

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

In the Matter of:

C.B.  
Neglected and Dependent Child

Case No. 2010-0180

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

Court of Appeals  
Case No. 92775

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**BRIEF OF *AMICUS CURIAE* JUSTICE FOR CHILDREN PROJECT  
IN SUPPORT OF APPELLANT C.B.**

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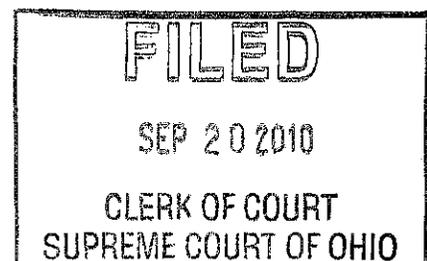
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**TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>I. <u>INTEREST OF AMICUS CURIAE</u>.....</b>	<b>1</b>
<b>II. <u>STATEMENT OF THE CASE AND FACTS</u> .....</b>	<b>2</b>
<b>III. <u>ARGUMENT</u>.....</b>	<b>3</b>
<b><u>FIRST PROPOSITION OF LAW OF AMICUS CURIAE</u></b>	
<b>A dispositional order that grants legal custody to a “relative or other interested individual” in a juvenile proceeding is a final appealable order. ....</b>	<b>3</b>
<b>A. An award of legal custody affects a substantial right and determines the action and prevents a judgment pursuant to R.C. 2505.02(B)(1). .....</b>	<b>4</b>
<b>B. An award of legal custody affects a substantial right and determines the action and prevents a judgment pursuant to R.C. 2505.02(B)(2) .....</b>	<b>7</b>
<b><u>SECOND PROPOSITION OF LAW OF AMICUS CURIAE</u></b>	
<b>A child who is the subject of a permanent custody motion in juvenile court is guaranteed legal counsel by R.C. 2151.352, Juv.R. 4, and the due process clauses of the state and federal constitutions. ....</b>	<b>9</b>
<b>A. A Guardian ad Litem cannot serve as a substitute for the child’s counsel. ....</b>	<b>9</b>
<b>B. A child has a constitutional right to appointed counsel in a permanent custody proceeding. ....</b>	<b>12</b>
<b>1. Substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution. ....</b>	<b>12</b>
<b>2. Children have a substantive due process right to family integrity under Article I, Section 16 of the Ohio Constitution. ....</b>	<b>15</b>

**TABLE OF CONTENTS**

**3. Children may not be deprived of a protected liberty interest without due process of law under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. .... 17**

**(a) The child’s liberty interest is substantial as it involves her right to continue an intimate relationship. .... 18**

**(b) Erroneous deprivation of the child’s rights is likely when she has not been afforded counsel and the opportunity to be heard..... 19**

**C. Children who are the subject of permanent custody motions are parties to the case and, thereby, entitled to appointed legal counsel under Juv. R. 4 and R.C. 2151.352..... 21**

**CONCLUSION ..... 23**

**CERTIFICATE OF SERVICE ..... 23**

## TABLE OF AUTHORITIES

### CASES

<i>Arnold v. Cleveland</i> (1993), 67 Ohio St. 3d 35, 35, 616 N.E.2d 163, 164 .....	16
<i>Bd. of Regents of State Colleges v. Roth</i> (1972), 408 U.S. 564, 570-73, 92 S.Ct. 2701, 3 L.Ed.2d 548 .....	17
<i>Chef Italiano Corp. v. Kent State Univ.</i> (1989), 44 Ohio.St.3d 86, 541 N.E.2d 64...	4
<i>Doe v. Heck</i> (7 <sup>th</sup> Cir. 2003), 327 F.3d 492, 518.....	15
<i>Duchesne v. Sugarman</i> (2d Cir. 1977), 566 F.2d 817, 825 .....	15
<i>In re Adams</i> , 115 Ohio.St.3d 86, 2007-Ohio-4840 .....	3, 7, 8 9
<i>In re Baby Boy Blackshear</i> (2000), 90 Ohio St.3d 197, 200, 736 N.E.2d 462 .....	16
<i>In re Baby Girl Baxter</i> (1985), 17 Ohio.St.3d 229.....	10
<i>In re Gault</i> (1967), 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527 .....	17, 18 19
<i>In re Hayes</i> (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680 .....	16
<i>In re Hoffman</i> , 97 Ohio St.3d 92, 2002.....	12
<i>In re Williams</i> , 101 Ohio.St.3d 398, 2004-Ohio-1500 .....	9, 11 12, 19 21
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981).....	19
<i>Mathews v. Eldridge</i> (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18.....	17
<i>Moore v. City of East Cleveland</i> (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 .....	13, 17
<i>Planned Parenthood of Central Missouri v. Danforth</i> (1976), 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 .....	12
<i>Santosky v. Kramer</i> (1982), 455 U.S. 745, 760, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599 .....	14, 15

## TABLE OF AUTHORITIES

### CASES CONTINUED

<i>Schall v. Martin</i> (1984), 467 U.S. 253, 275-76, 104 S.Ct. 2403, 81 L.Ed.2d 207 ....	20
<i>Shelley v. Kraemer</i> (1948), 334 U.S. 1, 14, 68 S.Ct. 836, 92 L.Ed. 1161 .....	17
<i>Smith v. Organization of Foster Families for Equality and Reform</i> (1977), 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14 .....	8, 13 14
<i>State ex rel. Asberry v. Payne</i> (1998), 82 Ohio.St.3d 44.....	9
<i>State ex. rel Heller v. Miller</i> (1980), 61 Ohio St. 2d 6, 8, 399 N.E.2d 66, 67.....	15, 16
<i>State ex rel. Scruggs v. Sadler</i> , 97 Ohio.St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101 .....	4
<i>Suboh v. District Attorney's Office of Suffolk Dist.</i> (1 <sup>st</sup> Cir. 2002), 298 F.3d 81, 91 .	15
<i>Troxel v. Granville</i> , (2000), 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 .....	14
<i>Wisconsin v. Yoder</i> (1972), 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15.....	9

### MISCELLANEOUS

Nancy Weinfield, <i>Comments on Lamb's "Placing Children's Interests First,"</i> 10 Va. J. Soc. Pol'y & L. 120, 121 (2002).....	16
--	----

### OHIO CONSTITUTION

Ohio Constitution, Article IV, Section 3(B)(2) .....	4
--	---

### OHIO RULES OF CIVIL PROCEDURE

Ohio Rules of Civil Procedure, Rule 54(B) .....	4
---	---

## TABLE OF AUTHORITIES

### OHIO RULES OF JUVENILE PROCEDURE

Ohio Rules of Juvenile Procedure Rule 1(B).....	12
Ohio Rules of Juvenile Procedure, Rule 2(Y).....	4, 21 22
Ohio Rules of Juvenile Procedure, Rule 4.....	6, 9, 21 22

### OHIO RULES OF PROFESSIONAL CONDUCT

Ohio Rules of Professional Conduct, Rule 1.14 .....	21
---	----

### OHIO CONSTITUTION

Article I, Section 1, Ohio Constitution .....	12, 15
Article I, Section 2, Ohio Constitution .....	15
Article I, Section 16, Ohio Constitution .....	12, 15 17
Article I, Section 19, Ohio Constitution .....	15

### OHIO REVISED CODE

Ohio Revised Code, Section 2151.281 .....	6
Ohio Revised Code, Section 2151.352 .....	9, 12 21, 22
Ohio Revised Code, Section 2151.353 .....	3, 4, 5
Ohio Revised Code, Section 2151.415 .....	3, 4, 5 9
Ohio Revised Code, Section 2151.42 .....	5

**TABLE OF AUTHORITIES**

**OHIO REVISED CODE CONTINUED**

Ohio Revised Code, Section 2505.02 ..... 4, 7, 8

**UNITED STATES CONSTITUTION**

First Amendment, United States Constitution..... 12

Fourteenth Amendment, United States Constitution ..... 12, 13  
15, 17

## **I. INTEREST OF AMICUS CURIAE**

Amicus Curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families and the direct legal representation of children and their interests in the courts. Through its production of scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. In its representation of individual clients through the Justice for Children Practicum, a one-semester course open to eligible third-year law students certified as Legal Interns by the Ohio Supreme Court, the Justice for Children Project strives to advance the cause of children's rights.

The Justice for Children Project has undertaken the role of Amicus Curiae in this litigation as part of its overall mission to secure a legal solution that would benefit the child in this permanent custody proceeding. The Project urges reversal of the trial court judgment because of the juvenile court's failure to appoint counsel to represent the minor child during the permanent custody trial. In addition, the Project urges this Court to find that an award of legal custody in a juvenile proceeding is a permanent disposition that constitutes a final appealable order. The Justice for Children Project has no relationship to any of the individuals involved in this litigation.

The Project firmly believes that children in juvenile custody proceedings must have a voice in the courtroom and that their rights must be protected by attorneys who serve as their advocates. Because of the nature of these proceedings, the right to counsel is

morally necessary, statutorily protected, and constitutionally guaranteed. The action of the trial court in the present case had the effect of removing the child from her long-term foster placement without giving her a direct voice in the proceeding and an advocate for her position. The Project urges this Court to reject the holding of the trial court and adopt a broad rule protecting the due process rights of children in permanent custody cases.

## **II. STATEMENT OF THE CASE AND FACTS**

Amicus hereby accepts and adopts the Statement of the Case and Facts set forth in the Merit Brief of Appellant C.B.

### **III. ARGUMENT**

#### **Overview**

A child has a fundamental interest in where she is placed, with whom she resides, and which party holds her custody. The child's voice should be heard – she should be represented by counsel as an advocate in the juvenile proceedings, have the right to give testimony, and be guaranteed appellate review of a judgment that determines her ultimate placement and fate. In short, a child has a statutory right to these protections as a party to the juvenile court proceedings and a due process right to these protections because of the fundamental liberty interests implicated by the court's actions. The child is not a disinterested individual nor is she chattel to be moved or placed at the whim of the parties. Her future will rest on a court decision in which she has a vested, cognizable interest. In furtherance of this interest, Amicus Justice for Children Project urges this Court to adopt the following two propositions of law.

#### **FIRST PROPOSITION OF LAW OF AMICUS CURIAE**

**A dispositional order that grants legal custody to a “relative or other interested individual” in a juvenile proceeding is a final appealable order.**

An award of legal custody is a final appealable order that is subject to challenge on direct appeal. The juvenile court may award legal custody as an initial disposition under R.C. 2151.353(A)(3) or R.C. 2151.415(A) when a temporary custody order terminates. This disposition is statutorily described as a permanent order that establishes the rights of the parties. Moreover, this Court has expressly held that while an agency cannot appeal the denial of permanent custody motion, any party whose substantial rights are affected can appeal an award of legal custody. *In re Adams*, 115 Ohio.St.3d 86, 2007-Ohio-4840, at ¶46. A child, as a party to the juvenile proceeding

pursuant to Juv.R. 2(Y), has substantial rights that are affected by an award of legal custody; thus, because of her status, C.B. was entitled to appeal the judgment of the trial court.

Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler*, 97 Ohio.St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5; see, also, *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio.St.3d 86, 541 N.E.2d 64, syllabus. The threshold requirements set forth in R.C. 2505.02(B) provide in pertinent part:

(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;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

A juvenile court's award of legal custody, therefore, qualifies as a final appealable order under both R.C. 2505.02(B)(1) and (B)(2) for the following reasons.

**A. An award of legal custody affects a substantial right and determines the action and prevents a judgment pursuant to R.C. 2505.02(B)(1).**

Legal custody can be awarded as an initial disposition, immediately following an adjudication that a child is dependent, neglected or abused, see R.C. 2151.353(A)(3); or it can be awarded as a final disposition, see R.C. 2151.415(A)(3); following the termination of a temporary custody order. Both sections clearly provide that legal custody is considered to be a permanent disposition which ends the action. Section

2151.353(A)(3) of the Revised Code permits the court to award legal custody to a person who signs a statement of understanding that (a) 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 child, (b) the person understands that legal custody is intended to be permanent in nature and the custodian will be responsible until the child reaches the age of majority, (c) the parents have residual parental rights, privileges, and responsibilities, and (d) the person must be present at the dispositional hearing.

Section 2151.415 of the Revised Code lists the permanent dispositions that are available to the court following the termination of temporary custody.

(A) Except for cases in which a motion for permanent custody described in division (D)(1) of section 2151.413 of the Revised Code is required to be made, a public children services agency or private child placing agency that has been given temporary custody of a child pursuant to section 2151.353 of the Revised Code ... shall file a motion with the court that issued the order of disposition requesting that any of the following orders of disposition of the child be issued by the court:

- (1) An order that the child be returned home and the custody of the child's parents, guardian, or custodian without any restrictions;
- (2) An order for protective supervision;
- (3) *An order that the child be placed in the legal custody of a relative or other interested individual;*
- (4) An order permanently terminating the parental rights of the child's parents;
- (5) An order that the child be placed in a planned permanent living arrangement;
- (6) In accordance with division (D) of this section, an order for the extension of temporary custody.

Section 2151.42(B) of the Revised Code states that orders of disposition issued under R.C.2151.353(A)(3) and R.C. 2151.415(A)(3) are "intended to be permanent in nature." Moreover,

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.

R.C. 2151.42(B)

The intention of the legislature to end juvenile court oversight when the court makes an award of legal custody can also be seen from other provisions. The guardian ad litem, who is appointed to protect the interest of a child, appears at the commencement of the abuse and neglect actions and continues until the termination of the case. It is at this point that the child loses her "protector." This termination point is statutorily determined to include an order of legal custody. According to R.C.

2151.281(G):

(G) In any case involving an alleged or adjudicated abused or neglected child or an agreement for the voluntary surrender of temporary or permanent custody of a child that is made in accordance with section 5103.15 of the Revised Code, the court shall appoint the guardian ad litem in each case as soon as possible after the complaint is filed, the request for an extension of the temporary custody agreement is filed with the court, or the request for court approval of the permanent custody agreement is filed. \* \* \* The guardian ad litem or the guardian ad litem's replacement shall continue to serve until any of the following occur:

- (1) The complaint is dismissed or the request for an extension of a temporary custody agreement or for court approval of the permanent custody agreement is withdrawn or denied;
- (2) All dispositional orders relative to the child have terminated;
- (3) *The legal custody of the child is granted to a relative of the child, or to another person;*
- (4) The child is placed in an adoptive home or, at the court's discretion, a final decree of adoption is issued with respect to the child;

(5) The child reaches the age of eighteen if the child is not mentally retarded, developmentally disabled, or physically impaired;  
child is mentally retarded, developmentally disabled, or physically impaired;

(6) The guardian ad litem resigns or is removed by the court and a replacement is appointed by the court. [Emphasis added]

A guardian ad litem must be appointed to represent a child during the pendency of abuse, neglect, voluntary surrender, and permanent custody proceedings. Juv.R. 4(B). The termination of that role signals the end of active juvenile court involvement. It is an order that determines the action and prevents a judgment. This conclusion is not only required by statute and rule, it also is recognized by this Court in *Adams*. In *Adams*, the Court stated that the permanent disposition orders set forth in R.C. 2151.415(A)(1) through (5) were final orders from which any affected party can appeal. According to *Adams*, at ¶46:

{¶ 46} Given that the Adams children have been in the temporary custody of the agency for more than the statutorily permitted time of two years, appellant should file a motion with the trial court requesting the issuance of an order of disposition set forth in R.C. 2151.415(A)(1) through (5). *When the trial court enters its final order, all parties whose substantial rights are affected by that order will be able to appeal.* [Emphasis added]

Certainly, the child has substantial rights that are affected by the lower court's judgment, and those rights entitled her to appeal the court's judgment through her counsel. The denial of a motion to terminate parental rights affects substantial rights of children because they determine whether family reunification efforts and visitation continue. Continued contact with biological parents can be unhealthy or even traumatic. Moreover, as in this case, the removal of a child from the only home that she had known and the placement of that child in a household that is potentially damaging, affects her

substantial rights. In the absence of appellate review, the child has limited recourse. Until the child suffers physical or emotional harm, she will have little chance to persuade the trial court to reverse its own order. By that time, the damage to the child will already have occurred.

**B. An award of legal custody affects a substantial right made in a special proceeding pursuant to R.C. 2505.02(B)(2).**

The Supreme Court held in *Adams* that termination of parental rights proceedings are special proceedings “as such actions were not known at common law.” *Adams*, ¶43. Although the trial court denied the agency motion to terminate parental rights in the present case, the court proceeded to grant the father’s motion for legal custody as a final dispositional order. This order terminated agency involvement and transferred the child from the foster home, where she had resided for her entire life, to the home of her biological father.

The United States Supreme Court has recognized that, “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children as well as from the fact of blood relationship.” *Smith v. Organization of Foster Families for Equality and Reform* (1977), 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14, quoting *Wisconsin v. Yoder* (1972), 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15. A child has an interest that is similar to that of the parents in preserving the integrity of the family unit. Although the United States Supreme Court has not yet recognized that a child has the same rights with respect to preserving nonbiological

relationships, a child does have a substantial interest in preserving such “familial” relationships. These interests certainly entitle a child to appeal dispositional orders regarding placement and care.

On the other hand, an agency generally cannot appeal the denial of a permanent custody motion under R.C. 2505.02(B)(2) because that denial would not affect a substantial right of the agency, which already has temporary custody. In addition, *Adams* is distinguishable “because the continuation of the agency’s temporary custody does not determine the outcome of the action for neglect and dependency.” *Adams*, at ¶36. The reason is that “[a] juvenile court has several ultimate dispositional options pursuant to R.C. 2151.415(A), and ordering the continuation of temporary custody do[es] not preclude the juvenile court from exercising any of these options,” *Adams*, at ¶36; or from renewing its request for permanent custody, *Adams*, at ¶37. The issuance of the legal custody order following the denial of the permanent custody motion was, according to *Adams*, an alternative disposition that determined the action.

### **SECOND PROPOSITION OF LAW OF AMICUS CURIAE**

**A child who is the subject of a permanent custody motion in juvenile court is guaranteed legal counsel by R.C. 2151.352, Juv.R. 4, and the due process clauses of the state and federal constitutions.**

The minor child in the present case proceeded to trial on the permanent commitment motion without the benefit of an attorney to serve as her advocate. This failure was in direct conflict with R.C. 2151.352 and Juv.R. 4, was contrary to the holdings of this Court in *In re Williams*, 101 Ohio.St.3d 398, 2004-Ohio-1500, ¶29 and

*State ex rel. Asberry v. Payne* (1998), 82 Ohio.St.3d 44, 48, and violated the minor's due process rights under the state and federal constitutions.

**A. A Guardian ad Litem cannot serve as a substitute for the child's counsel.**

Although an attorney served as guardian ad litem during the permanent custody trial, a court appointed guardian ad litem is not an attorney for the child and is not bound by the child's wishes. The fact that the trial court assigned a guardian ad litem to represent C.B. does not otherwise satisfy statute, rule, or constitutional guarantee. As a party to a permanent commitment action, a child is entitled to be represented by counsel in addition to receiving a guardian ad litem. Both roles must be filled because there is a fundamental distinction between the responsibilities of the attorney and the guardian ad litem that easily and frequently conflict. Juv. R. 4(C)(1) provides that a dual appointment of an attorney to serve in both capacities is possible "providing no conflict between the roles exists." Accordingly, this Court held in *In re Baby Girl Baxter* (1985), 17 Ohio.St.3d 229, at 232, that,

Juv. R. 4(C) expressly allows appointed counsel to also serve as guardian ad litem. Appellant now argues that Heflin, who served as both her attorney and guardian ad litem in juvenile court, had conflicting duties and that he, therefore, failed to provide her with proper representation.

The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. 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. DR 7-101; DR 7-102.

Even in a case in which the child's wishes and the recommendation of the GAL may coincide at given points in time, this cannot justify the deprivation of counsel. The

GAL makes a recommendation that considers but is not controlled by the child's desires. This recommendation can obscure and diminish the importance of the child's wishes, even though those wishes must be considered by the court in termination proceedings.

According to this Court in *Baxter*, 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. When an attorney serves in a dual capacity, it is the role of the attorney that controls. According to the American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, adopted in 1996, the "child's attorney" is "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." ABA Standard A-1. The Comment to the standard emphasizes that child clients have particularized needs that must be addressed through independent counsel.

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

It would also be inappropriate for a child in a permanent custody proceeding to share an attorney with a person who has similar interests – a position expressly rejected by this Court in *Williams*, at ¶¶24-27. A court may never assume that the particular position of the child will always be consistent with the position of another party. Ohio law requires that the child, who is a party to the proceedings, have appointed counsel, who serves as an advocate for the child. *Williams*, at ¶27.

**B. A child has a constitutional right to appointed counsel in a permanent custody proceeding.**

It is well settled that children have constitutional rights; those rights do not mature and come into being only when children reach the age of majority. *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788. The right of C.B. to be heard and represented in a permanent custody proceeding is grounded not only in R.C. 2151.352 and the Ohio Juvenile Rules but also in the United States and Ohio Constitutions. Amicus Curiae respectfully submits that the actions of the trial court below infringed on the child's fundamental right to maintain and pursue a parent-child relationship pursuant to the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 16 of the Ohio Constitution. Moreover, the failure to provide C.B. with appointed counsel violates her federal and state procedural due process rights.

**1. Children have a fundamental right to family integrity under the Substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution.**

In *Williams*, this Court recognized that “Juv.R. 1(B) provides that the Juvenile Rules ‘shall be liberally interpreted and construed so as to effectuate \* \* \* the just determination of every juvenile court proceeding by ensuring the parties a fair hearing

and the recognition and enforcement of their constitutional and other legal rights.’ Once we accept the premise that the subject child is a party whose due process rights are entitled to protection, peripheral practical considerations fade in importance. See *In re Hoffman*, 97 Ohio St.3d 92, 2002, ¶ 14 (recognizing importance of ensuring due process in cases involving the termination of parental rights).” *Williams*, ¶28.

Liberties “deeply rooted in this Nation’s history and tradition” are fundamental rights. *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531. The family unit garners considerable constitutional protection precisely because the institution of the family is “deeply rooted” in our history and tradition and provides the means for the inculcation and transmission of important moral and cultural values. *Id.* at 503-04, 97 S.Ct. at 1938. Moreover, the concept of a family is a broad one, encompassing not just a nuclear family but an extended family as well, which may include aunts, grandparents, or even cousins. *Id.* at 504, 97 S.Ct. at 1938. As the United States Supreme Court noted in *Smith v. Organization of Foster Families for Equality and Reform* (1977), 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14, the importance of the family “stems from the *emotional attachments* that derive from the intimacy of daily association” (emphasis added), not from any biological relationship. Thus the right to maintain and pursue intimate familial associations is a fundamental right protected by the Substantive Due Process Clause of the Fourteenth Amendment. *Moore v. City of East Cleveland*, 431 U.S. at 503, 97 S.Ct. at 1938.

Moreover, these rights are rights of the family and of the individuals in that association; they are not simply the rights of parents to the care, custody, control, or upbringing of their children. For example, the Court in *Moore v. City of East Cleveland*, 431 U.S. at 502, 97 S. Ct. at 1937, held that the Due Process Clause protects more than just parental rights and authority; it also protects the sanctity of the family and familial rights. Nor are the hallmarks of living in a family--intimacy and emotional attachment--only experienced by parents. The Court has noted that these characteristics, even advantages, of familial arrangements are important to all the individuals involved because of "the emotional attachments that derive from the intimacy of daily association." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. at 844, 97 S. Ct. at 2109. Because the right to maintain familial relationships is a fundamental right, substantive due process provides heightened protection against any state regulation. *Troxel v. Granville* (2000), 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49.

As the child's voice is seldom heard, the United States Supreme Court has never explicitly clarified whether children have a substantive due process right to maintain and pursue their relationships with their parents. The Court nevertheless has alluded to the child's right to familial integrity. In *Santosky v. Kramer* (1982), 455 U.S. 745, 760, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599, the Court noted that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship." In *Troxel v. Granville*, Justice Stevens, in his dissenting opinion, noted that "children are in many circumstances possessed of constitutionally protected rights and liberties." *Troxel*, 530 U.S. at 88 n.8, 120 S.Ct. at

2072 n.8 (Stevens, J., dissenting). The Court's "prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel." *Id.* at 88-89, 120 S.Ct. at 2072 (Stevens, J., dissenting). Thus, it is "extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too do children have these interests." *Id.* at 88, 120 S.Ct. at 2072 (Stevens, J., dissenting).

The lower federal courts also have recognized the child's liberty interest in maintaining the parent-child relationship. The Second Circuit has held that "the most essential and basic aspect of familial privacy [is] the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children." *Duchesne v. Sugarman* (2d Cir. 1977), 566 F.2d 817, 825. Similarly, the Seventh Circuit Court of Appeals found "equally fundamental...the right of a child to be raised and nurtured by his parents." *Doe v. Heck* (7<sup>th</sup> Cir. 2003), 327 F.3d 492, 518 (citing *Santosky v. Kramer*, 455 U.S. at 760, 102 S.Ct. 1388, 71 L.Ed.2d 599). The First Circuit, too, has recognized the child's right to maintain and preserve the parent-child relationship. *Suboh v. District Attorney's Office of Suffolk Dist.* (1<sup>st</sup> Cir. 2002), 298 F.3d 81, 91 (child has a liberty interest in being in care and custody of parent).

In the case at bar, there is little doubt that C.B. has a liberty interest at stake. C.B. has an emotional bond to her foster mother and views her as the only parent that she has ever had. The lower courts severed that bond permanently. C.B.'s right to family integrity thus is directly infringed by the lower court's decision.

**2. Children have a substantive due process right to family integrity under Article I, Section 16 of the Ohio Constitution.**

Article I, Section 16, when read in conjunction with Sections 1, 2, and 19, affords protection analogous to that provided by the Fourteenth Amendment Due Process Clause. *State ex. rel Heller v. Miller* (1980), 61 Ohio St. 2d 6, 8, 399 N.E.2d 66, 67. “As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the Ohio Constitution.” *Id.* Of course, state courts may rely on their own constitutions to provide broader protection for individual rights independent of protections afforded by the United States Constitution. “The Ohio Constitution is a document of independent force. . . . [S]tate courts are unrestricted in according greater civil liberties and protection to individuals and groups.” *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 35, 616 N.E.2d 163, 164.

Ohio has long recognized the importance of familial relationships. The right to raise a child is an “essential” civil right. *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680. Because the parental right to custody is paramount, the decision to terminate that right is “the family law equivalent of the death penalty in a criminal case.” *Id.* But this Court also has recognized the “child has legal and constitutional rights and that the juvenile courts were created, in part, to protect those rights.” *In re Baby Boy Blackshear* (2000), 90 Ohio St.3d 197, 200, 736 N.E.2d 462. Thus, this Court has stated that both “a parent and child have substantial, protected rights in their family relationship under the due process clause” of the federal and Ohio Constitutions. *State ex rel. Heller v. Miller*, 61 Ohio St.2d at 10, 399 N.E.2d at 68.

C.B. has a substantial interest in the custody determinations entered in juvenile court, both in addressing the motion to terminate parental rights and in appealing the

judgment that terminated her familial relationships and placed her with her biological father. The attachments that a child as young as C.B. has formed with her primary caregiver are extremely important to the child's development. That loss of attachment can have far-reaching and negative consequences for the child. See, e.g., Nancy Weinfield, *Comments on Lamb's "Placing Children's Interests First"* (2002), 10 Va. J. Soc. Pol'y & L. 120, 121. To terminate the relationship without a significant understanding of the effects on C.B. clearly implicates her constitutional rights.

**3. Children may not be deprived of a protected liberty interest without due process of law under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.**

The Fourteenth Amendment to the United States Constitution establishes that "no state [shall] deprive any person of life, liberty, or property, without due process of law." Fourteenth Amendment, United States Constitution. To apply procedural due process, a state must take action to deprive an individual of a protectable interest in life, liberty, or property. See *Bd. of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 570-73, 92 S.Ct. 2701, 3 L.Ed.2d 548. Judicial action qualifies as state action for procedural due process purposes. *Shelley v. Kraemer* (1948), 334 U.S. 1, 14, 68 S.Ct. 836, 92 L.Ed. 1161. The Supreme Court clearly has established that familial relationships are a liberty interest encompassed by the due process clause. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. at 499, 97 S.Ct. 1932, 52 L.Ed.2d 531.

In 1976, the Supreme Court created a three-part balancing test to determine what process is due when an individual has been deprived of a liberty interest. *Mathews*

*v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18. The three factors set out by *Mathews* are:

[F]irst, the private interest that will be affected through the procedures used; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

Three critical procedural due process rights are the right to notice, a meaningful hearing, and counsel. *In re Gault* (1967), 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527. The Supreme Court has determined that these rights extend to children when their protected liberty interests are threatened by state action. *Id.* at 28-31.

**(a) The child's liberty interest is substantial as it involves her right to continue an intimate relationship.**

In this case, the private interest affected is substantial. C.B. has a relationship that is at risk of being permanently terminated by the proceedings below. Moreover, it is clear that the relationship between the child and her foster mother is a close one. C.B. has lived with her foster mother for her entire life and clearly has a strong emotional bond with her. She has been raised in this foster family during critical times in her emotional development.

**(b) Erroneous deprivation of the child's rights is likely when she has not been afforded counsel and the opportunity to be heard.**

The risk of erroneous deprivation in this case is great, and the severity of this risk entitles C.B. to representation by counsel during any proceeding that could potentially

limit her ability to maintain and pursue a parent-child relationship. See *Gault*, 387 U.S. at 28-31, 87 S.Ct. 1428, 18 L.Ed.2d 527. By excluding the child from the permanent custody trial, the juvenile court deprived her of the right to address issues of familial integrity.

In addition, the trial court's failure to appoint independent counsel for C.B. was inadequate to guarantee the child's constitutional right to maintain and preserve the familial relationship. There is little doubt that "counsel is often indispensable to the realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." *Gault*, 387 U.S. at 40, 87 S.Ct. 1428, 18 L.Ed.2d 527 (citing the New York Family Court Act, § 241). It is clear from the facts of this case that C.B.'s biological parents could not act as disinterested best friends on her behalf. Rather, they have pursued outcomes that best serve their own interests.

Furthermore, a child, unlike an adult, may have special need of counsel in these matters. In *Lassiter v. Department of Social Services* (1981), 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640, the Supreme Court held that the appointment of counsel to an indigent parent in a termination of parental rights proceeding was to be made on a case-by-case basis. *Id.* at 31-32, 101 S. Ct. at 2162. Among the factors to be considered in making the appointment are whether there are no troublesome points of law, whether an expert will testify for the state, and if the weight of the evidence is sufficiently great that presence of counsel would not have made a qualitative difference. *Id.* at 32-33, 101 S. Ct. at 2162-63. Obviously, these factors envision the parent as a fully competent and capable participant in the legal proceeding. Certainly, the same could not be said

for a child, particularly a very young child who will have very little experience in these matters.

It is instructive that the United States Supreme Court has extended the right to counsel to children as a matter of due process in other contexts when the state seeks to take custody away from the parent. For example, in *Gault*, the Court explicitly held that as a matter of due process, the child has a constitutional right to counsel in any delinquency proceeding “which may result in commitment to an institution in which the juvenile’s freedom may be curtailed.” *Gault*, 387 U.S. at 41, 87 S.Ct. 1428, 18 L.Ed.2d 527. The child “needs the assistance of counsel to cope with problems of law, make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings.” *Id.* at 36, 87 S.Ct. 1428, 18 L.Ed.2d 527. Similarly, in *Schall v. Martin* (1984), 467 U.S. 253, 275-76, 104 S.Ct. 2403, 81 L.Ed.2d 207, the Court upheld the pretrial detention of minors, finding that the procedural safeguards in place, which included the right to counsel, were adequate as a matter of due process.

The costs and burdens imposed on the state to provide these additional procedural safeguards is minimal in a case such as this, where termination of parental rights is contested. Providing children notice and an opportunity to be heard would not add significantly to the costs already assumed by the state in providing the parties with a judicial forum for the resolution of their disputes. Moreover, concern with the cost of providing C.B. with court-appointed legal counsel cannot overcome the statutory and constitutional mandate requiring representation. *Williams*, at ¶¶26-27.

For these reasons, procedural due process mandates that C.B. be given independent appointed counsel to represent her interest before the court below.

**C. Children who are the subject of permanent custody motions are parties to the case and, thereby, entitled to appointed legal counsel under Juv. R. 4 and R.C. 2151.352.**

Under both statute and rule, a juvenile court is required to appoint counsel to represent children subject to termination of parental rights proceedings. Ohio courts have consistently recognized that that the plain language of both statute and rule guarantee this right.

Juv. R. 2(Y), which unequivocally provides that,

*“Party” means a child who is the subject of a juvenile court proceeding, the child’s spouse, if any the child’s parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child’s custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court. [Emphasis added]*

A child’s right to counsel is apparent when this language is read in conjunction with Juv. R. 4(A), which states in pertinent part that,

*Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. [Emphasis added]*

In addition, there is a separate statutory right to counsel under R.C. 2151.352, which states that “a child or the child’s parents, custodian, or other person *in loco parentis* of such child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152.”

In *Williams*, this Court held in syllabus, 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.” R.C. 2151.352 and Juv.R.

4(A) do not set limits on the right of a party to counsel in juvenile proceedings. Any restriction on the appointment of counsel, or as to counsel's role, is governed by Rule 1.14 of the Ohio Rules of Professional Conduct. To deny an attorney to C.B., who was represented by counsel during the early stages of litigation and later on appeal, would require a finding that she was a preverbal child who was incapable of communicating with counsel. It would also require the trial court to make an inquiry into the child's circumstances prior to depriving the child of counsel during the trial on the permanent custody motion.

Ohio law is well-settled. The trial court's failure to properly appoint counsel under these circumstances mandates reversal.

#### **IV. CONCLUSION**

For the above stated reasons, this Court should reverse the decision of the Cuyahoga County Court of Appeals, vacate the judgment of the trial court with respect to the denial of the permanent commitment motion and the award of legal custody to the father, and direct that the juvenile court appoint counsel for C.B. The failure to appoint counsel for the minor child is a fundamental error that requires reversal and rehearing.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief was mailed by Regular U.S. Mail, postage prepaid on this 20th day of September, 2010, to the following persons:

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