

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

Kayla H. and Joshua H.

On Appeal from the Lucas County  
Court of Appeals,  
Sixth Appellate District  
Case Number 07-2454  
Ct. App. Case Number L-06-1376

**MEMORANDUM IN OPPOSITION TO JURISDICTION  
OF APPELLEE LUCAS COUNTY CHILDREN SERVICES**

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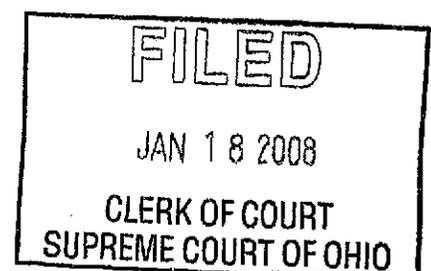


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## STATEMENT OF THE CASE

On March 4, 2005 Appellee Lucas County Children Services (“LCCS”) requested and obtained a telephone *ex parte* order after it received a referral stating that Joshua, who was three months old, was in the hospital being treated for several injuries, including a subdural hematoma, which was consistent with “shaken baby syndrome.” On March 7, 2005 Appellee Lucas County Children Services (“LCCS”) filed a complaint in dependency, neglect and abuse and motion for shelter care hearing in the Court of Common Pleas of Lucas County, Ohio, Juvenile Division. In addition to the two children who form the subject matter of this appeal a third child who is a half sibling was initially involved. Legal custody of that child was subsequently awarded to his father and is no longer a party to the case.

At a shelter care hearing on March 9, 2005 LCCS was awarded interim temporary custody. That was followed by an adjudication and disposition on April 11, 2005 during which Kayla was found to be dependent and Joshua was adjudicated as dependent and abused. Temporary custody of the children was awarded to grandparents and case plans were filed and approved for the parents.

On May 2, 2006 LCCS filed a motion for permanent custody and on October 3, 2006 a hearing was held on that motion. The guardian ad litem filed a report recommending an award of permanent custody to LCCS. On November 6, 2006 the trial court entered an order awarding permanent custody of both children to LCCS.

The parents noticed an appeal from that order to the Sixth District Court of Appeals of Lucas County. On November 16, 2007 that court entered a decision and judgment entry affirming the permanent custody award. The appellants have noticed a further appeal to this court from that order.

## STATEMENT OF THE FACTS

The appellants are the mother and father of the two children involved in this case. When this case was filed, Kayla was two years and eight months old and Joshua was four months old. LCCS received a referral on February 26, 2005 alleging that Joshua had been admitted to the hospital with serious physical injuries. It was further alleged that the home was filthy with little or no heat.

Upon investigation, LCCS personnel learned that Joshua was being treated in the hospital for evidence of shaken baby syndrome. He had chronic and acute subdural hematomas and was being treated in the intensive care unit. The child's treating physicians stated that the injuries were inflicted. Neither parent had an explanation for the injuries other than a statement that the child had been cared for by an uncle the previous evening. Hospital personnel stated that Joshua exhibited evidence of both old and new injuries to his brain.

The complaint also alleged that the appellant father was a registered sex offender. A certified copy of his criminal docket sheet was introduced at the adjudication. It showed that in 1991 he pled guilty to two counts of gross sexual imposition and one count of illegal use of a minor in nudity oriented materials and was sentenced to an indefinite term of 4 to 15 years incarceration. The original charges included six counts of gross sexual imposition, two counts of felonious sexual penetration, one count of disseminating matter harmful to juveniles and five counts of illegal use of a minor in nudity oriented materials. In 1998 the court classified him as a sexual predator which, after an appeal and subsequent hearing, was changed to a sexually

oriented offender. He was incarcerated for those offenses for a period of six years and later released on "probation."<sup>1</sup> The probation was terminated in January 2003.

Although the appellant father claims that he "successfully" completed his probation and the various services provided in his case plan, that description is highly misleading. For example his probation officer testified. He stated that the appellant father's probation was "successfully" completed in that he finished the requirements imposed by the court. However, he did not do well. For example, he testified that the appellant had been unsuccessfully terminated from the therapy component of community control because he was not able to progress from the "denier's group." Although he did not deny that he had committed his offenses, he did not share or talk in group therapy unless he was directly confronted. He did not tell his group that he was engaged to marry the appellant mother until the group members saw the marriage license in the newspaper because he believed it was "none of their business." Obviously, his marriage to a woman with a child was clearly of interest to the group in view of his criminal history. His former probation officer concluded by stating his opinion that the appellant was at "extremely high risk" to re-offend and that his probation had done nothing to lower that risk.<sup>2</sup>

A successor probation officer was also called as a witness. She testified that the appellant's "successful" completion of probation meant that he had complied with the court's

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<sup>1</sup> The record is not entirely clear as to whether the appellant was on parole or probation. For purposes of this discussion, it will be referred to as "probation" since that was the term used by the Court of Appeals.

<sup>2</sup> In several places throughout his memorandum the appellant father complains that no tests were administered that might have numerically quantified the degree of risk he posed for re-offending. He goes on to claim that the risk he presented was only low to moderate. That claim was repeatedly contradicted by the evidence offered by four different treating professionals, all of whom described the appellant as being at high risk for re-offending. The fact that no numerical value was assigned to the degree of risk is immaterial. If such an assignment was either necessary or possible, the appellant had the opportunity to present such information at trial but did not.

conditions, but not that he had successfully completed sex offender therapy. She was particularly concerned that the appellant refused to acknowledge that living in a home with the appellant mother's son, Jonathan, presented a "high-risk situation as a target aged child of his preference."

Another witness, who is qualified as an expert in sexual offender treatment and therapy, provided therapy to the appellant father for five years of his probation. She concluded that he had not successfully completed the therapy component of his probation. She assessed his psychological pathology as that of a classic pedophile, with a primary sexual attraction to children which would not change. She stated that the risk he presented to children was "high." She stated that after five years of therapy the appellant father had not been willing to understand the risk he presented and take steps to mitigate it. Although she acknowledged that on a diagnostic risk assessment test the appellant's risk was assessed as "moderate," she stated that given the diagnosis of pedophilia she recommended that he have no unsupervised contact with minor children. She further stated she would not recommend family reunification for an offender diagnosed with pedophilia. Although she had experienced some pedophiles who she believed could safely have families, in order for an offender to cohabit, the family must truly be able to understand that there's is a lifelong problem and it's not ever going to go away and that vigilance would necessarily have to be extreme. She concluded that the idea of living in separate habitats is a more realistic plan.

Another witness was a sexual offender counselor at a local mental health treatment facility who had provided treatment to the appellant father and mother pursuant to case plan services offered in this case. Among other things, he testified that victim empathy was not one of the appellant father's "strong suits." He said that the appellant father was "at risk" whenever

engaged “in any kind of behavior around or with children since his victim was a five-year-old child.” He said any contact with children increases his risk of re-offending and definitely behavior such as bathing or dressing, states of undress, those kinds of things he should never engage with his own children or anyone’s children for that matter. He said any time the appellant has access to children, it’s going to increase his risk of re-offending.

The therapist also testified as to an incident which occurred during a supervised visit between appellant father and the children. It was reported that the appellant had Kayla “straddled” across his lap and visitation personnel had to intervene to remove her from his lap. There was additional testimony that on another occasion the appellant father was discovered changing Joshua’s diaper during visitation. Later, in therapy, the appellant father was confronted with how that behavior was not only inappropriate but also increased his risk of re-offending. The therapist also said that any attempt at reunification of the appellant into a household with his children would require severe physical boundaries in order to separate him from physical interaction or unsupervised interaction with the children.

The therapist also testified as to the appellant mother’s therapeutic progress or lack thereof. He had asked her whether she would consider separating from appellant father and she said she hoped she would not have to make that decision. He asked her to inquire of LCCS whether separating from appellant father would increase her chances of keeping custody of the children and she said that she was told there would be no impact one way or the other.<sup>3</sup>

Of particular concern to the therapist regarding the appellant mother was the fact that she had been identified by appellant father as his “primary support person” in his relapse prevention

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<sup>3</sup> Other testimony established that statement was either misleading if not flatly incorrect. LCCS was advised that if she did separate from the appellant father she planned to eventually return to him sometime after the children were returned. LCCS advised her that if that was her intention, separation from the appellant father would make no difference.

plan. Therefore, the therapist questioned him and counseled her as to what was necessary to prevent him from relapsing. The therapist testified that at first appellant mother was unable to identify high-risk factors and behaviors that appellant father should not engage in with children. The therapist confronted both appellants with the fact that he had chosen a primary support person who was unable to identify risks and successfully implement the safety plan. Shortly after that confrontation, appellant mother requested another opportunity to learn what was appropriate for her to do. Two months later she reengaged in therapy. However, when the therapist reassessed her ability to follow a safety plan she was only able to “regurgitate” the plan information and demonstrate a “rote memorization” of the concepts.

The therapist also testified as to what might be necessary in the event there was a reunification. He instructed the appellant mother about the use of alarms in the house to be placed on the outside of the appellant father’s bedroom and on the inside of the children’s bedrooms and the appellant mother would have to ensure constant supervision. Locks would be placed on the children’s doors as they age and they should understand how to use them. A home-based therapist who specialized in sex offender treatment would have to perform home visits to ensure the home was “safe guarded.” The therapist stated he usually does not advocate family reunification as it is “extremely difficult.” The offender cannot be unsupervised in the same room with children and it “really puts a strain on the significant other to be everywhere all at once.”<sup>4</sup>

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<sup>4</sup> To illustrate some of the extreme measures which would have to be taken in the event of reunification, there was testimony at the trial to the effect that if the supervising person had to go to the bathroom, the appellant father would have to leave the home.

## ARGUMENT

Proposition of Law Number 1:

AN APPELLANT IS NOT ENTITLED TO A DISCRETIONARY APPEAL BEFORE THIS COURT WHEN THE CASE INVOLVES NEITHER A MATTER OF PUBLIC INTEREST NOR GREAT GENERAL INTEREST NOR A SUBSTANTIAL CONSTITUTIONAL QUESTION

Although the appellant father mentions on page 1 of his memorandum in support of jurisdiction that the case offers an opportunity to provide guidance to the lower courts concerning “the balancing of the constitutional rights of parents to marry or remain married and to have and raise children, and the rights of children to be free from undue exposure to risk, when a parent has a conviction of child sexual abuse in his past, or has been diagnosed as a pedophile,” that is the sole mention of alleged constitutional issues in the memorandum. It is also the first mention of any constitutional issues in this case. None were raised at the trial court nor at the Court of Appeals. Because a constitutional claim was not previously raised in this case it is now waived and is not properly before this court. Hack vs. Gillespie, 74 Ohio St. 3d 362 (1996). See also, The State of Ohio, Appellee v. Awan, Appellant, 22 Ohio St. 3d 120; 489 N.E. 2d 277 (1986).

Contrary to the claims of the appellant, this case does not involve questions of public or great general interest as distinguished from questions of interest primarily to the parties. Rather, it involves questions as to whether, after extensive case plan services, the parents were able to demonstrate they would be able to keep their children safe from harm and provide a safe and practical environment for reunification. Extensive evidence was presented at trial and reviewed by the Court of Appeals which showed to a clear and convincing degree that under the circumstances of this case safe and practical reunification with the parents would be impossible.

This court has held that the sole issue for determination at the initial stage of a discretionary appeal is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties. Williamson, Appellee v. Rubich, 171 Ohio St. 253; 168 N.E. 2d 876 (1960) The judgments rendered by the trial and appellate courts in this case did not turn on the fact that appellant father was a diagnosed pedophile and the appellant's mother declined to separate from him in order to regain custody of her children. Rather, they depended upon the unsatisfactory results both appellants achieved after extensive therapy. The facts and circumstances demonstrating those results were unique to these appellants in this case. As such, the considerations which went into deciding this case were no different than any other permanent custody case coming before a trial and appellate court for decision. Consideration of those therapeutic results and the impact they had upon the prospects for reunification were certainly a concern to the appellants but that concern does not extend to the general public.

Furthermore, much of the appellants' memorandum is occupied with arguments that the trial court and appellate court drew incorrect conclusions from the evidence presented at trial or that the evidence was insufficient to support those conclusions. In other words, the appellants seek to reargue a claim that the judgments were against the manifest weight of the evidence; however, the appellants are not entitled to another review of the weight of the evidence at this stage of the proceedings and this court is not required to conduct such a review. State ex rel Pomery v. Webber 20 Ohio St. 2d 84; 206 N.E. 2d 204 (1965)

Because this appeal involves neither a substantial constitutional question nor a matter of public interest nor great general interest jurisdiction should be declined.

Proposition of Law Number 2:

WHEN PARENTS HAVE FAILED TO ACHIEVE A SATISFACTORY RESULT IN THE COURSE OF THEIR COURT ORDERED CASE PLAN SERVICES A JUDGMENT OF PERMANENT CUSTODY SHOULD BE SUSTAINED

The appellant father attempts to convince this court that the sole basis for termination of his parental rights was his prior conviction as a sexual offender and diagnosis as a pedophile. In turn the appellant mother argues that the sole basis for termination of her parental rights was her refusal to divorce or permanently separate from the appellant father. Both of those attempts are unsupported by the facts.

Although the trial court found a number of factors enumerated in ORC §2151.414(E) to be present in this case, the Court of Appeals concurred in only two. With respect to the appellant father it found that ORC §2151.414(E)(2) was supported by the evidence. It found that the appellant father's mental illness was "so severe that it makes the parent unable to provide an adequate permanent home" presently or within one year after the dispositional hearing and that the mental illness impacts the parent's ability to care for his or her children, citing In re D.A., 113 Ohio St. 3d at 95 (2007).

The appellate court specifically stated that, "While a sexual offense conviction – standing alone – would most likely not *per se* demonstrate that a parent is unable to provide an adequate parental home, we need not confront the issue. Rather, the evidence sufficiently supports a finding that Todd's repeatedly diagnosed pedophilia – not his 16-year-old conviction – is sufficient to support a finding pursuant to ORC §2151.414 (E)(2)."<sup>5</sup>

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<sup>5</sup> That conclusion is reinforced by the fact that shortly before the permanent custody hearing the appellant father was found at visitation with Kayla straddling his lap. On another occasion he was found to be changing Joshua's diaper. Both of those activities were found by his therapist to be quite inappropriate for someone with a history of pedophilia. Those incidents rather vividly

The appellate court went on to conclude that, "Due to Todd's multiple diagnoses of pedophilia, and the expert testimony regarding his therapy, we find that Todd's pedophilia qualifies as a 'chronic mental or emotional illness' so severe that his children cannot and should not be placed in his care." The court also concluded that any reunification in this case would be impractical. It stated that, "a pedophile parent would have to renounce physical contact with children, daily caretaking chores for the children are completely curtailed, and the parent could never be alone in the same room with the child. A home in which a child must be taught never to physically interact with the parent due to the risk of sexual abuse cannot constitute an adequate permanent home."

With respect to the appellant mother, the appellate court found that ORC §2151.414(E)(14) was applicable to her circumstances. That statute provides,

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

The appellate court found that although the appellant mother did complete her case plan services, she was unwilling to separate from the appellant father. Therefore, the appellate court found that she was unwilling to prevent her children from suffering sexual abuse by continuing to cohabit with a pedophile.

The court further concluded that,

It should also have been patently apparent that ceasing to cohabit with Todd was necessary. The testimony and evidence before the trial court showed the risk of sexual abuse Todd presented to the children while cohabitating with them was high. Any person would find it practically impossible to follow the reunification plan -- to parent two young children while ensuring that another adult in the household was never alone with them. Appellants gamely argue that any risk of harm to the children was speculative, as Todd had not re-offended in 16 years; the

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demonstrated how little judgment or control the appellant was able to muster after literally years of therapy.

children, including (appellate mother's) oldest son, denied sexual abuse had occurred; and a relapse prevention plan and a home-based, post-reunification services were available. (Appellant mother's) refusal to take the step of establishing a separate physical household from Todd demonstrates a lack of empathy for the risk of sexual abuse Todd presents while cohabitating with her children. Because (appellant mother) did not voluntarily choose to cease cohabiting with Todd, clear and convincing evidence supports a finding that she is unwilling to prevent the risk of sexual abuse to her children pursuant to RC 2151.414(E)(14).

LCCS would like to briefly comment on several assertions made by the appellants in their memo. They claim there was no evidence before the trial court addressing the effect of Kayla and Joshua being the natural children of Todd, and they cited a purported study which found that pedophiles are less likely to molest their own children as opposed to unrelated children. There are two major problems with that assertion. The study cited by the appellants was neither mentioned nor made a part of the record at the trial and it was not mentioned at the Court of Appeals. Therefore, it is not of record and may not be considered now. Further, all of the expert testimony that was presented to the trial court explicitly found that regardless of whether natural or unrelated children were involved, the high degree of risk for re-offending by the appellant father was virtually the same.

The appellant's claim that should reunification occur, Unison<sup>6</sup> had a home-based therapy program that specialized in sex offender treatment programs to make sure that the house was safeguarded and to make sure that there were no environmental issues that would contribute to risk to the children.

Again, there are problems with that assertion. No one at the trial, including the several representatives from Unison, testified that any such home-based therapy program was available from Unison. The appellants also claimed before the Court of Appeals that an award of

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<sup>6</sup> Unison is one of the local mental health agency service providers utilized by Appellee LCCS to provide case plan services for the appellants.

protective supervision to Appellee LCCS would be sufficient to prevent any further problems with molestation on the part of the appellant father. Those suggestions were specifically considered and rejected by the Court of Appeals. The court stated in its opinion,

Appellant contends that home-based sexual offender therapy is available and that LCCS could still retain protective supervision after reunification. However, given the testimony regarding Todd's risk of re-offending, intermittent home checks would likely detect harm only after abuse has occurred and would thus insufficiently protect the children. As to Todd's safety plan, the trial court specifically found "shallow empathy" in the plan's creation, and the record supports this determination.

The appellants' assertion that permanent custody was awarded in this case primarily because of the appellant father's status as a pedophile is simply not supported by the facts. As mentioned, *supra*, the Court of Appeals specifically stated that the status of sexual offender would likely not *per se* support a permanent custody award. Rather, it was the appellant father's multiple counts of sexual molestation coupled with his less than satisfactory progress during treatment that adequately supported the permanent custody judgment by the trial court. Further, it was the appellant mother's lack of empathy for her children's welfare in the family relationship and her poor insight into the nature and degree of risk that would be involved with cohabitation with a pedophile even after extensive therapy, that justified a permanent custody award as to her. Her ability to recognize risky behavior on the part of the appellant father remained questionable even after additional therapy was given specifically targeted to that issue. Testimony by her therapist that after the additional treatment she was able to "regurgitate" the plan information and demonstrate a "rote memorization" of the concepts, certainly inspired less than firm confidence in her ability to keep the children safe and protect them from sexual molestation.

The Court of Appeals affirmed a finding of the trial court that neither of the appellants had achieved satisfactory results after extensive services were delivered pursuant to their case plan. The Court of Appeals affirmed the trial court findings that two of the ORC §2151.414(E) factors existed in this case, one of them applicable to each of the appellants. The Court of Appeals further affirmed the trial court's consideration and finding that the best interest of the children would be served by an award of permanent custody.

I days in a This case involved the same set of issues as in any permanent custody case: whether or not the parents achieved satisfactory progress during their case plan services so as to reduce the risk of harm to the children to an acceptable degree and whether or not an award of permanent custody was in the best interest of the children. Those issues are peculiar to the parents and children in each permanent custody case. They are of primary interest to the parties rather than the general public. Because of that, this case is not appropriate for a discretionary appeal by this court and the same should be denied.

## CONCLUSION

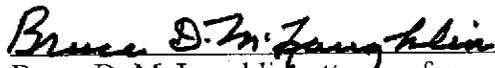
Although the appellants make a brief, singular, passing reference to a substantial constitutional question in their memorandum, they present no argument in support. This case does not involve a substantial constitutional question. The appellants failed to raise a constitutional question at either the trial court or appellate court level and, therefore, are precluded from doing so now.

The case does not involve a matter of public interest or great general interest. The issues presented and decided during the trial and later, at the Court of Appeals, was whether or not these appellants had achieved sufficient success during their case plan services to warrant a return of custody of these children to them. The facts presented at trial were concerned with demonstrating what these appellants did or did not achieve during those services. As such, this case involves issues of primary concern to the parties involved rather than the public at large.

By arguing that there was either insufficient evidence presented at trial or that the trial court and the Court of Appeals misconstrued and or wrongly decided the facts based upon that evidence, the appellants are really requesting that this court conduct a further review of the manifest weight of the evidence. As previously noted, they are not entitled to another review of that issue at this level.

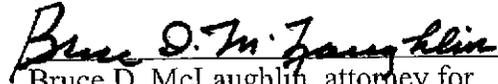
The appellants have had a full and fair appellate review of the decision reached by the trial court after a full and fair evidentiary hearing. They are entitled to no more than that. The appellants have failed to support their claim of jurisdiction and the appeal should be disallowed.

Respectfully submitted,

  
Bruce D. McLaughlin, attorney for  
Appellee Lucas County Children Services

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Thomas A. Sobecki, 409 Madison Ave., Suite 910, Toledo, OH 43604, attorney for the Appellants, by ordinary US mail on the 16<sup>th</sup> day of January, 2008.

  
Bruce D. McLaughlin, attorney for  
Appellee Lucas County Children Services