

IN THE SUPREME COURT OF OHIO

08-0073

IN THE MATTER OF
CHRISTIAN THOMAS

: On Appeal from the Crawford County
Court of Appeals, Third Appellate
District

An Adjudged Dependent Child.

: Court of Appeals
Case No. 3-07-0020

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
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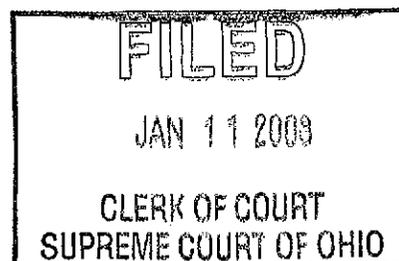


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EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST

This cause presents a critical issue, not only for the future of this one (1) minor child, Christian Drake Thomas, but also for the safety, security and the permanency planning for all abused, dependent and neglected children throughout the State. At the core of this issue is the ability of all *guardians ad litem* throughout this State to fully and completely discharge the powers and duties entrusted to them by the State legislature for the preservation of the health, welfare and safety of their wards. The issue presented is whether *guardians ad litem*, acting pursuant to the express statutory provisions of O.R.C. §§2151.281(I), 2151.415(A)(4) and (F), may move for an order of permanent custody pursuant to O.R.C. §§2151.413 and 2151.414.

In its decision, reversing the award of permanent custody granted by the trial court, the court of appeals held that *guardians ad litem* lack standing to file and prosecute motions for the termination of parental rights (i.e. permanent custody). The court held that “. . . the *guardian ad litem* is not permitted to file a motion for permanent custody because said motion is subject to the requirements of R.C. 2151.413 and 2151.414, which require the motion to be filed by the appropriate agency.” (Pg. 6, Appendix i., December 26, 2007 Opinion)

The decision of the court of appeals is a direct contradiction to its prior decision in the case of *In The Matter of Paige Olmstead*, 2001 WL 150242 (Ohio App. 3 Dist.), 2001-Ohio-2323, and the express statutory authority granted to *guardians ad litem* under O.R.C. §§2151.281 and 2151.415(A)(4) and (F). This decision, if left intact, would strip from the

hands of *guardians ad litem* a critical and essential tool provided by the state legislature for the protection and advancement of the best interests of minor children.

The implications of the decision of the court of appeals affects the future safety and security of untold numbers of children in the temporary custody of child care agencies throughout this State, both now and in the future. The public has a vested interest in insuring that abused, dependent and neglected children are provided a safe and secure home in which to live and grow. This interest was recognized by the General Assembly with the creation of Chapter 2151 of the Ohio Revised Code and the creation of an entirely new area of the law devoted to the welfare and protection of our children. A key and essential component of this new area of the law was the creation of a checks and balances system which provided that child welfare agencies were not to be the sole voice for what would be in the best interest of the children in their care. Rather, this system (Chapter 2151) provided for the appointment of an independent agent, to-wit: a *guardian ad litem*, to act as the voice for those without a voice, and armed the *guardian ad litem* with a variety of legal mechanisms to employ in the discharge of his/her duties. The interests of the public, in protecting children who have already been abused, neglected or rendered dependent by the actions of their caregivers, is critically damaged whenever, as in the within cause, a judicial body disregards the clear and unambiguous language of a lawfully adopted statute and substitutes its own interpretation for what was clearly intended by the legislature.

Further, although not certified as a conflict, the court of appeals' decision in the within cause creates a conflict of law among the various appellate jurisdictions throughout this State. The Fifth, Sixth, and Ninth district appellate courts have each held that the filing and prosecution of motions for termination of parental rights, when accompanied by a motion

seeking permanent custody in the hands of the appropriate child care agency, is not a matter left to the sole discretion of the public agency with custody of a child. See *In Re: Webster*, 2006 WL 1063766 (Ohio App. 5 Dist.), 2006-Ohio-2029; *In the Matter of Brian L.*, 2000 WL 216619 (Ohio App. 6 Dist.) - "R.C. 2151.415(F) provides that a neglected child's GAL may petition the trial court to modify and existing dispositional order and to issue a permanent custody order. R.C. 2151.415(A)(4) sets forth the dispositional order of "permanently terminating the parental rights of the child's parents." In this case, Brian's GAL did have standing to file the motion seeking to place Brian in the permanent custody of DHS."; and *In Re: Stanley*, 2000 WL 1507917 (Ohio App. 9 Dist.). The court of appeals' decision in the case at bar overturns its prior ruling with regard to this issue and creates a clear conflict among the various appellate jurisdictions whereby *guardians ad litem* in other appellate jurisdictions in the State of Ohio are afforded more rights under the exact same statute than those *guardians ad litem* in the Third District's jurisdiction.

The very statutory creation of the position and the bestowment of legal authority in a *guardian ad litem* for the representation of minor children illustrate that the General Assembly felt the position of *guardian ad litem* vital to the proper legal representation of minor children in the Ohio court system. As such, the public has a substantial interest in protecting the rights and powers invested in *guardians ad litem* by its legislature, and in ensuring that the minor children of the State of Ohio are given a full and fair opportunity to appropriate legal representation. The court of appeals' decision undermines the rule of law and directly contradicts the legislative intent of the statute.

The court of appeal's decision eliminates one of the fundamental and statutorily guaranteed powers of a *guardian ad litem*. Under the appellate court's ruling, a *guardian ad*

litem is denied standing to make a motion for termination of a birth parent's parental rights under those circumstances where the *guardian ad litem* feels such action to be in the child's best interests. The result of such a rule contravenes not only the plain and unambiguous language of O.R.C. §§2151.281 and 2151.415 (F), but also the very purpose for the creation of the position of *guardians ad litem*. Therefore, it is respectfully submitted that this Court must grant jurisdiction to hear this case and further review the erroneous statutory interpretation made by the court of appeals.

STATEMENT OF THE CASE AND FACTS

The Crawford County Department of Job and Family Services filed a complaint alleging Christian Drake Thomas to be a dependent child on January 7, 2006. Temporary emergency (*ex parte*) custody of Christian Drake Thomas was granted to the Department of Job and Family Services contemporaneous with the filing of the complaint. The complaint filed by the Department was predicated upon the filing of companion case in the Crawford County Juvenile Court wherein Christian's sister, Angel Agapay, was alleged to be an abused child. At the time of the filing of the dependency complaint Christian Drake Thomas was less than two (2) months of age.

Following a Shelter Care Hearing on January 9, 2007, Christian Drake Thomas was formally placed into the temporary custody of Crawford County Department of Job and Family Services for appropriate foster care placement. An adjudicatory hearing on the abuse/dependency complaints was scheduled for February 7, 2006. The February 7, 2007, hearing on Christian Drake Thomas' case was continued (on that date) due to the need to establish Christian Drake Thomas' true paternity. The two (2) potential fathers were ordered to undergo genetic testing to determine which of the men was, in fact, Christian's biological

father. On March 8, 2006, the continued adjudicatory hearing was held in the Crawford County Juvenile Court. Prior to commencement of hearing the trial court was provided with genetic testing results which excluded both men tested as Christian's biological father. Thereafter, upon commencement of hearing, the minor child's mother, Naomi Agapay, formally acknowledged Angel Agapay to be an abused child, and Christian Drake Thomas to be a dependent child. Based upon these admissions the trial court found Angel Agapay to have been abused and Christian Drake Thomas to be dependent.

A further hearing was held in the Crawford County Juvenile Court on January 9, 2007 (one year from the date of the initial Shelter Care Hearing). This hearing came about as a result of two (2) motions filed in the trial Court. The first motion, filed by Naomi Agapay, sought a review and modification of the Court's March 13, 2006, dispositional orders. The second motion, filed by the Department of Job and Family Services, sought an initial extension of temporary custody. Following the hearing, the Court denied Naomi Agapay's motion for return of her child and granted the request for initial extension filed by the Department of Job and Family Services.

On January 23, 2007, a motion for permanent custody was filed in the trial court the *guardian ad litem*. A hearing on said motion was had on March 21, 2007. Thereafter, on June 28, 2007, the trial court rendered its decision in which it granted the motion for permanent custody. Naomi Agapay filed her original notice of appeal of the trial court's June 28, 2007, decision on July 24, 2007. The Third District Court of Appeals rendered its decision and judgment on December 26, 2007, reversing and remanding the decision of the trial court. The appellee, Geoffrey L. Stoll, *guardian ad litem* now appeals to this Honorable Court, and in support of his position, offers the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: O.R.C. §§2151.281 and 2151.415 invest a *guardian ad litem* with the statutory authority to file and prosecute a motion for termination of parental rights (i.e. permanent custody) under O.R.C. §§2151.413 and 2151.414.

The authority of *guardians ad litem* to act in child welfare cases springs from O.R.C. §2151.281. Subsection (I) of O.R.C. §2151.281 imposes specific duties to be performed by *guardians ad litem* in the discharge of his/her duties, and grants unto *guardians ad litem* broad, sweeping powers to effectuate their statutory mandate:

(I) The guardian ad litem for an alleged or adjudicated abused, neglected, or dependent child **shall perform whatever functions are necessary to protect the best interest of the child**, including, but not limited to, investigation, mediation, monitoring court proceedings, and monitoring the services provided the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, **and shall file any motions and other court papers that are in the best interest of the child.**

[O.R.C. §2151.281. Emphasis added]

O.R.C. §2151.415 governs the mechanism for modification of dispositional orders for children in the care of the public child care agencies. Subsection (F) of O.R.C. §2151.415 provides that:

(F) The court, on its own motion or the motion of the agency or person with legal custody of the child, **the child's guardian ad litem**, or any other party to the action, **may conduct a hearing with notice to all parties to determine** whether any order issued pursuant to this section should be modified or terminated or **whether any other dispositional order set forth in divisions (A)(1) to (5) of this section should be issued.** **After the hearing and consideration of all the evidence presented, the court, in accordance with the best interest of the child, may** modify or terminate any order issued pursuant to this section or **issue any dispositional order set forth in divisions (A)(1) to (5) of this section.** *In rendering a decision under this division, the court shall comply with section 2151.42 of the Revised Code.*

[Emphasis Added]

Subsection (A) of O.R.C. §2151.415 contains the orders which the trial court may issue, following the hearing referenced in R.C. 2151.415(F). Subparagraph (4) of 2151.415(A) specifically provides that the trial court may issue "An order permanently terminating the parental rights of the child's parents;". Under the current state of Ohio law there are only two (2) mechanisms for the judicial termination of parental rights, to-wit: (1) the granting of a petition for adoption of a child by third parties (Chapter 3107 of the Revised Code), a fact pattern not presented by the within cause; and (2) the granting of a motion for permanent custody pursuant to O.R.C. §§2151.413 and 2151.414 (Chapter 2151 of the Revised Code). The only logical conclusion to be drawn from the "order permanently terminating the parental rights of the child's parents" language contained in O.R.C. §2151.415(A)(1) - (5) is that the legislature, by the very enactment of O.R.C. §§2151.281 and 2151.415, intended to vest *guardians ad litem* with the power to file motions to terminate the parental rights of birth parents. When read *in pari materia* with O.R.C. §§2151.281, 2151.413 and 2151.414, it is clear that O.R.C. §2151.415 implicitly authorizes a *guardian ad litem* to file and prosecute motions for permanent custody under O.R.C. §§2151.413 and 2151.414.

O.R.C. §2151.415 (F) sets forth who may move the court for modification or termination of any order issued pursuant to that section. Included in the list of those given statutory authority to make such motions to the court is "the child's *guardian ad litem*." O.R.C. §2151.415(F) also authorizes those listed to move the court for a hearing to determine "whether any other dispositional order set forth in division (A)(1) to (5) of this section should be issued." As such, the statute clearly and unambiguously confers upon those listed authority to move the court for a hearing to determine ". . . any other dispositional order...."

As evident from the express language of subsection (A)(4) of O.R.C. §2151.415, when read in conjunction with the authority conferred in provision (F), a child's *guardian ad litem* may file a motion with the court for a hearing seeking a dispositional order "permanently terminating the parental rights of the child's parents." One need only look at the appellate court's interpretation of the express language of O.R.C. §2151.415 to comprehend the level of misunderstanding that the appellate court had as to the mechanics of these statutes and the power of the *guardian ad litem* to act in his/her ward's best interest:

"The statute permitting a GAL does permit the GAL to file any motions that are in the best interest of the child. See R.C. 2151.281(I) and 2151.415(F). However, while this may include a **recommendation** that a children services agency move for permanent custody, the GAL cannot move on behalf of children's services to grant permanent custody to children's services. To rule otherwise would permit a third party to seek custody of a child on behalf of a nonmoving party."

(Appendix i., Page 5. Emphasis added.)

There is nothing within the context of O.R.C. §2151.415 which supports the appellate court's conclusion that the power conferred on guardian ad litem to file for the termination of parental rights is intended only as an advisory "recommendation" to children services.

Further illustration of the appellate court's confusion in this matter is to be found in footnote 2 of its decision. In footnote 2 the court wrote:

"Additionally, if this court were to find that the GAL did have authority to move for permanent custody, then the trial court errs by granting custody to the Agency. The statute mandates that permanent custody be granted to *the moving party*, which is the GAL, not the Agency. **Thus, the GAL would be required to accept permanent custody as he is the moving party.**"

(Appendix i, Page 7. Emphasis added.)

Under Ohio law, termination of the birth parents' parental rights immediately vests permanent custody of the child into the appropriate public agency charged with the welfare of children. Contrary to the appellate court's opinion in this regard, no other placement is possible. Specifically, O.R.C. §2151.011 (B)(23) defines "permanent custody" as ". . . a legal status that vests in a public children services agency or a private child placing agency, all parental rights . . . and divests the natural parents or adoptive parents of all parental rights" Therefore, a key component to the termination or divestment of parental rights is the immediate vesting of those parental rights into the appropriate public agency - regardless of who filed the motion for permanent custody.

Furthermore, when read *in pari materia* with O.R.C. §2151.413, it is apparent that, while the legislature failed to specifically include the *guardian ad litem* as a party that may file for permanent custody under O.R.C. 2151.413, it was clearly the legislature's intent that *guardians ad litem* have that authority. To only grant a *guardian ad litem* the authority to file a motion to terminate parental rights without also granting him/her authority to file and prosecute a motion for permanent custody would yield an absurd and irrational result.

R.C. 2151.413 explicitly authorizes a public children services agency to file a motion with the court for permanent custody of a minor child. However, the statute is silent with regard to whether *only* a public children services agency may file for permanent custody. The tension between R.C. 2151.413 and the authority of the *guardian ad litem* to act pursuant to O.R.C. 2151.281 and 2151.415 is the issue to be resolved in this case. The court of appeals' decision does not reconcile the ambiguity in the law between R.C. 2151.413 and R.C. 2151.415. Instead the court's decision creates an incongruity wherein the *guardian ad litem* is

provided the mechanism by which to terminate parental rights under R.C. 2151.415(A)(4) and (F), but fails to authorize the *guardian ad litem* to implement the termination of parental rights by disallowing the *guardian ad litem* from filing the appropriate motion for permanent custody. The court of appeals' decision ignores the interdependence between the legal notions of termination of parental rights and the filing/prosecution of a motion for permanent custody.

Prior to its decision in the within cause, the Third District Court of Appeals had itself, in *In The Matter of Paige Olmstead* (Hancock App. No. 5-01-24, 2001 –Ohio- 2323), recognized and adopted the very proposition of law now proffered by Appellant. In that case, the court also relied upon provision (A)(4), “an order to terminate parental rights,” to determine that R.C. 2151.415 **did** grant a *guardian ad litem* authority to move the court for permanent custody. In that decision the court held that “. . . because the concepts of termination of parental rights and establishment of permanent custody are inherently interdependent, a *guardian ad litem* may file a motion seeking permanent custody placement with the appropriate public agency.” *Olmstead* (supra) at 2.

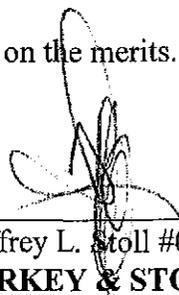
In the case *sub judice*, the court of appeals dismisses its holding in *Olmstead* as *dicta*. However, one of the issues determined in the case was whether the *guardian ad litem* had standing to move the court for a hearing to determine permanent custody. As such, the court's ruling on the issue of whether the *guardian ad litem* had standing to file a motion for permanent custody is not *dicta*, but rather essential to the court's final determination. Moreover, three other district courts of appeal in the State of Ohio have ruled in like manner, each holding that the filing of a motion for permanent custody is not a matter limited to the

sole action of the public child care agency. *In Re: Webster* (supra); *In the Matter of Brian L.* (supra) and *In Re: Stanley*, (supra).

In this case, the court of appeals has erroneously held that a *guardian ad litem* may not file a motion for permanent custody. The court's holding is in direct contradiction to statutory law, its own prior decision, and creates a split of authority with other jurisdictions in the State of Ohio. To uphold such a decision would yield the absurd and irrational result of allowing that same *guardian ad litem* to file for termination of parental rights yet refusing to authorize him or her to file a motion vesting those rights in the permanent custody to the appropriate children's services agency. Moreover, the court of appeals' decision creates a conflict of law where the rule of law was previously settled and uniformly applied across several jurisdictions. As such, to avoid the irrational result that accompanies the Third District Court of Appeals' decision, the court's ruling should be overturned.

CONCLUSION

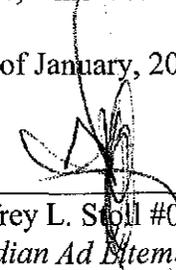
This case involves matters of public and great general interest, and upon the -
aforementioned grounds, Appellant hereby respectfully requests this Court accept jurisdiction
in this case so as to resolve these important issues on the merits.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, Geoffrey L. Stoll, *Guardian Ad Litem*, was duly served upon Michael E. Wiener, Esq., **Asst. Prosecuting Attorney for Crawford County**, 112 East Mansfield Street, Suite 305, Bucyrus, Ohio 44820; and Shane M. Leuthold, **LEUTHOLD & LEUTHOLD**, 1317 East Mansfield Street, Bucyrus, Ohio 44820, Counsel for Naomi Loraine Agapay, by regular U.S. mail this 10th day of January, 2008.



Geoffrey L. Stoll #0038520
Guardian Ad Litem/ Appellant

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

CRAWFORD COUNTY

IN THE MATTER OF:

CASE NUMBER 3-07-20 FILED IN THE COURT OF APPEALS

CHRISTIAN DRAKE THOMAS,

JOURNAL

DEC 24 2007

ADJUDGED DEPENDENT CHILD.

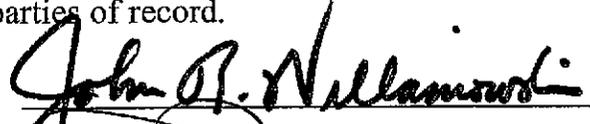
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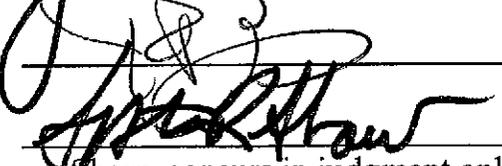
SUE SEEVERS
CRAWFORD COUNTY CLERK

[NAOMI AGAPAY - MOTHER/APPELLANT]

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellee for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.





(Shaw, concurs in judgment only)

JUDGES

DATED: December 26, 2007

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

FILED IN THE COURT OF APPEALS

DEC 24 2007

SUE BEEVERS
CRAWFORD COUNTY CLERK

IN THE MATTER OF:

CASE NUMBER 3-07-20

CHRISTIAN DRAKE THOMAS,

ADJUDGED DEPENDENT CHILD.

OPINION

[NAOMI AGAPAY - MOTHER/APPELLANT]

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: December 26, 2007

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Willamowski, J.

{¶1} Appellant Naomi Agapay (“Agapay”) brings this appeal from the judgment of the Court of Common Pleas of Crawford County, Juvenile Division, terminating her parental rights.

{¶2} On March 20, 2006, Christian Thomas (“Thomas”) was adjudicated a dependant child because his sister had been adjudicated an abused child. At disposition, occurring on the same day, temporary custody was granted to the Crawford County Department of Job and Family Services (“the Agency”). The Agency then created a case plan for Agapay which included the following requirements: 1) obtain financial independence; 2) obtain a psychological evaluation and complete any recommended counseling; and 3) obtain a parental evaluation and complete any recommended counseling. Agapay successfully completed the psychological evaluation and counseling. She also completed the

parental evaluation, which identified no problems and did not require any additional action.

{¶3} On January 9, 2007, a hearing was held on Agapay's motion for review and modification, which requested that custody be returned to her. The Agency also had filed a motion requesting an extension of temporary custody. The parties stipulated that with the exception of obtaining and maintaining stable employment, Agapay had completed the remaining goals and objectives of the original case plan. On January 17, 2007, the trial court granted the Agency's motion for a continuance of temporary custody and denied Agapay's motion for modification of custody.

{¶4} On January 23, 2007, the Guardian Ad Litem ("GAL") filed a motion requesting that permanent custody be granted to the Agency.¹ This motion was filed less than twelve months after the Agency assumed custody of the children pursuant to R.C. 2151.414(B)(2)(d). A hearing was held on the motion on March 21, 2007. On June 28, 2007, the trial court granted the GAL's motion and granted permanent custody to the Agency. Agapay appeals from this judgment and raises the following assignments of error.

¹ This court finds it interesting that the motion for permanent custody does not reference any failure by Agapay to comply with the case plan. At the prior hearing, the Agency and Agapay stipulated that Agapay had substantially complied with the case plan by completing all of the objectives except obtaining employment. Instead, the motion rests on Agapay's failure to accept that a sibling had been abused by a boyfriend. However, there was no requirement concerning this or even to keep the child away from the boyfriend in the case plan.

The court's grant of permanent custody of [Thomas] to [the Agency] was against the manifest weight of the evidence since [Agapay] had substantially completed the case plan goals and objectives.

The court erred when it granted the motion for permanent custody since the Agency could have secured permanent placement without the grant of permanent custody to the Agency pursuant to R.C. 2151.414(D)(4).

{¶5} A review of the record in this case indicates that the GAL filed its motion and permanent custody was granted pursuant to R.C. 2151.414.

(A) A public children services agency or private child placing agency that, pursuant to an order of disposition under [R.C. 2151.353(A)(2)] * * * is granted temporary custody of a child who is not abandoned or orphaned may file a motion in the court that made the disposition of the child requesting permanent custody of the child.

* * *

(D)(1) Except as provided in division (D)(3) of this section, if a 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, the agency with custody shall file a motion requesting permanent custody of the child.

R.C. 2151.413.

(A)(1) Upon the filing of a motion pursuant to [R.C. 2151.413] for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing * * * to all parties to the action and to the child's guardian ad litem.

* * *

(B)(2) With respect to a motion made pursuant to [R.C. 2151.413(D)(2)], the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines that permanent custody is in the child's best interest.

R.C. 2151.414. No where in this statute is a GAL granted authority to move for permanent custody. A GAL is not an agent of the Agency, but rather an agent of the court, created by statute to represent the best interests of the child. R.C. 2151.281. "The [GAL] so appointed shall not be the attorney responsible for presenting the evidence alleging that the child is an abused or neglected child and shall not be an employee of any party in the proceeding." R.C. 2151.281(B)(1). The statute permitting a GAL does permit the GAL to file any motions that are in the best interest of the child. See R.C. 2151.281(I) and 2151.415(F). However, while this may include a recommendation that a children's services agency move for permanent custody, the GAL cannot move on behalf of children's services to grant permanent custody to children's services. To rule otherwise would permit a third party to seek custody of a child on behalf of a nonmoving party.

{¶6} This court notes that in *In re Olmsted*, 3rd Dist. No. 5-01-24, 2001-Ohio-2323, this court was asked whether a trial court erred when it denied a guardian ad litem the opportunity to argue and present evidence with regard to a motion filed by the guardian ad litem for permanent custody. This court held that

as a matter of law, the trial court did not err because the statute which permits the guardian ad litem to file the motion only states that the trial court may hold a hearing, not that it shall. See R.C. 2151.415(F). This court was not required in *Olmsted* to determine whether a guardian ad litem has the authority to file the motion. Thus, notwithstanding the dicta in *Olmsted* which may appear to permit a guardian ad litem to file a motion for permanent rights, this court now holds that the guardian ad litem is not permitted to file a motion for permanent custody because said motion is subject to the requirements of R.C. 2151.413 and 2151.414, which require the motion to be filed by the appropriate agency. R.C. 2151.415(B).

{¶7} A specific statute governing the motion for permanent custody is found at R.C. 2151.413. This statute is specifically referenced by R.C. 2151.414, which is the statute governing the hearing on the motion for permanent custody. “There is only one mechanism for a public children services agency or a private child placing agency to obtain an order for the permanent termination of parental rights and that is by filing a motion for permanent termination of parental rights and permanent custody.” *In re Kenyarra Webster*, 5th Dist. No. 05-CA-21, 2006-Ohio-2029, ¶18. At no point do these statutes reference other statutes which grant any party other than the Agency to move for permanent custody of a child. In fact, R.C. 2151.415(B), when referring to the remedies set forth in division A of

the section specifically states that “the court * * * shall issue an order of disposition as set forth in division (A) of this section, except that all orders for permanent custody shall be made in accordance with [R.C. 2151.413 and 2151.414] * * *.” Id. at ¶19. Since R.C. 2151.413 and 2151.414 require a motion by the Agency, the GAL did not have standing to seek permanent custody of Thomas to the Agency and the GAL’s motion is not permitted under R.C. 2151.413. The granting of the GAL’s motion is plain error.²

{¶8} Having found that the trial court’s judgment granting the GAL’s motion for permanent custody when the GAL lacked standing to file the motion was error, there is no need to address the assignments of error. The judgment of the Court of Common Pleas of Crawford County, Juvenile Division is reversed and the matter is remanded.

*Judgment reversed
and remanded.*

ROGERS, P.J., concurs.

SHAW, J., concurs in judgment only.

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² Additionally, if this court were to find that the GAL did have authority to move for permanent custody, then the trial court errs by granting custody to the Agency. The statute mandates that permanent custody be granted to *the moving party*, which is the GAL, not the Agency. Thus, the GAL would be required to accept permanent custody as he is the moving party.

IN THE COURT OF COMMON PLEAS, JUVENILE DIVISION
CRAWFORD COUNTY, OHIO

In the Matter of:

Case Nos. C 265002
and F 275008

CHRISTIAN DRAKE THOMAS,

JUDGMENT ENTRY

adjudged dependent child.

This matter came on to the further attention of the Court on March 21, 2007 upon the Motion for Permanent Custody as provided in O.R.C. Secs. 2151.413 and 2151.414 as was filed by the Guardian Ad Litem on January 23, 2007.

From the record of the case file the Court finds that mother was personally served Summons to Appear and a copy of the Motion, together with a written explanation of legal rights, by the Crawford County Sheriff on January 24, 2007. The record should reflect that at the initial adjudicatory hearing on February 7, 2006 it was discovered that there was confusion as to the true biological father of the within child as there existed competing presumptions of parentage. Rex Marlon Agapay was presumed father pursuant to the provisions of O.R.C. Sec. 3111.03(A)(1) as the child was born during the couple's marriage and Daniel Lee Thomas was presumed father pursuant to the provisions of O.R.C. Sec. 3727.17 as he had signed a voluntary acknowledgement of paternity at birth. To eliminate the presenting confusion all parties were referred to the Crawford County Child Support Enforcement Agency for genetic testing. Based upon the genetic test results both Rex Marlon Agapay and Daniel Lee Thomas were both excluded as the father of the within child. Pursuant to Civil Rule 21 both were officially and formally dismissed and deleted as necessary parties to these proceedings as a parent of this child by Judgment Entry dated March 20, 2006. Because the identity of the father of the child was unknown, and could not be ascertained with reasonable diligence, the Guardian Ad Litem requested a publication for any person claiming to be the father of this child. So pursuant to O.R.C. Sec. 2151.29 and Juvenile Rule 16 the unknown father, or any person claiming to be the father of this child, was served with Summons to Appear, Notice of the Motion and an explanation of rights, by a publication in the Bucyrus Telegraph

Forum newspaper on March 15, 2007. The Court further specifically finds that attached to the Summons delivered to mother, and contained within the text of the publication for the unknown father, was a full written explanation of the consequences of the Court granting permanent custody, as well as an explanation of all rights afforded to respondent's, as is required by O.R.C. Sec. 2151.414(A).

Present for the proceedings were Peggy Reeves, Intervention Supervisor for Job + Family Services; Sasha Rondy, Jodi Miller and Traci Mason, Case Workers for Job + Family Services; Connie Taylor, Family Support Worker for Job + Family Services; Michael J. Wiener, Assistant County Prosecutor; Naomi L. Agapay, mother; David R. Cory, court appointed counsel for mother; Shane M. Leuthold, retained co-counsel for mother and Geoffrey L. Stoll, Guardian Ad Litem. The record should reflect that the Court had delayed the commencement of these proceedings for approximately fifteen (15) minutes to allow for the late arrival of any other party, but that no person claiming to be father appeared or offered any explanation for his absence and was found to be in default of an appearance or any responsive pleading. For these proceedings the Court did designate Tammy K. McGhee as the official Court Reporter, and a complete steno-type record of the proceedings was taken by the reporter.

In support of the Motion the Court received sworn testimony from Jodi Miller, Sasha Rondy, Peggy Reeves, Connie Taylor and Tracy Reedy. Upon the Movant resting his case, counsel for the respondent/mother made an oral motion for a directed verdict for failing to sustain the required burden of proof. The court received arguments from counsel and found the motion not to be well taken and did deny the same. In reply to the Motion the Court then received sworn testimony from Jodi Miller and Rebecca Rushing and admitted into evidence, without objection, Respondent's Exhibit 1. At the conclusion of all testimony counsel for the respondent/mother again made a motion for a directed verdict for the lack of filing a written Guardian Ad Litem's report in advance of hearing any evidence as required by O.R.C. Sec. 2151.414(C), the same being a jurisdictional requirement. Whereupon a discussion ensued as to the authority in support of the position this would be a jurisdictional requirement when the Guardian Ad Litem was the Movant in this case and as a result of those discussions it was determined that all parties would submit briefs on the motion and written summations of the evidence. The briefs and

summations were duly filed and considered herein. This then is the written opinion of the Court of the findings of fact and conclusions of law required by O.R.C. Sec. 2151.414(C).

The first matter to be resolved is the second motion for directed verdict. The brief filed by the respondent/mother raises the point of the guardian ad litem usurping the authority of the agency to file a motion for permanent custody. This matter of “standing” of a guardian ad litem to file a motion for permanent custody has previously been addressed by this Court in another case and although this issue has been decided in our appellate district by the holding in *In the Matter of Paige Olmsted, Alleged Dependent Child* (2001 Ohio App. LEXIS 5236) this court believes there is additional support for the holding in *Olmsted*. Even though this is a dependency case, immediately upon the filing of the Complaint herein a guardian ad litem was appointed pursuant to the provisions of O.R.C. Sec. 2151.281(B)(1) because of the allegation the infant was residing in a household where a sibling was alleged to have been abused, see Judgment Entry dated January 9, 2006. The guardian ad litem statute, O.R.C. Sec. 2151.281 at subsection (I) provides:

“The guardian ad litem for an alleged or adjudicated abused, neglected, or dependent child shall perform whatever functions are necessary to protect the best interest of the child, including, but not limited to, investigation, mediation, monitoring court proceedings, and monitoring the services provided the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, and shall file any motions and other court papers that are in the best interest of the child.” (Emphasis added.)

Clearly the State Legislature has empowered a guardian ad litem with the authority to file motions on behalf of the child, and, in fact, by the use of the word shall in the statute made it a responsibility and obligation to file motions when determined by the guardian ad litem’s judgment to be appropriate to the best interests of the child. Juvenile Rule 2(Y) clearly defines a guardian ad litem as a necessary party and affords him interested party status in the proceedings. O.R.C. Sec. 2151.353(E)(2) provides any party may file a motion to modify a disposition. O.R.S. Sec. 2151.417 provides for review at any time of the child’s placement or custody arrangement and Subsection (B) of that section provides as follows:

“The court may amend a dispositional order in accordance with division (E)(2) of section 2151.353 of the Revised Code at any time upon its own motion or upon the motion of any interested party.” (Emphasis added.)

Clearly, in addition to the reasoning in Olmsted there is sufficient statutory authority for a guardian ad litem to file an independent motion for permanent custody without being denounced as assuming a power reserved to the public child caring agency.

The initially argued gravamen of the second motion for directed verdict was that the failure to file a written guardian ad litem's report prior to or at the time of the hearing upon the motion is a fatal jurisdictional error. However, in carefully examining the brief of the respondent/mother this Court can find no citation of authority for that proposition. This is not the first occasion before this Court that the guardian ad litem has moved for permanent custody. In those instances it is usually the habit of this Court, before receiving any testimony, to address the matter of the necessity of the filing of a separate written report of the guardian ad litem as required by 2151.414(C) as obviously from the text of the motion and prayer for relief all other parties clearly know the alleged grounds and his recommendation and therefore a further written report would be redundant and unnecessary as it would be requiring procedure over substance. However, by oversight, this was not done at the outset in this particular case.

Once again the matter of the necessity of filing a separate formal written guardian ad litem's report prior to or at the time of the hearing upon the motion has previously been addressed by this Court in another case. An examination of O.R.C. Sec. 2151.414(C) does not set forth any guidance as to what should be the format or contents of such a written report. The only directive it does issue is that the guardian ad litem cannot be silent on the issue of permanent custody and must express an opinion in writing. There is no requirement that copies of the report must be provided to the other parties to the case or that it is sworn to. The only purpose of the guardian ad litem's report is nothing more than a further independent source to assist the court in deciding the matter. The Civil Rules of Procedure and Juvenile Rules of Procedure, which generally provide guidance as to a particular format and/or contents of pleadings, likewise are of no help. So what such written report must look like could be subject to reasonable interpretation. Could not the format and contents be subject to the discretion of the one to whom its purpose it is to assist? Even though what the guardian ad litem filed herein on January 23, 2007

was clearly captioned "Motion for Permanent Custody" its contents clearly and succinctly set forth the analysis and grounds for what was being requested and the prayer for relief clearly and succinctly set forth the opinion of the guardian ad litem as to what should occur as a permanency plan for this child. Clearly its purpose was intended to guide the ultimate decision maker {the court} in a certain direction. By filing the actual post-dispositional motion the guardian ad litem has acquired the weight of sustaining the burden of proof and is actually seeking an Order of the court for a certain result, but that does not mean that what was filed could not fulfill the requirement of O.R.C. Sec. 2151.414(C). The Third District Court of Appeals had concluded *In the Matter of Danny Clark* (90-LW-2232) that a respondent has no standing to challenge the contents of the report of the guardian ad litem. The contents would surely have more importance than format, so a simple extension of inductive reasoning would likewise conclude that a respondent has no standing to challenge the particular format of the report of the guardian ad litem.

Finally, as stated above, the purpose of the report is for the assistance of the court and is not evidence to the advantage or disadvantage of any other party. It seems incomprehensible that the respondent/mother should now claim a fatal error to the proceedings from the lack of something that would neither improve nor detract from her position in the case. This Court fails to comprehend how construing that if the guardian ad litem is the movant for permanent custody that the filing of a separate written report would be redundant and unnecessary biases or prejudices a respondent's position in the case. If such insight as could be gained from a separate written report was so important to the respondent/mother's position, then she could have rectified the deficiency by availing herself of the opportunity to call the guardian ad litem as a witness to question him regarding the substance of his analysis and recommendation, but in this case she specifically chose not to do so. Also, should a party benefit from a claimed error they invited to occur by remaining silent and not questioning the deficiency at a time when the same could have been appropriately corrected?

Therefore, based upon the foregoing, it is the determination of the Court that the guardian ad litem filing a motion for permanent custody, clearly and succinctly setting forth the analysis and grounds for the motion and clearly and succinctly setting forth the opinion of the guardian ad litem as to what

should occur as a permanency plan for the child, fulfills the requirement of O.R.C. Sec. 2151.414(C) and is an equivalent to an actual formal written guardian ad litem report so that the second motion for a directed verdict is found not to be well taken and is denied.

The initial removal and finding of dependency in this case stemmed from the finding of abuse of a sibling residing in the same home. The abuse adjudication of the sibling was based upon competent medical reports and corroborating photographic evidence of other bruising. At the time these cases came to the attention of the authorities this child was a swaddling infant only two months old. The evidence from the commencement of the case has been clear there were two adults present at the time the sibling suffered the presenting fractures. The medical findings (left proximal tibia metaphyseal fracture and left distal femur metaphyseal fracture) did not comport to the explanation given for the cause of the injury. The primary concern at the outset of this case was identifying who caused the injuries to the sibling. Fourteen months later who caused those injuries remains unknown. Who to protect this child from remains unknown and therefore the risk level to this child continues to be high. The respondent/mother continues to deny the injury to the sibling was due to a deliberate act, but rather attempts to diminish the whole situation as being an unexplained self-inflicted accidental injury. On the other hand the guardian ad litem opined that from the known facts three potential scenarios exist as an explanation, any one of which poses a grave risk of harm to this child.

Essentially what was presented at this hearing was also well litigated at the hearing on January 9, 2007. At the hearing on January 9, 2007 it was stipulated and the evidence at this hearing clearly shows the respondent/mother has substantially completed goals No.2 and No. 3 of the Case Plan. However in the fourteen months this case has been open she has not successfully completed goal No. 1 in that she has continuously failed to address the economic concerns for the family. She has failed to obtain stable employment or engage in the JOBS programs offered by Job + Family Services and is completely reliant upon her paramour or others for her and her children's basic sustenance. The significance of this goal comes from the unrefuted testimony of the case work supervisor that child welfare research statistically shows that family financial difficulties contribute to abuse and raise risk concerns.

As to an analysis of the foregoing the pertinent statutory section would be O.R.C. Sec. 2151.414(B)(1)(a) and the question for resolution is whether by having completed two of three case plan goals the child should be placed back with mother or can be placed back with mother within a reasonable time. While the guiding principle of Ohio's child welfare law, to wit: Senate Bill 89 in response to federal Public Law 69-272, is that children should be cared for in the family setting and separated from their parents only when necessary for the child's welfare and safety, that does not mean that reunification is always the paramount result. The Adoption and Safe Families Act of 1997 mandates child safety as a "paramount concern" of national child welfare policy. Ohio's response to the Adoption and Safe Families Act of 1997, House Bill 484, now makes clear that safety concerns must be addressed throughout the life of a child welfare court case and provides reunification must be tempered by safety concerns and recognizes that reunification may not always be appropriate. To phrase the matter another way, the issue is not whether the parents have substantially complied with the case plans as such, or *can* accomplish those tasks, but rather whether the conditions that caused the child's removal have been substantially remedied so that with reasonable certainty the child can be safely returned home. The focus of case plan goals and objectives is the genuine remedying of, and elimination of, conditions detrimental to children and not the mere rote of completing the process outlined in a case plan.

Once again, the provisions of House Bill 484 require the court to evaluate the progress realized towards resolving safety concerns and the adequacy of protecting children from recurrence of maltreatment. As was stated earlier, basically what was presented at this hearing was also presented at the hearing on January 9, 2007 and nothing that has been presented at this hearing has changed the findings from that earlier hearing and perhaps it is well to repeat those findings herein:

"Based upon the testimony, stipulated case plan goals completion and stipulated documents the Court finds that mother presents a significant denial of the obvious existence of the condition found on January 7, 2006. Based upon the medical reports, corroborated by the photographs of the bruising of the sibling of the within child, the Court found probable cause of the condition of the dependency at the Shelter Care Hearing on January 9, 2006 and so adjudicated at the hearing on March 9, 2006. Quite simply mother's opinion does not comply with the known medical facts and physical evidence. Further mother seems to present a victim posture in that the 'system' has not filed charges against her or her paramour and therefore they must be innocent of any

involvement concerning the cause of the sibling of the within child's injuries and continuing to keep the child away from her makes her the victim of this whole incident. Nothing has been presented in this or preceding hearings to competently and reliably identify the cause of the obvious injuries to the sibling of the within child. Nine months later who to protect this child from continues to be unknown and the risk level still very significant. Mother's presenting attitude and position causes a significant elevated concern for the adequate protection of this child. The perceived attitude that it is someone else's responsibility to identify the cause of the harm to the sibling of the within child and since 'they' have not satisfied the obligation then the child should be summarily returned home causes this Court to be very uncomfortable. The highest duty of care for protecting children should be from parents and not necessarily the 'system' and from what has been presented this Court does not trust mother to adequately exercise that duty of care for the safety and welfare of the child."

As stated earlier, the known fact is two adults were present at the time the sibling suffered the fractures. Neither adult can provide any definitive information as to how those fractures occurred. The medical findings do not support the respondent/mother's theory of an unexplained self-inflicted accidental injury. The testimony revealed that during visits the respondent/mother would engage Job + Family Services personnel in discussions that always involved a new explanation of how neither adult could be at fault. The simple question involved in this case is who the perpetrator was and who failed to protect. This is the dilemma that confronted Job + Family Services in creating the Case Plan goals. The inference of three potential scenarios existing as an explanation for the unknown had to be ruled out of consideration. In an attempt to resolve the unknown and to eliminate the respondent/mother as a suspect, the child welfare agency offered the opportunity to take a polygraph examination but the respondent/mother declined. The testimony revealed that if the perpetrator were identified, then definitive services and protections could have been added to the Case Plan to eliminate the concern of the significant risk of harm to this child. The child welfare agency found itself in a "catch 22" conundrum beyond their control. The Court must find that without a competent and reliable identification of the cause of the obvious injuries to the sibling nothing could be put in a Case Plan that would be effective in remedying the condition that caused the child to be placed out of the home.

In addition to the two broken bones, the sibling also exhibited numerous bruises and a bite mark on her arm. The paramour had admitted he bit the child and the respondent/mother acknowledged this had happened. The testimony revealed the paramour had slapped the sibling because she had tried to bite

him. The unrefuted testimony was that mother knew her paramour was generally physically aggressive with the sibling. Further, it was revealed that in the course of discussions with the various Job + Family Services personnel during visitations that mother would focus on the fractures and ignore the other multiple injuries of the sibling and the prior conduct of the paramour towards the sibling. Although the Court cannot draw a reliable and conclusive inference from these facts as to whom the perpetrator was, they do raise a significant elevated concern for the safety and protection of this child and, as stated from the hearing on January 9, 2007, does not establish an acceptable level of confidence to believe that mother will exercise the appropriate duty of care for the protection of this child.

From the foregoing the Court must conclude that notwithstanding reasonable case planning under the circumstances and diligent efforts by the agency to assist the parent to remedy the problems that initially caused the child to be placed out of the home those concerns have not been adequately resolved to consider *safely* reunifying the child back home and that this situation is not likely to significantly improve in the near foreseeable future. Now, having concluded that the criteria of O.R.C. Sec. 2151.414(B)(1)(a) exist, the next consideration is whether a grant of permanent custody to the public child caring agency would be in the best interests of the child. For this determination the Court must consider the five (5) factors set forth in O.R.C. Sec. 2151.414(D).

While in the preceding fourteen months mother exercised consistent weekly visitation with the child, the testimony divulged that the child lacks a strong bond to mother and while there for the purpose of visitation mother would rather interact with the other adults present in the room and had to be frequently redirected to the child. The child has been in the same foster home since January 13, 2006. The child is well bonded with the foster family and given the opportunity they are prepared to adopt him.

The mother proposes that a legally secure placement could be accomplished without granting permanent custody to the public child caring agency by placing the child with the maternal aunt. The maternal aunt, Rebecca Rushing, is an out-of-state resident, residing in North Carolina. She testified she is a Certified Nursing Assistant employed at the Five Oakes Manor nursing home. The maternal aunt has never met the child, but claims she loves him already. The maternal aunt testified that as a family

member it was her “right” to demand the child be placed with her. The maternal aunt testified that, if ordered by the court, she would keep the child safe from mother’s paramour. Cross-examination revealed how little the maternal aunt actually knows of the circumstances of the injuries to the sibling and the reasons for the removal of these children from their family home.

An Interstate Compact Placement of Children as provided in O.R.C. Sec. 5103.20 through 5103.28 would need to be completed for placement with maternal aunt to be a viable consideration. The maternal aunt had testified that she had expressed interest early on in the case of having custody of the child, but she did not push the matter due to mother’s stated desire to maintain the child in a local foster home so that it would be more convenient for her to visit him. The local public child welfare agency made a referral to the State of North Carolina for an interstate compact homestudy of the maternal aunt in January of 2007. As of the date of the hearing the reciprocal child welfare agency of North Carolina has never come to the maternal aunt’s home for an inspection or secured releases for a records check of the members of her household. The unrefuted testimony of the case work supervisor is that an interstate compact placement approval takes an average of nine (9) months.

Mother has urged that whatever time it would take for the reciprocal child welfare agency in North Carolina to complete the home study of maternal aunt should now be indulged, however the provisions of House Bill 484 requires a “*fast-track*” for permanency for children. The provisions of House Bill 484 would require time conflicts to be resolved in the favor of the interests of children. Further, from the circumstance of the lack of accurate knowledge of why the child was removed, this Court does not find the maternal aunt’s assurance of adequately protecting this child to be trustworthy and reliable. For these reasons this Court does not find the maternal aunt to be a suitable and appropriate alternative long-term secure placement for this child.

Considering everything, the Court finds that there is a questionable parent-child relationship in existence. That the child has been in an out-of-home placement for fourteen (14) months. That given the presenting circumstances, that in the preceding fourteen (14) months all reasonable efforts have been made to help the mother resolve the primary problem that initially caused the child to be removed from

home and to consider reunifying the child back home, however the mother has continuously failed to substantially remedy the conditions causing the child's initial removal and there is no indication that this situation is likely to improve in the near foreseeable future. That it is in the best interests and welfare of this child to provide him with a safe, stable nurturing environment from another home and family.

Based upon the evidence, the Court specifically finds by clear and convincing evidence as follows: (a) that the child should not be placed back with mother because in fourteen (14) months she has continuously failed to substantially remedy the conditions causing the child to be placed outside the home as provided in O.R.C. Sec. 2151.414(E)(1), (b) that the child cannot be placed back with mother within a reasonable time, (c) that considering the circumstances the public child caring agency has made all reasonable efforts to consider *safely* reunify the child back home, however the uncertainty of the cause of the injuries to the sibling of the within child effectively prevented the complete provision of those services, (d) that there are no available relatives suitable and appropriate to assume legal custody of the child, and (e) that considering the factors established in O.R.C. Sec. 2151.414(D) that it would be in the best interests of the child to grant permanent custody to the public child caring agency to provide him with a safe, stable nurturing environment from another family home.

WHEREFORE, based upon the foregoing, it is hereby **ORDERED, ADJUDGED** and **DECRRRED** as follows:

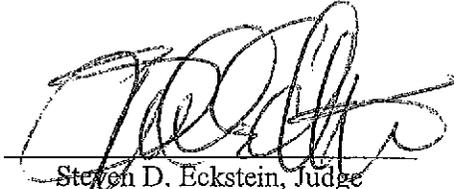
1. That this matter is properly within the jurisdiction of the Court and that all notice requirements have been properly complied with as required by law;
2. That the second motion for a directed verdict is found not to be well taken and is denied;
3. That the parental rights of mother, Naomi Lorraine Agapay, and the unknown biological father, are herewith terminated and forever severed and released;
4. That the child is committed to the permanent custody of Crawford County Job + Family Services for appropriate adoptive placement;
5. That Crawford County Job + Family Services shall develop a Case Plan Amendment consistent with this decision and submit the same for approval herein within two weeks;

6. That mother is Ordered to fully cooperate in the completion of the social and medical history as provided in O.R.C. Sec. 3107.12.

FILED
PROBATE COURT
JUVENILE COURT

JUN 28 2007

Steven D. Eckstein, Judge
CRAWFORD COUNTY OHIO



Steven D. Eckstein, Judge
Dated: June 28, 2007

CERTIFICATE OF SERVICE

Pursuant to Civil Rule 58(B), I, the undersigned Deputy Clerk of the Crawford County Juvenile Court, do hereby certify that I caused a true and exact copy of the foregoing Judgment Entry to be served upon counsel of record, to wit: David R. Cory, Shane M. Leuthold, Michael J. Wiener and Geoffrey L. Stoll, by depositing a copy of same in their respective correspondence slots in the court offices this 28th day of June, 2007.



Deputy Clerk

cc: Job + Family Services
Child Support Enforcement Agency