

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**In The Matter Of:** : **Case No. 2010-0180**  
**C.B.** :  
**NEGLECTED and** : **On Appeal from the**  
**DEPENDENT CHILD** : **Cuyahoga County Court**  
: **of Appeals, Eighth**  
: **Appellate District**  
:  
: **Court of Appeals**  
: **Case No. 92775**

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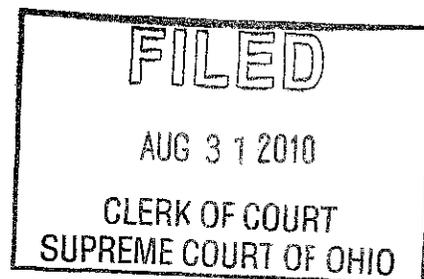
**MERIT BRIEF OF AMICUS CURIAE  
GUARDIAN AD LITEM PROJECT  
IN SUPPORT OF APPELLANTS GAL THOMAS KOZEL AND C.B.**

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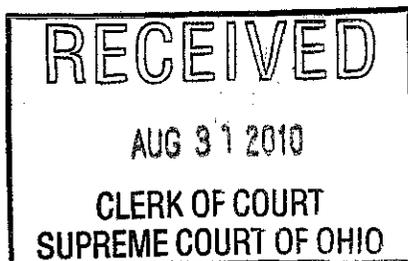
GUARDIAN AD LITEM PROJECT  
By: JUDITH L. LAYNE (0056064) (COUNSEL OF RECORD)  
2163 EAST 22<sup>ND</sup> STREET  
CLEVELAND, OH 44115  
(216) 443-3377 (Telephone)  
(216) 443-3490 (fax)  
E-mail: [INFO@GALPROJECT.ORG](mailto:INFO@GALPROJECT.ORG)  
AMICUS CURIAE GUARDIAN AD LITEM PROJECT

Jonathan Garver, Esq. (0031009) (COUNSEL OF RECORD)  
The Brownhoist Building  
4403 St. Clair Avenue  
Cleveland, Ohio 44103  
(216) 391-1112 (Telephone)  
(216) 881-3928 (Fax)  
E-mail: [jgarver100@aol.com](mailto:jgarver100@aol.com)  
COUNSEL FOR APPELLANT  
THOMAS KOZEL, GUARDIAN AD LITEM

R. Brian Moriarty, Esq. (0064128) (COUNSEL OF RECORD)  
1370 Ontario Street, Suite 2000  
Cleveland, Ohio 44113  
(216) 566-8228 (Telephone)  
(216) 623-7314 (Fax)  
E-mail: [bmoriarty@marketal.com](mailto:bmoriarty@marketal.com)  
COUNSEL FOR APPELLANT C.B.



(continued on next page)



Timothy R. Sterkel, Esq. (0062869) (COUNSEL OF RECORD)  
1414 South Green Road, # 310  
Cleveland, Ohio 44121  
(216) 291-1050 (Telephone)  
COUNSEL FOR APPELLEE FATHER

George Coghill, Esq. (0033778)  
10211 Lakeshore Boulevard  
Cleveland, Ohio 44108  
(216) 451-2323 (Telephone)  
(216) 451-5252 (Fax)  
E-mail: [georgecoghill@sbcglobal.net](mailto:georgecoghill@sbcglobal.net)  
GUARDIAN AD LITEM FOR FATHER

Betty Farley, Esq. (0039651) (COUNSEL OF RECORD)  
1801 East 12<sup>th</sup> Street, Suite 211  
Cleveland, Ohio 44114  
(216) 621-1922 (Telephone)  
(216) 621-1918 (Fax)  
COUNSEL FOR APPELLEE MOTHER

Carla L. Golubovic, Esq. (0061954)  
P.O. Box 29127  
Parma, Ohio 44129  
(216) 310-5441 (Telephone)  
(440) 842-2122 (Fax)  
E-mail: [cgolubovic@aol.com](mailto:cgolubovic@aol.com)  
GUARDIAN AD LITEM FOR MOTHER

Bill Mason, Esq. (0037540)  
Cuyahoga County Prosecuting Attorney  
By: Greg Millas, Esq. (0066769) (COUNSEL OF RECORD)  
4261 Fulton Parkway  
Cleveland, Ohio 44144  
(216) 635-3802 (Telephone)  
(216) 635-3881 (Fax)  
E-mail: [p4gam@cuyahogacounty.us](mailto:p4gam@cuyahogacounty.us)  
COUNSEL FOR CCDCFS

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## PREAMBLE

The Guardian Ad Litem Project is an independent Project of the Cleveland Metropolitan Bar Association. The Project consists of an administrator and an Advisory Committee (hereafter referred to as "Project"). The Committee and its administrator recruit, provide training to, and monitor the performance of attorney Guardians Ad Litem practicing in the Juvenile Court. The Project maintains a list of approved Guardians Ad Litem who have completed pre-service training and advanced trainings and who comply with all other requirements for Guardians Ad Litem practicing in Juvenile Court. The Project has adopted procedures relating to the practice of Guardians Ad Litem approved by Juvenile Court.

On behalf of the Guardians Ad Litem practicing in Cuyahoga County Juvenile Court, the Project desires to be heard to ensure Guardians Ad Litem have the opportunity to perform their statutorily imposed duties. If this court sustains the ruling of the Cuyahoga County Court of Appeals, Eighth Appellate District, in this case, it is the belief of the Project that Guardians Ad Litem will not be able to fulfill their mandated duties. The ability of a Guardian Ad Litem to advocate for the best interests of their wards would be altered dramatically. Guardians Ad Litem should be permitted to appeal a denial of a motion for Permanent Custody. Additionally, an order granting legal custody to a party should be determined to be a final appealable order. Determining that an award of legal custody to a parent is not a final appealable order would adversely impact the ability of Guardians Ad Litem to advance the best interests of their wards. Finally, the issue of the appointment of counsel for a minor child should be clarified by the Supreme Court, specifically regarding when an attorney should be appointed to represent a child in a termination of parental rights case.

## STATEMENT OF FACTS

This cause arises from a contested dispositional trial on a *Motion to Modify Temporary Custody to Permanent Custody* which was filed pursuant to R.C. 2151.413 and R.C. 2151.415 in the Cuyahoga County Juvenile Court by the Cuyahoga County Department of Children and Family Services (hereinafter referred to as "CCDCFS"). Appeal has been taken from the decision of the Eighth District Court of Appeals in the case of *In re C.B.*, Cuyahoga App. No. 92775, which decision dismisses said appeal for lack of a final appealable order.

On March 22, 2006, CCDCFS filed a complaint alleging that the child C.B. was a dependent child and requesting a dispositional order of Temporary Custody. On June 7, 2006, C.B. was adjudged to be dependent and was ordered placed in the temporary custody of CCDCFS. On July 27, 2007, CCDCFS filed a Motion to Modify Temporary Custody to Permanent Custody (hereinafter referred to as "Motion") with regard to C.B. A contested trial was held on the Motion, after which the trial court issued its decision, in which the trial court denied CCDCFS' Motion, terminated temporary custody, and ordered the child C.B. placed in the legal custody of her father subject to the protective supervision of CCDCFS.

The mother appealed this decision to the Eighth District Court of Appeals on February 5, 2009, and the child through her guardian ad litem filed a cross-appeal thereafter, but these appeals were dismissed for lack of a final appealable order on the basis of this Honorable Court's pronouncement in the decision of *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, 873 N.E.2d 886.

The child and the child's guardian ad litem filed their joint notice of appeal to the Supreme Court of Ohio on January 29, 2010. On June 23, 2010, the Supreme Court granted

jurisdiction to hear the case and allowed the appeal. This brief is being filed on behalf of the Cuyahoga County Guardian Ad Litem Project as *amicus curiae* in partial support of appellants, and urges this Honorable Court to reverse the decision of the Eighth District Court of Appeals.

### **ARGUMENT**

Insofar as Appellant's first two Propositions of Law are interrelated, they will be addressed together in the first section of this Brief.

**Proposition of Law No. I: A parent or a child may appeal the dismissal of a Motion for Permanent Custody filed by a children's services agency.**

**Proposition of Law No. II: An order granting legal custody to a party is a final appealable order.**

While Appellant characterizes the first Proposition of Law in relation to the "dismissal" of a Motion for Permanent Custody, the "denial" of a Motion for Permanent Custody is the more appropriate characterization, given resolution of the underlying action and for purposes of the discussion related thereto. The right of a parent or child to appeal such a denial necessarily depends on whether or not the resulting order is a final appealable order.

"R.C. 2505.02(B)(2) requires a court order to affect 'a substantial right' made in a 'special proceeding' in order to be a final, appealable order." *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840 at ¶42, 873 N.E.2d 886. The *Adams* court acknowledged that "[a]ctions in juvenile court that are brought pursuant to statute to temporarily or permanently terminate parental rights are special proceedings, as such actions were not known at common law." *Id.*, 2007-Ohio-4840 at ¶43 (emphasis added). The only remaining issue, then, is whether the

decision of the trial court affects a substantial right of the mother and/or child.

“An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt. Sinai Med Ctr.* (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181. In the present matter, the trial court denied CCDCFS’ motion for permanent custody, terminated the existing order of temporary custody, and ordered the child placed in the legal custody of the child’s father. Pursuant to R.C. 2151.42(B), such an order of legal custody “is intended to be permanent in nature.” Therefore, the order affects a substantial right as to the mother in that the inability to appeal this order upon issuance would foreclose appropriate relief in the future. *Bell*, supra. The order also affects a substantial right as to the child who is the subject of the order.

“Pursuant to R.C. 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances.” *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500 at syllabus. Additionally, R.C. 2151.417(F) provides, in pertinent part, as follows: “In any review hearing that pertains to a permanency plan for a child, the court or a citizens board appointed by the court pursuant to division (H) of this section shall consult with the child, in an age-appropriate manner, regarding the proposed permanency plan for the child.” Clearly then, a child subject to permanent custody proceedings is a party to the action and has both an interest in the proceedings as well as a substantial right at stake in the outcome of the proceedings. Because the trial court decision affects a substantial right in a special proceeding, the child has a right to appeal the decision pursuant to R.C. 2505.02(B)(2).

A review of applicable rules of court lends further support to the argument that a child

has a right to appeal the denial of permanent custody and the grant of legal custody to a father. The order being appealed from in this matter resulted from a permanent custody case originating in Cuyahoga County Juvenile Court. The Ohio Rules of Juvenile Procedure, with limited exceptions, “prescribe the procedure to be followed in all juvenile courts of this state[.]” Juv. R. 1(A). With regard to dispositional hearings in general, and the modification of dispositional orders in particular, Juv. R. 34(G) provides as follows:

The department of human services or any other public or private agency or any party, other than a parent whose parental rights have been terminated, may at any time file a motion requesting that the court modify or terminate any order of disposition. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties and the guardian ad litem notice of the hearing pursuant to these rules. The court, on its own motion and upon proper notice to all parties and any interested agency, may modify or terminate any order of disposition.

Additionally, Juv. R. 34(I) states that “[h]earings to determine whether temporary orders regarding custody should be modified to orders for permanent custody shall be considered dispositional hearings \*\*\*.” Pursuant to Juv. R. 34(C), “[a]fter the conclusion of the hearing, the court shall enter an appropriate judgment within seven days.” Juv. R. 34(J) provides, in pertinent part, that “[a]t the conclusion of the hearing, the court shall \*\*\*, where any part of the proceeding was contested, advise the parties of their right to appeal.” Finally, App. R. 11.2(C) indicates that “[a]ppeals from orders \*\*\* granting or denying termination of parental rights shall be given priority over all cases except those governed by App. R. 11.2(B).” (Emphasis added.) This Honorable Court has therefore, pursuant to its rulemaking authority, specifically acknowledged that the denial of a permanent custody motion is just as valid a reason for appeal as is a grant of permanent custody.

In the matter pending before the trial court, a further dispositional order has been issued

upon the denial of CCDCFS' motion for permanent custody, which order directs that the child be placed in the legal custody of the child's father and that CCDCFS remain involved through an order of protective supervision. The hearing on CCDCFS' motion was plainly a dispositional hearing as described in Juv.R. 34(G) and (I), and the court's resulting judgment was a dispositional order as required by Juv.R. 34(C). Since the proceedings on CCDCFS' motion were contested and since both the child and the mother are parties to the matter, they each have an independent right to appeal, and to notification of this right pursuant to Juv.R. 34(J). Cf. *In re Murray* (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169, which notes that "a further dispositional order continuing an original temporary custody order, issued pursuant to Juv.R. 34, constituted a final appealable order." *Id.*, 52 Ohio St.3d at 159 (fn. 2). "The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law." *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, paragraph one of the syllabus. Both child and mother clearly had a present interest in the subject matter and, therefore, a right to appeal the trial court's decision. See *In re Surdel* (May 12, 1999), Lorain App. No. 98CA007172, 1999 WL 312380 (In a neglect/dependency proceeding where temporary custody was ordered, "the parties, including LCCS (even under the *Blakey* standard) would have been parties to the dispositional hearing and thus would have standing to appeal the court's decision." *Id.* at \*5.)

Although this Court held in *Adams* that the "denial of an agency's motion to modify temporary custody to permanent custody does not determine the action or prevent a judgment in the same way that a finding of neglect or dependency by a trial court followed by an award of temporary custody to an agency determines the action" in part because "the status quo of

temporary custody by the agency is maintained”<sup>1</sup>, the Court later held in the case of *In re H.F.*<sup>2</sup> that, in keeping with its holding in the *Murray* case, an adjudication and original disposition does determine the action as there are then no issues left pending. *H.F.*, 2008-Ohio-6810 at ¶15.

Appellee's argument that issues remain pending because the juvenile court retains jurisdiction over the case and is required to conduct reviews of a children services agency's case plan for the child is not persuasive. These obligations do not involve an active controversy or claim between the parents and the children services agency. They arise out of the children services agency's designation as the child's legal custodian and remain part of the juvenile court's duty to determine the child's best interests.

*H.F.*, supra, at ¶16. Similarly, the fact that the trial court in the present matter ordered CCDCFS to continue monitoring the child's situation through an order of protective supervision does nothing to alter the finality or intended permanency of the legal custody order pursuant to R.C. 2151.42(B). Additionally, unlike the facts of the *Adams* case, in the present matter the status quo of temporary custody was not maintained. Instead, the trial court terminated the temporary custody order and placed the child in the legal custody of the father. This new dispositional order is a final order and is therefore subject to appeal.

This Honorable Court has previously recognized that an order of legal custody in a child protection proceeding is a final appealable order and subject to appellate review. See *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, 843 N.E.2d 1188. By accepting the *C.R.* case for review and ruling on the issues relating to the order of legal custody, this Court tacitly acknowledged its jurisdiction to hear the matter. The words of this Honorable Court describe such recognition most aptly:

While a jurisdictional issue was not raised in these appeals by the parties, given the admonition of this court in *Whitaker-Merrell v. Geupel Co.* (1972), 29 Ohio

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<sup>1</sup> *Adams*, supra, at ¶40.

<sup>2</sup> *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607.

St.2d 184, 186, 58 O.O.2d 399, 400, 280 N.E.2d 922, 924, that courts of appeals should *sua sponte* dismiss appeals which are not from appealable judgments or orders, these courts implicitly concluded that their jurisdiction had been properly invoked by appeals from final orders.

*In re Murray*, supra, 51 Ohio St.3d at 159 (fn. 2).

In the present matter, if a denial of a motion to modify temporary custody to permanent custody, coupled with an order of legal custody to the father were not immediately appealable, appellants could not obtain appropriate relief in the future. Without the ability to appeal erroneous judgments, the parties might be forever precluded from addressing legal issues related to the erroneous judgments. Relevant legal issues would evade review because they would never be able to be raised. Essentially, all means of legal redress would be denied the parties, who would thereby be denied due process and the right to be heard in a meaningful manner.

**Proposition of Law No. III: The failure to provide legal counsel to a minor child in a permanent custody case is a denial of due process and equal protection of the laws.**

R.C. 2151.352 states, in pertinent part, as follows:

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. \*\*\* Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

When considering the appointment of counsel for a child, it must be noted that “[a] lawyer for the child has an ethical duty to zealously represent his client within the bounds of the law. The attorney is the spokesperson for the ward's wishes.” *In re Stacey S.* (1999), 136 Ohio App.3d 503, 514, 737 N.E.2d 92 (Emphasis added). Cf. Ohio Rules of Professional Conduct, Rules 1.2 - 1.4. As noted in the commentary to Rule 1.14, said Rule “does not explicitly permit the lawyer

representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.” *Id.*, at Comparison to former Ohio Code of Professional Responsibility.

Prior to 2004, there were varying interpretations as to the status of a child in a child protection proceeding as well as regarding the right to counsel possessed by such a child. Some appellate districts held that a child was not a party to a child protection proceeding, and that such a child had no right to counsel. See, e.g., *In re Alfrey*, Clark App. No. 01CA0083, 2003-Ohio-608 at ¶21. Other districts conversely held that a child involved in a child protection proceeding is entitled to counsel in **all** circumstances. See, e.g., *In re Clark*, 141 Ohio App.3d 55, 61, 2001-Ohio-4126, 749 N.E.2d 833, 838. Fortunately, some clarification of the issue was provided with the release of this Court’s decision in *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500.

This Court held in *Williams* that “[p]ursuant to R.C. 2151.352, as clarified by Juv.R. 4(A) and Juv.R. 2(Y), a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent counsel in certain circumstances.” *Id.*, 2004-Ohio-1500 at syllabus. The *Williams* decision resolves the issue related to a child’s status in a child protection proceeding, yet further guidance and clarification is needed regarding the extent of such a child’s right to counsel. It has been noted that “[t]he *Williams* court did not outline what circumstances might trigger the juvenile court’s duty to appoint counsel but presumably it was triggered by the facts before it.” *In re Mack*, Trumbull App. No. 2005-T-0033, 2008-Ohio-4973 at ¶17. Since this Honorable Court issued its decision in *Williams*, several appellate districts have interpreted the import of the *Williams* decision in an

effort to further clarify what is meant by the “certain circumstances” that would warrant appointment of independent counsel for a child. While some appellate districts recognize that *Williams* fails to explicitly define the “certain circumstances” (*Mack*, supra), others interpret the *Williams* court’s reference to the underlying appellate decision as not simply a recitation of the holding below, but rather as an adoption of the lower court’s rationale. See *In re T.J.*, Montgomery App. No. 23032, 2009-Ohio-1290 (“The *Williams* court recognized that “courts should make a determination, on a case-by-case basis, whether the child actually needs independent counsel, taking into account the maturity of the child and the possibility of the guardian ad litem being appointed to represent the child.” \*\*\* As set forth above, the magistrate also found that T.J. expressed no preference regarding custody and displayed no ability to assist an attorney.” *Id.*, 2009-Ohio-1290 at ¶7, 9.).

The case-by-case approach seems to make the most sense as it balances a child’s right to counsel with the ethical duties of that counsel. Such an approach would result in the appointment of counsel for children who would materially benefit by such representation, and would not put appointed counsel in the untenable position of having to advocate for clients who might not be able to even reveal, let alone assist counsel in the representation of, their wishes. R.C. 2151.352 does not explicitly require analysis of a child’s maturity and ability to assist counsel prior to appointment of counsel, but when read in *pari materia* with relevant other considerations, can be interpreted in such a manner. R.C. 2151.352 certainly contemplates appointment of counsel for a child, but its terms are perhaps more clearly applicable to a child who is subject to juvenile court jurisdiction because the child is facing delinquency or other charges than they are to a child who is subject to such jurisdiction pursuant to a child protection

proceeding. The requirements of R.C. 2151.352 have much greater relevance to a child subject to the juvenile court's jurisdiction pursuant to a delinquency matter, as the child who is "charged" has implicitly been determined to be competent, and of sufficient maturity to possess the mens rea of the offense and to therefore face charges. Such a child will by extension possess the ability to formulate a meaningful expression of his/her wishes and to assist counsel in the pursuit of those wishes. The same cannot be said for a child who is subject to juvenile court jurisdiction in a child protection proceeding, as many of these children are mere infants, or children of such tender years and limited mental abilities as to preclude such a meaningful formulation or expression of their wishes. A reasoned approach to the issue would require the trial court to consider a child's right to counsel against an attorney's ethical considerations, and to determine, on a case-by-case basis, whether a particular child is of a sufficient age and/or maturity to formulate a meaningful expression of his/her wishes and to assist his/her counsel in the achievement of those wishes. See *Williams*, supra, at ¶17. As noted above, this has been the approach sanctioned by several appellate districts since the release of the *Williams* decision. The Third District Court of Appeals, for example, in the case of *In re C.E.*, Hancock App. Nos. 5-09-02 & 5-09-03, 2009-Ohio-6027, stated as follows:

Here, the children in question are toddlers and are not capable of understanding the proceedings or making their wishes known. The trial court correctly considered the maturity level of the children and determined that they could not make their wishes known. Since the children cannot express their wishes, they did not conflict with the recommendation of the guardian ad litem. Thus no appointment of separate counsel was necessary.

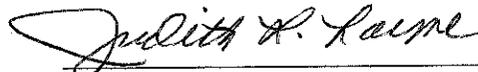
*Id.*, 2009-Ohio-6027 at ¶21. See also *In re T.J.*, supra. This Honorable Court should consider adopting such an approach after careful consideration of the issues presented in this matter in an effort to further clarify the meaning of its holding in the *Williams* case.

**CONCLUSION**

The decision of the Eighth District Court of Appeals is fundamentally wrong in its reasoning and deprives parties to a case of their due process right to have a final order reviewed for error by an appellate court. The decision incorrectly interprets case law precedent as well as the statutory language which confers upon the parties the right to appeal. Such a holding, which denies a mother and a child the right to appeal a final order denying permanent custody in favor of an order granting legal custody to a father, must be rejected.

The decision below must be reversed. A reversal will promote the integrity of the legislative and judicial processes as well as the parties' rights to appeal and secure review of trial court orders which impact the best interest of the child.

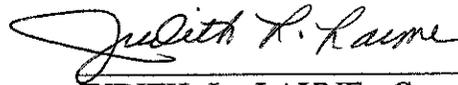
Respectfully submitted,



\_\_\_\_\_  
JUDITH L. LAYNE, (0056064)  
Counsel of Record  
COUNSEL FOR AMICUS CURIAE  
GUARDIAN AD LITEM PROJECT

Proof of Service

I certify that a copy of this *Merit Brief of Amicus Curiae* was sent by ordinary U.S. mail to Appellant C.B. through counsel R. Brian Moriarty, Esq., 1370 Ontario Street, Suite 2000, Cleveland, Ohio 44113, to Appellant Guardian ad Litem Thomas Kozel through counsel Jonathan Garver, Esq., The Brownhoist Building, 4403 St. Clair Avenue, Cleveland, Ohio 44103, to Appellee father through counsel Timothy R. Sterkel, Esq., 1414 South Green Road, # 310, Cleveland, Ohio 44121, to Appellee mother through counsel Betty Farley, Esq., 1801 East 12<sup>th</sup> Street, Suite 211, Cleveland, Ohio 44114, to Guardian ad Litem for father, George Coghill, Esq., 10211 Lakeshore Boulevard, Cleveland, Ohio 44108, to Guardian ad Litem for mother, Carla L. Golubovic, Esq., P.O. Box 29127, Parma, Ohio 44129, and to Appellee CCDCFS through counsel Greg Millas, Esq., 4261 Fulton Parkway, Cleveland, Ohio 44144 on the 30<sup>th</sup> day of August, 2010.



JUDITH L. LAYNE, Counsel of Record  
COUNSEL FOR AMICUS CURIAE  
GUARDIAN AD LITEM PROJECT