ORIGINAL

IN THE SUPREME COURT OF OHIO

In re Adoption of J.A.S. and J.N.S.	:	**CASE NOS. 2009-1695**
	:	**2009-1980**
	:	**On Appeal from the Court of**
	:	**Appeals of Lorain County, Ninth**
	:	**Appellate District**

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STATEMENT OF THE FACTS

Appellee adopts Appellants' statement of the procedural history of the case, but wishes to bring the following additional facts to the attention of the Court.

Appellee, Jennifer Wahl (she now uses the last name of Walker, but will be referred to herein as "Ms. Wahl," or "birthmother"), gave birth to J.A.R., (referred to herein as J.A.S.), in October of 2002 and J.N.R., (referred to herein as J.N.S. or collectively with J.A.S. as "the children"), in October of 2003. (Record at the Petitions for Adoption and Magistrate's Decision, attached to Appellants' Brief as App. 15 to 21, at 17.) Ms. Wahl struggled with mental health and substance abuse issues while also having money and housing troubles. (Id.) Ms. Wahl was admitted for treatment of her mental health and substance issues in October of 2005, and she made arrangements for J.A.S. and J.N.S. to stay with their maternal aunt and her husband. (Id.) When they could no longer care for the children, the husband of the maternal aunt made new arrangements for the children to reside with his sister and her husband, the Appellants in this matter. (Id.)

On January 5, 2006, the children were adjudicated Neglected and Dependant by the Lorain County Juvenile Court when Lorain County Children Services (LCCS) sought and was granted Temporary Custody of J.A.S. and J.N.S to Appellants with ongoing Protective Supervision by LCCS. (Id. at 16, 17.) On October 5, 2006, the Juvenile Court held a hearing before a magistrate on a motion for further dispositional orders. (Id. at 15.) Birthmother, Ms. Wahl, attended that hearing and was represented by counsel. (Id. at 16, 21.) The court found that Ms. Wahl was receiving mental health counseling and in-patient substance abuse treatment at the time of the hearing, but she had not made

sufficient progress on LCCS's case plan to be able to resume the day-to-day care of her children. (Id. at 18.)

The juvenile court found "by a preponderance of the evidence," that it was in the best interest of the children for Legal Custody to be granted to Appellants. (Id.) Further, the court terminated the Protective Supervision previously granted to LCCS and cancelled any future annual reviews of the matter. (Id.) The Magistrate's Decision stated that the court found that "[a]ll parties have been advised of the nature of the proceeding and how their parental rights are affected" and set forth a visitation order and enumerated other parental rights and responsibilities. (Id. at 15, 19.) Ms. Wahl, her attorney, and Appellants all signed the juvenile court's judgment, signaling their approval. (Id.)

The Decision of the Juvenile Division of the Lorain Court of Common Pleas did not terminate Ms. Wahl's parental rights. (Id.) Since October 2006, LCCS has not sought an award of Permanent Custody of J.A.S. or J.N.S. No application for approval of a proposed adoptive placement has been filed with the Lorain County Probate Court. To this day, Ms. Wahl retains her residual parental rights, including her right to consent to the adoption of her children.

ARGUMENT

PROPOSITION OF LAW:

> **Pre-adoptive placement is required by R.C. 5103.16(D) when the prospective adoptive parents have been awarded legal custody of the child pursuant to a final dispositional order out of the juvenile court, regardless of whether the child has been living with the prospective adoptive parents since the award of legal custody.**

INTRODUCTION

Essential. Basic. Fundamental.

These are the words used by The Supreme Court of the United States to describe the rights of biological parents in their natural children. *Stanley v. Illinois* (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558; *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S. Ct. 1388. The relationship between parent and a child is so important, permanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App. 3d 1, 16, 601 N.E.2d 45, 54. It follows that when an unrelated party attempts to sever this biological link, parents "must be afforded every procedural and substantive protection the law allows." *In re Perales* (1977), 52 Ohio St.2d 89, 97, 369 N.E.2d 1047, 1051-1052.

In Ohio, these standards are not just judicial virtues – they are embedded into the heart of the adoption laws. Parents who temporarily part with their children retain explicit residual rights by statute. R.C. 2151.011(A)(46). Legal custodians must show "clear and convincing evidence" to permanently extinguish a parent's rights. R.C. 2151.414(B)(1). And parents retaining residual rights must personally appear before a probate court for approval of placement and adoption. R.C. 5103.16(D).

The crown jewel in the Assembly's protective arsenal is R.C. 5103.16 (a.k.a. the "placement statute"). It is a uniquely important provision, both for its purpose and practical effect. Not only does the placement statute "provide some measure of judicial control over the placement of children for adoption which is not conducted under the auspices of a statutorily recognized and authorized agency," it encourages struggling parents to find safe environments for their children, without permanently forfeiting a relationship with their children. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 452 N.E.2d 1304. Without R.C. 5103.16(D)'s enhanced judicial oversight, an unintended class of would-be adoptive parents could bypass probate court scrutiny by obtaining an award of legal custody from a juvenile court, and petitioning to adopt outright. And although the prospective adoptive parents would still have to obtain the required consents from a probate court – or have them excused – the relaxed procedure would put a significant number of biological parents at risk of having their rights pulled out from under them without due process.

Appellants and Amici urge this court to come to a result they claim will support the rights of children to live in safe, permanent homes with loving families. (Merit Brief of Amicus Curiae American Academy of Adoption Attorneys in Support of Appellant at 3.) In doing so, they ignore the reality that their policy could actually *endanger* children trapped in troubled domestic environments by encouraging biological parents to cling to their offspring, out of fear that handing them over might place them at the mercy of a fast-tracked adoption and the end of their relationship with their children forever. Applied correctly, the placement statute preserves the right of biological parents to retain a relationship with their children even if the children remain in the legal custody of

others.

The recent national movement to unseal adoption records – thus allowing individuals to identify and reconnect with their biological parents – demonstrates that children really want to know where they came from. This underscores the importance of protecting the relationship between parents and their posterity.

Certainly, the placement statute is not inflexible. The legislature has expressly amended R.C. 5103.16(E) on two occasions to add to the list of parties exempt from its requirements. But the fact that legal custodians are not an exempted class only serves to reaffirm the legislature's purpose in safeguarding the rights of biological parents from subversion. Because courts are not free to graft an additional exception onto a well-maintained legislative enactment, this Court must answer the certified question in the affirmative, and affirm the decision of the Ninth District in *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009).

I. NATURAL PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CARE, CUSTODY, AND MANAGEMENT OF THEIR CHILDREN.

Appellants and Amici would have this court elevate the interests of individuals who are awarded legal custody of a child by a juvenile court over the rights of the natural parents. This suggestion should be rejected as it ignores the foundational principle that biological parents have a "fundamental liberty interest…in the care, custody, and management of their child." *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S. Ct. 1388.

States cannot interfere with the rights of the parents without satisfying a high burden of proof. In *Santosky*, the United States Supreme Court held that a

"preponderance of the evidence" standard violated due process in termination proceedings. Id. at 749. The Court made it clear that before a state can permanently sever the rights of parents in their natural child, it must prove its allegations by clear and convincing evidence or greater. Id. at 750.

The fundamental rights of biological parents "do[] not evaporate simply because [the natural parents] have not been model parents *or have lost temporary custody of their child to the State*." Id., emphasis added. When states attempt to intervene in the parent/child relationship, their actions receive Constitutional scrutiny.

This federal tradition is reflected at the state level. Ohio courts have long recognized the right to raise a child as an "essential" and "basic" civil right. *In re Murray* (1990), 52 Ohio St.3rd 155, 157, 556 N.E.2d 1169, 1171, quoting *Stanley v. Illinois*, (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558. A parent's right to the custody of their child has been described as "paramount." *In re Perales* (1977), 52 Ohio St.2d 89, 97, 369 N E. 2d 1047, 1051-1052.

Accordingly, biological parents "must be afforded every procedural and substantive protection the law allows." Id. In practice, protection is a two-part process. First, the General Assembly designs and enacts adoption laws that prevent the state from encroaching on a parent's constitutional rights in their children. Second, Ohio courts require strict construction and compliance. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 452 N.E.2d 1304.

The result is a tightly knit system that bends over backwards to protect the parent-child relationship. The Propositions of Law advanced by Appellant and Amici must be rejected because they creates a situation where the rights of non-related, prospective

adoptive parents trump the fundamental liberty interest of the natural parents.

II. THE LEGISLATURE UNDERSTOOD THE FUNDAMENTAL NATURE OF BIOLOGICAL PARENT'S RIGHTS, AND PASSED STATUTES THAT OPERATE AS PROCEDURAL SAFEGUARDS.

Certainly, the biological parent is not the only player in the adoptive process. The state has a legitimate interest in protecting, and providing for the stability of minor children. To this end, the legislature has the responsibility to pass laws that give the state the ability to remove children from harmful domestic environments – when absolutely necessary – and at the same time protect the natural parents' interest in the care, custody, and management of their children. See *In re Campbell*, 138 Ohio App.3d 786, 790, (10th Dist. 2000) (stating that the "termination of the rights of a birth parent is an alternative of last resort, but is sanctioned when necessary for the welfare of the child").

In Ohio, this balance is struck by dividing custody into three cognizable categories: permanent, legal, and temporary. See R.C. 2151.353(A)(4); R.C. 2151.353; R.C. 2151.31; R.C. 2151.353. Each gives the state/caretaker the responsibility of caring for the minor, but in *all* but one case, the natural parent retains the ability to visit the child, to determine the child's religious affiliation, and (importantly) consent to adoption. R.C. 2151.011(A)(46). Unless the state has been granted *permanent* custody of a child, the biological parents retain fundamental "residual rights" – like in the case at present.

Because permanent custody has the effect of irrevocably severing a biological parent's rights, a state must overcome an extremely high procedural hurdle to obtain an award. Revised Code section 2151.414 states that a court may commit a child to the permanent custody of a public children services agency or private placing agency only in situations of abuse, neglect, or dependency. R.C. 2151.414(A)(1). Moreover, the court

may grant permanent custody only if the determination is made by clear and convincing evidence. R.C. 2151.414(B).

In the present case, the juvenile court did not award permanent custody of J.A.S. and J.N.S. Therefore *by definition*, the children's biological parents retained fundamental residual rights in their care, custody, and management. To fully protect these interests by preventing surreptitious adoptions the General Assembly passed R.C. 5103.16(D).

R.C. 5103.16(D) addresses the independent placement of children. As the statute states:

> No child shall be placed or received for adoption or with intent to adopt unless placement is made by a public children services agency, an institution or association that is certified by the department of job and family services under section 5103.03 of the Revised Code to place children for adoption, or custodians in another state or foreign country, or unless all of the following criteria are met:
>
> (1) Prior to the placement and receiving of the child, the parent or parents of the child personally have applied to, and appeared before, the probate court of the county in which the parent or parents reside, or in which the person seeking to adopt the child resides, for approval of the proposed placement specified in the application and have signed and filed with the court a written statement showing that the parent or parents are aware of their right to contest the decree of adoption subject to the limitations of section 3107.16 of the Revised Code;
>
> (2) The court ordered an independent home study of the proposed placement to be conducted as provided in section 3107.031 of the Revised Code, and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;
>
> (3) The court has approved of record the proposed placement.

R.C. 5103.16. Section (E) of the placement statute further provides that "[t]his section does not apply to an adoption by a stepparent, a grandparent, or a guardian."

It is well established that "[a]lthough R.C. 5103.16 is not part and parcel of the adoption statutes, it is in substance an adoption statute," requiring strict construction and compliance. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 452 N.E.2d 1304.

If a child is transferred from one home to another and a certified agency, institution, association, or foreign custodian has not placed the child, R.C. 5103.16 requires a four-step procedural process: 1. Application to a *probate court*, 2. Appearance before a *probate court*, 3. Parental approval of the proposed placement, and 4. A signed written statement filed with the *probate court*. R.C. 5103.16(D).

In this case, the *only* placement that has occurred is for legal custody. Appellee sent her kids to reside with a maternal aunt whose husband then made arrangements for the children to live with his sister and her husband. (Record at the Petitions for Adoption and Magistrate's Decision, attached to Appellants' Brief as App. 15 to 21, at 17.) Appellants were granted legal custody, and the children resided with them for an indefinite period. Nevertheless, once Appellants decided to petition for adoption, the pre-adoptive placement requirement was triggered.

Because the plain language of R.C. 5103.16(D) requires pre-adoptive placement whenever someone other than a certified agency, institution, association, or foreign custodian places a child for the purpose of adoption, the adoptive parents must satisfy the pre-adoptive placement criteria described in Subsections (1), (2), and (3), which they did not do. Instead, the adoptive parents filed a motion asking the Probate Court to declare the requirement "unnecessary." Had the court conceded, Appellants would have been

able to skip an important procedural hurdle – shortcutting pre-placement, and moving forward to the final safeguard: consent.

Consent to an adoption, required by the legislature in R.C. 3107.06, is the final chance a court has to protect a biological parent's rights. If a proponent can show that a parent has failed without justifiable cause to contact a minor or provide maintenance and support for a period of at least one year immediately proceeding the filing of the petition or placement, consent to the adoption is not required. R.C. 3107.07(A).

R.C. 3107.07 makes pre-adoptive placement essential to the protection of the residual rights of the biological parent. Without R.C. 5103.16(D)'s extra procedural check, a natural parent might not get notice of an attempted adoption by a legal custodian until a petition for adoption is made under R.C. 3107.05. If the custodian-turned-prospective adoptive parent can successfully argue that potential consent is not required under R.C. 3107.07(A), the natural parent's rights vanish without notice.

If nothing else, R.C. 5103.16(D) serves as a wake up call to the biological parent. It provides a final opportunity to an estranged natural parent to start contacting and supporting their child – if they have not already been doing so – or risk waiving their right to consent. Without this double check, a parent might find out too late that the residual rights he or she relied on have vanished without explanation. That result is surreptitious.

III. R.C. 5103.16 APPLIES TO *ALL* INDEPENDENT PLACEMENTS THAT RESULT IN PETITIONS FOR ADOPTION, REGARDLESS OF WHEN THE CHILD MOVED INTO THE HOME OF THE PROSPECTIVE ADOPTIVE PARENTS.

A. The Ninth District is correct that pre-adoptive placement is required even when the prospective adoptive parents have been awarded legal custody.

The Ninth District Court of Appeals in *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009) recognized the legislature's goals and protected the fundamental rights of biological parents when it refused to allow legal custodians to skip pre-adoptive placement.

The non-relative adoptive parents asked the court to dispense with R.C. 5103.16(D)'s procedural requirements because: (1) they were legal custodians, and (2) in their opinion the placement was not black market or surreptitious. They further asserted that the legislature forgot to add legal custodians as an exception under R.C. 5103.16(D) and claimed that justified a court departure from strict statutory construction. They argued the court should exempt a new class of persons from the statute.

The Ninth District was unconvinced. It pointed to this Court's decision in *Lemley v. Kaiser* requiring "strict compliance" with provisions authorizing adoptions. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 452 N.E.2d 1304. It then noted that the legislature could have expressly made an exception for legal custodians if it intended, and concluded that the reason it did not is because a "significant distinction" exists between legal custodians and guardians. Id. That distinction is simple: custodians are not subject to oversight by the juvenile court once they are granted custody while guardians remain subject to oversight and control by the probate court until the termination of the guardianship.

This reading of R.C. 5103.16(D) makes sense because it matches the legislature's goal of "provid[ing] some measure of judicial control over the placement of children for adoption which is not conducted under the auspices of a statutorily recognized and

authorized agency." Id. The legislature intended to provide protection across the board. Otherwise, as the Ninth District pointed out "children services agencies [could] bypass[] the onerous burden of prosecuting a motion for permanent custody, instead seeking an award of legal custody to a third party who [could] then pursue adoption yet avoid the statutory requirement for adoptive placement and its corresponding investigation and approval." *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009) (Record, Appellants' Appendix at 1).

The Ninth District recognized that if the requirements of 5103.16(D) were not applied to non-relative legal custodians, natural parents might not be informed of an attempted adoption of their child. As at least one trial court has pointed out, "Without these proceedings and precautions, an adoption by non-relatives could be surreptitious." *In re A.W.K.*, 2d Dist. No. 22248, 2007-Ohio-6341 {¶ 15}. The Ninth District understood that a loose reading of the statute presented the greatest danger to the fundamental rights of biological parents and the parent/child relationship. Accordingly, it refused to "dispense with strict construction" and "graft[] an additional exception for legal custodians upon the statute." *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009). Appellee respectfully requests that the decision be upheld.

B. The Second District was mistaken when it held that R.C. 5103.16(D)'s requirements do not apply to unrelated persons with custody of a child who has been living in their home, and should be overruled.

The Second District's holding in *In re A.W.K.* renders a child placed into a home on the heels of a grant of legal custody immune from R.C. 5103.16(D)'s stringent adoptive placement requirements. 2s Dist. No. 22248, 2007-Ohio-6341 {¶ 14}. The

A.W.K. court justified this dramatic departure "[b]ecause [the child] already was living in the [prospective adoptive parents'] home pursuant to the juvenile court's grant of legal custody." Id. Accordingly, the court reasoned that "there was no need for agency or judicial involvement in any pre-adoptive placement under R.C. 5103.16."

This reading ignores the fact that the General Assembly could have added legal custodians to R.C. 5103.16(E)'s list of parties exempt from the pre-adoptive placement requirements when it amended the statute in 1999, but intentionally did not. It also confuses the placement requirement with physical movement. Finally, the traditional adoptive consent requirements found in R.C. 3107.05, R.C. 3107.06, and R.C. 3107.07 do not, by themselves, protect the rights of biological parents. For all of these reasons, the Second District's opinion must be overruled.

To support its departure from the application of the placement statute, the Second District cited *In re Proposed Adoption* and *In re Wilson* for support. (1998) 131 Ohio App.3d 358, 362, 722 N.E.2d 574; (Feb. 13, 1995), Jefferson App. No. 93-J-12, unreported. Their reliance on these two opinions was problematic.

In re Proposed Adoption dealt with a mother who moved her infant child into a couple's home "solely because they had agreed to adopt the child and would also care for the child until the adoption process was completed." Id. at 362. There was no evidence that children services had informed either the mother or the prospective adoptive parents that "private adoptions must be conducted through the probate court or that the child could not be moved until the court had been consulted." Id. Because the skipped step was attributable to the parties' failure to consult an attorney, and was not an attempt to conduct a "black-market baby transaction," the Sixth District found that the trial court

abused its discretion when it held that the prospective adoptees could "never be considered as suitable adoptive parents." Id. at 363. Still, the court made it clear that R.C. 5103.16(D) only allows a *parent* to petition the court to approve a private adoption placement prior to placement – *not* an adoptive parent seeking pre-placement approval. Id.

The Second District ignored this mandate and focused on the Sixth District's dicta that "[t]he key is not whether the child is in the home of the prospective adoptive parent, but rather why the child is in the home. If the child is already in the prospective adoptive home for reasons other than the expected adoption, R.C. 5103.16 has not been violated." 131 Ohio App.3d at 362.

The Sixth District in *In re Proposed Adoption* also cited the Seventh District in *In re Wilson*. (Feb. 13, 1995), Jefferson App. No. 93-J-12, unreported. *In re Wilson* involved a natural mother's challenge to a probate court's grant of adoption in favor of her child's paternal grandparents. Id. at 1. The grandparents had been granted custody of the child pursuant to the parent's divorce decree and had petitioned for adoption after taking care of the child for more than two years. Id. The child's biological father consented with the petition, but the mother did not. Id. The petition alleged that the mother's consent was unnecessary "because she had failed to communicate with the child for at least one year immediately preceding the filing of the petition and that she had failed to provide for the maintenance and support of the child as required by law, without justifiable cause." Id.

The mother challenged the adoption on several grounds, one of which was that the child "was never properly placed in [the grandparent's] home for purposes of adoption."

(Feb. 13, 1995), Jefferson App. No. 93-J-12, unreported. The Seventh District held that R.C. 5103.16 "does not state that placement under its terms is a jurisdictional prerequisite for adoption." Id. at 2.

Since the initial placements in both *In re Wilson* and *A.W.K.* were not directly for the purpose of adoption, the Second District bought into to the Sixth District's reasoning that under some circumstances the placement statute need not apply. In doing so, it ignored the fact that the General Assembly amended R.C. 5103.16 after both cases were decided to add grandparents to the list of parties exempt from pre-adoptive placement requirements. See 1999 H 59, eff. 10-29-99.

This action by the legislature is significant both for what it did and did not do. It *did* show a willingness by the Assembly to apply a flexible, fact-specific rubric for adoptive pre-placement. When circumstances are such that the potential for "black-market or surreptitious" behavior is limited – as is the case when a legal guardian, grandparent, or stepparent seeks to adopt – the legislature waives the statutory requirement. At the same time, it did *not* open the flood gates as widely as the *In re Wilson* and *In re Proposed Adoption* courts suggested might be appropriate. See 131 Ohio App.3d at 362 ("If the child is already in the prospective adoptive home for reasons other than the expected adoption, R.C. 5103.16 has not been violated.").

The Second District relied on both cases without acknowledging that their holdings were placed into serious doubt by the Assembly's 1999 amendment of R.C. 5103.16. This affirmative action by the legislature had a material effect on the statute – installing more flexibility into the pre-adoptive placement process. Accordingly, the Second District erred when it based its ultimate conclusions on opinions written before

the placement statute was amended.

1. *Nothing in R.C. 5103.16 requires children to be physically removed from a home and returned to accomplish placement.*

The Second District and Appellants assume that the placement statute does not apply to situations where a child is already living in the home of the prospective adoptive parents at the time they decide to adopt. They reason that placement only needs to occur in situations where the child is outside the home of the prospective adoptive parents and needs to be physically relocated. Otherwise, they suggest that children living in homes pursuant to grants of legal custody would be taken out only to be put back in.

Nothing in R.C. 5103.16 requires children to be physically removed from their residence and returned to accomplish placement. The fact that the Second District anticipated this result suggests that they mistakenly confused the placement requirement with physical movement. There is nothing in the language of the statute that suggests the legislature intended R.C. 5103.16 to only apply to situations where a child is living outside of a prospective adoptive parent's home *at the time* the later decides to adopt. It follows that the legislature intended for the statute to apply to *all* independent placements that result in adoption regardless of when the child moved into the home.

In other words, placement does not have to result in a physical transfer, but it does have to be a judicial check. The moment a party that has a child living in its home pursuant to a grant of legal custody decides that he or she wants to adopt, R.C. 5103.16 and its numerous procedural requirements are triggered.

The Second District's holding in *A.W.K.* creates a loophole in an otherwise stringent statutory framework that threatens to compromise the integrity of Assembly-

mandated judicial oversight. The Second District justified its action by pointing to specific facts that it found made up for the lack of strict compliance: First, the child was placed in connection with a dependency action filed in juvenile court. *In re: A.W.K.,* 2d Dist. No. 22248, 2007-Ohio-6341 {¶ 12}. Second, a county children services agency assisted in the placement. Id. Finally, judicial oversight resulted in an award of legal custody. Id.

Although these facts show executive and judicial involvement in the placement process, they obscure the fact that the input was not of the kind contemplated by the General Assembly when it enacted R.C. 5103.16. The statute plainly requires: 1. Application to a *probate court*, 2. Appearance before a *probate court*, 3. Parental approval of the proposed placement, and 4. A signed written statement filed with the *probate court*. A dependency action in a Juvenile Court followed by an award of legal custody is simply not the required amount of oversight.

This Court has established that the intent of the legislature was to provide a measure of judicial control over placement. *Lemley v. Kaiser*, 6 Ohio St.3d 258, 452 N.E.2d 1304. "That measure of judicial control is accomplished by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption." *In re Harshey* (1974), 40 Ohio App.2d 157, 163, 318 N.E.2d 544, 69 O.O.2d 165.

Judicial oversight is not all created equal. Here, a juvenile court's award of legal custody is not analogous to a probate court's approval of a proposed placement. The legislature expressly repealed former R.C. 3107.08 (See 136 Ohio Laws, Part I, 326, 391), which gave the probate court the discretion "to certify the case to the juvenile court

or conduct its own hearing to determine if placement without court approval was proper." See *In re Proposed Adoption* (1998), 131 Ohio App.3d 358, 363. By getting rid of a statute that allowed the probate court to choose whether a particular case could be "handed off" to the juvenile court, the Assembly made it clear that the probate court's role is *essential* in the placement process, and should not be brushed aside.

2. *The General Assembly intentionally chose not to add legal custodians to the list of parties exempt from R.C. 5103.16's pre-adoptive placement requirements.*

The Ninth District was right in stating that the legislature did not just "forget" to add legal custodians to the list of exemptions to the placement statute when it exempted legal guardians. *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009). The court correctly looked at the definitions of "custodian" and "guardian" and pointed out their intrinsic differences.

A "custodian" is "a person who has legal custody of a child or a public children services agency or private child placing agency that has permanent, temporary, or legal custody of a child." R.C. 2151.011(A)(11). "Legal custody" is "a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." R.C. 2151.011(A)(19). Once a juvenile court issues a final disposition awarding legal custody of a child to a person, judicial (and agency) oversight ceases. *In re Adoption of J.A.S.*, 2009 WL 2424094 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009).

By contrast, a "guardian" is "a person, association, or corporation that is granted authority by a *probate court* pursuant to Chapter 2111 of the Revised Code to exercise

parental rights over a child *to the extent provided in the court's order* and subject to the residual parental rights of the child's parents." R.C. 2151.011(A)(16), emphasis added. R.C. 2111.01(A) similarly defines "guardian" as "any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor." The probate court has exclusive jurisdiction to appoint guardians. R.C. 2101.24(A)(1)(e).

The definitions make it clear that a custodian has an ability to exercise independent discretion, while a guardian is kept on a tight judicial leash. The difference in court control justifies the Assembly's decision to exempt one, but not the other.

Appellants' protest that although step-parents and grandparents have less judicial oversight than custodians, both are exempted under the current state of the law. (Merit Brief of Appellants at 6.) This ignores the natural proximity of both classes to the biological parent. Step-parents are in the home, and have a legal relationship to a biological parent. Grandparents have a biological relationship to both a natural parent and the child. The legislature clearly had a rational basis when it decided that there was less of a possibility of a natural parent's rights being pulled out from under them in cases of petitioning step-parents and grandparents, as compared to legal custodians.[1] When biological connections exist there is less of a risk that children will be cut off from their roots.

For all of these reasons, this Court cannot carve out a new exception to R.C. 5103.16(E) without undermining the separation of the powers doctrine of the Ohio Constitution. Appellants should raise their concerns about statutory allowances with the

[1] This is also believed to be the case with guardians because most guardians are family members, though Appellee can point to no statistical analysis to support this assertion.

legislature, not this Court.

C. The traditional adoptive consent requirements found in R.C. 3107.05, R.C. 3107.06, and R.C. 3107.07 do not, by themselves, adequately protect the rights of the biological parents.

A universal application of R.C. 5103.16 is necessary to provide a child's biological parents with notice of a prospective adoption. Without this added procedural step, natural parents might not be informed of the imminent adoption of their child, until they receive notice that a hearing is set to take place on a petition alleging that consent to adoption is not required under R.C. 3107.05, R.C. 3107.06, R.C. 3107.07. By the time this happens, it is already too late for many struggling parents who were initially motivated to give up their children to protect them from less than ideal domestic environments. Parents who part with children on an emergency basis under these circumstances are unquestionably motivated to do so because they retain fundamental residual rights by statute.

As R.C. 2151.011(A)(46) describes, "Residual parental rights, privileges, and responsibilities" are "those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, *consent to adoption*, the privilege to determine the child's religious affiliation, and the responsibility for support," emphasis added. Acceptance of the Second District's view of the scope of R.C. 5103.16 could have a disastrous practical effect on the willingness of fledging parents to give up their children to appointed legal custodians. Parents undergoing treatment for severe substance abuse problems, or mental or physical illnesses would not just have the responsibility to get better, but also would bear the burden of making sure they

maintained contact with their children, thus ensuring that their consent to an imminent adoption would be required under R.C. 3107.05, R.C. 3107.06, and R.C. 3107.07. It is possible that some parents do not make contact with their children because they do not want to be seen in a depressed or dependant state.

These concerns motivated the trial court in *A.W.K.* to note that "[w]ithout these proceedings and precautions, an adoption by non-relatives could be surreptitious." *In re A.W.K.*, 2d Dist. No. 22248, 2007-Ohio-6341 {¶ 15}. Without R.C. 5103.16(D)'s extra procedural step, a natural parent might not get notice of an attempted adoption by a custodian until a petition is made under R.C. 3107.05. If the custodian-turned-prospective adoptive parent can successfully argue that consent is not required under R.C. 3107.07, the natural parent's rights disappear under the cover of night. If nothing else, R.C. 5103.16(D) is a biological parent's wake up call.

IV. AS APPLIED, THE GUIDELINES OF PRE-ADOPTIVE PLACEMENT UNDER R.C. 5103.16(D) PROTECT THE SHORT AND LONG-TERM INTERESTS OF CHILDREN AND BIOLOGICAL PARENTS.

This Court must affirm the Ninth District's application of R.C. 5103.16(D) to protect the short and long-term interests of children.

It is true that as long as the biological parents retain residual parental rights to a child, they must consent to the placement of that child for adoption. However, contrary to Appellants' contention, it is not the case that an affirmation of the Ninth District's decision would prevent a legal custodian from ever adopting a minor unless the natural parents placed the child for adoption. (Appellants' Brief at 4.) If the natural parents do not exercise the residual rights given to them under the award of legal custody, the child

may be deemed abandoned and those rights may be extinguished. See R. C. 3107.07(A). Alternatively, the legal custodians could seek a disposition committing the child to the permanent custody of a public children services agency or private child placing agency, which would then be able to make the necessary placement for adoption with the legal custodians. See R.C. 2151.353(4). But in the absence of a judicial determination by clear and convincing evidence that the biological parent should lose his or her rights, those rights are protected by the placement statute.

There is no threat to a child's short term stability in the application of R.C. 5103.16(D). There is nothing in Ohio's statutory scheme that requires the removal of the child from the home of the legal custodian for a valid placement for adoption to take place.

Further, legal custody is intended to be permanent and stable. Before a person is awarded legal custody by a juvenile court of a minor adjudicated abused, neglected, or dependent, the person must sign the following:

> A statement of understanding for legal custody that contains at least the following provisions:
>
> (a) That it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child;
>
> (b) That the person understands <u>that legal custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian for the child until the child reaches the age of majority</u>. . .
>
> (c) That the parents of the child have residual parental rights, privileges, and responsibilities, including but not limited to, . . . consent to adoption, . . .

R.C. 2151.353(A)(3), emphasis added. If a biological parent retains residual parental rights and exercises those rights, the child's stability is not threatened. A biological parent may not remove the child from the home of the legal custodian without demonstrating a change of circumstances with the child or the legal custodian. R.C. 3109.04(E)(1)(a). If the natural parent does not exercise those rights, the rights may be lost.

Moreover, stability is augmented by allowing children to maintain contact with their biological parents in situations of awarded legal custody because the biological parents and children can maintain their family bond. The legislative amendments adding exceptions to R.C. 5103.16 in (E) support this contention. In adoptions by a stepparent, grandparent or guardian, there is a greater likelihood that a familial bond will be retained than in adoptions by unrelated third parties.

It is important for children to retain a connection with where they came from whenever possible. Adoption by a non-family member severs that relationship between children and their biological parent and should be disfavored unless it is in the best interest of the child for that relationship to be severed.

The national trend among states to amend statutes simplifying the process for adopted children to find their lineage acknowledges the importance of allowing children to stay connected to their biological parents. For example, most states now allow birthparents, minor and adult adoptees, who desire to exchange identifying information, to obtain identifying information through adoption records. See e.g. Ala.Code 26-10A-31; Ariz.Rev.Stat. 8-129; Col.Rev.Stat. 19-5-304; 19-5-305; Conn.Gen.Stat. 45a-746; Del.Code Ann. Tit. 13, 924; Ill.Ann.Stat. 750, 50.18.1; 50.18.4; Ind.Code 31-19-18-2;

Mich.Comp.Laws Ann. 710.68; Wisc.Stat. 48.432; Vir.Code Ann. Code 63.2-1246; (all allowing adoptee to access identifying information). The mutual identification between biological parent and child fulfills the purpose of R.C. 5103.16(D)—to protect the fundamental rights of the biological parents and to promote family unity.

The state trend acknowledges the benefits of allowing adoptees to find their birthparents. Thus, this Court should affirm the decision of the Ninth District because the application of R.C. 5103.16(D) and its pre-placement for the purpose of adoption preserves the fundamental rights of the biological parent and fulfills the short and long-term domestic stability of their child.

CONCLUSION

The placement statute, R.C. 5103.16(D), protects the essential, basic, and fundamental rights of biological parents to society with their children. As long as natural parents retain their residual parental rights, pre-adoptive placement is required by R.C. 5103.16(D) when the prospective adoptive parents have been awarded legal custody of the child pursuant to a final dispositional order out of the juvenile court. The legislature made an exception for cases where the prospective adoptive parents are stepparents, grandparents, or guardians, but did not choose to add legal custodians to that list.

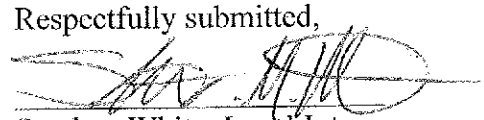
Legal custodians may not skip the pre-adoptive placement step if they subsequently decide they would like to adopt the child, regardless of how long the children have been in their custody. This step is necessary to put the biological parents on notice that if they do not exercise their residual parental rights, they may waive their right to consent to the adoption. This is not redundant or duplicative, but necessary to protect these important parental rights. The application of R.C. 5301.16(D) promotes

stability by encouraging natural parents to exercise their residual rights and foster their relationship with their children while children are living with their legal custodians.

For these reasons, Appellee respectfully requests that this Court affirm the holding of the Ninth District below, and adopt the following proposition of law:

> Pre-adoptive placement is required by R.C. 5103.16(D) when the prospective adoptive parents have been awarded legal custody of the child pursuant to a final dispositional order out of the juvenile court, regardless of whether the child has been living with the prospective adoptive parents since the award of legal custody.

Respectfully submitted,



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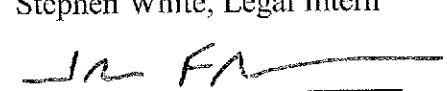

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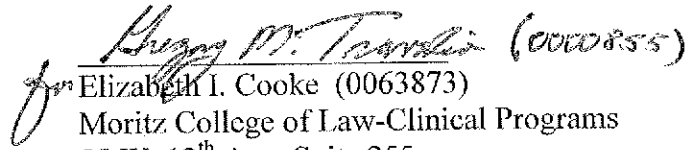

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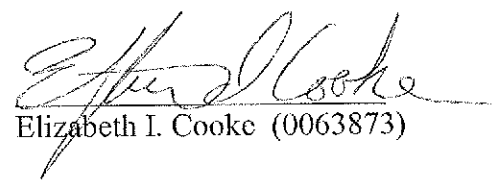

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APPENDIX

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2101.24 Jurisdiction of probate court.

(A)(1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

(a) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. If the probate judge is unavoidably absent, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of these acts shall be preserved in the usual records of the probate court.

(b) To grant and revoke letters testamentary and of administration;

(c) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(d) To appoint the attorney general to serve as the administrator of an estate pursuant to section 2113.06 of the Revised Code;

(e) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts;

(f) To grant marriage licenses;

(g) To make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that they are unable to manage their property and affairs effectively, subject to guardianship;

(h) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(i) To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(j) To authorize the completion of real estate contracts on petition of executors and administrators;

(k) To construe wills;

(l) To render declaratory judgments, including, but not limited to, those rendered pursuant to section 2107.084 of the Revised Code;

(m) To direct and control the conduct of fiduciaries and settle their accounts;

(n) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by the trustee;

(o) To terminate a testamentary trust in any case in which a court of equity may do so;

(p) To hear and determine actions to contest the validity of wills;

(q) To make a determination of the presumption of death of missing persons and to adjudicate the property rights and obligations of all parties affected by the presumption;

(r) To hear and determine an action commenced pursuant to section 3107.41 of the Revised Code to obtain the release of information pertaining to the birth name of the adopted person and the identity of the adopted person's biological parents and biological siblings;

(s) To act for and issue orders regarding wards pursuant to section 2111.50 of the Revised Code;

(t) To hear and determine actions against sureties on the bonds of fiduciaries appointed by the probate court;

(u) To hear and determine actions involving informed consent for medication of persons hospitalized pursuant to section 5122.141 or 5122.15 of the Revised Code;

(v) To hear and determine actions relating to durable powers of attorney for health care as described in division (D) of section 1337.16 of the Revised Code;

(w) To hear and determine actions commenced by objecting individuals, in accordance with section 2133.05 of the Revised Code;

(x) To hear and determine complaints that pertain to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment in connection with certain patients allegedly in a terminal condition or in a permanently unconscious state pursuant to division (E) of section 2133.08 of the Revised Code, in accordance with that division;

(y) To hear and determine applications that pertain to the withholding or withdrawal of nutrition and hydration from certain patients allegedly in a permanently unconscious state pursuant to section 2133.09 of the Revised Code, in accordance with that section;

(z) To hear and determine applications of attending physicians in accordance with division (B) of section 2133.15 of the Revised Code;

(aa) To hear and determine actions relative to the use or continuation of comfort care in connection with certain principals under durable powers of attorney for health care, declarants under declarations, or patients in accordance with division (E) of either section 1337.16 or 2133.12 of the Revised Code;

(bb) To hear and determine applications for an order relieving an estate from administration under section 2113.03 of the Revised Code;

(cc) To hear and determine applications for an order granting a summary release from administration under section 2113.031 of the Revised Code;

(dd) To hear and determine actions relating to the exercise of the right of disposition, in accordance with section 2108.90 of the Revised Code;

(ee) To hear and determine actions relating to the disinterment and reinterment of human remains under section 517.23 of the Revised Code.

(2) In addition to the exclusive jurisdiction conferred upon the probate court by division (A)(1) of this section, the probate court shall have exclusive jurisdiction over a particular subject matter if both of the following apply:

(a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.

(b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court or agency.

(B)(1) The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:

(a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, any action that involves that subject matter;

(b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(u) and (z) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus.

(2) Any action that involves a concurrent jurisdiction subject matter and that is before the probate court may be transferred by the probate court, on its order, to the general division of the court of common pleas.

(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.

(D) The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

Effective Date: 08-29-2000; 10-12-2006; 01-01-2007

2111.01 Guardian and conservatorship definitions.

As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19 of the Revised Code, means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor. When applicable, "guardian" includes, but is not limited to, a limited guardian, an interim guardian, a standby guardian, and an emergency guardian appointed pursuant to division (B) of section 2111.02 of the Revised Code. "Guardian" also includes an agency under contract with the department of developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent.

(B) "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code.

(C) "Resident guardian" means a guardian appointed by a probate court to have the care and management of property in this state that belongs to a nonresident ward.

(D) "Incompetent" means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.

(E) "Next of kin" means any person who would be entitled to inherit from a ward under Chapter 2105. of the Revised Code if the ward dies intestate.

(F) "Conservator" means a conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(G) "Parent" means a natural parent or adoptive parent of a minor child whose parental rights and responsibilities have not been terminated by a juvenile court or another court.

Amended by 128th General Assembly ch. 7, SB 79, § 1, eff. 10/6/2009.

Effective Date: 01-14-1997

2151.01 Liberal interpretation and construction.

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

Effective Date: 01-01-2002

2151.31 Taking child into custody.

(A) A child may be taken into custody in any of the following ways:

(1) Pursuant to an order of the court under this chapter or pursuant to an order of the court upon a motion filed pursuant to division (B) of section 2930.05 of the Revised Code;

(2) Pursuant to the laws of arrest;

(3) By a law enforcement officer or duly authorized officer of the court when any of the following conditions are present:

(a) There are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, as described in section 2151.03 of the Revised Code, and the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(b) There are reasonable grounds to believe that the child is in immediate danger from the child's surroundings and that the child's removal is necessary to prevent immediate or threatened physical or emotional harm;

(c) There are reasonable grounds to believe that a parent, guardian, custodian, or other household member of the child's household has abused or neglected another child in the household and to believe that the child is in danger of immediate or threatened physical or emotional harm from that person.

(4) By an enforcement official, as defined in section 4109.01 of the Revised Code, under the circumstances set forth in section 4109.08 of the Revised Code;

(5) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child has run away from the child's parents, guardian, or other custodian;

(6) By a law enforcement officer or duly authorized officer of the court when any of the following apply:

(a) There are reasonable grounds to believe that the conduct, conditions, or surroundings of the child are endangering the health, welfare, or safety of the child.

(b) A complaint has been filed with respect to the child under section 2151.27 or 2152.021 of the Revised Code or the child has been indicted under division (A) of section 2152.13 of the Revised Code or charged by information as described in that section and there are reasonable grounds to believe that the child may abscond or be removed from the jurisdiction of the court.

(c) The child is required to appear in court and there are reasonable grounds to believe that the child will not be brought before the court when required.

(d) There are reasonable grounds to believe that the child committed a delinquent act and that taking the child into custody is necessary to protect the public interest and safety.

(B)(1) The taking of a child into custody is not and shall not be deemed an arrest except for the purpose of determining its validity under the constitution of this state or of the United States.

(2) Except as provided in division (C) of section 2151.311 of the Revised Code, a child taken into custody shall not be held in any state correctional institution, county, multicounty, or municipal jail or workhouse, or any other place where any adult convicted of crime, under arrest, or charged with crime is held.

(C)(1) Except as provided in division (C)(2) of this section, a child taken into custody shall not be confined in a place of juvenile detention or placed in shelter care prior to the implementation of the court's final order of disposition, unless detention or shelter care is required to protect the child from immediate or threatened physical or emotional harm, because the child is a danger or threat to one or more other persons and is charged with violating a section of the Revised Code that may be violated by an adult, because the child may abscond or be removed from the jurisdiction of the court, because the child has no parents, guardian, or custodian or other person able to provide supervision and care for the child and return the child to the court when required, or because an order for placement of the child in detention or shelter care has been made by the court pursuant to this chapter.

(2) A child alleged to be a delinquent child who is taken into custody may be confined in a place of juvenile detention prior to the implementation of the court's final order of disposition if the confinement is authorized under section 2152.04 of the Revised Code or if the child is alleged to be a serious youthful offender under section 2152.13 of the Revised Code and is not released on bond.

(D) Upon receipt of notice from a person that the person intends to take an alleged abused, neglected, or dependent child into custody pursuant to division (A)(3) of this section, a juvenile judge or a designated referee may grant by telephone an ex parte emergency order authorizing the taking of the child into custody if there is probable cause to believe that any of the conditions set forth in divisions (A)(3)(a) to (c) of this section are present. The judge or referee shall journalize any ex parte emergency order issued pursuant to this division. If an order is issued pursuant to this division and the child is taken into custody pursuant to the order, a sworn complaint shall be filed with respect to the child before the end of the next business day after the day on which the child is taken into custody and a hearing shall be held pursuant to division (E) of this section and the Juvenile Rules. A juvenile judge or referee shall not grant an emergency order by telephone pursuant to this division until after the judge or referee determines that reasonable efforts have been made to notify the parents, guardian, or custodian of the child that the child may be placed into shelter care and of the reasons for placing the child into shelter care, except that, if the requirement for notification would jeopardize the physical or emotional safety of the child or result in the child being removed from the court's jurisdiction, the judge or referee may issue the order for taking the child into custody and placing the child into shelter care prior to giving notice to the parents, guardian, or custodian of the child.

(E) If a judge or referee pursuant to division (D) of this section issues an ex parte emergency order for taking a child into custody, the court shall hold a hearing to determine whether there is probable cause for the emergency order. The hearing shall be held before the end of the next business day after the day on which the emergency order is issued, except that it shall not be held later than seventy-two hours after the emergency order is issued.

If the court determines at the hearing that there is not probable cause for the issuance of the

emergency order issued pursuant to division (D) of this section, it shall order the child released to the custody of the child's parents, guardian, or custodian. If the court determines at the hearing that there is probable cause for the issuance of the emergency order issued pursuant to division (D) of this section, the court shall do all of the following:

(1) Ensure that a complaint is filed or has been filed;

(2) Comply with section 2151.419 of the Revised Code;

(3) Hold a hearing pursuant to section 2151.314 of the Revised Code to determine if the child should remain in shelter care.

(F) If the court determines at the hearing held pursuant to division (E) of this section that there is probable cause to believe that the child is an abused child, as defined in division (A) of section 2151.031 of the Revised Code, the court may do any of the following:

(1) Upon the motion of any party, the guardian ad litem, the prosecuting attorney, or an employee of the public children services agency, or its own motion, issue reasonable protective orders with respect to the interviewing or deposition of the child;

(2) Order that the child's testimony be videotaped for preservation of the testimony for possible use in any other proceedings in the case;

(3) Set any additional conditions with respect to the child or the case involving the child that are in the best interest of the child.

(G) This section is not intended, and shall not be construed, to prevent any person from taking a child into custody, if taking the child into custody is necessary in an emergency to prevent the physical injury, emotional harm, or neglect of the child.

Effective Date: 05-16-2002

2151.414 Hearing on motion requesting permanent custody.

(A)(1) Upon the filing of a motion pursuant to section 2151.413 of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section 2151.314 of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section 2151.413 of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section 2151.35 of the Revised Code. If the court issues an order pursuant to section 2151.353 of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section 2151.413 of the Revised Code.

The failure of the court to comply with the time periods set forth in division (A)(2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B)(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public

children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

(b) The child is abandoned.

(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section 2151.413 of the Revised Code, the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section 2151.353 of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

For the purposes of division (D)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after the removal of the child from home.

(2) If all of the following apply, permanent custody is in the best interest of the child and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency:

(a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

(b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.

(c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.

(d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;

(3) The parent committed any abuse as described in section 2151.031 of the Revised Code against the child, caused the child to suffer any neglect as described in section 2151.03 of the Revised Code, or allowed the child to suffer any neglect as described in section 2151.03 of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.03, 2905.04, 2905.05, 2907.07, 2907.08, 2907.09, 2907.12, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(7) The parent has been convicted of or pleaded guilty to one of the following:

(a) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;

(b) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or

another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E)(7)(a) or (d) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

(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.

(15) The parent has committed abuse as described in section 2151.031 of the Revised Code against

the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

Effective Date: 10-05-2000; 2008 SB163 08-14-2008; 2008 HB7 04-07-2009

3107.08 Executing consent.

(A) The required consent to adoption may be executed at any time after seventy-two hours after the birth of a minor, and shall be executed in the following manner:

(1) If by the person to be adopted, in the presence of the court;

(2) If by a parent of the person to be adopted, in accordance with section 3107.081 of the Revised Code;

(3) If by an agency, by the executive head or other authorized representative, in the presence of a person authorized to take acknowledgments;

(4) If by any other person, in the presence of the court or in the presence of a person authorized to take acknowledgments;

(5) If by a juvenile court, by appropriate order.

(B) A consent which does not name or otherwise identify the prospective adoptive parent is valid if it contains a statement by the person giving consent that it was voluntarily executed irrespective of disclosure of the name or other identification of the prospective adoptive parent.

Effective Date: 09-18-1996

3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.

(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. If the court issues a shared parenting order under this division and it is necessary for the purpose of receiving public assistance, the court shall designate which one of the parents' residences is to serve as the child's home. The child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code.

(B)(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

(b) The court first shall determine the reasoning ability of the child. If the court determines that the child does not have sufficient reasoning ability to express the child's wishes and concern with respect to the allocation of parental rights and responsibilities for the care of the child, it shall not determine the child's wishes and concerns with respect to the allocation. If the court determines that the child has sufficient reasoning ability to express the child's wishes or concerns with respect to the allocation, it then shall determine whether, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation. If the court determines that, because of special circumstances, it would not be in the best interest of the child to determine the child's wishes and concerns with respect to the allocation, it shall not determine the child's wishes and concerns with respect to the allocation and shall enter its written findings of fact and opinion in the journal. If the court determines that it would be in the best interests of the child to determine the child's wishes and concerns with respect to the allocation, it shall proceed to make that determination.

(c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview.

(3) No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes and concerns regarding the allocation of parental rights and responsibilities concerning the child. No court, in determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child or for purposes of resolving any issues related to the making of that allocation, shall accept or consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters.

(C) Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

If the court determines that either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being a neglected child, that either parent previously has been determined to be the perpetrator of the neglectful act that is the basis of an adjudication that a child is a neglected child, or that there is reason to believe that either parent has acted in a manner resulting in a child being a neglected child, the court shall consider that fact against naming that parent the residential parent and against granting a shared parenting decree. When the court allocates parental rights and responsibilities for the care of children or determines whether to grant shared parenting in any proceeding, it shall consider whether either parent or any member of the household of either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of

the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child. If the court determines that either parent has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding, has been convicted of or pleaded guilty to any sexually oriented offense or other offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the proceeding and caused physical harm to the victim in the commission of the offense, or has been determined to be the perpetrator of the abusive act that is the basis of an adjudication that a child is an abused child, it may designate that parent as the residential parent and may issue a shared parenting decree or order only if it determines that it is in the best interest of the child to name that parent the residential parent or to issue a shared parenting decree or order and it makes specific written findings of fact to support its determination.

(D)(1)(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable:

(i) If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to it. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motion requesting shared parenting of the children and proceed as if the request in the pleadings or the motion had not been made. The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.

(ii) If each parent makes a request in the parent's pleadings or files a motion and each also files a separate plan, the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that neither filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections, or may select one of the filed plans and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit

changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the requests in the pleadings or the motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the parents' pleadings or denies their motions requesting shared parenting under this division and proceeds as if the requests in the pleadings or the motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(iii) If each parent makes a request in the parent's pleadings or files a motion but only one parent files a plan, or if only one parent makes a request in the parent's pleadings or files a motion and also files a plan, the court in the best interest of the children may order the other parent to file a plan for shared parenting in accordance with division (G) of this section. The court shall review each plan filed to determine if any plan is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. If the court determines that no filed plan is in the best interest of the children, the court may order each parent to submit appropriate changes to the parent's plan or both of the filed plans to meet the court's objections or may select one filed plan and order each parent to submit appropriate changes to the selected plan to meet the court's objections. If changes to the plan or plans are submitted to meet the court's objections, and if any of the filed plans with the changes is in the best interest of the children, the court may approve the plan with the changes. If changes to the plan or plans are not submitted to meet the court's objections, or if the parents submit changes to the plan or plans to meet the court's objections but the court determines that none of the filed plans with the submitted changes is in the best interest of the children, the court may reject the portion of the parents' pleadings or deny the parents' motion or reject the portion of the parents' pleadings or deny their motions requesting shared parenting of the children and proceed as if the request or requests or the motion or motions had not been made. If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the pleadings or denies the motion or motions requesting shared parenting under this division and proceeds as if the request or requests or the motion or motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(b) The approval of a plan under division (D)(1)(a)(ii) or (iii) of this section is discretionary with the court. The court shall not approve more than one plan under either division and shall not approve a plan under either division unless it determines that the plan is in the best interest of the children. If the court, under either division, does not determine that any filed plan or any filed plan with submitted changes is in the best interest of the children, the court shall not approve any plan.

(c) Whenever possible, the court shall require that a shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child.

(d) If a court approves a shared parenting plan under division (D)(1)(a)(i), (ii), or (iii) of this section,

the approved plan shall be incorporated into a final shared parenting decree granting the parents the shared parenting of the children. Any final shared parenting decree shall be issued at the same time as and shall be appended to the final decree of dissolution, divorce, annulment, or legal separation arising out of the action out of which the question of the allocation of parental rights and responsibilities for the care of the children arose.

No provisional shared parenting decree shall be issued in relation to any shared parenting plan approved under division (D)(1)(a)(i), (ii), or (iii) of this section. A final shared parenting decree issued under this division has immediate effect as a final decree on the date of its issuance, subject to modification or termination as authorized by this section.

(2) If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, that it considers necessary or as the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

(E)(1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

(b) One or both of the parents under a prior decree allocating parental rights and responsibilities for the care of children that is not a shared parenting decree may file a motion requesting that the prior decree be modified to give both parents shared rights and responsibilities for the care of the children. The motion shall include both a request for modification of the prior decree and a request for a shared parenting order that complies with division (G) of this section. Upon the filing of the motion, if the court determines that a modification of the prior decree is authorized under division (E)(1)(a) of this section, the court may modify the prior decree to grant a shared parenting order, provided that the court shall not modify the prior decree to grant a shared parenting order unless the court complies with divisions (A) and (D)(1) of this section and, in accordance with those divisions, approves the submitted shared parenting plan and determines that shared parenting would be in the best interest of the children.

(2) In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(d) Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

(2) In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

(3) When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition.

(G) Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance.

(H) If an appeal is taken from a decision of a court that grants or modifies a decree allocating parental rights and responsibilities for the care of children, the court of appeals shall give the case calendar priority and handle it expeditiously.

(I) Upon receipt of an order to active military service in the uniformed services, a parent who is subject to an order allocating parental rights and responsibilities or in relation to whom an action to allocate parental rights and responsibilities is pending and who is ordered to active military service shall notify the other parent who is subject to the order or in relation to whom the case is pending of the order to active military service within three days of receiving the military service order. Either parent may apply to the court for a hearing to expedite an allocation or modification proceeding. The application shall include the date on which the active military service begins.

The court shall schedule a hearing upon receipt of the application and hold the hearing not later than thirty days after receipt of the application, except that the court shall give the case calendar priority and handle the case expeditiously if exigent circumstances exist in the case.

The court shall not modify a prior decree allocating parental rights and responsibilities unless the court determines that there has been a change in circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that modification is necessary to serve the best interest of the child. The court may consider active military service in the uniformed services in determining whether a change in circumstances exists under this section and shall make specific

written findings of fact to support any modification under this division.

Upon application by either parent, the court may modify a prior decree allocating parental rights and responsibilities after the parent's active military service has been terminated, hearing testimony and making specific written findings of fact to support the modification.

Nothing in this division shall prevent a court from issuing a temporary order allocating or modifying parental rights and responsibilities for the duration of the parent's active military service.

(J) As used in this section:

(1) "Abused child" has the same meaning as in section 2151.031 of the Revised Code.

(2) "Active military service" means the performance of active military duty by a member of the uniformed services for a period of more than thirty days.

(3) "Neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(4) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(5) "Uniformed services" means the United States armed forces, army national guard and air national guard when engaged in active duty for training, or the commissioned corps of the United States public health service.

(K) As used in the Revised Code, "shared parenting" means that the parents share, in the manner set forth in the plan for shared parenting that is approved by the court under division (D)(1) and described in division (L)(6) of this section, all or some of the aspects of physical and legal care of their children.

(L) For purposes of the Revised Code:

(1) A parent who is granted the care, custody, and control of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(2) A parent who primarily is allocated the parental rights and responsibilities for the care of a child and who is designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting has "custody of the child" and "care, custody, and control of the child" under the order, and is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child under the order.

(3) A parent who is not granted custody of a child under an order that was issued pursuant to this section prior to April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(4) A parent who is not primarily allocated the parental rights and responsibilities for the care of a child and who is not designated as the residential parent and legal custodian of the child under an order that is issued pursuant to this section on or after April 11, 1991, and that does not provide for shared parenting is the "parent who is not the residential parent," the "parent who is not the residential parent and legal custodian," or the "noncustodial parent" of the child under the order.

(5) Unless the context clearly requires otherwise, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, both parents have "custody of the child" or "care, custody, and control of the child" under the order, to the extent and in the manner specified in the order.

(6) Unless the context clearly requires otherwise and except as otherwise provided in the order, if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(7) Unless the context clearly requires otherwise and except as otherwise provided in the order, a designation in the order of a parent as the residential parent for the purpose of determining the school the child attends, as the custodial parent for purposes of claiming the child as a dependent pursuant to section 152(e) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended, or as the residential parent for purposes of receiving public assistance pursuant to division (A)(2) of this section, does not affect the designation pursuant to division (L)(6) of this section of each parent as the "residential parent," the "residential parent and legal custodian," or the "custodial parent" of the child.

(M) The court shall require each parent of a child to file an affidavit attesting as to whether the parent, and the members of the parent's household, have been convicted of or pleaded guilty to any of the offenses identified in divisions (C) and (F)(1)(h) of this section.

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