

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
Dependent Child	:	Eighth Appellate District
	:	
	:	Court of Appeals
	:	Case No. 92775

MERIT BRIEF OF APPELLEE FATHER ANTHONY WYLIE

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Dependent Child

MERIT BRIEF OF APPELLEE FATHER ANTHONY WYLIE

Comes now Appellee Natural Father of C.B. Anthony Wylie, *pro se*, hereinafter referred to as "Father." Appellee Father pursuant to *S. Ct. Prac. R. 6.3(A) (2)* in conjunctive accordance with *S. Ct. Prac. R. 6.2 (B)* hereby submits his *Appellee Merit Brief* to the pleading standard as set forth and described by the United States Supreme Court in *Haines v. Kerner*, wherein the Court unanimously held that in a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹ "Pro se pleadings are to be considered without regard to technicality; pro se litigants' pleadings are not to be held to the same high standards of perfection as lawyers."² "Lest the citizenry lose faith in the substance of the system and the procedures used to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and tell them they lose because they did not know how to play the game or should have taken us at our word."³ "Equality before the law, like universal suffrage, holds a privileged place in our political system, and to deny equality

¹ 404 U.S. 519 520-521 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972)

² Maty v. Grasselli Chemical Co., 303 U.S. 197 (1938)

³ Moore v. Price, 914 S.W.2d 318, 323 Ark. (1996) (Mayfield J. dissenting)

before the law delegitimizes that system... when these rights are denied, the expectation that the affronted parties should continue to respect the political systems... that they should continue to treat it as a legitimate political system—has no basis.”⁴

STATEMENT OF FACTS

At the outset, it should be noted that in the case at bar, there are 21 transcripts which are part of the record on appeal. The assignments of error filed by all parties in the lower Eighth District Appellate Court and which arises out of the appeal therein from the Trial Court and which is the subject of the matter before this Court, concern only issues involving evidence presented at trial in the Cuyahoga County Juvenile Court, which began on *October 28, 2008* and concluded on *November 3, 2008*.

As a result, and *as is proper*, Appellee Father Anthony Wylie will only be relying on and utilizing the *five volumes of transcript concerning the trial* conducted which began on *October 28, 2008* and concluded on *November, 3, 2008*. *Those volumes are marked I, II, III, IV, and V of V and page numbered sequentially by the court reporter. As a result reference to them will be made as TR., followed by a page number.*

Moreover, Appellee Father Anthony Wylie *objects to the “Statement of the Case and Facts”* of the Appellant”s as set forth jointly in the Appellant’s Merit Brief filed by attorney’s Garver and Moriarty and asks that portions of the arguments contained in “*Statement of the Case and Facts*” along with any that are further contained in the Appellant’s jointly filed Merit Brief including any matters which are predicated thereon including any ancillary arguments,

⁴ David Luban, Lawyers and Justice: An Ethical Study, 251, 264-266 n.12 (Princeton Univ.) excerpted from Disparate Treatment of Pro Se Civil Litigants in Federal Court: A Justification for Resort to Inappropriate Self Help by Sean L. Harrington (Page 1.)

assertions, or contentions along with any and ALL of the inappropriate and improper facts originating there from, be stricken from both the Appellant's "*Statement of the Case and Facts*" along with the Appellant's Merit Brief, and ignored by this Court specifically:

(Tr. 4-5), (Tr. 6-8), (Tr. 9), (Tr. 10), (Tr. 4), (Tr. 8), (Tr. 15), (Tr. 15-16),
(Tr. 20-22), (Tr. 24), (Tr. 25-27), (Tr. 28-29), (Tr. 7), (Tr. 8), (Tr. 9), (Tr. 11), (Tr. 18),
(Tr. 18-19), (Tr. 20-21), (Tr. 68), (Transcript of Sept. 12, 2007, pg. 5-6), (Tr. 6-10), (Tr. 19),
(Tr. 21), (Tr. 24-26), (Tr. 28), (Tr. 3), (Tr. 8), (Tr. 34), (Tr. 42), (Tr. 48), (Tr. 4-5, 17), (Tr. 15),
(Tr. 21), (Tr. 22-23), (Tr. 28), (Tr. 28), (Tr. 32), (Tr. 10-13), (Tr. 12), (Tr. 14), (Tr. 16),
(Tr. 16-17), (Tr. 18), (Tr. 34), (Tr. 35), (Tr. 38), (Tr. 39), (Tr. 40), (Tr. 40), (Tr. 44), (Tr. 46),
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(Tr. 129), (Tr. 131-138), (Tr. 141), (Tr. 144-145), (Tr. 147), (Tr. 4-5), (Tr. 5), (Tr. 19-27),
(Tr. 28), (Tr. 29), (Tr. 35-36), (Tr. 36), (Tr. 54), (Tr. 5), (Tr. 6-8), (Tr. 16), (Tr. 31).

which are collectively and improperly advanced in the Appellant's Statement of the Case and Facts and are specifically referenced above by the Appellee Father and which are specifically located on pages 2, 3, 4, 5, 6, 7, 8, 9, 10, in the Appellant's Statement of the Case and Facts.

In the lower Appellate Court of the Eighth District Court of Appeals for Cuyahoga County, Ohio the (*Appellee Mother herein*) (*Appellant Mother therein*) filed an appeal on February 05, 2009 from the denial of the motion for permanent custody decision which was rendered on (February 1, 2009) by the Cuyahoga County Juvenile Court.

Mother stipulated to the motion. *Father contested* the motion.

On May 7, 2008 trial was had *with evidence and testimony presented by CCDCFS.*

On July 17, 2008, prior to conclusion of trial, the original guardian ad litem withdrew and *the*

court declared a mistrial.

The retrial which is the subject of this appeal commenced on October 28, 2008 and concluded on November 3, 2008. After a full hearing the motion for permanent custody was denied. The trial court terminated temporary custody and vested father with legal custody.

It is important to note that prior to retrial mother again stipulated, father again contested the motion. As mother stipulated to the motion and she, her attorney and her guardian ad litem all asked to be and were in fact excused from further proceedings on the motion. Mother presented no evidence, cross-examined no witnesses, objected to no evidence being presented and never even observed the trial. She totally and completely failed to test the credibility of anyone or thing being presented at trial and has clearly waived the right to do so on appeal and thus waived her right to complain about the outcome thus again WAIVING HER RIGHT TO APPEAL, OR ALTERNATIVELY, WAIVING HER RIGHT TO COMPLAIN ABOUT ANYTHING OTHER THAN PLAIN ERROR.

*Despite the above aforementioned, Appellant mother filed a written notice of appeal from the denial of the Motion for Permanent Custody first in the trial court on *February 5, 2009* which subsequently was then re-filed in the Eighth District Court of Appeals on *February 6, 2009*. No one else filed an appeal. Eventually, on *March 10, 2009* the child's guardian ad litem Thomas Kozel filed a notice of cross-appeal *under the same case number* (**BUT NEVER FILED HIS CROSS- APPELLANT'S BRIEF**) the guardian ad litem's notice of appeal *did not state* he filed it on behalf of the child, thus it was filed by the guardian ad litem in an individual and *pro se* capacity as a party to the lower court proceedings.*

On March 9, 2009 the child's guardian ad litem also filed a separate motion *which expressly*

states it was filed on behalf of the child requesting an attorney to be appointed to represent the child on appeal.

It is important to note that on *March 9, 2009* in the lower Eighth District Appellate Court the Guardian ad litem, Thomas Kozel filed a “**Notice of Appeal**” (*Cross-Appeal*) in the capacity as a party to the lower trial court proceedings, and **did not specify as required** that it was filed on behalf of the child, as such he thus advanced said cross-appeal in his own capacity as a separate and distinct party from the child and **what is further important to note**, is that also simultaneously on *March 9, 2009* Guardian ad litem, Thomas Kozel also filed Motion to Appoint Appellate Counsel on behalf of the Child this latter aforementioned motion was granted on *April 1, 2009* attorney **Brian Moriarty was appointed to represent the child C.B.** The Guardian ad litem, Thomas Kozel *never* independently sought appointment of counsel to represent himself and thus was proceeding party *pro se* in the lower appellate court proceedings. Though the Guardian ad litem, **Thomas Kozel, filed a “Notice of Appeal” (Cross- Appeal)** on *March 9, 2009* and then **never filed his Cross-Appellant’s Merit Brief.**

Father further points out that on *March 9, 2009* in the lower Eighth District Appellate Court the Guardian ad litem, Thomas Kozel filed a “**Notice of Appeal**” (*Cross-Appeal*) and though he did simultaneously file a *Motion to Stay Proceedings*, and which was in fact granted, on April 1, 2009 he accomplished this by purposefully putting forth matters *which either in vast part were either not part of the trial court record* (from the trial October 28, 2008, through November 3, 2008) *or were absolutely never a part of the trial court record at all*, both of which were never fully subjected to the heightened scrutiny required by due process of law due to the fundamental rights at stake herein in which the contents of which were either absolutely untrue, so purposefully misconstrued and misrepresented so as to be set forth in such a bastardized fashion

that it rendered the factual nature of the improperly advanced assertions grossly distorted from whatever substantive factualness or merit they may have had so as to be untrue which is and was wholly improper and unethical and *has been the mainstay of Guardian ad litem Thomas Kozel's underhanded tactics along with Brian Moriarty C.B.'s appellate counsel in the aforementioned lower appellate proceedings* (and herein) irrespective of whether or not it comports with ethics, propriety, or whether or not it is congruous with the fundamental tenets of appellate procedure. *On March 25, 2009* Betty Farley counsel for the Appellant Mother *instead of filing an "Ander's Brief" as would have been proper*, instead proceeded to file the Mother's Appellant Merit Brief on behalf the Appellant Mother *in disregard of App. R. 23* assigning assignments of error wherein she did not raise plain error which was the only error she could have properly raised on behalf of her client the Appellant Mother as the Mother did not participate in the trial. *On April 1, 2009* Brian Moriarty was appointed to represent the child in the lower appellate court. Attorney Brian Moriarty **never filed an independent appeal on behalf of C.B. and as a result, C.B. was and is an Appellee in the lower Appellate Court.**

Brian Moriarty checked out the 21 transcript volumes and *improperly filed* several motions to supplement the record and several motions for extension of time. *He improperly filed his motions on behalf of the guardian ad litem and not on behalf of the child C.B. whom he was appointed to represent by the Eighth District Court of Appeals.*

Most of the documents with which Moriarty improperly supplemented the record with in the lower appellate court were created subsequent to judgment and should be stricken as not properly part of the record on appeal.

On June 1, 2009 attorney Dale Hartman was appointed to represent the Appellee Father in the lower appellate Court proceedings. Attorney Hartman opposed the last motion for extension of

time filed by Moriarty on *July 29, 2009* filed nearly five months after the Appellant Mother filed her merit brief. Before the lower appellate court ruled on the latter request for extension of time filed by Moriarty, on *August 5, 2009* Moriarty filed an appellant's brief instanter on behalf of the guardian ad litem FOLLOWED BY a motion to correct on *August 10, 2009* stating it was filed on behalf of the child instead of on behalf of the guardian ad litem which the lower appellate court granted on *August 18, 2009*. That brief, though organized differently, basically argued the same error IMPROPERLY ADVANCED AND ASSIGNED BY THE APPELLANT MOTHER. (The verdict was against the manifest weight of the evidence and permanent custody was in the child's best interest.)

As C.B. was an Appellee, it was improper for attorney Moriarty to have filed a Merit Brief in which C.B. argued her own assignment of errors as an Appellee can only argue defensively the assignments of errors of the Appellant Mother in this instance, who preserved nothing for appeal by not participating in the trial court proceedings and didn't argue plain error. Moriarty's brief sinks with the Appellant Mother's due to failing to file an independent appeal on behalf of C.B. Meanwhile Appellee Father's counsel therein attorney Hartman filed several motions on behalf of the Appellee Father including *a motion to dismiss for a lack of final appealable order* and *a motion to dismiss for a lack of standing*. These motions were referred to the merit panel on *August 7, 2009*, hearing the case on the merits.

On *September 29, 2009* attorney Hartman also filed on behalf of the Appellee Father *a motion to strike Moriarty's merit brief since it is an appellant's brief assigning error* WHEN IN FACT *the child C.B. is an APPELLEE* in the lower appellate court proceedings.

On *September 29, 2009* the *motion to strike Moriarty's merit brief* was also referred to the

panel hearing the case on the merits in the lower appellate court.

On *December 1, 2009* the Eighth District Court of Appeals dismissed the underlying matter for lack of final appealable order.

On *December 7, 2009* even though the Appellant Mother or her attorneys never participated in trial court proceedings below and even though the Mother's appellate counsel Betty Farley did not raise plain error in the Eighth District Court *attorney Farley* appellate counsel for the Appellant Mother *inexplicably proceeded to file a motion for reconsideration.*

On *December 9, 2009* despite the fact that the Guardian ad litem filed a Notice of Cross- Appeal in an individual capacity on behalf of himself, *AND even though he NEVER filed a Cross- Appellant Merit Brief*, the GAL Thomas Kozel proceeded to file a Motion for Reconsideration or Alternatively, Motion to Vacate, or alternatively, Motion for Relief from Judgment.

On *December 10, 2009* the lower appellate court denied the Appellant Mother's Motion for Reconsideration.

On *December 16, 2009* the lower appellate court denied Thomas Kozel's the Guardian ad litem for the child's Motion for Reconsideration or Alternatively, Motion to Vacate, or alternatively, Motion for Relief from Judgment.

Also on *December 16, 2009*, the lower appellate court also *sua sponte* instructed the clerk's office to vacate the December 9, 2009 journalization due to the timely motion for reconsideration filed on December 9, 2009 with instructions that the journalization properly reflect *such as dated December 16, 2009* due to timely Motion for Reconsideration being filed on December 9, 2009.

On *December 23, 2009*, the Guardian ad litem Thomas Kozel and Brian Morairty counsel for the child filed a Motion to Certify a Conflict.

Also on *December 23, 2009* the Guardian ad litem Thomas Kozel and Brian Morairty counsel for

the Child filed a Motion for Consideration en banc.

On *January 12, 2010*, the lower appellate court denied the Motion by the Guardian ad litem Thomas Kozel and Brian Morairty counsel for the Child to certify a conflict.

On *January 15, 2010* the lower appellate court also denied the Motion by the Guardian ad litem Thomas Kozel and Brian Morairty counsel for the child for consideration en banc as filed untimely.

On *January 22, 2010* the Guardian ad litem Thomas Kozel and Brian Morairty counsel for the Child filed a motion for reconsideration of denial of motion for consideration en banc.

On *January 26, 2010* the lower appellate court again denied the Motion by the Guardian ad litem Thomas Kozel and Brian Morairty counsel for the child for reconsideration of denial of motion for consideration en banc *again* as filed untimely and advised both once again the denial of a state's motion is not a final appealable order and that the child remains in protective custody of the county and that issues remain pending in the trial court.

On *January 29, 2010* a motion was filed in the lower appellate court by the guardian ad litem Thomas Kozel to appoint legal counsel for guardian ad litem for appeal to the Ohio Supreme Court.

On *January 29, 2010* a motion was also filed in the lower court by Brian Moriarty attorney for the child C.B. to appoint legal counsel for the child to the Ohio Supreme Court.

On *January 29, 2009* the Guardian ad litem for the child Thomas Kozel and Brian Morairty counsel for the child filed a written notice of appeal in the Ohio Supreme Court.

On *January 29, 2009* the Guardian ad litem for the child Thomas Kozel and Brian Morairty counsel for the child also filed a memorandum in support of jurisdiction in the Ohio Supreme Court purposefully ignoring *St.Ct. Prac. R 3.1 (B) (1)* which provides that:

“A memorandum in support of jurisdiction shall contain all of the following:

A table of contents, which **shall** include the propositions of law” The appellant’s instead ignore this requirement and instead attempt to sneakily place their “*propositions of law*” only within the Memorandum in Support of Jurisdiction so as to immerse the “*propositions of law*” within scandalous unsworn statements forcing the reader to find them and which are purposely placed amidst references to the Guardian ad litem’s report of matters specifically predicated on statements that were never corroborated by either the Mother’s testimony or other evidence thereto as she never testified and further immersed within accusations that were false , unsubstantiated, and never part of the trial court record during trial and never filed within the original complaint or as amended, and were meritless and is more of the same sneaky manipulative, and grossly underhanded tactics of the appellant’s.

The Appellant Mother through her counsel in the lower Appellate Court Betty Farley (nor did she seek alternate appointment of appellate counsel to the Ohio Supreme Court) interestingly did not file an appeal or a cross appeal to the Ohio Supreme Court from the dismissal of the appeal by the Eighth District Court for lack of final appealable order even though she was the initiator of the appeal in the Eighth District Court of Appeals and the only party to file an independent appeal in the lower court with the exception of Guardian ad litem Thomas Kozel, who filed a Notice of Cross Appeal under the same case number, but never filed his Cross – Appellant Merit Brief.

On *February 8, 2010* Brian Moriarty was once again appointed to represent the child C.B. on further appeal from the Eighth District Court of Appeals in the Ohio Supreme Court by the Eighth District Court of Appeals.

On *February 8, 2010* the Eighth District Court of Appeals granted the Motion by Guardian ad litem Thomas Kozel to appoint him legal counsel to the Ohio Supreme Court and appointed Jonathan Garver to represent the Guardian ad litem for the child Thomas Kozel on appeal in the Ohio Supreme Court.

First, Moriarty and Garver both rely heavily on testimony elicited on May 7, 2008. **That testimony was from the first trial. There was a mistrial and a subsequent retrial.** The testimony presented on May 7, 2008 has no bearing whatsoever on the retrial in the Cuyahoga County Juvenile Court which commenced on *October 28, 2008* and concluded on *November 3, 2008* from which this appeal was originally taken from to the Eighth District Court of Appeals and which has been further appealed to the Ohio Supreme Court and as such also has no bearing herein. They use the testimony substantively as if it was part of the body of evidence presented at the second trial to support their “Statement of the Case and Facts” which is also improperly contained in their jointly filed Appellant’s Merit Brief.

Since the May testimony was from a separate trial, was testimony from witnesses that were available for and testified at the retrial and since no one utilized any portion of the May testimony at retrial for any purposes whatsoever (including impeachment), use of that testimony on appeal improperly in their “Statement of the Case and Facts” and in furtherance of the arguments contained in the merit brief is improper. All references to evidence presented on May 7, 2008 must be stricken and ignored by the Ohio Supreme Court. The improper references in the Appellant’s Brief are throughout the “Statement of the Case and Facts” and Brief on pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and within in their argument on page 27 fn 1, page 28 specifically “*two lawyers appointed to serve as C.B.'s guardian ad litem for the child recommended permanent custody to the agency*” the previous Guardian ad litem Jeffrey Froude was appointed in a dual

role as C.B.s attorney and Guardian ad litem. Jeffrey Froude's Guardian ad litem report was not entered into evidence, either as originally filed or as amended was part of the mistrial, never subjected to questioning or rebuttal by the Father, not accepted by the trial court and not entered into evidence during the October 28,-November 3, 2008 trial and as such, any reference thereto must be stricken and ignored by this Court. Thus there is only (*one lawyer*) only one Guardian ad litem report that is properly part of the evidence which is the one submitted by the replacement Guardian ad litem Thomas Kozel and not the latter aforementioned. As such, it is an improper furtherance of matters not part of the trial court record and any ancillary assertions or arguments thereto must also be stricken and ignored by this Court.

Further, also contained on page 28, is the misrepresented statement that: "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."

Dr. Pinciotti testified: **The doctor talked to the social worker and asked her what she wanted him to emphasize**, and she told him it was up to his professional judgment. (Tr. 546) **She was not cooperative** regarding father's history or the reasons for the evaluation. (Tr. 601) **The doctor tried to mail the evaluation to her three times and eventually faxed it.**

(Tr. 527--8) Dr. Pinciotti testified **the social worker did not request a copy of the evaluation prior to August 2007.** (Tr. 523) Moreover, father provided her with a report from Dr. Pinciotti in 2006; however, she considered that report to be insufficient. (Tr. 308; 311) Nevertheless **she failed to make a referral for a psychological evaluation until February 2008, after the permanent custody motion had been filed and only two to three months before the May mistrial.** (Tr. 374-5) **Most significantly, she admitted there is no indication that father is so mentally disabled as to impair his ability to interact with or parent his child!** (Tr.377)

With this said, after the appellant's improperly try to assert predicated on the above aforementioned false premise they next improperly try to assert matters again that were either not part of the trial court record on appeal, post-judgment, post appeal, and not part of the trial court record, have not been entered into evidence NOR has the father been given the opportunity to challenge the report with a pre Daubert challenge, nor has the report or the examiner been subjected to the rigors cross-examine of accorded by the protections of due process of law accorded the Father, accordingly the assertion that "a psychiatric evaluation completed after the award of legal custody to the father revealed that the father is mentally ill" must be stricken and ignored as it is not part of the trial court record on appeal and father has not been accorded the right to cross-examine and challenge the examiners testimony nor has he been accorded the right to rebut the contents of said report and the examiner' that has not yet even been voir dire, nor has he even been qualified or accepted by the trial court as an expert witness, nor has the Father been accorded the right accorded by due process of law to submit rebuttal evidence in response to the report. The post judgment and post appeal assertion made by the Appellant's that is not part of the trial court record on appeal accordingly, this must be stricken and ignored by this Court.

In addition, the Appellant's also rely on testimony presented at several other hearings and proceedings which were held prior to the commencement of the October 28, 2008 through November 3, 2008 re-trial.

No one ever filed any appeals from those hearings and the evidence presented from them is not at issue because it was not offered at trial. The assigned error concerns evidence presented at trial. Again nothing from these prior proceedings was either used substantively or for impeachment purposes at the October 28, 2008 through November 3,

2008 retrial. Again for the same reasons as stated above all reference to these matters should be stricken from the “Statement of the Case and Facts” and the Appellant’s Brief.

Second, the appellant’s rely on matters and events which occurred in the lower trial court subsequent to judgment on *February 1, 2009* and even subsequent to notice of appeal having been filed on *February 5, 2009* to the Eighth District Court of Appeals. Despite having supplementing the record on appeal with these matters, they should not have been made part of the record on appeal in these matters, they should not have been made as part of the record on appeal because they occurred after judgment. *Yet again*, for the same reasons as stated above, all references to these matters should be stricken from the “Statement of the Case and Facts” and the Appellant’s Brief and ignored by this Court.

Next, they falsely assert and attempt to mislead the Court that: “In this case, there existed a conflict between the biological wishes and the wishes of the child.” There was no conflict as the Guardian ad litem clearly stated and referenced more than once on the stand that: The guardian ad litem reported to the court **the child was not mature enough to make a determination** nor to express her desires; **she did not have the cognitive ability to have an opinion to the outcome of this matter.** (Tr. 757-8) there was no conflict and is also a misplaced assertion by the Appellant’s as a “conflict” goes to whether the child’s wishes conflicted with Guardian ad litem’s **neither of which was the case** as the child was not old enough at 3and 1half yrs old to state her wishes **as evidenced by the Guardian ad litem’s own statements!!**

Yet again, the Appellant’s attempt introduce an “allegation” of abuse which was not entered into evidence, or made a part of any complaint, nor raised by any party and not part of the trial court record at trial yet again these tactics must be stricken from page 29 of the Appellant’s Brief and

ignored by the Court

Yet further, the appellants attempt more of the same and attempt to assert what once again was not part of the trial court record **and INTERESTINGLY NEVER RAISED BY ANYONE AT TRIAL** namely that the “Father had approached made inappropriate contact/ threats with the original GAL resulting in the filing of a police report and criminal investigation causing a mistrial (July 17, 2007)” Father was the complainant, father subjected himself to full cross examination on the stand **UNDER OATH by all parties UNCLUDING THE TRIAL COURT JUDGE! The former guardian ad litem did not subject himself to such scrutiny!**

This again was not part of the trial court record and should be stricken and ignored by the Court.

If the tactics and the lack of ethics on the part of the appellants are any indication as to their honorableness and the truthfulness then one must also strongly reject the premise that trial court judge abused her discretion to appoint an attorney to a 3 and 1 half yr. old child where there was not any conflict between the Guardian ad litem's recommendation and the child's wishes a child who “was not mature enough to state her wishes” and “did not have the cognitive ability to have an opinion about the outcome of the matter” where the unsubstantiated allegation was not part of any complaint [s]and where the so called alleged incident with the former G.A.L. as asserted that was not part of the trial court record of the October 28, 2008 through November 3, 2008 Trial.

Interestingly if it was so important, WHY WAS IT NOT INTRODUCED AT TRIAL ...?

As it is not part of the trial records matters and assertions thereto must be stricken and ignored by this Court including any premises and ancillary arguments predicated thereon.

Father further objects to the Appellant's assertion that “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.” located on page 19 of the Appellant’s Merit Brief namely the purposefully omitted Statement of the Case contained in the Amicus Curiae Guardian ad Litem Project in Support of the Appellant’s GAL Thomas Kozel and C.B. contained on Page 2 of the Merit Brief of Amicus Curiae Guardian ad Litem Project contained in the Statement of the Case due to the fact that by omitting the fact that there was a mistrial and subsequent retrial it purposefully seeks to mislead the Court as to this case arose out of those set of facts at trial when in fact the Trial took place on October 28, -November 3, 2008 and all matters from the previous mistrial and the original complaint were not part of that retrial which by omission the Amicus Curiae Guardian ad Litem Project in the Statement of the Facts attempts to misrepresent this to this Court that the trial prior to the retrial is the one that is part of this appeal.

Further, Father hereby objects to and moves to strike any and all reference to the above aforementioned matters that were not part of the trial court record as referenced on Page 2 of the of Amicus Curiae Justice for Children Project in Support of Appellant C.B and namely objects to the statement that “Amicus hereby accepts and adopts the Statements of the Case and Facts set forth in the Merit Brief of the Appellant C.B.” and asks that all reference to the above aforementioned matters contained in the Appellant’s Brief be stricken and barred from incorporation by reference in the “Amicus Curiae Justice for Children Project in Support of Appellant C.B (Amicus Brief) whether in the brief or through incorporation in any form during oral argument.

As made plain, *the Appellant’s Brief also grossly mischaracterize the facts.* As such once again, the Appellee Father *requests that this Court ignore objectionable references to testimony which*

occurred during the mistrial, testimony of prior proceedings, which were not introduced at the October 28, 2008 through November 3, 2008 trial as well as references to matters occurring subsequent to judgment which have been purposefully improperly included by the Appellant's, designed and calculated to intentionally bypass and subvert the mandates and strictures of due process of law, the rule of law, purposefully taken out of context, grossly and purposefully misrepresented with tar and feather smear tactics of the lowest common denominator, improperly presented herein under the false pre-text and guise of law, tactics of which are employed by the Appellants and utilized in an attempt to perpetuate hanging accusations, vicious innuendo, and supposition, calculated by malicious design, to castigate, prejudice, and disenfranchise the Appellee Father from a fair hearing on appeal, in an attempt at trial de novo, tactics that are not only wholly unethical and improper, but are tantamount to no less than Salem Witch Hunt attempts utilized in an attempt to render hearing conditions no less oppressive and prejudicial. It is well settled law that: " 'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. ' ”⁵

The foster mother testified that at the time of trial she had been the child's foster mother for two and one half years, and that she loves the child. (Tr. 149; 150-1) She testified she is open to the idea of considering adoption. (Tr. 212) The foster mother claimed the child had temper tantrums on occasion when visiting the father; however, she also admitted the child says positive things about her father and has told her she loves her father. (Tr.152-3; 200). The child is also very

⁵ State ex rel. Montgomery Cty. Pub. Defender v. Siroki, 108 Ohio St.3d 207, 2006-Ohio- 662 at 20 citing State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254, quoting State v. Ishmail (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus.

fond of items the father has given her. (Tr. 200) Regarding the foster mother's testimony Loretha Knight, the CCDCFS social worker, testified without objection to the foster mother's prior statements which were inconsistent with her trial testimony, namely that the foster mother told the social worker that she had every interest in adopting the child which is inconsistent with the idea that the foster mother is merely open to the concept. (Tr. 371-2)

Ms. Knight also testified the child was removed from the mother, not father, because mother dropped the child off at a police station and claimed she did not know who the child was. (Tr. 277-9; 312-3) Sometime after removal the worker identified Mr. Wylie as the Father and learned that father and mother had met in a mental health facility. (Tr. 283) Father established paternity early on in 2006. (Tr. 284; 326)

The child has a good bond with father, who visits weekly for three hours. (Tr. 289-90) Father reads to the child, interacts with her appropriately and does not discuss the case during the visits. (Tr. 291) His visitation is consistent having missed only two visits in three years. (Tr. 332) One of the two visits was because the father had a cold and did not want to get the child sick. (Tr. 334-5) Visits went so well that the worker had no concerns about the visits. (Tr. 347; 379, 380) However, Ms. Knight is in favor of permanent custody because, according to her, father has not satisfactorily completed the case plan which calls for a psychological evaluation, employment and stable housing. (Tr. 292-3)

She referred father to parenting classes not because she thought she needed them but because the court had suggested it. (Tr. 295-6) Father completed two separate parenting classes programs, but she had not received the documentation. (Tr. 296)

Regarding housing, she testified father's housing is suitable; however, she claimed father had not satisfactorily completed that aspect of the case plan because the copy of the lease father

previously provided eventually expired and the father had not given her a copy of the new lease. (Tr. 293-5)

Knight assumed father has mental health issues because of six year old records and because father admitted to a history. (Tr. 297; 381) She admitted she had no current knowledge of any treatment. (Tr. 305) There are no reports nor any indications of bizarre behavior during the visits. (Tr. 377) Most significantly, **she admitted there is no indication that father is so mentally disabled as to impair his ability to interact with or parent his child!** (Tr.377)

Moreover, father provided her with a report from Dr. Pinciotti in 2006; however, she considered that report to be insufficient. (Tr. 308; 311) Nevertheless she failed to make a referral for a psychological evaluation until February 2008, after the permanent custody motion had been filed and only two to three months before the May mistrial. (Tr. 374-5)

Mary Persanyi, father' aunt did testify for the county and did say negative things in support of the motion for permanent custody; however, she also admitted she has made hateful and venomous statements about father and even said "It's too fu__in' bad you even fu__in' exist."(Tr. 438-9) She admitted she is nasty to him. (Tr. 452) She also admitted to harassing him. (Tr. 455) She does not speak to father and had seen him only four times before his eighteenth birthday. (Tr. 442-449) She has infrequent contact with him. (Tr. 461) The witness has never seen him with his daughter and has never met his daughter. (Tr. 450) Despite all this she also admitted father has an apartment in Rocky River and is employed. (Tr. 449-50)

The remaining testimony was presented by father. His first witness was Dr. Pinciotti. Before his substantive testimony CCDCFS voir dired him. (Tr. 486-522) After the extensive voir dire he was qualified as an expert. (Tr. 522)

The highlights were that he as a PhD. in psychology, is licensed, is past president of the Ohio

School Psychologists Association, has worked for the last nineteen years in a mental health facility where he was a clinical supervisor for the last sixteen years and has been clinical director for the last three. He has had a private part time practice for the last twelve years and sees adults and children. He has seen over 300 clients about equally divided between adults and children. He also explained his methodology.

After the court accepted his qualifications, Dr. Pinciotti testified the social worker did not request a copy of the evaluation prior to August 2007. (Tr. 523) The witness assumed father requested the evaluation in order to help complete the case plan objectives which also included parenting, stable housing and employment. (Tr. 525) The doctor talked to the social worker and asked her what she wanted him to emphasize, and she told him it was up to his professional judgment. (Tr. 546) She was not cooperative regarding father's history or the reasons for the evaluation. (Tr. 601) The doctor tried to mail the evaluation to her three times and eventually faxed it. (Tr. 527-8)

The witness met with the father again on Sept. 10 to get an update regarding housing, employment and potential child care arrangements. (Tr. 528-9) During the initial evaluation interviews, which took about four hours, father was consistently concerned about his daughter's well being and future. (Tr. 533) He wanted to send her to a Catholic school. (Tr. 534) He also expressed the desire to have an active role in parenting her and was sympathetic and nurturing. (Tr. 533) His parenting strategy was sound and emphasized guidance by example and communication. (Tr. 534-5) He was also open to getting more information to be a better parent. (Tr. 534-5) He seemed to have a good work ethic, working two to three jobs at a time. (Tr. 533) His goal was income stability. (Tr. 535, 542)

Dr. Pinciotti stresses the cognitive behavioral approach when doing a diagnostic evaluation

which basically relies on the idea that how one thinks effects how one feels which effects how one behaves. (Tr. 535) Emotional disturbance an even mental illness is influenced by cognitive distortions people have in dealing with their circumstances; accordingly one needs to assess the thinking process, views and beliefs to predict a person's reactions. (Tr. 535-6) Stressors like employment, finances, relationships and safety issues have to be factored in. (Tr. 536) The doctor tested father with the Young Schema Assessment which looks for eighteen maladaptive schemes (Tr. 537-8) Only three were slightly detected and none were detected to a significant degree; father's thought process and responses were healthy and appropriate. (Tr. 537-8) There were no maladaptive schemes, beliefs or attitudes which would support a significant concern about his daughter. (Tr. 538-9) The doctor was impressed by father's commitment to his daughter's best interests. (Tr. 542) Dr. Pinciotti opined father suffers from no pre-existing nor current conditions or presents any concerns or obstacles that would impede his ability to parent. (Tr. 543) He needs no mental health services at this time. (Tr. 543) Moreover, the doctor testified he reviewed the records regarding father's previous mental health hospitalization in 2003. (Tr. 547) He saw those records after his report had been made, and did acquire more information from those records. (Tr. 566-8) **However, nothing in those records changed his expert opinion.** (Tr. 589)

Regarding employment, work ethic, character and to a certain extent case plan compliance, Rayshawn Lowe testified he worked with father at Avis, and father is timely, hardworking and helps out beyond his duties. (Tr. 618-20) Steven Moore testified he drove an RTA bus during the winter. At night he would pick up the father from his parenting classes and drop him off on Brecksville, where he would have to walk for thirty minutes in the snow to get to a second job at Fedex. (Tr. 624-30) The lower court also accepted documentation from father establishing that

he works at Avis. (Tr. 726-8) Regarding housing, the court also accepted a copy of a current lease for the apartment referred to in prior testimony. (Tr. 772)

Nancy Port testified as the records custodian for Cornerstone Among Women. (Tr. 731, 734) She is an LSW and director of the organization. (Tr. 732-3) They offer a nationally recognized parenting program called S.T.E.P. (Tr. 733) The instructor was on vacation and unavailable for trial. (Tr. 734) Ms. Port brought father's file which includes a parenting certificate and a letter from Carolyn Herbert, the Clinical Services Director. (Tr. 737, 739)

The letter states father attended all classes in the S.T.E.P. Program. (Tr. 740) He completed his homework assignments, displayed insight into parenting issues and was an asset to the class. (Tr. 740)

Father presented a lot of testimony regarding his visits and the bond he has with his child.

Benjamin Cooper testified he has been employed by CCDCFS for 22 years. (Tr. 649) He transports children for visits and monitors visits. (Tr. 650) He met the family three years before trial. (Tr. 651) The child seemed normal, accepting of her father and well adjusted. (Tr. 651-3) Father is also appropriate during visits. (Tr. 668) She expresses happiness upon seeing him. (Tr. 655) He brings her toys and other items. (Tr. 654) They sit, talk, play, and eat. (Tr. 655-6) The witness most recently observed a visit two or three months before trial and nothing was out of place or inappropriate. (Tr. 657-8) The child hugs the father, they have a good, strong, loving bond. (Tr. 659-61) Based upon the visits father should be given a chance for reunification. (Tr. 663, 666)

Marsha Thomas testified she has been employed by CCDCFS for over 28 years. (Tr. 670) She is currently employed as a case aid in the visitation department; prior to that she was first a social worker and then a supervisor for ten years. (Tr. 670) She has extensive experience at CCDCFS.

(Tr. 672) She has known the father for two and one half years. (Tr. 670-1)

She has observed about twenty visits. (Tr. 675) The most recent visit was within a week of her testimony. (Tr. 681) Father is consistently on time, brings food and toys (including a bike), talks with his daughter and is very protective. (Tr. 673) The visits are consistent and are once, sometimes twice per week. (Tr. 682) He has a close bond with his daughter, and his parenting skills are fine. (Tr. 674) Father has over time grown in his relationship and learned to give her breathing room, and she has learned how to play with him. (Tr. 681) The child does not express anxiety towards her father. (Tr. 675) Father is capable of raising his child. (Tr. 675) He should have the opportunity to reunify and would be a good father to his daughter. (Tr. 679-80)

The witness has transported the child at least thirty times; sometimes the child she is willing to go, and sometimes she is not. (Tr. 676) But there is nothing abnormal about that: sometimes she wants to stay involved with whatever activity she is doing when the witness arrives to transport her. (Tr. 677; 689) That behavior is age appropriate. (Tr. 683)

They interact and communicate appropriately. The child talks about her mother and foster mother a lot. (Tr. 684) Although the witness is sometimes confused about which one she is talking about, father is never confused and always seems to know which one she is talking about. (Tr. 684) He never gets upset about the child talking about the mother or the foster mother and never says anything negative about either of them. (Tr. 685)

The guardian ad litem reported to the court the child was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter. (Tr. 757-8)

These were the facts which were substantially omitted from the Appellant's "Statement of the Case and Facts" contained in the Appellant's Merit Brief which was not only purposefully and

grossly misrepresented ,but the vast majority of these gross misrepresentation were predicated on matters that were not part of the trial court record specifically the trial of October 28, 2008 through November 3, 2008 which is the subject matter of the appeal herein.

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.”

This case is before this court on an order denying CCDCFS’s motion for permanent custody. A motion for permanent custody and a dismissal of the appeal thereto in the lower appellate court thereto for lack of final appealable order. A motion for permanent custody is a special statutory proceeding. The denial is not a final appealable order within the meaning of *R.C. 2505.02*, *In re Adams (2007)*, 115 Ohio St. 3d 86; *In re Wilkinson (Montgomery)*, 1996 Ohio App. LEXIS 1091.

Parents have a fundamental right to retain custody of their children, not terminate it. Consequently, the failure to require a child services agency to file a motion for permanent Custody and / or the denial of a motion for permanent custody does not effect a substantial right and is not a final appealable right order. *Parents do not have a fundamental right to terminate their parental rights. In re Devore (Logan)*, 2006 Ohio 4432, 2006 Ohio App. LEXIS 4349. As denial of motion for permanent custody is not a final appealable order, it therefore effect’s no one’s substantial rights including the child and the Guardian ad litem. That is because of the public policy in favor of preservation of the family unit. *See In re M. (Cuy. Cty. Juv. Ct. 1979)*, 65 Ohio Misc. 7.

Father further points out that the Appellant’s did not list the above assignment of error in their “Notice of Appeal” which states in pertinent part notated in bold and italics for emphasis:

“This case is one of public or great general interest, and *involves whether or not a Guardian ad Litem can appeal the agency’s permanent custody motion...*” and whether a child can appeal the a child can appeal the trial court’s ruling when the child is placed in the legal custody of the father when the Guardian ad litem strongly believes that neither decision is in the child’s best interest.”

The appellant’s **now attempt** to *improperly advance the proposition of law that: “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.”*

As is plainly evident the appellant’s **have failed to raise this in their** Joint “Notice of Appeal” namely “whether or not” “**A minor child**” *can appeal the agency’s permanent custody motion...*”

It is important to note that a child and a guardian ad litem are separate and distinct parties to this case as such the Appellant’s have failed to properly raise this in their Notice of Appeal.

See *Juv. R. 2 (Y)* which defines a party as:

“**“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.”

S. Ct. Prac. R. 2.2. (A) (1) (b) provides and states in pertinent part that:

“Except as provided in divisions (A) (2), (3), (4), (5), and (6) of this rule, *the time period designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory*, and the appellant’s failure to file within this time period *shall divest the Supreme*

Court of jurisdiction to hear the appeal.”

“We do not reach the merits of either contention, because CCleveland did not assert either argument as an assignment of error in its notice of appeal. As a result, we lack jurisdiction to consider either contention as a basis for granting relief to the appellant.”⁶ In addition, CCleveland advances ancillary arguments that did not form the subject of any of the assignments of error set forth in its notice of appeal. Because we have no jurisdiction to grant relief on grounds not stated in the notice of appeal to the court, we must disregard the ancillary arguments.”⁶ “when a litigant fails to raise a particular argument in the notice of appeal to the court, the court 'do[es] not have jurisdiction to consider the argument’”), *See also Christian Church of Ohio v. Limbach, Tax Commr.* No.89-1464 53 Ohio St. 3d 270; 560 N.E.2d 199; 1990 Ohio LEXIS 1037 at 4 fn.1(“...that issue is not presented in this appeal. Accordingly, we lack jurisdiction to decide that issue.”)

*As such, this Court lacks jurisdiction to consider whether a “A minor child ...” “ 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.” and must ignore and disregard all ancillary arguments thereto along with this proposition of law. *See Appellant’s Joint Notice of Appeal of Appellant Guardian ad litem Thomas Kozel and C.B.**

Guardian ad litem Thomas Kozel has failed to preserve anything for further appeal herein and as such lacks standing to advance any further appeals there from due to the failure to

⁶ *CCleveland OH Reality I, L.L.C., v. Cuyahoga County Board of Revision* No. 2008- 0636 121 Ohio St. 3d 253; 2009 Ohio 757; 903 N.E.2d 622; 2009 Ohio LEXIS 520 at P9 and P1, quoting *Newman v. Levin*, 120 Ohio St.3d 127, 2008 Ohio 5202, 896 N.E.2d 995, P 28 ([HN2] citing *Norandex, Inc. v. Limbach* Ohio St.3d 26, 31, 1994 Ohio 536, 630 N.E.2d 329, fn. 1.

file his Cross-Appellant's Merit Brief in the Eighth District Court of Appeals!

To be pragmatically blunt, how can the Guardian ad litem, Thomas Kozel in essence skip the lower appellate proceedings by the aforementioned failure to file a Cross-Appellant Brief , and in essence for all intents and purposes make the quantum leap to appeal to the Ohio Supreme Court? The answer is he can't, and has waived any further ability to appeal by failing to file a cross appellant merit brief and thus any claimed assignments of error whether discretionary or claimed right of appeal now improperly advanced on his behalf by attorney Garver must be stricken and disregarded by this Court as he waived any further right to appeal.

His collectively claimed assignments of error have not been preserved have not been preserved due to his failure to file a cross appellant merit brief in the lower appellate court proceedings and such are a nullity and must be ignored and disregarded by this Court. *See the lower Eighth District Appellate Court Docket Case # 92775* from which this appeal has been taken and which is contained in the Appendix which has been filed separately herewith.

No matter, father hereby answers this proposition of law first as applied to the *distinct party child* and then secondly as applied to the *distinct party Guardain ad litem*.

In the case at bar, it should be strongly noted that the child C.B. born April 16, 2005, at time of trial on October 28, 2008, she was *slightly more than 3 and 1 half yrs. old* and further it should be strongly noted that after interviewing the child *The guardian ad litem reported to the court the child was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter.* (Tr. 757-8)

R.C. 2151.414(C) provides in pertinent part: "A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but ***shall not be submitted***

under oath.”

As made plain by O.R. 2151.414(C) “*A written report of the guardian ad litem of the child*” “...*shall not be submitted under oath.*” and is thus an unsworn report which if conjunctively applied to the Proposition of Law that would render O.R. 2151.414(C) unconstitutional on its face if the Court were to find that:

“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.”

To allow the guardian ad litem to advance an appeal of a matter that is not only not a final appealable order to be allowed to after submitting an unsworn report which “shall not be submitted under oath” fails to meet the heightened scrutiny required by the due process of law when a fundamental right such as parent’s right to the care, custody, and control of their children is at stake let alone when the possibility that those rights could be forever permanently severed and lost through a motion for permanent custody or an appeal arising there from possibly advanced by a party guardian ad litem who’s report and testimony is not subjected to heightened scrutiny mandated by the due process of law. This proposition is constitutionally abhorrent. The decision to terminate a parent’s rights cannot be taken lightly; it is both total and irrevocable. “Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child.”⁷ The Supreme Court of the United States has characterized a parent’s interest as “far more precious than any property right.” “Few consequences of judicial action are so grave as the severance of natural family ties.”⁸

⁷ *M.L.B. v. S.L.J.* (1996), 519 U.S. 102, 118, 117 S. Ct. 555, 136 L.Ed.2d 473 (quoting *Lassiter*, 452 U.S. at 39)

The United States Supreme Court has explained that an elevated level of procedural due process should be accorded to parties for whom the potential for loss is great, and that **parents in a permanent custody case are among those to whom a greater level of protection is due.**

Santosky v. Kramer (1982), 455 U.S. 745, 758. **“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’”** “The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the 14th Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. *When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.*” (Internal citations and quotations omitted.) *Id.* at 758.

The Ohio Supreme Court has equated the termination of parental rights to a sentence of capital punishment: “[p]ermanent termination of parental rights has been described as ‘the family law equivalent of the death penalty in a criminal case.’” *Therefore, parents “must be afforded every procedural and substantive protection the law allows.”*⁹

To allow a Guardian ad litem to advance an appeal from a denial of permanent custody without requiring under O.R. 2151.414(C) that the Guardian ad litem be subjected to cross examination under oath and that the Guardian ad litem’s report be submitted under oath does not provide the parents with “fundamentally fair procedures” required by the heightened scrutiny required by

⁸ *Santosky v. Kramer* (1982), 455 U.S. 745, 758-759, 787, 102 S. Ct. 1388, 71 L.Ed.2d 599.

⁹ *In re Hayes* (1997), 79 Ohio St. 3d 46, 48, 679 N.E.2d 680 citing *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54.

due process of law when such a fundamental right is at stake.

Now as to whether “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.”

In the case at bar, to allow C.B. a *slightly more than* **3 and 1 half yr. old** child who as the guardian ad litem reported to the court was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter. (Tr. 757-8) To allow a 3 and 1half year old child or any child, to argue against the preservation of the family unit is constitutionally abhorrent.

C.B. at 3 and 1half yrs. old, cannot possibly give “informed consent”¹⁰ to an attorney to advance such an ugly proposition asserted by the Appellant’s especially a child who is “not mature enough to make a determination nor to express her desires; who does not have the cognitive ability to have an opinion to the outcome of this matter.” (Tr. 757-8) *See Prof. Cond. R. 1.0 (f)*.

The Proposition of Law that **was not raised in the Appellant’s “Notice of Appeal”** whether “A **minor child...**” 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.” advocates a position which is contrary to public policy and contrary to the fundamental policy behind the juvenile court system and is detrimental to the best interest of the child. A principle purpose of *R.C. 2151* is the preservation of the family unit. Obviously that reflects the clearly reasonably and obvious public policy that the family unit is considered one of

¹⁰ *Prof. Cond. R. 1.0 (f)* defines: ““Informed consent” as denotes [ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

the most important cornerstones of American society. Of course another purpose of chapter 2151 is to insure that children are protected and the juvenile court is charged also with the responsibility of doing that which is in the child's best interest.

These basic tenets of public policy and basic purposes of the juvenile legal system are completely consistent. It is in a child's best interests to be a part of the family unit. They are removed only when the unit is so dysfunctional as to be unable to protect the child from abuse, neglect, or dependency and only removed permanently when the situation leading to the original removal cannot be reasonably remedied.

The members of the family unit have due process rights to its protections and maintenance.

The county social service agency, in this case CCDCFS, and the guardian ad litem protect the best interest of the child by advocating that which is in the child's best interest whether or not the position is consistent with the preservation of the family unit.

However, it is against public policy to allow a family member of the of the family unit to argue against the preservation of the family unit and to complain that it was error to allow its maintenance. If a recalcitrant teenager is not allowed to argue such (Ohio does not recognize the ability of child to be emancipated from his family), then how could this Court allow a toddler, who clearly is unable to express her opinion one way or another (*See again* Tr. 757-8 above) and obviously cannot give informed to do so through counsel. The idea with all due respect is not only against public policy, it is abhorrent and an affront to all that is beautiful, right and true. To allow the arguments of either legal counsel or the Guardian ad litem to be presented indirectly through the child is to allow the destruction of the family unit by authorizing and endorsing children to sever the bonds themselves through the court system. That is just something that as a

matter of public is not allowed in this state even by older competent children, who are expressly prohibited from divorcing themselves from their parents in this state and any proposition thereto with all due respect is gross, morally repugnant, and clearly against public policy, contrary to law and constitutional protections that are designed to preserve and protect the sanctity of the family.

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.”

This case is one of public or great general interest, and involves whether or not a Guardian ad Litem can appeal the agency’s permanent custody motion and **whether a minor child can appeal the trial court’s ruling when the child is placed in the legal custody of the father** when the Guardian ad litem strongly believes that neither decision is in the child’s best interest.”

Here again *Father first points out* that the Appellant’s did not list the above assignment of error in their “Notice of Appeal” which states in pertinent part notated in bold and italics for emphasis **namely** “...**whether her guardian ad litem** may file an appeal from an award of legal custody in a juvenile court dependency proceeding.” and now improperly try to advance this combined assignment of error. Once again, the child is a *distinct party* to the case and secondly the Guardain ad litem is a *distinct party* from the child see again *Juv. R. 2 (Y)* and as such the Court is without jurisdiction to consider this added party specifically the Guardian ad litem to this assignment of error as he wasn’t specifically listed in the original “Notice of Appeal” see again *S. Ct. Prac. R. 2.2. (A) (1) (b), Christian Church of Ohio v. Limbach, Tax Commr. No.89-1464 53 Ohio St. 3d 270; 560 N.E.2d 199; 1990 Ohio LEXIS 1037 at 4 fn.1*(“...that issue is not presented in this appeal. Accordingly, we lack jurisdiction to decide that issue.”), CCleveland OH Reality I, L.L.C., v. Cuyahoga County Board of Revision No. 2008- 0636 121 Ohio St. 3d

253; 2009 Ohio 757; 903 N.E.2d 622; 2009 Ohio LEXIS 520 at P9 and P1, [Emphasis added] quoting Newman v. Levin, 120 Ohio St.3d 127, 2008 Ohio 5202, 896 N.E.2d 995, P 28 ([HN2] [Emphasis added] citing Norandex, Inc. v. Limbach Ohio St.3d 26, 31, 1994 Ohio 536, 630 N.E.2d 329, fn. 1, as set forth under Proposition of Law III which is incorporated, asserted, and set forth herein as if fully rewritten herein.

As it relates specifically to whether a “... **whether a minor child** can appeal the trial court’s ruling when the child is placed in the legal custody of the father”

The retrial which is the subject of this appeal, *commenced on October 28, 2008 and concluded on November 3, 2008.* After a full hearing the motion for permanent custody was denied. The trial court terminated temporary custody and vested father with legal custody.

It is important to note that prior to retrial mother again stipulated, father again contested the motion. As mother stipulated to the motion and she, her attorney and her guardian ad litem all asked to be and were in fact excused from further proceedings on the motion. Mother presented no evidence, cross-examined no witnesses, objected to no evidence being presented and never even observed the trial. She totally and completely failed to test the credibility of anyone or thing being presented at trial and has clearly waived the right to do so on appeal and thus waived her right to complain about the outcome thus again WAIVING HER RIGHT TO APPEAL, OR ALTERNATIVELY, WAIVING HER RIGHT TO COMPLAIN ABOUT ANYTHING OTHER THAN PLAIN ERROR.

Despite the above aforementioned, Appellant mother filed a written notice of appeal from the denial of the Motion for Permanent Custody first in the trial court on *February 5, 2009* which subsequently was then re-filed in the Eighth District Court of Appeals on *February 6, 2009.*

On March 25, 2009 Betty Farley counsel for the Appellant Mother *instead of filing an "Ander's Brief" as would have been proper*, instead proceeded to file the Mother's Appellant Merit Brief on behalf the Appellant Mother *in disregard of App. R. 23* assigning assignments of error wherein she did not raise plain error which was the only error she could have properly raised on behalf of her client the Appellant Mother as the Mother did not participate in the trial. Attorney Betty Farley counsel for Appellant Mother *did not raise plain error* in the Appellant Mother's Merit Brief.

On March 10, 2009 the child's guardian ad litem Thomas Kozel filed a notice of cross-appeal *under the same case number (**BUT NEVER FILED HIS CROSS- APPELLANT'S BRIEF**)* the guardian ad litem's notice of appeal *did not state* he filed it on behalf of the child, thus it was filed by the guardian ad litem in an individual and *pro se* capacity as a party to the lower court proceedings.

On March 9, 2009 the child's guardian ad litem also filed a separate motion *which expressly states it was filed on behalf of the child* requesting an attorney to be appointed to represent the child on appeal.

On April 1, 2009 Brian Moriarty was appointed to represent the child in the lower appellate court. Attorney Brian Moriarty **never filed an independent appeal on behalf of C.B. and as a result, C.B. was and is an Appellee in the lower Appellate Court.**

An Appellee cannot file their own assignment of errors, and can only argue defensively the assignment of errors of the Appellant Mother who in this case preserved none and did not raise plain error. The failure of attorney Moriarty to file an independent appeal on behalf of C.B. is jurisdictional, further the failure on the part of the Guardian ad litem Thomas Kozel to file a Cross-Appellant Merit Brief waives the right to any further appeal. Moriarty's failure to file an

independent appeal on C.B.'s behalf in the lower appellate court also fails to preserve any assignments of error to advance as the mother Appellant Mother did not by failing to participate in the trial court proceedings and did not raise plain error as such Moriarty has waived any further assignment of error on further appeal as has the Guardian ad litem Thomas Kozel by failing to file a Cross Appellant Merit Brief in the lower appellate court proceedings.

“Moreover, this argument does not present a dilemma. Under legal custody with protective supervision, the court retains jurisdiction and an active case is maintained with CFS. If the child is in danger, parties are free to file appropriate motions with the lower court. Moreover, there is nothing that would prohibit the agency from removing the child in the future.”

As such, an award custody with protective supervision does not determine the issue as an active case remains pending the trial court and thus is not a final appealable order as it does not determine the issue.

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.”

Father first points out that the Appellant's did not list the above assignment of error in their

“Notice of Appeal” which is notated in bold and italics for emphasis and states:

“This case is one of public or great general interest, and *involves whether or not a Guardian ad Litem can appeal the agency's permanent custody motion...*” and *whether a child can appeal the a child can appeal the trial court's ruling when the child is placed in the legal custody of the father when the Guardian ad litem strongly believes that neither decision is in the child's best interest.*”

*** **It is important to first note**, that in the case at bar, C.B. was born on April 16, 2005 and at the time of trial on October 28, 2008 C.B. was *slightly more than* **3 and 1 half yrs. old.*****

Appellee Father *yet further* respectfully points out, that in the case at bar, Appellant's counsel Garver and Moriarty in their Joint Notice of Appeal filed on January 29, 2010 *did not assert* "Proposition of Law No. III" in their original written "Notice of Appeal" and now along with the Amicus Curiae Guardian Ad Litem Project and the Amicus Curiae Justice for Children Project within their Merit Briefs collectively attempt to improperly advance and assert this nonexistent third assignment of error in their Appellant's Merit Brief and via both Amicus Curiae Briefs namely that: "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."

S. Ct. Prac. R. 2.2. (A) (1) (b) provides and states in pertinent part that:

"Except as provided in divisions (A) (2), (3), (4), (5), and (6) of this rule, *the time period designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal.*"

As the Appellant's have failed to properly comport with the mandatory requirements of S. Ct. Prac. R. 2.2. (A) (1) (b), this Court is thus without jurisdiction to consider the latter aforementioned assignment of error *more specifically Proposition of Law III*, or assertions predicated thereon along with any corresponding ancillary arguments thereto which have been improperly advanced and which are also predicated thereon whether in whole or in part on the latter aforementioned proposition of law.

Accordingly, this Proposition of Law must be fail and must be ignored by the Court, as the Appellant's have failed to properly invoke the jurisdiction of this Honorable Court which is fatal

as *this requirement is both jurisdictional and “mandatory.”*

The Ohio Supreme Court has repeatedly and consistently ruled and determined that:

"We do not reach the merits of either contention, because CCleveland did not assert either argument as an assignment of error in its notice of appeal. As a result, we lack jurisdiction to consider either contention as a basis for granting relief to the appellant." In addition, CCleveland advances ancillary arguments that did not form the subject of any of the assignments of error set forth in its notice of appeal. Because we have no jurisdiction to grant relief on grounds not stated in the notice of appeal to the court, we must disregard the ancillary arguments."¹¹ "when a litigant fails to raise a particular argument in the notice of appeal to the court, the court 'do[es] not have jurisdiction to consider the argument") See also Christian Church of Ohio v. Limbach, Tax Commr. No.89-1464 53 Ohio St. 3d 270; 560 N.E.2d 199; 1990 Ohio LEXIS 1037 at 4 fn.1("...that issue is not presented in this appeal. Accordingly, we lack jurisdiction to decide that issue.")

As the Appellant's Kozel and Counsel Moriarty for C.B. in their Joint Notice of Appeal filed on January 29, 2010 "did not raise this in their *notice of appeal*" which is "mandatory" and "jurisdictional" this Court thus is patently and unambiguously without jurisdiction to consider the third assignment of error which was not raised in the Appellant's "Notice of Appeal" or the Proposition of Law thereto in either the Appellant's Merit Brief or as further improperly advanced and further set forth in either of the Amicus Curiae's Briefs in support of the Appellant's Guardian Ad Litem Kozel and C.B. and thus must be collectively stricken from the

¹¹ CCleveland OH Reality I, L.L.C., v. Cuyahoga County Board of Revision No. 2008- 0636 121 Ohio St. 3d 253; 2009 Ohio 757; 903 N.E.2d 622; 2009 Ohio LEXIS 520 at P9 and P1, quoting Newman v. Levin, 120 Ohio St.3d 127, 2008 Ohio 5202, 896 N.E.2d 995, P 28 ([HN2] citing Norandex, Inc. v. Limbach Ohio St.3d 26, 31, 1994 Ohio 536, 630 N.E.2d 329, fn. 1.

aforementioned briefs and ignored by this Court along with any and all assertions predicated thereon and along with any ancillary arguments thereto collectively further contained in their briefs.

“A void judgment is one rendered by a court lacking subject- matter jurisdiction or the authority to act.” “Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, *it can never be waived and may be challenged at any time.*”¹² “[A] judgment rendered by a court lacking subject matter jurisdiction is void ab initio.”¹³

Accordingly, due to lack of subject matter jurisdiction Father objects to its inclusion and its improper advancement in this appeal and asks that it be stricken from the Appellant’s Merit Brief as well as the Amicus Briefs and disregarded by this Court.

In the event that, for whatever reason this relief is not granted Father hereby proceeds to answer the Appellant’s contentions so as to not only preserve this matter for further appeal if necessary, but so that this proposition of law is not allowed to advance unabated, Father first points out that:

The Ninth District Court of Appeals of Ohio in: *In re: B. L. and J. L.C.A.* stated:

“None of the parties raised this issue at any time in the trial court”, “As this Court has repeatedly stated, “where no request was made in the trial court for counsel to be appointed for the children, the issue will not be addressed for the first time on appeal.” *In re: B. L. and J. L.C.A.* Nos. 09CA0016, 09CA0017 9TH Dist. Ct. App. (Wayne County)2009 Ohio 3649; 2009 Ohio App. LEXIS 3132 at P36 citing *In re T.E.*, 9th Dist. No.

¹² *Pratts v. Hurley*, 102 Ohio St.3d at 83, 84.

¹³ *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70, 518 N.E.2d 941.

22835, 2006 Ohio 254, P7, quoting *In re K.H.*, 9th Dist. No. 22765, 2005 Ohio 6323, at P41, citing *In re B.B.*, 9th Dist. No. 21447, 2003 Ohio 3314, at P7. Other appellate districts have also held that this issue must be raised in the trial court to preserve it for appellate review. See, e.g., *In re Graham*, 4th Dist. No. 01CA57, 2002 Ohio 4411, at P31-33; *In re Brittany T.*, 6th Dist. No. L-011369, 2001 Ohio 3099, at *6.”

In the case at bar, like in *In re: B. L. and J. L.C.A.* no request was made to appoint counsel for the child by the Appellant Guardian ad litem Thomas Kozle in the trial court nor was it raised in the lower Eighth District Appellate Court or by either the *Cross-Appellant* Guardian ad litem Thomas Kozel or the *Appellee* child through her counsel Brian Moriarty therein. The appellant’s should be barred from a blatant attempt at a trial de novo predicated on grossly misrepresented assertions distorted and meant to purposefully bastardize the truth in an attempt to render the facts unrecognizable to support this wretchedly asserted and grossly alleged contention.

It should be strongly noted that C.B. born April 16, 2005, at time of trial on October 28, 2008, was *slightly more than **3 and 1 half yrs. old*** and that after interviewing the child

The guardian ad litem reported to the court the child was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter. (Tr. 757-8)

The Eighth District Court of Appeals, of Cuyahoga County Ohio in *In re G.C. & M.C.* No 83994 Eighth Dist. Ct. App. Cuyahoga County Ohio, 2004 Ohio 5607; 2004 Ohio App. LEXIS 5066 at P9 in reiterating its earlier holding in *In re K. & K.H.*, Cuayhoga App. No. 83410, 2004 Ohio 4629 stated:

“As this author expressed in a recent decision of this court, it is unlikely that a four-year-old child is able to exhibit the level of cognitive maturity sufficient to indicate the need for

independent legal counsel.”

As stated above C.B. a slightly *slightly more than 3 and 1 half yrs. old* child at time of trial on October 28, 2008, fully consistent with the Eighth District Court of Appeal Court’s holding in *In re G.C., & M.C.*, and as further established by Appellant Guardian ad litem Thomas Kozel when he reported to the court that:

...the child was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter. (Tr. 757-8)

Now not only after the Appellant Guardian ad litem Thomas Kozel, fails to raise this preposterous assertion in the trial Court to so as to preserve it for further appeal (for lack of a better word...) and though he filed a Cross-Appeal in the Eighth District Court of Appeals, the Guardian ad litem never filed a Cross-Appellant Merit Brief and thus absolutely failed to preserve anything for further appeal!

Similarly, Appellant’s C.B.’s counsel herein Brian Moriarty was appointed to represent C.B. in the lower Appellate proceedings, but never filed an independent notice of appeal on behalf of C.B. thus C.B. was an Appellee. An Appellee cannot advance their own assignment of errors, but for sake of argument let us propose for a moment that this wasn’t so, like the Cross-Appellant Guardian ad litem Thomas Kozel, Brian Moriarty also failed did not raise this assignment of error as on behalf of **Appellee** C.B. therein. Now both wish to attempt to assert this now after not listing it in their joint “Notice of Appeal” herein. On top of this there is nothing that implicitly in the holding in *Williams* that requires the trial court to appoint an attorney to child where there is a conflict with the child’s wishes and the father’s wishes, and further as stated by Appellant Guardian ad litem Thomas Kozel once again *...the child was not mature enough to make a determination nor to express her desires; she did not have the*

cognitive ability to have an opinion to the outcome of this matter. (Tr. 757-8) [Emphasis added]

It goes to whether there is conflict with the child's wishes and the guardian ad litem which there wasn't and which yet again the Guardian ad litem made clear ...*the child was not mature enough to make a determination nor to express her desires; she did not have the cognitive ability to have an opinion to the outcome of this matter.* (Tr. 757-8)

Juv. R. 4 (A) states and provides:

“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. *When the complaint alleges* that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.”

As this Court is aware an “*allegation* “of abuse, is not the same as a “*complaint*” that alleges such as made plain by *Juv.R. 4 (A)*. It is important to strongly note that allegation was NOT EVER raised at trial by CCDCFS in its *complaint* (either as originally filed or as amended) and *was not part of the trial record* and thus is not part of the record and thus is not part of the record on appeal, and is some more of the Appellant's cheap attempts at a hanging accusation, tabloid-esq attempts at tar and feather tactics the origins of which were baseless, and determined to be unsubstantiated, and which are just some more of the same compunction less mean spirited bottom feeder tactics of the lowest common denominator on the part of the appellant's asserted with mercilessness in an attempt to bastardize the truth to an attempt to grossly prejudice the father herein and must be disregarded and stricken by this Court as “‘*A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then*

decide the appeal on the basis of the new matter.’¹⁴

In **CONCLUSION:**

First, the social worker testified under oath that she knew of no mental illness in father which was so severe that it would impair his ability to parent. Second, Dr. Pinciotti testified under oath that after considering everything as outlined in his report, a subsequent interview with the father, and the medical records concerning father’s mental health hospitalization, father suffered from no mental health condition which would impede his ability to parent.

Notwithstanding father’s failure to do the court ordered evaluation, father obtained an evaluation and that along with the social worker’s own albeit conflicting, testimony established father did not suffer from any mental illness which would impair or impede his ability to parent. Moreover, Mary Persanyi’s testimony father’s alleged aberrational behaviors was uncorroborated and clearly biased. She admitted to hating father, having harassed him in the past, having had very little contact with him when he was younger and having chance contact with him now. She never saw him with his child.

Interestingly, everyone who has seen him with the child testified his interactions with his child and his parenting were both appropriate and reasonable, substantiating the fact the he had or has no mental illness or at least no mental illness which is so severe as to impair his ability to parent his child.

First the child was removed from the mother, not father. However father presented evidence of

¹⁴ *State ex rel. Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio- 662 at 20 citing *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254, quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus.

stable adequate housing. The social worker testified her only objection regarding his apartment was that his six month lease had expired and father had not provided her with a new lease. Father offered such and the court took notice of such lease during trial.

Even Mary Persanyi admitted he had the apartment.

Second, evidence was presented that Father works more than one job at a time and has been working for at least one year. Again, even Persanyi admitted father was employed.

Third, regarding paternity, father established it early on.

Fourth, regarding parenting, father took two courses and presented records regarding successful completion of one of those courses in court.

Fifth, regarding a psychological evaluation, admittedly, father did not do this through the court clinic as ordered by the court. However, he did get an evaluation on his own from a reputable expert. Moreover, although it was not exactly what the guardian ad litem or the social worker would have liked, Dr. Pinciotti did qualify as an expert, went through his methodology, and testified that his testimony in court was based upon not only the matters set forth in his report, but also the additional follow up interview and the records of the hospitalization which had not been available at the time of initial evaluation.

Also Dr. Pinciotti testified that he tried to obtain guidance and information from the social worker regarding what she would like to see in the report and what information she might have that would effect the report and she was uncooperative which tends to establish evidence of a lack of diligent efforts by the agency.

Father may not have complied with the case plan in the way the social worker wanted, but he nevertheless did comply and remedied the situation. Consequently there are no factors which would prevent reunification.

Consequently, the court, based upon the evidence presented could have easily come to a conclusion that was neither arbitrary, unreasonable nor capricious that permanent custody was not proven to be in the child's best interest as there was ample evidence establishing that permanent custody was not in the child's best interest.

Father points out and it is important to remember that:

The evidence further demonstrated further that:

First all three CCDCFS employees who testified at trial described the visits as appropriate. Ms. Thomas and Mr. Cooper both described a healthy, loving appropriate, normal, supportive and nurturing relationship. They described a strong close and loving bond. Dr. Pinciotti reported that father expressed appropriate, relevant and proper concerns, issues, goals, beliefs, an perspectives about parenting. Mrs. Thomas and Mr. Cooper observed the father's interactions with the child and described situations substantiating that father put these concerns, goals, practices and beliefs into action. He understood and listened to his child, never said anything negative about the mother or foster mother and never talked about the case. He gave her presents, which the foster mother testified that the child cherished. He fed her, read to her and played with her. The child was happy to be with him and expressed her love of her father to others including the foster mother.

The only negative matter presented was that occasionally the child was reluctant to be transported to the visits. The foster mother, who loves her and wants to adopt clearly had an interest in permanent custody being granted. She had her own self serving motivation to characterize these episodes as the child being anxious about the visits and not wanting to see the father.

Ms. Thomas, who witnessed some, if not all of these episodes, characterized them quite

differently. She described the behavior as normal and age appropriate. If the child was engaged in an activity that she was enjoying when Ms. Thomas arrived to transport her, the child would get upset and make a fuss about going on the visit because she wanted to continue that activity.

It was quite reasonable for the court to have given more weight to her opinion since she has extensive experience as a social worker, supervisor, and as a case aid in the visitation department.

She has transported many children to visits and has seen their reactions. Moreover, unlike the foster mother she also observed the child's interactions with her father at the visits. Finally, unlike the foster mother she had no subjective interest or agenda in having permanent custody decided one way or the other.

Regarding the child's wishes, the guardian ad litem focuses heavily on these reports from the foster mother in determining what he feels are the wishes of the child, when coupled with and factored with the guardian ad litem's own reported testimony to the court, that the child was not mature enough to make a determination nor to express her desires; and that she did not have the cognitive ability to have an opinion to the outcome of this matter is compelling, obviously, father submits the interactions during visits, the child's statements to the foster mother that she loves her father and the way in which she cherishes her gifts from him are much more reliable indices of what her desires may be. In light of Ms. Thomas's explanation of the episodes and in the light of the interests to be advanced by the foster mother, the lower court reasonably gave more weight to visits and the child's positive statements and behavior and less to the foster mother's self serving statements.

True, the custodial history weighed in favor of permanent custody, but father had also remedied by successfully competing parenting classes, by obtaining a favorable psychological

report, by maintaining a stable apartment, by maintaining stable employment, by successfully developing a bond and relationship with his daughter and by establishing paternity. The remediation established permanency could be achieved by awarding legal custody to father. Consequently, a legally secure placement could be achieved without the grant of permanent Custody.

Based upon the foregoing and taking into consideration all of the collective factors as set forth, the court did not abuse its discretion in determining it was in the child's best interest to deny the motion for permanent custody and to grant legal custody to father. Despite the county's stance and strategy, the court properly denied the motion by focusing on the best interest analysis. The county and the guardian ad litem simply failed to prove their case by clear and convincing evidence thus the trial court rendered a decision that was neither arbitrary nor capricious, but just, equitable, and fair properly considering the evidence that was before the court. To have ruled otherwise would have been not only unjust, constitutionally abhorrent, but an affront to all that is beautiful, right, and true and would be to render the father's demonstrated loving commitment to his child to have held otherwise would have rendered those clear efforts on the part of the father meaningless. Clearly the father's natural bonds of affection led him to act in the best interests of his daughter the trial court concluded correctly and justly upheld the sacred and promised virtue to protect, cherish, and uphold the protected rights to the sanctity of the family for which the law at its substantive core was written to give voice to, one of the most basic civil rights of man. The record and evidence is clear that the trial court was faithful to the record and rendered a decision that was just and fair. The father clearly demonstrated his love and commitment to his child. Since love is a verb not a noun, the Father by his actions demonstrated that his love for his child was clearly backed by his actions and clearly the Father

has chosen "to persevere...rather than quit." to "Go another mile..."¹⁵ for his daughter, to go beyond the extra mile for his daughter, as such, has proven that he is deserving of his walk with his daughter...

"Walk a Little slower, Daddy." said a little child so small.

I'm following in your footsteps and I don't want to fall.

Sometimes your steps are very fast, sometimes they're hard to see;

So walk a little slower Daddy, for you are leading me.

Someday when I'm all grown up, You're what I want to be.

Then I will have a little child who'll want to follow me.

And I would want to lead just right, and know that I was true;

So, walk a little slower, Daddy, for I must follow you!!"¹⁶

When properly considered in this collective light, this Court should conclude that that a Guardian ad litem should not be able to appeal a denial of Motion for Permanent custody and that is not a final appealable order and that to allow a Guardian ad litem to advance such an appeal without requiring his or her report be subjected to cross examination *under oath* would be a denial of substantive due process which requires heightened scrutiny and fundamentally fair procedures when a fundamental right is at stake.

The court should determine that it is constitutionally abhorrent and an affront to all that is

¹⁵ The Greatest Miracle in the World excerpted from the poem therein: The God Memorandum: by Og Mandino (1975) Bantam Books ISBN:0-553-27972 6

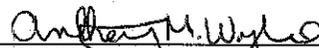
¹⁶ "Walk a Little Slower Daddy" - Author Unknown
www.fathers.net/walkalittleslowerdaddy.htm (Last viewed on October 20, 2010)

beautiful right and true to suggest that a 3 and 1 half yr. old child could or should be allowed to argue against the preservation of the family a child who cannot give informed consent to an attorney and who is not mature enough to state her wishes and doesn't have the cognitive ability to even be aware of the ramifications of such an ugly proposition. The Court should conclude it is without jurisdiction to determine the matter as it is without jurisdiction as the Appellant's did not list this in their *Notice of Appeal*.

Again the Court should conclude it is without jurisdiction as to Proposition of Law III as it was not listed in the Notice of Appeal further it should further determine that the Appellant's waived this due to the failure of the Appellant Guardian ad litem to raise it in the trial court and the failure of Moriarty to raise it in the Eighth District Court of Appeals and should further conclude: "*it is unlikely that a four-year-old child is able to exhibit the level of cognitive maturity sufficient to indicate the need for independent legal counsel.*" let alone a child like C.B., who was 3 and 1 half yrs old at the time of trial on October 28, 2008.

This Court should further collectively determine that the Appellant Guardian ad litem Thomas Kozel as advanced by attorney Garver, waived any further appeal by failing to file a Cross Appellant Merit Brief in the lower appellate court proceedings and likewise the Court should similarly determine that Moriarty's failure to file an independent appeal on behalf of C.B. in the lower appellate court proceedings waives any further error herein and similarly waived the right to further appeal herein as an Appellee cannot file an Appellant's Merit Brief in the lower Appellate court proceedings when they haven't filed an independent notice of appeal and thus this Court should dismiss the entire appeal for lack of jurisdiction.

Respectfully submitted,



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APPELLEE FATHER OF C.B.

CERTIFICATE OF SERVICE

This certifies that a true copy of Merit Brief Brief of Appellee Father Anthony Wylie and the corresponding Appendix to the Merit Brief of Appellee Father Anthony Wylie have been faxed and e-mailed to all parties or their attorneys of record as listed below on this 1st day of November 2010.

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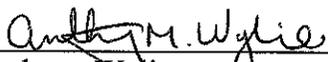
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