

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

CASE NO. 07-2317

T.M.

ON APPEAL FROM THE MADISON
COUNTY COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
COURT OF APPEALS CASE NOS.
CA2007-04-016 & CA2007-05-020

**MERIT BREIF OF AMICUS CURIAE
OHIO PROSECUTING ATTORNEY'S ASSOCIATION
IN SUPPORT OF APPELLEE-MCDJFS**

RACHEL M. PRICE, #0064848
Madison County Assistant Prosecutor
59 North Main Street
London, Ohio 43140
740/852-2259; fax 740/845-1694

COUNSEL FOR APPELLEE MCDJFS

RICHARD A. DUNKLE, #0047241
2 North Main Street
London, Ohio 43140
740/852-2746

GUARDIAN AD LITEM

J. MICHAEL MURRAY, #0020319
8 East Main Street
West Jefferson, Ohio 43162
614/879-7606; fax 614/879-7607

COUNSEL FOR APPELLANT
LINDA OVERFIELD

STEPHEN K. HALLER, #0009172
Greene County Prosecuting Attorney

STEPHANIE R. HAYDEN, #0082881
Greene County Assistant Prosecuting Attorney
61 Grece Street, Second Floor
Xenia, Ohio 45385
937/562-5250; fax 937/562-5107

COUNSEL FOR AMICUS CURIAE
OHIO PROSECUTING ATTORNEY'S ASSOCIATION

OFFICE OF THE OHIO PUBLIC DEFENDER

MELISSA M. PRENDERGAST, #0075482
Assistant State Public Defender
Counsel of Record
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
614/466-5394; fax 614/752-5167

COUNSEL FOR AMICUS CURIAE
OHIO PUBLIC DEFENDER

RENAE E. ZABLOUDIL, #0073729
58 East High Street, Ste. B
London, Ohio 43140
740/852-9747; fax 740/852-9774

COUNSEL FOR APPELLANTS
SUMMER OVERFIELD & SHANE MANLEY

FILED

MAY 12 2008

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	1-4
<u>Proposition of Law No. 1:</u> Compelling a parent to admit to the abuse of the child, as a requirement under a case plan for reunification of the child with the parent, is unconstitutional and a violation of the parent's Fifth Amendment privilege against self-incrimination.	
(Authorities cited in support of Proposition of Law No. 1)	
<i>In re Gault</i> (1967), 387 U. S. 1	1
<i>In re Amanda W.</i> (Nov. 21, 1997), Sixth Dist. App. L-97-1058, unreported	1
<i>In re Jeffrey S.</i> , (Dec. 18, 1998), Sixth Dist. App. No. L-96-178, unreported	2
<i>In re A.D.</i> , 9 th Dist. App. No. 22668, 2005 Ohio 5183	2
<i>Matter of Welfare of J.G.W.</i> , 433 N.W. 2d 879 (Minn. 1987)	2
<i>Mullins v. Phelps</i> , 162 Vt. 250 (1994)	3
<i>In re Interest of Clifford M. et al</i> , 6 Neb. App. 754 (1998)	3
<i>Santosky v. Kramer</i> (1982), 455 U. S. 745	3
<i>In re Murray</i> (1990), 52 Ohio St. 3d 155	3
<i>In re Cunningham</i> (1979), 59 Ohio St. 2d 100	4
STATEMENT OF INTEREST	4
CONCLUSION	5
CERTIFICATE OF SERVICE	5

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Ohio Prosecuting Attorneys Association adopts the case and facts as presented by Appellee-State of Ohio.

ARGUMENT

PROPOSITION OF LAW NO. 1:

COMPELLING A PARENT TO ADMIT TO THE ABUSE OF A CHILD, AS A REQUIREMENT UNDER A CASE PLAN FOR REUNIFICATION OF THE CHILD WITH THE PARENT, IS UNCONSTITUTIONAL AND A VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

It has long been recognized that the privilege against compulsory self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution can be claimed in any proceeding. *In re Gault* (1967), 387 U.S. 1. Furthermore, the availability of the privilege is not determined by the type of proceeding; rather, it is determined by whether the compelled statement is or may be inculpatory. *Id.* The issue of to what effect the Fifth Amendment privilege against self incrimination applies in cases involving termination of parental rights has not yet been definitively decided in Ohio courts, but has been touched on in several cases with varying results.

The Sixth District Court of Appeals first touched the issue in *In re Amanda W.* (Nov. 21, 1997), Sixth Dist. App. No. L-97-1058, *unreported* and noted that permanent custody award based solely on parents' refusal to admit sexual abuse without an offer of immunity was in violation of the Fifth Amendment right against self incrimination. Again in *In re Jeffrey S.* the Sixth District noted in a case with no findings of sexual abuse, removing the children solely because there was no admission of sexual abuse is in

violation of the Fifth Amendment right against self-incrimination. *In re Jeffrey S.*, (December 18, 1998), Sixth Dist. App. No. L-96-178, *unreported*.

The issue was again raised in the case of *In re A.D.*, 9th Dist. App. No. 22668, 2005 Ohio 5183. The father in that case was required to attend a sex offender group treatment without an offer of immunity. The 9th District rejected the father's claim this violated his Fifth Amendment right against self-incrimination because there were sufficient facts supporting the claim of sexual abuse, and parental rights were not terminated solely because of the father's failure to attend the treatment program. The Court in that case essentially sidestepped the question as to what effect the Fifth Amendment privilege against self-incrimination applies in cases of child abuse.

While the resolution to this issue in prior cases may leave something to be desired, other courts around the country have dealt with the issue head on. The Minnesota Supreme Court has noted that, while the State may not directly compel parents to incriminate themselves in cases of child abuse, they may require the parents to successfully complete a treatment program. *Matter of Welfare of J.G.W.*, 433 N.W.2d 885 (Minn. 1989). Moreover, if a parent's failure to admit guilt results in that parent failing to successfully complete the treatment, there is no Fifth Amendment violation. *Id.* The reasoning for such a policy is that "the risk of losing the children for failure to undergo meaningful therapy is neither a 'threat' nor a 'penalty' imposed by the state' but is 'simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent'" *Id* quoting *Matter of Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987). The Vermont Supreme Court has come to a similar conclusion; that parental rights may be terminated when a parent's denial of the existence of an abuse

related problem prevents them from receiving effective treatment without violating the parent's Fifth Amendment privilege against self-incrimination. See *Mullins v. Phelps* 162 Vt. 250 (1994). The above cases suggest that requiring a parent to successfully complete treatment is constitutionally permissible, even if the treatment requires them to confront prior behavior toward the child involved. This is also the conclusion that has been reached by the Court of Appeals of Nebraska in *In re Interest of Clifford M. et al.*, 6 Neb.App.754 (1998) (noting the constitutional distinction between terminating parental rights solely because of a failure to admit abuse and failure to successfully undergo therapy which may require some admission with respect to prior abuse).

In this case, T.M. was the victim of horrible abuse at the hands of one of the child's four caretakers. The case plan recognized that the individual responsible needed to be identified so that individual could participate in counseling tailored to rehabilitate the individual and ensure the child's safety. The initial goal of the case plan was reunification; in order to accomplish that goal, the perpetrator of the abuse needed to undergo some measure of meaningful treatment in order to protect the child in the future. As other states have recognized, a requirement that a parent successfully completes treatment that may require them to acknowledge some prior behavior on their part is not a violation of the Fifth Amendment privilege against self-incrimination.

It is a long recognized principal that a parent has a "fundamental liberty interest" in the care of their child. *Santosky v. Kramer* (1982), 455 U.S. 745; *In re Murray* (1990), 52 Ohio St.3d 155. Furthermore, a parent has an "essential" right to raise their children. *Id.* Courts have noted, however, that the parent's rights are not without limitation. "It is plain that the natural rights of a parent...are always subject to the

ultimate welfare of the child, which is the pole star or the controlling principle to be observed.” *In re Cunningham* (1979), 59 Ohio St.2d 100. Allowing a parent to completely refuse to accept responsibility for what has happened to their child is to completely vitiate the concept of the best interests of the child and to prevent Children’s Services Agencies across the State to help those parents receive the effective treatment and counseling they need in order to safely parent those children who are at the most risk for harm.

STATEMENT OF INTEREST

The Ohio Prosecuting Attorneys Association is an association of county prosecutors from the 88 counties in the State of Ohio. The Association respectfully asserts that reversing the decision below negates the State’s ability to protect the children referred to Children’s Services Agencies across the State of Ohio from future violence and abuse by hampering their ability to identify the perpetrators of the abuse suffered and to ensure these children are returned to safe and stable homes free from violence and the risk of abuse.

Consequently, the Ohio Prosecuting Attorneys Association supports the position of the State of Ohio, Appellee in this matter.

CONCLUSION

Based upon the foregoing, Amicus Curiae Ohio Prosecuting Attorneys Association respectfully urges this Court to affirm the judgment of the Court below.

Respectfully submitted,

OFFICE OF THE GREENE COUNTY
PROSECUTING ATTORNEY

By: Stephen K. Haller
Stephen K. Haller, #0009172
Prosecuting Attorney

By: Stephanie R. Hayden
Stephanie R. Hayden, #0082881
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Rachel M. Price, Counsel for Appellee-MCDJFS, Madison County Prosecutor, 59 North Main Street, London, Ohio 43140 and Richard A. Dunkle, Guardian Ad Litem, 2 North Main Street, London, Ohio 43140 and J. Michael Murray, Counsel for Appellant-Linda Overfield, 8 East Main Street, West Jefferson, Ohio 43162 and Melissa M. Prendergast, Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 and Renae E. Zabloudil, Counsel for Appellants-Summer Overfield and Shane Manley, 58 East High Street, Suite B, London, Ohio 43140 by regular U. S. Mail the date same as filed above.

Angela M. Stoumen