

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of:

C. B.
DOB: 4/16/05

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On Appeal from the Cuyahoga County
Court of Appeals, Eighth
Appellate District

COURT OF APPEALS
CASE NO. 92775

10-0180

JOINT MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT GUARDIAN AD LITEM, THOMAS KOZEL
AND
OF APPELLANT C.B.

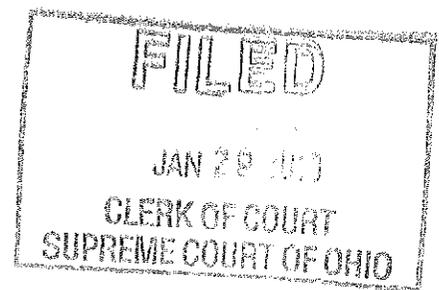
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TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	4
STATEMENT OF THE CASE AND FACTS	7
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	
Proposition of Law #1	8
Proposition of Law #2	13
Proposition of Law #3	14
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDIX	Appendix page
JOURNAL ENTRY OF THE CUYAHOGA COUNTY COURT OF APPEALS (FILED DECEMBER 1, 2009, VOLUME 694, PAGE 744)	1
JOURNAL ENTRY OF THE CUYAHOGA COUNTY COURT OF APPEALS (FILED DECEMBER 16, 2009, VOLUME 695, PAGE 815)	2
JOURNAL ENTRY OF THE CUYAHOGA COUNTY COURT OF APPEALS (FILED DECEMBER 16, 2009, VOLUME 695, PAGE 818)	3
JOURNAL ENTRY OF THE CUYAHOGA COUNTY COURT OF APPEALS (FILED DECEMBER 16, 2009, VOLUME 695, PAGE 827)	4

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents three critical issues to all parents and their children in the State of Ohio. The first issue is whether or not a party to a Juvenile Court custody proceeding may appeal a denial of a Motion for Permanent Custody filed by a children's services agency. Is the denial of a Motion for Permanent Custody an order which can be appealed by a party other than a children's services agency? The second issue is whether or not a legal custody determination by a Juvenile Court is a final appealable order. The third issue is whether or not a child has a right to be represented by an attorney in a permanent custody proceeding.

In this case, the Court of Appeals determined that a Motion for Permanent Custody filed by a children's services agency, the Cuyahoga County Department of Children and Family Services (CCDCFS) is not a final appealable order. The Court of Appeals cited *In re: Adams*, 115 O. St. 3d 86; 2007-Ohio-4840; 873N.E. 2d 886; 2007 Ohio LEXIS 2402, in support of its determination that the denial of a Motion for Permanent Custody filed by CCDCFS is not a final appealable order.

In the case at bar, the mother of the minor child, and the minor child through her Guardian Ad Litem, each filed a Notice of Appeal of the trial court determination. Does the holding of this Court in *In re: Adams*, supra, prevent all parties from appealing a denial of a Motion for Permanent Custody filed by a children's services agency?

Additionally, the trial court order awarded legal custody of the minor child, C.B., to her father in the same order on appeal. The determination that a legal custody order is not a final appealable order is contrary to the opinions found in the following cases:

In re: J.O., et al., 2007-Ohio-407, 2007 Ohio App. LEXIS 360 (No. 87626)

In re: A.H., 2005 Ohio 1307, 2005 Ohio App. LEXIS 1275 (No. 85132)

In re: S.M., 160 Ohio App. 3d 794, 2008-Ohio-2187, 828 N.E. 2d 1044, 2005 Ohio App. LEXIS 2118 (No. 84409).

The determination to not allow the mother of a child or the child, through her Guardian Ad Litem, to appeal an award of legal custody to father is a denial of due process and equal protection of the laws found in the United States Constitution and in the Ohio Constitution. Article I, Section 2 of the Ohio Bill of Rights declares that a government is instituted for the equal protection and benefit of its people. The 14th Amendment to the Constitution of the United States declares that no state shall deny to any person within its jurisdiction equal protection of the laws. Courts have repeatedly referred to the Ohio Bill of Rights as guaranteeing equal protection. *Hocking Valley Coal Company v. Rosser*, 53 OS 12, 41 N.E. 263; *State, ex. rel., Bateman v. Bode*, 55 OS 224, 45 N.E. 195; *State v. Gardner*, 58 OS 599, 51 N.E. 136; *State, ex rel., Graves v. Bernon*, 124 OS 294, 178 N.E. 267; *Higgins v. Cleveland* (App) 7 OL Abs 437. The issue presented in this case is whether or not legal custody granted to the father is a final appealable order. If it is not, then a parent or child could never appeal a trial court determination of legal custody.

The Court of Appeals for the Eighth District has previously determined that an award of custody to a parent in a divorce case is a final appealable order. *Macfarlane v. Macfarlane*, 2006-Ohio-3155, 2006 Ohio App. LEXIS 3043 (No. 86835), *Bastian v. Bastian*, 160 N.E. 133 (1959) and *DiSanto v. DiSanto*, 1978 Ohio App. LEXIS 9844 (1978).

Finally, almost all of the other districts have determined that a legal custody award to a

parent is a final appealable order. *In re: B.J.*, No. C-081261 (First District Court of Appeals, Hamilton County December 11, 2009); *Pyburn v. Woodruff*, No. 2009-CA-10, (Second District Court of Appeals, Clark County, November 6, 2009); *Helle v. Helle*, 1981 Ohio App. LEXIS 12652 (Ohio Ct. App., Third District, Feb. 5, 1981); *In re: Hatch*, 2008 Ohio 5822 (Ohio Ct. App., Third District, Allen County Nov. 10, 2008); *Hewitt v. Hewitt*, No. 14-08-48 (Third District Court of Appeals, Union County, December 14, 2009); *Liming v. Damos*, No. 08 CA 34, (Fourth District Court of Appeals, Athens County, December 8, 2009); *Betts v. Betts*, 1987 Ohio App. LEXIS 5674 (Ohio Ct. App., Fourth District, Pickaway County Jan. 27, 1987); *In re: S.C., D.C. and A.C.*, No. 2009 C 00110, (Fifth District Court of Appeals, Stark County, December 7, 2009); *In re: Ritterbeck*, 2008 Ohio 5547 (Ohio Ct. App., Fifth District, Guernsey County Oct. 23, 2008); *In re: Christian S.*, 2007 Ohio 5750 (Ohio Ct. App., Sixth District, Erie County Oct. 26, 2007); *In re: I.S., A.S., T.S. and K.S.*, No. 24763, (Ninth District Court of Appeals, Summit County, December 9, 2009); *In re: K.K.*, 2005 Ohio 3112 (Ohio Ct. App., Summit County, Ninth District, June 22, 2005); *In re: T. A.*, 2006 Ohio 4468 (Ohio Ct. App., Summit County, Ninth District Aug. 30, 2006); *Rowles v. Rowles*, 1988 Ohio App. LEXIS 1537 (Ohio Ct. App., Eleventh District, Lake County Apr. 29, 1988); *Kenney v. Kenney*, 2001 Ohio 8662 (Ohio Ct. App., Warren County, Twelfth District, Nov. 26, 2001); *In re: C.K.*, No. CA 2008-12-303, (Twelfth District Court of Appeals, Butler County, October 26, 2009).

C.B. is a party to this case. (Ohio Rules of Juvenile Procedure, Rule 2(Y)). It is clear that a party to a permanent custody case has right to appointed counsel if they cannot afford their own attorney. *In re: Moore*, 158 O App 3d 679, 821 N.E. 2d 1039, 2004-Ohio-4544, supplemented 2005-Ohio-136; *In re: Williams*, 2003-Ohio-3550, 2003 WL 21517986, unreported, state granted 99 Ohio St. 3d 1526, 793 N.E. 2d 496, 2003-Ohio-4303, Motion To

Certify allowed, 99 Ohio St. 3d 1540, 795 N.E. 2d 680, 2003-Ohio-4671, Appeal not allowed, 99 Ohio St. 3d 1547, 795 N.E. 2d 684, 2003-Ohio-4671, Affirmed 101 Ohio St. 3d 398, 805 N.E. 2d 1110, 2004-Ohio-1500; *In re: Emery* (Ohio App 4 Dist., Lawrence, 04-25-2003) No. 02CA40, 2003-Ohio-2206, 2003 WL 2003811; *In re: Calvin, Anthony, Alyshia, and Samantha Borntreger* (Ohio App 11 Dist., Geauga, 11-22-2002) No. 2001-G-2379, 2002-Ohio-6468, 2002 WL 31663562, unreported, stay granted, 98 Ohio St. 3d 1459, 783 N.E. 2d 518, 2003-Ohio-644, appeal not allowed, 98 Ohio St. 3d 1513, 786 N.E. 2d 63, 2003-Ohio-1572; *In re: Stacey S.*, 136 Ohio App 3d 503, 737 N.E. 2d 92, 1999-Ohio-189; *In re: Solis*, 124 Ohio App 3d 547, 706 N.E. 2d 839; *Holley v. Higgins*, 86 Ohio App 3d 240, 620 N.E. 2d 251; *Lowry v. Lowry*, 48 Ohio App 3d 184, 549 N.E. 2d 176; *In re: Johnston*, 142 Ohio App 3d 314, 755 N.E. 2d 457; ORC §2151.352.

STATEMENT OF THE CASE AND FACTS

On March 22, 2006, the Cuyahoga County Department of Children and Family Services (CCDCFS) filed a Complaint for Dependency and Temporary Custody and relating to C.B. On March 27, 2006, Jeffrey Froude was appointed as the Guardian Ad Litem for the child. On March 23, 2006, pre-adjudicatory temporary custody was awarded to CCDCFS. At that time, C.B. was placed in foster care. C.B. is four and a half years old and has been living with the same foster mother for nearly 48 months. She has never had an overnight visitation with her father during the entire 48 month period.

On June 7, 2006, C.B. was adjudicated dependent. The pre-adjudicatory order placing the child in the temporary custody of CCDCFS was terminated and the child was placed in the temporary custody of CCDCFS. Jeffrey Froude filed a Motion to Withdraw as Guardian Ad

Litem, which Motion was granted on July 25, 2008. In a subsequent Nunc Pro Tunc order filed January 5, 2009, Mr. Froude “is removed as GAL and counsel for child”. On July 27, 2007, CCDCFS filed a Motion to Modify Temporary Custody to Permanent Custody. On July 25, 2008, subsequent to hearing, the court declared a mistrial. On July 21, 2008, Jodi Wallace was appointed as successor Guardian Ad Litem and counsel for the child. On August 4, 2008, Jodi Wallace filed a Motion to Withdraw as Guardian Ad Litem which Motion was granted on August 5, 2008. On August 11, 2008, the third Guardian Ad Litem, Thomas Kozel was appointed as Guardian Ad Litem only for the minor child, C.B. No attorney was appointed to represent the child.

Subsequent to hearing, on November 3, 2008, the Motion for Permanent Custody was denied in a Journal Entry filed February 5, 2009. In that same Journal Entry filed February 5, 2009, the court terminated the temporary custody of CCDCFS and granted legal custody of C.B. to the father.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW #1

A parent or a child may appeal the dismissal of a Motion for Permanent Custody filed by a children’s services agency.

The Supreme Court of Ohio, in the case of *In re: Adams*, supra, identified that “the question presented is whether a children-services agency may appeal a trial court’s order denying the agency’s Motion to Modify Temporary Custody to Permanent Custody and continuing temporary custody.” At paragraph 4. The Supreme Court of Ohio goes on to indicate that the

status of temporary custody provides for the interim care of children who are dependent pursuant to ORC §2151.04.

The Court referenced Ohio Revised Code §2151.353 reflecting the different orders of disposition available to a trial court in a dependency case and specifically subdivision (F) which identifies that temporary custody continues until a dispositional order is issued by the court. The Supreme Court of Ohio goes on to indicate that a dispositional order pursuant to ORC §2151.353(A)(3) provides for a disposition of “legal custody of the child to either parent...”.

The issue raised in the case of *In re: Adams*, supra, was simply “...whether an order denying an agency’s Motion to Modify Temporary Custody to Permanent Custody and continuing temporary custody is a final appealable order.” At paragraph 24. The Supreme Court of Ohio goes on to define what is a final appealable order. At paragraph 27. One of the three issues in the case at bar is whether or not, an order in a dependency action brought by CCDCFS with a disposition of legal custody to the father, is a final appealable order.

An action in Juvenile Court is a special proceeding where the action is to temporarily or permanently terminate parental rights. *In re: Murray*, 52 O St. 3d at 161; 556 N.E. 2d 1169 (Douglas, J., concurring in syllabus and judgment). The Supreme Court of Ohio determined that “...a Juvenile Court order must also affect a substantial right to a final, appealable order under R.C. 2505.02(B)(2). R.C. 2505.02(A)(1) defines ‘substantial right’ as ‘a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.’ Importantly, no constitutional provision, statute, rule of common law, or procedural rule, entitles a children-services agency to any inherent right to raise a child to adulthood. In contrast, a parent has a substantial right in custody.” At paragraph 43. The Supreme Court of Ohio, in its reasoning, determined that:

The denial of an agency's Motion to Modify Temporary Custody to Permanent Custody does not 'determine the action' because the continuation of the agency's temporary custody does not determine the outcome of the action for neglect and dependency. Instead, all parties remain subject to further court order during the temporary-custody phase. A Juvenile Court has several alternate dispositional options pursuant to R.C. 2151.415(A), and ordering the continuation of temporary custody do not preclude the Juvenile Court from exercising any of these options. At paragraph 36.

In the case at bar, legal custody to the father determines the action and, therefore, the matter is not continued. The denial of the Permanent Custody motion also represents a substantial and significant right which adversely affects the child. The Supreme Court of Ohio goes on to identify that:

An order denying a Motion to Modify Temporary Custody to Permanent Custody also does not 'prevent a judgment.' In an action alleging neglect or dependency, a children-services agency may seek any of the ultimate dispositions with the presentation of appropriate proof. A denial of permanent custody and a continuation of temporary custody do not prevent a children-services agency from seeking any applicable dispositional order or even renewing a request for permanent custody. A final judgment in a Juvenile custody case will be rendered, and a trial court's ruling to deny permanent custody and continue an agency's temporary custody does not foreclose the rendering of such a judgment. At paragraph 37.

In the case at bar, there are no other possible dispositions other than legal custody to the father once the trial court files this order. Further, the Supreme Court of Ohio goes on to find that a denial of an agency's Motion to Modify Temporary Custody to Permanent Custody does not determine the action or prevent a judgment. The Court indicates that the agency may file another Motion for Permanent Custody. However, the granting of legal custody to the father in this case provides for the application of the doctrine of res judicata as it relates to facts that exist prior to the filing of the Judgment

Entry granting legal custody to the father. There is a plethora of case law that provides that when legal custody is granted to a parent, there must be a finding of a change of circumstances from the time of the filing of the prior Judgment Entry granting custody through the present for the court to even consider modifying a legal custody award to a parent. As stated by the Ohio Supreme Court on May 30, 2007, in the case captioned *In re: Brayden James*, 113 Ohio St. 3d 420, 2007-Ohio-2335:

R.C. 3109.04(E)(1)(a) precludes a trial court from modifying a prior decree allocating parental rights and responsibilities unless it finds, based on facts that have arisen since the time of the decree or where unknown to it at that time, not only that a change has occurred in circumstances of the child, the child's residential parent, or either parent subject to a shared-parenting decree, but also that the modification of the prior custody decreed is necessary to serve the best interest of the child.

Therefore, both the aggrieved parent or the child are foreclosed from addressing issues occurring before the date the Journal Entry granting legal custody to father is filed.

The issue presented by the dismissal of this case is when can a parent who is divested of custody of their child, or the child themselves, both of whom are parties to the case, have the ability to appeal the decision of the trial court that grants legal custody to the other parent. Domestic Relations case law is clear in that a Judgment Entry modifying legal custody from one parent to another is a final appealable order. Although CCDCFS initially had temporary custody in this case, the disposition of the case is "legal custody to the father", terminating the original legal custody of the mother and, thereby, placing the child in the legal custody of a different parent. This is a final appealable order and materially differs from the denial of a Motion for Permanent Custody filed by an agency which results in a child continuing in the temporary custody of the agency. The order placing this child in the legal custody of the father makes this order a final appealable order.

The undersigned further assert that the decision by the trial court to deny the Agency's Permanent Custody Motion does affect substantial rights of the child. The *Adams* case only speaks to the inability of an agency to file an appeal when a Permanent Custody Motion is denied. In this case, the trial court did not simply leave the child in a temporary custody situation, but placed the child in her father's legal custody. This makes the permanent custody denial a significant and critical decision that significantly affects the child's rights. There is nothing in *In re: Adams*, supra, that suggests that the child or the child's Guardian Ad Litem are prohibited from appealing the denial of permanent custody. It is asserted in this appeal that the trial court denied the Permanent Custody Motion in direct contradiction to the weight of the evidence and the child's best interests. The undersigned Guardian Ad Litem, Thomas Kozel, wrote the following in his report to the trial court on October 20, 2008:

It is in the best interest of Caroline Bartok to be placed in the permanent custody of CCDCFS. Caroline has been in the custody of CCDCFS for almost three years. The mother, Mary Bartok, has agreed that permanent custody is in the best interest for her daughter. As for the father, Mr. Wylie, he has failed to comply with the mental health portion of his case plan. Mr. Wylie was failed to be evaluated by the Court's Diagnostic Clinic after being reportedly ordered to do so.

Mr. Wylie refused to discuss his past family history regarding his mental health with me. CCDCFS has records indicating that on or about October 14, 2003, St. Vincent Charity Hospital diagnosed Mr. Wylie with Bi-Polar disorder, manic episode-sever and Personality disorder, nor otherwise specified, with anti-social traits and paranoid personality traits. On or about October 15, 2003, North Coast Behavioral Healthcare diagnosed father with Bi-Polar disorder most recent episode manic, unspecified and Personality disorder, not specified. Father was prescribed medications and advised to continue treatment at Recovery Resources and Bridgeway Crisis Shelter.

The mother, Mary Bartok, reports that her and the father met at North Coast. She reports that Mr. Wylie has been

domestically violent towards her and has stalked her. Mother also reports that father stopped taking his medication while they were together. Mother does not believe that Mr. Wylie would be an appropriate care giver for their child.

Because of the length of time Caroline has been in CCDCFS's custody and father's unwillingness to obtain a mental health evaluation to clarify his current mental health state, I recommend that Caroline be placed in the permanent custody of CCDCFS. Father has had multiple opportunities to comply with the Court's order for an evaluation, but has failed to do so.

When the trial court issued its decision on November 2, 2008, the child had been out of the home of both parents for approximately thirty-five months. Obviously, this is far greater than the minimum standard prima facie test for the grant of permanent custody which is when a child has been in temporary custody twelve or more months of a consecutive twenty-two month period pursuant to R.C. 2151.414. The child has a right to have permanent planning and have the best placement for her. The undersigned contend that both the child and her Guardian Ad Litem have the right to appeal the trial court's denial of the Permanent Custody Motion based on the facts herein.

In the case at bar, it is not CCDCFS filing an appeal of the denial of the Motion for Permanent Custody filed by CCDCFS. This appeal was initiated by the filing by mother of the granting of legal custody to father and the denial of permanent custody. A Cross Appeal was then timely filed by the Guardian Ad Litem in regard to the issue of the denial of permanent custody and the granting of legal custody of the child to father. These substantial differences in the facts of the case at bar when compared to the case of *In re: Adams*, supra, should cause this Court to conclude that *In re: Adams*, supra, is distinguishable from the case at bar.

PROPOSITION OF LAW #2

An order granting legal custody to a party is a final appealable order.

The law in this area has been clear until recently. An order granting to a parent legal

custody has always been determined to be a final appealable order. See string of citations previously identified. If a grant of legal custody to a parent is not a final appealable order, then when can a parent aggrieved by the determination of the court raise the issue by way of appeal? If not now, when?

PROPOSITION OF LAW #3

The failure to provide legal counsel to a minor child in a permanent custody case is a denial of due process and equal protection of the laws.

The case law is clear in this area. Where there is a conflict that exists between the position of a parent and the child, an attorney for the child must be appointed to represent the child. In the case at bar, the child, through her Guardian Ad Litem, expressed a desire not to visit with her father. Father desired custody. The determination of the trial court was to place legal custody of the child with the father. This is a clear conflict.

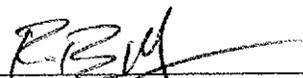
Case law also provides that where an allegation of abuse exists, an attorney shall be appointed to represent the child. On August 17, 2007, the father himself filed the following motion: "Writ of Habeas Corpus and Motion to Compel the Court to Initiate an Investigation into Allegations of Sexual Abuse Made by Cuyahoga County Department of Children and Family Services Social Worker, Loretha Knight, on Tuesday, August 7, 2007 at 10:10 a.m. at St. Augustine Church." Although a Journal Entry filed on December 17, 2007 provides that the Writ of Habeas Corpus is not well taken, the court further determines that "upon due consideration of the arguments of counsel, the court finds that father's emotional stability is at issue and therefore father is subject to further evaluation by an evaluator selected by the agency...upon due consideration of the arguments of counsel, representations of father and case worker as well as

the report and recommendation of the GAL, the court finds that the Motion to Amend the Case Plan for unsupervised visitation for father is not well taken at this time.” Pursuant to the case law previously identified herein, together with the facts of this case, an attorney should have been appointed to represent the minor child, C.B.

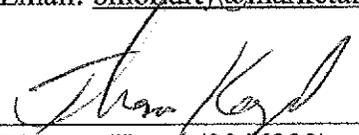
CONCLUSION

This Court should conclude that a parent or child can appeal a denial of a Motion for Permanent Custody filed by a children’s services agency. Further, this Court should determine that an order granting legal custody to a parent is a final appealable order. Finally, this Court should determine that, in a permanent custody case, where there is an allegation of abuse, or where there is an obvious conflict between the child and a parent, the court shall appoint an attorney for the child.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing, Joint Memorandum in Support of Jurisdiction of Appellant Guardian Ad Litem Thomas Kozel and of Appellant C.B., was forwarded this 28th day of January, 2010, via ordinary US mail, postage prepaid, upon the following:

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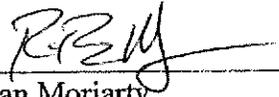
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