

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF: : Case No. 2008-0073
CHRISTIAN DRAKE THOMAS : On Appeal from the Crawford
AN ADJUDGED DEPENDENT CHILD : County Court of Appeals, Third
Appellate District

**MERIT BRIEF OF APPELLEE,
CRAWFORD COUNTY DEPARTMENT OF JOB & FAMILY SERVICES**

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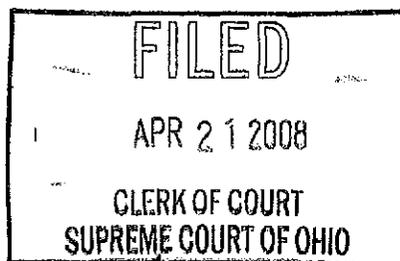


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STATEMENT OF THE CASE AND FACTS

The Crawford County Department of Job and Family Services, Children's Services Division, first became involved with the family on January 6th, 2006 in response to a referral of another child in the home being physically abused. A Dependent Child Complaint was filed with the Crawford County Juvenile Court on January 9th, 2006, together with an Abused Child Complaint in the companion case for Christian's sister, Angel Agapay. (See Record – Complaint 01/09/2006).

A Shelter Care Hearing was conducted on January 9th, 2006 where Christian Drake Thomas was placed into the Temporary Custody of the Crawford County Department of Job and Family Services. (See Record – Judgement Entry 01/25/2006). An adjudicatory hearing was initially scheduled for February 7th, 2006; however, upon review of the discovery materials, counsel for the Appellee, Naomi L. Agapay, and alleged father, withdrew as there was a potential conflict of interest in representing both parties. (See Record – Judgement Entry 02/08/2006). The matter was continued to allow for the appearance of substitute counsel for the parties. *Id.* In the interim, genetic (DNA) testing was completed to establish the identity of the biological father herein; however, both the presumed father and the alleged father were excluded as such, and dismissed as parties herein. (See Record – Judgement Entry 03/20/2006). The Adjudication and Disposition were completed on March 8th, 2006 the the child formally committed to the Temporary Custody of the Crawford County Department of Job and Family Services. *Id.*

A Case Plan was prepared which addressed (a) economic resources of the family, (b) mental and physical health of the family members, and (c) parenting of the children. (See Record – Case Plan 04/24/2006). The Case Plan was approved and adopted by the Trial Court

on April 24th, 2006. (See Record – Judgement Entry 04/24/2006).

The matter again came before the Trial Court on January 9th, 2007 upon two (2) separate motions. (See Record – Judgement Entry 01/17/2007). The first motion, filed by the Appellee, Naomi Agapay, sought a review and modification of the Trial Court's March 13th, 2006 Dispositional Orders, requesting custody of the within child to be restored to her. *Id.* The second motion, filed by the Appellee, Crawford County Department of Job and Family Services, also sought a review and modification of the Trial Court's March 13th, 2006 Dispositional Orders, requesting an initial six (6) month extension of Temporary Custody. *Id.* Following the hearing, the Trial Court denied Naomi Agapay's motion for the return of the child to her custody, and instead granted Crawford County Department of Job and Family Services' motion for an initial extension of temporary custody. *Id.*

On January 23rd, 2007, the *Guardian Ad Litem* filed a Motion for Permanent Custody in the Trial Court. (See Record – Motion for Permanent Custody 01/23/2007). A hearing upon said motion was held on March 21st, 2007. (See Record – Judgement Entry 06/28/2007). The Trial Court issued its written decision, granting the *Guardian Ad Litem's* Motion for Permanent Custody on June 28th, 2007. *Id.*

On July 24th, 2007, Naomi L. Agapay filed her notice of appeal of the Trial Court's June 28th, 2007 decision. (See Record – Notice of Appeal 07/24/2007).

The Third District Court of Appeals rendered its decision on December 26th, 2007 reversing the Trial Court's grant of permanent custody and remanded the case to the Trial Court, as it found that a *Guardian Ad Litem* lacked standing to file a motion for permanent custody. (See Record – Opinion 12/24/2007).

ARGUMENT

Response to Proposition of Law:

R.C. §§ 2151.281 and 2151.415 vest in *Guardian Ad Litem* the authority to file and prosecute motions for the termination of parental rights in child welfare cases.

Guardian Ad Litem in abuse, neglect, and dependency cases are statutory in nature as defined in Chapter 2151 of the Revised Code. The existence and authority of the *Guardian Ad Litem* is defined in R.C. §2151.281.

In cases involving allegations of abuse and neglect, the court shall appoint a *Guardian Ad Litem* to protect the best interests of the child. R.C. 2151.281(B)(1). To provide *Guardian Ad Litem* the ability to protect the best interests of the child, R.C. §2151.281(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. R.C. 2151.281(I).

The statute appointing the *Guardian Ad Litem* specifically permits the *Guardian Ad Litem* to file any motions that are in the best interest of the child.

R.C. §2151.353(E)(2) in conjunction with R.C. §2151.415 governs the modification of dispositional orders in child welfare cases. R.C. §2151.415(F) provides that:

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. R.C. 2151.415(F).

The five dispositional alternatives under divisions (A)(1) through (5) include: (1) restoring the child to the parents, guardian or custodian without restrictions; (2) ordering protective supervision; (3) legal custody to a relative or other interested party; (4) permanent termination of parental rights; and (5) planned permanent living arrangement placement. R.C. 2151.415(A) Not only does R.C. §2151.281 authorize *Guardian Ad Litem*s to file any motion that is in the child's best interests, but R.C. §2151.415 likewise authorizes the *Guardian Ad Litem* to file a motion seeking to modify the previous dispositional order for a permanent termination of parental rights.

Prior to its decision in the within case, the Third District Court of Appeals held that:

[w]hile R.C. 2151.415 does not mention the term "permanent custody" but instead grants a guardian ad litem the authority to move the court to "terminate parental rights," a reading of these statutes *in pari materia* does not preclude a motion for permanent custody to be filed by a guardian ad litem because a termination of parental rights cannot occur without the concomitant vesting of permanent custody. In other words, the termination of parental rights would necessarily cause permanent custody to vest in one of the designated agencies listed in R.C. 2151.011(B)(23) just as if the agency had filed for permanent custody pursuant to its own authority under R.C. 2151.413. Although different terminology is used in R.C. 2151.413 and 2151.415(A)(4), the result of filing a motion for permanent custody or for a termination of parental rights is identical. Therefore, 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. *In re Olmsted*, 2001 Ohio 2323 (Ohio Ct. App. 2001).

Similarly, the Sixth District Court of Appeals held that "R.C. 2151.415(F) provides that a neglected child's GAL may petition the trial court to modify an existing dispositional order and to issue a permanent custody order." *In re Brian L.*, 2000 Ohio App. LEXIS 628 (Ohio Ct. App. 2000). As R.C. 2151.415(A)(4) provides for a dispositional order to permanently terminate parental rights, the Sixth District Court of Appeals found that the *Guardian Ad Litem* did have

standing to file a motion seeking to have his ward committed to the permanent custody of the public children services agency. *Id.*

In the instant case, the Trial Court appointed a *Guardian Ad Litem* for Christian Drake Thomas because the child was residing in a household where a sibling was alleged to have been abused. During the pendency of the case with the Trial Court, the *Guardian Ad Litem* faithfully discharged his duties with an independent investigation, by attending all court proceedings, and by monitoring the services provided by the Crawford County Jobs & Family Services. As a result, he determined that a modification of the dispositional orders was necessary to protect the best interests of the child by placing the within child in the permanent custody of the Crawford County Jobs & Family Services. To that end, the *Guardian Ad Litem* filed a motion to terminate the parental rights of Naomi Agapay with the Trial Court.

Based upon a clear and unambiguous reading of the relevant statutes, the *Guardian Ad Litem* was acting within the scope of his authority to file the within motion for permanent custody. *Guardian Ad Litem*s in Ohio have standing to file the motions for permanent custody for their wards under R.C. §2151.281 and §2151.415.

The holding of the Third District Court of Appeals in the within matter limits the authority of *Guardian Ad Litem*s in child welfare cases to merely making a “ recommendation that a children's services agency move for permanent custody”. To uphold this decision places the best interests of some of the state's most vulnerable children, those subject to child welfare proceedings, in jeopardy. Further, if the *Guardian Ad Litem* is not permitted to file a motion for permanent custody, despite the clear and unambiguous authorization to do so under R.C. §2151.415, the same prohibition would likewise apply to *any* other motion authorized by R.C.

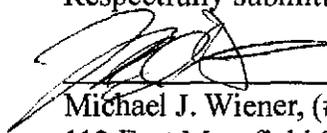
§2151.415 to modify disposition when filed by the *Guardian Ad Litem*.

The role of the *Guardian Ad Litem* is to protect the best interests of his or her ward. The legislature has adopted clear and unambiguous language in the statutes authorizing *Guardian Ad Litem*s to faithfully discharge their duty to protect the best interests of their wards. The decision of the Third District Court of Appeals severely curtails the authority granted by statute to *Guardian Ad Litem*s to file appropriate motions on behalf of their wards, thereby damaging the system by which children, who have already been victimized upon at least once, are supposed to be protected.

CONCLUSION

*Guardian Ad Litem*s in child welfare cases act within the scope of their authority granted under §2151.281 and §2151.415 by filing a motion requesting the modification of the court's prior dispositional orders by a termination of parental rights with the award of permanent custody in the public child services agency. The Third District Court of Appeals erroneously held that *Guardian Ad Litem*s lack that statutory authority. To allow the decision of the appellate Court to remain intact would not only eliminate the *Guardian Ad Litem*'s ability to pursue permanent custody for his ward, but also prohibit them from filing *any* motion seeking *any* modification of disposition under R.C. §2151.415. The decision of the Third District Court of Appeals must be reversed, and the Trial Court's grant of permanent custody reinstated.

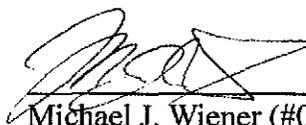
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee, Crawford County Department of Job & Family Services, was duly served upon Shane M. Leuthold, Esq., **LEUTHOLD LAW OFFICE, LLC.**, 1309 East Mansfield Street, Bucyrus Ohio 44820, Counsel for Appellee, Naomi L. Agapay; and Geoffrey L. Stoll, **STARKEY & STOLL, Ltd.**, 208 South Walnut Street, Bucyrus Ohio 44820, Appellant, *Guardian Ad Litem*, by regular U.S. Mail this 18th day of April, 2008.



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