

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

In The Matter Of:	)	Case No. 2010-0180
	)	
C. B.	)	On Appeal From The
	)	Cuyahoga County Court Of Appeals,
	)	Eighth Appellate District
	)	
	)	Court of Appeals
	)	Case No. 92775

**MERIT BRIEF  
OF APPELLANTS C.B. AND THOMAS KOZEL, GUARDIAN AD LITEM**

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## STATEMENT OF CASE AND FACTS

This case is unique in both procedure and substance. This custody case began in 2006 and lasted approximately three years before the juvenile court issued a final disposition. The docket in this case consists of 720 entries, due in large part to the following: 1) numerous pro se motions filed by Appellee Anthony Wylie ("Wylie"), the natural father of the minor child, C.B., who is the subject of the underlying dependency action; 2) motions concerning inappropriate conduct and/or interaction by Wylie with persons appointed by the court to serve as guardian ad litem for C.B., and 3) numerous motions concerning Wylie's failure to comply with court orders. The record in the case contains over twenty five (25) volumes of transcript, which include the declaration of a mistrial followed by a new dispositional hearing.

While the issues presented by this appeal concern – for lack of a better term - procedural matters, procedural matters do not arise in a vacuum. It is important to bear in mind that at the heart of this case is the care, custody, and welfare of a little girl. A review of the record in this case from the beginning through the appellate process reveals a disturbing portrait of Anthony Wiley and an even more disturbing decision by the juvenile court -- a decision which rejected the public children's services agency's motion for permanent custody even though the mother of C.B. favored permanent custody and two guardian ad litem's for the minor child recommended permanent custody. Despite his refusal to comply with a court-ordered psychiatric examination prior to final disposition (and the trial court's inexplicable failure to enforce this important order before rendering a decision), the record demonstrates that Wiley is highly manipulative, emotionally and mentally unstable, and unfit to have custody of C.B.

The record also provides the basis for the appellate court to appoint appellate counsel for the minor child which is the subject of Proposition of Law No. 3.

On March 23, 2006, a probable cause hearing was conducted in connection with the agency's request for temporary custody. The court began by recognizing that there exist possible mental health issues with the father, Anthony Wylie. (Tr. 4-5). After appointing counsel for father, a social worker employed by the Cuyahoga County Department of Children and Family ("CCDCFS") testified that on or about December 23, 2005, the mother came to the police station and did not know who she was or who the child at issue was. The mother was admitted to the hospital for mental health services. The child was removed from the care of the mother. A complaint which was filed by CCDCFS subsequently expired.<sup>1</sup> (Tr. 6-8). The father stipulated to probable cause and the child was placed in foster care. (Tr. 9). The Court found probable cause existed and placed the child in emergency custody of CCDCFS. (Tr. 10). A case plan was to be filed as soon as practicable.

On April 25, 2006, a pretrial was held and a new case plan was submitted. Wiley asked that his assigned counsel be removed from the case. (Tr. 4). The State of Ohio also requested an order compelling the father to have a psychological evaluation prior to the next court date. (Tr. 8).

On June 7, 2006, Wiley denied that he has any mental health issues. (Tr. 15). However, he was willing to submit to Safe Harbor, a mental health facility, for an assessment and/or treatment. (Tr. 15-16). The father waived his right to a trial and the Court found the child to be a dependent child pursuant to *Ohio Rev. Code §2151.04(B)*. (Tr. 20-22).

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<sup>1</sup> The original case No. AD 05902088 expired by law March 23, 2006. At said hearing, the case was assigned a new case no. AD 06900501.

Temporary custody with the agency was recommended with visitation by the parents. (Tr. 24). Again, the court ordered both parents to submit themselves for mental health services and to follow their follow recommendations. Both parents agreed. (Tr. 25-27). The court found it was in the best interest of the child for temporary custody with the agency and that the parents should complete the case plan and obtain the mental health evaluations/recommendations. (Tr. 28-29).

On April 16, 2007, the court reconvened and heard the testimony of Loretha Knight, a social worker employed by CCDCFS. . (Tr. 7). She created a case plan for the mother and father including mental health services. The plan was filed in January of 2006. (Tr. 8). Amended case plans were filed on June 16<sup>th</sup>, 2006, and later in November of 2006. (Tr. 9). Wiley objected to the amended case plans stating that he should not be denied the ability to do things that fathers normally do with their children. The Court noted that the Wiley refused to sign the case plan, but never filed an objection or asked for a hearing. (Tr. 11). The social worker then testified that Wiley was ordered to submit to a psychological evaluation, but he refused again and instead chose his own agency for the assessment. (Tr. 18). Knight testified that Wiley informed her that he did not go to the assessment at Safe Harbor. (Tr. 18-19). She testified that Wiley also failed to obtain stable housing and had refused to inform the worker where he resides. (Tr. 20-21). She testified that Wiley had not substantially completed his case plan. (Tr. 25). Since Wiley had failed to establish stable housing, Knight testified that his weekly visits with C.B. took place at a facility selected by CCDCFS. (Tr. 68).

It appears from a review of the record and transcripts that, on June 6, 2007, the court considered a motion for permanent custody of the child to CCDCFS. (Transcript of Sept.. 12,

2007, pg. 5-6). The motion for permanent custody was supported by an affidavit which was read into the record:

“The child had been in the custody of the agency for 12 or more months of a consecutive 2-month period, that the child was removed from the home on March 23<sup>rd</sup>, 2006, and that the child was adjudicated abused, neglected, or dependent on November 17<sup>th</sup>, 2006, and that temporary custody was granted on November 17<sup>th</sup> of 2006.

“The social worker states that the child is not abandoned or orphaned, however, cannot be placed with one of the child’s parents within a reasonable period of time, or should not be placed with either parent.”

She states that “Notwithstanding usual 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 parents have failed to continuously and repeatedly to substantially remedy the conditions, causing the child to be placed outside the child’s home.

Specifically, the mother was in agreement that Children and Family Services obtain permanent custody of her child. She has stated that she lacks the ability to financially support herself and the child.

“Father has failed to comply with the case plan objectives that were designed to reunify the family, specifically, the father has failed to obtain the following: Employment, basic needs, a psychological evaluation

“Father has not obtained safe, stable housing or appropriate housing in which to raise a child.”

“Father claims that he has employment, but refuses to provide evidence of his employment.

“Father claims he has housing, but refuses to provide evidence of a lease rental agreement or allow CCDFS to evaluate the alleged housing.

“Father has failed to comply with the case plan objectives by remaining unavailable to the agency for purposes of service provision.

It is alleged that father has a chronic mental illness, chronic emotional illness, mental retardation, physical disability or chemical disability that is so severe that it makes father unable to provide an adequate permanent home for the

child at the present time.....”

“Father has failed to cooperate with the agency by failing to substantially and successfully complete his case plan.....”

In conclusion, the social worker asserts that permanent custody is in the best interest of the child because the child has been in substitute care since March 23, 2006.

“The child is off and unwilling and emotionally distraught at the prospect of visitation with Mr. Wylie.....

“The child has developed a bond to the foster care takers. (Tr. 6-10).

At that point, Wylie, requested the Court appoint him legal representation. (Tr. 19). He then denied the allegations made in the motion. The social worker again requested that the court order a psychological evaluation. Up to that point in time, the agency had offered to make the referral, but Wylie had refused to cooperate. (Tr. 21). Wylie indicated that he had obtained relevant employment and housing information and that he had a psychologist’s report which he provided to the social worker. (Tr. 24-26). The agency requested a second opinion and the Court stated that it would refer. Wylie to the court clinic for a psychiatric evaluation. (Tr. 28).

On December 4, 2007, the Court held a hearing on Wylie's motion for recusal, writ of habeas corpus, and objections to the case plan amendment.(Tr. 3). Wylie’s counsel began by withdrawing the writ. He went on to argue that the Court had shown prejudice to him by appointing counsel (even though he previously requested it), because now he wanted to represent himself. (Tr. 8). The recusal and writ were denied. The Court then overruled Wylie's objections to the October 10<sup>th</sup> case plan amendment calling for parenting classes. (Tr. 34). The Court then addressed the fact that a second psychological evaluation was ordered as part of the emotional stability component of the case plan. (Tr. 42). Wylie refused to cooperate with an evaluation by

the juvenile court's diagnostic clinic. The Court again ordered that Wiley to appear at the diagnostic clinic for an evaluation. (Tr. 48).

On March 6, 2008, the Court addressed a number of motions filed by Wylie. Wylie's request was that his appointed counsel be dismissed and that he be permitted to proceed pro se was denied. (Tr. 4-5, 17). The first witness to testify on March 6th was the social worker, Loretha Knight. (Tr. 15). Knight testified that the case plan for both mother and father included mental health services. (Tr. 21). Knight testified that Wylie confided to her that he had been diagnosed as bipolar. As a result, she included the mental health/emotional stability component in the case plan. The case plan also called for Wylie to attend and complete parenting services. (Tr. 22-23). Wylie refused to participate in the court-ordered psychiatric. (Tr. 28). The agency had received an "evaluation" from Wylie in August of 2007, but it was deemed incomplete. (Tr. 28). Further, according to Knight, as of the date of the hearing, Wylie had not provided any information/documentation concerning the parenting classes he was ordered to complete. (Tr. 32).

On May 7, 2008, the hearing began with a discussion regarding discovery of Wylie's medical records which had been subpoenaed by the agency. (Tr. 10-13). The agency argued that the subpoena for his medical records was necessary since Wylie refused to attend the court-ordered psychological evaluation. (Tr. 12). The court denied the Wylies motion in limine to exclude the medical records and noted its December 4<sup>th</sup> entry ordering compliance with the parenting classes and psychological examination. (Tr. 14).

Loretha Knight was called back on the stand. (Tr. 16). She testified that the agency had learned that Wylie had been hospitalized for mental illness. (Tr. 16-17). She testified that Wylie

told her that he had previously been diagnosed with a bipolar condition, but approximately one week later, Wylie denied ever making such a statement. (Tr. 18). The agency then introduced Wylie's medical records. In February of 2008, the agency scheduled a psychiatric evaluation for Wylie March 12, 2008. (Tr. 34). Knight testified that Wylie failed to show up for the appointment. (Tr. 35).

The parenting classes had been put into the case plan in September of 2007. (Tr. 38). At the last hearing, on March 7<sup>th</sup>, Wylie had not provided any documentation concerning the parenting component of the case plan. (Tr. 39). Stable housing was another part of the case plan. After housing was added to the plan, Wylie provided a 6 month lease agreement which expired in March of 2008. (Tr. 40). Wylie has not provided any additional documentation related to housing. (Tr. 40). Knight testified that, in October of 2007, she made an appointment for a home visit. However, there was a miscommunication which caused Wylie to believe that Knight would be bringing C.B. with her for the home visit. When Wylie learned over the telephone that Knight would not be bringing C.B. with her for the home visit, he became hostile, calling her a "compulsive liar" and she was unable to make an appointment with him for the visit. (Tr. 44). Knight testified that she subsequently scheduled a home visit for March of 2008, but Wylie cancelled the visit. (Tr. 46) Knight testified that, in October and/or November of 2007, she made unannounced visits to the apartment, but found noone at home. (Tr. 45-46).

At the time of the hearing, Wylie's visits with C.B. were still supervised. Knight further testified that the child refused to go for unsupervised visits. (Tr. 51). Knight further testified that she did not believe that Wylie would successfully complete the parenting classes and achieve the

other objectives of the case plan. Knight testified that she did not believe it was safe for C.B. to be in Wylie's custody. (Tr. 52).

Knight testified that, since there are no relatives available for possible placement, the child has been in foster care for approximately two and one-half years, as of March 7, 2008. (Tr. 52-53). She further testified that the child has a strong bond with the foster family (Tr. 53) and that the foster parents are willing to adopt the child, which she believes is in the best interest of the child. (Tr. 54). Knight supported her opinion by citing Wylie's emotional instability, his failure to maintain stable housing, and his lack of stable employment. "[H]e has shown no stability since I've known him." (Tr. 54).

Since she had never been inside Wylie's apartment and did not know if he had a current lease, Knight was unable to testify that he was in a position to provide suitable housing for C.B.. (Tr. 91-92). Knight testified that Wylie's emotional instability makes him a danger to injure the child. (Tr. 92). Finally, Knight testified that Wylie had not provided her with proof that he had substantially complied with the case plan. (Tr. 100).

On re-direct, Knight testified that Wylie had lied to her, concealing the presence of other family members living in the area. (Tr. 110). Knight also testified that she had discovered that both Wylie's brother and father also suffer from mental illness. (Tr. 111). Knight described Wylie's employment history as "unstable" and testified that she knew he had worked at the Cleveland Christian Home for five weeks, but was terminated. She did not know if he was presently employed. (Tr. 111-112).

The next witness was Wylie's aunt, Mary Persanyi. (Tr. 117). Persanyi testified that she attempted to have Wylie move out of his grandmother's house/apartment because his behavior

was so egregious that their mother didn't want him to live there anymore. (Tr. 118-119). They also tried to formally evict him in 2001 and 2002. (Tr. 119).

Persanyi further testified that she and her sister purchased the food for her mother and that Wylie would always use it. It got to the point where his mother had to put a pad lock on a cabinet of food in her room. (Tr. 123). Persanyi further testified that in 1998, Wylie used his grandmother's life savings to purchase a house with a plan to rent it out and pay his mother back. When the family found out, they discovered the grandmother had to take a \$6,000 loan to pay the past due mortgage payments he failed to pay. (Tr. 127-128). It was around this time the grandmother probated Wylie because she was afraid to live with him. (Tr. 129). She concluded that she would not want to see Wylie care for anybody let alone a child due to his emotional instability and the way he treated his grandmother which she described as "abusive." (Tr. 131-138). She testified that she is afraid of him. (Tr. 141).

On cross-examination, Persanyi testified that when Wylie lived in Lakewood with their grandmother, he had a dog which he left in the attic "all the time." So much so that when they tried to sell the house, she observed that the dog had urinated in the attic which came through the ceiling. (Tr. 144-145). When he was released from the mental health hospital, nobody in the family was willing to give him a place to stay. (Tr. 147).

On July 17, 2008, the Court reconvened. A matter was brought to the Court's attention concerning the guardian ad litem for the child. He stated to the Court that, on July 7, 2008, he was unexpectedly approached from behind by Wylie, there was a disturbance, and a police report was made in the City of Lakewood by Mr. Wylie, who requested that the police conduct an investigation into the matter. The guardian ad litem also reported that Wylie went to the

guardian's girlfriend for a haircut and left an unusually large tip. (Tr. 4-5). As a result of those two incidents and concerns for his personal safety and that of his girlfriend, the guardian requested he be permitted to withdraw from the case. (Tr. 5).

Wylie claimed that the confrontation was arranged by the guardian ad litem. (Tr. 19-27). Wylie testified: "I've been trained in I Kenpo and Aikido. I was well within my rights to defend myself, but I have a soft heart." (Tr. 28). He estimated the confrontation/incident took "two forty-five to three minutes and fifteen seconds." (Tr. 29). He also acknowledged that this event happened soon after he saw the guardian's report indicating a recommendation in favor of permanent custody for the agency – as such it was beneficial to have the guardian ad litem removed. (Tr. 35-36). On cross-examination, Wylie testified that he was disgusted with the "omissive dishonesty" of the GAL report. (Tr. 36).

The trial court granted the guardian's motion to withdraw and declared a mistrial. (Tr. 54).

On August 18, 2008, the trial court reconvened and addressed a number of issues. First, Wylie's attorney filed a motion to withdraw as counsel. He argued that his abilities do not meet the expectations of his client and that communication had broken down. (Tr. 5). Wiley accused his attorney of ambushing him by just recently providing him discovery and/or court filings, by failing to file an objection he requested, and by lying. (Tr. 6-8). Wylie then requested that the brother of a Pulitzer Prize winner to be appointed his counsel. (Tr. 16). The Court re-set the trial and acknowledged that the case was already past state and federal guidelines for resolution. (Tr. 31).

At that point, the prosecutor filed an amended motion to modify temporary custody to permanent custody. the purpose of the amended motion was to clarify several issue; no new

substantive allegations were included in the amended complaint. (Tr. 33-35). Wylie then argued that the Court did not have jurisdiction to order him to maintain treatment. (Tr. 37). The newly appointed guardian ad litem requested an order prohibiting personal contact between Wylie and the guardian ad litem outside of previously arranged meetings. The Court granted the guardian's motion. (Tr. 46-47). Finally, it was suggested that the Court again order Wylie to report to the diagnostic clinic for a psychological evaluation. (Tr. 60). Wylie requested a change in venue for his psychological evaluation due to an alleged conflict of interest between the county court administrator and the federal government (an oblique reference to the then-pending investigation of corruption within the county government by the Federal Bureau of Investigation). (Tr. 62-63). The Court noted that it was a court-ordered evaluation and that Wylie had the opportunity to engage but did not. Wylie's latest explanation --that he refused to go because of the discovery deadline -- was not well taken. (Tr. 56-91).

Finally, after almost two and one-half years since the child was placed in temporary custody of the agency, a new trial began on October 28, 2008.

A preliminary issue was presented by the 14-16 subpoenas Wiley had issued for CCDCFS employees, including the attorney handling the case for CCDCFS. CCDCFS argued that Wylie was attempting to disqualify counsel in order to obtain yet another delay in the trial. (Tr. 2-5). CCDCFS's motion to quash was granted. (Tr. 17). Wylie asked this Court to take notice that a former prosecutor committed a crime against him. The court declined to take any such notice and noted Wylie's objection. (Tr. 20-22). Wylie's motion for sanctions was renewed and again denied. (121-125). CCDCFS requested a finding of contempt against Wylie for threatening

the prosecutor with criminal charges in an effort to obtain an advantage in a civil proceeding. (Tr. 126-127).

The hearing began with a stipulation again by the biological mother that she was in favor of the motion for permanent custody to CCDCFS being granted. The first witness called was the foster mother, Margaret Walsh-Conrad. (Tr. 148). At that time, she has been the foster parent for approximately two and-a-half years without interruption. (Tr. 148-149). Walsh-Conrad testified that, when she took custody, the C.B. was a healthy, well nurtured, nine-month-old baby with no developmental delays. (Tr. 149). Walsh-Conrad testified that C.B. was currently attending pre-school three days a week, swimming lessons twice a week, and music lessons once a week. (Tr. 150). Walsh-Conrad testified that C.B. is loved by the family, is an integral part of the family, and has very close bonds with the other children whom C.B. calls her brother and sister. (Tr. 150-151). Walsh-Conrad testifies that she lives with an elderly priest Father Jim O'Donnell whom C.B. views as a grandfather figure. Walsh-Conrad further testified that she loves C.B. and that the child calls her "momma." (Id.)

Walsh-Conrad testified that C.B. knows she has a biological mother and father and that she is excited prior to visits with her biological mother. (Tr. 152). Walsh-Conrad further testified that C.B. throws a temper tantrum before going to see Wylie. She refuses to go and is afraid of him. Walsh-Conrad testified that, although the C.B. is potty trained, she often has an accident on the day she has to visit Wylie. (Tr. 153). After six months of observing this behavior, Walsh-Conrad asked the social worker to come to the house and observe it for herself. (Tr. 155).

On cross-examination, she reiterated that the child is afraid to visit with him. (Tr. 232).

On re-direct examination, Walsh-Conrad testified that she has been a licensed foster

parent since 1999 and is required to complete 21 hours of training each year. In that capacity, she again offered her opinion that the child should not be reunified with Wylie due to the anxiety she demonstrates when she visits with him and that she tells her that she is afraid of him. (Tr. 250). According to Walsh-Conrad, this occurs nearly every time she has to see him for almost a year. (Tr. 251).

On re-cross, Wylie asked if there was ever a time when the C.B. was overjoyed in anticipation of seeing her father. Walsh-Conrad answered, "No." (Tr. 256).

The next witness was Loretha Knight, the CCDCFS social worker.. (Tr. 276). Knight testified that C.B. had been in custody of CCDCFS since June of 2006. (Tr. 286). Knight testified that C.B. had adjusted well to the foster care setting. (Tr. 287). She testified that C.B. had bonded a very well with her foster mother. (Tr. 288). Knight testified that placement in the foster care home is in the best interest of C.B. because the foster mother is willing and able to provide for the child's basic needs in a loving environment. (Tr. 289).

Knight testified that the case plan called for Wylie was to complete a psychological evaluation, attend and successfully complete parenting classes, obtain employment, and obtain suitable housing. (Tr. 293, 296). With regard to the housing, Knight inspected Wylie's former place of residence – his grandmother's studio apartment – and found it to be unsuitable. (Tr. 294-295). With regard to his new Wooster apartment, Wylie provided a six month leasing agreement which has since expired. Knight testified that she had requested additional, up to date information on his housing, but Wylie had failed to provide it. As of the date of the hearing, Wylie had not provided any evidence of his current housing arrangements. (Tr. 294-295).

Knight testified that she referred Wylie to Metro Health Hospital's parenting program. Wylie did not complete the program. Instead, Wylie has claimed that he had completed two other independent programs. However, Knight was unable to verify whether or not he completed those programs. (Tr. 296). He refused to sign a release order necessary for the agency to obtain verification of his participation in those programs. (Tr. 296).

Knight included in the case plan "emotional stability" as a goal for Wylie. Knight testified that, upon meeting Wylie, he acknowledged that he had some mental health history and that he had been diagnosed with a bipolar condition. Knight testified that Wylie later refused to discuss his mental history with her. (Tr. 297). Knight learned that Wylie had been hospitalized for psychiatric reasons at St. Vincent Charity Hospital. (Tr. 298). Knight identified hospital records for Anthony Wylie that were entered into evidence as an exhibit. (Tr. 299-301). The records indicate that he was brought in by the police due to threats of a bomb. (Tr. 300). The reports indicate that the justification for the hospitalization was that Wylie posed a potential harm to others, inability to care for himself, and that he could benefit from in-patient treatment. (Tr. 301). The diagnosis was "bipolar, manic episodes, severe, poor social supports." (Tr. 301). He was prescribed Zyprexa, Depakote, and a therapeutic tablet. (Tr. 302).

Medical records related to Wylie's discharge from the hospital indicate that he accepts his diagnosis and that he will follow up with the community health clinic, Recovery Resources. "The patient will also have a hearing where the conditions of his probation will include continuous out-patient follow-up and case management." (Tr. 304). His discharge diagnosis was bipolar effective disorder, manic personality disorder, not otherwise specified, with antisocial traits and paranoid personality traits. His discharge was December 23, 2003. Knight testified that to her

knowledge, Wylie has not been under the care of a psychiatrist or other counselor and is not on any medications to address his mental health diagnosis. (Tr. 305).

Knight identified the court order, dated December 17, 2007, requiring Wylie to submit to a psychological evaluation. The court order specifically states that Wylie was to complete an evaluation by an evaluator *selected by the Agency*. (Tr. 307-308). In February of 2008, Wylie was referred to psychological evaluation to court diagnostic clinic. (Tr. 305-306). Wylie did not comply with the evaluation order. Two appointments were scheduled. He did not show up for either appointment. (Tr. 306, 308).

On re-direct, Knight testified that she was not satisfied with Wylie's progress on the case plan. As of the date of the hearing, Wylie had not completed a parenting education program. As of the date of the hearing, there was no proof of stable and/or appropriate housing. As of the date of the hearing, she had not been provided the requested documentation establishing Wylie has established and/or maintained emotional stability. (Tr. 382-383).

On cross-examination by the Guardian Ad Litem, Knight testified that along with the medical records establishing prior hospitalization and diagnosis, she had concerns about Wylie's mental health due to his unstable employment history and his outbursts in anger in the office and at other public places. Specifically, Wylie had 6-7 jobs since 2006. She also testified about an incident where Wylie believed the child would be at a home visit during a scheduled visit to inspect his home. According to Knight, Wylie became angry when he was told that the child would not be brought to his home during this. Wylie repeatedly called her a liar and kept referring to conversations/plans that were never made. (Tr. 384-385). Similar concerns about Wylie's temper, unusual outbursts, and odd behavior were expressed by visitation staff that had

observed and interacted with Wylie. (Tr. 385-387). These same concerns about his mental health were also expressed by family members. (Tr. 386-388). It is for all of these reasons that the referral for a psychological evaluation was deemed essential.

The next witness called was Mary Persanyi who is Wylie's aunt. (Tr. 410). Her relationship with Wylie became strained when he began living with her mother. He moved in with her when he was 18-19 years old. (Tr. 411). She testified that Wylie is currently residing with his mother and that she recently observed him sleeping on the floor of his mother's apartment. (Tr. 411-413) She testified that he is not allowed to be living there and has to go in and out unobserved. (Tr. 415).

Persanyi testified that her mother probated Wylie in 2003. His erratic behavior had been escalating. He had made a bomb in the basement and threatened to kill people. (Tr. 416-417). It was at that time Wylie was taken to Northcoast Behavioral Institute. (Tr. 418). She further testified that Wylie has a brother who was diagnosed with a bipolar disorder. His father (who is Persanyi's brother) was diagnosed with paranoid schizophrenia and an obsessive compulsive disorder. (Tr. 418-419).

In the spring of 2008, the Adult Protective Services investigated possible elderly abuse by Wylie against her mother. Persanyi testified that she has had concerns since the late 1990's about him abusing her. (Tr. 429-430). She also testified that the family has concerns about her nutrition because Wylie eats the food that they purchase her. This escalated to the point that in May of 2008, the mother had to put a pad lock on her food cabinet. (Tr. 432). The mother locks her food and money in the cabinet to keep Wylie from taking it. (Tr. 432). At no time did Wylie offer any financial assistance to her mother. (Tr. 433).

The following day, Dr. Dennis Pinciotti was called to testify by Wylie. (Tr. 486). He was not aware of any standards because he does not perform custody evaluations on a routine basis. (Tr. 496-499). It was noted that he merely performed a psychological evaluation, not a custody evaluation. As such, he simply obtained a medical history from Wylie and conducted an interview with him. (Tr. 499-504).

On cross-examination, Dr. Pinciotti reiterated that it would be unethical to make a recommendation about custody without having seen all of the family members. (Tr. 563). He believed it was within his ethics to make a recommendation on visitation because he was told by Wylie that he was in the process of reunification. (Tr. 563). This wasn't a custody recommendation. (Tr. 563). When he wrote the report, Dr. Pincotti had not seen the records of Wylie's psychiatric hospitalization at St. Vincent's Charity Hospital. (Tr. 566). When he wrote the report, Dr. Pincotti did not know that Wylie's family had a history of schizophrenia. (Tr. 568). When he wrote the report, Dr. Pincotti did not know that Wylie's brother was diagnosed with a bipolar disorder. (Tr. 568). Dr. Pinciotti testified that had he known of or seen the hospital discharge report, he would have conducted further testing of Wylie. (Tr. 575).

On cross-examination, Dr. Pincotti acknowledged that his observations were gained from information provided to him by Wylie. (Tr. 593). In fact, Dr. Pincotti admitted that he does not know how Wylie is currently functioning except for his self-report. (Tr. 596). Dr. Pincotti further admitted that collateral source information would have made the report more accurate and could have changed his opinion. (Tr. 609).

The guardian ad litem recommended permanent custody to the agency. He noted that the child had been removed in December of 2005. The guardian stressed the importance of Wylie's

mental status and emotional stability. (Tr. 758). He noted that he tried to speak with Wylie about his prior hospitalization, but Wylie refused. He also noted that, to date Wylies never produced any documentation that he attended follow up counseling as recommended by the hospital. (Tr. 759). The guardian ad litem suggested that the report/letter written by Dr. Pinciotti should not be given much weight because Wylie was the sole source of information used for the report.

The Guardian Ad Litem recognized that the Court issued an order for a referral for an evaluation and Wylie refused to comply. Nor had Wylie complied with the other requirements of his case plan. Finally, the guardian ad litem cited Wylie's other bizarre and/or unstable behavior in support of his recommendation that the Court should grant the motion for permanent custody.. (Tr. 762).

The Court continued temporary custody in the best interest of the child. However, on February 5, 2009, in an astonishing reversal, the Court terminated temporary custody of CCDCFS and granted legal custody to the father. The Court has subsequently ordered progressive implementation for in-home visitation and overnight visitation. On February 6, 2009, a timely notice of appeal was filed.

On February 27, 2009, the matter was before the Court for another dispositional review hearing. The Court inexplicably held that there has not been sufficient time to allow substantial compliance with the case plan amendments and that progress has not been made in alleviating the cause for removal of the child. As such, contradicting a prior order, continued temporary custody of the child was deemed necessary and in the child's best interest. The Court noted that the child's adjustment to the efforts to reunify her with Wylie continue to present significant concerns including the child's heightened anxiety, and feelings of anger and fear. Wylie was

again instructed to complete and/or obtain an updated psychological examination by and through CCDCFS. At subsequent review hearings, it is discovered the child is now experiencing soiling behaviors. The child's therapist has been consulted and Wylie was scheduled for his court ordered evaluation on March 19, 2009.<sup>2</sup>

On March 9, 2009, the guardian ad litem intervened, filed a cross-appeal, and filed a motion to stay all lower court proceedings. On April 1, 2009, the Court of Appeals granted the stay and subsequently appointed appellate counsel for the child.

On December 8, 2009, however, just prior to oral argument, the Court of Appeals dismissed the action for lack of a final appealable order. Appellants' motion to reconsider and motion to certify conflict were denied.

On January 29, 2010, a timely notice of appeal and memorandum in support of jurisdiction was filed.

This Court accepted jurisdiction on June 23, 2010.

## ARGUMENT

**Proposition of Law No. I: A minor child and/or her guardian ad litem may file an appeal from the denial of a motion to modify temporary custody to permanent custody filed by a public children's services agency in a juvenile court dependency proceeding.**

Initially, Appellants incorporate by reference each and every argument raised in the Merit Brief of Amicus Curiae Guardian ad Litem Project, as if fully rewritten herein.

Three years ago, in *In re: Adams*, 115 Ohio St. 3d 86, 2007 Ohio 4840, 873 N.E. 2d 886, this Court held that a *public children's services agency* may not appeal the denial of a motion for

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<sup>2</sup> On May 10, 2009, the examiner found, among other things, both parents in the case severely wanting and that placement of the child with either one would put her at significant risk of abuse or neglect. "Mr. Wylie, the father, has a long-term severe mental illness that remains untreated."

permanent custody where the denial is coupled with an order continuing an award of temporary custody to the agency. The first issue presented by this appeal is whether *a minor child and/or his guardian ad litem* may appeal the denial of a motion for permanent custody in a juvenile court dependency proceeding.

*Article IV, §3(B)(2)* of the Ohio Constitution provides, inter alia, that courts of appeals "shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district . . ."

In the present case, as in *Adams*, the question is whether the denial of a motion for permanent custody is a final appealable order. Under relevant portions of *Ohio Rev. Code §2505.02(B)*, an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) an order that affects a substantial right in an action that in effect determines the action and prevents a judgment; or (2) an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment. *Ohio Rev. Code §2505.02(A)* defines "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." It defines "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity."

To constitute a final, appealable order the judgment or order need not satisfy both *Ohio Rev. Code §2505.02(B)(1)* and (2). Since the statute is worded in the alternative, if the order satisfies either division (B)(1) or (B)(2), it is a final appealable order.

Actions brought in juvenile court pursuant to statute to temporarily or permanently terminate parental rights are "special proceedings," as such actions were not known to the common law. *In re: Murray*, 52 Ohio St. 3d 155, 161, 556 N.E. 2d 1169 (Douglas, J. concurring in syllabus and judgment). Hence, in order to satisfy *Ohio Rev. Code §2505.02(B)(2)*, Appellants need only demonstrate that a "substantial right" is affected.

In *In re Murray* (1990), 52 Ohio St. 3d 155, 556 N.E. 2d 1169, the parents had filed an appeal from a juvenile court's initial grant of temporary custody following a finding of dependency. In *Murray*, this Court held that an award of dependency or neglect followed by a temporary custody award to a public children's services agency was a "final order" for purposes of *Ohio Rev. Code §2905.02*, because:

" . . .there is still no assurance that an original adjudication of neglect or dependency would ever be reviewable were this court to deny a parent's ability to immediately appeal such a finding. There is no requirement that the agency having custody of the child be required to seek permanent custody. If the agency fails to seek permanent custody and the temporary order remains in effect, the parent is without remedy to attempt to demonstrate errors in the initial juvenile proceedings which resulted in the loss of custody. Even if the court eventually terminates the temporary custody order and returns the child to his or her parents pursuant to R.C. 2151.415, the initial determination of neglect or dependency will not then be in issue.

Moreover, if the agency were to seek permanent custody of the child, R.C. 2151.414(A) provides, inter alia, as follows:

"The adjudication that the child is an abused, neglected, or dependent child and the grant of temporary custody to the agency that filed the motion *shall not be readjudicated* at the hearing and shall not be affected by a denial of the motion for permanent custody." (Emphasis added.)

In effect, a parent would be denied the opportunity of appellate review of the trial court's finding of neglect or dependency until such time, if ever, as an award of permanent custody is made to the agency. In that event, it is likely that the situation of the child would be markedly different from that time when temporary

custody was initially awarded to the agency." Id. at 158.

In *Adams*, however, this Court distinguished *Murray*, noting that it was the *parents* who were appealing the denial of permanent custody in *Murray*, not a public children's services agency. Id., at ¶38. The Court went on to state, "Equally important to our determination of whether an order is a final, appealable order under *R.C. 2505.02(B)(1)* and controlling in our discussion of a final, appealable order under *R.C. 2505.02(B)(2)* is the fact that a children services agency does not have a substantial right in the permanent custody of children based on the fact that the agency has temporary custody of the children. *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." Id., ¶42.

The *Adams* decision is clearly distinguishable from the present case. There can be little doubt that the denial of a motion for permanent custody affects a "substantial right" of the minor child. This Court has already determined that the parent's interest in the parent-child relationship involves a "substantial right." *In re Murray*, supra, at 157 (" . . . it is manifest that parental custody of a child is an important legal right protected by law and, thus, comes within the purview of a 'substantial right' for purposes of applying R.C. 2505.02.") Both the General Assembly and the appellate courts of this state have recognized the importance of the minor child's interest in obtaining a legally secure permanent placement. *Ohio Rev. Code* §2151.414(D)(4); *In re: H.M.*, Clinton County Case Nos. CA2005-09-022, CA2005-09-023, 2006 Ohio 819; *In re: G.N.* 176 Ohio App. 3d 236, 2008 Ohio 1796, 891 N.E.2d 816¶17. In another context, this Court has found that the interest of a minor child in the parent-child relationship is as important as the parent's interest in that relationship and has given the same

protection to both interests. See, *Gallimore v. Children's Hosp. Med. Ctr.*, (1993), 67 Ohio St. 3d 244, 617 N.E.2d 1052, and *Rolf, et al v. Tri-State Motor Transit Co., et al* (2001), 91 Ohio St. 3d 380, 2001 Ohio 44, 745 N.E. 2d 424 (recognizing minor child's action for loss of parental consortium).

It is clear that the provisions of the Ohio Revised Code and the Ohio Rules of Juvenile Procedure dealing with abuse, neglect, and dependency proceedings were enacted or adopted to protect the interests of the child. See, e.g. *Ohio Rev. Code §2151.01* (One of the purposes of the sections of Chapter 2151 is, "To provide for the care, protection, and mental and physical development of children subject to Chapter 2151 of the Revised Code . . ."); *Ohio Rev. Code §2151.414(B)(1)* (permitting termination of parental rights and an award of permanent custody only if the movant can establish, inter alia, that it is in the best interest of the child to grant permanent custody); *Juv. R. 1* (One of the purposes of the Juvenile Rules is "to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court . . .")

Indeed, it appears that the General Assemble considers the interests of the child in permanent custody proceedings to be superior to those of the parent. See, *Ohio Rev. Code §2151.414(C)*: "In making 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."

With the interests of the child being the focal point at virtually every stage of abuse, neglect, and dependency proceedings and the child being a party to such proceedings it would seem impossible to suggest that an order denying permanent custody does not affect a

"substantial right" of the child.

Since minor children are often too young to assert their rights on their own behalf and a guardian ad litem is appointed "to protect the interests of [the] child," a guardian ad litem should have the same right to file an appeal on behalf of the child as the child, himself or herself. See, *Juv. R. 4(B)*.

A dispositional order need not be final in all respects to permit an appeal. This Court has determined that "the question of whether an order is final and appealable turns on the effect the order has on the pending action rather than the name attached to it, or its general nature." *In re Murray*, supra. Thus, an adjudication of neglect or dependency followed by an award of temporary custody to a public children's services agency constitutes a final appealable order. *In re: H.F.*, 120 Ohio St. 3d 499, at ¶18, 2008 Ohio 6810, 900 N.E. 2d 607, where this Court stated:

"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. They continue even after a children services agency has been granted permanent custody. R.C. 2151.415(E)." *Id.*, at ¶16.

The denial of a motion for permanent custody is not without consequences for the child who is the subject of a neglect or dependency action. An erroneous denial of a motion for permanent custody means that the best interests of the child will not be served. Accordingly, the minor child should be afforded an opportunity to have such important decisions reviewed by an appellate court.

Finally, the Ohio Rules of Appellate Procedure, approved by this Court, appear to

acknowledge the propriety of an appeal from a denial of permanent custody. Thus, *App. R. 11.2(C)* states that "appeals from orders . . . granting or *denying* termination of parental rights shall be given priority over all other cases except those governed by *App. R. 11.2(B)*. (Emphasis Added)

Appellants C.B. and her guardian ad litem respectfully submit that this Court's holding in *Adams* should be limited to its facts and should not be expanded to bar a minor child and/or her parents from pursuing an appeal from an order denying the agency's motion for permanent custody.

In the present case, there is no assurance that the denial of permanent custody will ever be reviewable. The agency may never file another motion to modify temporary custody to permanent custody. Moreover, any subsequent filing would have to be based upon a showing of changed circumstances. Hence, as to the minor child, the original denial of permanent custody is, for all intents and purposes, final. For the neglected or dependent minor child seeking permanency in a safe and nurturing home, the denial of the agency's motion for permanent custody may very well represent the extinguishment of all hope. For the minor child, her interest in having the court get it right is vital. Precluding appellate review in such cases not only violates the constitutional guarantees of appellate review and due process; it frustrates the goals of legislation designed to protect neglected and dependent children.

Accordingly, the Court should reverse the decision of the court of appeals dismissing Appellants' appeal from the denial of the agency's motion for permanent custody and remand the case to the court of appeals for further proceedings.

**Proposition of Law No. II: A minor child and/or her guardian ad litem may file an appeal from an award of legal custody in a juvenile court dependency proceeding.**

In the present case, the denial of the public children's services agency's motion for permanent custody was accompanied by an award of legal custody to the natural father of the minor child. The second issue presented by this appeal is whether a minor child and/or his guardian ad litem may appeal an award of legal custody to a parent in a neglect or dependency proceeding. The question is whether an award of legal custody in a neglect or dependency proceeding is a final appealable order.

The authorities cited and the analysis set forth under Appellant's first proposition of law is equally applicable to Appellants' second proposition of law and is incorporated herein by reference.

"Legal custody" means "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 provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court." *Juv. R. 2(Y)*.

Under *Ohio Rev. Code §2151.42(B)* an order of disposition granting legal custody of a child is intended to be permanent:

"(B) An order of disposition issued under division (A)(3) of section 2151.353 [2151.35.3], division (A)(3) of section 2151.415 [2151.41.5], or section 2151.417 [2151.41.7] of the Revised Code granting legal custody of a child to a person is intended to be permanent in nature. A court shall not modify or terminate an order

granting legal custody of a child unless it finds, based on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child." (Emphasis Added)

The permanent nature of an award of legal custody underscores the need for appellate review when the award is made.

There is nothing novel about an appeal from an award of legal custody in juvenile court actions. See e.g., *In re: S.M.*, 160 Ohio App. 3d 794, 2005 Ohio 2187 (appeal by father from award of legal custody to grandparent); *In re: J.O.*, Cuyahoga App. No. 87626, 2007 Ohio 407 (appeal by mother from award of legal custody to father); *In re: A.H.*, Cuyahoga App. No. 85132, 2005 Ohio 1307 (appeal by father from award of legal custody to grandparents); *In re: B.J.*, No. C-081261 (First District Court of Appeals, Hamilton County December 11, 2009) (appeal by grandparents from award of legal custody to parent); *In re: Hatch*, 2008 Ohio 5822 (Ohio Ct. App., Third District, Allen County Nov. 10, 2008) (appeal by third party from award of legal custody to mother) Such appeals should be allowed, and have been allowed, because an order awarding legal custody can continue for an indefinite period of time, thereby depriving interested parties of any means to challenge it.

Without timely appellate review, there will be no meaningful check on the enormous power entrusted to our juvenile courts and children will be at risk of being victimized by the very system that was established to protect them. The arbitrary and capricious action of the trial court in the present case underscores the need for appellate review. In the present case, permanent custody of C.B. was denied and legal custody was awarded to the father even though C.B. was reportedly doing well in the foster home and her foster parent had expressed a desire to adopt her;

two lawyers appointed to serve as C.B.'s guardian ad litem for the child recommended permanent custody to the agency; the father had no previous relationship with C.B.; serious questions were raised concerning the father's mental health and emotional stability; the father refused to submit to a court-ordered psychiatric examination prior to the final hearing and otherwise refused to cooperate with the court and the public children's services agency; and a psychiatric evaluation completed after the award of legal custody to the father revealed that the father is mentally ill.

Accordingly, the Court should reverse the decision of the court of appeals dismissing Appellants' appeal from the award of legal custody to the father and remand the case to the court of appeals for further proceedings.

**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.**

It is well established that a minor child involved in a child custody proceeding is a party to said proceedings. Accordingly, courts routinely appoint Guardian ad Litem (hereinafter GAL") to protect the interests of the child. *Ohio Rev. Code §2151.281(B)(1)*. However, under certain circumstances, courts have also appointed separate counsel for the minor child in conjunction with a GAL. This determination by the court is made in some cases under statutory mandate, *Ohio Rev. Code §2151.352*, and other cases pursuant to the particular facts and circumstances of each case. This determination by the Court's recognizes the difference in responsibilities and role for both the GAL and separate legal counsel. "The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law. [Citations omitted.]" *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232, 479 N.E.2d 257.

In many case, courts have held that the appointment of separate individuals to serve as GAL and counsel for a child is required if either the GAL or the trial court determines that a conflict exists between the role of GAL and the role of an attorney. See e.g., *In re P.S.* (August 11, 2005), Cuyahoga App. No. 85917; *In re C.E.*, *Hancock* App. No. 5-09-02 & 5-09-03; *Ohio R. Juv. P. 4(C)(2)*. Other cases find that when a child expresses a clear wish in conflict with the GAL, then the court should appoint counsel for the child. See, *In re Wylie*, 2d Dist. No. 2004CA0054, 2004 Ohio 7243; *In re J.P. -M.*, 9th Dist. Nos. 23694 and 23714, 2007 Ohio 5412. These cases recognize the duty of a court to appoint counsel when such a conflict exists. However, that is not the only instance when counsel can be appointed.

As set forth in *In re Williams*, 101 Ohio St.3d 398, “[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.” The term “certain circumstances” was never defined. “The *Williams* Court did not outline what circumstances might trigger a court’s duty to appoint counsel but presumably it was triggered by the facts before it.” *In re Mack* (Sept.26, 2008), Trumbull App. No. 2005-T-0033, 2008 Ohio 4973, at 17. We argue that the use of such broad terms was intentional and used in an effort to afford the courts a large degree of discretion in making such determination with the overall goal being protecting and serving the best interests of the parties/child involved. See *In re Baby Girl Baxter*, *supra*; *Dell v. Dell* (December 31, 1986), Lucas App. No. 86-133.

In this case, there existed a conflict between the biological father’s wishes and the wishes of the child. In this case, there was ample evidence before the Court that the biological father

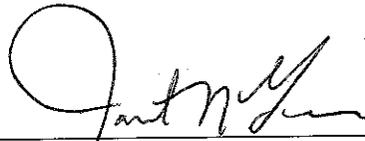
suffered from emotional and mental illness. In this case, there was an allegation that the biological father had abused the child. In this case, the biological father had approached made inappropriate out-of-court contact/threats with the original GAL resulting in the filing of a police report and criminal investigation causing a mistrial. (July 17, 2008, Transcript pgs. 4-54). Another GAL had to be appointed. Due to the unique facts and circumstances of the case, the juvenile court abused its discretion in failing to appoint separate legal counsel to protect the child's due process rights and ensure the equal protections of the law.

We believe that this case provides this Court an opportunity to clarify the meaning of its holding in *Williams* and/or to provide a standard that courts should employ or factors that should be considered when appointing separate legal counsel to represent a minor child in a custody proceeding.

## CONCLUSION

For the reasons set forth herein, the Court should reverse the decision of the Court of Appeals and remand the case with instructions to reinstate Appellants' appeals from the denial of the agency's motion for permanent custody and the award of legal custody to the father and with instructions to appoint counsel to represent the child both in the court of appeals and for any further proceedings in the trial court..

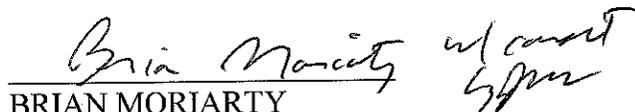
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True copies of the foregoing Merit Brief of Appellants and Appendix were mailed this

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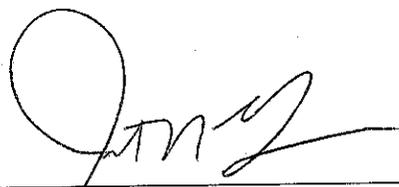
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