means to an end (the child’s best interest) into an end in itself – despite the child’s best interest:

This Court in *Harold v Collier* recently held in syllabus law that the state has a compelling interest in protecting the child’s best interest and that Ohio’s nonparental visitation statute was necessary to protect that interest.<sup>10</sup> In contrast, the requirement of a change of circumstances *which excludes the transformation of a parent from unsuitable to suitable as a relevant change* is not necessary to further the child’s best interest. In fact, to the extent that the requirement could be used to arbitrarily keep Brayden from his Parents in this case, the requirement is diametrically opposed to the child’s best interest.

Parents Merit Brief at p. 22. The Legislature recognized that the stability that might arise from maintaining the status quo is just one of many factors that relate to a child’s best interest.<sup>11</sup>

The possibly unintended effect of this Court’s decision is to foreclose the right of a child to reunification with his or her natural parents even when in that child’s best interest, and even when reunification would provide a net gain in the child’s best interest as compared to the status quo, and even when reunification would provide a *more stable* environment.

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<sup>10</sup> *Harrold v Collier* (2005), 107 Ohio St.3d 44; 2005-Ohio-5334; 836 N.E.2d 1165 (syllabus 2) (“The state has a compelling interest in protecting a child’s best interest and Ohio’s nonparental visitation statutes are narrowly tailored to serve that compelling interest. (R.C. 3109.11 and R.C. 3109.12, construed and applied.)”)

<sup>11</sup> R.C. § 3109.04 (Allocation of parental rights and responsibilities for care of children)(F) (1) “In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to: \*\*\* (d) The child’s adjustment to the child’s home, school, and community.”)

Parents hereby ask this Court to consider the issue whether a child has a fundamental liberty interest in being raised by his or her natural parents, the resolution of which is necessary to provide proper guidance to Ohio's trial courts which in future cases will decide whether certain of Ohio's families will be reunited or possibly torn apart forever.

The Legislature pronounced that the dual purpose of the Juvenile Act is to: (1) provide for the care, protection, and mental and physical development of children "whenever possible, in a family environment, *separating the child from the child's parents only when necessary for the child's welfare*;" and (2) provide judicial procedures that ensure "constitutional and other legal rights are recognized and enforced."<sup>12</sup> This Court has long recognized that the best interest of the child is always the primary concern in this area of law.<sup>13</sup>

Parents respectfully submit that this Court's majority opinion, which writes the rights of the child out of the equation altogether, fails to adequately protect Ohio's children. More importantly, it constitutes an abdication of this Court's duty to define the scope of a child's fundamental due process right and liberty interest in being raised by his or her natural parents, a matter of constitutional and great public import which is "conferred not by legislative grace, but by constitutional guarantee."<sup>14</sup>

In conclusion, for the foregoing reasons, Parents respectfully request that this Honorable Court grant their Motion for Reconsideration.

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<sup>12</sup> R.C. § 2151.01 (Construction, Purpose) (emphasis added)

<sup>13</sup> *In re James*, 107-Ohio-2335 at ¶45 (citing *In re Perales* (1977), 52 Ohio St. 2d 89; 369 N.E.2d 1047 ("The language of the *Clark* opinion is clear. The welfare of the child is the interest given priority -- the 'first interest.'")(citing *Clark v Bayer* (1877), 32 Ohio St. 299, 310))

<sup>14</sup> *State of Ohio v Cowan*; 103 Ohio St. 3d 144; 2004 Ohio 4777 at ¶8.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I certify that I forwarded a copy of the foregoing to Stephen King, King & Myfelt, LLC, 10999 Reed Hartman Highway, Ste. 231, Cincinnati, Ohio 45242, Attorney for Appellants, on this 11<sup>th</sup> day of June 2007, by regular U.S. Mail, postage prepaid.

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