

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

* Case No. : 2008-0401

T.R.

*

T.H.

*

A.H.

*

D.H.

*

*

APPELLEE SEPTEMBER HINER'S BRIEF OF APPEAL

Byron K. Shaw (0073124)
Appointed Counsel for September Hiner
Law Office of Byron K. Shaw
4800 Belmont Place
Huber Heights, Ohio 45424
(937) 286-5505; 237-8865 Fax

Montgomery County Prosecutor
Appellate Division
Attorney for Appellant/State of Ohio
301 West Third Street
Dayton, Ohio 45422
(937) 225-5757; 225-3470 Fax

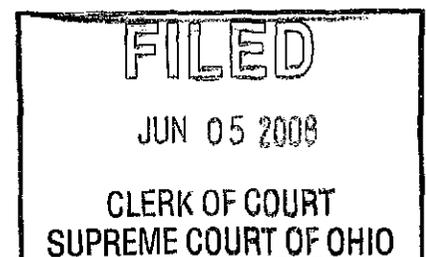


TABLE OF CONTENTS

	<u>Pages</u>
<u>STATEMENT OF THE CASE</u>	3
<u>STATEMENT OF FACTS</u>	4-5
<u>ARGUMENT</u>	6-8
<u>CONCLUSION</u>	8
<u>CERTIFICATE OF SERVICE</u>	9

TABLE OF CASES

1. <u>In Re Brown</u> (1994), 96 Ohio App.3d 306.....	3
2. <u>In re Cavender</u> , Madison App. No. CA 2000-06-037.....	6-7
3. <u>In re Gordon</u> , Trumbull App. No. 2002-T-0073, 2002-Ohio-4959..	6
4. <u>In re McCutchen</u> , Knox App. No. 90-CA-25.....	6-7

TABLE OF STATUTES

1. Ohio Revised Code 2151.412.....	7
2. Ohio Revised Code 2151.413.....	6

STATEMENT OF THE CASE

On January 26, 2006, the Montgomery County Children Services filed a permanent custody motion against September Hiner to obtain custody of her four minor children: Tabitha Rudy, Terrence Hiner, April Hiner, and David Hiner. However, the dispositional hearing was not held before Magistrate Durden until July 19, 2006 as being beyond the statutory time limit of ninety (90) days pursuant to Juvenile Rule 34 and Ohio Revised Code Section 2151.35. This proceeding was also contrary to the manifest weight of the evidence in September Hiner's favor as provided by the State of Ohio's own witnesses along with being based on a defective case plan that did not include a specific plan for adoption of the children as required by Ohio Revised Code Section 2151.413(E). Thus, permanent custody should not have been granted by Judge Capizzi in this case in violation of the Ohio Revised Code and specifically, the case law of the Second District Court of Appeals. (See In re Brown (1994), 96 Ohio App.3d 306, 644 N.E.2d 1117).

//

//

STATEMENT OF FACTS

On July 19, 2006, the Montgomery County Children Services proceeded with a hearing on a permanent custody motion filed against September Hiner in January 2006 before Magistrate Durden of the Montgomery County Juvenile Court to obtain custody of her four minor children: Tabitha Rudy, Terrence Hiner, April Hiner, and David Hiner. (Hearing Transcript of July 19, 2006: Tr.4, lines 1-9). The Montgomery County Children Services alleged that September Hiner nor the fathers of the minor children had complied with their case plans even though there was evidence to the contrary as admitted by their own case workers. (See Tr.13, lines 20-22; Tr.14, lines 1-13; Tr.15, lines 7-9; Tr. 61-63; Tr.15, lines 20-25; Tr.16, lines 1-11; Tr.19, lines 18-20; Tr.66, 89; Tr.100, lines 19-25). Although Mother's Appointed Counsel, Byron K. Shaw, objected to the Court's jurisdiction for violating the statutory ninety (90) day rule, Magistrate Durden overruled counsel and proceeded with the permanent custody hearing anyways. (See Tr.6, lines 18-24).

Upon completion of the hearing, Magistrate Durden issued a Magistrate's Decision in granting permanent custody of the minor children to the Montgomery County Children Services. After receiving notice of said decision, September Hiner, by and through Appointed Counsel, timely filed initial objections to the Magistrate's Decision within the fourteen (14) day statutory period of said decision with supplemental objections being filed

on April 23, 2007, upon receipt of the delayed transcript of the hearing on April 9, 2007, from the Montgomery County Juvenile Court. Judge Anthony Capizzi of the Montgomery County Juvenile Court issued a decision on July 5, 2007, and adopted the findings and conclusions of Magistrate Durden granting permanent custody of the minor children to the Montgomery County Children Services.

Thus, September Hiner now timely files this appeal on July 24, 2007 of Judge Capizzi's decision of July 5, 2007 in this matter to regain custody of her children due to the violations of the Ohio Revised Code and applicable case law that have violated her inherent rights to custody of her children.

//

//

ARGUMENT

I. DOES R.C. 2151.413(E) REQUIRE A CHILDREN SERVICES BOARD TO FILE AN ADOPTION PLAN WITH THE COURT, PRIOR TO THE COURT GRANTING PERMANENT CUSTODY OF A MINOR CHILD.

Pursuant to Ohio Revised Code Section 2151.413(E), "any agency that files a motion for permanent custody under this section shall include in the case plan of the child who is the subject of the motion, a specific plan of the Agency's actions to seek an adoptive family for the child and to prepare the child for adoption."

In the present case, the Agency never included a specific plan for adoption in the case plan, as filed July 2006, for any of the children mentioned therein. Moreover, the Agency admitted on the witness stand that they never added an adoption plan or even a reference to an adoption plan in the case plan that was filed with this Court as required by Ohio law. (Tr.64, lines 11-15). Thus, the Second District Appellate Court had no other choice than to overrule the trial court's decision in favor of the mother, September Hiner, for violating O.R.C. 2151.413(E).

Moreover, the Eleventh District Court, in citing the cases of Cavender and McCutchen for authority, held that "An Agency is not required to set forth an exact plan of adoption until permanent custody is granted. A case plan outlining the ultimate goal of adoption and the agency's treatment actions to prepare the child for adoption process is in accord with the requirements of R.C. 2151.413(E)." In re Gordon, Trumbull App. No. 2002-T-

0073, 2002-Ohio-4959.

In the present case, the Montgomery County Children Services Board did not even make an attempt to outline an adoption plan in their case plan from July 2006, let alone an exact plan of adoption, in the case plan itself nor by caseworker testimony, before proceeding with permanent custody of all four minor children. (Tr.64, lines 11-15).

Further, the decisions of the Fifth and Twelfth District Courts of Appeal rely heavily on the statutory scheme provided under Ohio Revised Code 2151.412(F). In so doing, these Courts reasoned that requiring an Agency to file an adoption plan prior to the granting of permanent custody would undermine the goals of reunification and not make said option viable. (See In re Cavender, Madison App. No. CA 2000-06-037 and In re McCutchen, Knox App. No. 90-CA-25).

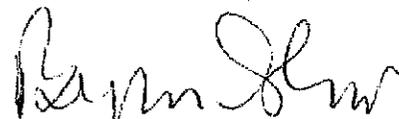
However, the reunification goal relied upon in R.C. 2151.412(F) expressly contemplates case plans involving children who are in the Agency's temporary custody and not permanent custody, which is governed by R.C. 2151.413. As expressly stated and practiced in Ohio courts, permanent custody motions reject reunification as a goal and seek the termination of parental rights by their very nature without parental agreement in any way.

Further, the purpose of the case plan for adoption herein would have allowed the Montgomery County Juvenile Court to

consider the children's prospects for adoption as being in the best interest of the children prior to granting any permanent custody motions. Also, any evidence relating to adoptability to which the State of Ohio refers in its briefs was tangential at best. (See Tr.64, lines 11-15). Therefore, the Montgomery County Juvenile Court erred when it granted the permanent custody to the Montgomery County Children Services when the Agency did not even make an attempt to outline an adoption plan in their case plan from July 2006 before proceeding with permanent custody of all four minor children. (Tr.64, lines 11-15).

CONCLUSION

For the foregoing reasons, the Ohio Supreme Court should uphold the decision of the Second District Appellate Court and either return legal custody of the abovementioned minor children back to their mother, September Hiner, promptly in accordance with Ohio law, or require the Montgomery County Juvenile Court to re-hear the matter upon submission of a new permanent custody complaint and case plan with inclusion of an adoption plan prior to any adjudication and dispositional hearings on permanency custody herein.

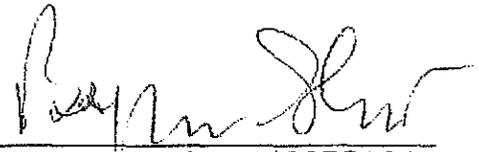


BYRON K. SHAW (#0073124)
Attorney for September Hiner
Law Office of Byron K. Shaw
4800 Belmont Place
Huber Heights, Ohio
(937) 286-5505; 237-8865 Fax

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Appellee's Brief was duly served upon the following parties by facsimile and/or by regular U.S. Mail Service, postage pre-paid, this 12th day of April 2008.

State of Ohio/Montgomery Co. Children Services
c/o Montgomery Co. Prosecutor
301 West Third Street
Dayton, Ohio 45422
(937) 225-3470 Fax



Byron K. Shaw (0073124)